Reflections:
40 years on from the
1967 Referendum

A publication of the Aboriginal Legal Rights Movement Inc.
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Foreword

By Elliott Johnston QC

Congratulations to the Aboriginal Legal Rights Movement on almost 40 years of continuous service to the Aboriginal population of South Australia. There is no more important task for the Aboriginal people than fighting for their right to justice.

The establishment of the colony of South Australia resulted in the Aboriginal people being deprived of their ancient land and thereby being deprived of much of their ancient culture and way of life. Many were forced to live on lands remote from their tribal homelands and many were obliged to yield up their children to white society. It was against this sort of background that the ALRM was established.

In its early days ALRM’s function was almost entirely to represent and assist Aboriginal people charged with some offence. Of course, that is still a very serious matter, but over time the functions have developed and now the Movement advises and assists individuals in relation to their civil rights and in various ways it fights for the rights of all Aboriginal people. Just one of those ways is the handling of native title claims (an important one of which has recently been won – DeRose Hill).

I express my deep respect for all those Aboriginal people who have over the years in various capacities … as Movement CEO, as telephonists, as organisers, as legal secretaries, as committee members and more recently as lawyers … devoted time and effort to the work of this crucial organisation. I think that you deserve great praise (and I think that this applies also to those non-Aboriginal lawyers who have served the ALRM over many years).
Introduction

By Frank H. Lampard
Chairperson, ALRM

In representing the Aboriginal Legal Rights Movement (an independent, incorporated Aboriginal community organisation) I feel humbled, excited and privileged to write this Introduction.

Those who have lived through the 1960s, will remember well, when in March 1966 the then Prime Minister Harold Holt MP began the break with the White Australia Policy by signing the United Nations International Accord for Elimination of All Forms of Racial Discrimination.

A year later, one day prior to the holding of the Constitutional amendment Referendum on his government’s Constitution Alteration (Aboriginals) Bill, Prime Minister Holt claimed that: “Anything but a Yes vote to this question would do injury to our reputation among fair-minded people everywhere”.

A quarter of a century later on 27 May, 1992 at the Aboriginal Tent Embassy in Canberra, Aboriginal playwright and activist Kevin Gilbert made a speech for the 25th Anniversary of the Referendum in which he asserted: “Twenty-five years after this citizenship, which was supposed to give us some sort of rights and equality, we see that instead of lifting us to any sort of degree of place or right, it has only given us the highest infant mortality rate, the highest number of Aboriginal people in prison, the highest mortality rate, the highest unemployment rate … If the Referendum hadn’t been passed, we would have been further advanced because white Australia would not have fooled the world into thinking that something positive was being done”.

As we commemorate the 40th anniversary of the 1967 Referendum it is wise to consider the question of whether the promise of the Referendum has been fully realised. The recent emphasis on “practical reconciliation” has clearly not borne fruit – as evidenced by the declining statistical outcomes in education, employment, health, housing, life expectancy and adult median income as recorded in Professor Jon Altman’s report for the Centre for Aboriginal Economic Policy Research, (2003).

Moreover, the concept of “practical reconciliation” is at odds with the principles of Indigenous self-determination as outlined in the United Nations Draft Declaration on the Rights of Indigenous Peoples. Aboriginal people have become “Australians” but on what terms?

This book reflects a range of different propositions and views about the journey of the last 40 years and about the road ahead. There are contributions from a cross-section of Indigenous and non-Indigenous men and women covering the areas of Aboriginal health care, Aboriginal housing, Aboriginal land care and management, academic research, criminal justice policy, Australian Government legislation and policy, grief, native title, State Government legislation and policy, and Treaty.

I trust everyone who gets an opportunity to read this absorbing account will enjoy it for its meaning, purpose and contribution.

In closing, and on behalf of the Aboriginal Legal Rights Movement, I extend gratitude and sincere thanks to all the contributing writers who have given of their valuable time, energies, intellect and wisdom to make such a wonderful publication possible.
Waratah

Waratah (aka Rosemarie Lorraine Gillespie) is still looking for her mob. She describes her Aboriginal ancestry as hidden from her for years as she wandered lost in a world of whiteness – her Indigenous awakening came on the island of Bougainville, where the people had rebelled, closing the mine that was destroying their land and environment and keeping it closed. Waratah says she may belong to Yorta Yorta country where the river flows past many red gums, silent sentinels to the destruction of land and the genocide of a people.

Waratah’s formal or conventional education includes: Bachelor of Science (University of Melbourne), Master of Arts in Social Science (University of Chicago), LLb (Monash University) and Graduate Diploma in International Law (Australian National University). She has worked as a teacher, taxi driver, housemaid-waitress, and road worker and also run a research company and worked as a barrister. In between Waratah bore and raised three children and is now a grandmother enjoying her newfound freedom.

Starting in 1992 she ran the military blockade of Bougainville several times, bringing in life saving medicines and sending reports from the war zone. In 2003 she joined the human shields in Baghdad protecting humanitarian sites such as water treatment plants and food storage units from the Anglo-American bombing campaign. Waratah now works as a writer and filmmaker.

Prof. Larissa Behrendt

Larissa Behrendt is Professor of Law and Director of Research at the Jumbunna Indigenous House of Learning, University of Technology, Sydney.

Professor Behrendt is also a practising barrister. Larissa is a Director of the Bangarra Dance Theatre and the Chair of National Indigenous Television Ltd. Her novel Home won the 2002 David Unaipon award.

Larissa is a Ealeyai and Kamilaroi woman.
Glenn Giles

Glenn Giles is ANTaR SA Co-ordinator and has been a member of the ANTaR National Management Committee since 1998. Glenn is motivated by wanting to see social justice in this country, especially for the First Peoples of this land, and firmly believes that the health of the whole country is dependent on a reconciliation being achieved that involves true respect for Aboriginal peoples, proper recognition of the real history of this land and a just redressing of the devastating consequences of colonisation for Aboriginal peoples.

Glenn believes that Australia and the world would benefit from the wealth of knowledge and experience that Aboriginal peoples possess and have practiced since time immemorial. (ANTaR is Australians for Native Title and Reconciliation – a community coalition of Aboriginal and non-Aboriginal people).

The Hon Philip Ruddock MP

The Hon. Philip Ruddock graduated from Sydney University (BA LLB) and before entering Parliament was partner of the boutique commercial and general law firm, Berne Murray and Tout in Sydney. He was first elected to the House of Representatives at a by-election on 22 September, 1973 and sworn-in as Australian Attorney-General on 7 October, 2003.

Prior to becoming Attorney-General, he had been appointed Minister for Immigration and Multicultural Affairs (1996) and became Australia’s longest serving Minister for Immigration. Mr Ruddock’s other portfolio responsibilities since 1996 have included Indigenous Affairs.

Mr Ruddock continues to work with his State and Territory counterparts to achieve important micro-economic reforms and consistency across jurisdictions wherever it is practicable and in the national interest. His commitment to achieving a national legal profession, a uniform defamation law and a single national personal property security register in Australia are indicative of this approach.

Chris Kourakis QC

Chris Kourakis QC was admitted to practice in 1982. He was articled at Johnston Withers McCusker and worked at the Legal Services Commission for several years and then at a suburban practice before joining the Bar in 1989.

He was the Legal Services Commissioner from 1993 to 1997 and was appointed Queens Counsel in 1997. He was President of the Law Society in 2001 and appointed Solicitor-General for the State of South Australia in February, 2003.
The Hon Mal Brough MP

Born in Brisbane in 1961, Mal Brough served in the Australian Defence Force as a soldier and army officer from 1979 to 1987. He was subsequently manager of a telecommunications company, proprietor of a wholesale business and partner in a trade show promotions company.

In 1996 he was elected to the Australian Parliament as the Member for Longman in Queensland. He has served as the Parliamentary Secretary to the Minister for Employment, Workplace Relations and Small Business; Minister for Employment Services; Minister Assisting the Minister for Defence; and Minister for Revenue and Assistant Treasurer.

Mr Brough has been the Minister for Families, Community Services and Indigenous Affairs since January 2006.

Neil Gillespie

Neil Gillespie is the Chief Executive Officer of South Australia’s Aboriginal Legal Rights Movement Inc. He is of Kamilaroi descent (Aboriginal people of northern New South Wales).

Neil Gillespie holds a Bachelor of Business and Masters in Business Administration and has professional membership at fellow level with a number of professional bodies.

He was a National Director with the Australian Taxation Office and a Corporate Banker, as well as a part time NSW TAFE lecturer.

His commitment to advancing the rights and addressing social disadvantage and marginalisation of Aboriginal peoples is demonstrated through involvement in many diverse committees and working groups with a rights and equity mandate.

He is a Board Member and Executive Member of the: National Native Title Council Ltd (the Native Title Representative Bodies Forum); Reconciliation SA; Nunga Mi:Minar; and Tauondi Aboriginal Community College. He is also: Chairperson of the David Unaipon College of Indigenous Education and Research Advisory Committee at the University of South Australia; a Member of the Indigenous Employment Advisory Committee (UniSA); an ALRM representative on the Adelaide City Council Reconciliation Advisory Committee; a Member of the Law Society of SAs Access to Justice Committee; Member of the National Aboriginal Justice Advisory Committee and Aboriginal Legal Services Forum.

Parry Agius

At the time of the 1967 Referendum Parry Agius was 10 years old. In the 40 years since then he has been extensively involved in caring for, and protecting Aboriginal rights.

He is a Narungga man; a traditional owner of the land and waters in and around the Yorke Peninsula district in South Australia. He is currently Executive Officer of the Native Title Unit of the Aboriginal Legal Rights Movement Inc, which is the Native Title Representative Body for Greater South Australia.

His work has included:
- Appointment to the interim South Australian Aboriginal Advisory Council
• Appointment to the Marine Advisory Committee
• Appointment to The Premier’s Round Table on Sustainability
• Member of the Resource Industry Development Board
• Member of the SA Government’s Economic Development Board, Community Attitudes Round Table
• Chairperson of the National Indigenous Working Group on Native Title (1998–2000)
• Editor of *Aboriginal Way*, South Australia’s only Indigenous newspaper
• Honorary Associate, Department of Human Geography, Macquarie University

Parry Agius has a Churchill Fellowship Award; and a Centenary Medal from the Prime Minister for contributions to the community.

**Brian Butler**

Brian has spent much of his working life as an advocate for Aboriginal and Torres Strait Islander elders in South Australia. He currently works within the Aged Rights Advocacy Service.

Brian is a proud member of the Eastern Arrernte and Luritja people of Central Australia and the son of Emily, who was forcibly removed from her family at Arltunga, east of Alice Springs.

Brian's history as an advocate for Aboriginal and Torres Strait Islander peoples has spanned over forty years through positions in community-controlled organisations throughout South Australia, and as a representative on national boards and committees and as part of international delegations to the United Nations in New York.

Brian continues to advocate strongly for human rights for Aboriginal and Torres Strait Islander peoples at the local grass roots level, statewide and nationally. In his current role as the Aboriginal advocate in the Aboriginal Advocacy Program at the Aged Rights Advocacy Service, he has developed strategies that support access to Home and Community Care (HACC) funded services by older Aboriginal and Torres Strait Islander people. The program has been an outstanding success and has been identified as an area of best practice.

**John Chester**

John Chester is General Manager of the Aboriginal Lands Trust – it is a position he has held for three and a half years. He has been employed in a variety of roles within the Lands Trust over a period of 13 years; beginning his career as a Rangelands Officer and moving onto the Indigenous Land Management Facilitator for Aboriginal lands across the State. The work involved providing land management advice to all Aboriginal communities and organisations throughout South Australia, including Maralinga, Tjarutja, Aangu Pitjantjatjara Yankunytjatjara.

John represents the A.L.T. and Aboriginal communities through involvement on various land management, Caring for Country Forums and steering committees. It is work he says ensures the development of sound working relationships between Aboriginal communities, state and Commonwealth agencies.
Elizabeth Grant

Elizabeth Grant lectures at Wilto Yerlo, the Centre for Indigenous Research and Studies at the University of Adelaide and also at the School of Architecture, Landscape Architecture and Urban Design at the University of Adelaide.

A research scholar at that institution, and the Aboriginal Environments Research Centre, at the University of Queensland, Elizabeth Grant’s teaching and research interests lie in Aboriginal architecture and environments.

Paul Memmott

Associate Professor Paul Memmott is the Director of the Aboriginal Environments Research Centre within the School of Geography, Planning and Architecture at the University of Queensland. The Aboriginal Environments Research Centre maintains a national focus on Indigenous housing and settlement research.

Paul Memmott is the author of five books, 100 published papers and over 200 technical research reports.

Diane Bell

Diane Bell is Professor of Anthropology at the University of Adelaide and Professor Emerita of Anthropology at George Washington University, DC, USA. She is a feminist anthropologist who lives her politics and does not shy away from controversy. Her commitment to social justice is apparent in her work in the area of land rights, law reform, violence against women and environmental causes.

Diane Bell’s books include Daughters of the Dreaming (1983/1993/2003); Generations: Grandmothers, mothers, and daughters (1987); Law: The old and the New (1980); Religion in Aboriginal Australia (co-edited 1984); Gendered Fields: Women, men and ethnography (co-edited 1993) and Radically Speaking: Feminism reclaimed (co-edited 1996); Ngarrindjeri Wurrwarrin: A world that is, was, and will be (1998); and her first venture into fiction, Evil: A novel (2005).
Donna Odegaard

Donna Odegaard is a Larrakia Aboriginal woman from the Darwin region of the Northern Territory. She was born at Woomera, in northern South Australia.

At an early age she experienced the effects of the Aboriginal “Stolen Generation”. Her parents suffered for many years over losing four children to the “Home” and the system. Her own experience in a Salvation Army Girls Home is one of isolation, segregation, silence, religious instruction and discipline.

In 1993, as a mature age student, she studied at the University of South Australia and went on to complete a Masters in Philosophy/Law at the University of Newcastle and commenced a Degree in Law and a PhD in Law in 2002. In 1997, Donna won the University of South Australia Indigenous Exchange Program Scholarship Ambassador for Indigenous students at the Northern Arizona University in the United States – an experience that expanded her understanding of global Indigenous issues and human rights.

Donna has had membership on a number of boards and committees representing Aboriginal and Torres Strait Islanders. From 1993–2005 she was a witness and gave important evidence on behalf of her family and especially for her Elder father Leo Odegaard and her Elder uncle Joseph Odegaard in the Larrakia “Kenbi Aboriginal Land Claim”. Donna’s experience in “Kenbi” consolidated her dedication to contributing to alleviating poverty, disadvantage and inequality for Aboriginal people.

Anthony Kerin

Anthony graduated from the Adelaide University in 1984, and was admitted to practice in 1985. The same year he began work at Johnston Withers. He has remained there ever since.

Currently the Managing Director, he has extensive experience in the fields of personal injury law, criminal law, employment and industrial law and continues to practice along with his managerial duties.

Anthony, through Johnston Withers, has had extensive involvement in a number of matters with ALRM over the years. In addition, he has worked both as a solicitor and counsel in the course of his career. The two organisations have regularly competed for the Elliott Johnston Cup in its annual cricket match.

Anthony is also a member of the South Australian Law Society and is the current South Australian Director of the Australian Lawyers Alliance and is its Local Branch State President.

The Hon Jay Weatherill MP

Jay Weatherill is the South Australian Minister for Families and Communities, Aboriginal Affairs and Reconciliation, Housing, Ageing, Disability and Minister Assisting the Premier in Cabinet Business and Public Sector Management.

He was born and educated in Adelaide’s western suburbs, completing his secondary education at Henley High School. He supported himself through university, working part-time as a cleaner; graduating with a law and an economics degree. In 1995 he established the law practice Lieschke and Weatherill.

Jay practised law until he was elected as the Member for Cheltenham at the 2002 State election. He has previously held the portfolios of Urban Development and Planning, Administrative Services, Local Government and Gambling.

Jay and his wife Melissa have two daughters, Lucinda and Alice.
Eva Sallis

Eva Sallis is a writer. Her fiction has won several major awards. Her most recent novel is *The Marsh Birds*.

Eva is also co-founder and current president of Australians Against Racism Inc. and, with Gillian Bovoro, coordinates Adnyamathanha Ngawarla Yarramalka, an Aboriginal language and culture course hosted at Tauondi College.

Chris Cunneen

Chris Cunneen is the NewSouth Global Professor of Criminology at the University of New South Wales. Previously, Chris was Professor of Criminology and the Director of the Institute of Criminology at Sydney Law School. He is also Chairperson of the NSW Juvenile Justice Advisory Council.


Mary Buckskin

Mary Buckskin is the CEO of the Aboriginal Health Council of SA Inc (AHCSA).

Mary has worked in Aboriginal health for well over 25 years at both the state and national level. Mary has a nursing background with qualifications in general nursing and midwifery. She has held a number of different positions throughout her career in Aboriginal health including clinic nurse, community health nurse, senior policy officer, Aboriginal hospital liaison officer and clinical educator. She has worked for both government and community-controlled organisations.

Mary has been with the AHCSA since September 2002. She is also a current board member of Nunkuwarrin Yunti Aboriginal Health Service (Adelaide) and the Aboriginal Elders and Community Care Services Inc (Adelaide) and is a past board member of Winnunga Nimmityjah Aboriginal Health Service (ACT).
Ngara Keeler

Ngara Keeler has worked for the Aboriginal Health Council of SA Inc for five years as the Workforce Development Officer. Prior to that Ngara worked for TAFE SA for six years in the area of students services and Aboriginal Education.

Kathleen Stacey

Kathleen Stacey runs beyond – a small consulting company that focuses on the health, mental health, youth, and community services sectors.

Prior to beyond she worked in the public sector and academia. Over the last nine years Kathleen has been regularly invited to support initiatives in the Aboriginal health, community and children's services sector in South Australia and nationally, which she approaches as an Aboriginal/non-Aboriginal partnership working closely with Aboriginal consultants and colleagues. She has had the opportunity to work on a range of projects for AHCSA on a consistent basis since 2003.

Warren Guppy

Warren Guppy worked as Senior Project Officer at ALRM Inc from 1992 through 2000. During 2000, he undertook a six month secondment to the Western Australian Government’s Aboriginal Affairs Department as Principal Policy Officer for the WA State Aboriginal Justice Advisory Committee. Since 2001 he has worked at Adelaide City Council as Reconciliation Officer, facilitating Council’s relationships with Kaurna and broader Aboriginal communities.
When 90.77 per cent of Australians voted “Yes” in the 1967 Referendum they were making a collective statement about the urgent need to recognise a hitherto largely ignored, mistreated, misunderstood and invisible group of people; the First Australians, the Aboriginal peoples.

In a sense it was an affirmation by the occupiers (the non-Indigenous colonists) that the occupied (the Aboriginal clans and nations) exist. Forty years on, and particularly in light of the recent Federal intervention in Aboriginal communities in the Northern Territory, it is both essential and logical to examine how far the Australian nation has advanced from the starting point of 1967.

In publishing this book the Aboriginal Legal Rights Movement seeks to provide a broad overview of the progress, (or lack of it), in a range of areas that are important to the First Peoples of Australia. From the Indigenous perspective, we examine the silences in our Constitution to the impact of the 1967 Referendum on native title. From the questioning of the use of the race power in Section 51(26) during the High Court Appeal against the Hindmarsh Island Bridge Act to the growth and history of organisations such as the Aboriginal Lands Trust and the Aboriginal Health Council of SA.

There are personal and private recollections in this book that speak of the deep impacts that the Referendum had on Aboriginal people and which they live with every day. Our contributors cover the legislative and political dimensions of Aboriginal affairs as well as the Indigenous view of Treaty.

This book presents viewpoints and strategies on finding the way forward and examines past policies and performance in the spheres of criminal justice, self-determination and the redressing of past wrongs. It also illuminates the genesis of racism in young Australians and details the cynical and gradual dehumanisation of Aboriginal people.

ALRM is a “people” organisation. That is to say, it is people and the betterment of their lives individually and collectively that matter to us. Forty years ago white Australia took a step beyond its self-inflicted boundary of “us” and “them” and dared to look at Aboriginal Australians as “people”.

This book aims to stir readers into looking closely at the various steps that have occurred since 1967, assessing them and then daring to visualise the next stage of our collective history.
Empires rise and fall but Indigenous peoples live on, except when destroyed by genocide.

In the beginning there was harmony, a resonance between our being and the land on which we tread, the earth from whence we come and will return. Like a gentle mother, she gave us nourishment and protection. Her forests gave us shelter from the searing heat of the summer sun, wood to keep the fires burning through the cold winter nights. We were one with the spirit of the land.

A common thread running through the culture of many Indigenous communities is the high value placed on living in harmony with the land. Surrounded by the natural world, there is a strong sense of continuity with the universe of which we all are a part. Spiritual strength grows from an awareness of belonging to the land, being part of the great web of life.

Sensitivity to the effects a community is having on the land, the plants and animals that share the same space and are a source of sustenance, is essential to life. The Indigenous peoples who survived were those capable of adapting their practices to avoid destroying the sources of food that sustained their communities. Laws and customs were developed to promote harmony and preserve the earth and her creatures.

When James Cook brought his crew to the east coast of what was then named “Terra Australis Incognita” on European maps, he was impressed with what he saw. At the same time, his crew used muskets to make a forced landing, shattering the harmony with the sound of gunfire. By their own account, they were not welcome:

… as soon as we approached the rocks two of the men came down … They called to us very loudly in a harsh sounding language … shaking their lances (spears) and menacing; in all appearance resolved to dispute our landing to the utmost, though they were but two, and we thirty or forty at least.

… They remained resolute: so a musket was fired over them … the younger of the two dropped a bundle of lances on the rocks the instant he heard the report. He, however, snatched them up again and both renewed their threats and opposition.

A musket loaded with small shot was now fired at the elder of the two, who was about forty yards from the boat; it struck him on the legs. The older man held his ground and was shot at again. The two men did not leave the rocks until after several more shots were fired.[1]

So began the resistance to the British invasion and occupation of this country.

Reflections: 40 years on from the 1967 Referendum

Sovereignty

“Sovereignty” is the power to make laws for the governance and protection of the people of a nation, and to ensure the laws are implemented. A “nation” may be defined as an identifiable and distinct people who have an enduring connection to a particular territory, who have their own system of laws, customs and governance.[2]

Sovereign status of the Aboriginal nations of Australia stems from their prior occupation of the country before Cook’s crew of foreign boat people landed in 1770. The presence of vibrant Aboriginal nations, with their own systems of laws and protocols prior to invasion, is beginning to be recognised after two centuries of official denial.

Myths of “discovery” and acts of invasion

“Discovery” is the act of finding uninhabited territory belonging to no one.[3] International law permits a nation that discovers such a territory to take possession of it and acquire sovereignty over the discovered land.[4] Cook’s action – planting a flag on Aboriginal land and claiming to take possession of it in the name of the King of England – was an unlawful application of the doctrine of discovery. He had no grounds for believing the land was uninhabited. Aboriginal people had valiantly resisted the first landing. Using the fiction of terra nullius (territory belonging to no one), he claimed the land for the King and named it “New South Wales”.

The first people to occupy a piece of land or territory have original sovereignty over it. Under international law, sovereignty can only be transferred as a result of conquest or by a treaty that formally cedes sovereignty to another power.[5] No such treaty was ever made with the first peoples of Australia. The invasion, conquest and subjugation by force that commenced in 1788, has never been acknowledged as such by the rulers who colonised the continent.

Between the original sovereignty enjoyed by the Aboriginal nations of Australia and the present situation lies a great gap, a ravine through which the stifled cries of peoples decimated by genocide ricochet through time. Many voices seek to break the silence over the violence of the invasion. Instead the gap is packed with myths and lies, like a temporary filling in a diseased tooth.

MYTH 1: Australia was colonised by “peaceful settlement”. This myth was reinforced by eminent judges of England’s Privy Council, who declared that the land was “a tract of territory, practically unoccupied ... at the time it was peacefully annexed to the British dominions”[Cooper vs. Stuart (1889) 14 App Cases, 286, 291]. Justice Lionel Murphy challenged the myth, referring to the judgment as “having been made in ignorance or as a convenient falsehood to justify the taking of Aborigines’ land”[Coe vs. Commonwealth (1979) 24 ALR 138]. Non-Aboriginal historians have recognised a total of 118 massacres continuing into the twentieth century. Aboriginal people collectively know of many more committed during the “killing times”[6].

MYTH 2: Aboriginal people did not fight back. The resistance, which began with opposition to the forced landing by members of Cook’s crew in 1770, would fill several volumes if the stories could be rescued from out of the silence. Pemulwuy, a warrior of the Eora Nation (whose land includes Botany Bay where the invasion began), was a clever strategist who harassed and outwitted the colonists for several years.[7]

Pemulwuy and his men were followed by many others: the warriors of the Wiradjuri led by Windradyne, resisting the mass killings of Aboriginal men women and children after the Governor of New South Wales imposed martial law;[8] the Gunditjmara resistance in south-west Victoria – also known as the Eumeralla War –

[2] This is a composite definition derived from several sources. Legal definitions of the meaning of “nation” are lacking in some Australian law dictionaries.
in which squatters were forced to flee the land they had stolen;[9] the land war in Tasmania where Aboriginal warriors fought the colonising forces to a standstill;[10] the guerilla war fought by the Kalkadoon of north Queensland, to name a few. In each case the resistance was met with bloody repression by the colonising powers, making nonsense of claims that Australia was colonised by “peaceful settlement.”

The brutal methods used to suppress Aboriginal resistance to the invasion occasionally threatened to pull the mask concealing the reality of an invasion contrary to international law. When the Governor of Van Diemen’s Land, now known as Tasmania, declared martial law, he followed it with an order directing a reward of five English pounds be paid for the capture of each adult Aborigine and two pounds for the capture of a child. Roving bands of “Five Pound Catchers” were organised to do the job.[11]

This threatened to embarrass the Crown and tarnish British international prestige. To declare war, obligatory prior to commencement of a war under international law, would alert the international community that Britain was engaging in an unjust and illegal war of conquest. In an ingenious exercise of verbal gymnastics that would do credit to Nazi propagandist Dr. Goebbels himself, the war was portrayed as a rescue and protection operation.[12] Under the rubric of “protection”, Aboriginal people were captured and forced into holding areas called “reserves”, where their British overlords could watch them. Aboriginal people could not leave a reserve without permission of the manager of the reserve, which was in reality an early form of concentration camp.

Resistance, in one form or another, continues right up to the present. For example, the response to the decision by the Queensland Director of Public Prosecutions not to proceed with charges against the police officer responsible for the death of Mulrunji Doomadgee is a recent example of resistance to the killing of Aboriginal people with impunity.

Impeded sovereignty

When a nation has been invaded and occupied the issue of sovereignty may be temporarily submerged. The use of overwhelming force to subdue a nation of people and occupy their country is not sufficient to extinguish sovereignty. The sovereignty of the nation of people is only impeded. For example, when Poland was invaded and occupied during World War II the exercise of the sovereign rights of the people of that country was impeded by the use of force. Following its liberation at the end of that war, Poland once more took its place among the world’s nation states.

The sovereign rights of the people of a nation survive invasion and remain extant as long as the bloodlines of the people under occupation continue to produce claimants to this sovereignty as an identifiable and distinct people. It follows that the sovereign rights of a people may be extinguished by genocide. Genocide refers in part to acts directed at destroying a group, nation or race of people, as such.[13] Under the United Nations Convention on the Prevention and Punishment of the Crime of Genocide it is recognised as an international crime against humanity.

“No sovereignty”: A judicial fig leaf for land theft

Following the invasion of Australia, the colonising power imposed British law and appointed judges sworn to serve the Crown. Aboriginal law and custom was treated as if it did not exist. In 1836 the Supreme Court of the Crown Colony of New South Wales declared Aboriginal people had “no sovereignty”[14] The words which formed this judgment dovetailed neatly with Cook’s notion of terra nullius.

This legal fiction spread a cloak of apparent legitimacy over the unlawful assumption of sovereignty by the Crown. The colonisers had seized the power to make laws for the governance of the peoples of the colony, including the Aboriginal peoples, by judicial fiat. From then on Aboriginal people were subject to two sets of laws, their traditional laws built up over millennia of living in harmony with the land, and Crown Law. These laws are often in conflict with each other. At the same time, this legal fiction provided a judicial fig leaf for the promulgation of laws facilitating the theft of Aboriginal land.

Stealing the means of survival

From time immemorial, Aboriginal people have relied on the land to which they belong for their survival. Looking after the land that supports the community is mandatory under Aboriginal law. The relationship with the land is both economic and spiritual. For Aboriginal and many others of the world’s Indigenous peoples, land is life, the source of material and spiritual well-being, sustenance and shelter. Its flowing waters are the wellsprings of the spirit. Without the land, the source of food, the people go hungry – or are subjected to the humiliation of dependence on government handouts.

Hunger weakens the body and the loss of spiritual connection to the land wounds the spirit. “They suffer from spiritual sickness,” says Dr. Barbara Nicholson, Aboriginal historian and Elder of the Wadi Wadi people.[15] Erikah Kyle, a Palm Island Aboriginal leader speaks of the pain and grief: “We feel the grief for the loss of our land. The land is our mother. We look after our mother. We love our mother. We are at a terrible loss.”[16]

While Aboriginal people endure this suffering, many non-Aboriginal people inherit the wealth from land stolen under laws imposed by the coloniser, facilitated by legal fictions. Many beneficiaries of this colonial protection racket came to enjoy privileges and high status in the hierarchical class based system, introduced into Australia along with the first convicts, the whip and the chain, the cross and the gun.

A constitutional fig leaf: genocide denied

The **Commonwealth of Australia Constitution Act** passed by the British Parliament provided for the federation of the six colonies, sets out the power sharing arrangements between the governments of the States (former colonies) and the Federal Government. The Act, to which the Australian Constitution was annexed, is remarkably silent on the method by which the Crown acquired sovereignty over the continent. Sovereignty was just assumed. At the same time Aboriginal people were excluded from being counted in the population under section 127 of the Constitution:

“In reckoning the numbers of the people of the Commonwealth, or State or other part of the Commonwealth, aboriginal natives shall not be counted.”

Exclusion of Aboriginal people from the census concealed the sharp decline in the Aboriginal population caused by massacres and other acts of genocide. Aboriginal people were characterised as “wildlife” or counted along with the domestic animals kept at sheep and cattle stations.

Genocide consists of acts committed with intent to destroy in whole or in part a national, ethnic or racial group, including:

(a) killing members of the group;
(b) causing serious bodily or mental harm to the group;
(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part,
(d) imposing measures intended to prevent births in the group
(e) forcibly transferring children of the group to another group[17]

[16] Erikah Kyle, leader of the Palm Island Aboriginal Council, speaking at the National Non-violence Gathering, Currimundil, Qld., May 1, 2005.
Theft of Aboriginal land, which results in impoverishment, hunger, malnutrition, death, disease, loss of law and culture, loss of identity, fragmentation and dispersal of communities, is arguably another form of genocide.

The many forms of repression used to subjugate Aboriginal people during the first two hundred years of colonisation would fill volumes. The courage of the Aboriginal men and women who organised the Day of Mourning on January 26, 1938 in defiance of the “law” as it then was is legendary. Decades of work by both Aboriginal and non-Aboriginal people culminated in the historic 1967 Referendum.

The 1967 Referendum

Years of campaigning bore fruit when people voted overwhelmingly in favour of amendments removing the provisions that (i) excluded Aboriginal Australians from the census and (ii) prevented the Federal Government from enacting special laws affecting Aboriginal people, a power that had previously been the preserve of the states.

For the first time in almost two hundred years of colonisation Aboriginal people would be counted, but by then genocidal practices had done their evil work. Where once many tribes and nations had flourished, the population had been decimated, reduced to a fraction of its former size. Acts of genocide, such as the forced removal of children from Aboriginal communities, continued. Five more years of “business as usual” elapsed before a new government, led by Gough Whitlam, was elected in 1972.

Whitlam took an enlightened approach and recognised the importance of upholding Aboriginal rights to land. The restoration of the land at Wave Hill to the Gurindji people led by Vincent Lingiari – who had refused to submit to the slave labour conditions imposed on them by Lord Vestey several years before – was a turning point. Legislation, in the form of the Northern Territory Land Rights Act (1976) followed.

When the Queensland State Government led by Joh Bjelke-Petersen refused to respect Indigenous rights to land, Eddie Mabo and others of the Meriam people began their court appeal in 1982. After ten years the High Court reached a landmark decision and consigned the fiction of terra nullius to the dustbin of history. The Court shied away from examining the question of acquisition of sovereignty by the Crown, declaring it to be an “act of state” and not subject to judicial review.[18]

The issue of sovereignty was buried once more and Aboriginal people continued to be denied power to make laws for the governance of their communities. Federal and State Governments reserved these powers for themselves. Continued denial of sovereignty rights resulted in the following:

(1) In 1993, the year after the Mabo decision, the Federal Government passed the Native Title Act which limited the application of the Mabo decision to native title rights.

(2) In 1998, following the 1996 decision by the High Court in the Wik case, Aboriginal land rights were further restricted by the Native Title Amendment Act, implementing the Federal Government’s Ten Point Plan which included: (i) Validating all invalid acts creating non-Indigenous interests in land between 1 January, 1994 and 23 December, 1996 and (ii) Empowering State and Territory Governments to extinguish native title over non-freehold Aboriginal land.

(3) In 2006, the Federal Government took advantage of its majority in both houses of Parliament to rush the Northern Territory Land Rights Amendment Act through the Senate while attention was diverted during a furor over proposed amendments to legislation concerning refugees. This Act is now being used to pressure Aboriginal communities into surrendering their land to 99 year leases.

The Aboriginal Nations of Australia are caught in a world governed by others. As captive nations, they are subject to the dictates of government. The Federal Government has the power to withhold funds for essential services such as health, education and housing. For example, Indigenous health services are currently under-funded by an estimated $450 million a year,[19] leading to high mortality rates and short life expectancy. Severe housing shortages result in the stress of overcrowding as several families squeeze into a single dwelling. The government is then able to exploit these hardships to pressure Aboriginal communities into signing away their land under 99 year leases.


The Nguiu Aboriginal community of the Tiwi Islands off the north coast of the Northern Territory is being targeted under the 2006 **Northern Territory Land Rights Amendment Act**. These islands have the potential to support a lucrative tourist industry. The question is: who will control the islands and who will reap the benefits? The traditional landowners are being pressured into signing a 99 year lease over their land.

In November 2006 the Federal Minister for Indigenous Affairs, Mal Brough, visited the Tiwi Islands and offered $10 million for a secondary college on condition the lease was agreed to. The community is also facing an acute housing shortage. Only nine new houses have been built over the last six years where 100 are needed. Promises of desperately needed services are being used to induce traditional landowners to sign a lease agreement. At the same time the Minister has reportedly threatened to withhold further expenditure on housing and other infrastructure unless the community signs up.

In March 2007 the Minister seized control of Aboriginal land tenure from the Northern Territory Government in a bid to speed up the leasing process. There is still much uncertainty as to how a Federal Government leasing system will operate and whether it will result in permanent dispossession of land signed away under such a lease. Mal Brough is seeking an early agreement despite uncertainties as to how the leasing system will operate. The use of any threat to withhold services until the agreement is signed, combined with pressure on the community to reach a quick decision, constitutes unconscionable conduct.

Until Aboriginal sovereignty is recognised and provision is made for a division of law making powers between the Federal Government, State and Territory Governments and the surviving indigenous nations of this land, Aboriginal people will be at the mercy of the winds of change blowing through the corridors of Canberra. Recognition of Aboriginal sovereignty, impeded but still alive, is vital to the process of treaty making.

**Treaty talk**

Talk of treaty surfaced again during the late 1980s as people commemorated the bicentennial of the arrival of the “First Fleet” – the invasion – in different ways. After promising a treaty in some form or other, the Federal Government of the day went into reverse and called for “reconciliation”. To expect Aboriginal people to be reconciled with the suffering, the loss of land, the genocide that followed a brutal and unacknowledged invasion, seems bizarre. Denial compounds the suffering. The grief is never ending; the mourning has never stopped.

Of the four English-speaking countries where invasion and genocide resulted in the Indigenous people becoming a minority in their own land, Australia is the only one to consistently refuse to make a treaty with the first peoples whose land was taken. The United States of America, Canada and New Zealand have recognised Indigenous sovereignty in some form. While some of the treaties concluded are unequal treaties – because of the use of force and/or deception – they at least preserve some of the sovereignty rights the first peoples enjoyed prior to invasion.

Australia continues to maintain the legal fiction that Aboriginal sovereignty was extinguished by an “act of state”. Continuing pressure on Aboriginal people to surrender any remaining land to 99 year leases and assimilate into what is referred to as the “mainstream”, augurs ill for the future and could usher in a new round of genocidal practices. The ancient knowledge and wisdom of the first peoples of Australia is in danger of disappearing, lost in a world of whiteness where genocide is denied.

**Treaty: experience of the Navajo Nation**

Treaty making is a process with traps and pitfalls, particularly in cases where the use of force, invasion, occupation and/or subjugation has altered the power relations between the treaty making parties.
The sordid history of the use of deception and double-dealing in treaty making processes would fill volumes; awareness of this is necessary for successful negotiation of any treaty aimed at preserving and giving effect to Indigenous sovereignty rights.

The Navajo Nation was successful in concluding a treaty that entrenched at least some of their original sovereignty rights. Sovereign powers are now divided between the United States Federal Government, the State Government(s) and the Navajo Nation. Their story is instructive:

At the turn of the (twentieth) century, the Navajo Nation numbered only 7,000 people. We were imprisoned in a concentration camp.\(^\text{25}\)

We were pushed off our land, taught new forms of violence, and suffered hunger. As a result we were forced into a dependency on the same government which had robbed us of our land and source of sustenance. A dependency on “welfare” followed, accompanied by the subjection of our people to control by police and other agencies of that government. Our own indigenous government had been suppressed, ignored, and some of our people used as a tool to control, as agencies of the invader.\(^\text{26}\)

Removal from our homelands was the most destructive thing that was done to us … Restoration of our homelands with de facto sovereignty made it possible for The Navajo Nation to rebuild and regenerate.\(^\text{27}\)

The Navajo Nation has now grown to be the second largest First Nation in the United States of America, with a population close to 300,000 people.\(^\text{28}\) The Navajo have set up their own courts where people can speak in their own mother tongue. Indigenous law men and women are restoring the system of Navajo traditional law and procedure.

“All justices of our Navajo courts must speak Navajo and know the Navajo culture, law and traditions. They must also know the white man’s law,” Justice Yazzie, Chief Justice of the Navajo Nation, told a conference on Indigenous Governance organised by the Aboriginal and Torres Strait Islander Commission (ATSIC) in Canberra in 2002, three years before the Federal Government abolished the Commission. “We are reviving our traditional justice system and educating our people. Any Navajo man or woman can learn to be a peacemaker.” Sixty per cent of the judges in Navajo courts are women. “There is a role for the community justice system to resolve issues between members of the community. You do not always need a law that provides for punishment. Restorative justice has an important part to play.”\(^\text{29}\)

Sovereignty and survival

Sovereignty claimed in the name of “the Crown in right of the Commonwealth of Australia” is being used not only to take land, but also other resources – timber from the mountains, minerals from the ground and fish from the sea. Fishing rights of Indigenous peoples are now being contested both in Australia and Aoteroa (New Zealand) because the profit potential of the commercial fishing trade in the region is increasing as other areas of the planet become depleted as a result of commercial over exploitation of fish stocks.

The accelerated depletion of natural resources is not only a problem for Indigenous peoples; it is a problem for the human race. According to the Millennium Ecosystem Assessment, a report endorsed by 1360 scientists from 95 countries, two thirds of the natural ecosystems that support life on Earth are at risk:

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\(^{25}\) Dr. Manley Begay, citizen of the Navajo First Nation and co-director of the Harvard project on American Indian Economic Development, speaking to the conference on Indigenous Governance organized by the Aboriginal and Torres Strait Islander Commission (ATSIC) in Canberra, 4 April, 2002.

\(^{26}\) Ibid.

\(^{27}\) Op cit.

\(^{28}\) Justice Yazzie, Chief Justice of the Navajo Nation, speaking to the conference on Indigenous Governance, Canberra, 5 April 2002.

\(^{29}\) Ibid.
“Wetlands, forests, savannahs, estuaries and other habitats that recycle air, water and nutrients for living creatures are being irretrievably damaged ... Human activity is putting such a strain on the natural functions of Earth that the ability of the planet’s ecosystems to sustain future generations can no longer be taken for granted.”[30]

Self-determination

Self-determination, the right of a people to make their own decisions in matters that affect them, is widely recognised as the foundation stone on which other human rights are based. Military aggression, invasion and conquest have historically been used to override the inherent human right to self-determination which, like sovereignty, may be impeded but not extinguished, unless the people have been annihilated by genocide.

Sovereignty is the power of a people or nation to exercise their right to self-determination. The right of all peoples to self-determination is written into both United Nations Human Rights Covenants, in particular, the right of all peoples to freely decide their political future and to determine how their natural resources will be used. This right sometimes finds expression in a decision to leave some of those natural resources undisturbed. For example, when the Mirrar people insisted that uranium at Jabiluka be left in the ground, they were asserting their right to self-determination under international law.

The right of Indigenous peoples to determine whether or not to permit mining or logging of the land to which they belong is essential to survival, because destruction, caused by mining or logging, may destroy the land on which they grow their food, pollute the creeks and rivers on which they rely on for their water supply, and may also cause atmospheric pollution. Open cut mining and clear felling of forests may destroy the capacity of an Indigenous community to live independently, to preserve their culture, their laws and their particular piece of planet Earth.

As a result of environmentally destructive practices by some human beings, the capacity of the planet to sustain future generations is at risk. The survival of all the peoples of the Earth is interconnected, and the destruction of Indigenous peoples leads to the destruction of ancient knowledge, learned over millennia, of how to protect and preserve the land, the forests and the fish of the rivers and seas, for future generations.

Recognition and respect for the sovereignty rights and ancient wisdom of the Indigenous peoples of the Earth, who have lived in harmony with the land since time immemorial, is necessary for the survival of all of us who share the planet. Empires may rise and fall, but Indigenous peoples live on.

The dawn of new hope

What may seem an impossible dream in one generation is sometimes realised in the next. Twenty nine years passed between the Day of Mourning in 1938 and the landmark Referendum of 1967. Those years saw global changes in perceptions and power relations: decolonisation was on the international agenda; civil rights campaigns were growing in strength. Racism had become the ugly wart decent people were at pains to deny.

The 1967 Referendum gave non-Aboriginal Australians the opportunity to express their belief in equality, justice and the idea of “a fair go”. A walk over the Sydney Harbour Bridge under the banner of reconciliation in 2000 expressed similar sentiments, but did not produce lasting changes, except perhaps in the hearts of the participants.

Now, as we face the challenges of the new millennium, we are entering into a new cycle. Awareness of the threat posed by global warming and environmental degradation is increasing as drought, fire, flood and hurricanes ravage the planet with increasing ferocity. Flowing in the wake of these changes is a growing recognition that the wisdom of Indigenous peoples, who have lived in harmony with the environment for millennia, may hold the key to survival of the human race.

Prejudice against Indigenous peoples, laced with racism, remains stubbornly entrenched in the wake of 500 years of European colonisation. Like the polar ice caps, such attitudes, frozen for centuries, are beginning to melt. Inspired with a new sense of self-confidence, many Indigenous communities and nations are experiencing a renaissance.

Liberation of Indigenous peoples from the chains of oppression can unlock the future for both Indigenous and non-Indigenous communities. Now is the time to start building towards a new Referendum, one that will provide for both recognition of Aboriginal sovereignty and for an honest treaty-making process with the First Nations of the land. While this may seem a distant dream, such changes are not only possible, they are necessary. Survival depends on knowing how to preserve the land and the life that springs from it, as well as putting this knowledge into practice. We need to do this, not only for ourselves but also for our children and our grandchildren, and future generations to come.
The 1967 Referendum: 40 years on

By Prof. Larissa Behrendt

Introduction

On Australia Day in 1938, a group of Aboriginal people protested in front of Australia Hall in Elizabeth Street, Sydney, after they were moved off the Town Hall steps. This small protest was the culmination of decades of activism by Indigenous communities and their leaders – people like William Cooper and Fred Maynard – in the south-east of Australia who had sought the same rights as all other Australians, especially in relation to their ability to own land, and to access jobs, education, and health services.

The protest marked a beginning. It was the beginning of the Indigenous rights movement and the long road on the search for equality under the Australian legal system. The focus on citizenship rights as an important part of the campaign for Indigenous equality was a key platform in the activism of advocates like Cooper and Maynard which had a marked influence on future generations.

Inclusion through equal access to education, employment and the economy were seen as key ways of improving the situation of Aboriginal people. Men like Cooper and Maynard had worked on pastoral stations that they were prevented from owning. They were self-taught men and they believed that if Aboriginal people were given the same opportunities as other Australians and could make the key decisions about their communities, their families and their lives, they would be able to find their own solutions to their problems. This notion of access and opportunity underpinned the desire for “citizenship rights” and with the claim for land and the desire for self-determination created the key platforms in the Indigenous political agenda.

Today, Indigenous Australians still have a life expectancy that is 17 years less than that of their non-Indigenous counterparts. Statistics continue to show poorer health, education, housing and employment outcomes for Indigenous people. While some moments in our nation’s history have shown a heightened interest in Indigenous issues and a greater effectiveness at addressing Indigenous disadvantage, there have equally been moments in which it is clear that the issue of reconciliation with Indigenous people is a contested priority within the Australian community. But one moment at which Australians seemed united in their interest in Indigenous equality was in the popular support for the 1967 Referendum. Forty years on from that Referendum, it is an opportune time to reflect on the Constitutional change that emerged and to evaluate the impact and legacy of that important constitutional moment.

The silences in the Constitution

To understand the 1967 Referendum, it is important to examine some of the key assumptions and choices made by the framers of the Constitution. The omission of Indigenous peoples both from the drafting process and from within the content of the Constitution is a reminder of the ideologies that shaped thinking around Indigenous people at that time.
Most influential were the beliefs in white racial superiority and the idea that Aboriginal people were a dying race and that the most humane thing that could be done for them was to allow them to fade out with dignity. These ideologies are often cited as the main reason why Aboriginal people were excluded from the Constitution, although the absence can also be explained by considering the attitudes towards rights more generally within the founding document.

The framers of our Constitution believed that decision-making about rights protections – which ones we recognise and the extent to which we protect them – were matters for Parliament. They discussed the inclusion of rights within the Constitution itself and rejected this option, preferring instead to leave our founding document silent on these matters. It was also a document framed within the prejudices of a different era of its own kind of xenophobia, sexism and racism.

A non-discrimination clause was discussed in the process of drafting the Constitution. George Williams in his book, notes that the Tasmanian Parliament proposed clause 110 that, in part, stated:

... nor shall a state deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of its laws.\[1\]

This clause was rejected for two reasons:
- It was believed that entrenched rights provisions were unnecessary; and
- It was considered desirable to ensure that the Australian states would have the power to continue to enact laws that discriminated against people on the basis of their race.

If one is aware of the intentions and the attitudes held by the drafters of the Constitution it explains why it is a document that offers no protection against racial discrimination today.

The legacy of the silences

The 1997 High Court case of *Kruger v. The Commonwealth*\[2\] assists in making this point. This was the first case to be heard in the High Court that considered the legality of the formal government assimilation-based policy of removing Indigenous children from their families. In Kruger, the plaintiffs brought their case on the grounds of the violation of various rights by the effects of the Northern Territory Ordinance that allowed for the removal of Indigenous children from their families. The plaintiffs claimed a series of human rights violations including the implied rights to due process before the law, equality before the law, freedom of movement and the express right to freedom of religion contained in section 116 of the Constitution. They were unsuccessful on each count, a result that highlighted the general lack of rights protection in our system of governance and the ways in which, through policies like child removal, there exists a disproportionately high impact on Indigenous people as a result of those silences.

The *Kruger v. The Commonwealth* case demonstrates the way that the issue of child removal – seen as a particularly Indigenous experience and a particularly Indigenous legal issue – can be expressed in language that explains what those harms are in terms of rights held by all other people: due process before the law, equality before the law, freedom of movement and freedom of religion. Kruger also highlights how few of the rights that we assume we inherently hold are actually protected by our legal system. It reminds us that there are silences in our Constitution about rights – that these silences were intended, and the way in which rights violations can be the legacy of that silence.

In the past, the inequities perpetuated by silences in the Constitution have given Australians cause to reflect upon our foundation document. Indeed, it was the feeling that this canonical document did not reflect the values of contemporary Australian society that gave momentum to the 1967 Referendum.

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The 1967 Referendum

The Federal Council for Aboriginal Advancement (FCAA) emerged in the 1950s as the first national representative body for Aboriginal people. It became the Federal Council for the Advancement of Aborigines and Torres Strait Islanders (FCAA TSI). It was the dominant voice on Aboriginal rights until the late 1960s. Its agenda focused on “citizenship rights”, although it also called for special rights for Aboriginal people. The involvement of people like Jessie Street saw non-Aboriginal people work alongside emerging Aboriginal leaders such as Doug Nicholls, Joe McGuiness and Kath Walker.

Perhaps because of the focus on “citizenship rights” in the decades leading up to the Referendum, and because of the equality for Aboriginal people rhetoric used in the “yes” campaigns, it was inevitable that there would be a mistaken perception that the constitutional change following the Referendum would allow Aboriginal people to become citizens or attain the right to vote. The Referendum in fact did neither.

In reality, the 1967 Referendum did two things:

• It allowed for Indigenous people to be included in the census; and
• It allowed the Federal Parliament the power to make laws in relation to Indigenous people.

Inclusion in the Census

Marilyn Lake, in her biography of Faith Bandler, goes some way towards explaining why those who advocated so hard for the constitutional change thought it went further than it did.[3] The notion of including Indigenous people in the census was, for those who advocated a “yes” vote, more than just a body-counting exercise. It was thought that the inclusion of Indigenous people in this way would create an imagined community and as such it would be a nation-building exercise, a symbolic coming together. It was hoped that this inclusive nation-building would overcome an “us” and “them” mentality.

Sadly, this anticipated result has not been achieved. One need only look at the native title debate to see how the psychological divide has been maintained and used to produce results where Indigenous peoples’ rights are treated as different and given less protection. One of the fundamental vulnerabilities of the native title regime, as it currently exists, is that the interests of native title holders are treated as secondary to the property interests of all other Australians. The rhetoric of those antagonistic to native title interests often evokes the nationalistic myths of white men struggling against the land to help reaffirm three principles in the public consciousness:

• when Aboriginal people lose a property right, it does not have a human aspect to it. The thought of farmers losing their land evokes an emotive response while a similar loss to Aboriginal people does not;
• when Aboriginal people gain recognition of a right, they are getting something for nothing rather than getting protection of something that already exists. Such rights are “special rights”; and
• when Aboriginal people have a right recognised, it threatens the interests of non-Aboriginal property owners in a way that means that the two interests cannot co-exist. In this context, native title is often portrayed as being “un-Australian”.

These principles of the public consciousness show how the notion of “us” and “them” still permeates thinking about Indigenous people, especially when it comes to issues concerning Aboriginal rights. They also highlight how inclusion in the census was an ineffective way to sustain an act of inclusive nation-building.

Section 51(26) – “the races power”

It was thought by those who advocated a “yes” vote that changes to section 51(xxvi) (the “races power”) of the Constitution to allow the Federal Government to make laws for Indigenous people would usher in an era of non-discrimination for Indigenous people. There was an expectation that the granting of additional powers to the Federal Government to make laws for Indigenous people would see those powers being used benevolently.

This has, however, not been the case; to take but one example, the enactment of the Native Title Amendment Act 1998 (Cth) had the effect of preventing the Racial Discrimination Act 1975 (Cth) from applying to certain sections of the Native Title Act 1993 (Cth).

Consideration as to whether the races power can be used only for the benefit of Aboriginal people, as the proponents of the “yes” vote had intended, was given residual attention by the High Court in Kartinyeri v Commonwealth (“Hindmarsh Island Bridge case”).[4] Only Justice Kirby argued that the “races power” did not extend to legislation that was detrimental to or discriminated against Aboriginal people. Justice Gaudron said that while there was much to recommend the idea that the “races power” could only be used beneficially, the proposition in those terms could not be sustained. Justices Gummow and Hayne held that the power could be used to withdraw a benefit previously granted to Aboriginal people and thus to impose a disadvantage.

When analysing the failure of the amendment of the races power to ensure benevolent and protective legislation as its proponents envisaged, one is reminded of the original intent of the framers to leave decisions about rights to the legislature. History provides us with many examples of the legislature overriding recognised human rights or passing legislation that protects rights only to override them when there is political motivation to do so. And the other lesson that can be learnt from the 1967 Referendum is that the Federal Parliament cannot be relied upon to act in a way that is beneficial to Indigenous people.

And yet, a triumph

Despite the fact that the 1967 Referendum did not create an even playing field or open an era of non-discrimination, it was a high water mark for the relationship between Aboriginal and non-Aboriginal people. Australia has been extremely reluctant to alter its Constitution, seemingly suspicious of many of the proposed changes over the course of its history since Federation. The 1967 Referendum became one of only six changes but with the most resounding endorsement, winning over 90 per cent of voters and carrying all six states. At a time when many parts of Australia were actively practicing segregation, this was an extraordinary result.

The Freedom Rides through northwest New South Wales, headed by Charles Perkins and including a group of University students who would feature future New South Wales Chief Justice Jim Spiegelman and historian Ann Curthoys, had a marked impact upon public opinion at this time. They brought to the attention of people in the cities the crude and racist conditions that existed in places like Walgett and Brewarrina and garnered public sympathy for Indigenous issues.

The referendum also enjoyed bi-partisan support for a “yes” vote, a prerequisite to ensuring its success. Political leadership was shown across the spectrum to support the Constitutional change that would grant more power to the Federal Parliament. It can be inferred that the relatively uncontroversial nature of the changes – including Indigenous people in the census and increasing Federal Government power over them – assisted in obtaining this bi-partisan support. A more radical change, one that more directly called for the entrenchment of Indigenous rights, would not have enjoyed this popular support.

An unintended legacy

What are the real impacts of changes to section 51(26) of the Constitution? It did not produce a new era of equality for Aboriginal people as its proponents had hoped. Instead, its most enduring, though perhaps unintended, consequence was the new relationship it created between federal and state and territory governments. And rather than being a relationship of co-operation, it is one that has seen governments of both levels try to blame the other for the failure of Indigenous policy and to shift the responsibility and the cost away from themselves.

This goes some way towards explaining one of the structural barriers to achieving social justice for Aboriginal and Torres Strait Islander people in Australia today. Indigenous communities continue to stand strong against these and other systemic injustices – recognising that although the 1967 Referendum led to greater complications and barriers to effective Indigenous policy reform it was also another important step in a continuing struggle for equality.

One finds a recent example of this in the response to negative media coverage of findings of high incidence of sexual assault in some communities and gang violence in others. Federal Minister for Aboriginal Affairs Mal Brough blamed the Northern Territory Government for not putting police into communities where violence was endemic. While he was absolutely correct that any community of 2,500 people with no police force would have law and order issues, it was a simplistic response focused only on blame and cost-shifting. Many other factors contribute to the cyclical poverty and despondency within some Aboriginal communities that create, over decades, the environment in which the social fabric unravels and violence, sexual abuse, substance abuse and other anti-social behaviour is rife. Just as unhelpful was the response of Northern Territory Chief Minister Claire Martin in asserting that the problem was the Federal Government’s failure to provide adequate housing and health and education services. Both were of course correct. Governments, federal, state, and territory all continue to under-fund the most basic Aboriginal community needs like health services, educational facilities and adequate housing services.

Forty years ago it was precisely the same unjust conditions that made Australian voters direct the Commonwealth to take responsibility for the good government of Indigenous people, as it had for all other Australians.

The final legacy of the 1967 Referendum is the new era of “radical” rights movements that it has shaped. Aboriginal people quickly became disillusioned by the lack of changes that followed from the Referendum and the continual discrimination facing Indigenous people and the poor socio-economic conditions of their communities. They rejected the notion of assimilation but embraced the idea of equal rights and equal opportunities for Aboriginal people.

In this environment, a new generation of activists was born whose protests culminated in the establishment of the Aboriginal Tent Embassy on the lawns of what is now Old Parliament House and from here, the new land rights movement was formed.
Promises yet to be fulfilled

By Glenn Giles

On 27 May 1967 Australians voted overwhelmingly for Aboriginal Australians.\[1\] It was a high point in positive non-Aboriginal community sentiment towards Aboriginal Australians. At the time of the 40th anniversary of the 1967 Referendum, it is well that we reflect upon that Referendum, as well as upon the contemporary situation of Aboriginal Australians.

While much has changed over the past 40 years for Aboriginal Australians, much has remained the same. Still, some Aboriginal Australians view the 1967 Referendum as the moment when significant change in their status began to occur: when Aboriginal people gained citizenship rights\[2\] and the right to vote. Although the reality of citizenship involved many individual legislative changes at both levels of government,\[3\] the Referendum nonetheless represents a positive achievement, itself the culmination of much campaigning by Aboriginal people and their supporters.

Today, it is therefore important that we listen to and appreciate Aboriginal perspectives on the 1967 Referendum. The very high “Yes” vote from non-Aboriginal Australians for Aboriginal Australians set an unmatched high water mark in this country. And many Aboriginal Australians see the 1967 Referendum as signalling a changed place for Aboriginal peoples in Australia:

This referendum and the publicity surrounding it brought the plight of our people and the injustice of our position home to the majority of Australians. The provisions of the Constitution Alteration (Aboriginals) Act that followed in 1967 had a tremendous impact upon the lives of our people all over Australia.\[4\]

The Referendum specifically, and the campaigning of the 1960s generally, brought about significant developments in the position of Aboriginal Australians, including the winding back of “formal” legal discrimination. Informal non-legal discrimination, however, remains a part of modern Australia.

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[1] In this discussion I use “Aboriginal Australians” to refer to Aboriginal and Torres Strait Islander Australians or Indigenous Australians. I apologise for any offence. It is notable that in recent times it seems that more Aboriginal Australians refer to themselves with the name of their ancestral clan group, such as Kaurna or Ngarrindjeri.


[4] Christobel Mattingley and Ken Hampton, Survival in Our Own Land, “Aboriginal” Experiences in “South Australia” since 1836 (Adelaide: Wakefield Press, 1998), 55. This is a significant South Australian book. It is an Aboriginal view of history in the lands of South Australia, especially since colonisation, with the input of nearly 150 Nungas (Aboriginal peoples of South Australia). It was produced for the 150th anniversary of the State, in 1986.
Writing in the mid-1980s, Charles Rowley commented that the Referendum “had clearly not marked the end of the prejudice [against Aboriginal Australians] based in this history”, that is, Australia’s history since British colonisation.[5]

Clearly Aboriginal Australians do not experience equality of access to life opportunities compared to most other Australians. It is clear that further change is necessary; all Australians must make real the positive sentiment engendered by the 1967 Referendum; and it is time for more substantial change to turn that sentiment into effective policies and government action. Change must incorporate real Aboriginal self-determination. Governments must pursue real, meaningful and respectful collaboration. Aboriginal Australians must be empowered. These truths are recognised across Aboriginal Australia – including by those Aboriginal people, such as Noel Pearson and Wesley Aird[6], favoured by the current Prime Minister, Mr Howard. Without empowerment, policies and initiatives will continue to be, at best, partial remedies to continuing issues. Noel Pearson recently commented on the Australian Government’s Aboriginal Affairs policies that “the most profound flaw is that there is no recognition of the rights of indigenous Australians as the original people of this country”. We must, therefore, have a process really to address this issue. This may mean another Referendum.

If the 1967 Referendum serves as any indication, a new constitutional amendment to the status of Aboriginal Australians will require a long campaign. The 1967 Referendum success took ten years.[8] Success in achieving positive constitutional change regarding Aboriginal Australians seems a remote possibility in 2007, given the ideology of John Howard’s Government and its lack of leadership in Aboriginal affairs.

The view taken by newly elected Prime Minister John Howard in 1996, that the pendulum had swung too far in favour of Aboriginal Australians was, and is, quite incredulous and offensive. But it seemed to “play well” with the Australia that had elected Pauline Hanson. Yet, despite the direction from the top over the past decade, indications of community support for justice for Aboriginal Australians continue. It is imperative, therefore, that we take the longer view, as Aboriginal Australians are well-accustomed to doing in the pursuit of justice over the past two centuries. We must focus on the fundamental issue – the full legal recognition of the First Peoples of Australia. If and when that is properly addressed, we must then begin seriously to address the numerous dimensions of Aboriginal disadvantage.

Some might argue, though, that those seeking justice for Aboriginal Australians should temper their strategy (and policy) by recognising the Realpolitik of contemporary Australia. For instance, the arguably more individualistic contemporary Australia seems readily to accept a “blame the victim” attitude. Many Australians see the disadvantage of Aboriginal Australians as the result of their own laziness and indolence. Moreover, Australians are conservative about changing the Constitution (only once since 1967 has a Federal Referendum been successful).[9]

In the face of these attitudes, however, we must consider whether “toning down” our objectives would produce sufficient change, or would we see more of the same and accept diversion from the scale, and type, of change required. It might be argued that when more substantial changes have either happened or been proposed in the past, such as recognising native title or granting land rights, strong opposition has been aroused.


Changes perceived by some as advantaging one group at the expense of another can arouse envy in those who feel they are losing something. Doubtless Australian society has changed over the past 40 years, including the attitudes of non-Aboriginal people towards Aboriginal Australians. In late 2006, for instance, it appeared that the broader community of Perth accepted the positive recognition of continuing Nyoongar native title in the Perth region by the Federal Court. But hope dissipates in the Commonwealth (Coalition) and State (ALP) Governments’ initial responses, which signalled challenges to the decision. Rather than work with Aboriginal peoples to address the issues arising from the British-led colonisation of this country – yet to be justly remedied – Governments for the large part remain in a state of not facing up to that history and its ongoing consequences for Aboriginal peoples. We can cling to hope, though, in the apparent community response to native title in Perth.

On an almost daily basis, Aboriginal people are all too familiar with the numerous reports describing the extent of the disadvantage experienced by Aboriginal Australians in their daily lives in 21st century Australia. Just one of these reports – the second in the series Overcoming Indigenous Disadvantage released in July 2005 – makes for painful reading:

Another report, released today, on disadvantages facing Aborigines and Torres Strait Islanders, paints a familiar picture of a vast gulf between Indigenous and non-indigenous Australians.

The life expectancy of Indigenous people is 17 years less than the rest of the population, while the rates of infant mortality, suicide and diabetes are all two to three times higher than for other Australians.

But the report … does show some improvement in education and employment.[10]

It is an international embarrassment for Australia that Aboriginal health, housing, education and employment experiences are so far behind the rest of Australia that the room for improvement is huge. While all Australians celebrate the achievements of many Aboriginal people in various endeavours and fields, including the formal education system, initiatives and programs to increase the formal educational achievements of Aboriginal Australians must be continued (as must programs in other policy areas, such as health, housing and employment).[11] The improvement in education indicated in the Overcoming Indigenous Disadvantage Report is, however, qualified by recent trends of declining numbers of Aboriginal students in higher education. This is especially troubling when faced with the additional fact that a much higher proportion of Aboriginal Australians, compared to other Australians, are young.

Present Government Aboriginal policy approaches fail to make the necessary quantum leap in results. From Government we see a continuing denial of self-determination, cuts to programs for Aboriginal people and an overarching policy stance of requiring success in mainstream Australian society. Too much policy is determined centrally by non-Aboriginal people and processes; it is ineffectual, under-funded and unproductive micro-managing, recently called shared responsibility agreements (SRAs).

Many non-Aboriginal Australians argue that this vast gulf between Aboriginal and non-Aboriginal Australians results from the First Australians not yet being accorded, at a societal level, recognition for the range of injustices inflicted on them in the process of European colonisation. Until there is appropriate atonement for the injustices and proper legal recognition of the status of Aboriginal Australians as the First Australians, therefore, the overall position will not improve markedly. This is especially worrying at a time of national economic prosperity, when it would be well within the capacity of a rich, First World country to right the wrongs of the past.


[11] At the time of writing in March, 2007, the Federal Minister of Aboriginal Affairs, Mal Brough, has signalled cutting Aboriginal specific housing programs, another policy directive that imperils the continued existence of Aboriginal Australians.
Reflections: 40 years on from the 1967 Referendum

The Deputy Governor of the Reserve Bank, Dr Ken Henry, also made this point in late 2006. He observed that in the recent years of a prosperous Australian economy, the national government has had large surpluses in its budget. Yet the disadvantage of the most disadvantaged is not showing much sign of improvement. On the contrary, there are signs of deterioration, for instance, in the gap in life expectancy, which has not improved as it has in comparable countries over recent decades; and, in the growing proportion of Aboriginal Australians in prison. As documented over a decade and a half ago by the Royal Commission Into Aboriginal Deaths In Custody, the underlying causes of Aboriginal peoples’ high incarceration require attention.

Since the 1960s, the social, political and legal position of Aboriginal Australians has changed significantly, resulting from many years of struggle by them and their allies in the community. Various discriminatory treatments of Aboriginal Australians were undone, but as a country we are yet to take the step to properly recognise the special status of Aboriginal Australians as the original owners of this land.

The Howard Government says it believes in “practical reconciliation” and that the “rights agenda” has nothing to do with the well being of Aboriginal Australians. For the Australian Government, therefore, reconciliation is not an issue; yet, its so-called “practical reconciliation” is failing to provide Aboriginal Australians with the basic social services that benefit non-Aboriginal Australians.

Many non-Aboriginal Australians reject the idea that recognition of the rights of Aboriginal Australians has nothing to do with their disadvantaged position in Australian society. A recognition of the reality of Aboriginal Australians’ existence is fundamental to addressing their disadvantaged position. It is fundamental to Australia truly embracing Aboriginal Australians.

Today, all Australians should reflect on the fact that the overall position and outcomes for the First Australians have not fundamentally improved since the 1967 Referendum. It is not because, as the Howard Government would have us believe, there has been too much “self-determination”. It is because there has not been enough.

Recent and present trends in government policy are increasingly dominated by measures contrary to and denying of self-determination for Aboriginal Australians – an approach that comes from a very narrow appreciation of our history as a nation.

It is well within our collective capacities to change the entrenched disadvantage that confronts Aboriginal and Torres Strait Islander Australians – we must all take responsibility for it. It is only by doing so that we will move towards a settled country with an appropriate respect for the Aboriginal and Torres Strait Islander peoples of Australia.

What we need, then, is a campaign to fix our Constitution. We must re-address the legal recognition of the rights of Aboriginal and Torres Strait Islander Australians. We must identify what Constitutional changes are required to achieve proper recognition, and agitate for a Referendum. The 1967 Referendum did not do enough to change the fundamentals.

As the 1967 Referendum engaged Australians in addressing some of the foundations of our nation, it is critical to the future of Australian Federation that we focus on the fundamentals of the relationship between the Australian state and the First Peoples of this land.

In my own State, this will mean looking at the Letters Patent of February 1836, which established the colony of South Australia. It is of interest that the Minister for Aboriginal Affairs and Reconciliation on Proclamation Day 2006, on the 170th birthday of the State, reflected on the Letters Patent, noting that they recognised the rights of the “Aboriginal natives” and their descendants to continue to enjoy their occupation of their lands. He recognised that this had yet to happen, that the suffering of Aboriginal people was a direct outcome of this failure, and that today we must re-commit to realising the promises made at the founding of the State. It is difficult to disagree with this assessment.

Were those promises made to Aboriginal Australians at the founding of South Australia today a reality, we would help open the door for the nation to achieve reconciliation between the peoples who have lived in this land since time immemorial and the descendants of the migrants who have come over the past two centuries.

Australia, whose average life expectancy is second or third in the world, has one group of people who have a life expectancy among the lowest in the world – Aboriginal Australians. In terms of the situation of its Indigenous peoples, which is a disadvantaged one in most countries, Australia is at the bottom of any league table of nations. Australia can learn from other countries.
Take Canada; for many years, it has spent double the amount compared to Australia on its Indigenous peoples.[12] There are also major legal differences with regards to the Indigenous peoples in Australia and Canada. It can be argued that the better health outcomes for Indigenous peoples in Canada, the United States and New Zealand are significantly related to the different legal status of Indigenous peoples in these nations, as compared to Australia.[13]

Over the past decade, Australia has moved further away from an ethically and legally just recognition of Aboriginal Australians. If we continue to fail, Aboriginal Australians will continue to be dealt with pre-emptively, without understanding, and be sidelined to the extent they receive attention at all.

It could be observed that in the present growing public consciousness of problems with water supply and climate change, we could learn much from the civilisation that prospered in this land for thousands of years.

We need a political settlement that establishes principled foundations for the future. We might learn from other countries that have addressed their colonial histories and the rights of Indigenous peoples. New Zealand has the Treaty of Waitangi; its associated Waitangi Tribunal can conduct hearings in community venues where accounts of the past are given in the presence of community members and representatives of the Crown, thereby recording and acknowledging these events by representatives of Government today.

To exist in this land in a settled way the nation needs to embrace the whole of its history. We need to recognise the specific and special status of the First Peoples of this land – in other words, the nation needs to embrace the First Peoples. We need to establish a firm foundation in our legal structure for Aboriginal peoples of this land. We should note and applaud the move in Tasmania in 2006, supported by both sides of Parliament, to compensate members of the Stolen Generations; this shows the country what is possible for the nation.[14] We can confront our history, adopt measures and processes to deal with it and its ongoing consequences, and move on to the future.

To understand the necessity for our nation to follow this path we could attempt to put ourselves in the position of Aboriginal Australians, and think of how we would have survived the onslaught of dispossession and oppression by the colonising society. At the National Rural Health Conference in March, 2007 at Albury, John Menadue spoke of an experience he had in South Australia while conducting consultations regarding a review of the State’s health system. A senior Aboriginal woman, after listening to and acknowledging Menadue, asked him what she should say to young men in her community who asked her, “Aunty, why should I want to stay healthy?” Menadue’s comments followed a wise and perceptive address from Rhonda Galbally. She pointed to the effects of people’s sense of belonging, hope and control on their approach to life and their health – the resonance with the exclusion of Aboriginal peoples in this nation was strong.

Aboriginal peoples, and their history since British led colonisation, need to be fully acknowledged. We need to come to a proper settlement in this land. Aboriginal peoples have never ceded their country, and we, the non-Aboriginal people have not rightfully acquired “our” lands, especially not until we have come to terms with the Aboriginal peoples of this land about the take over of their lands. The need for the nation to embrace Aboriginal and Torres Strait Islanders at a fundamental level remains and is clear.

[14] In late 2006 the Tasmanian Parliament passed unanimously legislation to compensate Tasmanian Aboriginal members of the Stolen Generations, and some of their descendants. Critics have observed that the Tasmanian Government pursued this policy because it only relates to a small number of people (around one-hundred or less).
Indigenous law and justice

By the Hon Philip Ruddock MP
Australian Government, Attorney-General

Introduction

The removal of discriminatory clauses that had adversely affected Aboriginal people in the Australian Constitution as a result of the public Referendum in 1967 was a significant landmark in Australian history. It signalled an increasing recognition of the rights of Indigenous people and the start of a long period of reform, including much greater Australian Government involvement in Indigenous affairs. The effect of these changes is still being realised today.

The 1967 Referendum

The second question on the Referendum of 27 May, 1967 sought to determine whether the Australian public wanted to remove two references in the Australian Constitution which discriminated against Aboriginal people. These references were:

51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:
   (xxvi) The people of any race, other than the aboriginal people in any State, for whom it is necessary to make special laws.

127. In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives should not be counted.

The Referendum resulted in the highest YES vote ever recorded in a Federal referendum, with 90.77 per cent voting for the removal of “... other than the aboriginal people in any State...” in section 51(xxvi) and the whole of section 127 from the Constitution. The decision was representative of the political climate at the time, with the Australian people becoming more conscious and aware of Indigenous issues. With this recognition came concern and indignation about the disadvantages suffered by Indigenous Australians, and an expectation that these issues would be addressed at a local, regional and national level.

A whole-of-government approach

The Australian Government and State and Territory Governments have shared responsibility for Indigenous affairs since 1967. In this period, Aboriginal and Torres Strait Islander people have made substantial advances in achieving recognition of their political, cultural and social rights. As part of that history, since 1996 there has been a comprehensive reform of Indigenous affairs by the current Australian Government, with the primary objective of achieving a whole-of-government response to the critical issues that continue to challenge the Indigenous peoples of Australia.

The new initiatives introduced by the Australian Government since 1996 ensure programs are more flexible and responsive to the needs of Indigenous Australians.
The Government’s approach has been called practical reconciliation, and fundamentally describes a relationship between government and Indigenous people that emphasises the dual requirement for services to be responsive and for local communities to share responsibility for outcomes. Practical reconciliation is a comprehensive vision of ensuring Indigenous Australians have the same choices and opportunities in life as other Australians.

At the local and regional level, Indigenous communities are talking to “solution brokers” at Indigenous Coordination Centres directly about their needs and possible solutions. The role of solution brokers is to develop and implement Regional Partnership Agreements (RPAs) and Shared Responsibility Agreements (SRAs) with the communities and other government agencies; identify gaps or duplications in service delivery areas; and advise where improvements can be made and opportunities exist for innovation, collaboration and harmonisation.

Indigenous Coordination Centres therefore represent the “one stop shop” in action, with the majority of Government agencies represented at key locations around urban, regional and remote areas of Australia. Through consultative arrangements such as RPAs and SRAs, government investment can respond to identified community needs and produce mutually desirable results.

At the national level, the National Indigenous Council provides expert advice to government on improving outcomes to Indigenous Australians. A single Indigenous Budget Submission identifies annually key initiatives of benefit to all Indigenous Australians and facilitates the re-allocation of funds to activities that support national priorities and reduce areas of disadvantage.

As part of the Government’s approach, my Department is responsible for the programs and strategies that enhance law and justice outcomes for Indigenous Australians. The aim is to increase access to justice and safety and reduce the effects of crime on individuals and communities.

The Attorney-General’s Department

My Department works to ensure all Australians live in a just and secure society and does so within the context of the whole-of-government approach to Indigenous affairs. In this paper I detail the programs that are improving law and justice outcomes, and identify how the Government continues to provide culturally inclusive and high quality services to all Indigenous Australians.

Family Violence Prevention Legal Services

The Australian Government has made a significant contribution towards addressing Indigenous family violence concerns through the expansion of the Family Violence Prevention Legal Services (FVPLS) program in 2006–2007, increasing from 26 to 31 units. Additional funding is intended to increase the capacity of each unit to undertake family and civil law matters and to focus on early identification and prevention initiatives.

The units are primarily managed by Aboriginal organisations, with local Indigenous community members taking a lead role in the development of the units through representation on management committees, steering committees and auspice bodies.

The program aims to provide culturally appropriate assistance to Aboriginal and Torres Strait Islander adults and children who are victims of family violence, including sexual abuse. Units also offer early intervention and prevention strategies to halt the cycle of family violence and sexual assault by promoting changes in behaviour and attitudes of individuals and the community.

The expansion in the number of units has enabled more Indigenous Australians who are victims of family violence – including sexual assault – to access legal advice and case work services, and other critical services such as sexual assault counselling. Additional resources will be allocated to increase preventative measures such as education and community awareness activities.

The Australian Government also funds the Early Intervention and Prevention Program (EIPP) to intervene in the cycle of family violence and sexual assault, promoting changes in behaviour and attitudes of individuals and the community. The program provides funding to organisations with the capability to deliver programs that will lower or eliminate the level of family violence in Indigenous communities. Programs will be delivered through the FVPLS units operating around Australia. Organisations focus on either a particular aspect of family violence or on a group of individuals within the community.
Prevention, diversion, rehabilitation and restorative justice

The Australian Government’s commitment to addressing crime and violence in Indigenous communities includes the funding it provides under the Prevention, Diversion, Rehabilitation and Restorative Justice (PDRR) Program. It funds activities intended to reduce adverse contact between Indigenous Australians and the criminal justice system.

The PDRR program complements other Indigenous Law and Justice programs. It seeks to fund activities that will decrease destructive and anti-social conduct in communities, including family violence, and lessen the need for legal aid and assistance by Indigenous Australians, either through the legal aid system or the demand on Indigenous legal services.

The PDRR program has four components:

- **Youth initiatives**, which are projects aimed at Indigenous young people who are at risk of engaging in destructive, anti-social or illegal conduct. Projects are intended to divert young people into socially beneficial activities and provide opportunities in areas such as education, skills and employment.

- **Night patrols**, which assist Indigenous people at risk of either causing or being the victims of harm, including intoxicated people, young people, victims of violence and the homeless. Projects are designed to reduce the likelihood of offending and police detention.

- **Prisoner support and rehabilitation services**, which are aimed at reducing recidivism and to assist in the rehabilitation of incarcerated Indigenous Australians. Activities which may be eligible for funding support include prison visitor schemes, counselling services, cultural programs, prisoner return home schemes, and recidivism reduction schemes.

- **Restorative justice initiatives** promote the involvement of families, communities, victims and offenders in developing mechanisms for early dispute resolution. They include appropriate alternatives to conventional sentencing procedures, such as conferencing and circle sentencing.

In 2005–2006 the PDRR Program funded approximately 150 projects around Australia and contributed $635,000 in relation to 22 SRAs between the Australian Government and Indigenous communities. The Department has contributed funding to support a range of identified needs, such as upgrading community facilities, capital equipment and support for youth initiatives.

Legal aid services for Indigenous Australians

The Government has committed more than $125 million over three years (2005–2006 to 2007–2008) to the provision of legal aid services for Indigenous Australians through contract arrangements. The move to contracting instead of annual grant payments has been a significant achievement. Since 1 July 2006 legal services contracts have been in place in all States and Territories following a progressive roll-out of tenders under an open and competitive procurement process.

The aim of these reforms has been to improve both the quality and efficiency of service delivery to the ultimate benefit of Indigenous clients. New policy directions issued by the Department for the provision of Indigenous legal aid services form part of the new contracts. These policy directions introduce clearly defined eligibility criteria, priorities for assistance and service standards.

The tendering requirements included an emphasis on providing culturally sensitive services, meeting the needs of Indigenous women and children and providing assistance to clients where there is a real risk to the person’s physical safety. Significant new initiatives developed by the contracted providers as part of the tender process include strategies for the increased representation of Indigenous women and children and restorative justice programs.

The Australian Government is committed to providing better services on the ground to Indigenous Australians. The Government wants to prioritise and target available resources to ensure services are responsive to community needs and provide the best possible quality of service to individual services.[1]

Other services provided by the Department

The mainstream legal aid program funds the provision of legal aid services for Commonwealth law matters through legal aid commissions in each State and Territory. Indigenous Australians, as with any other Australians, are eligible to seek the assistance of legal aid commissions.

Indigenous Women's Projects receive funding to provide legal services specifically for Indigenous women under the mainstream Community Legal Services program. Women are assisted on matters including domestic violence and family law, child support, child abuse, discrimination and harassment, financial matters, housing and tenancy, property, consumer credit, and relationships. Services are located in Sydney, Brisbane, Townsville, Port Augusta, Geraldton, Port Hedland and Kununurra, and offer advice, casework, community legal education, and law reform projects.

The National Community Crime Prevention Program provides funding for grass roots projects designed to enhance community safety and crime prevention by: preventing or reducing crime and anti-social behaviour, improving community safety and security, and reducing the fear of crime. Indigenous communities receive specific funding through the Indigenous Community Safety Stream. Indigenous communities may also benefit from a variety of projects funded under other streams.

The Family Relationships Services Program is jointly funded by the Department and the Department of Families, Community Services and Indigenous Affairs. It funds activities including family dispute resolution services, counselling, a parenting orders program and a family relationship advice line. A significant part of the program is the network of Family Relationship Centres around Australia which provide information, advice and dispute resolution services to families to help them reach agreement on parenting arrangements without the need to go to court.

To ensure that Indigenous clients are serviced effectively, selected Family Relationship Centres receive additional funding to provide Indigenous outreach services in locations identified as high need areas or areas with significant Indigenous communities.

Reconciliation Action Plan

The Department has implemented a Reconciliation Action Plan in 2007. This Plan outlines three key objectives to achieving practical reconciliation within the workplace which build a relationship for change.

The three objectives identified in the Reconciliation Action Plan are to:

- deliver high quality and culturally inclusive services
- provide opportunities for employment and foster a culturally inclusive workplace, and
- promote understanding of Indigenous culture.

2006 Budget initiatives

In the 2006 Budget the Australian Government increased its funding for Indigenous justice initiatives by $43.6 million over four years. The programs endeavour to prevent and respond to Indigenous Australians experiencing adverse contact with the criminal justice system.

The initiatives include:

- $23.6 million to fund an expansion in the number of family violence prevention legal services units from 26 to 31. The new units will be operational by July, 2007.
- a further $14.9 million over four years in June, 2006 to fund prevention, diversion, rehabilitation and restorative justice initiatives as part of a $55 million commitment to tackle substance abuse in Indigenous communities. This is a comprehensive approach incorporating education, justice, community support and health initiatives. My Department's role in this coordinated approach is through the funding of new activities, including targeting earlier stages of intervention and providing identified pathways for those exposed to the criminal justice system, or at risk of exposure, for more productive participation in the community. Other activities, led by Departmental officers based at Indigenous Coordination Centres, include the employment of Restorative Justice Officers, development of restorative justice training and support for night patrols.
• $5.1 million in a continuing joint funding initiative with the Northern Territory Government to improve Indigenous access to interpreter services in the Northern Territory. A Memorandum of Understanding with the Northern Territory Government covering funding for the next four years was signed on 20 October, 2006. The Australian Interpreter Service intends to allocate funding of $900,000 across 17 services in the Northern Territory in 2006–2007 through Indigenous legal aid service providers and Family Violence Prevention Legal Services that use interpreter services under the Memorandum.\(^2\)

**June 2006 Summit**

While law and justice programs for Indigenous Australians remain a key responsibility of State and Territory governments, the Australian Government is working closely with States and Territories to ensure better coordination of strategies to prevent family violence and child abuse.

As part of the whole-of-government approach to Indigenous issues, an intergovernmental Summit on Violence and Child Abuse in Indigenous Communities was conducted on 26 June, 2006 in response to widespread community concerns. The Australian Government and all State and Territory Governments agreed that the levels of violence and child abuse in Indigenous communities warranted a comprehensive national response. Proposals at the Summit were then agreed at the Council of Australian Governments’ meeting on 14 July, 2006.

While all jurisdictions over recent years have taken significant steps to address the problem, the Summit acknowledged that better resources, improved methods and a concerted, long-term joint effort were essential if the necessary breakthroughs were to be achieved, as stated in the official Communiqué.

Indigenous children continue to be overrepresented in substantiated cases of child abuse and neglect. Indigenous people also continue to experience increasing levels of violence and abuse. A series of reports – the latest conducted in New South Wales – point to endemic problems, particularly in remoter areas but also evident in some regional and urban areas.

Action therefore needs to be accelerated – in particular the imperative of giving Indigenous Australians confidence that the justice system will work for them. Indigenous people must enjoy the same level of law and order as applies in the broader community.\(^3\)

The Australian Government has been undertaking bilateral negotiations with State and Territory Governments to move forward a number of proposals relating to these outcomes. This includes measures aimed at restoring law and order and safety in Indigenous communities, and improvements to the operation of the criminal justice system for Indigenous Australians.

**The way forward**

I am committed to the provision of effective law and justice measures to address the economic and social disadvantage of Indigenous Australians. My Department’s programs seek the best results for on-the-ground services to ensure they are professional, culturally sensitive and respond to the complex challenges and changes affecting Indigenous Australians. This means maintaining service priorities that address issues such as Indigenous incarceration, but also increasing emphasis on complementary approaches that include alternative dispute resolution and restorative justice initiatives. The continued provision of high quality services is a key element to ensure that all Australians live in a just and secure society.

\(^2\) The Attorney-General, the Hon Philip Ruddock MP, Indigenous law and justice initiatives, media release, viewed 11 April 2007.

\(^3\) Intergovernmental Summit on Violence and Child Abuse in Indigenous Communities, Communiqué, safer kids, safer communities, The Hon Mal Brough MP.
State legislation about Aboriginal people

By Chris Kourakis QC

Introduction

Legislation is a body of rules generally accepted by the people of a political entity and enforced by a range of sanctions. It both reflects a social consensus and discloses the goals and objectives of the politically empowered. For these reasons an analysis of State legislation both before and after the 1967 Referendum is instructive, for it reveals not only the explicit legislative responses and sanctions with regards to the treatment of Aboriginal people, but also the underlying social policies and objectives of the State of South Australia.

The effect of the Referendum was to give the Commonwealth power to legislate about Aboriginal people. The legislative power conferred was not an exclusive power, however, but rather one that was shared with the states, so that the states could continue to legislate about Aboriginal people, provided that such enactments were not inconsistent with Commonwealth legislation. The states have continued to exercise this power, though the method and objects chosen have evolved greatly since 1967. In this chapter I will, therefore, survey the changing ways in which the power to legislate for, and over, Aboriginal people has been used in South Australia.

It is not at all surprising that much twentieth century South Australian legislation was paternalistic and segregationist. Aboriginal people were placed under the control and direction of a government officer with the Orwellian title of the “Chief Protector.” Compliance by Aboriginal people with the will of the new occupiers of their lands was ensured through the operation of the civil and criminal law. The rights of Aboriginal people were severely curtailed, such as through restrictions on the right of free movement and regarding guardianship. However, the enactment of the **Community Welfare Act 1972** (SA) just five years after the Referendum reflected a significant change in legislative policy. It addressed the special welfare needs of Indigenous people as members of the wider South Australian community, while the authoritarian regime of earlier statutes was dismantled.

In the 1980s, legislation recognised the special connection of Aboriginal people to the land. Some land was vested in Aboriginal corporations. More recently legislation has required government agencies to have regard to the special interests of Aboriginal persons. Statutory boards and consultative committees with administrative power affecting Aboriginal interests often include an Aboriginal member. To that extent the laws might be said to carry the Aboriginal rights banner.

This chapter will seek to explore State legislative actions regarding Aboriginal issues, using South Australia as a case study. It will examine State enactments both before and after the Referendum to highlight the changing social and legislative approaches to these matters. A detailed survey will be given of current legislation dealing with Aboriginal issues, and the issue of inconsistency between State and Commonwealth responses will be explored. In my conclusion I will explore some of the themes emerging from the above survey, including a relative weakness of modern enforcement procedures, a lack of driving purpose and a tendency towards government appointment, rather than election, for positions of authority.
First, however, I shall turn briefly to the 1967 Referendum, and examine how that has affected Commonwealth legislative actions.

The Referendum

Section 51(xxvi) of the Commonwealth Constitution originally empowered the Parliament to make laws with respect to the “people of any race other than the Aboriginal race in any State, for whom it is deemed necessary to make special laws.” By Referendum approving the Constitution Alteration (Aboriginals) Bill 1967 (Cth) the words “other than the Aboriginal race in any State” were deleted. In the second reading speech to the Referendum Bill the then Prime Minister, the Hon Harold Holt, said that the government had been influenced to make the amendment “by the popular impression that the words now proposed to be omitted from s 51(xxvi) are discriminatory – a view which the government believes to be erroneous but which, nevertheless, seems to be deep rooted.” The Prime Minister continued:

“If the words “other than the Aboriginal race in any State” were deleted from s51(xxvi) the result would be that the Commonwealth Parliament would have vested in it a concurrent legislative power with respect to Aboriginals as such, they being the people of a race, provided the Parliament deemed it necessary to make special rules for them. It is the view of the government that the national Parliament should have this power.”

On the other hand the government rejected a proposal put by a government member of Parliament, Mr Wentworth, to include a constitutional guarantee against racial discrimination. The Prime Minister announced that if the proposals relating to Aboriginals were to be approved by the people, then the government would hold discussions with the States to secure the widest measure of agreement with respect to Aboriginal advancement.

However, it was not until after the election of the Whitlam government in 1972 that the Commonwealth moved to take direct responsibility in the additional area of legislative power given to it by the Constitutional amendment. It was later still, in 1975, that the Commonwealth prohibited racial discrimination with the enactment of the Racial Discrimination Act 1975 (Cth).[1]

In introducing the Aboriginal Affairs (Arrangements with the States) Bill 1973 (Cth) the Minister for Aboriginal Affairs, Mr Bryant, announced that the introduction of the Bill was the implementation of the Labor Party’s undertaking “that in accordance with the new powers acquired by the Australian Government as a result of the 1967 Referendum, Labor would assume the ultimate responsibility for Aboriginals and establish a Ministry for Aboriginal Affairs with offices in each state.” He observed that the state departments responsible for Aboriginal Affairs had, since the Referendum, received an increasingly large part of their funds from Commonwealth grants. Indeed by 1973–1974 close to one half of the total budget on Aboriginal affairs was provided by the Commonwealth. Mr Bryant explained that the Commonwealth sought “responsibility for policy, planning and coordination” and not the transfer from the states of particular responsibilities in the fields of health, housing, education and other functional areas.

The purpose of the Bill was to transfer those employees of state government departments involved in the policy, planning and coordination of Aboriginal Affairs to the Commonwealth. Those functions had already been removed from departments providing services in Western Australia, South Australia and New South Wales.

The transfer of responsibility for Aboriginal affairs to the Commonwealth culminated in the enactment of the Aboriginal and Torres Strait Islander Act 1989 (Cth). That Act established the Aboriginal and Torres Strait Islander Commission (ATSIC), a representative body that had substantial administrative responsibility for Aboriginal affairs. The preamble to the ATSIC Act read in part:

[1] It should be noted that this Act was largely supported by the Commonwealth external affairs legislative head of power, ensuring that Australia met her international obligations imposed under the International Convention on the Elimination of All Forms of Racial Discrimination, which entered into force in 1969.
“... it is also appropriate to establish structures to represent Aboriginal persons and Torres Strait Islanders to ensure maximum participation of Aboriginal persons and Torres Strait Islanders in the formulation and implementation of programs and to provide them with an effective voice within the Australian Government.”

The measure of self-government granted by that Act may well have obviated the need for similar state based institutions. ATSIC was, however, abolished from 1 July 2005,[2] leaving Aboriginal people without processes and institutions controlled by them.

This chapter is concerned, however, not so much with Commonwealth legislative enactments that have occurred since the 1967 Referendum, but rather with those legislative actions taken by the states. Using South Australia as a case study, I shall now examine the legislative enactments of that State regarding Aboriginal peoples, both before and after the 1967 Referendum.

Colonial paternalism – pre-Referendum State legislation

Legislative enactments from the first half of the twentieth century reflect the entirely different social milieu of that time, and it is hardly surprising that the legislation enacted prior to the Referendum appears abhorrent to our modern eyes. The preamble to the Aborigines Act 1934 (SA) unashamedly proclaimed its purpose to be the:

“... protection and control of the Aboriginal and half-caste inhabitants of South Australia.” To that end the Governor was empowered to appoint a “Chief Protector” of Aboriginals,[3] whose “protection and control” was enforced through the sanction of the criminal law.

The Chief Protector was the legal guardian of every Aboriginal and every half-caste child, notwithstanding that any such child had a parent or other relative,[4] and could commit any Aboriginal child to an institution to be detained until the child attained the age of 18 years.

The Chief Protector could order any Aboriginal or half-caste to be kept within the boundaries of any reserve or Aboriginal institution, or to be removed to and kept elsewhere.[5] Additionally, the State was divided into districts, with each district under the authority of a “Regional Protector.”[6] It was an offence for any person, without the authority in writing of a Protector, to remove any Aboriginal, any female half-caste, or any half-caste child under the age of 16 years from one district to another.[7] A District Protector could order and cause any Aboriginals or half-castes camped within the limits of or near any town, to remove their camp or proposed camp away from that town. All members of the police force were required to assist the Protector to give effect to his order.[8]

Aboriginals who were employed, who held permits or were married to and residing with a husband who was not himself an Aboriginal were exempt from the Chief Protector’s control. However any person who enticed or persuaded an Aboriginal or half-caste to leave his or her lawful employment was guilty of an offence.[9]

It is not difficult to see why Section 30 of the Act may have exemplified for many Indigenous Australians the indignity to which the Aborigines Act 1934 subjected them. It provided that blankets issued to Aboriginal people remained the property of the Crown and made it an offence for any Aboriginal person to sell or otherwise dispose of any blankets they had received.

[6] Aborigines Act 1934 (SA) ss 8(2) and 11.
The Aboriginal Affairs Act 1962 (SA) repealed the Aborigines Act 1934 (SA) but did not make any fundamental change to the control exercised by the State over Aboriginal persons, and was restricted, rather, to the refinement of administrative arrangements.

The Chief Protector was replaced by the Aboriginal Affairs Board,[10] though there was no requirement that any member of the Board be of Aboriginal descent or even have experience in Aboriginal affairs. The Board was required to compile and maintain a Register of Aborigines.[11] The Act drew a distinction between Aborigines of full blood and Aboriginals who were “less than full blood”[12] Aborigines who were “capable of accepting the full responsibilities of citizenship” were removed from the register.[13]

The objective of assimilation inherent in the Act was seen in the responsibilities given to the Minister, who was required to “promote the social, economic and political development of Aborigines and persons of Aboriginal blood until their integration into the general community.”[14]

A benign failure? State legislative power and policy since the Referendum


The second reading speech of the Community Welfare Bill 1972 announced that the Department of Community Welfare and Aboriginal Affairs Department were to be amalgamated so that a more comprehensive service could be provided to Aboriginal persons and services delivered closer to their place of residence. It was the then Government’s policy that Aboriginal persons, especially those living in urban areas, should enjoy and use the same services available to the rest of the community. However special services designed to overcome Indigenous disadvantage were to be continued. The new Government policy emphasised that Aboriginal and non-Aboriginal people are “fellow citizens of the same community with the same rights and obligations.” The reason given for many provisions of the Aboriginal Affairs Act 1962 not being picked up in the Community Welfare Act 1972 was that they were “protectionist or paternal in nature”.[15]

This difference of objectives between the Acts is seen in the different functions given to the Minister. Part V of the Community Welfare Act 1972 was headed “Special Provisions Relating to Aboriginal Affairs,” and the very first section in that part provided that it was the function of the Minister:

“To promote in consultation and collaboration with the Aboriginal people, the cultural, social, economic and political welfare and development of the Aboriginal people.”[16]

The Minister was further commanded to establish a division of the Department of Community Welfare with the specific purpose of providing consultative, planning and advisory services in relation to the economic, social and cultural development of the Aboriginal people.[17]

The Governor retained the power to declare any land to be an Aboriginal Reserve.\[18\] It was an offence for non-Aboriginal persons to enter upon an Aboriginal Reserve without permission of the Minister or unless the Minister had, after consultation with Aboriginals living on the reserve, satisfied himself that the majority of those Aboriginals desired the removal of restrictions upon access to the reserve.\[19\] Officers of the Department were, however, authorised to enter upon pastoral land to enquire as to the welfare of Aboriginal persons.\[20\]

Courts were required to inform the Director-General of the Department if an Aboriginal person appeared in Court on an indictable offence without representation. If the Director-General then requested an adjournment to arrange legal representation, a Court was required to grant it.\[21\] However, the Minister could only undertake the general care protection or management of the property of an Aboriginal person if requested to do so by that Aboriginal person.\[22\]

Apart from those special provisions, the welfare of Aboriginal persons was managed under the same statutory scheme that applied to the population generally. The interests of children were made the paramount consideration,\[23\] with provision for the welfare of children committed to the care of the Minister to be carefully monitored and regulated.\[24\] Mandatory reporting of cruelty to children was introduced.\[25\]

Current State legislation – A survey

A survey of current legislation shows that the approach heralded by the Community Welfare Act 1972 of enacting limited safeguards of Aboriginal interests within general legislation has continued. Current legislation can be grouped into five major categories: natural resources, criminal law and corrections, welfare, Aboriginal heritage and land rights.

1) Natural resources

The first category of legislative enactments concerns the taking into account of Indigenous interests in the management of natural resources. The definition of “Aboriginal person” for the purposes of addressing Indigenous interests thus becomes important. The definition found in Section 3(1) of the Fisheries Management Act 2007 (SA) reflects the definition commonly used in current statutes. That Act defines “Aboriginal person” to mean a person of Aboriginal descent who is accepted as a member by a group in the community who claim Aboriginal descent.

Generally, legislative enactments concerning natural resource management establish a system of consultation and representation to take account of Indigenous interests. This approach is evidenced in the Fisheries Management Act 2007 (SA), whereby The Fisheries Council of South Australia, established by Section 11 of the Act to prepare and oversee fishery management plans and advise the Minister, must include at least one person with knowledge and experience of Aboriginal traditional fishing.\[26\] It is a function of the Council to advise the Minister on the management of Aboriginal traditional fishing as well as commercial and recreational fishing.\[27\] General fisheries management plans must be consistent with any relevant Aboriginal traditional fishing management plan.\[28\]

\[18\] Community Welfare Act 1972 (SA) s 84(1).
\[19\] Community Welfare Act 1972 (SA) s 88.
\[20\] Community Welfare Act 1972 (SA) s 89.
\[21\] Community Welfare Act 1972 (SA) s 90.
\[22\] Community Welfare Act 1972 (SA) s 91.
\[23\] Community Welfare Act 1972 (SA) s 42.
\[24\] Community Welfare Act 1972 (SA) ss 44-47.
\[25\] Community Welfare Act 1972 (SA) s 73.
\[26\] Fisheries Management Act 2007 (SA) s 11(4).
\[27\] Fisheries Management Act 2007 (SA) s 16.
\[28\] Fisheries Management Act 2007 (SA) s 43. The Minister and a native title group that is a party to an Indigenous land use agreement can make an Aboriginal traditional fishing management plan under the land use agreement (Fisheries Management Act 2007 (SA) s 60).
Likewise, the Wilderness Advisory Committee established under the Wilderness Protection Act 1992 (SA) is required to prepare a draft code of management of wilderness protection areas and zones containing policies in relation to, amongst other things, the preservation of Aboriginal sites and Aboriginal objects. Additionally the code must contain policies in relation to the entry into and use of wilderness protection areas and zones by Aboriginal people to observe Aboriginal traditions.[29]

The object of the Natural Resources Management Act 2004 (SA) is to assist in the achievement of ecologically sustainable development in the State. In the application and administration of the Act, and in meeting this goal, consideration must be given to Aboriginal heritage, and to the interests of traditional owners of any land or other natural resources.[30] The Natural Resources Management Council established by the Act must include a person nominated as a result of consultations with bodies that represent the interests of Aboriginal people.[31] Section 94 of the Opal Mining Act 1995 (SA) requires all persons to give proper consideration to the protection of any Aboriginal sites or objects within the meaning of the Aboriginal Heritage Act 1988 (SA) when carrying out mining operations under the Act.[32] Environmental reports prepared under the Petroleum Act 2000 (SA) must take into account cultural amenity and other values of Aboriginal and other Australians insofar as those values are relevant to the assessment.[33] The Minister must, when determining the conditions of a licence pursuant to the Mining Act 1971 (SA), give proper consideration to the protection of any such sites.[34] Persons conducting or proposing to establish a special mining enterprise must make an application to the Minister accompanied by, amongst other things, a statement of the measures that the applicant considers appropriate for the protection of any Aboriginal sites.[35]

The National Parks and Wildlife Act 1972 (SA) adopts the common definition of an Aboriginal person, and defines that a “relevant Aboriginal group” means, in relation to a particular land, an Aboriginal group or community with a traditional association with that land. Advisory committees established under the National Parks and Wildlife Act 1972 may advise the Minister on the involvement of Aboriginal people in the management of land and wildlife. Parks cannot be proclaimed over Aboriginal owned land except with the agreement of the registered proprietor.[36] Section 43F provides that the Minister may enter into a co-management agreement with traditional Aboriginal owners of land that is a National Park or Conservation Park. The Governor may establish co-management Boards for co-managed parks.[37] A majority of members of the Board must be members of the relevant Aboriginal group. Limited immunities are given to Aboriginal persons for the taking of flora and fauna and they are not required to hold a permit in relation to hunting if the animal hunted will be used as food or for cultural purposes of Aboriginal origin.[38]

It is an object of the Pastoral Land Management and Conservation Act 1989 (SA) to recognise the right of Aboriginal persons to follow traditional pursuits on pastoral lands.[39] The right of an Aboriginal person to enter, travel across or stay on pastoral land for the purpose of following his or her traditional pursuits is preserved subject to some limitations.[40] However, the Act represents an example of the recognition and enforcement of those special rights Aboriginal peoples have in certain cases of natural resources management and access.

[34] Mining Act 1971 (SA) s 30. Similar consideration must be given to the grant of a mining lease, and the terms and conditions of a retention lease, and a miscellaneous purposes licence. (Mining Act 1971 (SA) s 30, s 34, s 41A, s 52).
[35] Mining Act 1971 (SA) s 56B.
[36] National Parks and Wildlife Act 1972 (SA) ss 27 and 30. Aboriginal owned land is land vested in the Aboriginal Lands Trust or a body that represents the interests of a relevant Aboriginal group.
[37] National Parks and Wildlife Act 1972 (SA) s 43G.
[38] National Parks and Wildlife Act 1972 (SA) s 68E.
[40] Pastoral Land Management Act 1989 (SA) s 97. Aboriginal persons cannot camp within a radius of 1 kilometre of any house, shed or other outbuilding on pastoral land or within 500 metres of a dam or any other constructed stock watering point.
As this survey shows, legislation regarding natural resource management makes special provision for the interests of Aboriginal people in a number of ways. These include the special consideration of Aboriginal interests in the management of general natural resources; the specific representation of Aboriginal interests on the various statutory boards dealing with natural resource management; and finally, the grant of special rights of access and use regarding traditional use of land and natural resources.

2) Criminal law and corrections

The second category of legislation concerns, firstly, representation on correctional boards, and secondly the consideration of a defendant’s “Aboriginality” in the application of the criminal law and in sentencing. Once more, definitions are important, and the Correctional Services Act 1982 (SA) (CSA) defines Aboriginal people to mean the people who inhabited Australia before European colonisation, and an Aborigine to be a descendant of the Aboriginal people who is accepted as a member by a group in the community who claim descent from the Aboriginal people. The CSA expressly includes tribal lands and Aboriginal Reserves within the definition of residence for the purpose of release on home detention of Aboriginal persons. \[41\]

A key example of representation of Indigenous interest on decision-making boards is found in the CSA. The Parole Board established under that Act must include at least one person of Aboriginal descent. \[42\] Likewise, the Training Centre Review Board established by the Young Offenders Act 1993 (SA) must include two Aboriginal persons with appropriate skill and experience appointed on the nomination of the Minister for Aboriginal Affairs amongst a Board of seven persons.

The consideration of a defendant’s Aboriginality is more controversial. An important example is contained in Section 9C of the Criminal Law (Sentencing Act) 1988 (SA), which allows a special procedure to be adopted on the sentencing of Aboriginal defendants. It allows the court to convene a sentencing conference facilitated by an Aboriginal Justice Officer employed by the Courts Administration Authority. The Aboriginal Justice Officer can assist the Court in sentencing Aboriginal persons by providing advice on Aboriginal society and culture. He or she also helps explain court procedures and sentencing options to defendants. A person regarded by the defendant, and accepted within the defendant’s Aboriginal community, as an Aboriginal Elder or as a person qualified to provide cultural advice relevant to the sentencing of the defendant can also attend, as may a member of the defendant’s family, with “family” defined widely. The section defines an Aboriginal person as someone descended from an Aboriginal or Torres Strait Islander and who so regards him or herself and is accepted as an Aboriginal or Torres Strait Islander by a community.

Section 9C provides a legislative basis for a procedure that had been informally adopted long before its enactment in December 2005. The first court to operate in this way in Australia was at the Port Adelaide Magistrates Court in 1999. The Court was styled the Nunga Court, and was established by Magistrate Chris Vass who had a long experience in the administration of the law in Indigenous communities in Australia and Papua New Guinea. Indigenous Courts have now been established in other states. The aim of the Nunga Court is to modify court processes to provide a more culturally appropriate environment than mainstream courts. The Court sits one day in each fortnight in Port Adelaide and has monthly sittings in Murray Bridge and Port Augusta. When the Court is in session all persons including the Magistrate sit at the same level and close proximity to facilitate direct communication. The defendant makes promises in front of his or her relatives and support groups. Extensive use is made of pre-sentence information, and government and non-government agencies, such as the Aboriginal Sobriety Group, can attend to support and provide information. The presiding Magistrate develops, over time, a close rapport with the local Aboriginal community. The attendance rate before the Nunga Court is in the order of 80% for Aboriginal offenders compared to less than a 50% attendance before general Magistrates Courts. \[43\]

The Criminal Law (Sentencing) Act 1988 requires sentencing Courts to, amongst other things, have regard to the character, antecedents, age, means and physical and mental condition of the defendants. \[44\]

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\[41\] Correctional Services Act 1982 (SA) s 37a.
\[42\] Correctional Services Act 1982 (SA) s 55.
\[44\] Criminal Law (Sentencing) Act 1988 (SA) s 10.
This provision along with its interstate counterparts has been at the centre of recent controversy. While it has long been accepted by the law that although Aboriginality does not create a special class of offenders to whom leniency is to be extended, irrespective of other circumstances, some mitigating circumstances of disadvantage may readily be inferred from Aboriginality. In Neil v The Queen Brennan J explained how general sentencing principles are applied to Aboriginal defendants in the following way:

“The same sentencing principles are to be applied of course in every case irrespective of the identity of a particular offender or his membership of an ethnic or other group. But in imposing sentences Courts are bound to take into account, in accordance with those principles, all material facts, including those facts which exist only by reason of the offender’s membership of an ethnic or other group. So much is essential to the even administration of criminal justice.”

The controversy came to a head in mid 2006, when the Commonwealth Minister for Indigenous Affairs, Mal Brough, called on the States to repeal or amend state sentencing legislation to fundamentally alter the way in which cultural background is treated by the criminal law. The Commonwealth also introduced the Crimes Amendment (Bail and Sentencing Bill) 2006 (Cth). The Senate Legal and Constitutional Legislation Committee strongly criticised the Bill pointing out that it was inconsistent with the overwhelming weight of published research and opinion on the question. The government majority recommended that the Bill be amended so as to allow sentencing courts to have regard to the cultural background of defendants. The opposition minority opposed the Bill in any form. Nonetheless the Commonwealth Crimes Act 1914 was amended by enacting Section 16A(2A), which came into operation on 13 December, 2006. That subsection provides that in considering the character, antecedents, age, means and physical and mental condition of any defendant the Court must not take into account any form of customary law or cultural practice as a reason for excusing, justifying, authorising, requiring or lessening the seriousness of the criminal behaviour to which the offence relates.

The Commonwealth pressured State and Territory Governments to introduce similar legislation by threatening to make Commonwealth funding for the provision of some Aboriginal services conditional on the legislative change. South Australia has not, at the time of writing, introduced the legislation desired by the Australian Government.

The Constitutional power of the Commonwealth to so act is plain. The conferral of Commonwealth legislative power over Aboriginal people affected by the Referendum supports the use of the Constitution Section 96 in that way. Whether or not the Commonwealth amendment to the Crimes Act 1914 or the imposition of a condition on grant money would contravene the Race Discrimination Act 1975 is a more difficult question. Certainly it is arguable that members of a race that in Australia more strictly observe customary practices are more likely to be practically disadvantaged by such an amendment if they are ever sentenced for offending that is related to that customary practice.

3) Welfare

The third category of legislation concerns the creation of special measures to further Aboriginal welfare, from adoption and child protection, through to carers and education. Perhaps the most visible post-Referendum alterations of policy in this area are found in the modern provisions regarding adoption and child protection.

In stark contrast to the pre-Referendum approach, the Adoption Act 1988 (SA) forbids the making of an adoption order by the Youth Court for the adoption of an Aboriginal child unless the Court is satisfied that the adoption is clearly preferable, in the interest of the child, to any alternative order that may be made.

[47] Victoria v Commonwealth (Federal Roads Case) (1926) 38 CLR 399; Deputy Federal Commissioner of Taxation (NSW) v W R Moran Pty Ltd (1939) 61 CLR 735.
The Act further provides that if an adoption order must be made, unless there are special circumstances justifying the making of an alternative order, the order for the adoption of the child must be made in favour of a member of the child’s Aboriginal community who has the correct relationship with the child in accordance with Aboriginal customary law.\[50\] Again the definition of an Aboriginal person is a person descended from an Aboriginal or Torres Strait Islander and who regards, or who has a parent who regards, himself or herself as an Aboriginal or Torres Strait Islander and is accepted as such by a relevant community of Aboriginal persons.

Amongst the fundamental principles prescribed for the care of children by the Children’s Protection Act 1993 (SA) is the principle referred to as the “Aboriginal Child Placement Principle.” That principle is found in Regulation 4 of the Children’s Protection Regulations 2006, and prescribes that the order of priority for the placement of Aboriginal children is:

1) A member of the child’s family, as determined by reference to Aboriginal culture;
2) A member of the child’s community who has a relationship of responsibility for the child, as determined by reference to Aboriginal practice or custom;
3) A member of the child’s community as determined by reference to Aboriginal practice or custom;
4) A person with the same Aboriginal cultural background as the child;
5) A non-Aboriginal person who is able to ensure that the child maintains significant contact with the child’s family (as determined by reference to Aboriginal culture), the child’s community and culture.

“Family” in relation to an Aboriginal or Torres Strait Islander child includes any person held to be related to the child according to Aboriginal kinship rules.\[51\] Any family care meetings convened under the Act with respect to an Aboriginal child must include a person nominated by a recognised Aboriginal organisation.\[52\]

Under the Children’s Protection Act 1993 (SA) one of the Minister’s functions is to assist the Aboriginal community to establish its own programs for preventing or reducing the incidence of abuse or neglect of children within the Aboriginal community.\[53\] The Act also establishes a Council for the Care of Children that must include at least one Aboriginal person.\[54\] The Family and Community Services Act 1972 (SA) includes among the objectives of the Minister the provision of assistance and services designed to assist migrants, members of ethnic communities, Aboriginals, children, youth and other persons.

It is a principle of the South Australian Carers Charter enacted as Schedule 1 to the Carers Recognition Act 2005 (SA) that Aboriginal and Torres Strait Islander Carers should be specifically identified and supported with culturally appropriate services within and outside their communities.

Lastly, the University of South Australia Act 1990 (SA) includes amongst the University’s functions the provision of such tertiary education programs as the University thinks appropriate to meet the needs of the Aboriginal people.\[55\]

4) Aboriginal heritage

The fourth category of legislation concerns enactments made for the protection of Aboriginal heritage. The most significant of these is the Aboriginal Heritage Act 1988 (SA). The Aboriginal Heritage Committee established under that Act consists of Aboriginal persons appointed by the Minister to represent the interests of Aboriginal people throughout the State in the protection and preservation of Aboriginal Heritage.\[56\]
It is the function of the Committee to advise the Minister on the making of entries into the central archives and the measures that should be taken for the protection of Aboriginal sites, objects or remains.[57] The Act requires the Minister to keep central archives relating to Aboriginal Heritage.[58]

Aboriginal objects and sites under the Act are those objects or sites that are of significance according to Aboriginal tradition or of significance to Aboriginal archaeology, anthropology or history.[59] An object that is not itself of significance according to Aboriginal tradition may therefore nonetheless be an Aboriginal object if it is significant to the history of the interaction between Aboriginal people and European settlers.

It is an offence to damage, disturb or interfere with any Aboriginal site or to damage any Aboriginal object without the authority of the Minister.[60] A person must not excavate land for the purpose of uncovering any Aboriginal site without the authority of the Minister.[61] Owners or occupiers of private land or their employees or agents who discover an Aboriginal site or Aboriginal objects or remains must as soon as practicable report the discovery to the Minister. The Minister may give directions prohibiting or restricting access to sites or activities on sites where it is necessary for the protection or preservation of any Aboriginal site or object.[62] The Minister may also authorise persons to enter on land and to seize, or excavate for, Aboriginal objects where he or she has reason to believe that those objects or sites may be found.[63]

Section 29 of the Aboriginal Heritage Act 1988 prohibits any person from selling or disposing of an Aboriginal object or removing it from the State without the authority of the Minister. A person who proposes to take action in relation to a particular object, where that action may constitute an offence under the Act if the object is an Aboriginal object, may apply to the Minister for a determination of whether that object is or is not an Aboriginal object.[64] The Minister is given compulsory powers of acquisition.[65] Penalties, including imprisonment, are provided for offences against the Act.

Although the Act plainly protects Aboriginal objects and sites and not Aboriginal spiritual beliefs themselves, a Court is likely to have regard to the spiritual significance of any site or object when determining whether or not it has been damaged, disturbed or interfered with.

The State Records Council established by the State Records Act 1997 (SA) must include at least one Aboriginal person engaged in historical research involving the use of official records nominated by the Chief Executive of the Department of State Aboriginal Affairs.[66]

5) Land rights

The final category of State legislation concerns the grant and regulation of Aboriginal land rights. It is beyond the scope of this chapter to consider the Native Title (South Australia) Act 1984 (SA) and its relationship with the Native Title Act 1993 (Cth). However the legislative vesting of land rights in Aboriginal corporations prior to the decision of the High Court in Mabo v Queensland (No.2) should be mentioned.

The Aboriginal Lands Trust Act 1966 (SA) established a body corporate known as the Aboriginal Lands Trust that consisted of a Chairperson and at least two other members appointed by the Governor. Section 16 of the Act provides that Crown land may be transferred to the Trust by proclamation of the Governor, with any such land vested as for an estate in fee simple, or freehold.

The Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981 (SA) (the APY Land Rights Act) constituted the Anangu Pitjantjatjara Yankunytjatjara (APY) as a body corporate. All members of the Pitjantjatjara Yankunytjatjara and Ngaanyatjarra people are members of APY.\[68\] Pursuant to Section 15 of the APY Land Rights Act, lands comprising more than one tenth of the land area of the State were vested in APY. All Anangu were given unrestricted right of access to the land.\[69\] Certain opal miners in the Mintabie field were exempted from the requirement to obtain permission from Anangu to access that part of their land.\[70\]

The APY operates through an Executive Board of ten members who are elected in an election conducted by the Electoral Commission.\[71\] Members of the Board are under similar duties as Executives and Board Members in the Public Sector to act diligently and honestly in exercising their functions under the Act. They must act impartially and free of any conflict of interest in accordance with a code of conduct.\[72\] The Board must meet certain prudential requirements.\[73\] The Minister must approve the terms and conditions of the Director of Administration appointed by the Executive Board,\[74\] with similar provisions governing the appointment of a General Manager.\[75\] Both positions are under similar duties to those that apply to public sector executives.\[76\] Many of those provisions were introduced on the 27th October, 2005 in response to considerable community concern about the administration of the APY Lands.

In other respects the regulatory regime of the APY Land Rights Act is similar to that later established for the Maralinga Tjarutja lands. The Maralinga Tjarutja Land Rights Act 1984 (SA) established the Maralinga Tjarutja Corporation. It provided for the vesting of certain lands in that corporation. The power of the Maralinga Tjarutja is exercised by a council comprising the persons who are for the time being leaders among the traditional owners of the land.\[77\]

The Act also provides for the Minister to establish, by regulation, a co-management board for the adjacent Unnamed Conversation Park (now known as the Mumungari Conservation Park). The co-management Board is constituted a body corporate and a majority of its members must be Maralinga Tjarutja.\[78\] The Governor may suspend the co-management board. Staff arrangements for the board are to be determined or approved by the Minister after consultation with Maralinga Tjarutja.\[79\]

Traditional owners are given unrestricted rights of access to the lands.\[80\] It is an offence for unauthorised persons to enter upon the land.\[82\] Maralinga Tjarutja must approve mining applications.\[83\] However refusals are subject to arbitration. Where the Minister of Mines and Energy and the Minister of Aboriginal Affairs are satisfied that an Aboriginal site exists within a mining tenement, provision must be made for its protection.\[84\]

\[68\] APY Land Rights Act 1981 (SA) s 5.
\[69\] APY Land Rights Act 1981 (SA) s 18.
\[70\] APY Land Rights Act 1981 (SA) s 25.
\[72\] Sections 12b 12c 12d 12e and 12f of the APY Land Rights Act 1981 (SA).
\[73\] APY Land Rights Act 1981 (SA) s 12h.
\[74\] APY Land Rights Act 1981 (SA) s 13B.
\[75\] APY Land Rights Act 1981 (SA) s 13D.
\[76\] Sections 13h, 13i, 13j, 13k of the APY Land Rights Act 1981 (SA).
\[77\] Maralinga Tjarutja Land Rights Act 1984 (SA) ss 6 and 7.
\[78\] Maralinga Tjarutja Land Rights Act 1984 (SA) s 15C.
\[79\] Maralinga Tjarutja Land Rights Act 1984 (SA) s 15D.
\[80\] Maralinga Tjarutja Land Rights Act 1984 (SA) ss 15 D and 15E.
\[81\] Maralinga Tjarutja Land Rights Act 1984 (SA) s 17.
\[82\] Maralinga Tjarutja Land Rights Act 1984 (SA) s 18.
\[83\] Maralinga Tjarutja Land Rights Act 1984 (SA) s 21.
\[84\] Maralinga Tjarutja Land Rights Act 1984 (SA) s 22.
Mining royalties from any minerals recovered from the lands are kept in a separate fund maintained by the Minister of Mines and Energy to be applied in equal proportions to Maralinga Tjarutja and the Minister of Aboriginal Affairs for the purposes of the health welfare and advancement of the Aboriginal inhabitants of the State and the general revenue.

Part 4 of the Act provides that the Minister of Aboriginal Affairs shall, with the approval of Maralinga Tjarutja, appoint a tribal assessor to determine disputes between traditional owners and Maralinga Tjarutja Corporation. Jurisdiction is conferred on the District Court to order compliance with a direction given by the assessor.

The relationship between state and Commonwealth legislation

As can be seen, the States have enacted various legislative reforms since the 1967 Referendum. However, the grant of the concurrent legislative power to the Commonwealth creates the possibility of inconsistencies arising between state laws and Commonwealth laws with respect to Aboriginal people. Inconsistencies can occur between laws of general application and those dealing specifically with Aboriginal issues. Where such inconsistencies arise, the offending state provision will be rendered void by operation of Section 109 of the Constitution.

An important question concerning direct inconsistency between State Acts and the Commonwealth Racial Discrimination Act 1975 was addressed by the High Court in Gerhardy v Brown. Appropriately, that case arose out of a prosecution for unauthorised entry into the APY Lands, under the legislative regime discussed in the section above. The decision saw the Court consider the legality of “positive discrimination” for the first time.

As observed above, the APY Land Rights Act vested the title of a large tract of land in the north-west of South Australia in the APY. Section 19 of that Act prohibited any non-Anangu person from entering the land without permission. The Respondent was charged under this provision and challenged the validity of the State Act.

A majority of the High Court considered that Section 19 of the APY Land Rights Act involved racial discrimination inconsistent with either Section 9 or Section 10 of the Racial Discrimination Act, because it restricted the right to access and this was a “right” within that Act. The Court held, however, that Section 19 of the APY Land Rights Act was a “special measure” taken for the sole purpose of securing adequate advancement of the Aboriginal racial group in question. As such the provision fell within the exemption granted in Section 8(1) of the Racial Discrimination Act and consequently was a valid law. Section 8(1) of the Act states that the prohibitions contained in that Part do “not apply to, or in relation to the application of, special measures to which paragraph 4 of Article 1 of the Convention applies.” Article 1(4) of the International Convention on the Elimination of All Forms of Racial Discrimination states that:

“Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.”

[85] Maralinga Tjarutja Land Rights Act 1934 (SA) s s 33 and 34.
[87] (1985) 159 CLR 70.
[89] Brennan and Dean JJ.
[90] Gibbs CJ, Mason, Murphy and Brennan JJ.
Two principles have come out of the Court's decision. The first is that Section 9 and Section 10 of the Racial Discrimination Act are to be interpreted as guaranteeing formal equality before the law.[91] The provision should receive a liberal interpretation and should not be read in a narrow, technical way,[92] so that "benign discrimination, which advances genuine and effective equality, is prohibited together with invidious discrimination."[93]

Secondly, the scope of "special measures" is to be interpreted broadly,[94] so that benign discrimination that nullifies or impairs formal equality but advances effective and genuine equality would "wear the aspect of a special measure."[95] Brennan, J set out four indicia of a "special measure,"[96] but it appears that benign discrimination will be almost necessarily a special measure.[97]

These two outcomes have seen the decision labelled as both "encouraging and disappointing."[98] It is encouraging, in that by the second principle, the Court unanimously gave the "go ahead" to measures aimed at the proactive protection and advancement of disadvantaged racial groups.[99] However it is disappointing in that the Court "failed to engage in a serious and profound discussion of the meaning, extent and criteria of discrimination."[100] The Court appears to have assumed "that racial distinctions are per se discriminatory and invalid, even if they are aimed at the improvement of the situation."[101] It was open to the Court to decide that the challenged provision was non-discriminatory because "it did not victimise, stigmatise and otherwise harm any racial group."[102] This proposition, that a law may make racial distinctions, but yet not be racially discriminatory so as to offend the Racial Discrimination Act, has received qualified judicial support,[103] but the liberal interpretation of "discrimination" of the majority has remained unchallenged.

Following Gerhardy v Brown[104] it seems that the laws that states may enact specifically granting rights to Aborigines will be limited almost entirely to "special measures,"[105] and must be justifiable as such.[106] The strict application of the prohibition under Section 9 and Section 10 has been off-set by the broad interpretation granted to "special measures." However, the inherent limitations of the statutory terms of the "special measure" provision means that cases of benign or positive discrimination remain liable to being struck down as inconsistent with the Commonwealth Act where they fall outside that provision.


[94] Ibid, 333.


[97] Nygh, above n89, 333.


[99] Sadurski, above n94, 5–6.

[100] Sadurski, above n94, 5–6.


[105] Nygh, above n89, 333.

[106] Nygh, above n89, 337.
Conclusion regarding State legislative actions

There is a strong consensus amongst those involved with, or with knowledge of, Aboriginal affairs that there remains much more to be done to overcome the disadvantages and injustices suffered by the Aboriginal people. Crises in health, social welfare and law enforcement in both remote and urban communities have dominated discussion of Aboriginal affairs in recent times. It is both surprising and disappointing that, 40 years after the Referendum and the first enactment of progressive legislations, so little seems to have been achieved. Writing in 1985 Sadurski observed that “all the available statistics demonstrate how great a distance separates [Aboriginal people] from the rest of the community in the fields of education, employment, wealth, political influence, health protection etc.” Over twenty years later it is difficult to argue that any of these issues have greatly improved.

Something is not working in addressing these issues, and a frank analysis of the State legislation since 1967 reveals three striking features that may, at least in part, explain these failings. The first is the relative weakness of available legal mechanisms to ensure that Aboriginal interests are respected. The pre-Referendum legislation engaged the criminal law to assimilate Aboriginal people that it was thought could be assimilated and to segregate those who could not. In contrast to the criminal law, the modern enforcement through judicial review of government agencies and the extent to which they have had regard to Aboriginal interests is a comparatively weak remedy. A court undertaking judicial review in accordance with common law principles cannot examine the merits of government decision-making. Nor can it determine the issue itself if it finds that Aboriginal interests were ignored. It can only examine the way in which a decision was made and if a procedural error was made require the decision-maker to again commence a process that may quite possibly result in the very same decision. Moreover the remedy of judicial review is not always available and when it is Aboriginal people and organisations are rarely in a position to pursue it.

The second feature is the absence of any clear vision. The ultimate objectives for the Aboriginal people and their place in the South Australian community are not stated. Intermediate benchmarks for advancing the health, welfare and education of Aboriginal people are not legislated. Whereas the pre-1967 objectives of assimilation are rightly no longer appropriate, the new guiding purpose is unresolved. This lack of a clearly defined object and purpose is more than simply bad policy. There may be constitutional implications for the validity of the State “benign discrimination” provisions. Special measures must be aimed at ensuring the advancement of a recipient group to a point of equality with the general community, and cannot continue once their objective is complete. Special measures cannot act to create a perpetually privileged class or group. Without a predetermined endpoint, or stated objective and purpose, there is no way in which one can conclude that those objectives have been met. While special measures must be subject to planned obsolescence, none of the above legislative enactments contemplate the necessary benchmark for advancement against which one can assess such obsolescence.

The third feature is that the executive government selects Aboriginal representatives on boards and committees. They are not chosen by and are therefore not accountable to the Aboriginal community. No element of self-government has ever been allowed except for the APY community in the north and west of the State.

In his overview to the recommendations of the Royal Commission into Aboriginal Deaths in Custody, Commissioner Elliott Johnston QC reported that only the empowerment of Aboriginal society could reduce the high incidence of Aboriginal deaths in custody. There were three essential pre-requisites to that empowerment. The first and most crucial was the desire and capacity of the Aboriginal people to put an end to their disadvantaged situation. The Commissioner found that the first element was undoubtedly present. The second was assistance from the broad society, meaning government with support of the electorate. Here too, Commissioner Johnston concluded there was ample support for the second pre-requisite. The third pre-requisite was a policy of self-determination that he described in this way:

“The third pre-requisite to the empowerment of Aboriginal people and their communities is having in place an established method, a procedure whereby the broader society can supply the assistance referred to and the Aboriginal society can receive it whilst at the same time maintaining its independent status and without a welfare-dependent position being established as between the two groups. That requires an adherence to the principles of self-determination, a concept which – I think – does not have a precise definition; it is a developing concept, one as to the limits of which there can be some disagreement but about which ... there is an enormous common area of agreement quite sufficient to allow progress to go forward with great benefit to Aboriginal people.”

Although the principle of self-determination may be incapable of precise definition I suggest that the three striking features of current legislation governing Aboriginal affairs to which I have referred are inconsistent with it. Self-determination requires that Aboriginal representatives on statutory boards and committees are truly representative and accountable to Aboriginal people. Their place on such boards and committees should rely on support from the Aboriginal community and not on acts of political patronage. Although difficult, it must surely be possible to devise institutions and processes through which the Aboriginal people can choose their delegates. Equally it is inconsistent with the principle of self-determination not to commit in a binding way to the health, education and welfare services to which Aboriginal people are entitled. Further wherever it is possible to positively confer an entitlement a right to a review on the merits by an appropriately constituted administrative tribunal should also be given. It is not sufficient for objectives and benchmarks to be expressed in rather general terms in the internal plans of public sector departments. The common law remedy of judicial review is not at all adapted to requiring governments to provide the services that should be delivered.

Moreover self-determination requires more than mere consultation with Aboriginal organisations about the development and implementation of government policy on Aboriginal affairs. There should be a government administrative unit established by legislation and charged with the responsibility for developing, and auditing compliance with policies that will secure the advancement of the Aboriginal people. That unit should be answerable to a board that is responsible of and accountable to the Aboriginal people.

Legislation that merely removes the discrimination of the past can never redress the disadvantage of the Aboriginal people. Legislation that pays lip service to Aboriginal interests without providing the mechanisms for achieving real advancement is perhaps more deceptive than progressive.

[110] The Strategic Plan for South Australia 2007 and certain of the publications of the South Australian Social Inclusion Unit refer extensively, but in general terms, to the disadvantages suffered by Aboriginal South Australians and to government objectives to improve their living conditions. The issue to which I draw attention however is the efficacy of the mechanisms that it is hoped will deliver those benefits. See http://www.socialinclusion.sa.gov.au/site/page.cfm?u=1.
The Blueprint for Action in Indigenous Affairs: Realising the promise of the Referendum

By The Hon Mal Brough MP
Australian Government, Minister for Families, Community Services and Indigenous Affairs

Introduction

The 1967 Referendum started with good will. It was a major step forward for the betterment of Indigenous people and Australia as a whole. Many things are better since 1967, for example there have been advances in land rights and ever increasing numbers of Aboriginal graduates.

While Australians have voted in 44 constitutional referenda, the historic result in 1967 remains the largest affirmative vote of them all. It achieved two important things that continue to influence policy and decision-making on Indigenous issues today.

Firstly, it permitted much greater Commonwealth Government involvement in the area of Aboriginal Affairs. Indeed, Australian Government expenditure on Aboriginal and Torres Strait Islander programs increased from nothing in 1967–1968 to $3.3 billion in 2006–2007.

Secondly, the Referendum ensured Indigenous Australians were counted in the national census and therefore allowed the use of this census data to inform Indigenous policy.

Aspirations for equality

It is reasonable to imagine that the 90 per cent of Australians who voted “Yes” in 1967 believed the decision would lead to similarity between Indigenous and non-Indigenous Australians in social, economic and health status. While much has been achieved, despite the passage of 40 years and significant expenditure, the statistics show that Indigenous people remain disadvantaged against the principal social, economic and health indicators. In fact, for some communities, each passing decade since 1967 has brought with it a greater burden of poverty and community breakdown.

A culture of widespread welfare dependence has spawned passivity and reliance and related social and community breakdown. Forty years on, in many places basic services provided by local and state governments to other Australians are still not provided to Indigenous Australians. The 40th anniversary is not a time for celebration. It is a time for honest reflection about what has been achieved, but more importantly what went wrong and how we can get better results in the future.

The question for policy-makers is why this has occurred and what can be done about it.

Considering demography and location

Issues of unemployment, welfare dependency and social breakdown are given added urgency by the age profile of the Indigenous population, which differs clearly from that of non-Indigenous Australians.
With 57 percent of the Indigenous population under the age of 25 and a fertility rate much higher than the rest of Australia at 2.11 percent, the task is to further and develop ambitions for young people that extend beyond welfare dependency and take in education, training and gainful employment.

Over 45 per cent of residents in very remote areas are Indigenous Australians. A trend of the last 20 years has been migration from remote areas to regional settlements such as Dubbo in NSW and Alice Springs in the NT, and a pattern of “chain migration” which often results in later moves to urban areas.

The public policy issue for Government is how to ensure Indigenous Australians are able to lead independent lives and benefit from the strength of Australia’s economy in the same way as other citizens. This requires working with Indigenous people in different ways to better bring into line services with circumstances and need.

What is the Australian Government doing to meet these challenges?

The Australian Government’s 2006 Blueprint for Action in Indigenous Affairs vision is:

Indigenous Australians wherever they live will have the same opportunities as other Australians to make informed choices about their lives, realise their full potential and take responsibility for managing their own affairs.

This vision is one of a nation demanding the same standards, same opportunities and same expectations for all its citizens. The Blueprint provides an overview of the direction and goals of the Government’s Indigenous Affairs reforms and focuses on the Australian Government’s three priorities of early childhood intervention; safer communities; and building wealth, employment and an entrepreneurial culture.

A new approach

In 2004, the Australian Government announced the beginning of its new approach in Indigenous affairs. The time for tinkering around the edges was over.

The Australian Government transferred Indigenous programs to mainstream agencies, but under a whole-of-government approach. Under the new arrangements, Ministers and departmental heads now take direct responsibility for working with communities in a whole-of-government way. The Australian Government established the Ministerial Taskforce on Indigenous Affairs involving nine Ministers that have key responsibilities for delivering programs and services to Indigenous Australians.

A whole-of-government focus also underpins Indigenous Coordination Centres, which are made up of staff from several different Government agencies, who work with each other and communities to identify and tackle solutions to local problems.

The following principles guide all of the reforms undertaken in Indigenous affairs.

Respecting culture

Culture is not something that governments can mandate, it is a matter for Indigenous people themselves. Indigenous culture is unique, rich, diverse, and has helped shape this nation.

The vibrancy and innovation of Indigenous culture is at odds with the disadvantage and despair that characterises life for some Indigenous people. Culture should never be seen as an explanation or excuse for these things.

Standards and expectations

In the past, governments have accepted lower standards for Indigenous Australians across a range of areas. Governments must have high expectations for and of Indigenous people.

Law and order needs to be improved in remote communities to enable Indigenous people to live in safety: a basic citizenship right. Indigenous Australians are over-represented as both victims and perpetrators of all forms of violent crime in Australia. From 1990 to 2000, family violence accounted for 63 per cent of all Indigenous homicides in Australia compared to 33 per cent of non-Indigenous homicides over the same decade. Aboriginal women in remote communities are 45 times more likely to be victims of abuse than other women.
Many remote communities do not have an adequate police presence. For example, the 2200 strong community of Galiwin’ku in the Northern Territory has no permanent police presence. Following the June 2006 Intergovernmental Summit on Violence and Child Abuse in Indigenous Communities, which I convened, the Australian Government has made $130 million available to tackle these issues.

Land tenure and housing have been identified as important issues in stimulating economic development and promoting financial security in remote areas. It is clear that Indigenous people living in remote communities should not be denied access to home ownership simply because of land tenure arrangements. Home ownership is an important pathway to individual and family financial security and wealth creation.

The Australian Government is negotiating land tenure changes with traditional owners in remote areas in the Northern Territory. In Wadeye in the NT, five new display houses have been designed and constructed in partnership with Indigenous people. The ultimate aim is that tenants will have the opportunity to purchase the houses when individual ownership of assets currently located on inalienable Aboriginal land is possible.

**Funding according to needs**

The Australian Government will target its investment to areas of greatest need across the nation. It is indisputable that fewer and poorer services are available in remote communities, and the Australian Government is currently focused on trying to address the worst effects of this issue.

Secondly, too often, Indigenous Australians do not feel able to take advantage of mainstream employment and other opportunities. The reforms to the Community Development Employment Projects (CDEP) are a tangible example of the Government’s commitment to ensuring that Indigenous Australians have real jobs. The reforms initiated in 2005–2006 were about getting people out of CDEP and into jobs in the real economy, something CDEP had generally failed to do. By March 2006, the reforms had already moved 2,450 people out of CDEP and into employment.

Thirdly, a focus on need means a greater focus on outcomes and ensuring that policies and programs are assessed on what results have been produced. Efficient, effective service delivery is now the overriding measure of program success and future funding.

**Working in partnership**

Separateness and isolation have not served Indigenous Australians well. The term “partnership” signals the beginning of a redefinition of relationships. A top-down approach will not work. Indigenous people need to be more than just passive and silent recipients. They need to be empowered to take control of their lives. The Australian Government’s shared responsibility approach based on mutual obligation is the beginning of a new relationship at all levels of government, especially the local level. It demands the development of real partnerships involving all layers of government, Indigenous communities, non-government organisations and the private sector.

These partnerships often find expression in “shared responsibility agreements” (SRAs) which are based on a local shared understanding of an issue and the contributions each party plans to make towards a solution. The most effective engagement mechanisms are those designed by local people.

There are many other excellent examples of partnerships operating between business, government, and the community. The Family Income Management (FIM) system is just one of them. FIM is a money management system especially designed to meet the particular needs of Indigenous families seeking to manage their incomes to achieve their goals. It is a partnership between the Cape York Institute, The Federal Department of Families, Community Services and Indigenous Affairs, and the Westpac Banking Corporation.

Operating in the Cape York communities of Aurukun, Coen, Mossman Gorge, Hopevale, Cooktown and Weipa, a key feature of FIM is the development of household budgets and direct deductions for household bills, food buying accounts and, personal and group savings accounts.

Participants have saved and bought beds, mattresses, fridges, freezers and washing machines. One family has bought their own house. Other successes of the FIM system include the establishment of nutrition and pharmacy accounts (including negotiating cashless payment systems with local retailers and pharmacist) which are contributing to better physical health.
Reflections: 40 years on from the 1967 Referendum

For the first time this year, the Prime Minister’s Awards for Excellence in Community Business Partnerships will recognise on the national stage successful groups working together through the Special Award – Contribution to Indigenous Communities.

Regional focus

This principle demands that service strategies are shaped by the needs of particular regions and communities and recognition of the differences between them.

The Blueprint recognises that location has a significant bearing on the opportunities available to Indigenous people and the need for Government to tailor its solutions to remote, urban, and regional geographic locations.

Urban areas

From the 1970s onwards, part of the response to Aboriginal inequality and disadvantage was the development of separate Indigenous service systems, including in urban areas. This was because Indigenous residents of urban areas often did not have good access to mainstream employment, health, housing and other services.

“Harnessing the mainstream” is the hallmark of the Australian Government’s approach in urban areas, where it seeks to improve the outcomes of mainstream services for Indigenous Australians; and improve access to jobs.

Thirty percent of Indigenous Australians live in urban areas and these areas are experiencing rapid Indigenous population growth. It is critical that urban Indigenous people have access to the same opportunities as other Australians living in urban areas. Parallel service delivery systems can allow governments to apply different and lower standards of service provision. Changes are required wherever parallel service systems mean that Indigenous clients receive poorer outcomes than if they had access to mainstream programs.

Remote areas

A high proportion of Indigenous people live in remote and very remote areas of Australia. Many Indigenous communities have grown rapidly in recent years. Wadeye in the Northern Territory, for example, has grown steadily since its founding in 1939 and now has a population of around 2200 with an expectation of reaching 3800 by 2023.

Most remote Indigenous communities experience grossly inadequate services and infrastructure. In remote communities, the Australian Government’s Blueprint focuses on dramatically improving services and creating the environment for the establishment of an economic base.

Some Indigenous young people in remote areas are choosing to move to areas with greater economic opportunities and they need to be better equipped by their education where they make this choice. Only around 20 per cent of Indigenous children in remote areas achieve years three and five reading bench marks, compared to around 90 per cent for non-Indigenous students overall. In some remote communities, Indigenous children today are less literate than their grandparents. As a result, Australian Government efforts in remote areas are placing a strong emphasis on school attendance and achievement. With an education, people in these communities will have genuine choices and greater economic opportunities.

However, education alone will not create economic opportunity in remote communities. Changing land tenure in the townships so that a market economy can emerge is a key priority for government.

In a small number of remote locations and in close collaboration with state and territory governments and Indigenous people, the Australian Government has a more intensive approach. These “strategic interventions” aim to improve standards of service and open these communities to the broader Australian community and the market economy.

These “strategic interventions” also focus on building more houses at lower cost, and in quantities that will alleviate accommodation shortages, as well as addressing other issues of concern, such as child care, education, and employment and introducing options for home ownership.

Regional areas

The final geographical piece of the Blueprint focuses on the needs of regional and rural areas. The challenge of increased population numbers is complicated by high numbers of short term visitors seeking access to services available in towns.
Alice Springs is a prime example of the challenges of migration facing regional centres. At 30 June 2001 Alice Springs’ Indigenous population was 4,912 or 17 per cent of the total Alice Springs’ population of approximately 28,000. Alice Springs has 19 legally established town camps with a total population between 906 and 1341 residents. Town camps are small communities made up of family members or members of the same language groups. High mobility of Indigenous people in the region means that at any one time, about one quarter of the population in town camps consists of visitors from remote communities who depend on Alice Springs for health, justice, commerce, education and other services.

These town camps operate outside normal urban services. A 2005 report found “no essential services were provided to the people living in town camps and no attention given to their eligibility for permanent housing or services (infrastructure, education, health etc).”

The Australian Government has committed $70 million to upgrade the town camps to the standard of normal suburbs and to provide separate and safe accommodation for short term visitors.

The Australian Government is also addressing other issues of importance in regional areas: for example, providing support for boarding school accommodation. This recognises that education is critical to future employment and mobility for Indigenous youth. Discussions are underway with the Indigenous Land Corporation to develop boarding schools at Weipa in Queensland and Borroloola in the Northern Territory.

Conclusion

When we commemorate the 40th anniversary of the resounding yes to the Referendum, it is time to reflect on what has been achieved and what went wrong, so that we can produce a better outcome in the next 40 years. The Australian Government believes that the consequences of welfare dependency and a breakdown in social norms in some communities require urgent attention.

The Blueprint is about building a strong and economically sustainable future for Indigenous Australians. It is based on principles that acknowledge cultural difference, focus on maximising access to existing services and aim to ensure high standards for all Australians. It is also based on partnership with other governments, local Indigenous people, the private sector and others.

The principles embodied in the Blueprint recognise that Indigenous Australians must be part of the solution to the significant problems facing many communities. Further, Indigenous Australians have the right to the same services and opportunities open to other Australians. They must also be subject to the same expectations. The Australian Government’s different approach for urban, regional and remote areas recognises the need for flexibility and interventions based on an assessment of local need. Only by working in partnership can the promise of 1967 be realised. It is up to all of us to keep faith with those Australians who believed a different future was achievable.
Justice through Aboriginal and Torres Strait Islander Legal Services

By Neil Gillespie
Chief Executive Officer, ALRM

During the review of the contents of this book it became evident that the Aboriginal Legal Rights Movement (ALRM) has not contributed a chapter other than that provided by the Executive Officer of our Native Title Unit, Mr Parry Agius. The reason for this is the lawyers in our criminal practice section, and the civil, family and human rights section have such huge demands on their time partly due to a small number of recent staffing departures due to salary offers that ALRM simply cannot match. This chapter provides some insight into the life of a CEO of an Aboriginal Legal Aid Service (ATSILS) and of the many challenges we face in continuing to deliver quality legal aid and other services to our clients.

Our Logo is “Justice without Prejudice” which ALRM pursues with vigour.

What is ALRM?

ALRM is incorporated under the South Australian Associations Incorporation Act and has been operating for over 30 years. The organisation was created when a number of prominent members of the Aboriginal community and supporters accessed limited funding from the Commonwealth Government to provide basic legal representation to Aboriginal people in the courts. It was established to overcome Aboriginal disadvantage.

It is unfortunate that many of the issues of accessing justice by Aboriginal people are still occurring and it is a sad reflection on the Australian society that the history making 1967 Referendum has not delivered improvements to quality of life, marginalisation, institutionalised discrimination and acceptance for Aboriginal Australians.

Surprisingly it is only a short 40 years ago that Aboriginal people were regarded as Australian citizens. Prior to the 1967 Referendum Aboriginal people were categorised with Australia’s flora and fauna – the celebrated Donald Horne 1960s novel “The Lucky Country” only applied to non-Aboriginal Australians. Those new to Australia, or those that do not know Australian history, must find this extraordinary revelation hard to believe.

Among the strong supporters of Aboriginal people in South Australia in the late 1960s and also an inaugural Board Member of ALRM was Elliott Johnston QC – later Supreme Court Judge and Commissioner to the Royal Commission into Aboriginal Deaths in Custody (RCIADIC). ALRM is a community-governed organisation that provides a range of programs such as legal aid, native title, low income support, Aboriginal Visitors Scheme, law reform and advocacy and restorative justice – many aimed at preventing people from getting into situations that might bring them into contact with the criminal justice system. It is Chaired by Mr Frank H. Lampard, a Ngarrindjeri Elder.

Key issues and concerns

Since joining ALRM I have expressed amazement and concern at the issues faced by ALRM and that of our colleagues in Aboriginal Legal Service organisations across the nation.
On arriving at ALRM I found the organisation staffed by dedicated individuals who work under extreme pressures such as high workloads and at times, difficult clients. On the governance side, the Board was chaired by Malcolm Davies – a Kuyani man. Malcolm and I formed a mutually respectful partnership to ensure the survival of the organisation. There were leadership issues and through funding pressures that are not unusual within the Aboriginal community – again a result of continuing frustrations and marginalisation. ALRM survived this difficult period and initiated constitutional change that reduced the Board to 10 members who are to be appointed by a Board Appointments Committee. In 2004 a new Board took office, Chaired by Barbara Wingard, a Kaurna Elder. Under another strong working relationship with Barb Wingard, we won a tender in 2006 to provide legal aid throughout the State. In 2007 Barb handed the Chairmanship to the current Chairperson, Frank H. Lampard.

ALRM is maturing as an organisation to the extent that The Native Title Program and its client base now consider it appropriate to separate from ALRM (which is the Native Title Representative Body (NTRB) for SA) and for ALRM to relinquish its NTRB status to another incorporated body – effectively to be controlled by native title claimants throughout SA. A position paper was developed and considered by the Board earlier this year and with the support of the Commonwealth Government, the issues identified by the Board for resolution are being addressed. On completion of a review it is expected the Board will make a final decision on whether to separate or not. From my standpoint it is pleasing one of our programs has grown to the extent that it is able to leave the ALRM family.

With the abolition of the former Aboriginal and Torres Strait Islander Commission (ATSIC) and the defunding of the National Aboriginal and Islander Legal Services Secretariat (NAILSS), ATSILSs and ALRM currently do not have a national voice to advocate on their behalf. I am pleased to advise that with the assistance of the Commonwealth Attorney-General’s Department (AGD) a new national advocacy legal aid body is in the formation stages. At the time of writing I still hold out hope that the Commonwealth will honour its undertaking to form a new national body representing the interests of Aboriginal people other than the Government appointed National Indigenous Council. Whilst it has a number of prominent and well-meaning members on it, it lacks any form of mandate from Aboriginal people.

Still on national bodies, I am encouraged about another AGD proposal to fund a new National Aboriginal Justice Advisory Committee (NAJAC). I understand too that discussions are also underway to refund the previous Aboriginal Justice Advisory Committees (AJAC) in each State and Territory. These bodies monitor the implementation of RCIADIC recommendations which, to the detriment of Aboriginal people, has dropped off the agenda due to competing priorities in the area of Aboriginal affairs. The recommendations from the RCIADIC have sadly and disappointingly not been fully implemented by various governments since the Commission first handed down its Report in 1991.

In my time as CEO I have pursued a constant agenda to increase funding for our programs, in particular the legal aid area. Our funding of this program has been effectively static since 1996 whilst mainstream legal aid has increased over 120% for the same period. In real terms our legal aid funding has declined well over 30% which is having a devastating effect on our ability to provide a quality service to the most disadvantaged and marginalised members of the Australian community.

How has this happened? The simple answer is that the Commonwealth regards itself as a supplementary funder to the State Government on legal aid, whilst the State says it has no responsibility for Aboriginal people. This standoff or demarcation dispute is having a dramatic effect on Aboriginal people accessing justice in our State. I understand other State and Territory Governments are in the same position. This is effectively two Governments at loggerheads as to responsibility to Aboriginal people. Whilst I can understand the Commonwealth’s stance as a supplementary funder because it says it should only fund matters relating to Commonwealth law, I fail to comprehend the State’s view that funding of Aboriginal legal aid is a Commonwealth responsibility because most of our legal aid relates to State law. I am doubly confused by the State’s stance because it funds other programs for Aboriginal people, but specifically excludes Aboriginal legal aid. It is also my view that this dispute over responsibility between Governments appears to conflict with the obligations arising from the Convention for the Elimination of Racial Discrimination (CERD) Article Two which provides for States (meaning nations) not to engage in racial discrimination. It appears ATSILSs are treated unequally and unfairly in regard to their funding when compared to other legal aid providers.
An effect of our gross underfunding is ALRM is being juniorised. By this I mean we cannot cope with increased salaries and those salaries offered by other organisations, so when a senior experienced lawyer leaves us we are often having them replaced by those who are less experienced. This comment is not an aspersion on the ability of our less experienced staff; but it does mean that in some cases ALRM can lose a 15 year experienced lawyer and all the knowledge they have. The lawyers that are attracted to ALRM are exactly the type of lawyer ALRM and our clients need; dedicated, professional, committed, caring and possessing a social conscience, but it is a sad fact I cannot pay the salaries my staff deserve.

I am surprised that the Commonwealth has not taken up my suggestion that mainstream legal aid to the State be conditional on the State contributing to our operations. The reasons advised to us by the Commonwealth appear inconsistent with other tied funding to the State and Territories by the Commonwealth. In this way our funding concerns would be addressed.

Still on some public policy issues, ALRM has for some years considered cost saving measures that relate to the purchase of goods and services and negotiating leases – using the ATSILSs’ collective financial buying power. It is pleasing that after all this time this issue has been taken up by the Australian Audit Office and it is pursuing an agenda of economies of scale for savings on such items as insurance, vehicles etc.

ALRM has never been funded for Long Service Leave which is a statutory obligation. Whilst I acknowledge the recent contribution by the Commonwealth of about 20% of our accrued commitment in this area, the fact remains that government policy, in denying funding to us, is flawed and certainly inconsistent. I understand the Commonwealth funded some interstate ATSILSs but not all; indicating there were differing views in funding from State to State.

Another policy by the State Government in SA that is difficult to comprehend is its inconsistency in the application of court filing and transcript fees to us and other legal aid providers. Simply put, we pay – they don’t. The reasoning behind this is the State says the Commonwealth funds us so should cover these court costs, whereas the Commonwealth has repeatedly suggested to us to have the fees waived by the State. This is simply a micro-version of the demarcation dispute. I will acknowledge that the Commonwealth does exempt us for these fees in Federal Court matters. I simply seek the same treatment by the State so there is parity with mainstream providers. The same scenario applies to the Emergency Services Levy in SA.

I now turn to the efficiency of ALRM. In 2003 a Government report (Office of Evaluation and Audit) issued its finding and one of them included a comparison of our funding to that of another mainstream service provider. This finding showed that the other provider would cost about 2 1/2 times more to deliver the same service. Shortly after ALRM was put to tender to gain the best value for money by the Commonwealth. Surprisingly mainstream was not put to tender even though the Commonwealth funds mainstream – matching the State on a dollar for dollar basis. My Board, staff and the wider community and sister ATSILS organisations across the country at various times have expressed confusion over this inconsistent approach.

Various State and Commonwealth budgets continue to show large budget surpluses which unfortunately does not flow to ALRM. Various government reports have repeatedly recommended increased funding to the ATSILSs but unfortunately increased dollars continue to be denied – which I can only assume is a result of the aforementioned demarcation between the Commonwealth and the States and Territories.

One of the most confusing aspects of funding of ATSILSs is the funding model that applies to the distribution of our limited funding. The model is applied to an amount that has been effectively static since 1996 and is based on a formula that allocates a limited budget amongst the ATSILSs. This seems unusual because the Commonwealth adopts a zero based budgeting process that starts from zero and builds up to a budget figure based upon need. The application of the funding model is the complete opposite of the approach adopted by the Commonwealth across its departments and agencies as I understand is the process. ALRM has repeatedly sought a change in the approach without success. ALRM will continue to pursue this.

I am reminded of the findings of a recent Coronial Inquiry in SA reported on 12 July, 2007 where it was recommended that future investigations should be undertaken by independent investigators from other interstate and Federal jurisdictions. This is because of certain concerns by the Coroner in regard to quality of the investigation into an Aboriginal death in custody. The Coroner’s findings reflects ALRM’s view that Police investigating Police is contrary to the ideals of independence and potential for conflicts of interest.
In this regard ALRM has consistently called for the Police Complaints Authority (PCA) to be replaced by an Independent Commission Against Corruption (ICAC). Aboriginal people have consistently regarded that the PCA is an unsatisfactory institution.

ALRM is a human rights organisation ensuring basic rights for Aboriginal people are pursued. In this regard ALRM notes some nations including Australia are not supporting the Draft Declaration on the Rights of Indigenous Peoples. This is surprising because of Australia's history of defending human rights since Federation both domestically and internationally. It is hoped that this position by Australia is altered and the Draft Declaration is supported. A final comment on our international obligations, our commitment on the Rights of the Child provide for access to justice. The current funding of ATSILSs appears to conflict with this obligation.

There is a great deal of concern regarding the disproportional incarceration rates of Aboriginal men and women in SA prisons. For men it is over 20% of the prison population and for women it is even higher. This disproportion must be of concern when Aboriginal people account for about 2% of the population of SA. I consider it therefore appropriate for the Government of SA to undertake a Parliamentary Inquiry into this disproportion, as the incarceration rate should reflect the number of Aboriginal people in custody, not be 1000 times or more above the population rate. Still on incarceration, in Western Australia there is an Office of the Inspector of Custodial Services created by legislation. In South Australia ALRM has concerns about the treatment and conditions under which Aboriginal people are held in custody. It is certainly appropriate that the whole system should be subject to the scrutiny and to the standards and operational practices relating to custodial services in SA. Again I call on the Government of SA to enact legislation similar to that of WA and that the Inspector also be charged with considering the implementation of relevant RCIAAC recommendations.

It would be irresponsible for me not to comment on the confusing issue of public policy where the Commonwealth forced the ATSILSs to become State and Territory wide service providers in the recent tenders called for Aboriginal legal aid. The confusion arises because the Commonwealth has funded Family Violence Prevention Legal Services (FVPLS) where funding of these services is provided to separate organisations such as four in SA, with similar arrangements interstate. Surprisingly the funding for both services is the same government agency. Still on this point, the same agency also funds both programs at significantly different levels. A final point on this issue. The FVPLS program funds only regional and remote areas and does not service cities. This program is urgently needed across the State and indeed the country, but should also be located in cities and major centres where family violence including child abuse occurs. This again demonstrates a demarcation between responsible governments.

In regard to ATSILSs and Government relations one positive aspect of the demise of ATSIC is improved relations between ALRM and our various funding agents at a national level. My dealings with the AGD and FaCSIA are respectful and professional and it is pleasing to work with high calibre and caring individuals. Previously there was a confrontational attitude from within ATSIC.

Conclusion

The above is an insight into the issues faced by an ATSILS CEO. I don't believe my views would depart too much from those CEOs of other Aboriginal Legal Services.

Whilst I applaud the improved professionalism and approachability of Government and agency officials, the key issue for ALRM and indeed other ATSILSs is the lack of funding that exists resulting from this demarcation on funding responsibilities between the Commonwealth Government and its State and Territory counterparts.

It is my view that the State and Territory Governments are abdicating their responsibilities to Aboriginal people and I take this opportunity to remind these Governments that Aboriginal people are citizens of their States and Territories and as such should not be denied access to justice.

A final comment is that since joining ALRM from a Corporate Banking and Taxation background, I am encouraged to continue the struggle to provide a quality service because of the support I receive from my Board, and the dedication and commitment from my overworked and underpaid colleagues, and importantly the personal satisfaction in knowing that without the ATSILSs across the country Aboriginal people would be further marginalised and disadvantaged. To see our clients receive a high quality service that is culturally respectful and appropriate gives me personal satisfaction.
2007 marks 40 years since the Aboriginal peoples of Australia were given the “Yes” vote of approval by white Australia.

The “Yes” vote was overwhelming – more than 90% agreed that there should be constitutional change which would embrace and acknowledge Aboriginal Australians.

But the changes, although widely applauded and seen by many as changing forever the social and political relationship between Aborigines and non-Aborigines, have not really brought about any significant benefits to Aboriginal Australians.

Ten years ago, on the 30th anniversary of the 1967 Referendum, Lowitja O’Donoghue AC, CBE wrote:

“According to every social indicator, Aboriginal and Torres Strait Islander people remain the most disadvantaged group in this country. The Mabo (no2) judgement – and its logical and just extension, the Wik judgement – merely made us equal with other Australians in that they recognised our ability to inherit our forebears property. They are judgments directly benefiting only a minority of Indigenous peoples, as the High Court held that native title had been validly extinguished over almost all areas where the vast majority of non-Indigenous Australians now live and work.

Mabo (no2) and Wik are about co-existence and equality, but they are being treated by their many vociferous opponents as discriminatory in that they gave us special rights. The rage to see us dispossessed of our rights after Wik is a sickening reminder of an old Australia, where we were regarded as not quite as human as other inhabitants.”

I believe we have come some way since that time – particularly here in South Australia – but, as Aboriginal people we still battle with the white authorities in our efforts to assert our native title and rights.

For the Aboriginal Legal Rights Movement’s Native Title Unit our vision is to reconfigure governance institutions of the State “with native title built in” in ways that are properly authorised by Aboriginal people. We believe this can be achieved by building on the shaky foundations laid by the 1967 Referendum. Being counted and recognised as belonging to this country means little without our land. And so we turn to Mabo, Wik and the Native Title Act to give us access to what we crave.

To be able to sit as an equal at a negotiating table, or in a courtroom, we need to be adequately funded. Unfortunately for us, the legacy of dispossession means we must seek government funding in order to assert our rights.

Sadly, whenever there are funding cuts, Aboriginal services are usually the first to bear the brunt of it.

The Native Title Act 1993 confirmed Aboriginal peoples’ property rights. It gave us a place at the negotiating table in respect to native title land, an opportunity to have a say in how that land was developed, and a right to a share of any economic benefits that may flow from that.
In South Australia we have tackled native title in a way that is quite different to the rest of the country. We decided in the very early days, when it became apparent that there was a way to negotiate native title matters rather than take them to court, that we needed a different approach.

We decided that if Aboriginal people were to be taken seriously, we would need to join forces. We needed to speak with one voice.

In South Australia, after many meetings with the State's Native Title Management Committees, the “Congress” was born.

The aim of Congress initially was to guide and direct the Aboriginal Legal Rights Movement – the Native Title Representative Body for Greater South Australia in its dealings with other native title peak bodies. In 2007, we are proud to say Congress has evolved into a powerful group that is able to sit as equals at the negotiating table.

The Statewide Indigenous Land Use Agreement Negotiations are a coordinated strategy that native title interest groups in South Australia have committed to in response to addressing native title matters.

The parties involved at the outset of the Statewide ILUA Negotiations in 1999 were the South Australian Government, the Aboriginal Legal Rights Movement (ALRM), the South Australian Chamber of Mines and Energy (SACOME) and the South Australian Farmers Federation (SAFF). The National Native Title Tribunal has had observer status since the negotiations began. In late 2002 the South Australian Fishing Industry Council (SAFIC), the Seafood Council of SA and the Local Government Association of SA also became parties to the negotiations.

The native title negotiations take place within two arenas, one known as the “Main Table”, the other “Congress”.

The Main Table is a forum where the peak bodies come together to progress and discuss the Statewide negotiations.

The Statewide process has evolved and developed since its inception and continues to do so.

Pilot groups initially tested the negotiation process and environment and have set protocols and benchmarks that will fuel the present and future negotiations. Pilot ILUAs were negotiated covering various sectors including pastoral, minerals exploration, fishing and local government.

As the pilots neared completion, the Statewide parties sought to expand the process and enter into negotiations with other groups. To support these further rounds of negotiations, template ILUAs were drafted drawing on the experiences of the pilot negotiations. A strategic planning process was undertaken.

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With the finalisation of templates, the Statewide process shifted in focus from pilot negotiations and template development to the strategic negotiation of ILUAs across the State. Significantly, the work carried out since 1999 has had positive and seemingly enduring results.

Participants now believe the foundations are set for the settlement of native title claims across the State.

Under the Native Title Act, the formal recognition of native title can only be established by a court determination, or outside of the Act, as a matter of common law. While the Native Title Act makes available different avenues for pursuing a court determination, such as through mediation or other agreement making processes, a court decision is ultimately required to confirm whether or not native title exists and is held by a claim group over particular lands or waters.

In addition, the judiciary has also been a key player in elaborating on the definitions of native title as specified under the Act. Though the Native Title Act provided an overarching legislative response to the implications of the Mabo decision, there were many questions and uncertainties regarding the application of native title across Australia’s land and water scapes (Neate 2004a). Giving meaning to these unknown details of native title has been largely left to the courts through an evolving case law.

With the mounting challenges of native title litigation, claimants and others have increasingly looked towards agreement making as a way to achieve native title. The Native Title Act makes provisions for and encourages agreement making through establishing suitable bodies and assigning functions to those and other bodies to provide assistance to, for example, undertake mediation and facilitation. Some of the 10 Point Plan amendments, which came into effect in 1998, also strengthened agreement making under the Act, replacing Section 21 Agreements with Indigenous Land Use Agreements (ILUAs).

Native title has importantly positioned traditional owners at the negotiation table and has provided an enforceable right to bring about change in regards to Indigenous engagement in the decision making process over land (Tehan, 2003). It has brought people together who have been “historically on opposite sides of the fence” to make “decisions about land and natural resource management” (Ridgeway, 2003).
The trend towards native title negotiation over litigation has resulted in a proliferation of agreements. The first ILUA was registered by the NNTT in June, 1999, the 100th was registered in November, 2003, and the 200th ILUA was registered in October, 2005 (NNTT, 2005).

In June 2007, there were 275 registered ILUAs across Australia; 13 of those are in South Australia. Significantly across Australia, there are 593 native title applications that are unresolved. Given that litigated outcomes can take many years, the prospect of negotiated outcomes is very attractive.

From the early stages of discussing prospects for Statewide ILUA negotiations, ALRM NTU has developed guiding principles to manage its role in negotiations.

ALRM NTU has pursued accountability to ten core, non-negotiable principles.

Of significance, is a commitment to move native title proceedings away from legal technicalities — to a people driven process with Aboriginal claimants as principals in the negotiations.

The 10 core, non-negotiable principles, pursued by ALRM NTU in the Statewide process are:

1. Native title is about people, not legal technicalities: agreement-building must build relationships between people.

2. Aboriginal claimants have standing as principals in the negotiations: they are people who hold native title rights and these are real property rights, as real as any other property rights.


5. Fairness: agreement-building should be fair. All participating groups should be better off, and none should be worse off because of an agreement, including not only native title groups, but also other Aboriginal groups and non-Aboriginal interests.

6. Inter-generational equity: agreements should recognise the principle of inter-generational equity because they are likely to set important aspects of the conditions facing Aboriginal people for several generations. They should not be short-term deals.

7. Sustainability: negotiated outcomes should be sustainable for the Aboriginal principals, for other interests and for natural and cultural resources.

8. Meaningful benefits: negotiated outcomes should be meaningful to the Aboriginal principals. Agreement-building is only worthwhile if the Aboriginal principals judge that it will produce outcomes they want.

9. Benchmarks: in order to be worthwhile, outcomes should not only be better than what exists now, but should also be better than can be achieved through other means (for example, litigation or legislation) and reasonable against appropriate benchmarks (for example, in comparable international settings). Appropriate benchmarks should be reviewed over time and opportunities to improve benchmarks should be taken from time to time.

10. An act of choice, not the only choice: agreement-building should not lock Aboriginal people into an “all-or-nothing” situation, in which they rely on complete settlement to achieve any gains at all – Aboriginal people should continue to negotiate only if they judge it to be producing worthwhile outcomes.

While some of the peak bodies may not share this vision, more than half a decade on and with a process built around Aboriginal jurisdiction and fair and just agreement making principles, there is evidence that our vision is beginning to be realised.

So 40 years on – we have come a little way, we are better organised, but sadly the battles we are fighting are the same ones we fought back in 1967.

I have a firm belief that if the Aboriginal people of South Australia can truly unite and speak with one voice – as the Congress of Native Title Management Committees is endeavouring to do, then we will start to see some real progress. Perhaps when we review the progress of Aboriginal people on the 50th anniversary of the 1967 Constitutional Referendum we will be living those changes.
In recognition of the pain, grief and trauma inflicted on the Aboriginal Nations of Australia by the onset of colonisation by the British and all who followed. The mass destruction of the Aboriginal race by the colonisers who killed our people in order to occupy Aborigine’s country: the continent of Australia. Thousands of cases of inhumane acts and practices annihilated our nations and slaughtered our people. Examples of this were the Elliston massacre, the Coniston Station massacre and poisoning of waterholes on the Dreaming tracks and major tribal ceremonial sacred sites across the Australian landscape from one end to the other.

In my opinion the 1967 Referendum did not ease the pain for our people. For instance the parliaments of Australia did not amend their constitutions in any way that gave total recognition to the Aboriginal race.

Most things done for Aboriginal people were just tokenistic and nothing was done by the greater society to outlaw racism. I have ingrained in me zero tolerance towards colonisation of any race of peoples from any part of the world. I deplore assimilation that kills off the race of peoples by dictatorial countries the way the British crushed the Aboriginal nations of Australia.

I have zero tolerance towards the abolition of bilingual education in our schools that worked on our children in the assimilation policy of Australia.

I have indelible memory scars about the horrid rapes endured by my grandmother by the police troopers from Arltunga east of Alice Springs. Nanna Liza was at great pains to tell of her abuse when she was a girl. Nanna was forced to kill her newborn baby by smothering and then burying her in the creek bed at Wipe out, a place not far from Arltunga; this name she muttered on her deathbed.

Then followed the stealing of the children and the screaming separations of babies from mothers. Equally as horrid was when the miners from Arltunga enticed the Aboriginal men to go down in the mines only to have a stick of dynamite thrown down behind them. After the men were killed, the miners would then rape the women and girls left behind in the camps.

Do I think the Referendum eased the pain?
The world may ask ...
The Aboriginal Lands Trust
Worth knowing, worth supporting, worth keeping – Aboriginal way

By John Chester

Forty years! An infinitesimal period in the history of Nungas in South Australia. Still, long enough to make the Aboriginal Lands Trust the oldest Aboriginal land holding authority in Australia owning land under its own Act of Parliament; the Aboriginal Lands Trust Act 1966.

The A.L.T. owns (Freehold) 61 Certificates of Title over land which it holds in Trust on behalf of around 40 Communities and groups from Dunjibba at Oodnadatta in the far North, to Kingston in the South East, to Yalata in the West, to Gerard at Berri in the East. This is land owned and managed by the Aboriginal Peoples of South Australia.

The Government of the day cannot change that. It would take both Houses of Parliament to agree to such a change. Not only is the land held in trust by the A.L.T. it has also kept the native title rights over it in place.

The Trust has a strong history of Nunga champions and leadership.

Uncle Garnie Wilson OAM, South Australia’s first qualified Aboriginal wool classer, was Chairman for 24 years. Before him Uncle George Agius AM and war hero Uncle Tim Hughes MM.

At the time of writing, Uncle Henry Rankine OAM was on the Board as a Ministerial Representative with 28 years service and Uncle George Tongerie AM, JP with 20 years service – the last seven as Chairman.

Haydn Davey appointed as Deputy Chairman is currently assisting Uncle George in his role of ensuring opportunities for younger Aboriginal people in leadership roles.

A large part of the A.L.T’s capacity to survive and serve its people comes from its Board. It is made up of twelve members nominated by their communities (Yalata and Nepabunna, Davenport, Raukkan, Umoona, Gerard, Point Pearce, Koonibba, Ceduna, Port Lincoln, Dunjibba and Marree) and appointed by the Governor.

They are a wise and formidable team confronted by many challenges in changing times with few resources.

For many years the Trust has recognised that the Aboriginal Lands Trust Act has out grown its functionality and is not adequately addressing the needs of communities today.

Several attempts have been made in the past to review the Act, but to no avail.

It is time for change and change for the better, for the future of our communities. More importantly to ensure stability for our future generations. There has got to be something left that we can pass on.

The LAND IS LIFE.

The Trust Board has agreed to a new agenda set by the Government.

1. Lease renewal

The Board agrees to put in place a new set of fair, modern, plain English lease arrangements. The task however is huge. These leases and subleases will number around 400. They will cover head leases (for large communities 99 year renewable leases) and subleases covering housing tenants, government services, commercial operations; such as farms, orchards, tourism, grazing; health services, schools and aged-care centres.
Reflections: 40 years on from the 1967 Referendum

The Trust has scoped the work. It will take a minimum of five staff at least a year. The Government must now face the practical responsibilities of the agenda it initiated and fund it. Lack of Government resourcing has already stalled the process for two years.

2. A.L.T. Act review and renewal

The Trust agrees with Government that a review of the Act is long overdue. The Board seeks a new dynamic statement which strengthens self-determination, self-regulation, self-management and entrenches it in legislation to the long term benefit of the Aboriginal people of South Australia.

This process of renewal is the single most important issue confronting the Aboriginal Lands Trust in its 40-year history. It must provide as an outcome all the settings for improving the health and well being of the thousands of Nungas living on Trust lands. The process must engage communities from the beginning; it must seek their opinions and consult fully with elected Board Members. The process must be transparent and properly serviced with capable staff and funding. It must constructively use the Parliamentary Standing Committee on Aboriginal Affairs, which this Government created for such purposes, and it must use only the Minister for Aboriginal Affairs as its spokesperson.

Writing an Act is a tricky legal business so not surprisingly the A.L.T. recently met informally with the Aboriginal Legal Rights Movement to discuss it. It was a revelation. It felt like brothers who have been walking in parallel for a very long time as the daily challenges of advocating for and supporting our communities were so very similar.

At the end of the day when the going gets tough it’s hard to keep brothers (and sisters) apart. The Aboriginal Lands Trust will seek the support of ALRM to provide the legal “grunt” we need to ensure a positive outcome for our people. It’s a good time for our paths to cross.

Caring for Country, Landcare, natural resource management

In the early 1990’s the Trust, in conjunction with Primary Industries South Australia, the Natural Heritage Trust and other agencies embarked on repairing severely degraded lands. Aboriginal lands at the time were some of the most seriously degraded in the State.

Grant Funding, run through the Trust, enabled the employment of Landcare Officers to work with all communities to address a number of issues such as:

- Heritage protection;
- Feral animals;
- Revegetation;
- Employment and self-management;
- Coastal protection; and
- Indigenous protected areas.

Because of these programs Trust Lands and Aboriginal Lands in general are today in far better condition than they have ever been, opening up opportunities for other land use industries.

Seventeen years later the Trust is still involved with natural resource management or caring for country programs through its partnership arrangements with the various NRM Regions, Arid Lands, Murray Darling Basin, and Northern and Yorke Peninsula Region.

Other recognised achievements over this period include:

- **Strategy for Aboriginal Managed Lands in South Australia (SAMLISA)**;
- The formulation of the Aboriginal Lands Natural Resource Management Group (the first of its kind in Australia) which was later developed into the Alinytjara Wilurara NRM Group;
- Development of the Strategic Plan for the Aboriginal Lands NRM Group;
- Participation in the Durban South Africa Protected Areas Convention.
The 41st year of the A.L.T. will be a challenging one. For the 41st time the A.L.T. will draw the same “line in the sand”. Aboriginal people must own their land. The culture demands it. Our National Aboriginal Cultural Institute – Tandanya in Grenfell Street and Australia’s first Indigenous Protected Area at Nantawarrina, one of the World’s most beautiful places, reminds us. There really is no other way!
Forty years of Aboriginal housing, public and community housing in South Australia from 1967 to 2007

By Elizabeth Grant and Paul Memmott

“We want to live in proper houses so our clothes won’t be dirty, so we can have showers; so our children won’t be always sick of cold and wind and dirt; so we can store food away from dogs and the rain.”

David Martin, Pipalyatjara 1980 cited in Coombs, Brandl et al. 1983

Aboriginal housing in South Australia has influenced the distribution of Aboriginal populations in the State and shaped the lived experiences of Aboriginal peoples. Despite traditions of building dome-shaped houses,[1] adapted over millennia to climatic and environmental conditions, Aboriginal building heritage has been predominantly ignored by researchers and policy makers and the expression “Aboriginal housing” has come to mean public or community-owned housing specifically intended for Aboriginal peoples. The term has become imbued with political meaning often conjuring up visions of forlorn, dilapidated and overcrowded houses in remote locations. With little documentation of the history, delivery and housing types of Aboriginal housing in South Australia over the last forty years, it appears an area well worthy of consideration. How far has Aboriginal housing come and what has shaped the journey? This chapter will examine the political history of the two major categories of Aboriginal housing in South Australia: the housing in discrete Aboriginal communities and on remote homelands, and the rental public housing in urban and rural areas.[2]

Figure 1: Anthropologist Norman Tindale photographed this family next to their Wiltja in a remote part of South Australia in 1964. The long tradition of constructing wiltjas and other ethnoarchitectural forms have largely been ignored by researchers in discussions of Aboriginal housing. The wiltja has an emphasis on spatial existence and supported seasonally mobile lifestyles while being environmentally adaptive (Source: South Australian Museum).

[1] Referred to colloquially as wurlies [after warli] and wiltjas in South Australia.
[2] We did not examine transient housing such as provided by Aboriginal hostels.
Aboriginal Housing prior to the 1967 Referendum

Aboriginal housing initiatives prior to the 1967 Referendum were State-governed and linked to South Australia’s welfare and protection policies (Memmott, 1988, Ross, 1998). In order to understand the development of housing since the 1967 Referendum, it is necessary to briefly outline the variety of circumstances and housing conditions in which Aboriginal peoples across the state lived during the earlier part of the 20th century.

At the time of the 1967 Referendum, the policies of segregation had grouped most South Australian Aboriginal peoples in nine reserves around the State[3] located at Port McLeay (established 1859 and now known as Raukkan), Koonibba (established 1898), Oodnadatta (established 1924, closed in 1939, then reopened in 1947), Point Pearce (established 1925), Nepabunna (1930), Umeewarra (1937), Ernabella (1937, now known as Pukatja), Gerard (1945) and Yalata (1952).[4] Most of the reserves and missions were originally established by church or Christian groups, but at the time directly prior to the Referendum all but one were government run (Braddock & Wanganeen 1981).

Figure 2: Housing at Point Pearce Reserve in the 1960s. The stone buildings were constructed during the early establishment of the Mission (Source: Gale, 1972).

Housing conditions on the reserves varied considerably but were usually very basic in the form of tin sheds or simple cottages. Some had housing constructed locally and others had prefabricated units supplied through the South Australian Housing Trust “Outback Programme” (Marsden, 1986). Christine Davis who grew up at Umeewarra[6] in the 1960s remembered the housing there:

We had little tin houses – there were about six of them, very old, down at the bottom end of the mission … The little tin houses we had, had dirt floors I think, and two rooms – kitchen and bedroom. It used to have holes in the walls you could look through to the outside and tin shutters you pushed out on a stick. We had lamps, kerosene Tilley lamps. There was a big fireplace in the kitchen and we cooked inside over the open fire … We had a tap. The houses were lined up and each had a tap off the one pipe. I think there was a water truck that went around before the taps. Port Augusta water was not good to drink. We used tap water for washing and baths. One or two had rainwater tanks. We used to share rainwater between families. We used to fill buckets to keep inside for water to drink. (Davis cited in Mattingley and Hampton, 1988:249).

[3] The term “reserve” is used in preference to “mission” as most settlements had transferred from earlier the control of Church and Christian groups by 1967.
Other reserves did not provide housing for the Aboriginal residents. At Yalata there was:

… no housing for Aboriginal people. Within the community there are two groups of people with quite different housing needs. One group consists of people who live around the settlement in humpies and tents. Many of them are working, and many have spent periods of their lives in ordinary housing. Members of this group want conventional housing in or close to existing community buildings. The other group of people are closer to the traditional way of life and live in bush wurlies in the Big Camp, which moves to different locations on the reserve at frequent intervals. (Braddock and Wanganeeen, 1981:36).

In remote communities, many Aboriginal residents were maintaining a traditional domiciliary lifestyle adapted to sedentary camp conditions and combined with acculturated materials, artefacts, utensils and foodstuffs (for example see Hamilton (1972) on Mimili, and Wallace (1979) on Ernabella and Amata).

Figure 3: Nellie Benbolt, Clem Benbolt, Jeannie Rice and Charlie Beara, Big Camp, Yalata, 1981. Big Camp existed for 30 years periodically moving around Yalata and surrounding area until members of the group moved back to their traditional lands around Lake Dey Dey (Source: Mattingley and Hampton, 1988).

There were links between the government policies and the various housing types available on the reserves around South Australia, since in the 1950s and 60s, housing was regarded as a vehicle for assimilation (Ross, 1998). Housing was supplied under a theoretical staged approach based on a belief in the slow evolution from nomadic lifestyles in which people constructed wiltjas, wurlies and other forms of ethnoarchitecture, to living in so-called “transitional housing”, and finally to being fully assimilated in European-style houses. Housing was provided on the reserves at the stage to which the Aboriginal population were perceived to have “evolved” from nomadic lifestyles (Memmott, 1988:34, 35). The stage one transitional house was typically a corrugated iron shed, a stage two house consisted of a couple of rooms, whilst a stage three house generally included two or three bedrooms and a crude kitchen area (Grant, 1999: 38).

Stages one, two and three of the transitional housing types on the reserves were a common source of concern. Charlie Perkins stated that the housing on the reserves was degrading and provided negative stereotypes for Aboriginal people that suggested they were “poorly educated frustrated misfits” (Perkins, 1967:799). In practice, Aboriginal peoples often chose to abandon the uninsulated and inflexible transitional housing to construct more climatically and culturally appropriate self-built housing. Returning to life in a wiltja or wurlie was ultimately more comfortable for many. As Walter Pukatiwara said at Amata, “A house is a good thing … you can lock it up and go and live anywhere you like” (Wallace, 1979:152).

The final phase of the staged housing philosophy was aimed at assimilating the Aboriginal people into the greater population by moving people from the reserves into towns. Migration tended to occur with the reserve remaining as the nodal centre of any one region. For example, people from Port McLeay (now Raukkan) moved initially to towns nearby such as Meningie and Tailem Bend (Gale, 1972). Movement to the towns gave people independence from the control of the reserve whilst still maintaining kinship ties and obtaining greater employment, education and lifestyle opportunities (Gale, 1972). The moves were assisted by a housing initiative between the South Australian Housing Trust, the Aborigines Protection Board and the Department of Community Welfare. The latter Department hand-picked “part-Aboriginal couples living on the reserves who were considered to have reached a reasonable enough standard of living to move from the missions and reserves” (Marsden, 1986) and the couples were accommodated in South Australian Housing Trust homes in rural towns.

[6] A term used to apply to forms of vernacular architecture built according to traditional principles and customary methods.
The town housing types were standard styles of the era and presented considerable problems for the residents. In keeping with the assimilation policy of the time, the South Australian Housing Trust did not encourage the occupancy of extended or multiple families, and often the houses were unsuitable for the maintenance of Aboriginal cultural practices and family size (Gale, 1972). Those making the move into town had other difficulties. As well as being separated from home country and culturally familiar milieu, Aboriginal families faced social isolation and local racist opposition. One non-Aboriginal townsperson was reported to have said in the 1950s “They should be housed but not in our town ... they are not truly accepted into the community.” (The Advertiser, July 1958).

The transitional program had other flaws. There were insufficient funds to meet the housing need for the number of families, let alone to construct housing of the various stages, so rather than progressing from one stage to the next, people tended to be indefinitely accommodated in a particular type of basic hut or cottage in the transitional program. The public housing in the rural towns was limited and provided under strict conditions. Nevertheless many Aboriginal people, who desired education, employment and other town-based opportunities, moved and dwelt in self-built housing on the fringes of towns across the State and notably along the Murray River. For example Liz Tongerie had memories of living outside Meningie:

“Every time I cook at my stove I think about me and my mother. She just had an open fire and a camp oven and she made good things for us. And I think about all I have. Four posts in the ground with tin around it – that was our house. Father made a windbreak with branches in the myall out from Meningie. I never knew what it was to live in a house until I was nine” (Tongerie cited in Mattingley & Hampton, 1988:269).
Many of the town campers were to go on to rent and purchase houses in the towns as government policies changed in the 1970s and their economic circumstances improved.

Figure 5: Unidentified Aboriginal family outside self-built housing on the outskirts of Port Lincoln (Source: Gale, 1972).

There were a number of other circumstances in which Aboriginal peoples lived prior to the Referendum which are important in recognising the diversity of the lived experience of housing. Aboriginal workers lived on sheep and cattle stations and worked itinerantly throughout the State. Pastoral workers to the south and south-east (and to some extent in the west of the state) were often well paid as highly-skilled shearers or stockmen. This group moved from job to job within particular regions. Many other Aboriginal workers were employed by the railways and housed in railway cottages spread across the State. Some workers found housing alongside their employment (e.g. railway houses and shearsers quarters) while other itinerant workers had to make do with their swags and whatever they could find for shelter. Margaret Crompton recalled the places she lived as her family followed employment:

“You’re sort of living in empty houses, or tents, or sheds, or whatever was available. People didn’t think the Aboriginal people had any right in those days to get a decent house like everybody is now – you tended to live with families who were around the place on the outskirts of towns … It’s no fun living out of boxes and things. You’d cart your stuff around in boxes or sugar bags, and just move from town to town,” (Crompton cited in Mattingley & Hampton, 1988:269).

Another group were the pastoral workers in the Flinders Ranges and Far North. Individuals from this group often identified strongly with the station where they were born and grew up. Many of these lowly paid workers lost their jobs when wages were equalised in the mid-1960s and drifted into the local country towns, often fringe dwelling. Certain fringe camps became scenes of great poverty with alcohol misuse leading to fighting, and despite attempts at household hygiene, the sedentary un-serviced living conditions led at times to serious health problems for the occupants (Johnston, 1991).

Many people from this group responded to the appalling conditions by re-establishing their connections with traditional country and the homeland movement in South Australia was established. In Fregon, in the far north east of the State (then known as the North-East Reserve and now known as the Agangu Pitjantatjara Yankunytjatjara Lands), the first homeland was established in 1961 to provide employment in cattle work. Amata and Indulkana were established in the following years (Mattingley & Hampton, 1988:80). Others were acquired after the Referendum. The homeland movement is notable as the single most tangible demonstration by Aboriginal peoples in remote areas of preferred lifestyle options and a revival of traditional land management practices (Johnston, 1991).
Certain government policies favoured the incarceration of sections of the Aboriginal population (especially the young and the criminalised), leading to many living in institutionalised circumstances. Children’s Homes operated at Umeewarra (Port Augusta), Colebrook (Eden Hills), Nepabunna and numerous other locations providing a variety of living conditions for children. The regimented and culturally alienating conditions in such institutions have been well documented elsewhere (e.g. Mattingley and Hampton, 1988; Hall, 1997; Kartinyeri, 2000; Hollinsworth and Craig, 2003; George, 2005). Other individuals’ experiences consisted of incarceration in a range of prison and police facilities around the State. The only facilities for the incarceration of those convicted of serious crimes were located in Adelaide and the imprisonment of Aboriginal men often resulted in the displacement of whole families due to relatives moving to Adelaide and other regional centres to be near kin. Describing the institutional experiences of Aboriginal peoples is outside the scope of this chapter, but nevertheless constituted another significant and distinct set of residential experiences of Aboriginal people.

It can be seen then, that during the period directly prior to 1967, a major redistribution of Aboriginal population had occurred across the State. The settlement conditions on the missions and reserves were generally unattractive. People were leaving the missions in large numbers and establishing themselves in towns and cities (Gale, 1972). A select few were able to access public housing while many others lived in rental accommodation or in self-built housing on the fringes of cities and towns across the State.

The Referendum and Aboriginal housing

Publicity surrounding the Referendum brought the appalling and impoverished living conditions of many Aboriginal communities to public attention. The mandate handed to the Commonwealth Government by the people of Australia provided a historically potent opportunity for a nationally scaled response. The provision of public housing was a very visible way of directly addressing disadvantage. Across Australia extravagant expectations became attached to the social benefits of providing housing to Aboriginal families (Heppell 1979:17, 20-21).

Shortly after the Referendum, the Australian Government commenced the release of special purpose grants to the States for Aboriginal housing under strict guidelines relating to the staged housing philosophy. The Commonwealth grants were intended to speed up the assimilation process whereby Aboriginal peoples were encouraged to move away from the reserves and into conventional housing in towns and cities. Forty percent of the funding was reserved to provide public housing for the “specially selected couples” in cities and towns (Marsden, 1988). The South Australian Housing Trust moved from providing housing only in rural towns to housing Aboriginal families in suburban Adelaide, typically in the outer northern and western suburbs. However once occupying the houses, Aboriginal families frequently retained traditional kinship behaviours and cultural practices. Houses experienced high numbers of visitors, with the overcrowding causing a strain upon and frequent failure of the household services. Occupants often laid little emphasis on the accumulation of possessions and a lack of concern about damage or inappropriate usage of houses. Houses were often abandoned upon the death of an occupant due to spiritual beliefs. Aboriginal norms and lifestyles often did not conform to the Western demands of an appropriate house lifestyle (Gale, 1972).

Less emphasis was placed on the provision of transitional housing at the missions and reserves under the Australian Government stipulation that not more than twenty percent of funding should be spent for this purpose (Paris, 1993:126). As a result, few new dwellings were built and only limited progress occurred in moving Aboriginal people out of “transitional” housing into more conventional houses. With a chronic shortage of housing, families continued to resort to self-build options. Towards the end of the 1960s, Aboriginal housing conditions began to be seen as a major social problem that the Australian Government was compelled to address.

The Whitlam years

By 1970, a lack of adequate housing for Aboriginal people overshadowed education and other issues, and housing was presented as the core obstacle to integration and social equality. The Australian Labor Party developed a social justice platform which sought to replace assimilation polices with the right to cultural practice under a model of self-determination (Ross, 1998).
Upon its election in 1972, Gough Whitlam’s Labor Government established the Commonwealth Department of Aboriginal Affairs to combat the widespread disadvantage. Housing formed a pivotal policy. In 1973, the Labor Government stated its Indigenous housing policy in the following terms:

“All Aboriginal families to be properly housed within a period of ten years. In compensation for the loss of traditional lands, funds are to be made available to assist Aboriginals who wish to purchase their own homes, taking into account personal wishes as to design and location. Trained social workers to be provided in areas where such housing has been undertaken under the jurisdiction of local communities” (Commonwealth of Australia, 1973:2).

The focus of Aboriginal housing in South Australia moved again from the provision of housing in cities and towns to include the higher levels of funding for housing on reserves and missions. The policy of self-determination was invoked and used to develop the housing delivery programs. Based on a housing association model trialled in Redfern, the first of the housing programs entitled the “Aboriginal Housing Organisations Grant Program” attempted to bring self-determination into housing delivery through the voluntary establishment and incorporation of Aboriginal community housing associations. The South Australian Department of Community Welfare deployed a project officer to explain the concepts of Aboriginal housing associations to people living on reserves and missions. Housing associations were formed at Oodnadatta, Coober Pedy, Nepabunna, Yalata, Point Pearce, Amata, Indulkana and Point McLeay. The associations gained legal status under the Associations Act 1956 and direct funding to the associations commenced. While this was an important step towards self-determination, many of the housing associations had little training, and were ill equipped to take control of the housing supply (Ross, 1998).

To provide expertise to the housing associations, the Royal Australian Institute of Architects formed its Aboriginal Housing Panel to coordinate information nationally (Memmott, 1988:37). Sharing information with the Panel and other communities, some South Australian housing associations began experimenting with housing models far removed from conventional housing. Several experimental modular houses and prefabricated tent shelters were developed to provide a cultural fit with Aboriginal end-users living on reserves or in remote areas. For example, experimental housing was designed by South Australian architect, John Chappel and constructed at Indulkana.

Figure 6: Watercolour representation of houses designed by architect John Chappel for Aboriginal families in remote South Australia and constructed at Indulkana. The houses were designed in one, two, three and four roomed variations although only one roomed houses were built. Known colloquially as the “Monkey Houses”, the houses were designed to resemble a wiltja and were orientated to take advantage of the sun and prevailing winds. The eaves were 4'6" in height, making the occupant stoop to enter and unable to stand upright in most internal areas (Source: Chappel n.d.).

[7] For example, see Knox (1975) and “Ayres Rock House” etc (1972).
An example of mobile housing was designed by Bill James of the South Australian Housing Trust and dubbed “the James Wiltja”. It was a two metre square and 1.4 metre high structure constructed of steel rods interlocking to form a rigid frame and covered by a flexible fabric covering (Heppell, 1977).

Figure 7: The James Wiltja was designed for housing mobile Aboriginal families in remote South Australia (Source: Heppell 1977).

However with the release of funds directly to the new housing associations, communities raced to meet essential housing needs and often expended funds with poor professional advice on transportables, caravans and basic shelters akin to the type provided under the transitional housing program. The net result was that much of the housing erected on the former reserves and missions during this period was substandard, undersized, shoddy and in some instances dangerous (Ross, 1998).

The provision of urban Aboriginal housing also underwent some radical changes. To incorporate Aboriginal housing in the cities and towns into a model of self-determination, the South Australian Housing Trust took over responsibility for that housing stock built outside Aboriginal reserves from the Department of Community Welfare (Paris, 1993). The Trust established its Aboriginal Funded Unit complete with a governing Board as the service and contact point for urban housing. The first Aboriginal Housing Board of South Australia included five Aboriginal individuals along with representatives from the South Australian Housing Trust, the Department of Community Welfare and the Department of Aboriginal Affairs. The model of governance was the first of its kind nationally. Lois (Lowitja) O’Donoghue, the first Chairperson, described the Aboriginal Housing Board as:

... a unique example of community participation on housing management, as the only housing program in Australia with any meaningful Aboriginal involvement and probably the only housing program of any size in Australia that is virtually run by the community it serves (O’Donoghue cited in Marsden, 1988:377).
The Board drew up annual budgets, made decisions on a range of housing services in consultation with local housing management committees, and managed the housing stock consisting of 195 houses located predominantly in country towns.

The Fraser years

After the dismissal of the Whitlam Government, Aboriginal housing policy under the Fraser Coalition Government (1975 to 1983) changed significantly from self-determination models to self-management and self-sufficiency with housing being continued to be delivered to rural towns and reserve communities via housing associations (Heppell, 1979:36-38). In 1976, a national review of delivery of services found that the Commonwealth Department of Aboriginal Affairs had failed to equip Aboriginal housing associations with a professional capacity to procure and build houses (Hay, 1976). The Review recommended that the Department only finance housing associations with a demonstrated capacity to build houses at a reasonable cost. The funding for Aboriginal housing administration was rationalised and Aboriginal housing associations formed under the Whitlam government were downsized (Ross, 1998) requiring community members to take greater responsibility for the administration of housing supply as the rate of construction slowed (Heppell, 1979:37, 38 & 42).

Land rights and Aboriginal housing across South Australia

The increased emphasis on remote housing was in tune with the growth of the homelands and land rights movements in South Australia. The homelands movement had continued to grow in popularity in the north and west of the State. Many small groups who had attempted to return to country during the late 1960s and 70s had joined into larger groups who were intent on gaining full land rights in traditional lands (Blanchard, 1987). After a stoic battle, the first Aboriginal freehold title was granted in South Australia when the Pitjantjatjara, Yankunytjara and Ngaanatjara people were handed back 100,000 square kilometres of land in the north of the state in 1981. Along with the Pitjantjatjara Lands Rights Act 1981 came the need to construct housing across the vast area of the Pitjantjatjara Lands (or APY Lands).

In the first instance, the newly formed Pitjantjatjara Council was responsible for organising and supervising housing construction and quickly needed to develop understandings of housing procurement and the complexities of construction in remote locations. Each project was a new problem-solving exercise for its builders. Graham Deare, one of the early builders on the APY Lands recalled the transport logistics and the challenges just getting to the site:

“We had to take everything with us. Earthmoving equipment, construction materials, tools, generators, fuel, food and caravans. You had to have everything; you couldn’t run down the hardware shop for parts later. It wasn’t easy moving loaded semi trailers up dirt roads and not being really sure where we were going and if we could get through. At one stage we had to take the backhoe off the “semi” and drive it up the dry creek bed for 70 kilometres just to get through (Graham Deare, 2007).

Basic prefabricated homes, which were illustrated in catalogues and could be speedily acquired, tended to be favoured by the communities. Some of the early homes were fabricated and transported from as far away as Queensland. However, one South Australian manufacturer, “Nomadic Enterprises” became involved in developing prefabricated housing kits in consultation with Aboriginal communities, noting that there were considerable differences between the housing aspirations of Aboriginal peoples in the remote areas and the standardised prefabricated housing designs. It was seen that the typical designs and sizes were not suitable for the housing knowledge and culture of the remote users, nor for the harsh environments of South Australia. The prefabricated housing firm, “Nomadic Enterprises” developed basic designs known as “Nomad houses” which focussed on living both in and around the house (Grant, 1999).
During this period communities had a number of options for funding and could apply directly for Commonwealth funding for housing and use the Aboriginal Funded Unit for guidance. As time passed, the Aboriginal Funded Unit (re-titled the Aboriginal Housing Unit) of the South Australian Housing Trust began to take more responsibility for remote housing across the State in line with Australian Government preferences that the supply of housing in remote areas be operated by State Housing Commissions for efficient and accountable operations. The Aboriginal Housing Unit developed specialised knowledge around the understanding that housing for remote South Australian Aboriginal families was more complex than the provision of a western house.

Notions of what constituted “appropriate” Aboriginal housing were challenged when the people from “Big Camp” near Yalata moved back to their traditional lands in 1982. The Aboriginal Housing Unit began examining the housing needs of the group with the advent of the Maralinga Tjarutja Land Rights Act in 1984. At the time, this group were intent on establishing a permanent community at Lake Dey Dey (Oak Valley). Permanent infrastructure, shelter and potable water were required; however the group made it very clear that permanent housing was not to be erected in the first instance. This tested the Aboriginal Housing Unit as the funding provisions stated only permanent housing was to be provided. After much thought, innovative “Shed Tanks” were designed by Nomadic Enterprises in consultation with the Aboriginal Housing Unit and the group. The Shed Tanks provided a roof area of 700 square metres with a centrally located self cleaning gutter that fed several tanks, each with a capacity of around 36,000 litres. The Shed Tanks allowed a supply of drinkable water with the spasmodic rain and provided a place for people to camp in and around. From 1985, Shed Tanks were erected throughout the Maralinga Tjarutja Lands allowing people to continue mobile lifestyles and have access to safe drinking water and shelter. Shed tanks have since been provided across the Agangu Pitjantjatjara Yankunytjatjara Lands and on a number of other communities and homelands (Grant, 1999).
Figure 9: A Shed Tank constructed along the Aquataine Road between Yalata and Oak Valley. The roof area collects rain from the isolated thunderstorms providing a source of potable water and shelter for people travelling across the Maralinga Tjarutja Lands (Source: Grant, 1999).

Other innovations to house mobile populations were trialled at Oak Valley by the Aboriginal Housing Unit. Families needed personal shelter and places to keep their food safe from the dogs. In the first instance, tarpaulins and tucker boxes were issued. While the people were mobile, the tucker boxes and tarpaulins seemed to travel greater distances, often without their owners (Grant, 1999). People also needed greater privacy and protection from the elements. After many different trials, the “Spider Tent” or “Wiltja” was developed. The Wiltjas consist of series of heavy galvanised legs fitting into a central fixing plate and covered by a heavy-duty canvas cover with two zip openings. The Wiltjas were designed to be mobile, to take account of prevailing winds and climatic conditions and to be periodically moved to a new site when the ground was fouled. The Wiltjas remain used in communities in South Australia to provide over-flow housing when overcrowding becomes a major issue and for temporary housing in certain circumstances (Grant, 2005).

Housing for health and standard forums

Despite major inroads into the delivery of housing in remote areas there were issues for ongoing concern. In 1986, the Report of the Aboriginal Women’s Task Force documented that Aboriginal housing across South Australia was in chronic short supply with discrepancies between the needs and aspirations of Aboriginal people and the minimal or non-existent maintenance of the housing (Daylight & Johnstone, 1986). Poorly maintained housing was having a major effect on the health of individuals in communities. In 1987, Yami Lester of the Nganampa Health Council on the then Anangu Pitjantjatjara Lands (AP Lands) put a brief to an architect, a doctor and an anthropologist in a very simple one-liner, “We need to stop people getting sick” (Uwankara Palyanku Kanyintjaku). The result was the first environmental health survey (known as the UPK Report) with a profound effect on Aboriginal housing across Australia (Nganampa Health Council, 1987).
The UPK report espoused nine “Healthy Living Practices” for Aboriginal housing. After providing a safe environment, the priorities of housing (in order) were:

- Washing people – ensuring there is adequate hot and cold water and that the shower and bath work;
- Washing clothes and bedding – ensuring functional laundries;
- Removing waste safely – ensuring functional drains and toilets;
- Improving nutrition – assessing and improving the ability to prepare and store food;
- Reducing overcrowding – ensuring health hardware can cope with the actual number of people living in a house at any time;
- Reducing the impact of animals, vermin or insects;
- Reducing dust to minimize the risk of respiratory illness;
- Controlling temperature so as to reduce the health risks of extreme temperatures (particularly to small children, the sick and the elderly); and
- Reducing the potential of house components to cause physical injury, for example by electrocution or laceration (Pholeros et al. 1993:1–10).

The UPK report considered housing on the APY Lands from a number of other perspectives as well, including the functioning of services, and the household demands placed on the house and the outside living area and yard. The findings indicated that not only were houses not maintained, but also the initial construction of housing and services was substandard and inadequate and did not match the environmental conditions, nor the way in which Aboriginal families used housing. Most people did not use the main body of the house and there was preliminary evidence to suggest that the more developed the surrounding yard, the better the condition of the house and health hardware in it. The survey concluded that maintaining the asset and its health hardware facilities was more important than providing the original asset. A poorly maintained building was potentially a major health hazard. (Nganampa Health Council 1987, Pholeros et al 1993[9]).

The emerging picture was that housing needed to be durable to withstand the climatic and environmental conditions of remote South Australia and to match the lifestyles of the occupants. The Aboriginal Housing Unit set up a forum to develop a set of standards for the construction of durable Aboriginal housing. The first forum was held in Marla in the late 1980s where it was quickly decided housing designed for urban settings was not appropriate in remote locations. Housing in remote communities ceased attempting to imitate housing in urban settings and started to develop a distinct character of its own. Much of the design work was completed by the Aboriginal Housing Unit in consultation with Aboriginal users, builders, and outside contracting firms. The early non-serviced one or two roomed models used in the 1970s were developed into a variety of serviced housing models that were re-examined at each annual standards forum. The target was to produce flexible functioning houses sympathetic to Aboriginal cultural practices. In the first instance, conventional floor plans were produced with specific adaptations for the climatic, environmental and cultural needs. Wide verandas were included in all designs and areas were left unsurfaced to allow people to live and sleep both in and around the house. All fittings were designed and redesigned to be sturdy and to require minimum maintenance. Kitchens were designed and redesigned to allow the preparation of traditional foods such as kangaroo. Wet areas were separated from other areas of the house so that flooding would not affect the continued functioning of the house should there be plumbing malfunctions. Later development included the provision of specific housing for the elderly and other household types. The standards forum allowed the continual re-examination of the housing needs of Aboriginal users, the sustained development of housing models to meet the evolving needs of the client group and the resolution of the issues of remote construction and maintenance.

[9] Also see Pholeros et al (1993) for an in-depth empirical study of housing and health at Pipalyatjara on the APY Lands in the far north-west of South Australia.
Figure 10: A “Nomad” House constructed at Yalata. The “Nomad” Houses developed from non-serviced one or two roomed structures supplied in the 1970s to house designs to fit with Aboriginal lifestyles in remote areas. On the exterior of this house brick is used for the lower external walls to provide greater durability. Areas under the three metre wide veranda areas are left unsurfaced to provide comfortable areas for sleeping and sitting (Source: Grant, 1999).

The importance of the UPK Report program and the Standards Forums in the continued development of Aboriginal housing models was recognised nationally when the Commonwealth Ministers adopted and developed the National Indigenous Housing Guide and the National Framework for the Design, Construction and Maintenance of Indigenous Housing (Commonwealth Department of Family and Community Services, 1999a). The national documents provided advice on the design, selection, installation, construction and maintenance of Aboriginal housing and other aspects related to the promotion of healthy living practices (Commonwealth Department of Family and Community Services, 1999b) and were intended to complement mainstream regulatory building mechanisms.

The inception and demise of the Aboriginal Housing Authority

By the end of the 1990s, there was an official shift to self-management by the Australian Government and suggestions that Aboriginal housing should become primarily a state responsibility. In line with this, the South Australian Government established a bilateral agreement in 1999, to create the Aboriginal Housing Authority as a separate entity within the State Government housing portfolio. The Authority was formed from the Aboriginal Housing Unit and governed by a board comprised of nine Aboriginal members, four from the State Government Aboriginal Housing Structure, four ATSIC representatives and an independent chairperson appointed by the Minister. The Aboriginal Housing Authority became a statutory corporation under the Housing and Urban Development (Administrative Arrangements) Act 1995 (SA). In February 2000, the Aboriginal Housing Authority took control of housing programs previously administered by agencies such as the Aboriginal and Torres Strait Islander Commission which had provided funding directly to communities and other Commonwealth infrastructure programs, becoming a one-stop shop for all public and community housing.

Early work on developing durable and culturally appropriate housing for remote areas continued. There were continuing issues with the shortage of housing to meet the rapid rate of family formation and with maintaining functioning houses in remote areas. The lack of fit between Aboriginal lifestyles and much of the housing stock continued, resulting in housing often being in poor condition.
In 2006 major changes occurred to the Aboriginal Housing Authority. A rationalisation of South Australian government departments occurred and many departments were merged. The Aboriginal Housing Authority was amalgamated with the South Australian Housing Trust and the South Australian Community Housing Authority into “Housing S.A.” The lack of a separate distinguishable entity for the service and delivery of Aboriginal housing in South Australia followed a national trend whereby Aboriginal organisations were being merged into existing mainstream services. At the time of writing this chapter, the impacts of mainstreaming in terms of the delivery of culturally appropriate Aboriginal housing services were yet to be seen and evaluated.

Conclusion

Popular perceptions of Aboriginal issues in South Australia have always been strongly shaped by geography. There is a tendency to overlook the Aboriginal cultures in the fertile south-east of the State and conceptualise “Aboriginal Affairs” within the remote, arid parts of the centre, north and west of South Australia where language and retention of other traditions has remained relatively strong. This has also been the case to a large extent with Aboriginal housing. The reportage and debate and even the definition of Aboriginal housing in South Australia has largely focused on the discrete settlements in the APY Lands and other surrounding desert areas. However the public rental housing targeted for Aboriginal families in rural and regional towns and metropolitan urban areas or settings also needs to be included in any account of Aboriginal housing history.

Indeed, one needs a very clear understanding of the role of such housing to make sense of the emphases and swings in political policy-making. The staged housing of the pre-Referendum period can be described as “ethno-sensitive mainstreaming”, i.e. the aim was assimilation but it was recognised that a culturally-specific approach was required to achieve this aim. This policy was never fully implemented on the ground in any completed way at the scale of the State. A second attempt at assimilation commenced in the late 1960s, and accelerated in the 1970s through the provision of public rental housing for Indigenous households which catalysed a movement of people from the missions and reserves into rural towns in the first instance and then later into particular suburbs of Adelaide.

However the 1970s saw another policy swing. In those remote areas where Aboriginal peoples had determined their own future by resettling on traditional lands secured under the land rights movement, Aboriginal housing came to be provided in a mode that can be termed “targeted service delivery”. It was recognised that housing had to be designed with a culturally appropriate method to suit the manner of remote Aboriginal living. The construction of housing in remote areas of South Australia has presented steep learning curves for those concerned. There was a concerted attempt to match Aboriginal lifestyles with appropriate house designs, which was nevertheless marked by many early failures. While a variety of innovative designs have been produced in South Australia there has been no one correct solution to meet all needs as Aboriginal people’s lifestyles and housing aspirations vary widely and constantly change and evolve. The provision of Aboriginal housing has thus, to a large extent, determined the distribution of the Aboriginal population across the State.

A number of the initiatives taken in the Aboriginal housing programs in South Australia since 1967 were innovative and grew to be national programs. The South Australian management model of Aboriginal housing committees, a governing board and separate units for service delivery nestled within the mainstream public housing organisation, became a model for the delivery of Aboriginal housing for over two decades and was replicated in other states of Australia. The early initiatives taken by the Nganampa Health Council in the 1980s, through its first UPK environmental health survey grew. In 2007, a derivative program, known as “Fixing Housing for Better Health” was being applied to Aboriginal community housing across Australia with the reporting process providing a national picture of the state of Indigenous community housing. The early standards forum set up by the Aboriginal Housing Unit had also grown into a set of national guidelines for Indigenous housing.

Nevertheless many of the key issues in Aboriginal housing have persisted since 1967. At the time of writing in 2007, the maintenance and functioning of housing continued to be a national and state issue with 58% of Aboriginal people in remote areas and 32% in non-remote areas across Australia reporting they are living in a dwelling with major structural problems (Australian Bureau of Statistics, 2006). Overcrowding was still an issue, much more so in remote areas across Australia, with 52% of householders living in Aboriginal
housing needing at least one extra bedroom and 44% reporting stress from overcrowding (Australian Bureau of Statistics, 2006). The shortage and poor state of housing in remote areas continued to be presented as a core obstacle to social equality. In 2007, the National Commonwealth Budget included $294 million of funding to reform Aboriginal housing through the construction of new houses and an expanded program for repairs and maintenance of existing housing in remote areas (Australian Broadcasting Commission, 2007). At the same time there have been popular cries for a return to “central mainstreaming”[10] and for the movement of remote Aboriginal communities into the cities to facilitate “normal services”, employment opportunity and adequate medical treatment and education, all signs that the pendulum of policy history is poised to swing yet again.

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Bibliography


Australian Bureau of Statistics (2006) Housing and Infrastructure in Aboriginal and Torres Strait Islander Communities 4710.0, Australia, Australian Bureau of Statistics, Canberra.


Chappel, J. (n.d.) Drawings entitled Housing at Indulkana (unpublished) held at Aboriginal Environments Research Centre Archives, University of Queensland, St Lucia.


[10] These policy descriptors used by the authors (i.e. “central mainstreaming”, “ethno-sensitive mainstreaming” and “targeted service delivery”) are based on earlier work in NSW by Memmott (1990).


Hall, A. (1997) *We took the Children*, South Australian Department of Family and Community Services, Adelaide.


Heppell, M. (1977) *Desert Housing Project: Occasional Report No. 3 of the Aboriginal and Torres Strait Islander Housing Panel*. Aboriginal and Torres Strait Islander Housing Panel, Canberra.


I. Two Moments

27 May, 1967. It’s another miserable Melbourne day, but there is a sense of elation at the polling booth. The Constitutional Referendum, on which I am about to cast my vote, promises to bring justice for Aboriginal people in Australia. The campaign for the “Yes” vote has been passionate, the culmination of decades of work by Aboriginal leaders and their non-Aboriginal colleagues. I cradle my one month old baby daughter in my arms and proudly tick “Yes”. The poster featuring a photograph of an Aboriginal baby with the message, “Right Wrongs Write Yes”, is in my nappy bag. My generation may have grown up with racist images of the original peoples of this land, but I am voting for a more just society for the next generation. I am voting for an end to discriminatory legislation.

Fast forward to 5–7 February, 1998. The High Court of Australia is considering a challenge brought by a group of Aboriginal people from the south-east of Australia regarding the passage of legislation, the *Hindmarsh Island Bridge Act 1997* (Cth), that will exclude the sacred sites on Hindmarsh Island from the protection they are seeking under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (*Heritage Protection Act*). Was not the *Aboriginal and Torres Strait Islander Heritage Protection Act* enacted for the benefit of Aboriginal people? Is it not discriminatory to say it applies anywhere but the place this group seeks its application? I look around the court and calculate who would have been of voting age in 1967; certainly all the judges. In a five to one decision the legislation is allowed to stand.\(^1\)

I think my expectations of the promise of the 1967 Referendum were shared by most of the 90.8% of eligible voters who voted to amend the Constitution, and probably by the five judges who upheld the *Hindmarsh Island Bridge Act 1997* in 1998. So, were we all misled? What happened in the intervening years? To understand the nature of the gap between the promise of 1967 and the reality of the 1998 decision of the High Court, we need to reconstruct the pitch and tenor of the arguments for the Referendum and then focus on the changes that were actually made to the Constitution. We need then to look at the *Heritage Protection Act 1984* in action and here I look at two troubled cases with very different outcomes. In the final wash, I suggest, hard cases make bad law.

\(^1\) Kartinyeri v. Commonwealth ("Hindmarsh Island Bridge case") (1998) 195 CLR 337.
II. The “Yes” campaign

“The Case for Yes”, as presented by the government, argued that the:

purposes of these proposed amendments to the Commonwealth Constitution are to remove any ground for the belief that, as at present worded, the Constitution discriminated in some ways against people of the Aboriginal race, and, at the same time, to make it possible for the Commonwealth Parliament to make special laws for the people of the Aboriginal race, wherever they may live, if the Commonwealth Parliament considers this desirable or necessary … The Commonwealth’s object will be to co-operate with the states to ensure that together we act in the best interests of the Aboriginal people of Australia. (emphasis in original).

But it was the strong spokespersons like Faith Bandler, Pastor Doug Nicholls, Gordon Bryant (MHR) and Joe McGinness of the Federal Council for the Advancement of Aborigines and Torres Strait Islanders (FCAATSI), who were the prime movers for the “Yes” campaign. The pitch was emotional, the terms lofty: citizenship, human rights, equality and freedom. The “Yes” campaign repeated the arguments from the 1962 petition campaign. There was so little uniformity across Australia in terms of laws pertaining to Aboriginal people in areas such as the right to marry freely, move freely, control their own children, own property freely, and receive award wages that the Federal Government needed the power to legislate. The stark message on a campaign poster, authorised by Joe McGinness, President of FCAATSI, which sticks in my memory read:

VOTE YES
FOR
ABORIGINAL RIGHTS

Churches, academics, politicians from all parties, especially the Labor Party, Amnesty International and working groups joined in the “Yes” campaign. Quoting Article 1 of the United Nations Declaration on Human Rights that “All human beings are born free and equal …”, the Australian Council of Salaried and Professional Associations, a FCAATSI affiliate, urged a “Yes” vote as a way in which “Australians of European descent could make this a reality for their fellow-Australians of Aboriginal descent”.

Unlike most referenda, there was no campaign for a “No” vote in 1967. No parliamentarian had voted against the proposals in the Constitutional Alteration (Aboriginals) Bill (Cth). Letters to the Editor urged a “Yes” vote and editorials warned of the consequences nationally and internationally of even contemplating a “No” vote. The overwhelming sentiment of the time was that this was the right thing to do and it would right an historic wrong.

Bain Attwood and Andrew Markus take up the issue of the emotional pitch of the “Yes” campaign as they map the emergence of powerful narratives about the role of the Referendum in shaping the relationship between the state and Indigenous people in Australia.
The Referendum, they point out, was not about getting the vote – the 1948 Nationality and Citizenship Act had addressed that matter. It was not about discriminatory legislation – most had already been repealed. These facts, Attwood and Markus argue, were well understood by the “bulk” of the FCAATSJ leadership who knew that the proposed changes were no guarantee that there would be changes at the Federal level.\[10\] But, the call for common rights for all Australians, rather than an argument for special rights for Aborigines was less threatening and, if the campaign could generate widespread support, it would generate a mandate for change, and the chances of getting the Federal Government to act were improved. So what changes were actually made to the Constitution?

A. The Referendum questions

There were two questions on that 27 May ballot: the first addressed the so-called “nexus question”, or the balance of the numbers in the Senate and House of Representatives; the second asked whether s. 51 (xxvi) of the Constitution should be amended and s. 127 be deleted so as to remove references to peoples of the Aboriginal race from both sections. The nexus question failed, the second question regarding Aborigines was carried by an overwhelming 90.8% of the eligible voting population.

Section 51 of the Constitution enumerates the range of matters on which the Commonwealth has the power to make laws. This covers some 39 matters including trade and commerce; taxation; postal, telegraphic, telephonic, and other like services; the naval and military defence of the Commonwealth and of several states, and the control of the forces to execute and maintain the laws of the Commonwealth; lighthouses, lightships, beacons and buoys; and astronomical and meteorological observations. Prior to the Referendum, s. 51 (xxvi) stated, “The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws.” The amendment removed the reference “other than the aboriginal race in any State” so that sub-s. (xxvi) now reads, “The people of any race for whom it is deemed necessary to make special laws.” But what appeared on the ballot papers in 1967? Question 2 was phrased thus:

Do you approve the proposed law for the alteration of the Constitution entitled “An Act to alter the Constitution so as to omit certain words relating to the people of the Aboriginal race in any state so that Aboriginals are to be counted in reckoning the population”?

To cast an informed vote, the electorate needed to know the contents of the Constitution Alteration (Aboriginals) Act 1967 (Cth)\[12\] and their guide to that document had been the “Yes” campaign. Now those who had been following the parliamentary debates of the previous several years may have asked about the extent and reach of the race power being conferred on the Commonwealth: would it now be possible to pass laws that discriminated against Aborigines or was this power to be exercised only for the benefit of the original inhabitants? Could “special laws” be read to mean any kinds of laws? They may also have asked if the support for the amendment of s. 51 was as wholehearted and as wide-ranging as the government “Yes” campaign and the FCAATSJ posters suggested.

B. Beneficial laws and special laws

The Constitution Alteration (Aboriginals) Act 1967 (Cth) had a history which John Gardiner-Garden argues makes evident that multiple agendas were at play in the Parliament.\[13\] In the debates concerning the earlier Constitution Alteration (Repeal of Section 127) Bill 1965 (Cth) drafted during the Menzies administration, and targeting only s. 127, a number of members of parliament raised the issue of s. 51 and opined that Federal powers should only be exercised for the benefit of Aboriginal people. Both Arthur Caldwell, the leader of the opposition, and ALP frontbencher Gordon Bryant favoured changing both sections of the Constitution.

\[10\] Ibid. 45.


\[12\] Constitution Alteration (Aboriginals) Act 1967 (Cth).

Government member W.C. Wentworth expressed interest in putting forward a Private Members Bill to replace s. 51 with wording that would ensure that racial origins would not be used to pass discriminatory laws, while Kim Beazley Sr. wanted the Commonwealth to have positive powers to make laws for the benefit of Aborigines.[14]

The 1965 Bill was postponed and reworked under Prime Minister Harold Holt who thought it prudent to address both s. 51(xxvi) and s. 127. He supported removing the words relating to the Aborigines from s. 51, not, he argued, because they were discriminatory but because there was the “popular impression” that they were.[15] Members from both sides of the house sought to emphasise the beneficial intent of the change but Holt resisted the call from Wentworth to include a clause that made the beneficial aspect of the proposed change explicit. Undeterred Whitlam spoke of the Referendum as the possibility of bringing “the resources of the whole nation in favour of Aborigines wherever they live”.[16]

Reflecting on the Constitution’s race power on the occasion of the 30th anniversary of the Referendum, Neil Lofgren takes up the issue of original intent.[17] He quotes from the five clause motion introduced by Prime Minister John Howard “acknowledging that the Referendum reflected the wishes of the Australian people that Aboriginal peoples and Torres Strait Islanders be treated as full citizens of Australia”.[18] Further, Lofgren cites former Opposition Leader, Kim Beazley, following in his father’s footsteps, as seeking an amendment which:

“recognises, as was made abundantly clear by the political leaders of the time, that the Referendum was passed with the intent that the power conferred on the Commonwealth only be used for the benefit of the Aboriginal and Torres Strait Islander people”.[19]

The Prime Minister’s motion carried, Beazley’s lapsed.

So, in 1997, the Referendum was still being cited as concerning citizenship, as being a positive measure for Indigenous Australians. There were good reasons to believe that the Referendum had opened doors for Aborigines. Lofgren points to the 1992 endorsement of the Council of Australian Governments (COAG) of the National Commitment to Improved Outcomes in the Delivery of Programs and Services to Aboriginal Peoples and Torres Strait Islanders.

The National Commitment acknowledges the Commonwealth’s special responsibility to Aboriginal peoples and Torres Strait Islanders arising from the 1967 Referendum, and through international treaties ratified by Australia which relate to indigenous peoples. The Coalition’s Aboriginal and Torres Strait Islander Affairs policy recognises the importance of the National Commitment.[20]

In marking the 40th anniversary in 2007, we can see ways in which the Referendum is still seen as concerning citizenship for Aborigines. It is about Aborigines needing to join the mainstream, learning to speak English, holding mortgages, sending their children to school. It is they who need to be brought within the fold of citizenship. In this respect, the casting of the Referendum as one that would make Aborigines equal citizens was an assimilationist move, one, I suggest, that persists. It is clear that “The people of any race for whom it is deemed necessary to make special laws,” are those of races other than the dominant. One wonders if, in some future multicultural era, when Anglo-Australians were in a minority, this “people of any race” might be read as including people of European descent?

[14] Ibid. 9.
[20] Lofgren
That the race power need not be exercised for the benefit of Aborigines was made clear once and for all in the 1 April 1998 decision of the High Court in *Kartinyeri v Commonwealth*. The government could make laws and the government could amend those laws. The race power could be exercised “with respect to” and not necessarily “for the benefit of” Aboriginal people. Amendments to the *Native Title Act 1993* (Cth), in the form of the “Ten Point Plan”, followed on 8 July 1998. How had this come to pass?

### III. The Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)

In 1984, the Parliament exercised its new powers under s. 51 when it passed the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, an interim measure pending the introduction of national land rights legislation, but which proved to be a fraught endeavour. Thus, in 1986, the sunset clause was removed and the legislation stood until 1996 when the Hon. Elizabeth Evatt conducted a review.

What expectations were held for the legislation? Senator Susan Ryan, in the Second Reading Speech, 6 June 1984, noted its timeliness when she said, “The need for legislation to enable direct, immediate action by the Commonwealth has been highlighted by such events as Noonkanbah and a number of situations that have arisen during the life of this Government.”

Like the campaign for the Referendum, the case for Federal Heritage legislation fell on fertile ground because, to quote the title of Faith Bandler’s 1983 book, “the time was ripe” and because the patchwork of laws at the state level was silent on a number of heritage issues. Thus, to have unifying legislation made sense.

What was the intent behind the legislation? In concluding her speech, Ryan stated:

“Mr. President, this will be beneficial legislation, as other legislation remedying social disadvantage has been …

As Mr. Justice Murphy recently observed as part of the High Court’s judgment in the Tasmanian dams case: “The history of the Aboriginal people of Australia since European settlement, is that they have been the subject of unprovoked aggression, conquest, pillage, rape, brutalisation, attempted genocide and systematic and unsystematic destruction of their culture.”

“This Bill is an exercise of a Commonwealth Constitutional power aimed at preserving what has survived that process. It falls within the kind of benefit which such laws properly confer.

But the benefit will not be confined to those local Aboriginals and Islanders whose areas and objects receive the direct protection of law. In a wider and very real sense, the benefit will be felt by the whole community. The preservation and protection of this ancient and significant culture from the destructive processes which have been operating at different rates across this country can only enrich the heritage of all Australians.”

The beneficial intent is explicit in this speech. The language of the legislation as enacted is more constrained:

The purposes of this Act are the preservation and protection from injury or desecration of areas and objects in Australia and in Australian waters, being areas and objects that are of particular significance to Aboriginals in accordance with Aboriginal tradition.

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[25] *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), s. 4.
The process by which areas and objects may be protected requires the Aboriginal applicant(s) to lodge an application. Section 9 concerns “Emergency declarations in relation to areas” and sets out the powers of the Minister:

(1) Where the Minister:
(a) receives an application made orally or in writing by or on behalf of an Aboriginal or a group of Aboriginals seeking the preservation or protection of a specified area from injury or desecration; and
(b) is satisfied:
(i) that the area is a significant Aboriginal area; and
(ii) that it is under serious and immediate threat of injury or desecration;
he or she may, by legislative instrument, make a declaration in relation to the area.[26]

Section 10 concerns “Other declarations in relation to areas”, repeats s. 9(1) a and b and adds:

(c) has received a report under subsection (4) in relation to the area from a person nominated by him or her and has considered the report and any representations attached to the report; and
(d) has considered such other matters as he or she thinks relevant.[27]

In terms of the role and responsibilities of a person appointed as a “Reporter”, s. 10(4) states:

For the purposes of paragraph (1) (c), a report in relation to an area shall deal with the following matters:

(a) the particular significance of the area to Aboriginals;
(b) the nature and extent of the threat of injury to, or desecration of, the area;
(c) the extent of the area that should be protected;
(d) the prohibitions and restrictions to be made with respect to the area;
(e) the effects the making of a declaration may have on the proprietary or pecuniary interests of persons other than the Aboriginal or Aboriginals referred to in paragraph (1) (a);
(f) the duration of any declaration;
(g) the extent to which the area is or may be protected by or under a law of a State or Territory, and the effectiveness of any remedies available under any such law;
(h) such other matters (if any) as are prescribed.[28]

In understanding why this legislation has not been widely used – of some one hundred applications only four have been granted and of those only one survives – it is helpful to bear in mind that the Aboriginal and Torres Strait Islander Heritage Protection Act is legislation of last resort. In other words, it comes into play when State or Territory laws do not provide adequate protection and when all other avenues have been exhausted. Of necessity, when an area is subject to an application for protection under this Federal legislation, the matter will have a history, and will more than likely have been the subject of significant disputation.

In her review of the legislation and the cases, Evatt pointed out the many shortcomings of the legislation; uncertainty and delays, lack of clear procedures being spelled out, lack of Aboriginal involvement – and she proposed a number of reforms.[29] Two troubled sets of applications brought under the Aboriginal and Torres Strait Islander Heritage Protection Act illustrate the unwieldy nature of the legislation. This section first sketches the history of Junction Waterhole (Niltye/Tnyere-Akerte) in the Northern Territory 1991–1992, the one declaration that still stands and, second, provides a more detailed account of the fortunes of Hindmarsh Island (Kumarangk) in South Australia 1994–1996. This latter declaration generated much legal activity and ultimately made explicit that the Aboriginal and Torres Strait Islander Heritage Protection Act was not to be interpreted as beneficial legislation.

[26] Ibid. s 9.
[27] Ibid. s 10.
[28] Ibid. s 10.
[29] Evatt, 12–18.
A. A dam at Junction Waterhole

A proposal to build a dam across the Todd River triggered a series of applications under the *Aboriginal and Torres Strait Islander Heritage Protection Act*. There had been a number of plans to dam the Todd River near Alice Springs over the years, but the dam proposal which had been given approval in 1989 by the Northern Territory Aboriginal Area Protection Authority had been represented as a temporary flood mitigation measure. The significance of the area where two major dreaming tracks – one concerning men, the other women – converge and intertwine had been recognised under NT legislation, and was the subject of a number of anthropological reports and representations from Aboriginal people and their organisations. When it became apparent the dam would mean the loss of a number of sacred red river gums and put others at risk, the Central Land Council, on behalf of the Arrernte, on 1 February 1991, sought a declaration under sections 9 and 10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act*.

One of the stated strengths of the legislation is that it has the capacity to bring a number of parties to the table and, indeed, negotiations facilitated by the *Aboriginal and Torres Strait Islander Heritage Protection Act* have been fruitful. In the case of the Todd River dam, negotiations continued after the February application but when the applicants learned in March that earthmoving work had begun, they alerted the Commonwealth. First the Commonwealth attempted to get the Northern Territory Government to halt work and then, on 16 March, made an emergency declaration under s. 9. This prevented work for thirty days. However, despite the work of two mediators, the matter remained unresolved.

A new application by the Northern Territory Government to its Aboriginal Area Protection Authority (NTAAPA) based on a redesign of the dam was refused. Nonetheless, the Northern Territory Minister authorised the work on 3 April 1992, thereby effectively overruling NTAAPA. Consultation continued. Further applications under the *Heritage Protection Act* ensued and on 8 April, the Hon. Hal Wootten was appointed as a “Reporter” according to s. 10(4). In his report of 30 April 1992, he wrote:

> The cultural gulf between European and Aboriginal attitudes to the acquisition and spreading of knowledge makes it difficult for Europeans to appreciate why Aborigines appear loath to discuss a site until a development proposal appears to be well under way. Aborigines, working under long inherited laws of protection through secrecy, prefer not to mention the existence of a sacred site, let alone its significance, until it is almost on the point of being destroyed. Europeans find this approach to be very frustrating and, because (sic) they do not understand it, claim that Aboriginal people find sites only after development proposals have been announced. From the Aboriginal point of view this appears to be a surprising attitude since Aborigines know that they must maintain secrecy until … the release of that knowledge is perceived, ultimately, to be the only way to protect an area.\[31]\n
On 15 May, 1992 the Minister for Aboriginal Affairs made a declaration under s. 10 of the *Heritage Protection Act* to halt construction of the proposed dam for 20 years. The Arrernte had successfully negotiated the requirements of the *Heritage Protection Act*. Their sites were protected from the proposed development, but the suspicion that sites appeared at the last moment lingered.

B. A bridge to Hindmarsh Island

This suspicion solidified with the Ngarrindjeri attempts to use the Federal Heritage legislation to protect sites in the Goolwa/Hindmarsh Island/Murray Mouth area of South Australia.

\[30\] Here I am following the account provided by Evatt, 304–306. I had been involved in the protection of sites in the Alice Springs area during 1981 when I worked for the Aboriginal Sacred Sites Protection Authority in Darwin. The complex of sites in the area was well known and documented back to the late 19th and early 20th century.

\[31\] The Hon J.H. Wootten, *Significant Aboriginal Sites in area of proposed Junction Waterhole dam, Alice Springs* Report to the Minister for Aboriginal Affairs under s. 10(4) of the Aboriginal and Torres Strait Islander Heritage Protection Act, 1984 (1992), 31.

Like the Junction Waterhole application in the Northern Territory, the Hindmarsh Island applications began with a development proposal, in this case a bridge to a little island nestled in the Murray Mouth. In both cases women's stories about their relationship to and responsibility for country were involved. The outcomes, however, were very different. The Arrernte clearly had traditions worth preserving. Ngarrindjeri traditions were contested in the courts, the parliament, the media and by anthropologists.\(^{[33]}\)

In 1977, Binnalong Pty. Ltd., owned by the Chapman family, bought land on Hindmarsh Island, or Kumarangk, as it is now known to many locals, Indigenous and non-Indigenous people. By 1993, the Chapmans had approval to construct a bridge to service development of a marina on the Island. It was claimed that the existing car ferry was too slow. Later that year in October, Ngarrindjeri applicants sought protection under the South Australian Aboriginal Heritage Act 1988 (SA) for registered sites in the area but, on 3 May, 1994, the State Minister authorised destruction of the sites and thus the Ngarrindjeri looked to the Federal Minister who issued a temporary emergency declaration on 12 May. Two weeks later University of Melbourne Law Professor, Cheryl Saunders, was appointed Reporter. The full process of a s. 10 declaration had begun.

The applicants explained the traditional story which underwrote their claim that the area was sacred and privileged to women. It could not be told to men. Saunders' report supported the women's claims.\(^{[34]}\) Attached to this report were three appendices, prepared by Dr. Deane Fergie.\(^{[35]}\) Two of the appendices were designated to be “Read by women only”; a restriction the Minister honoured. In placing a twenty-five year ban on the site on 10 July 1994, he relied on a female advisor that the contents of what became known as the “secret envelopes” were consistent with the assertions regarding the sacred nature of the site complex.

His decision to impose a ban was appealed to the Federal Court, which held that the Minister had erred and that justice required that he read all the documentation.\(^{[36]}\) The Minister appealed the decision,\(^{[37]}\) arguing that the Minister may not have read the “secret envelopes”, but Ian McLachlan, then Federal Minister for the Environment, and Member for Barker, a district that takes in Goolwa and Hindmarsh Island, revealed in the Parliament that his office had copied the documents. He brandished the envelopes in Parliament. By some postal error they had landed in his office. His behaviour was deeply offensive and hurtful for the women who had so reluctantly divulged their stories in the first place. Within a week the Minister was forced to resign, but the case grew murkier and cries of “hoax”, “fabrication” and “conspiracy” grew louder.

All was not well with the local community. Several Ngarrindjeri women made headlines with their claim not to know of the women’s story associated with the area and a Ngarrindjeri man suggested the story had been made up and that he had assisted in the fabrication. A number of interested parties asked if there had been a deliberate fabrication to thwart development. This question became the subject of a South Australian Royal Commission.\(^{[38]}\) Where were the historical, ethnographic, geographic records that would support the claim that this place was sacred? Why did only one woman know the story?

On 19 December 1995, the Royal Commission found deliberate fabrication.\(^{[39]}\) The Ngarrindjeri applicants had lied. Commissioner Iris Stevens did not hear from the women applicants who, with one exception, refused to testify in a forum that they took to be a violation of their religious freedoms. Thus, the finding that the women’s tradition was a fabrication was made on the basis of evidence from women who said they knew nothing of it.

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\(^{[34]}\) Cheryl Saunders, Report to the Minister for Aboriginal and Torres Strait Islander Affairs on the significant Aboriginal area in the vicinity of Goolwa and Hindmarsh (Kumarangk) Island (Adelaide: South Australian Government Printer, 1994).

\(^{[35]}\) Deane Fergie, To all the mothers that were, to all the mothers that are, to all the mothers that will be: An anthropological assessment of the threat of injury and desecration to Aboriginal tradition by the proposed Hindmarsh Island Bridge construction Report to the Aboriginal Legal Rights Movement Inc. in relation to s 10 of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (1994).


\(^{[39]}\) Ibid. See also Greg Mead, A Royal Omission (South Australia: The Author, 1995).
Ignorance had become a knowledge claim. That same month the appeal of the Minister against setting aside his ban on the bridge was quashed. At that moment there was nothing to stop the bridge being built.

On 19 December 1995, the Ngarrindjeri lodged another application and by January 1996, an all female team: a woman Minister; a woman judge as Reporter; a woman anthropologist (myself); and an instructing solicitor, began another s. 10 report. When the election of March 1996 brought the Howard Government to power, the rules changed. The reporter was still a woman, but the Minister was a man. More problems with respect to confidentiality hampered the women’s ability to tell their story. A Federal Court ruling in another case in Western Australia indicated that all parties must have access to all documents. Then a confidential appendix of mine was improperly circulated. The women withdrew their confidential materials from Jane Mathews, the Federal Court judge acting as Reporter to the Minister. In the view of the Ngarrindjeri applicants, Anglo courts could not protect their places or their stories. Then the developers appealed the propriety of the appointment of Justice Mathews as Reporter.

Despite all these legal technicalities, the women had placed an enormous amount of material before Justice Mathews and her report of June 1996 acknowledged that the site was significant. This contradicted the findings of the Royal Commission, but the media and Parliament did not take up the story and the Minister decided to sit on the report until the High Court ruled on the propriety of appointing a Federal Court judge to be the Reporter on a heritage application. In a six to one decision the High Court found that Mathew’s appointment breached the constitutional separation of powers of the executive and judiciary. It was as if the s. 10 process had not happened and the report did not exist.

Mathews had found that the area was significant but without the confidential parts that the women were withholding she was not prepared to say that the Minister had sufficient material to declare the area was sufficiently significant to attract protection from the Heritage Protection Act. Sounds complicated? How does an outsider determine the gravity of religious beliefs? By reference to the content of the story? By the sincerity with which it is held? By the authority of the Elders who know the stories? I would argue that without a nuanced understanding of religious beliefs and practices, the details reveal little of the importance accorded the beliefs by believers. Such are interesting matters for speculation but the report was tabled and there it lies. The bridge could be built.

C. The Hindmarsh Island Bridge Act 1997 (Cth)

The Ngarrindjeri applicants were prepared to lodge a further application for protection of their sites. The failure of previous applications had been caused by legal technicalities, by matters beyond their control. The passage of the Hindmarsh Island Bridge Act in May 1997 prevented further applications under the Aboriginal and Torres Strait Islander Heritage Protection Act. Described as “An Act to facilitate the construction of the Hindmarsh Island Bridge, and for related purposes”, s. 4 sets out the “Provisions facilitating construction etc. of the bridge”:

(1) The Heritage Protection Act does not authorise the making of a declaration in relation to the preservation or protection of an area or object from any of the following activities:
   (a) the construction of a bridge, and associated works (including approaches to the bridge), in the Hindmarsh Island bridge area;
   (b) work or other activities in that area preparatory to, or associated with, that construction;
   (c) maintenance on, or repairs to, the bridge and associated works;
   (d) use of the bridge and associated works;
   (e) the removal of materials from, or dumping of materials in, the pit area in connection with any of the activities mentioned in paragraphs (a), (b) and (c).

[40] Tickner v Chapman.
Reflections: 40 years on from the 1967 Referendum

(2) The *Heritage Protection Act* does not authorise the Minister to take any action after the commencement of this Act in relation to an application (whether made before or after the commencement of this Act) that relates (wholly or partly) to activity covered by paragraph (1)(a), (b), (c), (d) or (e).

The Ngarrindjeri returned to the High Court to challenge the constitutionality of the *Heritage Protection Act*. Counsel for Neville Gollan and Doreen Kartinyeri argued that the race power was limited: it was to be exercised for the benefit of Aborigines. The justices found otherwise. Garth Nettheim summarises their reasons this way:

Chief Justice Brennan and Justice McHugh made no decision as to whether s 51(xxvi) is subject to any such limitation. They treated the 1997 Act as an amendment of the 1984 Act which was, itself, supported by s 51(xxvi). On general constitutional principles they held that the power to make a law necessarily includes the power to repeal it or to amend it. Accordingly the 1997 Act was valid.

Justice Gaudron did consider the suggested limitation. She noted that the original intention was to authorise laws which would discriminate against people of particular “coloured” or “alien races”. But the power in s 51(xxvi) is not a bare power, and the words “for whom it is deemed necessary to make special laws” must be given some operation …

But her Honour went on to agree with the Chief Justice and McHugh J that, generally speaking, “a plenary power to legislate … carries with it the power to repeal or amend existing laws …” (para 48). The 1997 Act was valid as a partial repeal of the 1984 Act.

Justices Gummow and Hayne pointed out that there is no Constitutional requirement that a Commonwealth law may not distinguish “between the different needs or responsibilities of different people or different localities” (para 57). S 51(xxvi) does not limit legislation to laws which apply to all the people of a race. Generally, the power to enact a law includes the power to repeal or amend that law. They stressed that the 1997 Act “curtails the operation of another law of the Commonwealth, not the enjoyment of any substantive common law rights” (para 73). [46]

The sole dissenting voice was that of Justice Kirby who looked to the history of the passage of the Heritage Act, to the arguments made for the race power in 1967, and to developments in international law. He concluded at paragraph 170 that the race power “permits special laws for people on the ground of their race. But not so as adversely and detrimentally to discriminate against such people on that ground”. The legal impact of the contesting of women’s restricted knowledge in matters concerning a bridge to Hindmarsh Island reached well beyond the *Heritage Protection Act*. In May 1997, under the *Trades Practices Act 1974* (Cth), the developers sued all who were party to the 1994 s. 10 declaration: the reporting lawyer, the Minister for Aboriginal Affairs, the anthropologist and the unit of the University of Adelaide through which she was employed. That case lasted some eighteen months, during which all parties testified the Ngarrindjeri believers and non-believers, men and women, the Museum men, the historians, anthropologists, archaeologists, lawyers, bureaucrats, and a member of parliament. On 21 August 2001 the High Court delivered its decision. [47] The developers had not been deceived. There was no fabrication.

The women and all who had worked with them were vindicated, but it had taken seven years, the bridge had been built, women’s bodies had been damaged, the community deeply divided. No compensation was forthcoming for those who had been branded liars and fabricators. In fact few have bothered to read the 853 paragraphs of Justice Von Doussa’s judgment. It was far more comforting and far simpler to believe the women had lied and that the anthropologists who worked closely with them had been hoaxed, or at the very least had lost their objectivity by becoming embroiled in the contesting of ethnography, what I call “writing ethnography in the eye of a storm”.


IV. Hard cases make bad law

The struggle of the Ngarrindjeri applicants to protect their sacred places and stories and the legal twists and turns as the matter rocketed back and forth to the Federal and High Courts certainly illustrates the shortcomings of the Heritage Protection Act, but it also highlights what a blunt instrument the law can be when dealing with beliefs other than those of the dominant society. Had the applicants been from a “remote” community I do not think the cries of “hoax” would have been taken up so strenuously. Had the applicants been elderly men whose sacred stories concerned representations of their bodies in the land, I do not think the stories would have been treated with such contempt. But the Ngarrindjeri lived in houses, spoke good English and sent their children to school; they were not “different” enough to be discriminated against.

Unfortunately we cannot choose the cases that will make law. This was a hard one. It attracted little attention from senior Indigenous spokesmen around the country. They were focused on native title, a national issue, a big story. Kumurangk was a small story in South Australia but the fall-out cleared the way for the passage of amendments to the Native Title Act 1993 (Cth).

The hope of the Referendum that wrongs would be righted has not been realised. The politico-legal manoeuvres around heritage issues point to a different reality, a slow and steady erosion of the good will of the eligible voting population in 1967.
Australia’s Legal Response to Aboriginal Demands for a Treaty


By Donna Odegaard

The 1970s Larrakia Treaty Petitions marked a significant milestone for Larrakia struggles becoming a catalyst for the treaty debate in Australia. Respect and recognition as the Traditional Aboriginal Owners of Larrakia Country was paramount in establishing key principles for negotiating treaty rights and processes over Aboriginal lands and resources for social and economic justice.

In February 2006 HMAS Larrakia, Armidale Class Patrol Boat was commissioned in Darwin by the Royal Australian Navy. This event marked the most recent major milestone in the history of Larrakia struggles as the traditional owners of the region. The event moved Northern Territory Government Minister, Paul Henderson (Leader of Government Business), to make the following speech in parliament:

"It was a privilege to be there and see the pride in the Larrakia people who attended the commissioning of HMAS Larrakia ... I want to read into the Parliamentary Record the commissioning speech that Donna Odegaard gave to the assembled guests and Chief of Navy and to put it on the public record for the Larrakia people":

"Chief of Navy, Maritime Commander, guest of honour, distinguished guests.

It is a great honour, as a member of my community, Larrakia, to be present as guest of honour and Commissioning Lady for HMAS Larrakia.

I must firstly pay respect and give thanks to our Larrakia people, our ancestors and spirits of Larrakia country for allowing us to be here today for this important ceremony. I also pay tribute to the memory of my late father, a senior Larrakia man, Leo Odegaard, represented today by my mother, Edith LeFrancois.

Larrakia are the traditional Aboriginal owners of this country here in Darwin, and the surrounding regions and across our beautiful Darwin Harbour to Kenbi (Cox Peninsula), where I live with many of our Larrakia and Indigenous people present today. I am reminded of the importance of protocol and respect for Larrakia country, Larrakia culture and all Larrakia who are guided by it. Also, to remind everyone that we are connected both spiritually and physically to Larrakia country and have done so since time immemorial.

My late father often remarked — we are proud people — we stand up for our beliefs and values, we fight for our land, our people and, most importantly, keep culture alive for all our children and for the future.

I was taught that respect rises above everything and that integrity and the ability to negotiate fairly is most important for our survival. I am also mindful that Aboriginality and being Larrakia cannot be represented by one person alone. Rather, it is the collective of individual's association within our community and our responsibilities we have that it is important to consider, and that defines who we are as people."
It is not the colour of our skin, or the different levels of knowledge and understanding that measures one’s Larrakia-ness or Aboriginality — it is about inner spirituality and maintaining strong connection to our country, abiding by our laws, protecting cultural heritage and respecting kinship that is most important to our survival.

Larrakia are saltwater people who have fought for many decades for recognition, rights, and rights to our land and resources against insurmountable poverty, injustice and the effects of Stolen Generations of our people.

We are presently experiencing a new phase of growth as we are gradually achieving success at a number of levels. We are a formidable community in our own right through hard work and dedication of many Larrakia and non-Larrakia across the region. Today marks a quantum leap towards recognition of our people and our goals, and especially the enjoyment of being included at the highest level in the defence and protection of Australia.

Our motto on our ship is “United as One”. We see the commissioning of our ship as an occasion that represents a milestone in developing the relationship between HMAS Larrakia and the Larrakia community – the benefits of which will be lasting and time honoured. Through our association with Commander Tony Powell and the crew of HMAS Larrakia, we are looking forward to a long and enriched relationship.

In closing, I would like to say I am especially honoured to be here since I have dedicated my work and my life to the memory of my late father, Leo Odegaard, for the benefit of the Larrakia community”[1]

Introduction

In this chapter I focus on the trajectory of the treaty debate arising from the 1970s Larrakia Treaty Petitions and Australia’s legal response. The 1967 Referendum offered hope for Aboriginal people that they would finally have recognition and the protection of the Australian Constitution. By the 1970s Aboriginal people had not gained rights to exercise what the Referendum had promised and pushed for a treaty. Demands for a treaty and Australia’s legal response is the subject of my PhD work and an extension of my Masters work, Law and Aboriginal Land Claims in Australia: justice in black and white. This questioned the measure of “land justice” granted to Aboriginal Australians through land rights and native title processes. I attributed the failure of our claims against the State to “cultural bias in legal reasoning”; concluding that; whilst Aboriginal claims against the State reveal an alarming account of contact history, Indigenous disparity is ongoing despite some achievements in legal and political reform in Australia.[3]

I contend that it is only through our collective actions as a nation of diverse peoples from diverse cultures and backgrounds that genuine change will occur. I advocate for a treaty to act as an instrument of empowerment for Aboriginal autonomy rather than as a Bill of Rights, to embody and enforce for all time under the Australian Constitution, respect and recognition for the unique status of Aboriginal Australians and, greater distribution of resources for economic stability and social justice. Until this occurs, our position as First Australians will be diminished and we will remain disadvantaged peoples dependent on the goodwill of governments for our physical survival and our economic development.

The 1970s Larrakia Treaty Petitions

The Larrakia’s treaty petitions of the 1970s made a very public, bold attempt at declaring Aboriginal sovereignty over the Aboriginal lands of Australia by petitioning the Queen of England and the Australian McMahon Government.\(^4\) In 1972 the Northern Territory News reported that the Larrakia Treaty Petition had been sent to the Queen of England.\(^5\) It read in part:

“The British settlers took our land. No treaties were signed by the tribes. Today we are refugees. Refugees in the Country of our ancestors. We live in refugee camps without land … without justice. The British Crown signed treaties with the Maoris in New Zealand and the Indians in North America.

We appeal to the Queen to help us, the original people of Australia.

We need land rights and political representation now.

We invite all people of Aboriginal descent to join the tribe of their ancestors. These are the demands of the Gwalwa Daraniki, and we shall not stop until the treaties are signed.”\(^6\)

The Larrakia Treaty Petitions demanded common law recognition for Larrakia as the traditional owners of the Darwin region under international law principles of legal equality, common law protection of cultural heritage and, certain rights and entitlements of Indigenous peoples to land, resources and benefits as dispossessed, sovereign Indigenous peoples. The treaty petitions presented to the Australian Government and HRH Princess Margaret on her Australian visit to Darwin in 1974, highlighted two important issues; firstly, Indigenous disparity and secondly, legal and political resistance to the plight of Aboriginal Australians.\(^7\) The Larrakia people demanded treaties to counter Aboriginal dispossession, poverty, homelessness, unemployment and ill-health by establishing important principles for negotiating Aboriginal land, social and economic equality, freedom and Aboriginal rights. Aboriginal people demanded the right to be able to make their own decisions about their lives, customary laws, cultural practice and traditions, societies, economies and resources. Underpinning the treaties were protocols for recognition and respect as the traditional owners of the lands of Australia.

Importantly, the treaty petitions related the imposition of the British common law to the denial of the authority of Aboriginal peoples’ legal systems which, in effect refused to recognise the "sovereign equality of Indigenous peoples and the rights and interests that have survived colonialism".\(^8\)

The 1970s Larrakia Treaty Petitions spearheaded the treaty debate in Australia and marked a new era of State-Aboriginal relations across Australia. It prompted Australia’s then Prime Minister, William McMahon to immediately respond by refuting Aboriginal claims to sovereignty by virtue of the British invasion in 1788 declaring sovereign superiority and colonial ownership over the continent of Australia through the doctrine of “terra nullius”.\(^9\) His public statement constituted an outright rejection to any Aboriginal challenges to Crown sovereignty on the basis of legal and political superiority. The relationship between Indigenous peoples and the Australian legal system remains contentious and un-reconciled on this point.

Numerous legal challenges emerging from the Larrakia treaty petitions and demands against the state, sought Indigenous recognition, equity and protection of Indigenous cultural heritages under the common law. Considered in this context the Larrakia treaty petitions and Australia’s legal response gave carriage to further Indigenous demands, presenting new legal challenges and, explicating Australia’s legal responses to Indigenous demands.

\(^4\) Wright, J 1989.
\(^5\) Wright, J 1998.
\(^7\) Buchanan, C 1974.
\(^8\) Strelein, L 2000.
\(^9\) Citation?
The underlying theme of this chapter is to align the trajectory of Larrakia demands for treaties and Australia’s legal response against emerging developments in the relationship between Indigenous peoples and the state.

The foundation of legal assertions by Larrakia arise primarily from the strength of Larrakia spiritual and physical connection to identified traditional Larrakia lands of Darwin and the surrounding regions in the Northern Territory, which Larrakia have known to exist since time immemorial. Larrakia have consistently claimed ownership of Larrakia Country and have vigorously defended this knowledge both on Larrakia Country and over lengthy periods of time in Australian courts.

Within the framework of Australian law, the institutional structures and the history of unfavorable legal responses to Indigenous treaty demands emerge as inimical to Indigenous “self-determination and self-governance”. This attitude was firmly cemented in the 1970s with the Australian Government’s dismissive response to the Larrakia Treaty Petitions. Consequently, this influenced further Indigenous demands and claims for Aboriginal rights for the return of Aboriginal lands stolen from traditional Aboriginal owners at the time of British colonisation of Aboriginal lands.

However intense the legal and political resistance to Aboriginal demands, this only served to increase Larrakia determination in the fight for rights and land justice, eventually leading to Larrakia becoming the first Aboriginal claimants to lodge an application for land rights under the Aboriginal Land Rights Act (Northern Territory) 1976 following the Woodward Report.

From 1979 to December 2000 Larrakia evidence was challenged in Australian courts until (an Australian record twenty plus years later), claimant evidence in the Larrakia Kenbi (Cox Peninsula) Aboriginal Land Claim No 37 eventually resolved in favour of Larrakia Traditional Owners. This landmark case gave Larrakia eminent status in being the first Aboriginal land claimants under the Act, and the last. Despite the successful outcome of Kenbi, in 2007 the Northern Territory Government has not yet handed Larrakia lands back to Larrakia. This is indicative of the legal and political resistance shown by Australia towards Indigenous demands and demonstrates the absolute authority of Australian law to measure its response in relation to favorable outcomes for Aboriginal claimants.

Treaty principles

Indigenous peoples’ demands for treaties arise in the absence of recognition, equality and protection of Indigenous peoples under common law. I choose the site of Larrakia Treaty Petitions to explicate my standpoint based on experience as a claimant and witness in the Larrakia Kenbi Aboriginal Land claim, native title claims, as an active participant in the Larrakia community and commercial developments, and as a representative for the Larrakia community in many forums. The Larrakia experience contextualises the constraints of Australian law in accommodating Indigenous demands and despite recent Larrakia initiatives involving social and economic ventures, these provide temporary hope from disparity. The majority of Larrakia will not benefit from commercial ventures entered into on behalf of all Larrakia unless there is legal contract, such as a treaty, to enforce the terms and conditions in the discretionary distribution of Larrakia funds for Larrakia people, and upholds the Larrakia Treaty Principles to ensure all Larrakia benefit.

The principles embedded in the Larrakia Treaty Petitions established by a proud group of Larrakia provided a framework for a solid foundation in the adoption of Indigenous treaty-making in Australia. These principles were underpinned by the beliefs and cultural traditions and practices for individual Aboriginal groups and communities to apply.

In choosing to identify myself as Larrakia for the purpose of this paper, and as an Indigenous researcher, my intention is to provide unique insight into my Larrakia identity, and spiritual and physical connection to Larrakia Country and our community. This identifies Indigenous self-determination activities and self-governance strategies and activities that are, for the most part, in reaction to our demands and in consideration of what we have accepted as “allowable” for us to pursue under the common law. Moreover, I contend it is an opportunity to share the creative ways that Larrakia have utilised the common law to achieve a form of self-governance beyond the constraints of fixed legal debates in relation to common law status of Indigenous peoples’ and Indigenous demands or claims against the state.

The legal concept of self-determination has a context in international law where it is described as “the right of peoples to freely determine their social, cultural, economic and political status.”[16] Self-determination claims by Indigenous peoples, by virtue of their distinct identity, implicitly assert the true and rightful ownership of traditional lands dispossessed by the colonising state. Both the meaning of self-determination in international law and in the Indigenous context introduces questions of sovereignty and is considered unchallenged against the legitimacy of the state.

The theoretical and institutional limitations of Australian law has been problematic particularly in the case of Larrakia and other Indigenous groups claiming sovereign status and demands for treaties for excluding Indigenous peoples from legal status and protection of the law.[17] The realisation of the potential for Australian law to accommodate Indigenous claims have surfaced and have been tested many times in the courts since the first push in 1970s for the Larrakia Treaty Petitions.

The many issues influencing Aboriginal demands for a treaty and Australia’s legal response to Aboriginal demands is presented through a wide range of media. These include written commentary, literature, Aboriginal land claim reports, government reports, journal articles and chapters, newsletters, newspaper reviews, articles and publications, anthropological and ethnographic texts, court transcripts, photographs, voice recordings, film and video recordings and, researcher public appearances and official presentations and, Territory and National community and corporate Indigenous and non-Indigenous board memberships. Authors such as Behrendt, Dodson, Strelein, Nettheim and others provide contemporary illustrations of the overarching legal arguments of common law jurisdictions, Indigenous legal issues and the Australian treaty debate. However, others such as Pearson provide coalface accounts of community strategies that address dispossession, disparity, poverty and lifestyle illnesses and addictions, which may have greater potential to influence and formulate a contemporary treaty.[18] The Larrakia experience offers the same potential.

Tuihiwai Smith points out the difficulties and frustrations of Indigenous researchers working within specific Indigenous contexts, cultural frameworks and structures. These are sites of engagement that require considerable knowledge, sensitivity, skill, maturity and experience on the part of the Indigenous author/researcher to work through the issues in a complex and interconnected environment that necessitates constant consultation and negotiation of the issues.

Major shifts

The responsiveness of Australian law to Indigenous demands from the 1970s Larrakia Treaty Petitions effected major shifts in Aboriginal rights, Aboriginal land rights and native title to present strategies of the Larrakia that arguably manifest as a form of Indigenous self-governance that espouse notions of Indigenous autonomy.

The theoretical and legal context is set in a case study of the Larrakia language group of which I am a member with primary knowledge, experience and importantly, responsibility to adhere to Larrakia protocols.

[16] Citation?
The convergence of “political” and “cultural” approaches formulate legal arguments around the assertion of Larrakia identity as the basis for disqualification in common law arguments via demands for treaties and leading to sites of contention in land claims and native title claims.

The arguments raised provide a practical approach to current initiatives that arise from “past legal injustice” in an attempt to counter issues of common law recognition, equality and cultural protection via “Australia’s legal response to Aboriginal demands.”[20] I contend that the 1970s Larrakia Treaty Petitions established a benchmark of resistance against the Australian legal system. Further, that despite adversity to Indigenous assertions of legal inequality and cultural bias in legal reasoning, Indigenous people will not quieten on issues of maintaining traditional ownership and cultural and spiritual connection to ancestral lands, waters and resources.[21]

The context

The Larrakia experience refines and contextualises the pressures and impositions placed upon Indigenous Australians in pursuing their demands through the Australian legal system. Australian law establishes the criteria for what is legally “allowable”, forcing Aboriginal people to engage with the courts to prove their Aboriginal identity, connection to country, association with their community, extent of cultural knowledge and finally, to demonstrate their ability to maintain their cultural heritage for future generations. Once Indigenous demands are brought before the law, the law then has the privilege of responding within its legal capacity and ability to utilise its discretion to interpret the facts within the legal parameters of Australian law. For Aboriginal people this process is intrusive, for Australian law it is merely a legal process.

Larrakia encounters in the courts since the 1970s have led to the formation of the key organisations for Larrakia, the Larrakia Nation Aboriginal Corporation established in 1998, Radio Larrakia Association Incorporation established in 1998 and the Larrakia Development Corporation incorporated in 2002. Radio Larrakia is a stand-alone organisation whereas the Larrakia Nation and Larrakia Development Corporation are under the umbrella and control of the Northern Land Council and the single shareholder being the NLC CEO.

Each organisation has a governing board and operates for the benefit of the Larrakia community in various ways. The Larrakia Nation hosts a number of employment programs and activities. The Larrakia Development Corporation operates and manages commercial activities with Larrakia funds for investments, commercial development and employment opportunities for Larrakia. Radio Larrakia provides an independent multimedia “voice” for promoting Larrakia language and culture to the wider Darwin, Northern Territory, National and international listening audience, an Indigenous program including training and employment, business sector, media and the arts, a multicultural program and a host of activities and community services.

For Larrakia to succeed in any “self-determination” ventures, due diligence to cultural protocols, legal compliance and appropriate conduct must be incorporated into organisational management and operations. Before we get to this stage, however, we have to “prove” ourselves in court in order to be in a position of negotiating any business ventures, be they community or commercially based.[22]

To this extent, the important message for Aboriginal Australia to consider in the journey to realise any self-determination ventures is:

- To be recognised as Aboriginal Australians and access any respective entitlements and benefits, we must first be recognised under Australian law and acts of parliament including Aboriginal land rights and native title. This is made difficult and near impossible in some cases due to the cultural bias in legal reasoning and the rigidity of Australian laws to accept cultural identity as a legitimate basis for our claims.

- To access the entitlements and benefits accorded to Australian citizens, we must first be recognised under Australian law and live according to Australian laws and regulations. These laws and regulations run counter to Aboriginal laws, customs and beliefs, which further compound the many social problems facing Aboriginal Australians and limit access to entitlements and benefits.

• To secure a place in Australian society, we are now pressured to incorporate and commercialize to secure our economic and financial survival or be faced with living on the fringe of society without status as Indigenous peoples and as “beggars in our own land”.

Larrakia: strong people, strong culture

The Larrakia experience represents a significant step towards self-determination. Larrakia’s push for a treaty in the early 1970s created a significant moment in Australia’s history of legal response to Indigenous demands for a treaty, which continues through the ongoing treaty debate. Further, Larrakia went on to provide a perspective and an involvement at the site of the most significant legal decisions in the course of Australia’s legal history. The primary contributors are the Larrakia via Larrakia struggles and achievements. In accordance with Larrakia protocol I must reiterate that Larrakia people are the traditional Aboriginal owners of the area of Darwin city, the surrounding region and across the Darwin Harbour to Kenbi Cox Peninsula, where I live and where my ancestors have lived since time immemorial. Darwin is referred to as the capital of the Northern Territory of Australia. To Larrakia it is Larrakia Country.

Larrakia have always resisted European domination of Larrakia lands through collaboration with other Aboriginal groups involved in Aboriginal activism in the North. This led to the push in the 1970s for Larrakia treaty petitions and in particular spearheaded the treaty debate in Australia in an attempt to demand justice for dispossession and disadvantage. Following the momentum of the Larrakia Treaty Petitions in the mid 1970s, Larrakia launched the first and most significant land rights case in the history of Australia under the Aboriginal Land Rights Act (Northern Territory) 1979. This case was the Larrakia, Kenbi (Cox Peninsula) Aboriginal Land Rights Claim No 37.

This case is known more popularly as “Kenbi”. Kenbi was a landmark case in that it was the longest running Aboriginal land claim in Australia’s history. Kenbi was considered the most contentious act by an Australian Government for their attempt to thwart the land claim by increasing the town boundary of Darwin to cover the land claim area thereby rendering the claim null and void. Justice Olney concluded in his report on Kenbi that there were no Aboriginal owners of the land under claim. Justice Peter Grey was the fifth appointed judge following Olney and after over twenty years in the Land Commissioner’s Court in Darwin and on site on Larrakia Country, Larrakia again defended ownership of Larrakia lands and Larrakia cultural identity to eventually win the case.

As a Larrakia Traditional Aboriginal Owner for Larrakia Country and respected member of my community, I was given permission to speak for Country by my father, Leo Odegaard, a senior Larrakia man and Elder, and also my uncle Joseph Odegaard the most senior Larrakia Elder remaining in our family. I have experienced the trials of defending my Larrakia identity and my people, both in and outside the courts and, within my own community. I have been examined and cross-examined and I continue to defend Aboriginal causes beyond my community. I work hard at establishing Larrakia as a community of Aboriginal people in control of their cultural, social and economic destiny.

The significance of the Larrakia Treaty Petitions is fundamental for the recognition of the struggles of Larrakia and other Indigenous Australians. The Larrakia treaty petitions laid the foundation for Larrakia self-determination for the future in that they identified fundamental principles for negotiating demands made by Aboriginal people to counter dispossession, disparity and oppression, and social and economic disadvantage. The Petitions were strategically crafted to bring together the issues of Aboriginal peoples to the Australian Government and the Queen of England in an attempt to negotiate a better quality of life for Aboriginal Australians and recognition as the first peoples of Australia, for all time.

The main proponents of the Larrakia Treaty Petitions are significant contributors to the treaty debate and are recognised for their dedication to elevating the position of Aboriginal people in Australian society, inspiring the formation of the Aboriginal Treaty Committee and influencing attitudes and reform in laws and politics in relation to Indigenous Australians.

The most significant record of the turbulent 1970s when the Larrakia Treaty Petitions reached national political and public attention is well documented in the newsletters of Aboriginal issues called Bunji. The primary writer and publisher of Bunji was Bill Day, an ardent supporter of Larrakia and non-Larrakia displaced Aboriginal fringe dwellers in Darwin. Bunji has since become the watershed publication for Larrakia struggles and achievements and is highly valued by Larrakia and non-Larrakia alike.[26] Judith Wright’s “We Call For A Treaty” was also crucial, becoming a treatise on the treaty debate in Australia, providing valuable coverage of the Larrakia Treaty Petitions, Bill Day’s work with Larrakia, and the legal issues surrounding the push for a treaty and the practical application of a treaty. For these reasons, Bill Day and Judith Wright’s work, provide valuable information on the Larrakia Treaty Petitions, combined with the authors’ experience and cultural knowledge to arrive at important conclusions drawn into the continuing treaty debate in Australia.

A further significant aspect of the demand for a treaty is to validate the contribution of Indigenous knowledge required under examination and cross-examination in the courts and on site on Larrakia Country. This knowledge has been translated, interpreted and contextualised to create an industry built on the extrapolation of Indigenous knowledge and Indigenous knowledge systems for legal decisions, commercial developments and academic research. Wei acknowledges a number of Larrakia views on this point.[27]

Evidence given over a long period of time suggest that the preparedness of Larrakia to remain active against their dispossession and marginalisation on Larrakia Country was expressed in early ethnographic and anthropological recordings and, more recently through the Larrakia Treaty Petitions and later, in the Aboriginal Land Commissioner’s Courts and native title land claims.[28] The legal responses to Larrakia demands resulted in legal precedents and drastic measures to prevent Larrakia and other similar Aboriginal claims from succeeding in domestic and international jurisdictions.

In the land claim and native title courts Larrakia have consistently fought for the right to exist as Traditional Aboriginal owners under the *Aboriginal Land Rights Act (Northern Territory)* 1976 and as native title claimants under the *Native Title Act 1992*. Larrakia forced Australia’s legal response in land rights after 25 years and won *Kenbi* achieving an undefinable “measure of land justice”. In native title Larrakia negotiated for a parcel of land and certain compensation. However, in the process, Larrakia were forced to surrender culturally sensitive evidence and all native title rights over the claimed land. We failed our recent native title claim and subsequent appeal under the same ruling as the Yorta Yorta Native Title Claim.

The current status of Larrakia Aboriginal people is set against a history of dispossession, denial of rights and generational disadvantage, however, the questions remain: To what extent did the Larrakia Treaty Petitions contribute to Australia’s legal response to Larrakia demands for land justice and subsequent recognition of Larrakia Traditional Aboriginal Ownership and Larrakia native title? As Bill Day suggests, “Do Larrakia now order their lives through [Larrakia law and]”cultural persistence” or [in response to Australian law and the]”culture of resistance”?29

Both hypotheses ultimately go towards understanding the complex nature and tensions associated with a relationship based on Aboriginal demands for justice and Australia’s legal response to Aboriginal demands. I propose that this relationship necessarily changes according to political and social changes and is constantly defining and redefining itself through the sheer will and determination of Aboriginal people to control their own destinies.

**Aboriginality**

The issue of “Aboriginality” entwined with the unique Aboriginal connection to land, culture, kinship and Aboriginal laws underpins and is central to Aboriginal demands for justice, which then gives rise to legal interpretation and cultural resistance in the courts.[30] As legally contested issues in the courts, Aboriginality shifted from the courts’ domain to our communities, forcing divisions, fostering self-doubt within our Aboriginal families and communities and tainting our credibility and Aboriginal image across a dubious Australian society.

As Aboriginal Australians we maintain our Aboriginality in ways that we choose to individualise both personally and collectively. As a community we are entitled to determine this just as other individuals and societies are entitled to do so, throughout the world.

Theoretical approaches to Australia’s legal response to Aboriginal demands for land rights and a treaty are suggested in this paper by the literature that explicates “Indigenous legal issues” in the context of Larrakia/European contact history and Aboriginal identity in the context of the Larrakia Treaty Petitions. Aboriginal rights, land rights, native title, reconciliation and the recent treaty debate in Australia.[31]

Larrakia resistance to the contextualisation of Larrakia identity is identified in the aforementioned legal challenges, which now manifests as the “positioning” of Larrakia within the Darwin and wider community.[32] This shows Larrakia determination to maintain Larrakia cultural integrity through the development of a range of cultural, social and economic initiatives driven by Larrakia for the Larrakia community and wider Darwin community.[33]

The literature on Larrakia and non-Larrakia ethnographic and anthropological studies and the legal inquiry of the Kenbi Land Claim in the Darwin and surrounding region might contribute towards greater understanding of Australian Indigenous people who challenge the validity of Australia’s legal responses to Aboriginal demands for treaty justice. The fact that Aboriginal people refuse to give up in the face of cultural resistance and adversity is testimony to the steadfast resilience and fortitude of Aboriginal peoples’ cultural belief.

Larrakia have demonstrated time and time again cultural strength and connection to Larrakia Country having chartered a sometimes unknown, but never-the-less successful, course around and beyond the restrictive parameters of what has historically been “allowable” under Australian law. By taking this somewhat unconventional approach, Larrakia are achieving the unachievable and forging ahead in every way – culturally, socially and economically, despite criticism of our mode of organisation function and, more significantly, operating within the complexities of our individual community family groups and clans.

Larrakia continue the demands for justice through a range of activities and community programs under the governance of the peak Larrakia organisations and under the guidance of Larrakia cultural protocols, which are on public display throughout urban and rural Larrakia Country in Darwin and the surrounding region. Larrakia are now recognised as Traditional Owners for Larrakia Country and are regularly invited to open major events, public forums, conferences and celebrations with a traditional Larrakia “Welcome To Country”. We now negotiate joint ventures with government, industry, community groups and business in an unprecedented scale; however, the need for a treaty is as valid today as it was in the early 1970s.[34] Disparity still exists for our people.

The fundamental significance of telling the Larrakia experience is that it presents a departure from past discourses where there is an absence of Indigenous voice on Australia’s legal response to Indigenous demands. Rather, the case of Larrakia via the demands of the Larrakia Treaty Petitions to arrive at strategies and initiatives employed by Larrakia to achieve cultural stability and legal standing. This exemplar offers ways of protecting and preserving Indigenous cultural heritage and ensuring the survival of the Indigenous peoples of Australia.

Conclusion

Explicating the scope and complexities influencing Indigenous demands for a treaty, and the elemental limitations and the constraints imposed upon Australia’s legal response highlights important initiatives Aboriginal people are taking to counter the limitations of Australia’s legal responses. These provide departure points from disparity and acknowledge important self-determination milestones.

The 1970s Larrakia Treaty Petitions reflected other Aboriginal groups’ demands as dispossessed peoples’ for respect, recognition, rights to land and resources and social and economic stability and equity – protected under Australian law. This summarises Indigenous demands, Australian legal constraints and Indigenous achievements.

[34] Rowse, T 1993.
The success of applying Indigenous methodology and Indigenous ability in community and commercial developments is gradually gaining ground for Indigenous demands despite the constraints of Australian law.

It is evident that the capability of Larrakia and other Indigenous peoples’ to initiate, organise, incorporate and manage self-governance for greater control over their destiny through community cultural, social and business affairs is improving. However, it is a slow process. Since the push for a treaty in the 1970s by the Larrakia, subsequent significant legal actions fuelled by Aboriginal demands forced Australia’s legal responses to recognise that Aboriginal and Torres Strait Islander Australians’ have legal standing.

The question remains as to how far Australian legislators and Australian politicians will go to honor basic principles for negotiating a better deal for Aboriginal Australians such as those established by a ‘proud group of Blacks’ from Darwin for a treaty, and more recently, the rhetoric of reconciliation. A treaty enshrined in the Australian Constitution is our only hope for ensuring the survival of Aboriginal and Torres Strait Islander peoples’ future in respect of the past.

Altogether this is what the Larrakia Treaty Petitions demanded 35 years ago and what the Referendum sought to achieve 40 years ago.

References


Buchanan, C, 1974, We have bugger all: the Kialla story. Melbourne: Australian Union of Students.


Gwalwa Daraniki Association Inc, 1995, Our future at Kulaluk and Minmarama Park: facts about the threats to our social and economic development.

Northern Territory News (1972) Larrakia Treaty Petitions, front page article


Risk, B, 1999, Submission to the House of Representatives Standing Committee an Aboriginal and Torres Strait Islander Affairs for hearing of the review of the Aboriginal Land Rights (NT) Act 1976 by John Reeves QC. Darwin: Northern Territory.


In May 1967 a monumental event occurred in Australian legal and political history. For the first time Indigenous Australians were to be counted in population statistics and the Australian Government was given a clear mandate to implement policies to benefit Indigenous Australians. It is sad to think that this only happened 40 years ago and not earlier as a turning point in the treatment of Indigenous Australians. However, if you ask many of the Indigenous Australians today they may suggest the “revolution” was not that great. It did provide a driving force for a number of changes that deserve comment on this anniversary.

The events of 1967 acted as a significant impetus for the formation of the Aboriginal Legal Rights Movement in South Australia.

In the early 1970s, championed by Elliott Johnston QC, an Adelaide lawyer and eventually to become a Supreme Court Justice, Robyn Layton, (now Justice Robyn Layton of the Supreme Court) and many courageous Aboriginal people, the organisation became a reality.

The organisation evolved initially through concerns about the treatment of Aboriginals when facing criminal charges in the Magistrates Court. Syd Tilmouth became the first principal legal adviser and Tim Agius the first officer in an organisation that eventually became the Movement.

Over the last 35 years, the relevance of the organisation can be seen in the continued representation of Indigenous Australians by ALRM to the best of their ability and resources in all parts of South Australia, in criminal and in civil matters.

As an observer of the legal system, it is fair to say that Indigenous Australians have not always viewed the imposition of the white man's common law system with much relevance. It did not show a significant degree of flexibility when dealing with issues unique to Indigenous Australians. It has been a burden on them. Some of these barriers have been breached and the presence of ALRM has been a major factor as to why that has occurred.

ALRM should be proud of its history in representing their clients in civil and criminal issues. In criminal matters on a large scale from the beginning, in civil matters over the last two decades, and in particular native title matters, the presence of ALRM has been of great substance. Having seen lawyers from ALRM operate both in and out of court, it can only lead an objective observer to have great admiration and praise for the manner in which they represent their clients explaining the law to persons who are unfamiliar with it or to whom it is not all that relevant in their daily life. It means that officers of ALRM are often acting in their client's best interests without the client being fully appreciative of ALRM's efforts.

ALRM has now been through its youthful years and has matured into a vibrant organisation that can provide a voice on a number of issues, fight prejudice and blinkered vision, which still occurs within the community at large on a number of Indigenous issues.
It has been this firm's good fortune to observe and act with ALRM to assist in the ongoing struggle to
ensure that individual rights are not subsumed into the modern world, for both white and black alike, against a
background of economic rationalism and a culture of fear.

The continued existence of ALRM will ensure that there is a voice and mechanism for the advancement
of Indigenous rights in South Australia. The vision of the 1970s of proper legal assistance and advocacy for
Aboriginal people has been fulfilled to a large degree, but there is still a need for more trained Aboriginal
lawyers to ensure strong support in the legal system for the future.

We would look forward to observing and working with the organisation in many areas of legal work which
still confront them.

The year 1967 was a major step in its journey to “justice without prejudice for Aboriginal people” – the
Movement’s mission statement. However, the battle to ensure Aboriginal communities enjoy social and legal
conditions at a level not below the rest of Australia is an ongoing journey.

The 40th anniversary of the Referendum is a cause for celebration, but also a cause to contemplate the
work that still needs to be done.

It will be necessary to continue to agitate Governments, Federal, State and Territory to ensure Aboriginal
communities are able to access justice and social systems applicable to most Australians.

ALRM will provide a significant catalyst and agency for that work to occur because of the establishment
and maintenance of legal rights for all and great things can then happen, maybe even true reconciliation.

Creating an avenue for access to justice is what the ALRM has been doing for 35 years and it is to be hoped
that in time that avenue broadens into a highway for its clients and the broader Aboriginal community.
What lessons for the future?

By The Hon Jay Weatherill MP

It took several decades of campaigning, but for those who tirelessly strove for Aboriginal rights for many years, the outcome of the Referendum of 27 May 1967 was a significant achievement.

To appreciate the importance of the event it is necessary to look at how successive Australian and State Governments approached their responsibilities towards Aboriginal people before this major policy shift. As well as the role of governments, we need to consider what people did to bring about the changes they sought. What were the circumstances of Aboriginal people at that time that so motivated a diverse group of people over an extended period to campaign for change?

I think it fair to say that the outcome in 1967 can be attributed to a combination of events, notably the growing acknowledgement of the poor treatment of Aboriginal people, matched by developments in the international arena affecting human rights.

I believe the Referendum of 1967 was significant because it squarely placed the issue of Aboriginal disadvantage on the Australian Government’s policy agenda, as well as in the public consciousness. The Referendum asked Australians to consider amending the Federal Constitution in two respects as it related to Aboriginal people. First to delete lines from section 51 (xxvi) that prevented Federal Parliament from making special laws in respect of Aboriginal people and secondly to repeal section 127, which said in part “Aboriginal natives shall not be counted” in national censuses.

The political and public response to these amendments to the Constitution was notable. The proposed amendments received 90.77% support, the biggest majority ever to be afforded to a referendum question in Australia.

This was a clear expression by Australian voters for the need to act to recognise the rights of Aboriginal people. It was also, to a significant extent, recognition of the level of disadvantage suffered by this section of the community.

There are a number of myths about the meaning of the Referendum. But what is clear is that the Commonwealth Government was told it had to shoulder greater responsibility for Aboriginal people. The proper provision for Aboriginal Australians was now no longer just the province of individual states; it was now a Commonwealth matter.

But I do not mean to suggest it was just a Commonwealth matter – both the Commonwealth and the states share responsibility for outcomes for Aboriginal people.

Prior to the Referendum, South Australia had taken a number of decisions that are now part of the history in paving the way for a better future for Aboriginal people in this State.

As early as 1856, Aboriginal men in South Australia had the right to vote – the first in the country. Again in a national first, our State extended the same right to Aboriginal women in 1894. While for a period Aboriginal South Australians were disenfranchised by Commonwealth laws passed in 1901, South Australia had signalled its intent with respect to human rights.
In 1966 the then Attorney-General and Minister of Social Welfare and Aboriginal Affairs Don Dunstan introduced the **Aboriginal Lands Trust Act**. This legislation was the first of its kind in Australia and it presented Aboriginal people with the opportunity to be owners of a major asset (land). Now, the combined area under Aboriginal control in South Australia (not just ALT land) accounts for around 20% of the State’s land mass.

During the same year, the land rights legislation was complemented by the passing of the **Prohibition of Discrimination Act 1966 (SA)**, which prohibited refusal of admission to any public place, services, dismissal from employment or restriction of acquisition of land interests on the grounds of race. This was a significant piece of equal opportunity legislation and had considerable benefit for Aboriginal South Australians.

Following the Fraser Government’s introduction of the **Aboriginal Land Rights (Northern Territory) Act 1976** (Cth), SA moved to grant freehold title to traditional owners in the north of the State. This creation of freehold ownership did not require men and women to go through a laborious process of proving their traditional rights to the country, as was required under the NT legislation.

More recently, the South Australian Parliament was the first to formally apologise to Aboriginal people for the forced separation of children from their families. This apology came only two days after the Human Rights and Equal Opportunity Commission’s **Bringing Them Home** report was tabled in the Australian Parliament on 26 May, 1997.

These are achievements that speak to the character of the State and particularly to its responsiveness to issues affecting Aboriginal people. Our Government will look to maintain the tradition of being at the forefront of changes to improve and build the welfare of all South Australians.

But notwithstanding some successes, we cannot now say that we have fulfilled the promise of the 1967 Referendum. A small snapshot suggests the broader picture.

According to the 2001 Census, the mean gross household income per week for Aboriginal people aged over 18 was $384, compared to $590 for non-Aboriginal South Australians.

**Low levels of education and employment and poor housing all contribute to Aboriginal South Australians suffering from chronic illness (such as diabetes, kidney disease, heart and respiratory disease) at much higher levels than non-Aboriginal people. They also experience disability at much higher rates. The hospitalisation rate for diabetes for Aboriginal men between 1999 and 2004 was 4 to 5 times higher than the rate for non-Aboriginal men and 6 to 8 times higher for Aboriginal women.**

The cumulative effect is that in 2004 the median age at death for Aboriginal men was 49.5 years (77.6 for non-Aboriginal) while for Aboriginal women it was 53.5 years (83.3 for non-Aboriginal).

This is not a picture of success.

For me the greatest message of the 1967 Referendum is one of hope – that change can happen and will happen when all Australians – Aboriginal and non-Aboriginal – listen. They did listen in 1967 and gave their overwhelming support. But we probably have not listened enough since that time. And we have not achieved enough. It is to the questions of how we might listen better, how we might move forward, and how we might achieve more that I now wish to turn.

In my view, the fundamental stumbling block preventing significant improvement in the lives and futures of Aboriginal people has been the profound misunderstanding of the balancing act performed by Aboriginal people in order to engage with the broader community. Aboriginal people walk in two worlds. They are often faced with the dilemma of balancing their desire to maintain cultural links and fulfil family obligations, while simultaneously negotiating the expectations and culture of South Australian society. The values that rest within Aboriginal culture and the broader South Australian culture are different.

Success or failure for Aboriginal South Australians is often measured against factors such as being employed, owning a home or doing well at school. While these things are important for Aboriginal South Australians, success or failure is also assessed against the strength of their relationships with family, and meeting family and cultural obligations.
Acknowledging the difference in cultural values between Aboriginal South Australians and broader South Australian society and agreeing on our common values is fundamental in order for us to move forward. Openly acknowledging that Aboriginal community values often differ from non-Aboriginal values can be a very difficult task that many avoid for fear of inviting comparison on the basis of judging one culture to be superior to the other.

However, failure to do so, even with the best intentions, has resulted in serious setbacks. Glossing over cultural difference can create an environment where western culture becomes “normal” to the exclusion of Aboriginal culture. Fear of inviting comparison between cultures, or criticism of Aboriginal culture, can also lead to government failure to scrutinise Aboriginal organisations to the detriment of Aboriginal people who rely on services.

Any practical attempts to work towards a better future for Aboriginal people must be open about the existence of the two worlds, where they intersect and how we need to work in each of them. This is not to imply there are clear delineations or that they will be fixed permanently.

If Aboriginal people are to share in the prosperity of the South Australian economy they must be equipped to walk in that world. But they must be able to do so on their own terms. History shows attempts to force Aboriginal people to choose between the two worlds will fail.

Similarly, South Australia benefits from understanding Aboriginal culture – and Aboriginal people are keen to share it where there is interest.

White and black benefit from walking in two worlds

South Australia’s Strategic Plan originally released in March 2004 and then updated earlier this year, recognises this dichotomy. The updated Plan, which is the key driver of policy in the South Australian Government, has an increased number of Aboriginal-specific targets (from 2 to 9), including those that draw on the strength of Aboriginal South Australia. On the one hand there are targets such as “reduce the gap between Aboriginal and non-Aboriginal unemployment rates” (T1.22), which seek to address Aboriginal disadvantage, but on the other, there is, for example, a target to have “Aboriginal cultural studies included in all school curriculum by 2014” (T4.5) that recognises that understanding Aboriginal culture enriches the lives of all South Australians.

The Strategic Plan is based on the fundamental principle of collaborative effort. It seeks to harness the strengths and expertise of government, business and the community to effect positive change for all South Australians.

From an Aboriginal affairs perspective, perhaps the most successful example of the type of collaborative effort that our Government is seeking to encourage is the Indigenous Land Use Agreement (ILUA) process where South Australia leads the country. The bringing together of Aboriginal traditional interests in land with government, mining, pastoralist and other developers at one time would have been considered a recipe for division and unresolvable conflict.

However, the ILUA process in South Australia has openly acknowledged the different values and interests brought to the table and with government support has set about clearly defining how they engage with each other to the benefit of all. As the ILUA process has demonstrated, the task is difficult, but the government hopes that this document will initiate dialogue.

Without being open about the challenge and without dialogue little progress can be expected in any area of Aboriginal affairs. For instance, it must be recognised that it was generations of control of Aboriginal people’s lives by white governments and church missions that robbed Aboriginal people of their independence. As would be the case with any community in Australia, grief and trauma at the dispossession of land and children have further compounded this by creating deep sadness and despair. It is difficult to fully comprehend the corrosive effects of these policies on Aboriginal people and communities. These practices also understandably created deep distrust towards authorities.

Decades of deliberate policies to weaken Aboriginal culture have taken a toll on the ability of Aboriginal communities to maintain strong social norms. Past policies of paternalism, severe restrictions on movement and the experience of church missions forced many Aboriginal people to be dependent on white authorities. The sudden abandonment of missions, low levels of education and changes to the modern economy have meant some groups of Aboriginal people slipped easily from paternalistic dependency to welfare dependency.

The most recent phenomenon of welfare dependency in some parts of the Aboriginal community is the natural progression of such paternalistic policies. It neither justifies a return to paternalism, imposed solutions and fettered Aboriginal control, nor justifies withdrawal of the State from taking responsibility for Aboriginal citizens.

Like any other group in society, sustainable solutions to improve the lives of Aboriginal people require solutions to come from and be owned by Aboriginal people. This requires the development of strong leadership now and the identification and support of emerging Aboriginal leaders that reflect both the culture and demographics of Aboriginal communities.

The need to focus on Aboriginal self-reliance is shared by many Aboriginal South Australians. In a report to the Child Protection Policy and Planning Unit (South Australia) the views and ideas of Pitjantjatjara women living on the Anangu Pitjantjatjara lands were sought. Their overall view was that it is:

“…essential to stop treating Aborigines as dependent people, whose welfare is looked after by others who know better than they and give them back the opportunities for self-reliance, independence and self-respect that were so cruelly taken away and denied them for most of the last 200 years.”

(Wootton, 1990, pg41)

Never before has self-determination been so important.

Reasserting self-determination at the moment is challenging for government and the community. While all tiers of government have expressed their commitment to working with Aboriginal people to improve wellbeing, the mechanisms for collaboration are not well defined.

In the post-Aboriginal and Torres Strait Islander Commission (ATSIC) era, governments are working to find new ways of effectively engaging Aboriginal leadership. In South Australia, we have asked an interim South Australian Aboriginal Advisory Council for direction. This appointed group of Aboriginal leaders will provide recommendations to me in the very near future on how best the South Australian Government can work with Aboriginal people and communities.

Again, this work is necessarily mindful that there are two sides to the engagement coin. The Aboriginal Advisory Council is assisting Aboriginal people to work out how best to work with government, while at the same time assisting government to position itself to be able to work with the Aboriginal community. The objective for both is to provide a shared understanding of priorities and to agree on an approach to work towards achieving them.

While appreciating the difficulties and challenges we face in Aboriginal affairs, we must remember that despite the complex and multi-faceted nature of the issues Aboriginal people face, Aboriginal individuals and families have succeeded. Aboriginal culture and tradition have been maintained; connection to land, while greatly challenged, is still strong; the sense of community remains; and individuals have risen as successful role models for Aboriginal and non-Aboriginal people alike. We have also started to see improvements in Aboriginal wellbeing, such as increasing home ownership, reducing Aboriginal unemployment rates and increasing school retention rates.

One particularly unhelpful aspect of the debate in the past is that it has swung between State paternalism imposing solutions on Aboriginal people and State withdrawal commonly associated with a “rights” agenda. The path is not so conveniently simple.

While government must recognise it has non-delegable responsibilities to Aboriginal people as citizens and communities in critical areas, it must also acknowledge that it has limits in its ability to actively manage sustainable change. Some things are not its province.

For Aboriginal people to be able to engage with the broader community and economy on their own terms they must control their culture and identity. Only Aboriginal people can be the custodians of their own culture. There must be Aboriginal control over culture, heritage, leadership, language, community governance and land ownership.
Equally importantly, this acknowledgment by government of the limits of its authority must not be allowed to justify the gradual withdrawal of resources and support.

The Aboriginal community must also acknowledge that even in areas where it is agreed that decision-making is entirely the domain of Aboriginal people, decision-making needs to be accountable – more so when public funds are being expended. Circumstances determine the degree and nature of self-determination for any group of citizens – but none come without responsibilities and consequences for not meeting them. Scrutiny of process is not inimical to self-determination, but rather it strengthens it. Aboriginal people benefit from Aboriginal organisations and government being accountable to each other, the community and most importantly Aboriginal people themselves.

And the Aboriginal community must accept that some responsibilities of the State can never be abdicated in the name of self-determination. These responsibilities extend to critical areas where the State has a unique role. They include: child protection, policing, corrections, planning and funding basic physical infrastructure, numeracy and literacy, compulsory education, tertiary health care and emergency services.

The most important and promising areas for progress in South Australia is where government and the private sector walk together with Aboriginal people.

Partly because of South Australia’s early history of well intentioned and benign paternalistic policies, followed by our proud history of progressive rights legislation, this is the area that has been most under-developed in South Australia. South Australia has too few examples of government facilitation of Aboriginal wealth and business collaboration with Aboriginal enterprise. There are also too few examples of government and community support for Aboriginal people to re-establish social norms in a collaborative way. These are the areas which are the most under-developed and show the most promise.

We need to build community capacity and strengthen communities as a necessary precursor to creating wealth and establishing positive social norms. We need to nurture and develop Aboriginal leadership, in order that we can then work with that leadership to jointly make progress.

The ability of government to re-orient from service provider and regulator to facilitator and equal partner is a huge challenge. It has never been done before. It will require a fundamental rethink of government policy and practice in areas where partnership is identified as being necessary. It will challenge Ministers and public servants. It may also be threatening for those in the community and government who have benefited from being gatekeepers to government resources. But it is essential if we are to make a prosperous and hopeful future for the greater proportion of our Aboriginal people.

The distinctions outlined above between areas of government, Aboriginal and partnership action remain unacknowledged too often. Where these distinctions are drawn is rarely debated. It should be no surprise that they are blurred and often impossible to identify. The imperative to act has often bypassed the need to examine them. Those debates that do occur are too often hijacked for ideological purposes.

The time has come to openly, calmly and without blame begin this discussion on the basis of practical necessity.

I will soon release a policy position paper that outlines my Government’s vision for working with Aboriginal South Australians so that they are able to prosper from the opportunities this State has to offer. Among the key aspirations outlined is the need for an equal partnership between government and Aboriginal communities. As a government we want to establish an open and respectful dialogue with Aboriginal South Australians about what we must do to support self-determination as a practical means for ensuring sustainable Aboriginal communities.

We wish to recapture some of the hope and enthusiasm seen around the 1967 Referendum. There was a sense of a national responsibility to do something about the circumstances of Aboriginal people then, but this time we must forge a new partnership to meet the challenge we now face.
This is not a scholarly paper. It is a novelist’s paper – that is to say, it is opinion, impression, invention and speculation.

That the debates on global terrorism have infected how Australians view each other and how we feel about being a plural society seems to me unsurprising, but no less tragic for having been predictable. Forty years on from the 1967 Referendum we seem no closer to addressing our national weakness, despite the spirit of those times and the many hopeful collective moments since then. This weakness, expressed in deep, endemic, multilateral racism, has a long history, and is still very frequently evaded or denied in our self-perceptions as Australians.

I read through the Racial Discrimination Act recently. It is a compelling document, for all its unlovely architecture and its arid prose. It isn’t legislation that protects a way of life or regulates power and money. It is legislation that makes a bid for a better future in the relationships between people. The hopes and dreams it embodies are striking to me; as is the gulf between what it proposes as right and just, and what happens in the day-to-day rub of peoples’ lives in Australia. The Racial Discrimination Act is a work in progress that invokes our better selves and tries to counter with our better selves the strange mixture of blindness, silence and excuses that makes up Australians’ reactions to each other. To me, the Racial Discrimination Act is a precious instrument to help in charting a course towards maturity as a community.

I am also moved by what a huge difference this codified idealism makes to a country, and how different life can be in countries that have not had the chance or the will to so codify for their own future peace.

Yet in peaceful Australia we have a long way to go.

I received an email a while ago in which the writer said he didn’t believe that it is real racism that we see in Australia. Wouldn’t racism be more accurately described as tribalism, he suggested politely, and wouldn’t this just dissolve away as people got to know each other, much the same way as it had for wogs, balts etc, in fact all the outsiders who gradually assimilated and became insiders in our large Australian tribe? He didn’t mention Aboriginal Australians.

This argument is nothing new. People sometimes buttonhole me to say that we have seen it all before: when the Displaced People (DPs) arrived after World War 2; with the post-war European migrants; when the Vietnamese refugees arrived. Nothing bad came of vilifying them: no lasting damage done. They imply that it is somehow all OK this time around too, and that any who suffer too obviously at the hands of the broader Australian community are whingers, are failing to cope with the unique rite of passage we inflict on newcomers. It is not really racism. They too don’t mention Aboriginal Australians.

The idea that it is not real racism that we experience between our cultural groups is an attempt to let us off the criticism that sticks with a harsh word like racism. Attempts to ignore or deny Australian racism, or to suggest that it is minor, natural or transient, obscure a lot: the vulnerability of an employee and the power base of an employer, for example. The privileged position of the police. Most of all this denial removes all suggestion that our actions damage people.
Tribalism, or the many variants of this argument, is never used to encourage us to do more, or improve as a community. I am never buttonholed to hear that because intense vilification of a newly arrived group happened in the past and is happening again, and, conceivably could again in the future, we have a serious problem, something unreconciled and unresolved in our national psyche.

Importantly, I am never buttonholed to hear that all is OK for living Aboriginal Australians: that they have now an equal enjoyment of their basic human rights along with the rest of us, that they have been delivered somehow undamaged from generations of prejudice to a new dawn in Australia. If I am buttonholed at all on the subject of Aboriginal Australians, it is to hear that they alone are responsible for their suffering and quality of life, or to receive a white person’s solution to problems he or she has never encountered or even humbly explored.

I do know from my inbox at Australians Against Racism[1] that we in Australia are terribly touchy and thin-skinned on the subject of racism.

The Aboriginal Australians I know live in a different Australia from the one I live in. The glimpses I get of their Australia scare me. It is not that occasionally they experience discrimination, or occasionally they expect it. They expect it all the time, based on long, hard experience. I have discovered that almost every transaction I might have with officialdom or private individuals is often a different transaction for my friends, whether it be with health professionals, police, social workers, educators, retailers, government or law. Sometimes these transactions are positive. But even when a transaction involves positive discrimination, even an excessive helpfulness, it is still discrimination. It is still alien to me and to the way I am met in the Australia I live in. More often discrimination is an ever-present negative. I have sat with Aboriginal friends when they are having a garage sale so that the presence of a white face will encourage cars to stop and browse. I am talking now about what I know of urban dwelling Aboriginal people. Regional and remote communities at times experience much worse.

The most awful thing I have found is that many of the Aboriginal Australians I know live without a sense of day to day personal safety, without a sense that they have rights that will be protected if they need them to be, and without a sense that they will always be able to protect their children, in fact with the constant anxiety that they will be unable to protect their children. The burden of history is such that these Australians live day to day in an exile from peace and safety that is unimaginable to most Australians.

Much as I love Australia, revel in the few languages I have acquired, and am charmed by our unique busloads of people, I don't think there is anything comfortable about who we are and how we be it.

My son is six. He has grown up in a world in which many languages feature, and people from many places are important as friends and family. He comes from a mixed culture marriage, and is himself consciously thoughtful about diversity in languages, religion and customs. He is a German, Lebanese, English, Danish, Jewish Australian, if we fully articulate his ethnic and cultural mix. He has travelled a lot in his short life, both in remote parts of Australia and overseas. He possibly has more friends and relatives who were born elsewhere than born here. This has been his life, bound up unavoidably as it is with Roger’s and mine.

Yet it is strangely heartbreaking to watch your child finally enter the social world that makes up Australia. When he began school, he became intensely conscious of who is Aboriginal and who is not. I have listened as he tunes in with a prevailing Australian distinguishing of peoples from peoples. I am intrigued that this, even at age five, is the primary differentiation, especially given the diversity in his very multicultural school.

Almost as if mirroring Australian history, the next group he noticed and commented on were people he called Chinese. “Why are so many Chinese people in Australia?” he asked me. “Van is as Australian as you are,” I said curtly, upset that Van, Roger’s legal assistant, suddenly stands out to him as somehow differentiated.

Then my son came home and said, big eyed and serious, “The only real Australians are the white ones.”

He must have been a little uncertain about this idea, as until recently he has learned his Australian history from his lifelong best friend who is an Adnyamathanha, Fijian, Afghan Australian. Emori and Rafael had worked out that just a little bit before the olden days there were dinosaurs, and in the olden days everyone was Aboriginal, and that then some white people came, they were baddies and thieves who stole the land. Rafael had wished out loud a number of times that he too could be Aboriginal and so more like Emori.

[1] www.australiansagainstracism.org
When Rafael and Emori found two small pieces of wood nailed together they agreed that Jesus Christ threw down his cross into our back garden for them to dig up, make wishes on and be blessed.

None of these cosmologies or histories prompted me to find narratives that would correct them. There is a natural correction inbuilt into all the processes of growing up that will automatically dissolve these inventive myths. But racist myths are shared by adults and are less likely to have a natural correction.

My son’s third excursion into prejudice gave me an opportunity to tell him an interactive legend of how people came to be Australian. It is a story he already knows from experience, and can supplement with his own ideas and enthusiastic guesses. We included his ancestors, Emori’s ancestors and his refugee friends. And thankfully this differentiating has faded as cross-cultural friendships have cemented over the last year.

But I know that he will hear again and again the ideas he has been experimenting with. It will ultimately be up to him to work out what he thinks from the mismatch between the prevailing winds and his own experiences, and he will be one of the lucky ones to be torn this way and that.

This is a small vignette of Australia. We are multicultural, and this opens up possibilities for us that we would not otherwise have – the dynamic, abrasive potential that cultural misunderstanding, cultural learning and mutual discovery can bring. But this hopefulness about our potential doesn’t change the small heartbreak of realising that my son has to make his own way and make his own mind, and that the pressures to choose racial loyalty groups will increase as the experiences he has include conflict and violence. To be closed and inward looking, shut off from other cultures will be one of the choices, in some circles the dominant and most attractive choice, offered him as he grows, now, in Australia.

When I said to my son, Van is as Australian as you are; I was invoking an age-old act of making Australians. The assertion is familiar. I recently met a judge who told me how his mother defended him from being called a reffo. She, in her rich Jewish accent, used exactly those words. He is not a reffo; he is as Australian as you are. I am Australian because I say I am. This assertion of belonging exists in one form or another as a primary act in many refugees’ and migrants’ histories. It is a frail, white knuckled kind of belonging, but it is, interestingly, often remembered in migrants’ narratives. It is a richer, more meaningful narrative than the day of swearing an oath, because as narrative, it is born of conflict. The next step in acquiring acceptance seems to me to be clowning. Defusing and making ridiculous whatever threat one embodies to the mainstream Australian peoples. Interestingly, the racism with which migrants and refugees are met can be defused by clowning. The racism Aboriginal Australians experience is a different matter altogether.

In Australia we don’t yet use a language that includes us all. We have no way to speak naturally of a many in one. The word multicultural doesn’t manage. Multicultural is used to mean some of our cultures, not all of them. Ethnic means some of our ethnicities and not others. Further, each community and each age group has different specifications as to which cultural or racial groups are them, not us.

It is strange that the popular and bureaucratic use of the term multicultural does not include Aboriginal cultures – that is usually a separate entity, portfolio, art gallery, department. To me the fault line in our multiculturalism lies in the silence about Aboriginal cultures, the distinguishing of and the failure to value these cultures as an integral part of us. This is the primary failure. Aboriginal cultures are left to be part of the multicultural nation by … glaring silence.

I went through a list of Aboriginal languages recently on the Ethnologue website, a reputable resource.[2] Of the 231 languages listed, 39 were extinct, and I counted 167 listed as nearly extinct. The website is dated 2006, but its principle cited source is 1981, so the numbers can only be worse. Only eleven languages have more than 1000 fluent living speakers, and most of those under 2000.

Australian languages are plural. Rather than have a Prime Minister insist that the flag be raised in all schools, I’d like to hear one say that Australian languages should be taught in all schools, and I don’t mean primarily the languages that came originally from elsewhere. The last living Aboriginal languages should be part of our lives. We cling so defensively to English yet of all peoples, in a nation of more than 270 languages, Australians should be bi, tri, quadrilingual.

The official languages of New Zealand are English and Maori. What would it do for us for our official languages to be English, Pitjantjatjara, Warlpiri, Arrernte, Tiwi and more? I would argue that it would do a great deal. It would say we are a plural nation, we have always been a plural nation, and it would say it both to ourselves and to others. It would remove the coy and subtle exile so much of our ingrown speak about ourselves specifies.

The list of Aboriginal languages was a striking and painful map of loss. I counted 27 languages that had, from the most recent source only one living speaker. This may be the only time you ever even read their names. Bandijigali, Barrow Point, Dirari, Djangun, Djawi, Djiwarli, Erre, Gugadj, Guwamu, Kuku-Mangk, Lamu-Lamu, Mandandanyi, Mangerr, Margany, Margu, Muluridyi, Muruwari, Ngawun, Ngurnbur, Nyangga, Nuinnyul, Wadjigu, Wamin, Wanggamala, Wulna, Yawarawarga, Yindjilandji.

Imagine that your child is to be the only person alive to speak your mother tongue. That is the end of a culture. The death of more than community. The death of all dreams of a better future. These final deaths are happening all around us all over our land without even a whisper from most of us. Most of us don't even know.

I went to Port Augusta recently. Port Augusta is just 300 kilometres from Adelaide, and is a large regional centre at the foot of the Flinders Ranges. It is a desert town at the head of Gulf St Vincent. It is quite beautiful, with many trees, blue water, a stark sky and orange earth. Gillian Bovoro and I have been working together to establish an Adnyamathanha language program[3] in Adelaide, and we were up there for an Elders’ meeting. She wanted to take me to some of the places of her childhood and show me things that upset her too. I want to tell you what Gillian showed me.

Port Augusta Council has recently imposed a city wide dry zone to control the symptoms of alcohol abuse. Port Augusta drinking now must take place inside, out of sight, and with it, all violence and anti-social behaviour associated with alcohol abuse now takes place behind walls and doors. Port Augusta's controversial curfew for youth is before Parliament. Port Augusta would like to force the children who roam the streets into the houses where the adults now drink. Both signs of social disintegration and despair would then be out of sight – silenced.

Port Augusta with SA government assistance has also built a residential compound for transient, visiting and homeless Aboriginal people to provide, they say, safe accommodation for the influx of visitors who come from the APY lands to Pt Augusta every summer. Gillian took me just out of the main part of town along a road that passes by a white salt lake and hills to the left. Here you come to a long, cyclone security fence eight feet high and topped with barbed wire. Behind it there are rows of numbered low domed canvas tents on earth, and on the other side tiny dongas that fit two single beds side by side. The sign says this is Lakeview Accommodation Centre, supported by Davenport Community, SA Housing and others. Ceduna has such a camp, although community owned and run, and Coober Pedy is contemplating one. Community consultation was part of the design of this one, but Port Augusta Council's Aboriginal Advisory Committee resigned en masse over the way it is fenced. Among some Aboriginal people, this place is called, with terrible irony, Blackster. It is the other side of town from Baxter Detention Centre, and, although less money is spent here, the echoes are stark, and when I thought about it, almost all generated by the fence.

This is where people, Australian citizens, from the northern lands who holiday in Port Augusta have to stay. They pay for it out of their Centrelink benefit at $30 a week. Two things shock me about this place: the prison-like fence and the question of people's choices. The fence is a clear-cut offence, but the choices less so – even some local Aboriginal people think the housing appropriate for some who live, ordinarily, with less.

People come down from the APY lands for services that are unavailable to them there, to visit relatives, and simply for summer by the seaside. Port Augusta's Mayor Joy Baluch says they come only to drink.[4] But Gillian's first thought is – what if I came to town with nothing? Would the fact that I ordinarily live in a house, would my lifestyle count at all, or are we all the same to them? Would I be forced to live with my kids here?

[3] Adnyamathanha Ngawarla Yarramalka, hosted at Tauondi College, for more information www.adnyamathanha.com
Lakeview wasn’t made simply by looking away, by neglect and by abandonment. It is neat, funded, built to control a group of Australians by another group of Australians really as pre-emptive crime prevention. It was made deliberately and our politicians are proud of it. But nothing can hide the fact that the place was built to deal with a problem not to serve individual people.

Lakeview has been a success, according to Marie Williams of the Port Augusta Council’s Community Harmony Centre. She artlessly cites the massive decrease in numbers of people coming down from the APY lands for this summer. [5]

Up the road from Lakeview is Davenport, an all-Aboriginal suburb of Port Augusta. Gillian says this was a nice place when she was a kid: poor, but with a real community spirit. The now fenced and boarded up community centre housed many good times. The houses in Davenport are generally modest housing trust style buildings. Some are well maintained, some not. Gillian tells me of recent riots and we see burnt out cars. We come to the police station, a meshed kiosk with a carport. It is the size of a pie cart. It is unoccupied. The funding here has been pulled from almost everything, it seems. Apparently it is very recent: Mal Brough’s office out of the blue disbanded the Davenport council last year, bringing a multitude of services and community based decision-making grinding to a halt. The Pika Wiya health service is operational. And the Aboriginal old folks home, Wami Kata.

Children and adults on one front porch wave. If they are the occupants of that house, then there are at least 15 people living there. There are many children in Davenport. There is no school, no shop. There are small groups of kids looking for something entertaining to do.

As you leave Davenport, you see the sign that tells you Port Augusta ahead of you is a dry zone. Davenport, of all places, is not. Whatever the reasons for this, it packs a symbolic punch: it suggests that all the social ills and violence that have been the reason for the controversial dry zone don’t matter in Davenport, don’t matter where whites don’t live.

No matter the good intentions that have been involved in building Lakeview, and stripping Davenport of infrastructure, the overall effect is dismaying. Many things on that long back alley of Port Augusta spoke unwittingly of segregation and of a kind of collective punishment, of silencing and control.

Places like Lakeview have both a real and symbolic effect. Lakeview says symbolically that Aboriginal people collectively are a problem. Many Aboriginal people like Gillian feel an obscure anger when they look at it, even when they know in detail what serious social problems and homelessness prompted it.

We have a long way to go before Aboriginal cultures are part of our sense of self, our sense of being, as a nation, a many in one. We have a long way to go before each of us takes personally what is proposed as solutions in places like Port Augusta. Until we travel that way, we will have trouble being what we are – multicultural.

I have reached the conclusion, through my life, writing, travels and significant friendships, that any criticism born of ignorance, mistrust or hatred is not only ineffectual and a complete waste of time, it is harmful and elicits equally pointless and damaging responses.

Loving criticism usually comes from within, not from the outside, because even if criticism from the outside is free of hatred or mistrust, it will often be ignorant. This principle holds for personal relationships as much as for human communities. For the big picture, human communities, think of it this way. Reform of the Catholic Church can only come from criticism expressed by people informed and influential in that church. Similarly, reform of Islam will only come from influential clerics and Muslim theologians and thinkers. It is a given that change in Aboriginal communities must come from the pressure of loving criticism, not paternalism or prejudgment.

I hope people are able to take this personally. Unless you love Aboriginal cultures, and have real experience and knowledge, what can you say that will not sound foolish or, worse, bigoted, to someone who knows and appreciates more than you do? You are not likely to be in a position to have something worth saying, believe it or not, unless you spend years immersing yourself in gaining knowledge, experience and understanding, and then only if your agenda isn’t hostile. This is what I call public imagination: the ability to know that the person you are meeting is a mystery, and that their faith, or community, or cultural group are mysterious to you, just as yours is to them. This means recognising oneself as foreign to the known of any other person’s life.

Recognising that everyone has a complex familiar world. Public imagination is the ability to look at someone and know immediately that he or she is loved, and that death or injury matters not just to the self, but in a web of human relationships – each person is enmeshed, like you and like those you love, and has the same intrinsic, mysterious worth that you have, or that your son or daughter has to you. Public imagination does not require the usually impossible step of really imagining oneself in someone else’s shoes. You imagine, merely, that he is someone’s son, she is someone’s daughter, and you all have the wherewithal to know what this means. Strangers whose lives we cannot know nonetheless earn our respect and our regard. It is not hard.

I would advocate far more than tolerance between Australia’s many peoples. I would like to advocate a true pleasure in each other, a basic affection for, and willingness to gain knowledge of, each other’s cultures, a desire to learn each other’s languages, especially Aboriginal languages; and, in the absence of capacity for any of that, an acknowledgment of ignorance.

Our invisible, silent prejudices have made damned experts of us all.

In this new century, we are fast losing the willingness to be plural that we once had. We are a long way from the spirit behind the 90.7 Yes vote of 1967. But to keep on this path we will lose much more. We need reconciliation now more than we ever have. It would be the beginning of being fully, and comfortably, what we are: an ancient multicultural nation.

A longer version of this paper was given as the Dymphna Clark Memorial Lecture, at Manning Clark House, Canberra, 31 March, 2007.
Reflections on Criminal Justice Policy since the Royal Commission into Aboriginal Deaths in Custody

by Chris Cunneen

Introduction

The Royal Commission into Aboriginal Deaths in Custody (RCADIC) was established in 1987 and reported to the Federal Parliament in 1991. It was generated by the activism of Aboriginal organisations, including the Committee to Defend Black Rights and Aboriginal Legal Services, and by the efforts of the families of those who had died in custody and their supporters. The Royal Commission provided a benchmark in the examination of Indigenous relations with the criminal justice system.

The Commission found that the high number of Aboriginal deaths in custody was directly relative to the over-representation of Aboriginal people in custody. However, failure by custodial authorities to exercise a proper duty of care was also exposed by the Royal Commission. The Commission found that there was little understanding of the duty of care owed by custodial authorities, that there were many system defects in relation to exercising care, and that there were many failures to exercise proper care. In some cases, the failure to offer proper care directly contributed to, or caused, the death in custody.

Commissioner Wootten in his report on New South Wales, Victoria and Tasmania noted that “every one of the [18] deaths was potentially avoidable and in a more enlightened and efficient system … might not have occurred. Many of those who died should not or need not have been in custody at all.”[1] He found that “… negligence, lack of care, and/or breach of instructions on the part of custodial authorities was found to have played an important role in the circumstances leading to 13 of the 18 deaths investigated”.[2]

The Commission found that the most significant contributing factor to bringing Indigenous people into contact with the criminal justice system was their disadvantaged and unequal position within the wider society. The elimination of Indigenous disadvantage would only be achieved through empowerment, self-determination and reconciliation. The Royal Commission also found that in the 99 deaths in custody investigated, the Aboriginality of the person played a significant and in some cases dominant role in the reason for the person being in and ultimately dying in custody. In almost half of the cases the person who had been in custody or who had died had been removed from their family as a child, and a similar proportion had been arrested for a criminal offence before they were 15 years old. In over 80% of cases the person was unemployed. In general, those who died had early and repeated contact with the criminal justice system.[3]

The Royal Commission made 339 recommendations aimed at reducing custody levels, remedying social disadvantage and assuring self-determination. All Australian governments committed themselves to implementing the majority of the recommendations. The Royal Commission also made specific recommendations designed to reduce the occurrence of deaths in custody including the removal of hanging points from cells; increasing the awareness by custodial and medical staff of issues concerning the proper treatment of both Indigenous and non-Indigenous prisoners; and a greater commitment to cross-cultural training for police, the judiciary and other criminal justice staff.

Contemporary Indigenous deaths in custody

There is certainly strong evidence to suggest that the results intended by the Royal Commission have not followed. Despite the Royal Commission, Indigenous people remain dramatically over-represented in the criminal justice system. Deaths in custody still occur at unacceptably high levels and the recommendations of the Royal Commission are often ignored. Rather than a reform of the criminal justice system we have seen the development of more punitive approaches to law and order giving rise to expanding reliance on penal sanctions. Coupled with this has been an inability effectively to generate a greater sense of obligation and responsibility among custodial authorities towards those who are incarcerated.

In the mid 1990s a report prepared by the Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner (1996) examined 96 Indigenous deaths in custody during the period 1989-1996 and found that on average there were between eight and nine Royal Commission recommendations breached with each death. The findings of the report are particularly troubling in relation to health issues. In examining deaths in police custody, the report found a lack of proper assessment procedures and little involvement of medical personnel, including Aboriginal Health Services. In deaths in prison, the report found that health services in some prisons were well below community standards, that “at risk” information and medical information was not being exchanged between appropriate personnel, and that knowledge by medical staff and prison officers of cross-cultural health issues was poor.[4]

Of the 54 deaths in custody in 2005, some 28% involved Indigenous detainees. Half of the Indigenous deaths occurred in police custody. Non-Indigenous deaths were more likely to occur while in prison.[5] The Indigenous rate of deaths in prison is slightly lower than the non-Indigenous rate (1.2 compared to 1.4 per thousand). The greater likelihood of Indigenous deaths occurring in police custody compared to non-Indigenous deaths reflects a consistent difference in location of Indigenous deaths in custody which has been noted since the Royal Commission into Aboriginal Deaths in Custody.[6]

An analysis of Indigenous deaths in custody since 2000 shows that many systemic defects in custodial situations which allow for deaths to occur relatively easily have not been remedied since the release of the RCADIC Report.[7] More generally the deaths illustrate the systemic disadvantage of Indigenous people that increases their contact with criminal justice agencies. The deaths show that negligence and lack of care are still endemic despite the accepted legal view that authorities have a duty of care for those in their custody. Indeed, when an individual loses their liberty there is a heightened responsibility on the State to exercise a duty of care and prevent harm. Yet we see basic failings: hanging points remain commonplace in prisons, medical assessments and other vital information are not communicated or do not impact on decision-making, there is a lack of training in how to respond to vulnerable persons such as the mentally ill, and there is a failure to follow instructions or procedure. The death of Aboriginal and Torres Strait Islander people in custody is still as much an issue today as it was two decades ago.

Indigenous young people and juvenile justice

Information on young people held in police custody shows extensive intervention by juvenile justice agencies into the lives of Indigenous youth. The last National Police Custody Survey in 2002 showed that 40% of young people in police custody were Indigenous. The rate of custody per 100,000 of Indigenous young people was 1,129 compared to a rate of 73.6 for non-Indigenous youth. The over-representation factor was 15.3.\[8\] In other words, Indigenous young people are 15 times more likely to be found in police custody than non-Indigenous.

Another way to view the extent to which Aboriginal youth are caught up in the juvenile justice system is through their level of over-representation in juvenile institutions (see Table 1).

Table 1: Indigenous Young People Aged 10–17 years in Detention Centres in Australia as at 30 June 2005

<table>
<thead>
<tr>
<th>State</th>
<th>Indigenous No</th>
<th>Non-Indigenous No</th>
<th>Indigenous Rate[A]</th>
<th>Non-Indigenous Rate[A]</th>
<th>OR[B]</th>
</tr>
</thead>
<tbody>
<tr>
<td>NSW</td>
<td>112</td>
<td>105</td>
<td>364.6</td>
<td>15.1</td>
<td>24.1</td>
</tr>
<tr>
<td>VIC</td>
<td>20</td>
<td>43</td>
<td>303.8</td>
<td>8.1</td>
<td>37.4</td>
</tr>
<tr>
<td>QLD</td>
<td>54</td>
<td>44</td>
<td>188.1</td>
<td>10.4</td>
<td>18.1</td>
</tr>
<tr>
<td>WA</td>
<td>79</td>
<td>27</td>
<td>555.3</td>
<td>12.6</td>
<td>44.1</td>
</tr>
<tr>
<td>SA</td>
<td>26</td>
<td>33</td>
<td>470.6</td>
<td>21.1</td>
<td>22.3</td>
</tr>
<tr>
<td>TAS</td>
<td>8</td>
<td>27</td>
<td>205.9</td>
<td>52.7</td>
<td>3.9</td>
</tr>
<tr>
<td>NT</td>
<td>15</td>
<td>2</td>
<td>136.6</td>
<td>13.8</td>
<td>9.9</td>
</tr>
<tr>
<td>ACT</td>
<td>3</td>
<td>7</td>
<td>352.9</td>
<td>20.4</td>
<td>17.3</td>
</tr>
<tr>
<td>Australia</td>
<td>317</td>
<td>288</td>
<td>312.3</td>
<td>13.6</td>
<td>23.0</td>
</tr>
</tbody>
</table>

[A] Rate per 100,000 of the respective juvenile populations
[B] Over-representation measured by comparing rates per 100,000.


On 30 June 2005 there were 605 young people aged 10 to 17 in detention in Australia, of these 52.4 per cent (317) were Indigenous youth. Table 1 shows that the majority of young people incarcerated in New South Wales, Northern Territory, Western Australia and Queensland are Indigenous. New South Wales has the greatest number of Indigenous young people in detention centres (112); the highest rate of Indigenous youth incarceration is in Western Australia (555.3 per 100,000).

In every jurisdiction in Australia the rate of incarceration for Indigenous youth is much higher than the non-Indigenous. The level of over-representation is greatest in Western Australia where an Indigenous young person is 44 times more likely to be in a detention centre than a non-Indigenous. Nationally, Indigenous young people are 23 times more likely to be incarcerated than non-Indigenous. In fact, the problem of over-representation of Indigenous young people in the juvenile justice system has actually worsened over the last decade.\[9\]

Some of the key criminal justice issues in relation to this over-representation of Indigenous young people include adverse policing, adverse use of discretion and the development of new “street cleaning” legislation. There has been a growing tendency to provide police with powers to remove children from public places under certain circumstances, and to hold parents “responsible” for the actions of their children.

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An example of this type of legislation is the **Children (Protection and Parental Responsibility) Act 1997 (NSW)**, analysis of which shows a disproportionate impact on Indigenous youth.\[10\] The “Northbridge Curfew” in Perth is another example of differential policing that negatively affects Indigenous youth. The Western Australian Law Reform Commission found that,

“… while ostensibly the Northbridge curfew applies to all children, statistics show that the majority of children dealt with pursuant to the curfew are Aboriginal. For example, 88 per cent of children dealt with by police in 2004 were Aboriginal.”\[11\]

The problem of differential policing of Indigenous young people can also be seen in the way search and move-on powers have been used. The **Crimes Legislation Amendment (Police and Public Safety) Act 1998 (NSW)**, for instance, provides police with the power to search for prohibited implements (knives, scissors, etc.). Such powers for juveniles are used more frequently in Aboriginal communities.\[12\]

Adverse use of police discretion also negatively impacts on the likelihood of Indigenous young people having the advantage of diversionary options as a substitute to an appearance in court. While most Australian jurisdictions have alternatives which include police cautioning and youth justice conferencing, the evidence repeatedly shows that Indigenous young people are less likely to receive the benefit of these options than a non-Indigenous young offender.\[13\] As a result they end up in court and subsequently with a criminal record.

**Policing and minor offences**

Many of the recommendations from the RCADIC dealt with diversion from police custody, which is not surprising given that two-thirds of all the deaths investigated occurred in police custody rather than in prison. Furthermore, most Aboriginal people at the time of the Royal Commission were in police custody for minor offences, usually public drunkenness and street offences.\[14\] The focus of the RCADIC recommendations in this regard was to decriminalise public drunkenness, provide sobering-up shelters, change practice and procedures relating to arrest and bail (particularly for minor offences) and to provide alternatives to the use of police custody.\[15\]

Despite the decriminalisation of public drunkenness in most jurisdictions, many Indigenous people still come into contact with the criminal justice system because of the public consumption of alcohol. These problems are related to the use of protective detention, the use of local council by-laws prohibiting alcohol consumption and other restrictions such as the Northern Territory’s law prohibiting alcohol consumption within two-kilometres of licensed premises, and penalties associated with breaches of Queensland’s alcohol management plans. Some alcohol restrictions, though, only apply to Indigenous people or Indigenous communities.\[16\]

Public order offences and police powers to intervene in public places remain among the most contentious issues in the application of the criminal law and policing of Indigenous people. Minor offences are still cause for police intervention in relation to Indigenous people. A recent report from the Law Reform Commission of Western Australia noted that:

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\[15\] Specifically, Recommendations 60–61, 79–91, and 214–233 call for changes to police practice and legislation to enhance diversion from police custody: Johnston, vol. 5.

“... there are numerous accounts to suggest that move-on notices are being issued to Aboriginal people in inappropriate circumstances and that this law is disproportionately affecting Aboriginal people. It appears that in some cases Aboriginal people are being targeted by the police for congregating in large groups in public areas even though no one is doing anything wrong ...

The Commission is very concerned about the apparent discriminatory treatment of Aboriginal people with respect to move-on notices ... because a move-on notice can be issued when a police officer reasonably suspects that the person is likely to commit an offence there is a large scope for misuse of police discretion.”[17]

Offensive language and offensive behaviour are offences under state and territory law in Australia. The RCADIC recommended that the use of offensive language in circumstances of interventions initiated by police should not normally be occasion for arrest and charge (Recommendation 86). Yet, a review of the implementation of this recommendation found that:

“... throughout Australia, Aboriginal people are being arrested, placed in police custody and, in some cases, imprisoned on the basis of behaviour that the police find offensive and which has been precipitated by police actions.”[18]

In New South Wales the maximum penalty for offensive conduct is three months imprisonment and for offensive language a fine of $660. Aboriginal people are significantly over-represented in prosecutions for these types of offences. Research by the New South Wales Aboriginal Justice Advisory Council found that in 1998 some twenty per cent of all prosecutions for these offences involved Aboriginal people, and 14.3 per cent of all Aboriginal people appearing in New South Wales Local Courts had at least one charge of offensive language or offensive conduct. In one out of four cases where an Aboriginal person was charged with offensive language or offensive conduct, they were also charged with offences against the police such as resist arrest or assault police.[19]

Some magistrates have questioned whether the use of the word “fuck” in public constituted offensive language given its ubiquitous nature in social discourse. For example, New South Wales Magistrate Heilpern dismissed offensive language charges against an Aboriginal woman in Police v Butler[20] and against an eighteen year old Aboriginal man in Police v Dunn.[21]

The criminal process: the use of arrest for minor offences

The RCADIC recommended that arrest should be used as a last resort when deciding to commence criminal proceedings (Recommendation 87). The use of arrest as a last resort was one of the keys to achieving a reduction in the over-representation of Indigenous people in police custody. The problem for Indigenous people is that police tend to use arrest for minor offences, and to use it more frequently in their apprehension of Indigenous people than they do with non-Indigenous people. A recent report on the Queensland Aboriginal and Torres Strait Islander Justice Agreement found that fifty-two per cent of Indigenous interventions involved the use of arrest compared to 36.5 per cent of non-Indigenous interventions. Conversely, more than half of non-Indigenous interventions were commenced by way of a “notice to appear” summons.[22]

[17] Law Reform Commission of Western Australia, 209.
[18] C. Cunneen and D. McDonald, Keeping Aboriginal and Torres Strait Islander People Out of Custody (Canberra: Aboriginal and Torres Strait Islander Commission, 1997), 8.
[22] Cunneen, Evaluation of the Queensland Aboriginal and Torres Strait Islander Justice Agreement, 43.
In a matter involving charges against an Aboriginal man for resisting arrest, assaulting police and intimidating police, Magistrate Heilpern ruled that evidence from police should be excluded because it had been obtained as a result of an improper act. The improper act in this case was the arrest of Lance Carr for offensive language in circumstances where the use of a summons or a court attendance notice would have been more appropriate. The Director of Public Prosecutions appealed the matter to the New South Wales Supreme Court, where the appeal was dismissed. Justice Smart noted that:

“… this Court has been emphasising for many years that it is inappropriate for powers of arrest to be used for minor offences where the defendant’s name and address are known, there is no risk of him departing and there is no reason to believe that a summons will not be effective. Arrest is an additional punishment involving deprivation of freedom and frequently ignominy and fear. The consequences of the employment of the power of arrest unnecessarily and inappropriately and instead of issuing a summons are often anger… and an escalation of the situation leading to the person resisting arrest and assaulting the police.”[23]

However, it appears that in most cases the use of arrest rather than summons for prosecutions of minor offences goes unchallenged. One result of the use of arrest in these types of cases is that bail is imposed, which leads to an assortment of further problems and potential criminalisation.

**Imprisonment**

There is little cause for optimism when analysing the figures for Indigenous adult imprisonment. As shown in Figure 1, Indigenous imprisonment rates have grown steadily over recent years.

<table>
<thead>
<tr>
<th>Year</th>
<th>Indigenous Adult Imprisonment rate per 100,000 adult population, as at 30 June 1996 to 2006</th>
</tr>
</thead>
<tbody>
<tr>
<td>1996</td>
<td></td>
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<td></td>
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<tr>
<td>2006</td>
<td></td>
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</tbody>
</table>


Figure 2 shows current comparative data on Indigenous imprisonment. Western Australia has the highest rate of Indigenous imprisonment in Australia at 2,688 per 100,000 of the population. The non-Indigenous imprisonment rate in that State is 145 per 100,000. Thus, Indigenous people are 18 times more likely than non-Indigenous people to be imprisoned in Western Australia. The over-representation rate of imprisonment for Indigenous people in Australia is 12.9.

There are many reasons for this over-representation. This section draws attention to two factors. The first is the failure to provide an adequate level of service for Indigenous people, particularly in the provision of non-custodial sentencing options. The second is the failure to properly recognise and resource Indigenous criminal justice interventions.

The lack of programs and services for Indigenous people

It has been widely noted that Indigenous people lack the same access as non-Indigenous people to the programs and services offered by the criminal justice system to both offenders and victims. These include the absence of or highly restricted availability of:

- Non-custodial sentencing options;
- Services for Aboriginal victims, particularly of family violence and sexual abuse;
- Interpreter services;
- Offender programs for sex offenders and violent offenders;
- Programs and counselling for substance abuse; and
- Programs for young offenders.

[24] See, for example, Cunneen, Evaluation of the Queensland Aboriginal and Torres Strait Islander Justice Agreement; D. Mahoney, Inquiry into the Management of Offenders in Custody and in the Community (Perth: Department of Premier and Cabinet, 2005); N. Morgan and J. Motteram, Aboriginal People and Justice Services: Plans, Programs and Delivery, Background Paper 7 (Perth: Law Reform Commission of Western Australia, 2004); Law Reform Commission of Western Australia, 209.
The Mahoney Inquiry into Offenders in Custody and in the Community in Western Australia found that there was a serious deficiency in Aboriginal-specific programs to reduce offending behaviour, and that the lack of appropriate programs for Indigenous offenders may partly explain higher recidivism rates. Lack of appropriate services means fewer opportunities for rehabilitation and more re-offending.[25]

Similarly a review of the Aboriginal and Torres Strait Islander Justice Agreement in Queensland found that Indigenous offenders are less represented in community corrections than they are in the prison population. One reason for this is the widely acknowledged difficulty of providing effective supervision for community corrections in remote communities. There was widespread concern among Aboriginal and Torres Strait Islander legal services and magistrates about the lack of sentencing alternatives in remote areas.[26] In New South Wales a recent parliamentary report also found that many sentencing options were not available in rural areas. In particular, supervised bonds, community service orders, periodic detention and home detention were not available in many parts of the state.[27]

The growth in Indigenous justice interventions

One of the most significant positive developments in the post-RCADIC period has been the flourishing of Indigenous justice interventions. They facilitate the development of Indigenous self-determination in the criminal justice arena, and provide the opportunity to open a space in which Aboriginal law can function. The primary limitation at present is that these mechanisms operate, by and large, within the broader parameters of non-Indigenous state law, often with inadequate support and recognition.

The development of Aboriginal justice programs is perhaps better understood as the facilitation and development of “Aboriginal justice institutions”. This emphasises the important governance aspect of self-determination, and stresses that modern Indigenous justice institutions are a process through which Aboriginal communities are empowered to apply their own laws and legal processes within a negotiated relationship to state legal institutions.

The New South Wales Aboriginal Justice Advisory Council noted that:

“... in recent years there have been a number of examples where local Indigenous communities have been allowed to have a direct decision making role in local justice administration and where justice processes have been adapted to incorporate local Indigenous views and needs.

These examples show that a greater flexibility in justice administration can allow for Aboriginal customary law to be recognised and provide a role for a local Aboriginal community and its culture to play. Further what we do know is that where this has been done, and local Indigenous communities have had a direct role in justice administration, where procedures and punishments are designed and delivered according to local culture and need, that the greatest impact on rates of offending/re-offending are achieved.”[28]

A similar argument has been made in relation to the potentially transformative process of Aboriginal courts:

“The task remains to ensure that the momentum of the Aboriginal courts transforms the relationships that exist between Indigenous and non-Indigenous Australians both in the criminal justice system and also in the broader context of society itself. Failure to do so will perpetuate the cycle of over-representation of Aboriginal offenders in the nation’s gaols and will certainly spell the end of any dreams of reconciliation.”[29]

[25] Law Reform Commission of Western Australia, 85.
[26] See Cunneen, Evaluation of the Queensland Aboriginal and Torres Strait Islander Justice Agreement.
Paul Chantrill has noted in relation to Aboriginal community justice groups in Queensland that “the achievement in these communities centres on increasing emphasis on community development strategies designed to improve opportunities for young people, the re-establishment of community authority and discipline based on the authority of community elders as well as efforts to improve the community’s relationship with external justice agencies.”

A wide range of Aboriginal justice institutions exist and can play an integral and practical role in providing a bridge between self-determination, governance and Aboriginal law on the one side and the non-Indigenous legal system on the other.

Aboriginal courts

Over the last few years, Aboriginal courts (Koori Courts, Murri Courts and Nunga Courts) have been established for both adult and juvenile offenders in Victoria, Queensland and South Australia. The courts involve an Aboriginal Elder or justice officer sitting on the bench with a magistrate. The Elder can provide advice to the magistrate on the offender to be sentenced and about cultural and community issues. Sentences include customary punishments or community service orders as an alternative to prison. Aboriginal Courts may sit on a specific day designated to sentence Aboriginal offenders who have pled guilty to an offence. The Court setting allows for the offender to have a relative sitting at the bar table along with the counsel. To assist with sentencing options, the magistrate may ask questions of the offender and, if present, of the victim and members of the family and community.

Circle sentencing

Canada introduced circle sentencing, or circle courts in early 1992. Circle courts are based on traditional Indigenous forms of dispute resolution and have been adopted by a number of more traditionally oriented First Nations peoples in Canada. They have subsequently been adopted in Canadian urban settings and are also now used in the United States and Australia. Pilot circle sentencing began in Nowra, New South Wales, in February 2002 and the program has subsequently been expanded to other areas such as Dubbo and Brewarrina. In its evaluation of the Nowra pilot program, the NSW Aboriginal Justice Advisory Council and the NSW Judicial Commission found that circle sentencing:

- Helps break the cycle of recidivism;
- Introduces more relevant and meaningful sentencing options for Aboriginal offenders;
- Reduces the barriers that currently exist between the courts and Aboriginal people with the help of respected community members;
- Leads to improvements in the level of support for Aboriginal offenders;
- Incorporates support for victims and promotes healing and reconciliation; and
- Increases the confidence and generally promotes the empowerment of Aboriginal persons in the community.

Community justice groups

Different types of Aboriginal Justice Groups have been established in several jurisdictions. Perhaps the most successful and certainly best evaluated have been the Aboriginal Justice Groups in Queensland. Evaluations of these groups indicate that they can:

- Achieve a reduction in juvenile offending and school truanting;
- Achieve a reduction in family and community disputes and violence;
- Increase the more effective use of police and judicial discretion;

Reflections: 40 years on from the 1967 Referendum

- Increase community self-esteem and empowerment;
- Provide better support for offender reintegration; and
- Generate cost-savings for criminal justice agencies.\[33\]

Aboriginal Community Justice Groups and community justice forums have now been established in New South Wales. These justice groups work with police to issue cautions, establish diversionary options, support offenders, assist in access to bail, provide assistance to courts, and develop crime prevention plans.

Night patrols

One of the longest running community-controlled initiatives in Indigenous communities has been the "night patrol". They are also one of the few types of initiatives that have been systematically, and positively, evaluated, showing that they can achieve:

- A reduction in juvenile crime rates on the nights the patrol operates, including for offences such as malicious damage, motor vehicle theft and street offences;
- Enhancement of perceptions of safety;
- Minimisation of harm associated with drug and alcohol misuse;
- Encouragement of Aboriginal leadership, community management and self-determination; and
- Encouragement of partnerships and cultural understanding between Indigenous and non-Indigenous communities.

Recently, Blagg and Valuri identified over one hundred self-policing initiatives operating in Aboriginal communities throughout Australia.\[34\] They suggest that underpinning these initiatives is "a commitment to working through consensus and intervening in a culturally appropriate way to divert Indigenous people from a diversity of potential hazards and conflicts".\[35\]

Taken together there exists at least in skeletal form the institutional processes for Indigenous justice which operates alongside the Anglo-Australian system. The task now is to open the space for these initiatives to flourish into what Fitzgerald referred to in the Cape York Justice Study as "pods of justice":

"There needs to be institutional space or spaces created for the accommodation of Aboriginal law within the broader Australia legal system. There must be institutional design for the administration of a local order by Aboriginal communities. There must be “pods of justice” distinct in form and function, autonomous but contributing to a federal whole. Authority must be devolved to Aboriginal communities so that they may first determine the law and order issues of their own."\[36\]

Conclusion

The RCADIC provided an important opportunity for changing the way the Australian criminal justice system deals with Aboriginal people and for changing Aboriginal people's position in a postcolonial society. This does not mean that the Royal Commission is beyond criticism, or that every recommendation it made should be uncritically implemented.\[37\] However, it does provide the starting point for any reasonable analysis of responding to Aboriginal deaths in custody, and reducing Aboriginal over-representation in custody.

\[33\] See Chantrill.


The long list of shocking cases provided a public understanding of the processes of racism in the criminal justice system and Australian society more generally. The stories of the deaths in custody were the incontrovertible stories of institutional racism, of human tragedy and monumental inhumanity. Some cases showed profound callousness, others simple indifference. The current tragedy is that so many of the circumstances leading to deaths in custody identified by the RCADIC are still routine occurrences.

At the broadest level, the political conditions of the late 1990s and the new century have not been conducive to effective reform of the Australian criminal justice system. There is little doubt that we have moved into a more punitive period in relation to criminal justice responses, and whatever impetus there was to reform in the early 1990s has largely evaporated. We see, rather, a drift into “law and order” responses manifested in a range of areas including increased police powers, “zero tolerance” laws that increase the use of arrest for minor offences, greater levels of bail refusal, and longer periods of imprisonment for a range of offences. Notwithstanding these failings of the criminal justice system generally, there has been a renaissance in Indigenous justice institutions specifically. Such institutions provide the potential for significant change in the criminal justice system, and an opportunity for greater recognition of the aspirations of Indigenous people.
Reflecting on Aboriginal health services and the history of the Aboriginal Health Council of SA

Mary Buckskin, Ngara Keeler and Kathleen Stacey

This article about the history of the Aboriginal Health Council is centred on an open and honest interview with Mary Buckskin, CEO of the Aboriginal Health Council of SA and is reflective of her life and the life of AHCSA. The italics text indicates Mary’s personal narrative.

“I have been working in Aboriginal health for over 20 years and will focus on the establishment of Aboriginal Health Services. However, rather than talk about health from an academic perspective I would like to talk about this from my own personal perspective and experience.

We all know that in 2007 Aboriginal health is still poor and the health statistics support this. Two key benchmarks used are infant mortality rates and life expectancy.” This is echoed by Professor Mick Dodson in the Human Rights and Equal Opportunity Commission’s Social Justice Report, 2005. Dodson said:

“The statistics of infant and perinatal mortality are our babies and children who die in our arms … The statistics of shortened life expectancy are our mothers and fathers, uncles, aunties and elders who live diminished lives and die before their gifts of knowledge and experience are passed on. We die silently under these statistics.”

I thought that as part of this article I would put a real face to the statistics that Professor Dodson talks about. I will tell you about my family and in particular my mother, May Karpany, and the hope that my children and grandchildren will be able to start telling a different story.

My Mum was born at the small Aboriginal mission of Point Pearce in 1936 and is the eighth child of 11 children. Her mother died when she was eight years old. Mum married at 17 years of age and had one daughter named Laura. Unfortunately, Laura died when she was about six months old. My Mum’s first husband, Matthew, died at age 19 before Laura was born. She was fortunate to have a second chance at love and married my father, Donald, when she was about 19 and had eight more children.

I was born in 1958 in Dimboola Hospital in Victoria, the eldest of my parent’s eight children but the second of my mother’s nine children. My siblings and I never knew our older sister but she has always had a presence in our lives. My parents told me that I was the first Aboriginal child born at the Dimboola Hospital.

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[1] Mary Buckskin is currently the Chief Executive Officer of AHCSA. Ngara Keeler is the Workforce Development Officer, and Kathleen Stacey runs beyond … (Kathleen Stacey and Associates) and is invited to work with AHCSA from time to time. The italics text indicates Mary’s personal narrative as she reflects on her life and the life of AHCSA.

This was very unusual at the time, because in those days Aboriginal people had to travel to the bigger country hospitals for treatment, as many of the smaller hospitals would not treat us. Due mainly to the intervention of my father’s white friends in Dimboola my mother gave birth to me in Dimboola. After my birth we moved back to South Australia where all my siblings were born.

Although I remember a happy childhood and my father always managed to find work, tragedy struck again in 1980 when my brother Reggie died at age 17. He was followed in 1993 by my brother Donny at age 35. My father died in 2001 at age 66 and my brother Kevin died in 2004 at age 42.

Mum also looked after her father when he became ill until he died at age 81. Of her siblings she has one older sister still alive. Mum has experienced a lot of pain and heartache over her lifetime and is only 70 years old. She has outlived two husbands and four of her children. My mother’s story is not an isolated case. I know from her that many of her relatives have similar stories to tell.

Although my mother has experienced so many losses throughout her life she has always had a great capacity to enjoy life. Her approach has been to face what happens head on, have your cry and then get on with life. She is a woman of great strength, courage, love and resilience. I am sure that if we could find a way of spreading whatever it is that makes her the person she is, then the lives of our future generations really will be better.

However, a life filled with so much pain and loss has to have a significant impact on the individual, their families and their communities. As we reflect on the past 40 years we must remember this and recognise that we still have a long way to go to ensure that Aboriginal people enjoy the same opportunities as non-Aboriginal Australians.

This next chapter describes how the Aboriginal Health Council of SA (AHCSA), as it is now known, came into being and became the significant organisation it is today. We identify important historical markers and then bring them alive through personal reflections. In the near future we hope to gather more personal reflections on the growth of AHCSA from people involved along its journey for a resource for AHCSA and Aboriginal communities across the State.

Starting with “the now”

AHCSA’s leadership in being the “health voice” for Aboriginal peoples across the State is now recognised, as is its monitoring and accountability role as a “watchdog”. This involves monitoring the consultation and decision-making processes, policy positions, funding commitments, and progress in achieving positive outcomes in Aboriginal health, of State and Federal Governments, other funding bodies and mainstream services. These priority roles serve AHCSA’s vision “that all Aboriginal people enjoy a high quality of health and wellbeing”.

In the “Our Choice, Our Health, Our Way: AHCSA Policy Framework” that was endorsed in 2006, AHCSA stated:

“AHCSA exists to redress the long-standing and ongoing inequity in access to mainstream health services and health and wellbeing status between Aboriginal and non-Aboriginal people. Equally, it honours and builds upon the resistance, tenacity and creativity of Aboriginal and Torres Strait Islander peoples in developing and maintaining culturally relevant and accountable primary health care services for their communities”[3]

It is a statement that is as relevant to AHCSA’s early days as it is to the current times. AHCSA has experienced a long and bumpy journey since it was established in 1981, known then as the Aboriginal Health Organisation.

Becoming established

An Aboriginal community controlled health service (ACCHS) is a primary health care service initiated by local Aboriginal communities to deliver holistic and culturally appropriate care to people within their communities. Aboriginal communities around Australia have been establishing ACCHS’s since the early 1970s in response to a range of barriers inhibiting Aboriginal access to mainstream primary health care services and, as an expression of self-determination.

In 1981 The Aboriginal Health Organisation was incorporated under the **South Australian Health Commission (SAHC) Act** as an incorporated Health Unit with a 10 member Aboriginal Board to advise the Minister for Health, direct the provision of state-wide Aboriginal health services and establish a Health Worker Training Program.

Following the 1967 Referendum, the Commonwealth had responsibility for Aboriginal Affairs, which meant that the Commonwealth gave money to the states to employ Aboriginal workers. At that time the AHO was a service delivery organisation that employed Aboriginal health workers, community health nurses and doctors around the State. When I first started in 1983 at the AHO we had one medical officer based in Adelaide. He was more of a medical advisor, rather than a practicing doctor, and provided advice to the health workers and nurses working in the field. The health workers and nurses provided a range of health care to clients. Most of the clinical work at the time was being done in the APY Lands and remote communities, and that’s where the majority of the nurses were employed.

**Figure 1:** Shows the location of health services, Health Workers and liaison services
At the same time in 1983 Nganampa Health Council had just been established, although it had been in operation for the six months leading up to their formal breakaway as an independent community controlled Aboriginal health service. AHO then officially handed over the money directly to Nganampa Health Council itself and they also began to receive additional funding from the Commonwealth. In the early days most of the money was Commonwealth. AHO still employed a couple of nurses that provided the service to Yalata at the time. The Oak Valley community was more of an outstation back then, and it was around this time that the community people started moving from Yalata back up to Oak Valley as a result of the Maralinga Lands being opened up and handed back. AHO started to employ nurses and Aboriginal health workers in the region. We also had nurses and Aboriginal health workers at Oodnadatta, Coober Pedy and Port Augusta. These AHWs joined a group of AHWs that were employed by AHO and located around the rest of State, including places like Berri, Gerard, Raukkan, Whyalla, Mount Gambier, Murray Bridge, and Point Pearce.

In those days the Health Workers in the communities provided a range of health support activities as well as referrals, working with the local health services where they could at that time, to make sure that Aboriginal people got those services when they needed them. A lot of the AHWs, especially the older mature ones like Barb Wingard, Cyril Coaby, Margaret Hampton and the late Joan O’Loughlin, who had been working for a number of years, would do health promotion activities as well.

In the early 80s, the only independent health services were the Aboriginal Community Centre in Adelaide (that later became Nunkuwarrin Yunti of SA Inc), the Aboriginal Sobriety Group, a small clinic at Davenport and Kalparrin. I had worked as the full time nurse at the Aboriginal Community Centre when it was a very small service. Nunkuwarrin Yunti has now grown into a huge service.

Over the years the AHO worked with communities to help them establish themselves as independent health services and the resources we got from the government were handed directly to those communities and services. If I can remember the order, Nganampa Health Council was the first established service, followed by Pika Wiya Health Service in Port Augusta, Ceduna/Koonibba Aboriginal Health Service and then Yalata. Yalata was initially called the Yalata/Oak Valley Health Service, although they provided more of an outreach health service to Oak Valley, before Oak Valley was set up as their own service. Port Lincoln Aboriginal Health Service (PLAHS) and Umoona Tjutagku Health Service (UTHS) in Coober Pedy were established after I left SA. After this, the AHO’s role started to change somewhat and that lead to the Foley Report.

The first of many reviews – the Foley Report

In 1984 the Report of the Committee of Review into Aboriginal Health in South Australia (the Foley Report) recommended the establishment of the Aboriginal Health Council of South Australia as a statutory body and addressed other matters regarding health budgets, training and related issues. The Council was to be a community controlled process “independent of government influences and interference.” The primary role of Council was to be coordination, research, information, and education and training. Aboriginal Health Services continued to be funded by the Commonwealth, while Aboriginal Hospital Liaison Officers were established and funded by the State.

John Cornwall was the State Health Minister at the time, and Gary Foley chaired this review that talked about not only AHO’s role, but also what was happening in Aboriginal health across the State. The CEO of AHO at the time was Elliott McAdam. Elliott, Gary Foley and John Tregenza (the other person involved) did a fair amount of consultation around the communities, spending days in communities rather than just going in and out. They talked to a range of people – Aboriginal community members and service providers, as well as local hospitals and health services. They looked at how to make those services more accessible; because back then they recognised that access was a major issue for Aboriginal people.

There are three significant things I can remember that came from that Foley Report. The first thing was the Aboriginal Hospital Liaison Officer positions that were a recommendation from that report. Elliott McAdam negotiated with the State to get some funding to establish six positions in the major metropolitan hospitals (most of the funding for the AHO continued to come from the Commonwealth). He negotiated the funding agreement and the AHO worked on the implementation papers. There was a lot of negotiation with the hospitals in Adelaide, including issues about who would employ them and how they would be employed. It was later agreed that AHO would manage the funding and the hospitals would employ the workers.
Reflecting on Aboriginal health services and the history of the Aboriginal Health Council of SA

The second area was training. We had an “in house” certificate training program for Aboriginal Health Workers that was formally accredited around the time the Foley Review started. Through the Foley review, the State saw the value in that training program and contributed some funding. It was very significant because Elliott McAdam negotiated that the Commonwealth jointly fund the program with the State. Getting a 50/50 agreement at that time was quite innovative nationally. For a state to actually put in any of their own money was pretty unusual. Even though we were incorporated under the Health Commission, 95% of the positions were Commonwealth funded positions. I think the State might have only funded the medical officer position and provided some money for administrative costs for running the organisation, including costs associated with the Board.

When the Board of the AHO was first established there was a ten member Board, which was appointed by the Minister. Eight were Aboriginal and the other two were non-Aboriginal; they were Ian Proctor from Treasury and Professor Ian Maddocks as the Medical Officer. They were initially appointed for three years. The third significant thing from the Foley Review was having a Board made up of all Aboriginal people. When the term of those two non-Aboriginal people came up their positions were filled with Aboriginal people.

When it came time to filling the AHO board positions there was quite a bit of consultation in different communities, as we regularly tried to get across the State to where all the Aboriginal Health Workers were based. We tried to get a cross-representation of community, plus service delivery people as well, because we were building relationships with other Aboriginal services related to health, for example, alcohol programs such as WOMA. AHO also used to provide service delivery around substance misuse, particularly in country communities. We also worked with the Trachoma Eye Health Program. Even though the Board members were ministerial appointments we tried to go through a process of making sure that communities had input. When the Board would meet they would rotate their meetings around the State, and have a community meeting in the evening followed by some kind of social activity.

We did quite a bit of travelling back then. We used to travel in pairs mostly driving. I travelled all over the State with the exception of the APY Lands, but at that time I didn’t need to because Nganampa Health Council was newly established. AHO still provided ongoing support when they asked for it, but basically they did it all themselves. Our CEO spent a lot of time going up and working with them in the early stages. Nganampa Health Council also got extra funding to employ doctors, nurses, and health workers, and that was the beginning of what we see now as a big service that is now 24 years old.

Becoming AHCSA

Although many important things flowed from the Foley Review, the late 1980s was a time of change and uncertainty, with other reports and recommendations from different groups. There was little action until 1988–1990 with another major review of the AHO and the advent of the National Aboriginal Health Strategy in 1989.

After the Foley Review we continued to employ health workers directly in the communities across the State, but things changed with the Sayers/O’Donoghue Review of AHO in 1988, known as the “Blue Book”, where we started the shift to become a council with a clear advisory role.

In 1988 “A Strategy Assessment of the Aboriginal Health Organisation and Advisory Mechanisms for Aboriginal Health Matters in South Australia” (the Sayers/O’Donoghue report) reported to the Minister for Health and Community Welfare, and the Federal Minister for Aboriginal Affairs, on the role, performance, function and management effectiveness of the Aboriginal Health Organisation. It found a “high degree of stress amongst staff” and “a general uncertainty on the part of the AHO as to where it stood”. Thirty two recommendations were made on education and training, policy advice and coordination, service delivery, research and planning. They included: a small Secretariat of seven staff for the AHO; delivery of training by TAFE and service delivery to local bodies; creating an Aboriginal Health Council (combining the AHO and the Combined Aboriginal Health Services Forum, which was established in 1986); retaining research and planning; and, creating an agreement with the SA Health Commission and Department of Aboriginal Affairs on who collected which information. A Select Committee of Parliament met to consider the report but elections intervened and the Committee did not report.
The Sayers/O’Donoghue report (the Blue Book) re-emphasised that Aboriginal health is a key issue that must be addressed. I think Cornwall and the succession of Ministers after him probably realised that Aboriginal health should be a priority and that the government needed formal advisory mechanisms for working with Aboriginal people. This was the context of the Sayers/O’Donoghue Review. They recommended creating this mechanism and that the AHO not be a service delivery organisation.

Resources were made available from both the Commonwealth and State, which was the Department of Aboriginal Affairs at that time, to develop a strategy for implementing the review recommendations. This included a name change and writing a new constitution. Two people were employed, Sue Edwards and myself. We split the main recommendations and I mostly worked on the education and training areas and looked at the membership issue. We wanted to achieve a cross-representation of communities and Aboriginal health services, including a representative from trachoma and one from substance misuse services as they were all community organisations and had the same principles of people being nominated by their communities to sit on the Board.

We considered how we could devolve our service delivery function for communities where we still provided services, like the remote areas of Oodnadatta and Coober Pedy, and other rural locations where communities were not large enough to gain funding for stand-alone health services, for example the Riverland, Murray Bridge and Mount Gambier and basically where all the AHCSA Rural based Health Workers are now! There was also Whyalla and Port Lincoln, both of which now have health services. We consulted widely, including with the Aboriginal community organisations and service providers in those locations, on developing arrangements to transfer the positions to existing health services. There was a big community health movement at that time, so most of our negotiations were with them, although occasionally with hospitals.

Most nursing staff that we employed were in remote communities. Most of the nurses who were working on the APY Lands stayed with Nganampa Health Council, and two returned to the AHO, they were Julie Coates and Bev Grime. Most nurses went over to the local services. At Yalata we relied heavily on agency staff. Julie, Bev and I would sometimes relieve when we couldn’t get any agency staff. When the nurse left Oodnadatta that position was changed to an AHW, which is why we still have two Health Workers there now.

The Sayers/O’Donoghue review also helped with recognition of the key and special role that Aboriginal Health Workers played, particularly as they were usually a member of the local communities, so a representative body for Health Workers was also discussed as part of the implementation strategy. This led to the establishment of the first Aboriginal Health Workers Forum, which recognised the significant and very special role that Health Workers have and how it is different from other health professionals working at a health service.

1989 National Aboriginal Health Strategy provided a national context and raised the profile of Aboriginal health issues.

1990 Aboriginal Health Council of South Australia established (1 December).

A community and government representative from each state was on the National Aboriginal Health Strategy (NAHS) Working Party. Barb Wingard was the community person nominated from South Australia. The National Aboriginal Health Strategy started talking about collaboration, known as the tripartite approach, which recognised the need to involve the two levels of government – Commonwealth and State – as well as the community, represented by the community controlled health sector. Although there was a whole lot of change going on in the late 1980s, we still continued to get most of our funding from the Commonwealth.

Although Aboriginal health was originally the responsibility of ATSIC, it was transferred to the Commonwealth Department of Health as it was known back then. A lot of people from the community did push for health to be moved out of ATSIC because they thought that ATSIC didn’t have the expertise or the clout, because the health portfolio was in the Department of Health, so they did quite a bit of pushing to get it moved.

Eventually, the Commonwealth Department of Health took the NAHS recommendation a step further in 1996 and developed the first Framework Agreements to formalise the tripartite approach. There were four partners in the agreement including the Aboriginal Health Council, ATSIC, Commonwealth Health and State Health.
Reflecting on Aboriginal health services and the history of the Aboriginal Health Council of SA

In 1990 we became the Aboriginal Health Council with the majority of funding still coming from the Commonwealth. The Commonwealth support for newly established services gave the State an “out”, as they said “We will fund most mainstream services to deliver Aboriginal health”. The NAHS did provide some leverage to get the State to play a stronger role.

South Australia has always been a bit more supportive in terms of their funding compared to the other states. One part of the tripartite funding agreements was that the states would fund the State affiliates of NACCHO, which is AHCSA in South Australia, and the Commonwealth would fund NACCHO as the national body. We are quite well funded by our State Government for our core funding compared to other states. Maybe that's because we continued to be incorporated under the Health Commission Act. AHCSA had and continues to have a policy and advisory role like the Sayers/O’Donoghue Review discussed and committed to the principles of Aboriginal self-determination that was also emphasised in the NAHS.

Some people argue that you can't do anything if you are still tied in some way under a government structure, such as being a body under the Health Commission. I've got to say that in theory that's probably true, but in my experience all the people that I have seen on any of our Boards have never been afraid to say what they thought and wanted. They have always advocated strongly for Aboriginal communities, Aboriginal community control and self-determination in the State. But others would have had an issue with being under the Health Commission and that's why the 1999 Cooley Review talked about really becoming independent and strengthening that advisory role as a separate organisation and no longer being incorporated under the Health Commission Act.

It's very clear that this organisation has always seen itself as an advocate for Aboriginal communities. Over the years the make up of the Board of Management has tried to reflect that. We worked through local Aboriginal organisations to identify community representatives. It involved a lot of relationship building with community organisations whose staff are living and working in those communities and with community people, so that it legitimises the advocacy role of AHCSA, which then links to the policy role and where we are now, as a membership-based peak body that speaks at a State and National level on behalf of our members.

Stronger State Government involvement in Aboriginal health

AHCSA has always endeavoured to work cooperatively and collaboratively with State Government, which, through my work at NACCHO, seems to be quite different from other states where there are stronger divisions. We recognised that no matter whether you worked for the State Government or community controlled organisations, we are all aiming for the same goal and that's for the health of our people.


1994 Director of Aboriginal Health was appointed within the Public and Environmental Health Division of SAHC. AHCSA was concerned with potential duplication.

From the “Foley” days I believe it was recognised that the Health Commission needed a unit that focused on how they did their own work – this became more apparent following the Sayers/O’Donoghue Review. At one time Elliott McAdam worked in the Health Commission for a short time to try to set a unit up. Later a senior position was created to head the unit, and Brian Dixon from the Northern Territory was recruited into it.

1994 *Dreaming Beyond 2000* report was produced by the Aboriginal Health Council of South Australia and South Australian Health Commission. It provided a comprehensive strategic plan, but no resources were received for implementation.

1995 Aboriginal Health Division (AHD) was established within the South Australian Health Commission. An options paper was commissioned (by SAHC and ATSIC) to examine the roles and responsibilities of the Aboriginal Health Council of South Australia in light of the creation of the Aboriginal Health Division.
1996  Aboriginal Health Council of South Australia Chief Executive Officer position was abolished and replaced with an Executive Chairperson position that combined Chair of the Council and management of the Secretariat. There was a Memorandum of Understanding between the AHCSA and the SAHC, transferring all remaining (four) service delivery positions to the Aboriginal Health Division. Under this arrangement the AHCSA was to remain as the peak body for monitoring statewide health indicators, education, research, research ethics and advocacy.

During this time of transition and sorting out relationships Tim Agius was the CEO of AHCSA. There was a bit of confusion because AHCSA and what became the Aboriginal Health Division (AHD) were two different organisations with different roles, AHCSA was meant to advise the Minister while AHD was meant to carry out the Minister’s instructions. Being in the same building created some difficulties, although this was eventually sorted and later AHCSA moved out to the first Fullarton Road location at Dulwich.

Other events happening in the early to mid 1990s were a shift in Commonwealth policy, the historic Mabo decision as well as the establishment of the Reconciliation Council of Australia. This led to more money becoming available from the Commonwealth for health for the establishment of more community controlled health services, more workers such as doctors and Aboriginal Health Workers and other infrastructure. A lot of this money was available for rural and remote communities.

Most capital cities around the country have large Aboriginal Medical Services (AMSs) such as Nunkuwarrin Yunti of SA Inc in Adelaide. Many of these large services have been around for decades. For example, Redfern AMS in Sydney was established in the early 70s. Nunkuwarrin Yunti is now more than 30 years old and is an example of a well-established and sustainable organisation. It is much more difficult now to establish new Aboriginal Community Controlled Health Services, particularly for smaller Aboriginal communities. There also appears to be a strong push from government for Aboriginal people to use mainstream services – however we believe that this is not always appropriate for Aboriginal people. Access to culturally appropriate services for Aboriginal people continues to be a major issue.

Incorporation and a new decade – creating a shared agenda for the sector

1999  The Cooley Report – another review of the Aboriginal Health Council of South Australia, was announced and completed during 2000.

2001  In October 2001 AHCSA was incorporated under the SA Associations Incorporation Act, becoming a community controlled organisation in its own right governed by a Board of Directors whose members represented Aboriginal Community Controlled Health and substance misuse services and Aboriginal health advisory committees/groups throughout South Australia.

The Cooley Report resulted in clarity about the independent nature of AHCSA, as it recommended that it be incorporated under the SA Associations Incorporation Act, which helped to clearly differentiate it from government – although it continues to receive both State and Commonwealth government funding. The Cooley Report focused on how AHCSA was led by the community through its member organisations. I think we have built on the work we did early in our life as the AHO, and hung on to the community input, although mostly that comes through AHCSA’s Board. Board Members are representatives from the Boards of local Aboriginal Community Controlled Health Organisations, which means they are members of their local communities.

Recognising this is an important issue. Funding bodies will talk about wanting community representation and input, and going through us to organise this. We give the argument that AHCSA’s members are Community Controlled Health Organisations with Board Members that are elected from the community, so they are reaching community members, but funding bodies don’t necessarily recognise this. I think we need to think more positively about how we respond, while also looking at how we can ensure there are other ways that communities have input into organisational development; both the development of AHCSA and other organisations.
Reflecting on Aboriginal health services and the history of the Aboriginal Health Council of SA

2004  The SA Aboriginal Community Controlled Health Sector Strategic Plan: 2004–2007, known as the Statewide Aboriginal Health Sector Strategic Plan, was launched in July 2004 at Pika Wiya following a nine month development process.

2006  The 1st Review of the Statewide Aboriginal Health Sector Strategic Plan was endorsed by AHCSA Board. The ongoing implementation of the Plan was supported and its timeframe extended until 2009.

2007  The Future Directions process commenced in 2006, initially proposed as a review by the SA Department of Health, but was reoriented to focus on the Future Directions for AHCSA based on what it had achieved to date. The report was finalised in 2007 and reinforced AHCSA’s unique and vital role in leading the agenda for Aboriginal health in South Australia.

The Statewide Sector Strategic Plan was developed by analysing the strategic and business plans of AHCSA members at the time. It was part of a process of legitimising AHCSA’s role following incorporation, but also to be inclusive by demonstrating in a real way that AHCSA is not removed from its members. Its members actually make up AHCSA, and for me that was really important to confirm through the consultation we did for the 2006 Future Directions process.

I think that the shift from 2004 to 2006 was very interesting and pretty significant, in terms of the members having a strong sense of ownership. It was interesting, the shift from the beginning in terms of getting support and agreement from members to provide copies of their organisational plans to help create the Statewide Sector Strategic Plan, to hearing clearly in the 1st review about the importance of the Plan and ongoing support for it, through working together. By the time of the Future Directions Process the ownership of AHCSA by members and their sense of collective identity was very strong. That is really important to me.

Through the Future Directions process, AHCSA endorsed the following identity statement:[4]

“AHCSA is a membership-based peak body with a leadership, watchdog, advocacy and sector support role, and a commitment to Aboriginal self-determination. It is the health voice for Aboriginal peoples across South Australia, representing the expertise, needs and aspirations of Aboriginal communities at both state and national levels based on a holistic perspective of health. AHCSA is a collective term that includes both the membership and the Secretariat. The role of the Secretariat is to undertake work that AHCSA directs them to do via its Board, on which all member organisations are represented.”

Conclusion

While AHCSA has had a challenging journey, the commitments that existed in the early 1980s remain with it as a much larger and more stable organisation 26 years later. They are the commitments that were enabled through the 1967 Referendum – that all Aboriginal people have a right to “enjoy a high quality of health and wellbeing” as citizens of this country. This right is enshrined in the vision of AHCSA’s current policy framework and brought alive through the dedicated and ongoing work of its members, the Secretariat, staff and Board Members.

A reconciled Australia?

Warren Guppy

Introduction

In the last forty years the meanings and interpretations of the term “reconciliation” have dramatically changed. Forty years ago the term was often attached to the Christian churches and the rituals of the sacraments where confession was followed by penitence and absolution. The term has a broad definition as: “to reconcile two things that seem to oppose one another, means to make them work or exist together successfully.”[1] The term “reconciliation” began to be used widely to refer to the relationships between Aboriginal and non-Aboriginal peoples with the final report of the Royal Commission into Aboriginal Deaths in Custody in 1991 where the establishment of a formal reconciliation process was recommended.

Reconciliation means something different for everybody. Many Aboriginal people assert that they have nothing to reconcile, as it is their way of life that has been systematically disrupted since the colonisation of Australia. They view reconciliation as the work of non-Aboriginal people. This view is also held by many non-Aboriginal groups including highly organised groups such as Australians for Native Title and Reconciliation (ANTaR), a national group who work with minimal resources and define their key role as “working in support of justice for Aboriginal and Torres Strait Islander peoples.”[2] This paper will look at the early beginnings of reconciliation and how reconciliation has been interpreted. It will also highlight how reconciliation has become an institutionalised process, a process where governments at all levels promote and advance reconciliation but where real outcomes for Aboriginal people have not significantly changed.

My reflections on reconciliation come from my involvement in working with and for Aboriginal people in South Australia since the early 1990’s. I become acutely aware of the injustices experienced by Aboriginal people while studying Social Sciences at the University of South Australia. The more I studied Aboriginal issues, the more I was appalled by the injustices. This led to the completion of a number of Aboriginal specific subjects at the University of South Australia, a 40 day student placement at the Aboriginal Legal Rights Movement (ALRM) in 1992 and involvement in the Aboriginal arena since. I view my involvement as a privilege, acknowledging that my life has been greatly enriched by the knowledge, relationships and friendships that have developed. I have learnt a great deal about Aboriginal and Torres Strait Islander peoples, their cultures, dreams and aspirations and most importantly, their continued oppression by all levels of government. Notwithstanding, I have much more to learn and I am honoured to write a contribution for a publication that marks the 40th Anniversary of the 1967 Referendum. In writing, I make no apologies for what may appear to be generalisations and note that the views and opinions given are my personal views.

Reflections: 40 years on from the 1967 Referendum

Reconciliation groups and attitudes to reconciliation

In South Australia, there are a number of groups and organisations that promote reconciliation. The peak group in South Australia is Reconciliation SA. Supported financially by the State Government, it provides a coordinated focus for reconciliation efforts across South Australia. Community based reconciliation groups also exist across metropolitan and rural South Australia, along with a number of formal reconciliation committees or advisory groups convened by local government and various State departments. The State Government also convenes the South Australian Government Reconciliation Reference Committee (SAGRRC), a high-level group of senior staff that coordinates the State Government’s efforts towards reconciliation.

The process of reconciliation is seen differently by many people. Some view the reconciliation process with scorn while others have nothing but good intentions. Those who view reconciliation with disdain help to maintain the dominant and inaccurate view of Aboriginal people as being a “bad lot” who never quite work out how to improve their “situation”. Many of these have never actually met an Aboriginal person or experienced the diversity of Aboriginal cultures. Equally disappointing are those who venture into the process of reconciliation with a paternalistic, “we know best” and “why can’t they be like us” approach. When Aboriginal communities criticise their efforts, they withdraw from the process and console themselves in the knowledge that they tried and clearly, Aboriginal people do not want to be “helped”.

There are also many people who sit between these two extremes and who do contribute to the process of reconciliation. However, despite the best intentions of many groups at all levels, actions ensuing from reconciliation efforts do not always result in real or significant changes to the social and economic position of Aboriginal people.

Reconciliation efforts have assisted to increase awareness in the broader community about the history of Aboriginal and non-Aboriginal relations and of the inequalities and disadvantage experienced by Aboriginal and Torres Strait Islander communities. The reality is that this has done little in terms of sustainable outcomes for Aboriginal and Torres Strait Islander peoples.

The catalysts and beginnings of the South Australian reconciliation movement

Reconciliation in Australia has had many catalysts, including the “Yes” vote in 1967. At this time of celebration of the 40th anniversary in 2007, a number of other significant anniversaries can also be highlighted including; the 50th anniversary of National Aboriginal and Islander Day Observance Committee (NAIDOC), the 45th anniversary of the right for Aborigines and Torres Strait Islanders to vote in Commonwealth elections, the 31st anniversary of the Northern Territory Land Rights Act, the 16th anniversary of the Deaths in Custody report, the 15th anniversary of the High Court’s rejection of terra nullius and the 10th anniversary of the Bringing Them Home report.

Contrary to popular belief, the 1967 Referendum did not give Aboriginal people the right to vote as this had already been addressed in 1962 (although Queensland did not amend legislation until 1965).[3] What the Referendum did do was give the Federal Government an endorsement to amend two sections of the Constitution that discriminated against Aboriginal and Torres Strait Islander peoples.

Those two sections were:

51: The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

(xxvi) The people of any race, other than the aboriginal people in any state, for whom it is necessary to make special laws.

127. In reckoning the numbers of the people of the Commonwealth, or of a state or other part of the Commonwealth, aboriginal natives should not be counted.[4]

Overwhelmingly supported by the Australian public, the outcome of the Referendum paved the way for a renewed focus on Aboriginal affairs in Australia. It was in the wake of this increased focus and understanding that agitation towards self-determination grew. This was assisted by governments and by a groundswell of support from many Australians. With increased goodwill and the provision of specific funding injected into Aboriginal affairs, it appeared that the injustices experienced by Aboriginal people and Torres Strait Islanders since colonisation were beginning to be dealt with. However, there still exists great ignorance and misunderstanding about Aboriginal cultures, which provides a particular challenge if we are to fully embrace the principles of reconciliation.

From the early seventies, Aboriginal specific agencies began to develop in earnest across Australia. In South Australia organisations such as Aboriginal Legal Rights Movement of South Australia came into existence, as did other focus areas including an Aboriginal childcare agency and the development of Aboriginal specific health services. These Aboriginal agencies thrived and developed during the 70s, 80, and 90s; a gross generalisation, but effectively these decades reflected a period where on the whole, Aboriginal agencies were self-determining, and were providing much needed services to Aboriginal and Torres Strait Islander communities. Aboriginal people could access services provided predominantly by other Aboriginal people, who had a greater understanding of their circumstances and were better able to meet their needs.

The Aboriginal and Torres Strait Islander Commission and other agencies

The rise and fall of the Aboriginal and Torres Strait Islander Commission (ATSIC) was instrumental in both the consolidation of Aboriginal self-determination and ultimately, in the demise of government supported self-determination.

Established in 1990 as the peak organisation for Aboriginal and Torres Strait Islander affairs across Australia, its establishment signalled a new era of self-governance and self-determination for Aboriginal and Torres Strait Islander peoples. While enjoying more than a decade of operations, ATSIC increasingly came under scrutiny from the government, media and the mainstream population. There were accusations of mismanagement and a perceived failure to improve the lives of Aboriginal and Torres Strait Islander peoples. It is interesting that while 200 years of colonial dominance failed to achieve equality for Aboriginal people, Aboriginal organisations were only provided with a small window of opportunity to achieve improved outcomes.

ATSIC had a crucial role in coordinating the functions required to address the clearly identified social and economic disadvantage that the 200 years of “coexistence” had had on the lives of Aboriginal and Torres Strait Islander communities. The volume of research and data collected about Aboriginal people is insurmountable. While different approaches and techniques to the research and data collection have been applied, the subsequent outcomes have not improved the lives of Aboriginal people. Outcomes continue to highlight a consistent and, in many cases, worsening scenario of disadvantage. The role of the Aboriginal & Torres Strait Islander Commission included the coordination of funding to existing Aboriginal organisations and the development of new Aboriginal specific services and programs as identified by Aboriginal communities through their elected representatives – the Regional ATSIC Councils. The Regional Councils also developed new policy and program directions to be implemented by administration.

In 2004, amid much controversy, the Federal Government announced its intention to abolish ATSIC and transfer responsibilities for its functions to various mainstream government departments.[5] Viewed by many as a major return to government control over Aboriginal affairs, the move has had a significant impact on reconciliation between Aboriginal and non-Aboriginal Australia. Ironically, information about ATSIC is now only available through Australian Archives.[6]

In South Australia, Aboriginal affairs has often been addressed by the State through a peak agency, sometimes through an Aboriginal affairs department or as is the case currently, through a division that is attached to a larger agency; in this case, the Department of Premier and Cabinet. Its placement within Premier and Cabinet is highlighted as a concerted and committed effort by the Rann Government to address Aboriginal disadvantage in South Australia. Supporting this position are key targets including Aboriginal employment, Aboriginal health and the resolution of 75% of the State’s native title claims by 2014 as detailed in the State Strategic Plan.[7]

The Royal Commission into Aboriginal deaths in custody

The Royal Commission into Aboriginal Deaths in Custody investigated the deaths of 99 Aboriginal and Torres Strait Islander people in all forms of custody across Australia which occurred in a nine year period. Prior to the release of the Final Report, an Interim Report by Justice Muirhead put forward a number of recommendations for immediate action.\[8\] These included an Aboriginal prison visitors scheme and other actions aimed at reducing the frequency of Aboriginal incarceration and assisting those that had been incarcerated. The Final Report, tabled by Royal Commissioner Elliot Johnston QC, provided 339 recommendations, aimed at reducing Aboriginal involvement with the criminal justice system. A number of the recommendations were aimed at addressing underlying issues viewed as significant contributing factors behind that involvement. In respect of reconciliation, the Royal Commission made this recommendation: \[9\]

“(Recommendation 339) That all political leaders and their parties recognise that reconciliation between the Aboriginal and non-Aboriginal communities in Australia must be achieved if community division, discord and injustice to Aboriginal people are to be avoided. To this end the Commission recommends that political leaders use their best endeavours to ensure bi-partisan public support for the process of reconciliation and that the urgency and necessity of the process be acknowledged.”\[10\]

In responding to the Royal Commission, a commitment by the Commonwealth, State and Territory Governments resulted in extensive funding being made available across numerous policy and program areas to implement the 339 recommendations put forward. Central to the success of the implementation was the premise that Aboriginal peoples needed to be involved in all levels of the implementation process. Many Aboriginal organisations were also funded to assist in the process. Prisoner support programs and increased funding for legal services was provided. A fund to provide legal education to Aboriginal communities was forthcoming and Aboriginal justice advisory committees were set up in each state and territory to monitor governments’ implementation of the recommendations. Among a raft of other program and policy changes, justice agencies also increased their employment of Aboriginal people and implemented cultural awareness training for staff.

Aboriginal justice advisory committees were established across Australia to provide an avenue for Aboriginal people to become involved in the implementation and monitoring of the Royal Commission recommendations. It was during this period that I worked with staff at the Aboriginal Legal Rights Movement of South Australia in establishing the South Australian Aboriginal Justice Advocacy Committee (AJAC) and ultimately, in undertaking executive functions for the Committee over a seven year period. This opportunity was enriching as much as it was frustrating. Enriching because I was afforded the opportunity to work closely with Aboriginal communities across South Australia and frustrating because it provided first hand information of the disadvantage experienced by Aboriginal communities. Many communities we visited were directly affected through the death in custody of a family member or from personal or family members’ experiences in the criminal justice system. The work also included visiting South Australian prisons to provide information about the Royal Commission and obtaining feedback from Aboriginal prisoners about their experiences in the prison system. Much of AJAC’s work has been documented through a series of annual, and in some cases biannual publications that were used to measure the implementation of Royal Commission recommendations from an Aboriginal community perspective.\[11\]

\[10\] Justice and Equity Human Rights Commission Social Justice Commissioner, CD ROM
These reports were presented to the State Government and, where appropriate, to relevant Commonwealth Government departments. Suffice to say that in many instances, while there was acknowledgment that changes had and were occurring, much more needed to be done in order to reduce the incarceration rates of Aboriginal peoples in the first instance and in the long term, to reduce the disadvantage and racism experienced by Aboriginal peoples on a daily basis.

On reflection, the work of the Royal Commission was instrumental in consolidating and highlighting a number of facts about the over-representation of Aboriginal involvement in all levels of the criminal justice system. It also highlighted an extraordinary range of social issues that when combined, painted a dismal picture of the continuing prejudice and disadvantage experienced by Aboriginal peoples. The recommendations provided some clear directions and the governments of the day provided significant funds, along with various levels of goodwill, to address the issues raised by the Royal Commission. Sixteen years later, the issues investigated by the Royal Commission remain a blight on all levels of government. Incarceration rates and deaths in custody of both Aboriginal and non-Aboriginal peoples remain unacceptably high. The failure of governments to adequately implement the recommendations or to address the extensive underlying issues examined by the Royal Commission was a missed opportunity to address the injustices of the past, which would have allowed Aboriginal and non-Aboriginal Australians a real opportunity to deal with the issues and move into a new future together.

The rejection of Terra Nullius

Another opportunity for Australia to address the injustices of the past and the current inequalities was provided through the High Court’s rejection of the mythology of terra nullius. In 1993, the High Court recognised traditional ownership of the land by Aboriginal and Torres Strait Islander peoples. The ruling rejected the terra nullius falsehood that had legitimised the colonists claim to Australia and clearly recognised Aboriginal peoples as the traditional “owners” of Australia. Whilst the ruling created a collective sigh throughout Aboriginal communities, it also sent ripples of apprehension through the wider population who immediately agitated to water down the ruling. This gave rise to an orchestrated propaganda campaign, clearly aimed at disrupting any perceived or real rights gained through the ruling.

In the period since the ruling, very few Aboriginal communities have gained ownership of their traditional lands and the benefits that go with ownership. The Federal Government’s response was antagonistic at best and subsequent rulings such as the Wik decision in conjunction with John Howard’s 10 Point Plan have further watered down the High Court’s ruling.

At a practical level, it remains difficult for Aboriginal communities to demonstrate their continued and uninterrupted association with their traditional and tribal lands due to the long history of dispossession, forced removal and other practices of removing Aboriginal people from their traditional lands. In South Australia, only two native title cases have been resolved since the High Court’s ruling. The De Rose Hill case was a protracted and expensive litigation fought out between the traditional owners, the Yankunytjatjara/ Antakirinja people and pastoralists. First lodged in 1994, the claim took just over 11 years to resolve, with the Full Federal Court delivering its determination in June 2005. At a ceremony to celebrate the outcome, National Native Title Tribunal President, Graeme Neate stated: “The Tribunal is not giving you native title. The Federal Court did not give you native title,” and said: “We are all recognising the traditional rights to country that your ancestors had and you still have.”

Closer to Adelaide, the Yorke Peninsula Indigenous Land Use Agreement (ILUA) was signed between the Narungga Nation, the South Australian Government and four Yorke Peninsula Councils in 2005.

The agreement recognises the Narungga people as traditional owners of the Yorke Peninsula region and clarifies how the Narungga people and local government in the Yorke Peninsula area interact. Elements of the ILUA include a compensation package, an agreement on how Narungga people are involved in local development applications and processes for the protection of local Aboriginal heritage. As the first ILUA for South Australia, the view is that the Narungga ILUA will form a “template” and the basis for future Indigenous Land Use Agreements between South Australian language groups, local governments and the South Australian Government. The ILUA process provides a significant opportunity for learning, particularly at the local government level. It also provides a rare opportunity for local governments to work closely with traditional owners to agree on workable and sustainable agreements which provide Aboriginal communities with real outcomes, including employment opportunities, land ownership and an economic base to assist Aboriginal communities to build for their future. It remains as a current challenge for local governments to utilise the opportunity an ILUA can provide to ensure real, sustainable and workable outcomes are achieved and that equitable partnerships are developed.

Bringing Them Home

There was another opportunity for mainstream Australia to address reconciliation with Aboriginal and Torres Strait Islander communities when the Australian Government handed down the Bringing Them Home report in 1997. The Report was the outcome of an investigation into past policies that governed the forcible removal of Aboriginal children from their families and communities.¹⁷ These separations continue to have long lasting and devastating effects on those who were stolen and their families. Disturbingly, the investigation highlighted that current practices of separation were legitimised on the grounds of neglect and abuse, ultimately based on judgments about the parenting skills of Aboriginal parents.¹⁸

Alarmingly, similar to other themes of the over-representation of Aboriginal people, the Bringing Them Home report found that Aboriginal and Torres Strait Islander children were six times more likely to be removed from their families for welfare reasons and 21 times more likely to be removed from their families and placed into juvenile detention centres.¹⁹ Fifty four recommendations were put forward to deal with the outcomes of the Stolen Generations Report. In South Australia, “Link Up” was established to assist reunion efforts and to provide counselling services to assist individuals and families to work through the issues created by the separations. A Journey of Healing Committee was established, which works to raise awareness in the broader community about the continuing effects of forcible removal. New relationships have been forged between Aboriginal organisations and government agencies including Births, Deaths and Marriages, State Records and National Archives, all of which assist to reunite the many families affected by forcible removal.

Some local governments, all State and Territory Governments and many churches issued formal apologies to Aboriginal and Torres Strait Islander communities as many of them were involved in implementing the policies. This was aimed at formally acknowledging the impact of past policies and viewed as a key step in the healing process between Aboriginal and non-Aboriginal Australians. The refusal of the Australian Government to offer such an apology has been well documented and remains as a major barrier to the healing that must occur before Australia’s Aboriginal and non-Aboriginal communities can become truly reconciled.

Conclusion

The Royal Commission into Aboriginal Deaths in Custody in 1991, the Mabo decision of 1993 and the Federal Government’s Bringing Them Home report in 1997 all assist to provide a comprehensive picture of how past and current policies impact on the social and economic disadvantage experienced by Aboriginal and Torres Strait Islander communities. While each had a distinctly separate focus, they combine to provide a thorough and disturbing history that continues to have a catastrophic effect on the lives of Aboriginal and Torres Strait Islander peoples.

Each provided an avenue for addressing the issues raised and each resulted in increased resources to implement recommendations or to further explore and advance the outcomes. Each of these significant investigations also provided some real opportunities for practical and meaningful ways in which to advance reconciliation in Australia.

However, many of the recommendations are interpreted by bureaucrats, or in ignorance, and the meaning of their intent is lost. They are not always implemented in the spirit in which they were made and they are implemented without the full involvement of Aboriginal and Torres Strait Islander communities. For many Aboriginal people, the reality is that governments pay lip service to the recommendations, whether they were from the Royal Commission or from the Bringing Them Home report.

In respect of native title, scaremongering and the suggestion that average, hard working Australians may lose their home galvanised opposition to the Mabo decision. This provided the Australian Government with the support it needed to introduce and pass subsequent legislation that effectively “watered” down any gains, whether real or perceived, envisaged by the High Court’s ruling.

It is disheartening that despite the best intentions of reconciliation efforts, Aboriginal and Torres Strait Islander communities still experience disturbing levels of disadvantage when compared to mainstream Australia. Aboriginal people continue to appear in all levels of the criminal justice system at higher rates than non-Aboriginal people. Housing conditions for Aboriginal people have not improved and although there are slight rises in home ownership by Aboriginal people, this still falls short of home ownership rates for non-Aboriginal people. Education outcomes continue to fall below that of the average Australian and employment opportunities continue to be limited. While recent reported increases in the life-expectancy of Aboriginal and Torres Strait Islander people is an improvement, the increase still fall short of the life expectancy rates in the non-Aboriginal Community. [20]

Ignorance of Aboriginal aspirations and racist attitudes continue to survive because Australia’s real history is not reflected in the education system while the demise of ATSIC and the return to “mainstreaming” have compounded the views of the extreme right that Aboriginal affairs should be tightly controlled. Many non-Aboriginal people continue to live their lives without ever having met an Aboriginal person and without ever having known the real history of Australia’s colonisation. The history books need to be rewritten to reflect the reality of life for the countless thousands of Aboriginal people who were the victims of colonisation which included massacres and the wholesale slaughter of individuals, groups and communities by the so called “colonisers”.

Increased efforts towards reconciliation must address these fundamental issues if there is to be true reconciliation between Aboriginal and non-Aboriginal Australians. Central to this process is a need to rewrite the Australian Constitution so that it recognises Aboriginal and Torres Strait Islander people as the traditional owners of Australia. Along with this recognition would be the sovereignty that would provide Aboriginal and Torres Strait Islander communities with a substantial economic base on which to build their futures.

Curriculum in all educational institutions needs to include detailed content about colonisation, the massacres and other atrocities committed on Aboriginal and Torres Strait Islander communities. Understanding and healing can only occur when all Australians fully understand the true history of Australia.

Apologies for the wrongs of the past and the present need to occur at all levels of the Australian community. Native title needs to be resolved quickly and in a way that assists in the restoration of land ownership, language reclamation and other cultural practices that have been eroded.

While healing the hurts of the past will be a long process, addressing these fundamental issues will assist to provide some real equality for Aboriginal and Torres Strait Islander communities. A future where the fundamental rights of Aboriginal and Torres Strait Islander communities are addressed will be a future where justice will be a reality for Aboriginal and Torres Strait Islander people and real reconciliation can occur.


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“For the first time in almost two hundred years of colonisation Aboriginal people would be counted, but by then genocidal practices had done their evil work.”

Waratah

“Our invisible, silent prejudices have made damned experts of us all … We are a long way from the spirit behind the 90.7 Yes vote of 1967.”

Eva Sallis

“The 40th anniversary of the Referendum is a cause for celebration but also a cause to contemplate the work that still needs to be done.”

Anthony Kerin