INDIGENOUS ISSUES IN THE LAW: THE PROGRESS AND LESSONS OF THE LAST 40 YEARS

In this speech, the terms 'Indigenous Australian people' or 'Indigenous Australians' will be used to refer to the Aboriginal peoples of Australia and the Torres Strait Islanders. Where appropriate, reference will be made to Aboriginal people only. It was often the case that laws applied only to Aboriginal peoples but that the term 'Aboriginal' in the relevant legislation inaccurately included Torres Strait Islanders.

Warning: the following material may contain reference to Indigenous persons who are deceased.

INTRODUCTION

May I join Judge Kingham in her acknowledgement of country and the traditional owners and custodians of this land; and pay my respects to the elders past and present of this part of the Meanjin area of Brisbane where those elders met to discuss important topics for the future of their people and solve problems much as you do every day of the week in the work of the Queensland Civil and Administrative Tribunal.

Thank you for inviting me to speak to you today during NAIDOC week, a week which celebrates the achievements of Aboriginal and Torres Strait Islander people and gives us all the opportunity to consider that contribution and the way forward. Amongst all the challenges facing Australia's Indigenous population today, it gives one some hope, even inspiration, to pause and think of the changes, many of them for the better, that have been made in the past forty years.

Just over forty years ago, in 1971, the first argument for native title rights was rejected as the Supreme Court of the Northern Territory reaffirmed the doctrine of *terra nullius*.[1] Although the worst excesses of the stolen generation occurred through the last half of the 19th and first half of the 20th century, a Victorian Government

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

submission to the *Bringing Them Home* report confirmed that the practice continued through to the 1970s. It admitted that:

> "*despite the apparent recognition in government reports that the interests of Indigenous children were best served by keeping them in their own communities, the number of Aboriginal children forcibly removed continued to increase, rising from 220 in 1973 to 350 in 1976*"[2]

As this era came to a long-overdue close, it was a time of great change. It was just over forty years ago that the Aboriginal flag was flown for the first time over the tent embassy. It was in 1967 that Indigenous persons were first counted in the distribution of electorates following repeal of s 127 of the Constitution,[3] although the right to vote had been specifically conferred five years before that.[4] In 1970, the Aboriginal Legal Service was created. The following year, in 1971, Evonne Goolagong won Wimbledon and became the number one ranked tennis player, going on to win 14 grand slam titles in her career. 1972 saw Australia's first Indigenous barrister admitted to the bar, and in New South Wales, the removal of the part of the teacher's handbook that allowed school principals to refuse enrolment due to conditions at home or substantial opposition from the community.[5] It was a time of movement and change.

Not all change was positive. In 1971, in Queensland the *Aborigines Act 1971* (Qld) was passed. Under it, the paternalistic permit system for Aboriginal people living on and visiting reserves was maintained. This gave authoritarian power to those who could control movement to and residence on the reserve.

LAND RIGHTS

Terra Nullius and the Gove Land Rights Case

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2 Victorian Government, Submission to Human Rights and Equal Opportunity Commission Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, *Bringing them Home*, April 1997, p 72.

3 *Constitutional Alteration (Aboriginals) Act 1967* (Cth).

4 *Commonwealth Electoral Act 1962* (Cth)

5 G Morgan, "Memory and Marginalisation: Aboriginality and Education in the Assimilation Era" 50 *Australian Journal of Education* 40.

In 1971, Justice Richard Blackburn of the Supreme Court of the Northern Territory handed down a decision that belongs very much to the past, but nevertheless forged a path to the present.

In *Milirrpum v Nabalco Pty Ltd*,[6] better known as the Gove Land Rights Case, his Honour was the first to consider the possibility of native title. Nabalco Corporation had been granted a twelve-year mining lease which would allow it to extract bauxite from parts of Arnhem Land, including the Gove Peninsula. The traditional owners of the Peninsula, the Yolngu People, objected.

The Yolngu People were familiar with the effects of mining on their land. Eight years earlier, part of the Arnhem Land reserve had been sold off to a mining company. They compiled a petition, which they framed with painted bark and sent to the Parliament in Canberra.[7] The symbolism was apparently lost on the government of the day.[8]

For the first time, the argument was mounted in court that their title to the land had not been properly extinguished or acquired. They were the original owners of the land, and since the right to that land had not been divested by any valid legal means, their proprietary interest should be recognised.

Justice Blackburn disagreed. He held that native title was not part of Australian law. On his Honour's assessment, "the clan belong[ed] to the land, more than the land belongs to the clan", and that the nature of the relationship between Indigenous Australians and their land was "a more cogent feeling of obligation to the land rather than of ownership to it".[9] He said there was "so little resemblance" between Western notions of property and the nature of the relationship between Indigenous Australians and the land that he "must hold that these claims are not in the nature of proprietary interests".[10] His Honour was satisfied of the existence of a legal system which

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6 (1971) 17 FLR 141.

7 Australian Government, "Bark petitions: Indigenous art and reform for the rights of Indigenous Australians" available at http://australia.gov.au/about-australia/australian-story/bark-petitions-indigenous-art.

8 Ibid.

9 *Milirrpum v Nabalco Pty Ltd* at 270-271.

10 *Milirrpum v Nabalco Pty Ltd* at 273.

predated settlement, but not that that legal system recognised private property rights in clans such as the claimants.

The Consequences

Such a view was dispelled in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 ("*Mabo*"), two decades later. However, despite his Honour's following the legal precedent of *terra nullius*, the seeds of progress were planted in the lost battle on Gove Peninsula.

Although evidence in cases concerning proprietary rights in real property must ordinarily be in writing, Justice Blackburn allowed the admission of oral evidence in the attempt to establish the claim.[11] This was a crucial step, a necessary foundation for any land rights case to be successful in the future.

Although the judge could not legally characterise the rights as proprietary at common law, such a course seems to have been despite, rather than because of, the disposition of his views on policy. In a confidential memorandum to both sides of parliament later to be released from the National Archives, Justice Blackburn wrote that the introduction of a system for granting land rights to Indigenous Australians would be both "morally right and socially expedient".[12]

Sometimes crucial changes come from adversity. The year after the decision was handed down, the Woodward Royal Commission was established to investigate Aboriginal land rights, which ultimately found that Indigenous Australians had a claim to vacant Crown land to which they had unbroken ties, and Aboriginal sacred sites must be protected, with mining and development to proceed only with the permission of and payment of royalties to the traditional owners.[13] The Commission

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11 *Milirrpum v Nabalco Pty Ltd* at 154 (rationalising that "the rules of evidence are to be applied rationally and not mechanically. The application of a rule of evidence to the proof of novel facts, in the context of novel issues of substantive law, must be in accordance with the true rationale for the law, not merely in accordance its past application to analogous facts").

12 National Archives of Australia, Confidential Memorandum provided to government and opposition by Justice Blackburn, 1972, released 31 December 2001.

13 Report of the Aboriginal Land Rights Commission (Woodward Commission), 1975.

led to the passage in 1976 of the *Aboriginal Land Rights (Northern Territory) Act* that allowed land claims in the Northern Territory.[14]

In 1985, Uluru would be returned to the Pitjantjatjara people, its traditional owners.[15]

In perhaps the best example of personification of the progress of those times, Galarrwuy Yunupingu had helped his father frame the failed Bark Petitions, helped interpret in the failed court challenge, but went on to become Chairman of the Northern Land Council after the passage of that Act.[16]

The Progress Since Then

It is clear that we have come a long way since then. Ultimately, native title was recognised, as is well known, in *Mabo*. Rather than meeting it with opposition, the Australian Government assisted its evolution into a statutory framework, enacting the *Native Title Act 1993* and establishing the National Native Title Tribunal to determine native title claims, and create an avenue of appeal through the federal courts.

Much has been achieved in the name of Indigenous land rights since *Mabo*. Successful native title determinations have been made in respect of over 1.1 million square kilometres, amounting to 15% of Australia's land mass.[17] Most of this is in Western Australia. Of the 20 determinations that have been made in that State, only six have been contested.[18] The progress has not come to a standstill: it still takes an average of six years to finalise a contested native title claim.[19] It is a gradual, but diligent process by which claims are now considered, and rights are recognised.

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14 Office of the Registrar, "A History of Aboriginal Land Rights in New South Wales, 1973-1981" available at http://www.oralra.nsw.gov.au/resourceshistoryb.html.

15 Senator the Hon Don Farrell and the Hon Warren Snowdon MP, Media Release, "Uluru Handback: A Historic Moment for all Australians", 26 October 2010, available at http://www.environment.gov.au/minister/farrell/2010/pubs/mr20101026.pdf.

16 G Yunupingu, "Tradition, truth and tomorrow" (December 2008) *The Monthly* 32.

17 Queensland South Native Title Services, "QSNTS Native Title Handbook", p 9, available at http://www.qsnts.com.au/publications/QSNTSNativeTitleHandbook.pdf.

18 Government of Western Australia, "Native Title Claims" available at http://www.dpc.wa.gov.au/lantu/Claims/Pages/Default.aspx

19 Adam McLean, "Frameworks to Settling Native Title" (2009) 7 *Indigenous Law Bulletin* 27, 29.

The tent embassy was set up 40 years ago in response to then government's refusal to grant Aboriginal land rights.[20] On 21 May this year, 35 years after the claim to the lands at Archer River by John Koowarta, Premier Newman returned them to their traditional owners, and apologised for the injustices of the past:

> *Today I want to confront the issue. That is, 35 years ago a great injustice was perpetrated. And today we're here to put that right. We're here to make sure that it is right forever, and to give back to the people what was rightfully theirs. I'm sure, if all Queenslanders knew the story of what happened in 1977 and afterwards, they would feel as sorry as I do myself. So, today, my apologies to those who have suffered.*[21]

CHALLENGES FOR INDIGENOUS AUSTRALIANS AND THE LAW

Notwithstanding these welcome developments, significant challenges remain to be addressed.

Overrepresentation in Prisons

Indigenous Australians are significantly over-represented in Australian prisons. In 2003, Indigenous Australians constituted 20% of all prisoners.[22] Another survey in 2004 showed that this figure had increased slightly to 21%.[23] This number continues to increase. By 30 June 2011, 26% of prisoners identified as Aboriginal or Torres Strait Islander.[24] Given that the total population of Indigenous persons in Australia at the 2011 Census was only 548,370, or 2.5% of the total population,[25] the number of incarcerated Aboriginal and Torres Strait Islander people is more than ten times higher than it should be.

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20 National Museum Australia, "Aboriginal Embassy, 1972: A Diplomatic Mission to Government" available at http://indigenousrights.net.au/section.asp?sID=12.

21 Gerhard Pearson "Newman closes 35 years of injustice with return of land" (26 May 2012) *The Australian* available at http://www.theaustralian.com.au/national-affairs/state-politics/newman-closes-35-years-of-injustice-with-return-of-land/story-e6frgczx-1226367379630

22 ABS, "Crime and Justice: Aboriginal and Torres Strait Islander People: Contact with the Law" (released 12 July 2005) available at http://www.abs.gov.au/ausstats/abs@.nsf/94713ad445ff1425ca25682000192af2/a3c671495d062f72ca25703b0080ccd1!OpenDocument

23 Ibid.

24 ABS, "Aboriginal And Torres Strait Islander Prisoners" (released 8 December 2011) available at http://www.abs.gov.au/ausstats/abs@.nsf/Products/AD702E3768342C4CCA25795F000DB4B0?opendocument

25 ABS, "Aboriginal and Torres Strait Islander Peoples: 2011 Census Counts" (21 June 2012) available at http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2075.0main+features32011

Across the Indigenous population, contact with the police is extremely prevalent. In another survey conducted in 2008, 15% of Indigenous Australians reported being arrested over the preceding five years.[26] This figure had decreased one percent from 16% in 2002.[27] This figure was higher in remote areas at 19%, compared to 14% in non-remote areas. Almost one-fifth (18%) had required legal assistance in the last 12 months.[28] More than one third of Indigenous Australians aged 15 years or older have been charged with a crime at least once in their lives.[29] When confined to men, this figure rises to 50%.[30] These figures are everyone's responsibility.

The Australian Institute of Health and Welfare has demonstrated that substance abuse and mental health issues, already problematic factors within Indigenous communities, are more prevalent amongst prisoners.[31] These factors can exacerbate problems and make rehabilitation of offenders more difficult.

Victims of Crime

Indigenous Australians are substantially more likely to be not only the perpetrators of violence, but also the victims of violent crime. In 2008, 25% of Indigenous Australians aged 15 and over had been the victims of threatened or actual violence in the previous 12 months.[32] This figure had increased one percent from 24% in 2002.[33]

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26 ABS, "Culture, Heritage and Leisure" (24 May 2012) available at http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/1301.0~2012~Main%20Features~Culture,%20heritage%20and%20leisure~246

27 Australian Institute of Criminology, Matthew Willis and John-Patrick Moore, "Reintigration of Indigenous Prisoners", Research and Public Policy Series No. 90 (2008) p 10.

28 ABS, "Culture, Heritage and Leisure" (24 May 2012) available at http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/1301.0~2012~Main%20Features~Culture,%20heritage%20and%20leisure~246

29 ABS, "Crime and Justice: Aboriginal and Torres Strait Islander People: Contact with the Law" (released 12 July 2005) available at http://www.abs.gov.au/ausstats/abs@.nsf/94713ad445ff1425ca25682000192af2/a3c671495d062f72ca25703b0080ccd1!OpenDocument

30 Ibid.

31 Australian Institute of Health and Welfare, Joseph Graffam and Alison Shinkfield "Closing the gap: Strategies to enhance employment of Indigenous ex-offenders after release from correctional institutions" (Resource Sheet No 11) available at http://www.aihw.gov.au/closingthegap/documents/resource_sheets/ctgc-rs11.pdf.

32 ABS, "Law and Justice" (24 May 2012) available at http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/1301.0~2012~Main%20Features~Law%20and%20justice~253

33 ABS, "Crime and Justice: Aboriginal and Torres Strait Islander People: Contact with the Law" (released 12 July 2005) available at

ABS statistics show that once adjusted for certain variables such as different age structures, the numbers of Indigenous victims of threatened or personal violence were double those of non-Indigenous Australians.[34]

One common form of such violence is domestic. One in five Indigenous Australians reported in 2002 that family violence of a violent or sexual nature was a common problem within their community.[35] In 2011, 71% of Aboriginal and Torres Strait Islander people reported at least one neighbourhood or community problem in their district.[36] Domestic violence and sexual assault are also far more common in remote communities.[37] The consequential effects of such an environment are not only the higher incidence of criminal activity that I have already mentioned, but it also correlates with lower levels of education, poorer quality of health, and higher incidence of disability or long-term permanent conditions.[38]

These problems are particularly acute in certain communities, where perpetrators and victims are often the same people. The pattern of crime tends to spiral, with victims later becoming offenders. Of those Indigenous people who had been arrested and charged, nearly half had previously been victims of violent crime—more than double the incidence of victimisation than amongst those who had not spent time behind bars.[39] In this sense, the statistics show that the way in which crime and violence is self-perpetuating.

Indigenous people are also victims of crime often because of the vulnerable socio-economic situation they find themselves in. Where that happens, courts must be respectful of them within the criminal justice system and recognise the language and cultural needs of those victims of crime. In particular, consideration needs to be given to cultural views on the naming or presentation of images of deceased persons.

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http://www.abs.gov.au/ausstats/abs@.nsf/94713ad445ff1425ca25682000192af2/a3c671495d062f72ca25703b0080ccd1!OpenDocument

34 Ibid.

35 Ibid.

36 ABS, "Law and Justice" (24 May 2012) available at http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/1301.0~2012~Main%20Features~Law%20and%20justice~253

37 Ibid.

38 Ibid.

39 Ibid.

Rehabilitation and Preventative Measures

So what trends are there which differ with Indigenous offenders that might attract a different approach? What indicators are there for the causes of these problems? The Australian Bureau of Statistics figures suggest that Indigenous people are in prison more frequently, for less time. Nearly three quarters (74%) of Indigenous prisoners in 2011 had been imprisoned before, compared to just under half (48%) of non-Indigenous prisoners.[40] Both figures have decreased only marginally since 2004 (Indigenous 76%; non-Indigenous 52%).[41] However, they were serving an average term of 24 months, roughly half the average term of non-Indigenous prisoners of 47 months.[42] These figures show the potential and need for rehabilitation of Indigenous offenders, who are less likely to commit serious offences, but substantially more likely to fall back into their offending ways.

There are other figures which suggest what form such rehabilitative and preventative measures might take. Nearly 60% of Indigenous prisoners had not completed grade 10, compared to only 40% of their non-Indigenous counterparts.[43] Accordingly, they had higher unemployment, and where they were employed, lower salaries. They are also younger: in 2011, the median age of Indigenous prisoners was 30.5 years, approximately 5 years below that of non-Indigenous prisoners.[44] Substantially more Indigenous prisoners had been removed from their natural families, or had siblings that had suffered such a fate, the social impact of which is well documented. Unsurprisingly, they tended to commence their offending at a younger age.[45]

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40 ABS, "Imprisonment Rates" (8 December 2011) available at http://www.abs.gov.au/ausstats/abs@.nsf/Products/875C813AF74635EBCA25795F000DB4EF?opendocument

41 ABS, "Crime and Justice: Aboriginal and Torres Strait Islander People: Contact with the Law" (released 12 July 2005) available at http://www.abs.gov.au/ausstats/abs@.nsf/94713ad445ff1425ca25682000192af2/a3c671495d062f72ca25703b0080ccd1!OpenDocument

42 ABS, "Imprisonment Rates" (8 December 2011) available at http://www.abs.gov.au/ausstats/abs@.nsf/Products/875C813AF74635EBCA25795F000DB4EF?opendocument

43 ABS, "Crime and Justice: Aboriginal and Torres Strait Islander People: Contact with the Law" (released 12 July 2005) available at http://www.abs.gov.au/ausstats/abs@.nsf/94713ad445ff1425ca25682000192af2/a3c671495d062f72ca25703b0080ccd1!OpenDocument

44 ABS, "Age" (8 December 2011) available at http://www.abs.gov.au/ausstats/abs@.nsf/Products/9C397CF24C5BFD7BCA25795F000DB530?opendocument

45 Ibid.

Solutions

These matters which I have just mentioned are those which need to be remedied if the problem of over-representation of Indigenous people in custody is to be addressed. Social factors which affect the likelihood of offending include education, health, employment, family unity, substance abuse and support. I do not mean to make the solution sound easy. Of course it is not. The logistics and finer policies of addressing each of these is an enormous undertaking.

Before looking at solutions, however, it is useful also to give an illustration of an experiment that does not appear to have been effective.

Mandatory Sentencing Regime in Western Australia and Northern Territory

In 1996 and 1997, Western Australia and the Northern Territory introduced mandatory sentencing regimes for property offences. In Western Australia, all burglary offenders convicted of a third home burglary offence were required to be sentenced to at least 12 months imprisonment, whether they were adults or juveniles.[46] In the Northern Territory, certain property offences attracted mandatory terms of 14 days for one offence, 90 days for a second, and one year for a third for offenders over 16 years of age.[47] Such offences were not confined to robbery: they included theft, unlawful entry to buildings, caravans or trailers or receiving stolen goods.[48]

The greatest impact was disproportionately felt by the Indigenous population. Between February 1997 and May 1998, 80% of mandatory detention cases before the Children's Court of Western Australia were Indigenous children.[49] A report by the Human Rights Commission in 2001 provides details of examples of cases where the laws led to what appear to be manifestly unjust results: an Indigenous mother who served 14 days in prison for stealing a can of beer; an 18 year old Indigenous man

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46 *Criminal Code* (WA), s 401.

47 *Sentencing Act 1995* (NT), s 78A (as it was before substituted by *Sentencing Amendment Act (No. 3) 2001* (NT) (Act No 55 of 2001), s 6).

48 For more detail, see H Bayes, "Punishment is Blind: Mandatory Sentencing of Children in Western Australia and the Northern Territory" (1999) 22 UNSWLJ 286.

49 Australian Human Rights Commission, *Mandatory Detention Laws in Australia* (2001) available at http://www.hreoc.gov.au/human_rights/children/mandatory_briefing.html.

who served 14 days after admitting to stealing a cigarette lighter; a 29 year old homeless Indigenous man who, while drunk, stumbled into a neighbour's back yard and took a towel, and, being his third offence, was sentenced to twelve months' imprisonment.[50] In its concluding observations on Australia, the UN Human Rights Committee criticised the provisions as "disproportionate to the seriousness of the crimes committed and … inconsistent with the strategies adopted by the State party to reduce the over-representation of Indigenous persons in the criminal justice system".[51] The provisions in the Northern Territory have since been repealed.[52]

This failed experiment in harsher punishments to reduce crime in Indigenous communities has demonstrated that it is not the answer.

ADDRESSING THE UNDERLYING SOCIAL CAUSES

Instead, it is only by fostering a society in which crime is less attractive that the over-representation of Indigenous prisoners may be remedied. All Indigenous people, particularly the younger population, must be given opportunity, responsibility, motivation, recognition and respect.

Education

In education, since oppressive provisions in the teacher's handbook which I mentioned allowing principals to somewhat arbitrarily refuse their enrolment were removed, the numbers of Indigenous enrolment and performance in schools has also progressed. The rate of Aboriginal children completing grade 12 is increasing with 22% completing grade 12 in 2008, up from 18% in 2002.[53] In Victoria, for example, kindergarten enrolment for Indigenous three year olds tripled in three years from 2008

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50 Australian Human Rights Commission, *Mandatory Sentencing Laws in the Northern Territory and Western Australia* (2001) available at http://www.hreoc.gov.au/pdf/social_justice/submissions_un_hr_committee/5_mandatory_sentencing.pdf.

51 UN Human Rights Committee, Concluding Observations on Australia, UN Doc A/55/40, paras 498-528, 24 July 2000.

52 *Sentencing Amendment Act (No. 3) 2001* (NT), s 6.

53 Australian Human Rights Commission, *A statistical overview of Aboriginal and Torres Strait Islander peoples in Australia* (2008) available at http://www.hreoc.gov.au/social_justice/statistics/index.html.

to 2011.[54] Literacy at primary school level continued to improve, and retention rates from years 7 to 10 also improved, although still below the national average.[55] The number of Indigenous high school graduates continues to increase.[56] However, while the performance of Indigenous students is increasing, the gap between them and their non-Indigenous peers is also increasing.[57]

Within the legal profession, there are now 60 Aboriginal law graduates in Western Australia each year alone.[58] However, although inroads have been made, there is still a long way to go. There has not yet been an Aboriginal barrister elevated to senior counsel, and according to *The Australian* in 2008, there were still only 8 Aboriginal and Torres Strait Islander barristers in practice including Nathan Jarro from Queensland (and we can lay claim on a State of Origin basis to Tony McEvoy at the Sydney bar).[59] But that is changing rapidly. In Victoria the number of Indigenous barristers has threefold from 2 to 6; still not nearly enough but certainly moving in the right direction.[60]

Employment

In employment figures there have also been improvements. 54% of Aboriginal and Torres Strait Islander people aged 15-64 years were employed in 2008, an increase from 48% in 2002.[61] The unemployment rate for Aboriginal and Torres Strait Islander Australians fell from 23% in 2002 to 17% in 2008, but remained more than three times higher than the rate for non-Indigenous Australians (5% in 2008).[62] As a

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54 Victorian Government, *Strategic Area for Action 2: Improve Education Outcomes* (Victorian Government Indigenous Affairs Report, 2010-11) p 26.

55 Ibid.

56 Ibid.

57 Ibid.

58 Law Society of Western Australia, "Aboriginal Lawyers Committee" available at http://www.lawsocietywa.asn.au/aboriginal-lawyers-committee.html.

59 Michael Pelly, "Black lawyers can raise the bar" (28 March 2008) *The Australian* available at http://www.theaustralian.com.au/business/legal-affairs/black-lawyers-can-raise-the-bar/story-e6frg986-1111115904986.

60 Victorian Bar Association, "Media Release: Victorian Bar selects three Indigenous Australians for Clerkships" (21 February 2012) available at http://www.vicbar.com.au/getfile.ashx?file=HomePageBoxLeftFiles/Media%20Release%20-%20Victorian%20Bar%20selects%20three%20indigenous%20Australians%20for%20clerkships%20-%2021%20February%202012.pdf.

61 Australian Human Rights Commission, *A statistical overview of Aboriginal and Torres Strait Islander peoples in Australia* (2008) available at http://www.hreoc.gov.au/social_justice/statistics/index.html.

62 Ibid.

consequence, the proportion of Aboriginal and Torres Strait Islander people who lived in households that had "run out of money for basic living expenses in the previous 12 months" decreased from 44% in 2002, to 28% in 2008.[63] However, while the rate of Indigenous Australians who were unemployed decreased from 23% in 2002 to 17% in 2008, that figure was still triple the corresponding rate for non-Indigenous Australians.[64]

Health

In health, the disparity between Indigenous and non-Indigenous Australians still remains, but has been narrowed. In regions of Australia in 1973, life expectancy of Indigenous persons was expected to be 47 years; now, that age is closer to 67 years for males and 73 for females.[65] These figures remain 10 years less than those for the non-Indigenous population.[66] It is also promising to see that 87% of Aboriginal and Torres Strait Islander who had been pregnant in the previous three years had bimonthly check-ups.[67] Nonetheless, babies born to Indigenous mothers are more likely than other babies to die around the time of birth.[68] According to the ABS, "those who survive are more likely than other Australians to live in poor conditions, to be unemployed, to suffer from violence, to be imprisoned, to develop a range of chronic diseases, to be admitted to hospital, and to die at a young age".[69]

Popular Culture & Role Models

In sport, the arts and popular culture, a number of Indigenous persons have emerged. Since Evonne Goolagong won Wimbledon in 1971, Australia's youth has had

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63 ABS, "Income and Economic Resources" (24 May 2012) available at http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/1301.0~2012~Main%20Features~Income%20and%20economic%20resources~251.

64 ABS, "The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples" (28 May 2010) available at http://www.abs.gov.au/AUSSTATS/abs@.nsf/lookup/4704.0Chapter1002010.

65 Australian Institute of Health and Welfare, "Indigenous life expectancy" available at http://www.aihw.gov.au/indigenous-life-expectancy/.

66 Ibid.

67 ABS, "The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples" (28 May 2010) available at http://www.abs.gov.au/AUSSTATS/abs@.nsf/lookup/4704.0Chapter1002010.

68 Australian Institute of Health and Welfare, "Mothers and babies", available http://www.aihw.gov.au/mothers-and-babies-indigenous/.

69 ABS, Media Release, "Lifelong disadvantage, early death for Indigenous Australians" (10 August 1999), available at http://www.abs.gov.au/ausstats/abs@.nsf/mediareleasesbytitle/570F37E0EEF911E8CA2568A900136347?OpenDocument.

Indigenous personalities and role models such as Ernie Dingo, Yothu Yindi, Christine Anu, Jessica Mauboy, Cathy Freeman and Wesley Enoch as well as Arthur Beetson and the Ella brothers and many Indigenous rugby league and rugby union players, as well as Australian Rules footballers, that were encouraged by them and have followed in their footsteps.

Political Representation

In politics, Indigenous Australians have suffered from, and continue to suffer from, underrepresentation. It was forty years ago that the first Indigenous Australian was elected to Federal Parliament, when Neville Bonner took his seat in the Australian Senate. Sir Douglas Nicholls, Governor General of South Australia, was the first Indigenous Australian to be appointed to vice-regal office. Ernie Bridge became the first Indigenous minister in Western Australia in 1980. However, this progress has been slow. It was not until the turn of the century that we saw the first Indigenous woman elected, again in Western Australia, when Carol Martin joined the Legislative Assembly, and it was not until 2008 that an Indigenous woman, Marion Scrymgour, became the first Indigenous female minister. After Neville Bonner, here has only been one further Indigenous senator, Aden Ridgeway, and the first Indigenous member of the House of Representatives, Ken Wyatt, did not take his seat until 2010. Underrepresentation of Indigenous people in political roles and decision-making processes remains problematic.

Reconciliation

In reconciliation, we have seen some progress also, particularly in recent years. Since the establishment of the Tent Embassy in 1972, there has been increasing awareness and recognition of the Indigenous tragedies that have tainted Australia's history. The Aboriginal flag was officially recognized under Federal legislation in 1995.[70] In 1999, the government passed a Motion of Reconciliation naming the mistreatment of Indigenous Australians as the "most blemished chapter in our national history".[71] Reconciliation Place was established in Canberra in 2001. It was not until 2008 that a

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70 Proclaimed under *Flags Act 1953* (Cth) s 5: see Australian institute of Aboriginal and Torres Strait Islander Studies, "The Aboriginal Flag", available at http://www.aiatsis.gov.au/fastfacts/aboriginalflag.html

71 New York Times, "Australia Acknowledges 'Injustices' to Aborigines", 27 August 1999, available at http://www.nytimes.com/1999/08/27/world/australia-acknowledges-injustices-to-aborigines.html.

prime minister formally apologised for the suffering inflicted upon the Indigenous community, but it marked a step forward which was significant. The public pressure and response to this apology was testament to the significance of such symbolic gestures in ensuring the recognition of Indigenous rights and the harmony between fellow Australians. In more practical matters, the *Racial Discrimination Act* was passed in 1975, but nonetheless, ABS statistics reveal that "27% of Aboriginal and Torres Strait Islander people aged 15 and over reported having experienced discrimination in the past 12 months".[72]

In 2010, a panel of Indigenous leaders was appointed to recommend how Indigenous Australians could be best recognised in the Constitution. The panel delivered its final report in January this year.

- It recommended the repeal of section 25, which was once the instrument of excluding Indigenous Australians from the electoral process.
- It recommended amendments to the race power and a new section 127A to recognise the importance of Aboriginal language, culture and heritage.
- And it recommended the insertion of a new section 116A to constitutionally entrench the prohibition of discrimination on the basis of race, colour or ethnic origin, while allowing laws for the purpose of overcoming disadvantage and remedying the discrimination of the past.[73]

Conclusion

In many of these areas, we can see that there is still much to be achieved. Remedying these social factors will go a long way to solving the significant disadvantage that Indigenous persons suffer before the law. This will require substantive policy changes to tackle these problems, but also an underlying acceptance of the central place of Indigenous people in contemporary Australian society and identity. Without the latter, any battle with the former will be fought uphill.

To me one of the most important developments is for Indigenous people to occupy positions of power and respect within the legal profession and decision making

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72 ABS, "Social and Emotional Wellbeing: Discrimination" (17 February 2011) available at http://www.abs.gov.au/AUSSTATS/abs@.nsf/lookup/4704.0Chapter450Oct+2010.

73 Expert Panel, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution* (January 2012) pp 230-231.

bodies. In Queensland we have well respected Indigenous members of the magistracy and of tribunals. The Indigenous Lawyers Association of Queensland is active and effective with its president, Joshua Creamer, Barrister-at-Law; Deputy President**,** Terry Stedman, South West Brisbane Community Legal Centre Inc and Secretary/Treasurer, Avelina Tarrago, from the Commonwealth Director of Public Prosecutions. Aboriginal and Torres Strait Island people are fundamental to who we are as Australians and need to be represented at all levels of the legal system for the law not only to apply to all members of our community but be seen to do so.