'THE NINE MOST TERRIFYING WORDS IN THE ENGLISH LANGUAGE ARE: 'I'M FROM THE GOVERNMENT AND I'M HERE TO HELP'"[1]

EDDIE CUBILLO[†]

I OPENING[2]

I would like to take this opportunity to acknowledge the Traditional Owners – Kaurna people on the land that we meet today.

It was not that long ago that I completed my Masters of International Law and International Relations at Flinders University. I remember coming to classes and wondering what I was doing in such a freezing place on the weekend. In particular the mornings at Flinders Campus in winter are pretty chilly. How I longed for the hot, humid weather of Darwin, where shorts and thongs is the common dress code.

I am honoured to be asked to speak at such an event especially with past speakers of the ilk of Father Frank Brennan, Magistrate Pat O'Shane, Professor Marcia Langton, Jacqui Katona, Professor Larissa Behrendt, Dr Irene Watson, Ms Linda Burney MP and Tom Calma just to name a few. And, as a proud Aboriginal man I also am honoured to acknowledge the former Royal Commissioner into Aboriginal Deaths in Custody, the Hon. Elliott Johnston AO QC, and to present this Tribute Lecture.

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1 Ronald Regan**,** Remarks to Representatives of the Future Farmers of America (28 July 1988), <http://www.reagan.utexas.edu/archives/speeches/1988/072888c.htm>.

† LLB, MILIR, DipAppSc (Community and Human Services), Northern Territory Anti-Discrimination Commissioner.

2 This is a revised, expanded and updated version of the Elliott Johnston Tribute Lecture delivered in Adelaide on 17 May 2011.

II INTRODUCTION

My talk will focus on engagement and how 'real respectful engagement' is essential to support Indigenous self-determination. I will look at engagement with a particular focus on the Northern Territory Emergency Response. I will draw on the historical attempts by Aboriginal people in the Northern Territory to get their voices heard. I will also discuss the Report into Aboriginal Deaths in Custody and the impact of the abolition of the Aboriginal and Torres Strait Islander Commission (ATSIC), and the Federal Government's Intervention on the concept and reality of engagement.

A theme throughout this discussion will be the need to appreciate and provide for real and respectful participation for the members of our First Nations about matters that impinge on our well-being and capacity for self-determination. So, this evening I will take the opportunity to speak with you about a range of issues, firstly those raised in the Commissioner's Report into Aboriginal Deaths in Custody. In doing this, while acknowledging that good work has been done, I am saddened that 20 years on, not enough has changed.

The Royal Commission produced a landmark Report into Aboriginal Deaths in Custody on the relationship between Indigenous people and the criminal justice system throughout Australia.[3] It investigated the 99 lives that were lost in custody and offered a tragic picture of these lives and deaths. It also drew out some common themes from those stories. 339 recommendations were made aimed at reducing Indigenous overrepresentation at all stages of the criminal justice system. However, Aboriginal Australians continue to suffer disproportionately at the hands of our justice systems. For example, the 'Corrective Services, Australia' report[4] released by the Australian Bureau of Statistics (ABS) in

[3] Commonwealth, Royal Commission on Aboriginal Deaths in Custody, *National Report* (1991).

[4] Australian Bureau of Statistics, 'Corrective Services, Australia' (Document No 4512.0, Australian Bureau of Statistics, 17 June 2010),

March 2010 confirmed that Aboriginal people continue to be statistically over-represented at all stages of the criminal justice process, and that incarceration numbers in the NT continue to soar.

The Australian Bureau of Statistics data demonstrate that the NT has by far the highest imprisonment rate in Australia, with 679 people incarcerated per 100,000 of the adult population. Compare this with the second ranked jurisdiction, Western Australia, with the rate of 260 people per 100,000 people.[5] Such statistics stand against the national imprisonment rate of 165 prisoners per 100,000 adults. It is a disturbing comparison, and suggests that the Northern Territory's incarceration rates are unacceptable and unsustainable. Three years ago, the NT rate was almost 3.5 times the national average. Today, I am embarrassed to say, the Territory rate is nearly 4 times greater.

The daily average number of prisoners held in the Territory's jails in 2008-09 was 1,030 - 18% higher than the previous year (875).[6] Indigenous prisoners in the NT during the same period represented 81%.

Perhaps even more concerning is that this increase in incarceration rates also impacts significantly on young people. The average number of juveniles in custody in the Northern Territory in 2008-09 increased by 8% from the previous year. The Department of Justice estimated the detention rate for the NT as 101 detainees per 100,000 juveniles aged between 10 and 17 years.[7] The monthly daily average of Indigenous juveniles in detention was 92.6% of the total. Based on these figures, we can expect that the proportion of adult

<http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/4BEA9C47591570E6CA257855000E67A9/$File/45120_dec%202010.pdf>.

5 Ibid 4.

6 See Northern Territory Department of Justice, *Correctional Services Annual Statistics 2008-2009* (2009) 3, <http://www.nt.gov.au/justice/policycoord/researchstats/index.shtml>.

7 Ibid 7.

Indigenous prisoners will continue to stay at the same appalling level in years to come, or even more shocking, to increase.

This growth of Aboriginal incarceration is depressing, with no end to the trend in sight. Moreover, daily Correctional Services' figures[8] show that on 10 April 2011 there were 1271 inmates in the Northern Territory's three gaols[9] which only have a combined design capacity of 1164 people. This means in the NT, the most incarcerated region of Australia, we have an occupancy rate of 109.19%. The growth in prisoner numbers is alarming; the high and growing percentage of Aboriginal prisoners is shocking.

Twenty years on from the Royal Commission, a commitment of a different sort is needed if we want things to change – one that, at its heart, is *not* just about 'law and order'. It is a commitment to address fundamental issues faced by many Aboriginal people and our communities, and to do so by talking *with* us not *to* us.

The adoption of *Aboriginal Justice Agreements* at a meeting of Attorneys General in Canberra in July 1997[10] was a step in the right direction for addressing over-representation of Indigenous people in their criminal justice systems. This was signed by all States and Territories - except the Northern Territory - since Mr. Bourke, the then NT Attorney General, declined. In their communiqué the signatories said that, in order to address over-representation, the -

> … Ministers agreed, in partnership with Indigenous peoples, to develop strategic plans for the coordination of Commonwealth, State and Territory funding and service delivery for Indigenous programs and services, including working towards the development of multi-lateral agreements between Commonwealth,

8 The NTCS Manager Operations Support provides daily stats to the organisation.

9 In Darwin there is a male and female prison and another male prison in Alice Springs which also holds women from time to time.

10 Fiona Allison and Chris Cunneen, 'The role of Indigenous justice agreement in improving legal and social outcomes for Indigenous people' (2010) 32 *Sydney Law Review* 645.

> State and Territory Governments and Indigenous organizations to further develop and deliver programs.[11]

The Strategic Plans referred to in this communiqué became known as *Indigenous Justice Agreements*. Such agreements were an important step to reshape the partnership of governments and Aboriginal Justice Agencies in relation to justice for Indigenous people. The Agreements heralded the beginnings of tangible change, including a reduction in incarceration growth rates in other jurisdictions. The Agreements support the Royal Commissioner's vigorous assertion of the importance of consultation with Aboriginal people and their communities when policies directly affecting them are to be implemented.[12] Empowerment and self determination are crucial themes underpinning the Royal Commission recommendations.[13]

But, as in 1991, we have to ask what the undeniable fact of Aboriginal over-representation says about Federal, State and Territory Government responses to the Commission's recommendations. The Commissioner's identification of the historic link between colonisation and dispossession and the current disadvantages (and related offending) faced by Aboriginal people was a significant finding. Despite the clear identification of issues and requirements by the Commissioner 20 years ago, why do we continue to have such appalling over-representation of Aboriginal people in the criminal justice system?

I am not here to point the finger. This lecture is not about blame. I want to look at why and how 'real respectful engagement' is

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[11] This a portion of the Communiqué dated the 4 July 1997 signed by Attorneys General of each state and Territory save the Northern Territory: Ministerial Summit on Indigenous Deaths in Custody, *Outcomes Statement* (4 July 1997).

[12] Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 1, 1.7.

[13] The Productivity Commission, Report on Government Services, *Justices Preface* (2010) vol 2, 20, <http://www.pc.gov.au/gsp/reports/rogs/2010>.

essential if we want to support Aboriginal self-determination as the context within which criminal justice issues must be developed. If we, as a nation, want Aboriginal people to have the same life opportunities and the ability to choose lifestyles as do other Australians, there needs to be genuine commitment to 'closing the gap'.

We need to talk about *meaningful* self-determination and respectful engagement. Fundamental to these concepts is the claim by Aboriginal people to 'sovereignty'. Despite the 200 plus year of colonisation, the issues surrounding sovereignty have only briefly been explored in this time. Sovereignty is a concept that should not be read down to reflect a simple, absolute model. Australia simply is not ready to discuss such a significant recognition of the rights of First Nations. We must walk before we can run. I hope one day we can run.

We need appropriate engagement between Aboriginal people, Governments and the wider community based on mutual respect, mutual resolve and mutual responsibility. This type of engagement should lead to better relationships and could lead to real outcomes and self-determination.

III A BASIS IN FUNDAMENTAL HUMAN RIGHTS

We can look to the Commissioner's 1991 comments to help shape this discussion -

> In the ultimate, self-determination is basically about people having the right to make decisions concerning their own lives, their own communities, the right to retain their culture and to develop it.[14]

[14] Productivity Commission, above n 10, 1.7.33.

In thinking about possible futures, I will draw on the history of attempts by Aboriginal people in the Northern Territory to have our voices heard. I also note the damage done to the idea and reality of engagement impact by the abolition of ATSIC and the implementation of the Australian Government's *Northern Territory Emergency Response Act*[15] - the Intervention. I hope to show how the lack of engagement that underpinned (and has been maintained through) the Intervention has damaged relationships. I also refer to some developments in the United States to show that it is possible to engage effectively with First Nations and the benefits that can stem from respectful dialogue.

For First Nations people such as Aborigines and Torres Strait Islanders Self Determination should be seen in an international relations context, especially as this has developed in international law in the United Nations era. Two human right treaties are particularly important – the *International Covenant on Civil and Political Rights*[16] and the *International Covenant on Economic, Social and Cultural Rights*.[17]

The first Articles of both treaties have identical wording:

> (1) All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

A core right to self-determination then is emphasised for Indigenous people in various articles of the *Declaration on the Rights of Indigenous Peoples*[18] (including articles 3, 4, 18, 19, 23 and 32).

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15 *Northern Territory Emergency Response Act 2007* (NT).

16 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force March 23 1976) art 19(1).

17 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force March 1 1976).

18 *Declaration on the Rights of Indigenous Peoples* A/RES/61/295.

The United Nations Special Rapporteur on the Rights of Indigenous Peoples, Professor James Anaya recently reported[19] on the situation of human rights and fundamental freedoms of Indigenous people. He commented that the inclusion of the right to self-determination in that Declaration 'responds to the aspirations of Indigenous peoples worldwide to be in control of their own destinies under conditions of equality, and to participate effectively in decision making that affects them'.[20] Professor Anaya also said that the right of self-determination 'is a foundational right, without which Indigenous peoples' human rights, both collective and individual, cannot be fully enjoyed'.[21]

It is against such essential expectations that self-determination for Aboriginal people needs to be appreciated. I also suggest that we think more broadly about what it implies too many people – for instance, the 'T'[22] word and an absolute sense of 'sovereignty'. Governments have promised a Treaty but it remains elusive. Perhaps, it is better thought about in terms of a continuum rather than as an end point. Dr Djiniyini Gondarra OAM, a Yolngu leader on his recent return from the Committee on the Elimination of Racial Discrimination - 77th Sessions said that the survival for Aboriginal people relies on changes to the Constitution and the establishment of a Treaty and that there needs to be an ongoing forum where there is a relationship between traditional peoples of central Australia, Arnhem Land and groups like the Human Rights Commission and other interested parties to continue the conversation that has been started.[23]

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[19] James Anaya, Special Rapporteur, *Report on the situation of human rights and fundamental freedoms of indigenous people, Australia* UN Doc A/HRC/15/4 (4 March 2010) <http://www2.ohchr.org/english/issues/indigenous/rapporteur/docs/ReportVisitAustralia.pdf>.

[20] Anaya, above n 13, [41].

[21] Ibid.

[22] 'Treaty'.

[23] Djiniyini Gondarra and Rosalie Kunoth-Monks, 'Report' (Paper presented at the International Convention on the Elimination on All Forms of Racial Discrimination, Geneva, 11 August 2010). This report written by Rev Dr Djiniyini Gondarra OAM on behalf of himself and Rosalie Kunoth-Monks

A form of sovereignty may be a justifiable end point, but we also need to see self determination as a *process* that should occur *now*. This is why we have to demand that all stakeholders commit to genuine engagement with Aboriginal people, including about issues that affect our daily lives and with the aim of delivering outcomes derived from the value of our participation.

At this point I will mention the abolition in June 2004 by the then Federal government of ATSIC,[24] the National representative body for Aboriginal people. This was achieved by March 2005, leading to a lengthy period in which there has been no National Aboriginal voice. The recently established *National Congress of Australia's First Peoples* is only in its infancy. There is no denying that the existence of ATSIC was hugely controversial. Love it, hate it or indifferent, the hiatus in national representation caused damage and took us all back in time. The lack of a high level forum for Aboriginal people has marginalised Aboriginal interests, especially in an environment of sensationalist media reporting. Needless to say, Aboriginal people have also been frustrated about the inability to speak with a coherent national voice when contentious policies such as the Intervention arose.

The *Northern Territory National Emergency Response Act 2007* (Cth) (NTER) supposedly was drafted and enacted in only 10 days - without consultation with Aboriginal Communities.[25] The then

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OAM, both of whom attended the Committee on the Elimination of Racial Discrimination - 77th Session August 2010, <http://stoptheintervention.org/facts/icerd/report-by-dr-gondarra-rosalie-kunoth-monks-aug-2010>.

[24] Aboriginal and Torres Strait Islander Commission (ATSIC) (1990–2005) was the Australian Government body through which Aboriginal Australians and Torres Strait Islanders were formally involved in the processes of government affecting their lives.

[25] ABC News, 'Intervention Created in Just 48 hours: Brough', *ABC News* (online), 16 June 2008 <http://www.abc.net.au/news/stories/2008/06/16/2275863.htm>.

Minister, Mal Brough, however, said that there was extensive consultation – and I quote -

> The NT National Emergency Response package is the cumulative result of extensive consultation with those directly affected by the issues raised by the Little Children Are Sacred report, particularly with women in remote communities. That that consultation has focused on listening to real people in real communities rather than self-proclaimed and vocal agitators who present themselves as 'indigenous leaders' is something I'm very pleased about.[26]

It is hard to reconcile this assertion with the findings of the extensive October 2008 Report of the NTER Review Board.[27] This noted that government officials had explained to the Review Board many times that the emergency nature of the Intervention required fast-paced implementation. The result was that there was not time for effective planning, consultation and meaningful engagement or understanding by the people it affected.[28]

While this lack of genuine engagement and communication between governments and Aboriginal people did not start with the NTER, the scale and implications of that exercise have exposed the flaws of such 'top down' approaches. The Review Board report went further and said that visits to communities had left a clear impression that there was a progressive disengagement by government agencies. Few government personnel were located in Aboriginal communities, and there was a perception, which was often also the reality, that

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[26] Commonwealth, *Northern Territory National Emergency Response Bill 2007*), Parl Paper No 28 (2007) 17, <http://www.aph.gov.au/library/pubs/bd/2007-08/08bd028.pdf >.

[27] Peter Yu, Marcia Ella Duncan and Bill Gray, *Report of the NTER Review Board, Australian Government, Canberra* (2008) <http://www.nterreview.gov.au/report.htm>. The three-person board consisted of Mr Peter Yu (chair), former chair of the Halls Creek Project Management Committee, Western Australia, Ms Marcia Ella Duncan, former chair of the New South Wales Aboriginal Child Sexual Assault Taskforce, and Mr Bill Gray AM, former Australian Electoral Commissioner.

[28] Ibid ch 3.

decisions affecting them directly were being made by unknown people 'in Canberra'.[29]

It is worth saying a few things here about the *Little Children are Sacred* report[30] ('the Report') which made 97 recommendations about a range of important issues. It is a compelling list which has some chilling similarities to the recommendations of the Royal Commission into Aboriginal Death in Custody (RCIADIC) - engaging with Aboriginal communities; government leadership; family and children's services; health crisis intervention; police; prosecutions and victim support; bail; offender rehabilitation; prevention services; health care as prevention of abuse; family support services; education; alcohol and substance abuse; community justice; employment; housing; pornography; gambling; and cross cultural practices.

As with RCIADIC, the Report looked at underlying social issues, such as education. The Report emphasised that education is the key to helping children and communities to foster safe, well adjusted families. The role of schools and regular school attendance is a critical part of the process of keeping future generations of Aboriginal children safe. Education campaigns were needed to address sexual abuse, the impact of alcohol and pornography.

Despite the urgency at the time of the imposition of the Intervention, and the serious concerns expressed by many political leaders, it is difficult to conclude that the Australian Government implemented the *Little Children are Sacred* recommendations. It is especially hard to find any useful measure implemented to pursue recommendations about taking action *following consultation* with

[29] Yu, Duncan and Gray, above n 27.

[30] Rex Wild and Patricia Anderson, 'Ampe Akelyernemane Meke Mekarle "Little Children are Sacred"', *Board Of Inquiry Into The Protection Of Aboriginal Children From Sexual Abuse* (2007).

Aboriginal communities.[31] Once again, we members of the First Nations were expected to defer to the wisdom of the colonisers.

The processes, policies and laws that were imposed as part of 'the Intervention', ostensibly justified by the *Little Children are Sacred* recommendations, was the lowest point for the recognition of the self-determination rights of Aboriginal people since the 1991 Royal Commission.

But a correction was coming. The October 2008 independent[32] review of the NTER noted that that the single most valuable resource that the Intervention lacked from its inception was the positive, willing participation of the people it was intended to help. Moreover, the most essential requirement for moving forward is for government to re-engage with the Aboriginal people of the Northern Territory.[33] The review recommended that -

> - the Australian and Northern Territory Governments endorse the need to reset the relationship with Aboriginal communities in the Northern Territory and move in partnership to develop and maintain a community development framework within which a genuine engagement with communities can develop and be maintained; and
>
> - both governments commit to the reform of the machinery and culture of government to enable a more effective whole-of-government approach to be delivered on the ground and to support professional development for their key personnel located in Indigenous communities. [34]

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[31] Commentary by Ian Anderson comparing those recommendations with the intervention as originally formulated by the Howard Government, *Australian Policy Online*, 29 June 2007, <www.apo.org.au/webboard/results.chtml?filename_num=161613. See also Thomas Hunter, *Little Children vs the PM: same same but different?* (2007) <http://www.crikey.com.au/2007/06/22/little-children-vs-the-pm-same-same-but-different/>.

[32] Yu, Duncan and Gray, above n 21.

[33] Yu, Duncan & Gray, above n 21, 10–11.

[34] Ibid ch 3.2.

These recommendations on re-engagement and communication were (in principle) adopted by the Australian Government, but effectively ignored.

Most of you will know about aspects of the 'Intervention' that have particularly aggrieved and offended many Aboriginal people and their supporters. It also is notable that individuals and communities have had different opinions about particular initiatives. For example, some may like welfare reforms which brought income management but not like the loss of CDEP; others may like increased police presence but not alcohol restrictions; or vice versa. But this surely argues for the necessity of more and better engagement – like all communities we have differences and different priorities. Monolithic impositions by what appear to be, at best, paternalistic governments are not the way forward.

Aboriginal people have not been consulted in a meaningfully way at any stage of this drastic policy intrusion on their lives. It is clear from my visits throughout the Territory that a constructive communication mechanism was not, *and still is not*, available to help Aboriginal communities work through this ordeal.

There was also an unacceptable reluctance to respond to fact that many Aboriginal people, while possibly proficient in several languages, may only have English as a third or fourth language. They also may have a range of other numeracy and literacy issues. Such factors must be taken into account if anyone wants to claim that they are serious about communicating effectively and respectfully with Aboriginal people.

It is in this context that we can look at the Government's response to the October 2008 report of the independent NTER Review Board. The current Government said that it would:[35]

> - recognise as a matter of urgent national significance the continuing need to address the unacceptably high levels of disadvantage and social dislocation experienced by remote communities and town camps in the Northern Territory;
>
> - reset its relationship with Indigenous people based on genuine consultation, engagement and partnership; and
>
> - respect Australian human rights obligations and reinstate the Racial Discrimination Act 1975 (RDA).

The Australian Government will argue that they followed through on these commitments and consulted with Aboriginal Territorians through discussions about future directions for the NTER[36] conducted in Aboriginal communities from June to August 2009. In the subsequent report on the NTER Redesign Consultations[37] it was asserted:

> That Aboriginal people valued the opportunity for genuine consultation and involvement in the development of policy and programs to address these complex problems, and considered this to be central to achieving successful, long-term outcomes.[38]

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[35] Department of Families, Housing, Community Services and Indigenous Affairs, *Policy Statement: Landmark Reform to the Welfare System, Reinstatement of the Racial Discrimination Act, and Strengthening of the Northern Territory Emergency Response: Part 1 - Australian government's position on future directions for the Northern Territory Emergency Response* (2009) <http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/policy_statement_nter/Pages/part1.aspx>.

[36] Department of Families, Housing, Community Services and Indigenous Affairs, *Future Directions for the Northern Territory Emergency Response* (2009) <http://www.fahcsia.gov.au/sa/indigenous/progserv/ntresponse/future_directions/Pages/default.aspx>.

[37] Department of Families, Housing, Community Services and Indigenous Affairs, *Report on the Northern Territory Emergency Response Redesign Consultations* (2009) <http://www.facs.gov.au/sa/indigenous/pubs/nter_reports/Pages/report_nter_redesign_consultations.aspx>.

[38] Ibid.

Caution is needed about this rosy statement. I have no doubt that Aboriginal people valued the opportunity for genuine consultation, but the future directions consultations followed a seriously flawed track record, and the bar had been lowered so much that the redesign consultations were a positive step, relatively speaking. In the *Will They Be Heard? Report*[39] retired Family Court Chief Justice Alistair Nicholson, was highly critical of these consultations. The Report analysed nine hours of consultations between government officials and Aboriginal communities at Bagot,[40] Utopia[41] and Ampilatwatja,[42] as well as government summaries of other consultation meetings.

The Report concluded that the process was a sham - the government offered the communities no real choice on the intervention; it had a pre-determined agenda. In the introduction to the report they said that the approach taken smacked of attitudes of racial superiority more appropriate to the 19th Century than this.[43]

But even the NTER Redesign Report, despite the obvious limitations of that so-called consultative process, identified a pervasive feeling amongst Aboriginal people in the Northern Territory that different standards had been applied to them compared with other Australians and that the NTER has accentuated racial divisions in some communities and townships.[44]

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39 Alastair Nicholson, Larissa Behrendt, Alison Vivian, Nicole Watson and Michele Harris, *'Will They Be Heard?' A response to the NTER Consultations June to August* (2009) <http://indigenouspeoplesissues.com/attachments/3094_WillTheyBeHeard_NT_2009.pdf>.

40 Bagot is one the larger town camps in Darwin, made up of about 400 residents.

41 The Utopia region is located 240 kilometres north east of Alice Springs. It is home to around 2000 people.

42 Ampilatwatja is a remote community 350 kilometres north-east of Alice Springs with a population of approximately 500 people.

43 Nicholson et al, above n 39, 5.

44 *Redesign Consultations*, above n 37, <http://www.facsia.gov.au/sa/indigenous/pubs/nter_reports/Documents/redesign_consultations/exec.htm#t2>.

IV SOME PERSONAL REFLECTIONS

In recent times I have heard Aboriginal people, including members of my family, identify the Intervention environment as similar to, or worse than, the era of assimilation. Such comments are now familiar. But think of it from a personal perspective. My senior family members have lived through an era of blatant and unacceptable discrimination. This is sobering. These were policies that saw great social harm and the attempted destruction of Aboriginal identity and culture. They also served to justify the dispossession of Aboriginal people from their lands and the forced removal of Aboriginal children from their families on the basis of their race.

My parents have described the inferior treatment faced by Aboriginal people in those times. They had to sit apart from non-Aboriginal people in cinemas, there were separate wards in hospitals, hotels refused admission or drinks, and schools were able to refuse enrolment to Aboriginal children. I do not remember seeing such overt racism in my childhood, and mostly was able to access the same services and opportunities as my non-Aboriginal friends. Growing up in the heyday of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) I was, however, aware that some people believed that we were inferior because of our race, and no doubt did try to exclude us indirectly from accessing services and opportunities.

The 'Intervention' took the retrograde step of suspending essential anti-discrimination laws in this country and included laws and policies which discriminate against people who are Aboriginal because they are Aboriginal. This legitimated the views of those who believe that it is OK to treat people differently because of their race. Since the Intervention this has been felt in a number of ways, perhaps most starkly when Aboriginal people accessing basic services such as shops, or otherwise are subject to measures that demonise them as alcoholics or pedophiles.

Some of you may think I am overstating this, but I ask you to consider the images of the tanks and soldiers coming in to their small communities under the guise of an emergency. Yes that really did happen. Consider what our older people should have thought when they saw the convoy of army vehicles rolling in. One comment I heard was that 'this isn't a country at war'. Not surprisingly, people in remote locations did not understand why the military was in their communities. Would any of you have understood if this had happened here in Adelaide? Then humiliating signs were erected outside of their communities and they were subject to the confusion of income management which in time they found required them to line up in a separate queue in supermarkets to use a basics card. This brought back old and painful memories.

When I returned last year to Darwin to take up my role as Anti-Discrimination Commissioner after living in Adelaide for a few years I took my son and his friends from Adelaide to our homelands. My son is proud of his heritage, and was looking forward to sharing this with others, the stories of his land, the beauty, the fishing. He had not lived in the Territory since attending year 12 in Adelaide in 2005 and then completing his dual degree at the University of South Australia. Our increasing excitement as we neared our country was felt by our fellow car passengers. But it collapsed as we got to the first gate to our country. We were both shocked and hurt – we had heard about 'the signs, but had not seen them. Blue signs: Alcohol and Pornography. I saw my son's hurt. Here, outside our home was a sign stigmatising our family. It dawned on me that he had now experienced the same sort of racism that his great grandparents had experienced.

As an Aboriginal man who has been educated in the legal mainstream, I may find it easier than some to see the sad irony of having my basic rights questioned in a country that sees itself as an international leader and as a state that respects Human Rights and International law. Why do I doubt this in a country that is so self-congratulatory about values of mateship and the 'fair go'? Why are

Aboriginal people not shown respect enough to be allowed to have an opinion on issues that affect us? Why do Governments continue to breach the international treaties that they have endorsed? Why do we not as a nation see the hurt inflicted on Aboriginal people?

It is worth quoting James Anaya again in relation to human rights and the fundamental freedoms of Indigenous people -

> Beyond the matter of the Northern Territory Emergency Response, I am concerned that there is a need to incorporate into government programmes a more holistic approach to addressing indigenous disadvantage across the country, one that is compatible with the objective of the United Nations Declaration of securing for indigenous peoples, not just social and economic wellbeing, but also the integrity of indigenous communities and cultures, and their self-determination.
>
> This approach must involve a real partnership between the Government and the Indigenous peoples of Australia, to move towards a future, as described by Prime Minister Rudd in his apology to indigenous peoples last year, that is "based on mutual respect, mutual resolve and mutual responsibility," and that is also fully respectful of the rights of Aboriginal and Torres Straight Islander peoples to maintain their distinct cultural identities, languages, and connections with traditional lands, and to be in control of their own destinies under conditions of equality.[45]

[45] United Nations High Commissioner for Human Rights, *Statement of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, as he concludes his visit to Australia, 27 August 2009*, <http://www.unhchr.ch/huricane/huricane.nsf/view01/313713727C084992C125761F00443D60?opendocument>.

V SOME HISTORY

Mutual respect, mutual resolve and mutual responsibility – are these not what Aboriginal people have always asked for? In the Northern Territory, Aboriginal people made their first statement some time ago in a form that was foreign to them. They hoped that the colonisers would listen to their pleas and take them seriously if it was in a form that they recognised, so they put it in writing.[46]

Through the 'Bark Petition' of 1963, the Yolngu people asserted the continuing existence of their law and land tenure in East Arnhem Land.[47] Their petition was made to the House of Representatives after the government sold part of the Arnhem Land reserve to a bauxite mining company without consulting the traditional owners.[48] The Yolgnu petition made eight points to Parliament. The five most relevant to our current discussion are:

> 2. That the procedure of the excision of this land and the fate of the people on it were never explained to them beforehand, and were kept secret from them.
>
> 3. That when the welfare officers and Government officials came to inform them of decisions taken without them and against them, they did not undertake to convey to the government in Canberra the views and feelings of the Yirrkala Aboriginal people.
>
> 6. That the people of this area fear that their needs and interests will be completely ignored as they have been ignored in the past, and they fear the fate which has overtaken the Larrakeah tribe will overtake them.
>
> 7. And they humbly pray that the Honorable House of Representative will appoint a Committee, accompanied by competent interpreters, to hear the views of the people of Yirrkala before permitting the excision of this land.

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[46] The petition was written in the Yolgnu language as well as English form.

[47] See *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141.

[48] Gary Foley, 'Teaching the whites a lesson' in Verity Burgmann and Jenny Lee (eds), *Staining the Wattle* (Penguin, 1988) 203.

> 8. They humbly pray that no arrangements be entered into with any company which will destroy the livlihood and independence of the Yirrkala people.[49]

History shows that Blackburn J in his subsequent decision in *Milirpum v Nabalco*[50] found that indigenous land laws were incapable of recognition because they lacked essential elements which define a propriety interest as comprehended by the Australian legal system - rights to alienate and to exclude others. This view held sway in Australia until 1992 when it was rejected in *Mabo* (No2).[51]

In June 1988 a statement of Aboriginal political objectives was given to Prime Minister Hawke when he visited the Barunga Festival.[52] It was a comprehensive list which included the right to self-determination and self-management, including the freedom to pursue our own economic, social, religious and cultural development in accordance with the *Universal Declaration of Human Rights*,[53] the *International Covenant on Economic, Social and Cultural Rights*,[54] the *International Covenant on Civil and Political Rights*,[55] and the *International Convention on the Elimination of all forms of Racial Discrimination*.[56] It also claimed rights to life, liberty, security of person, food, clothing, housing, medical care, education and employment opportunities, necessary social services and other basic rights. The Prime Minister responded by saying that he wanted

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49 Bark Petition.

50 Ibid 37.

51 *Mabo and Others v Queensland* [1992] HCA 23; (1992) 175 CLR 1.

52 Barunga Festival is one of Australia's longest running Aboriginal festivals, located four hours away from Darwin.

53 *Universal Declaration of Human Rights,* GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).

54 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force March 1 1976).

55 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force March 23 1976).

56 *International Convention on the Elimination of all forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

to conclude a treaty between Aboriginal and other Australians by 1990. This wish was not fulfilled.

Similarly the Kalkaringi Statement[57] was developed by the Combined Aboriginal Nations of Central Australia at the Kalkaringi Constitutional Convention in August 1998. This set out the aspirations and concerns of Convention delegates regarding issues of Statehood, Constitutional development and governance. They stipulated that Aboriginal self-government should be recognised as a fundamental right and as a solution to the existing disempowerment of the Aboriginal people of the nations of the NT.[58] They also said that a NT Constitution must contain a commitment to negotiate a framework agreement with Aboriginal peoples that would set out processes for mutual recognition of our respective governance structures and how power would be shared with the Aboriginal nations of the NT.

VI BUILDING RESPECTFUL RELATIONSHIPS

Tackling real engagement with people of the First Nations is not a new phenomenon, especially if you cast your eyes overseas. For example, in the United States in 1988 former President Clinton issued an Executive Order which, among other things, required federal government agencies to 'have an effective process' to ensure that tribal representatives could provide meaningful input into regulatory policies that 'significantly or uniquely affect communities'.[59] This was followed two years later by another Executive Order strengthening these provisions by restraining federal agencies to consult with tribes in the rulemaking process and

[57] Statement coming out of the Constitutional Convention of the Combined Aboriginal Nations of Central Australia at Kalkaringi, 17-20 August 1998.

[58] Indigenous Constitutional Strategy Northern Territory, Document produced by ATSIC, Central Land Council and the Northern Land Council, 1998.

[59] Executive Order 13084, 'Consultation and Cooperation with Indian Tribal Governments', Federal Register 65, no. 96 (May 19, 1998).

by obliging agencies to designate an official to handle relations with Native nations.[60]

These initiatives can be seen as an effort to change the relationship between the government and the tribes in a fundamental way. While paternalism still is alive in many interactions, the US federal government at least was showing a new willingness to deal with the Native American nations with an increased respect for their sovereignty, governments, languages and cultures.[61] Cooperative approaches to issues of mutual concern also have been developing for some time at a state level in the United States. Many states are formalising their relationships with tribes through agreements, statutes, and executive orders that embody a new approach to state-tribal relations by establishing mechanisms for regular dialogue and even shared jurisdiction.[62] Governors in several states have used executive orders to help institutionalise state-tribal relationships. An example is New Mexico where the Office of Indian Affairs was promoted to become a cabinet-level department by statute, which in turn gives Indian issues more prominent significance in state policy development.[63] The Governor of Wisconsin signed an executive order directing states agencies to work respectfully with tribes and to consult with them 'regarding state action and proposed action that is anticipated to directly affect on Indian Tribe or its members'.[64]

These types of agreements and the formalisation of new relationships between states and Native nations points to an underlying shift toward mutual recognition. Relationships long marred by confrontation are in the early stages of being redefined. New ways to interact on a government-to-government basis are

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60 Executive Order 13175, 'Consultation and Cooperation with Indian Tribal Governments', Federal Register 65, no 218 (November 9, 2000).

61 Eric Henson, Jonathan Taylor, Catherine Curtis, Stephen Cornell, Kenneth W. Grant, Miriam Jorgensen, Joseph Kalt, and Andrew Lee, *The State of the Native nations, Conditions Under U.S Policies of Self Determination, Tribal Jurisdiction* (Oxford University Press, 2008), 57.

62 Ibid 72.

63 Ibid.

64 Ibid 73.

being attempted, with the aim that the resulting dialogue between equals will bring benefits all state and tribal citizens.[65]

Is this not an approach that warrants greater attention in Australia? Do we not need to look at our relationships and strive to make them better? Is it possible to sit down and have respectful discussions that recognise the integrity of both perspectives?

VII MAKING OUR VOICES HEARD

Aboriginal people also have to develop ways in which we can be effective participants in such a dialogue. We need to educate others about what we want with respect to governance. We have to address misunderstandings about what we mean by self-determination, especially to respond to fundamentalist reactions to any idea of sovereignty. Our efforts to educate are important because sovereignty is important for Aboriginal people if we are to be true partners for the future. We need to control our own resources to meet our own needs.

Aboriginal people must work with territory, state and federal governments not only when funds are being distributed but in order to further develop relationships based on mutual trust, mutual resolve and mutual responsibility. We need to engage at every level to help ensure that public resources are not consumed by unnecessary bureaucracy. Otherwise, what reaches the communities will not be sufficient even to maintain the status quo. The ability to exercise our sovereignty by self determination on our lands will hopefully increase economic and political influence to determine our own destinies and minimise dependency on government funding.

[65] Henson et al, above n 61, 77.

In his 2010 Report[66] the Aboriginal and Torres Strait Islander Social Justice Commissioner, Mr Mick Gooda, encapsulated such goals when he said that he wanted to establish a framework for engagement that will enable genuine relationships to exist between governments, non-Indigenous and Aboriginal and Torres Strait Islander peoples. A focus would be how the 2007 United Nations *Declaration on the Rights of Indigenous Peoples* can be used as a framework to build stronger and deeper relationships.[67] He sees it as essential that Governments at all levels develop a framework to achieve substantial improvement in Aboriginal lives. To achieve this, Aboriginal people must be treated as substantive players and major stakeholders in the development, design, implementation, monitoring and evaluation of all policies and legislation that impact on their communities.[68]

This framework is a good start for building a strong relationship to underpin ongoing respectful dialogue. It indicates a way forward in a problematic environment - one that is described in the *Australian Reconciliation Barometer*[69] report recently released by Reconciliation Australia. This national study looked at the relationship between Aboriginal people and other Australians and showed that the level of mutual trust is very low.[70] More positively, the report also shows that more than two thirds of general respondents believe that Indigenous culture is important to Australia's identity as a nation, that Indigenous history should be a compulsory part of the history curriculum in schools[71] and that Government should take steps to help Indigenous people reach equality on a wide range of measures.

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66 Mick Gooda, 'Social Justice Report 2010' (Australian Human Rights Commission, 2010).

67 Ibid III.

68 Ibid 22.

69 David Stopler and Jennifer Hammond, 'Australian Reconciliation Barometer 2010: Comparing the Attitudes of Indigenous People and Australians Overall' (Reconciliation Australia, 4 June 2010).

70 Ibid 9.

71 Ibid 13.

This realisation comes at a good time given that the Australian Government has established an expert panel to lead broad consultations and bring forward a report and recommendations on constitutional change. This means that some hard issues must be confronted including, in my opinion, the Government's capacity to suspend the *Race Discrimination Act (RDA) 1975* (Cth) under s51 (xxvi) - the race power.

Suspending the RDA to allow the Intervention is not the first time the RDA has been put aside. It has happened on two other occasions. Firstly, to amend the *Native Title Act 1993 (*Cth*)* (which removed existing guarantees of rights to Indigenous people) and also when enacting the *Hindmarsh Island Bridge Act 1997* (Cth).[72] So, while potential Constitutional change is mooted, we should keep in mind that only eight of forty-four proposed Constitutional amendments have ever been carried by referendum. One of these times was in 1967. In the current climate, relationships between Aboriginal people and Governments are strained. We all will need to do considerable work to rebuild trust. We also need to recognise that any constructive constitutional changes will only happen if improved understanding is built within the broader public. The information needs to be concise and clear. But we know from the recent Barometer report[73] that many Australians believe that Aboriginal people and their culture are important to the identity of this nation. Such goodwill may have been a factor in the 1967 referendum and will be needed if a referendum for any meaningful change to the Constitution is to succeed.

This discussion also is happening when the 5-year time frame set down for the Intervention is drawing to a close. The effective sunset to the Emergency Response legislation occurs in September 2012. Territorians have received no clear guidance about what is proposed to happen after that date. It is a question I am asked constantly by

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[72] Peta MacGillvray, 'Aboriginal People, the United Nations and Racial Discrimination: The Request for Urgent Action in the Northern Territory' (2009) 7(10) *Indigenous Law Bulletin* 6, 7.

[73] Stopler and Hammond, above n 69.

Aboriginal people and organisations - what are the Government's longer term plans for the Intervention? Even at a practical level, organisations need to know whether 'new monies' that have accompanied the Intervention process will be continued.[74] Will somebody actually be sitting down and discussing this with them? At least in recent discussions[75] between organisational representatives and FAHCSIA the need for *genuine engagement* was agreed to as a basis for improving relationships and identifying mutually desired outcomes. It was agreed that previous policy development avoided such respectful engagement and that it will be done differently this time around.

VIII CONCLUSION

Northern Territory Aboriginal people and organisations have a history to draw on that tells us that positive words can end up being just 'words', and that participatory exercises will count for nothing. But we can look to processes that have been initiated recently in the United States to see that new ways can be found to interact constructively through dialogue as equals.

As stated by Billings Learned Hand:[76]

> Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help...[77]

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[74] See, eg, the North Australian Aboriginal Justice Agency (MAAJA) which received a Nhulunbuy Civil Solicitor, Nhulunbuy Civil Administration officer, 2 Darwin Civil Solicitors, Darwin In House Counsel – Criminal, 3 Darwin Criminal Solicitors, Katherine Family Solicitor, and Katherine Criminal Solicitor.

[75] Meeting held in Darwin with Aboriginal Organisations and FAHCSIA, Deputy Secretary on the 20th April 2011.

[76] Billings Learned Hand was a United States Judge and judicial philosopher.

[77] Billing Learned Hand, 'The Spirit of Liberty' (Speech delivered at the I Am an American Day ceremony, Central Park, New York City, May 21, 1944).

Liberty is a concept in political philosophy that identifies the condition in which people are able to govern themselves, to behave according to their own free will, and take responsibility for their actions. For the First Nations of Australia, this aspiration requires recognition of our integrity and claims for self-determination.

Just as friends such as Professor Mick Dodson and Catherine Branson (current President of the Human Rights Commission), have had much to say about the contributions made by Hon. Elliott Johnston, I also want to acknowledge that at the core of his work and commitment lies a refined sense of social justice that accommodates our demands to be recognised appropriately in our own land. This strong sense of justice is what appears to be missing in Australia at the moment. Have we lost a capacity to value and create the opportunity for a 'fair go'?

I have tried to paint a picture this evening that contributes to understanding about what is lacking if we genuinely are committed to engaging with Aboriginal people and the broader community to create a better future for us all. Such engagement requires leadership and is a process that can be undermined by political partisanship or sectional interests. Leadership is needed that is committed to really involving Aboriginal people in developing an Australian society of which we all can be proud. People of the First Nations are happy for our heritage and living culture to be part of what defines a future Australia. Just talk with us.

But that is the scary thing; nothing I have said here tonight is breaking new ground. We know what we should do. Perhaps we are just reluctant to make the hard decisions.