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# A CULTURE OF DISRESPECT: INDIGENOUS PEOPLES AND AUSTRALIAN PUBLIC INSTITUTIONS

Megan Davis\*

Australia is a racist country. It has a racist history which continues to impact on the lives of Aboriginal people. Evidence of racism in Australia against Aboriginal people is extensive.

Hannah McGlade.\*\*

When Aboriginal people say they lived with racism every day they are not meaning to say that all day every day they met non-Aboriginal people who insulted them and called them names (some of the time, of course, they did), but that every day the system of inequality put them down. They are talking about the laws, the systems, that were put in place pursuant to the laws which operate every day whether the people who operate the system are well meaning and helpful or personally racist.

Royal Commission into Aboriginal Deaths in Custody.\*\*\*

A cursory examination of Indigenous and non-Indigenous Australian reflections and criticisms of juridical and political developments since significant constitutional events in Australia (such as the 1967 Referendum<sup>1</sup> or even *Mabo*<sup>2</sup>) illustrate the incapacity of Australian public institutions to adequately respond to Indigenous culture, and thus Aboriginal and Torres Strait Islander notions of religion and spirituality. Aboriginal customary law, land rights, native title, intellectual property and heritage protection, Indigenous peoples have been disappointed with the paucity of recognition and legal protection given to tangible and intangible aspects of Indigenous culture and religion. Moreover, any legislative protection or common law interpretation has frequently diminished or inadequately accommodated these aspects.<sup>3</sup> The reality for Indigenous Australians is

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\* Senior Research Fellow, Jumbunna Indigenous House of Learning, University of Technology Sydney

\*\* "Reviewing Racism: HREOC and the *Racial Discrimination Act 1975* (Cth)" (1997) *Indigenous Law Bulletin* 29.

\*\*\* Royal Commission into Aboriginal Deaths in Custody, 1991, National Report Australian Government Publishing Service, Volume 2, 12.1.27

1 David Mercer, "'Citizen Minus?': Indigenous Australians and the Citizenship Question" (2003) 7(4) *Citizenship Studies* 421-45.

2 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

3 For example in the field of native title, Callinan J, *Western Australia v Ward* (Miriuwung-Gajerrong Case) (2002) 213 CLR 1, 395: I fear, however, that in many cases because of the chasm between the common law and native title rights, the latter, when recognised, will amount to little more than symbols. It might have been better to redress the wrongs of dispossession by a true and unqualified settlement of lands or money than by an ultimately, futile or unsatisfactory, in my respectful opinion, attempt to fold native title rights into the common law.

that Australia's public institutions have failed to accommodate difference and in some cases, as seen in native title law, have distorted and limited the practice of Indigenous culture and religion. This has been referred to in some literature as the psychological *terra nullius*,<sup>4</sup> or the racism<sup>5</sup> of Australia's public institutions. This paper explores some of the reflections and criticisms by Indigenous and non-Indigenous Australians concerning the institutionalised racism that Indigenous Australians continue to face today.

## Background: Deteriorating Race Relations

Race relations in Australia have rapidly declined over the past decade.<sup>6</sup> On 14 January 2004, there were race riots in Redfern after a young Aboriginal boy, T J Hickey was killed while being chased by police. On 26 November 2005 there were race riots on Palm Island following the death in custody of Mulrunji Doomadgee. The trial of an Aboriginal man involved in the riots had to be moved from Townsville due to concerns that the accused may not receive a fair trial because of racism.<sup>7</sup> In 2006 there has been renewed focus on the widespread problem of sexual abuse and violence in Aboriginal communities,<sup>8</sup> and intractable law and order problems continue in regional and remote areas such as the gang warfare in Wadeye, Western Australia, that reflect the ongoing dislocation between Indigenous youth and non-Indigenous Australia.<sup>9</sup>

There is a vacuum in Indigenous political leadership since the abolition of the peak Indigenous representative body, the Aboriginal and Torres Strait Islander Commission (ATSIC) in 2004. ATSIC was abolished by the Federal Government without any consultation with Aboriginal and Torres Strait Islander communities.<sup>10</sup> The government replaced the elected

4 See, e.g., Larissa Behrendt, *Achieving Social Justice* (2003); Megan Davis, "Chained to the Past: The Terra Nullius of Australian Public Institutions" in T Campbell, J Goldsworthy, A Stone (eds), *Protecting Rights Without a Bill of Rights: Institutional Performance and Reform in Australia* (2006).

5 Mick Dodson and Lisa Strelein, "Australia's Nation-Building: Renegotiating the Relationship between Indigenous Peoples and the State" (2001) 68 *University of New South Wales Law Journal*.

6 Will Sanders, *Journey Without End: Reconciliation between Australia's Indigenous and Settler People* Centre for Aboriginal and Economic Policy Research, No. 237/2002.

7 Ian Gerard, "'Racism' leads to Palm riot trial shift", *The Australian* (Sydney), 15 July 2006; ABC Radio National, "Townsville mayor condemns racism poll", *The World Today*, 17 July 2006 <<http://www.abc.net.au/worldtoday/content/2006/s1688260.htm>>

8 Australian Broadcasting Corporation, "Sexual abuse reported in Indigenous community", *Lateline*, 21 June 2006 <<http://www.abc.net.au/lateline/content/2006/s1668773.htm>>

Australian Broadcasting Corporation, "Paper reveals sexual abuse, violence in NT Indigenous communities", *Lateline*, 15 May 2006 <<http://www.abc.net.au/lateline/content/2006/s1639133.htm>>

9 See, e.g., Paul Toohy, *Way of the Warrior* (2006); *The Bulletin* <<http://bulletin.ninems.com.au/bulletin/site/articleIDs/7B10AF85B4B3B630CA25712C001B97AD>> accessed 7 September 2006; Paul Henderson, Minister for Police, Fire and Emergency Services, "Police, Justice Taskforce to Target Wadeye Gangs" (Press Release, 13 June 2006).

10 William Jonas and Darren Dick, "Ensuring Meaningful Participation of Indigenous

representative structure with new “whole of government” policies across Aboriginal and Torres Strait Islander communities which are benignly referred to in government literature as the “new arrangements”.<sup>11</sup> These new arrangements include shared responsibility agreements that require Indigenous peoples to enter into agreements with the state for basic services and infrastructures that ordinary non-Indigenous Australians receive by virtue of their citizenship.<sup>12</sup> These agreements generally involve behavioural change on behalf of the community, for example, washing children’s faces in exchange for a community petrol bowser. The Human Rights and Equal Opportunity Commission (HREOC) Aboriginal and Torres Strait Islander Social Justice Commissioner, Tom Calma has warned that,

It would be unacceptable for Indigenous people to be denied basic citizenship services that all Australians take for granted . . . any proposals must comply fully with the *Racial Discrimination Act* and the principle of non-discrimination more generally.<sup>13</sup>

Moreover the United Nations Special Rapporteur on adequate housing, Miloon Kothari, recently questioned the shared responsibility agreements, which he observed as “very likely to be discriminatory and contrary to international human rights standards”.<sup>14</sup>

The tenor of public debate about Indigenous issues has also deteriorated. Complex theories of Aboriginal sovereignty and self-determination are trivialised or distorted in public discourse as contributing to Indigenous dysfunction. The current Australian Labor Party (ALP) national President Warren Mundine has argued that Indigenous Australians have to “earn” sovereignty.<sup>15</sup> The Federal Government has labelled self-determination a “failed experiment” and the former Commonwealth Minister for Immigration, Multicultural and Indigenous Affairs, Senator Amanda Vanstone likened the existence of a separate Indigenous electoral structure as akin to apartheid, saying, “There was once a country we wouldn’t play cricket with because they had separate systems.”<sup>16</sup> Vanstone also claimed

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Peoples in Government Processes: The Implications of the Decline of ATSIC” (2004) 23(2) *Dialogue* 4–16.

11 Office of Indigenous Policy Coordination, *New Arrangements in Indigenous Affairs*, Canberra, August 2004; See generally, Kerry Arabena, “Not Fit for Modern Australian Society: Aboriginal and Torres Strait Islander People and the New Arrangements for the Administration of Indigenous Affairs” Research Discussion Paper #16 (2005) Australian Institute of Aboriginal and Torres Strait Islander Studies.

12 Ruth McCausland and Marc Levy, “Indigenous Policy and Mutual Obligation” (2006) 41(3) *Australian Journal of Social Issues* 277–94; Ruth McCausland, “Shared Responsibility Agreements: Practical Reconciliation or Paternalistic Rhetoric?” (2005) 6 (12) *Indigenous Law Bulletin* 9–11; Ruth McCausland, “Petrol Bowsers for Washing Kids Faces: A New Conversation in Indigenous Policy” (Paper delivered at the Australian Social Policy Conference, University of New South Wales, 21 July 2005).

13 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2005*, Human Rights and Equal Opportunity Commission, Sydney 2005.

14 United Nations Special Rapporteur on Adequate Housing, Miloon Kothari *Preliminary Observations*, Canberra, 15 August 2006, 7.

15 Diana Bagnell, “Warren Mundine”, *The Bulletin*, (Sydney), 28 September 2005.

16 Michelle Grattan, “PM jumps, ATSIC falls”, *The Sydney Morning Herald* (Sydney),

that “for too long we have let ideological positions like self-determination prevent governments from engaging with their Indigenous citizens”,<sup>17</sup> despite the fact that many Indigenous Australians argue that self-determination has never been seriously implemented in Australia.<sup>18</sup> And despite the historical sensitivity of early policies impacting on Indigenous peoples lives, from control acts to the removal of Aboriginal children from homes, the Commonwealth Health Minister, Tony Abbott, has argued that self-determination should be replaced with “new paternalism”.<sup>19</sup>

The reconciliation movement between Indigenous and non-Indigenous Australians has also stalled. According to Sean Brennan:

The underlying issues confronting Australia regarding its race relations between indigenous and non-indigenous people will not go away. Many people thought that when half a million Australians marched across the bridge in support of reconciliation the momentum for substantive change was unstoppable. Since 2000, much of the wind has gone out of its sails.<sup>20</sup>

And in recent years a false legislative and policy dichotomy has emerged between rural and remote and urban Indigenous communities.<sup>21</sup> This is contributing to conflict between Indigenous communities because of the implications for resource allocation of government funding, but also because of the false assumptions this dichotomy generates in the broader Australian community about who are “real” Aborigines, and what constitutes authentic Aboriginal spirituality. This questioning occurs despite the history of Australia revealing the dispossession of Indigenous land, the forced removal of Aboriginal people from their traditional lands, the removal of Aboriginal children from their homes and the prohibition of traditional language, as reasons for the increased urbanisation of Indigenous peoples.

The Australian polity is increasingly drawing Aboriginal religion and culture as being the province of those Aboriginal people living in rural and remote communities which under the conservative “new arrangements” between Indigenous peoples and the State, has significant resource implications for Indigenous Australians living in urban settings. For example, there has been no shared responsibility agreement signed in an urban area. A significant area where this dichotomy is having a disastrous impact is in Indigenous education. The Federal Government initiated changes in Indigenous policy, including altering the funding arrangements for Indigenous education. This has resulted in \$2 million cuts to school

18 April 2004.

17 Amanda Vanstone, Opening Address, Bennelong Society Address (Sydney, 4 September 2004) 4.

18 Larissa Behrendt, “Back to the Future” (2005) 75 *Arena* 5–7.

19 ABC, “Abbott suggests ‘new paternalism’ solution to Indigenous disadvantage”, *AM*, 21 June 2006 <<http://www.abc.net.au/am/content/2006/sl667987.htm>> accessed 7 September 2007.

20 Sean Brennan, “Reconciliation in Australia: The Relationship between Indigenous Peoples and the Wider Community” (2004) *Brown Journal of World Affairs* 149.

21 Paul Briggs, “We’re Aborigines, too”, *The Age* (Melbourne), 23 August 2006.

age Indigenous education, and consequently fewer Indigenous children will have access to tutorial assistance. More importantly the Federal government cancelled the funding of the Aboriginal Student Support and Parent Awareness Scheme (ASSPA) which “enabled individual school communities to locally coordinate their own support programs” in many urban areas—where the majority of Indigenous children reside—and contributed to important community activities including afterschool homework clubs, breakfast clubs, activities with elders such as dancing and story telling, and assisted in the revival and continuation of aboriginal culture.<sup>22</sup> This was replaced by a new program Parent School Partnership Initiative (PSPI) that forces schools and communities to compete with each other for money rather than the “guaranteed, per-capita funding for schools”.<sup>23</sup> These kinds of developments highlight the culture of disrespect toward Indigenous culture.

## Fundamental Disrespect of Australian Public Institutions

Australia’s public institutions have demonstrably failed Indigenous peoples, Mick Dodson and Lisa Strelein describing the development of Australia’s legal and political system as entrenching a “fundamental disrespect” for Indigenous peoples.<sup>24</sup> The Royal Commission into Aboriginal Deaths in Custody also highlighted the shifting nature of the racism entrenched in Australia’s public institutions:

Institutional racism changes over time. Once people understand the facts they can see very clearly how Aboriginal people were continually subject to racism of the institutional type during the protection and assimilation periods . . . now institutional racism is of a more subtle kind, not always obvious even to those involved.<sup>25</sup>

## The Australian Constitution

The *Constitution*, the core public document underpinning Australia’s legal and political system, also continues to imbue the Australian polity with race. The *Constitution* provided Indigenous Australia with inadequate recognition, though this is not surprising, given Indigenous peoples were viewed at the time as a dying race. Section 51 (xxvi) which allows the Federal Parliament to make laws with respect to Aboriginal people continues to be of concern to Indigenous peoples because of its potential to be used to

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22 *Indigenous Education (Targeted Assistance) Amendment Act 2005* (Cth); See e.g., John Davis, “‘Practical Reconciliation’ and the State Education System: Education Policy Update” (2005) 9(3) *Australian Indigenous Law Reporter*, 103; Kate Munro, “The Indigenous Education (Targeted Assistance) Amendment Bill” (2005) 6 (12) *Indigenous Law Bulletin*, 12–15.

23 John Davis above n 22, 104.

24 Dodson and Strelein, above n 5.

25 Royal Commission into Aboriginal Deaths in Custody, 1991, National Report Australian Government Publishing Service, Volume 2, 12.1.28.

the detriment of Indigenous rights. This was the scenario that was played out in *Kartinyeri v Commonwealth* (the Hindmarsh Island Bridge Case).<sup>26</sup> The case involved a proposed development on Kumarangk (Hindmarsh Island), situated in the Murray River delta in South Australia,<sup>27</sup> home to the Ngarrindjeri people. Because of the cultural significance of the area, the Commonwealth Minister for Aboriginal and Torres Strait Islander Affairs made an interim declaration because of the cultural heritage value under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (“the Act”). The Minister appointed Professor Cheryl Saunders to make a report under the Act to determine whether he could make a declaration. Professor Saunders received evidence about the cultural significance of Kumarangk to the Ngarrindjeri women. On the basis of this report and despite the fact that the Minister had never viewed the evidence, he made a declaration under s 10 of the Act. The Minister’s declaration and the Saunders report were eventually quashed by the Federal Court,<sup>28</sup> and this decision was confirmed by the Full Court of the Federal Court.<sup>29</sup>

Meanwhile the South Australian Government itself appointed a Royal Commission to determine the validity of the women’s claims and the competing claims that contradicted the cultural value of the site. Iris Stevens, the Royal Commissioner found that the women’s evidence had been fabricated solely for the purpose of stopping the development.<sup>30</sup> The Minister then nominated Justice Jane Mathews to prepare a second report and stated that he would delegate his statutory function to his parliamentary colleague Senator Rosemary Crowley.

Following these events there was a change of government and the appointment of Mathews was the subject of further litigation. The High Court held that Mathews was not authorised to be appointed under the Act and eleven days later the Mathews report was tabled in the Senate. It emerged that the Ngarrindjeri women had withdrawn most of their evidence relating to the cultural significance of the site because the new Minister had declared that he would consider the evidence himself and not delegate his authority as the previous Minister had done.<sup>31</sup> Therefore Mathews found on the basis of the evidence that was provided to her by the Ngarrindjeri women that their claims were not substantiated.

Subsequently the *Hindmarsh Island Bridge Act 1997* (Cth) was enacted by removing the Hindmarsh Island Bridge area from the 1984 Act to prevent any further litigation. Thus the legacy of race in the Constitution was

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26 *Kartinyeri v The Commonwealth* (1998) 195 CLR 337.

27 See generally, Margaret Simons, *The Meeting of the Waters: The Hindmarsh Island Affair* (2003).

28 *Chapman v Minister for Aboriginal and Torres Strait Islander Affairs* (1995) 133 ALR 74.

29 *Norvill v Chapman* (1995) 133 ALR 226.

30 Royal Commission of South Australia, Report of the Hindmarsh Island Bridge Royal Commission (Iris Stevens, Royal Commissioner) Adelaide 1995.

31 Justice Jane Mathews, Commonwealth Hindmarsh Island Report (under s10(4) of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*) June 1996.

exhibited as the uncertainty of the effect of the races power on the Federal Government's power to legislate for Aboriginal people was confirmed.<sup>32</sup> In this case the Commonwealth argued that the races power could be used to permit the Federal Government to legislate to the detriment of Aboriginal peoples, and that the races power had no limitations so long as the legislation has race as its consequence. Indigenous Australians are frequently reminded of the exchange in the courtroom where the Commonwealth Solicitor General acknowledged the "direct racist content of this provision", and in response to question, querying whether a law such as a Nazi races law would be beyond the province of the Court to consider. The Solicitor General responded:

Your honour, if there was a reason why the Court could do something about it, a Nazi law, it would in our submission, be for a reason external to the races power. It would be for some wider over-arching reason.<sup>33</sup>

To many Indigenous scholars and commentators, the Hindmarsh Island Bridge case is significant because of the way in which Aboriginal religion—the spiritual beliefs of Ngarrindjeri women—were disregarded and disrespected by the political system.<sup>34</sup>

The same colonial processes which have left women such as the Ngarrindjeri most vulnerable to "spiritual dispossession" have been reinvented in order to deny the legitimacy of their claims. The uncertainties and contradictions surrounding the "women's business" in this case have been used as "proof" that the women are lying, rather than as proof of the dislocating effect of colonisation on such knowledges.<sup>35</sup>

Marcia Langton posited the question

why is it so difficult for Aboriginal people to seek protection of places of great religious significance to them? Why do other Australians hold Aboriginal religion in such low esteem? Devotees of many religions throughout human history have asked the same question of their persecutors: Jews, Huguenots and many others. To have to ask the same questions in late twentieth century when our laws provide a high standard

32 See e.g., Justin Malbon, "Avoiding the Hindmarsh Island Bridge Disaster: Interpreting the Race Power" (2002) 6 *Flinders Journal of Law Reform* 44; Justin Malbon, "The Race Power under the Australian Constitution: Altered Meanings" (1999) 21 *Sydney Law Review* 80; See generally (timeline) Jennifer Clarke, "Chronology of the Kumarangk/Hindmarsh Island Affair" (1996) 3 (84) *Aboriginal Law Bulletin* 22–23; Hilary Charlesworth, "Little Boxes: A Review of the Commonwealth Hindmarsh Island Report by Justice Jane Mathews" (1997) 3(90) *Aboriginal Law Bulletin* 19; Annie Keely, "The Hindmarsh Island Bridge Case: Breaches of Australia's Human Rights Treaty Obligations" (1996) *Human Rights Defender* 27; Frank Brennan, "Building a Bridge on a Constitutional Sea Change" (1997) 4(3) *Indigenous Law Bulletin*; Jennifer Clarke, "Should Parliament Enact the Hindmarsh Island Bill" (1997) 3(88) *Indigenous Law Bulletin* 6.

33 *Kartinyeri v The Commonwealth* A29/1997 (5 February 1998) cited in George Williams, *A Bill of Rights for Australia* (2000) 8.

34 Marcia Langton, "The Hindmarsh Island Bridge Affair: How Aboriginal Women's Religion became an Administerable Affair" (2006) 11( 24) *Australian Feminist Studies* 211–17. See generally, Annie Keely, above n 32.

35 Joanna Bourke, "Women's Business: Sex, Secrets and the Hindmarsh Island Affair" (1997) 20(2) *University of New South Wales Law Journal* 349.

of legal protection seems ironic and suggests more than an ambivalence in implementation and administration.<sup>36</sup>

The unresolved question of whether the races power permits racially discriminatory laws continues to invite growing examination of institutional reform such as a Bill of Rights in Australia. And it is illustrative of the fundamental disrespect that Dodson and Strelein have alluded to and how it feeds “the ongoing tolerance of disrespect that maintains racism as a core value of Australian society.”<sup>37</sup>

## Day to Day Institutional Racism

Dodson and Strelein have observed that “disrespect occurs not just in the relationship between the state and Indigenous peoples, but has engendered a more personal disrespect that is experienced by Indigenous people on a daily basis.”<sup>38</sup> This was observed by the RCIADIC quotation used in the introduction when attempting to describe what Indigenous peoples mean by institutional racism: They are talking about the laws, the systems, that were put in place pursuant to the laws which operate every day, whether the people who operate the system are well meaning and helpful or personally racist. The belief about the racism of Australian public institutions has been confirmed by external human rights institutions. In 1999 and 2000 the United Nations Committee on the Elimination of Racial Discrimination found that Australia was in breach of its obligations in international law by suspending the operation of the *Racial Discrimination Act 1975* (Cth) to enable Aboriginal people to be discriminated against on the basis of race in amending the *Native Title Act 1993* (Cth). Again in 2003 the United Nations Special Rapporteur on Racism expressed serious concerns about how racism affects Indigenous Australians.<sup>39</sup> According to the United Nations Special Rapporteur on adequate housing, “Indigenous peoples experience substantial discrimination in Australia in accessing adequate housing [in the] private housing market”.<sup>40</sup> Institutional discrimination in State housing is also a controversial issue.<sup>41</sup>

Yet in fact this discrimination occurs across a wide section of Indigenous peoples’ lives, including private and public housing, health care, employment in the public and private sector, access to the legal system, including the effectiveness of racism complaints mechanisms,<sup>42</sup> over-policing and trends

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36 Marcia Langton, above n 34, 216.

37 Dodson and Strelein, above n 5.

38 Ibid.

39 UN Doc/CN.4/2002/24/Add.1.

40 United Nations Special Rapporteur on Adequate Housing, Miloon Kothari Preliminary Observations, Canberra, 15 August 2006, 7.

41 Jeffrey Rosales-Castaneda, “Flogging a Moribund Horse while the Emperor is Naked: Issues in Proving Institutional Racial Discrimination in State Housing in Western Australia” (2003) *Murdoch University of Electronic Journal of Law* 37.

42 Hannah McGlade, “Reviewing Racism: HREOC and the *Racial Discrimination Act 1975* (Cth)” (1997) *Indigenous Law Bulletin* 29; Martin Flynn, “Why has the *Racial Discrimination Act 1975* (Cth) Failed Indigenous Peoples?” (2005) *Australian Indigenous Law Reporter* 2.



in imprisonment that highlight “racialized assumptions about Aboriginal inferiority”.<sup>43</sup> Indigenous peoples also experience racism in the Australian Public Services which Gavin Mooney describes as “institutionalised”.<sup>44</sup> According to Mooney, “Government institutions in Australia are racist in their interaction with Indigenous peoples. This institutional racism is contextualized by a recent history in which Australian society has shown itself to lack compassion”. Mooney singles out health bureaucracy as being the worst, particularly given that there is “a mistaken belief that we have an equitable health care system”.

Aboriginal people have lost their trust in the institutions of government, including healthcare services. Lack of respect by white Australians for Aboriginal values, the discounting of these values by those who have sought, patronisingly and paternalistically, to “do good” to Aboriginal people (according to a “good” defined by white fellas), leads to further erosion of trust. The lack of trust by Aboriginal people in white people and white institutions is obvious.<sup>45</sup>

This fundamental disrespect has manifested itself in many other ways. Areas of the law that significantly impact upon Indigenous peoples culture and beliefs that may require legislative action or reform to better protect Indigenous rights, invariably suffer from the ambivalence of the political system.<sup>46</sup> The fundamental disrespect for Indigenous culture is reflected in the action and inaction of Australian Parliaments, whose appalling record on Indigenous issues disproves the Diceyan proposition (still remarkably strong in Australia) that Parliament is the best protector of human rights.<sup>47</sup>

## Rights: Parliament Giveth and Taketh Away

The way in which Parliament responds to Indigenous peoples is inextricably linked to the goodwill of the political party of the day. The insecurity of Indigenous rights in Australia is arguably related to the fact that Australia remains the only common law country that hasn’t entered into a treaty agreement with its Indigenous peoples, nor engaged in any belated state building exercise.<sup>48</sup> Any suggestions for law reform, rather than being seen as a part of an evolving liberal democracy with capacity to accommodate difference, are viewed not as recognising pre-existing rights, but creating

43 Chris Cunneen, “Introduction: Race, Prison and Politics in Australia” (2000) *Indigenous Law Bulletin* 113; Angela Davis, “Marked Racism: Reflections on the Prison Industrial Complex” (2000) *Indigenous Law Bulletin* 113.

44 Gavin Mooney, “Institutionalised Racism in Australian Public Service” (2003) 5(26) *Indigenous Law Bulletin* 10.

45 Barbara R Henry, Shane Houston and Gavin H Mooney, “Institutional Racism in Australian Healthcare: A Plea for Decency” (2004) 180(10) *Medical Journal of Australia* 517–20.

46 Robynne Quiggin, “Boobera Lagoon” (2001) 5 (6) *Indigenous Law Bulletin* 4; Russell Goldflam, “Cowboys v Suits” (1997) 22(2) *Alternative Law Journal* 86–96; Geoff Adlidge, “Sacred Sites under Threat” (1989) 2 (39) *Aboriginal Law Bulletin* 40.

47 See George Williams, *Human Rights under the Australian Constitution* (1999) 39.

48 Larissa Behrendt, Sean Brennan, Lisa Strelein and George Williams, *Treaty* (2004) 1.

new and special rights that are divisive, creating “a nation within a nation”.<sup>49</sup> This is despite the fact that the appalling perennial statistics on Aboriginal and Torres Strait Islander disadvantage are evidence to the proposition that in Australia—a nation already exists within a nation.<sup>50</sup>

Historically legislation has been used as a means by Parliaments to control Indigenous peoples in Australia.<sup>51</sup> Legislation has also been used to benefit Indigenous peoples through the creation of land rights regimes, or independent statutory authorities ostensibly mandated to deliver self-determination to Aboriginal and Torres Strait Islander communities. Yet in doing so, these legislatively recognised rights mean that Indigenous rights are inherently insecure.

Australian history illustrates the way in which Indigenous rights are granted and easily taken away by successive Parliaments—subject to the whims of the ideology of the day. For example, in 1988 the Labor Prime Minister promised a Treaty between Indigenous Australians and the State. This never came to fruition. The *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) was passed by a Federal Labor Government and was abolished by the Federal Coalition government in 2005 without consultation with Indigenous communities.<sup>52</sup> The High Court decision in *Mabo* led to protracted parliamentary debates and resulted in the *Native Title Act 1993* (Cth) (NTA) that established the legislative regime for determining native title. The NTA was then amended by the new Federal Government in response to the High Court decision in *Wik*.<sup>53</sup> This Federal Parliament was able to suspend the operation of the *Racial Discrimination Act 1975* (Cth)—the domestic expression of the United Nations International Convention on the Elimination of All Forms of Racial Discrimination—in relation to the 1998 *Native Title Amendments* (Cth).<sup>54</sup> The amendments that were enacted diminished Aboriginal native title. Moreover Indigenous peoples weren’t adequately consulted on the amendments. The United Nations Committee on the Elimination of Racial Discrimination held that suspending the operation of the RDA

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49 Transcript of the Prime Minister the Hon. John Howard, Interview with Tim Lester, 7.30 Report (29 May 2000) <[www.pm.gov.au/news/interviews/2000/7302905.htm](http://www.pm.gov.au/news/interviews/2000/7302905.htm)>

50 See generally, Aboriginal and Torres Strait Islander Social Justice Commissioner, Social Justice Report 2004, Human Rights and Equal Opportunity Commission Chapter 2; Productivity Commission “Overcoming Indigenous Disadvantage: Key Indicators 2005” (2005) Australian Government Publishing Service.

51 *Aboriginal Protection and Restriction of the Sale of Opium Act 1897* (Qld); *Aboriginal Protections Act 1909* (NSW); *Northern Territory Aboriginals Act 1910* (SA); *Aboriginals Ordinance 1911* (NT); *Aboriginals Ordinance 1918* (NT); *Welfare Ordinance 1953* (NT); *Aboriginal and Torres Strait Islanders Affairs Act 1965* (Qld); *Aborigines Act 1911* (SA); *Aborigines Act 1934* (SA); *Aboriginal Affairs Act 1962* (SA); *Aborigines Protection Act 1886* (WA); *Aborigines Act 1905* (WA); *Native Welfare Act 1963* (WA); *Natives Administration Act 1905–1936*; *Aborigines Act 1890* (Vic); and *Cape Barren Island Reserve Act 1912* (Tas).

52 *Aboriginal and Torres Strait Islander Commission Amendment Act 2005* (Cth).

53 *Wik Peoples v Queensland* (1996) 187 CLR 1.

54 Gillian Triggs, “Australia’s Indigenous Peoples and International Law: Validity of the *Native Title Amendment Act 1998* (Cth)” (1999) *Melbourne University Law Review* 2.

was in violation of Australia's obligations under international law.<sup>55</sup> On the basis that the Federal Government failed to adequately consult the affected Indigenous communities, the Committee noted that:

members of Indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent.<sup>56</sup>

According to Indigenous leaders such as Mick Dodson and Aden Ridgeway, they were not part of the crucial negotiations leading up to the *Native Title Amendment Act 1998* (Cth) and were “*not invited to the negotiating table*”.<sup>57</sup> The ease in which the amendments were negotiated in the absence of true Indigenous consultation is an example of the way in which Indigenous peoples struggle to influence Parliament. The experience prompted Mick Dodson to observe:

What I see now is the spectacle of two white men, John Howard and Brian Harradine, discussing our native title when we're not even in the room. How symbolically colonialist is that?<sup>58</sup>

## Inertia in Law Reform

Apart from the insecurity of Indigenous rights manifest in the making and repealing of legislation, there is serious inertia in reforming those areas of law and policy that disproportionately disadvantage Indigenous peoples. This is evidenced in a number of ways. It is the case that very few recommendations from the Royal Commission into Aboriginal Deaths in Custody, Law Reform inquiries and others, have been followed through. Only a few of the recommendations of the Royal Commission into Aboriginal Deaths in Custody have been implemented and this has been the source of extensive Indigenous and non-Indigenous critique and discontent.<sup>59</sup> Almost none of the recommendations of the Australian Law

55 See e.g., Greg Marks, “Avoiding the International Spotlight: Australia, Indigenous Rights and the United Nations” (2002) 2 *Human Rights Law Review* 19–57.

56 CERD, Decision 2(54) on Australia, 54th Session A/54/18 (1999).

57 Hannah McGlade, “Not Invited to the Negotiating Table: *The Native Title Amendment Act 1998* (Cth) and Indigenous Peoples Right to Political Participation and Self-Determination under International Law” (2000) 1 *Balayi* 97.

58 David Brearley and David Nason, “The Long Division, When can Black and White Australia Expect to be Reconciled?” *Weekend Australian* (24–25 October 1998) 25, cited in *ibid.*, 100.

59 Royal Commission into Aboriginal Deaths in Custody, 1991, National Report: Overview and Recommendations, Australian Government Publishing Service; See e.g., Chris Cunneen, “Aboriginal Imprisonment During and Since the Royal Commission into Aboriginal Deaths in Custody” (1992) 19 *Aboriginal Law Bulletin*; Jason Behrendt and Larissa Behrendt, “Recommendations, Rhetoric and Another 33 Aboriginal Deaths in Custody: Aboriginal Custodial Deaths Since May 1989” (1992) 50 *Aboriginal Law Bulletin*; Tauto Sansbury, “State and Territory Implementation of the Recommendations of the Royal Commission—Overview” (2001) 29 *Indigenous Law Bulletin*; Robyn Ayres, “Way Out West: Implementation of RCIADIC Recommendations in WA” (1994) 29 *Aboriginal Law Bulletin*; David Lavery, “Empty Words—Queensland’s Response to RCIADIC Recommendations 6 to 40” (1994) 26 *Aboriginal Law Bulletin*; “To the casual observer, it would be surprising to learn that Aboriginal incarceration rates have actually increased rather than decreased since the publication of the final report of the Royal Commission into

Reform Commission inquiry<sup>60</sup> into the recognition of Aboriginal customary law have been implemented. The report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children<sup>61</sup> has attracted sustained criticism and mean-spirited conservative comment.<sup>62</sup> Further, most of the recommendations of the Council for Aboriginal Reconciliation have not been implemented.<sup>63</sup>

Indigenous Australians frequently experience the legislative inertia and indifference of Federal and State Parliaments on issues that require urgent remedial legislative action. For example, the current Federal Government has argued that the process of reconciliation must be achieved outside of a legislated process. In the area of intellectual property where Indigenous peoples require collective protection of copyright to reflect communal participation and ownership, the issue has produced endless discussion papers and proposals but has never been adequately legislated for.<sup>64</sup> This is remarkable given the contribution of Aboriginal arts and crafts to the economy and the tourism sector in Australia. Particularly given the contemporary political rhetoric of the importance of economic development in Aboriginal Australia and embracing capitalism, securing Indigenous intellectual property could go some way to ensuring the benefits of creative output.<sup>65</sup> Former Democrat Senator Aden Ridgeway argued that the Federal Government should negotiate with the Northern Territory Government to buy back the copyright in Albert Namatjira's works. He proposed that the Federal Government create *sui generis* legislation that

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Aboriginal Deaths in Custody": Loretta Kelly, "10 Years On: The Continuing Poor Health of Indigenous Prisoners" (2001) 38 *Indigenous Law Bulletin*.

60 Australian Law Reform Commission, Report into the Recognition of Aboriginal Customary Laws, Report No 31 (1986) Australian Government Publishing Service.

61 Human Rights and Equal Opportunity Commission (HREOC) *Bringing Them Home: A Guide to the Findings and Recommendations of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (1997) Australian Government Publishing Service.

62 Christopher Pearson, "Conscience has the final say" (2005) *The Australian* (Sydney); Ron Brunton, "Betraying the Victims: The 'Stolen Generations' Report" (1998) *IPA Backgrounder* <<http://www.ipa.org.au/files/IPABackgrounder10-1.pdf>> accessed 25 July 2005; Reginald Marsh, "'Lost', 'Stolen' or 'Rescued'?" (Australian Policy Towards Part-Aboriginal Children)" (1999) *Quadrant* 15.

63 Council for Aboriginal Reconciliation, *Recognising Aboriginal and Torres Strait Islander Rights* (2000) Australian Government Publishing Service.

64 See generally, Commonwealth, *Stopping the Rip-Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples*, Issues Paper (1994); Terri Janke, *Our Culture, Our Future*, Report on Australian Indigenous Cultural and Intellectual Property Rights (Sydney, ATSI, 1999); Australian Law Reform Commission Report No 31; Department of Aboriginal Affairs, *The Aboriginal Arts and Crafts Industry: Report of the Review Committee* (1989); H H Guldberg, *The Arts Economy 1968–1998: Three Decades of Growth in Australia*, Research Report (Sydney, Australia Council, 2000) 56; Indigenous Communal Rights Paper, Intellectual Property Branch, Department of Communications, Information Technology and the Arts and the Copyright Law Branch, Attorney General's Department (Canberra, December 2003).

65 Amanda Vanstone, "Passive Welfare—Killing them Softly?" Speech, Center of Full Employment and Equity, University of Newcastle, 21 July 2003; Noel Pearson, *The Right to Take Responsibility* (2000).

could protect his works and extend financial benefit to his family. Ridgeway stated that if the Federal government was:

willing to acknowledge Indigenous artists of Albert Namatjira's stature and fame as national treasures, why doesn't it follow that we show the same level of concern and respect for their memory as we do for other 'national treasures'.

Senator Ridgeway then juxtaposed the inaction in the area of Indigenous intellectual property legislation with the Prime Minister's personal intervention to ensure Sir Donald Bradman's name is protected from commercial exploitation in the *Corporations Amendment Regulation 2000* (No. 8).

Indigenous experience with public institutions has not been an entire failure however. Certainly a balanced lens would highlight the 1967 Referendum, the Reconciliation bridge walks, the *Racial Discrimination Act 1975*, the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth), and the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) as examples of positive and empowering developments for Aboriginal and Torres Strait Islanders in Australia whatever their limitations. Moreover, innovative initiatives such as community justice models and circle sentencing have proven to be successful in reducing recidivism rates.<sup>66</sup> Prime Minister Keating's<sup>67</sup> famous Redfern address remains highly regarded within the Indigenous community as a stand out example of the narrative of inclusion by a public institution—the Office of the Prime Minister—and had a significant and continuing impact upon Indigenous Australians.<sup>68</sup>

Imagine if ours was the oldest culture in the world and we were told that it was worthless. Imagine if we had resisted this settlement, suffered and died in the defence of our land, and then were told in history books that we had given up without a fight. Imagine if non-Aboriginal Australians had served their country in peace and war and were then ignored in history books. Imagine if our feats on sporting fields had inspired admiration and patriotism and yet did nothing to diminish prejudice. Imagine if our spiritual life was denied and ridiculed. Imagine if we had suffered the injustice and then were blamed for it. It seems to me that if we can imagine the injustice then we can imagine its opposite.<sup>69</sup>

Also, Prime Minister Gough Whitlam<sup>70</sup> effectively used his time in the Office of Prime Minister to breach the chasm between White Australia and Indigenous Australia. In his first year Whitlam articulated the necessity of

66 E Marchetti and K Daly, "Indigenous Courts and Justice Practices in Australia" 277 *Australian Institute of Criminology Trends and Issues* (10 August 2004); A Larsen and A Petersen, "Rethinking Responses to 'Domestic Violence' in Australian Indigenous Communities" (2001) 23 *Journal of Social Welfare and Family Law* 121; P Ryan and J Antoun, "Report on the Law and Justice Plans", Darwin: Department of Community Development, Sport and Cultural Affairs (2002) 21; ABC Radio "Bush Courts, The Law Report" 21 August 2001.

67 Prime Minister from 20 December 1991–11 March 1996.

68 Prime Minister Paul Keating, "Redfern Park" *Indigenous Law Bulletin* (2001) 57.

69 *Ibid.*

70 Prime Minister Gough Whitlam, from 5 December 1972–11 November 1975.

Aboriginal land rights. Whitlam played the important role in the enduring national image of a Prime Minister of Australia pouring the red sands of Gurindji land through the hands of Gurindji elder Vincent Lingiari in 1975.

In no field of government activity was Labor's slogan "It's Time" more appropriate than in Aboriginal affairs. Whitlam, at the head of an energetically reformist government, came to power in December 1972 and almost immediately created the Department of Aboriginal Affairs . . . The government abolished the law which prevented Aborigines leaving the country without permission, established a commission to determine how (not if) land rights should be granted . . . dropped the charges against those arrested at the embassy, stepped up recruitment of Aborigines to the public service and froze uranium mining in the Northern Territory.<sup>71</sup>

## The Practice of Aboriginal Customary Law

The manifestations of legislative inertia are particularly pronounced in the area of Aboriginal customary law, particularly in the context of criminal law. Indigenous women have been disadvantaged and discriminated against because of the use of distorted Aboriginal customary law, or *bullshit law*, to legitimate the crimes of Aboriginal men, such as sexual assault against aboriginal women.<sup>72</sup> Aboriginal lawyer, Sharon Payne, has described *bullshit law* as, "a distortion of traditional law used as a justification for assault and rape of women. It is ironic that the imposition of the white man's law on traditional law have resulted in the newest one".<sup>73</sup> Mick Dodson argues that, "Some of our perpetrators of abuse and their apologists corrupt these ties and our culture in a blatant and desperate attempt to excuse their abusive behaviour".<sup>74</sup> The adversarial nature of the common law has been pinpointed as facilitating the development of *bullshit law*. Bullshit law makes it tempting for white counsel in representing Aboriginal men before the courts: "In particular the adversarial nature of our legal system has provided opportunities for white legal counsel representing Aboriginal men to employ distorted custom in defence".<sup>75</sup> Encouragement for the use of distorted customary law is arguably found in the voluminous judicial pronouncements that have derogated Aboriginal women to a status lower than their non-indigenous counterparts, but also in the legislative inertia that has been experienced on this issue in State and Federal jurisdictions.

71 Peter Read, *Charles Perkins: A Biography* (2001) 160.

72 See generally, ABC Radio National, "Customary Law and Sentencing", The Law Report, 22 October 2002; Paul Memmott, Rachael Stacy, Catherine Chambers and Catherine Keys, *Violence in Indigenous Communities*, Report to Crime Prevention Branch of Attorney-General's Department January 2001.

73 Sharon Payne, "Aboriginal Women and the Law" in P W Eastaale and S McKillop (eds), *Women and the Law* (Australian Institute of Criminology, 1993).

74 Mick Dodson, "Violence Dysfunction Aboriginality" (Paper presented at the Telstra Address, National Press Club, Canberra, 11 June 2003).

75 Megan Davis and Hannah McGlade, *International Human Rights Law and the Recognition of Aboriginal Customary Law* (2005) Western Australia Law Reform Commission, 13.

One of the most controversial national debates about Aboriginal customary law followed the decision in *Hales v Jamilmira*.<sup>76</sup> The defendant was a 50 year old Aboriginal man Jackie Pascoe who employed aboriginal law in defence of statutory rape.<sup>77</sup> During a police interview in Maningrida Police station, Mr Pascoe argued that: “She is my promised wife. I rights to touch her body” and that “its Aboriginal custom, my culture. She is my promised wife”.<sup>78</sup> The court held that Mr Pascoe had a reasonably sophisticated knowledge of the law and reduced the original magistrate’s sentence of four months to one day imprisonment. The most controversial aspect of Justice Gallop’s reasoning was that: “She didn’t need protection from white law she knew what was expected of her . . . Its very surprising to me [Pascoe] was charged at all.”<sup>79</sup>

These kinds of comments about Aboriginal women and the abuse of customary law as a defence are not new in Australia. In fact there are many examples of judges making such comments about Aboriginal women. In *R v Lane* it was observed that rape is “not considered as seriously in Aboriginal communities as it is in the white community”, that “the chastity of women is not as importantly regarded as in white communities” and that the “violation of an Aboriginal woman’s integrity is not nearly as significant as it is in a white community”.<sup>80</sup> Audrey Bolger later wrote about this decision, reporting that the rape had resulted in the death of the woman and that the defence counsel suggested that “by approaching the men and asking for a cigarette the woman may have been seen as inviting the men to join her.”<sup>81</sup> Similarly in *R v Narjic*, the defence submission argued that “it is the custom . . . for whatever reason, that wives are assaulted by their husbands”.<sup>82</sup> In *Mungkilli, Martin and Mintuma*, the court stated that rape was not “regarded with the seriousness that it is by the white people”.<sup>83</sup> According to Larissa Behrendt:

Colonial notions that Aboriginal women are easy sexual sport have also contributed to the perception that incidents of sexual assault are the fault of aboriginal women. While behaviour and treatment of aboriginal men is often contextualized within the process of colonization, no context is provided

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76 *Hales v Jamilmira*, unreported [2003] NTCA 9. See also *Jamilmira v Hales* [2004] HCATrans 18 (13 February 2004); ABC Radio National, “Aboriginal customary law/white law divide”, PM, 16 April 2003 ><http://www.abc.net.au/pm/content/2003/s834003.html>> accessed 1 November 2004.

77 See e.g., Gerard Bryant, “Promised Marriages—The Jackie Pascoe Case” (2002) 20 *Indigenous Law Bulletin*.

78 [2003] NTCA 9.

79 Paul Toohey, “Victim Trapped Between Two Worlds: Tribal and White Law Clash Over Sex”, *The Australian* (Sydney), 9 October 2002, 2.

80 *R v Burt Lane, Ronald Hunt and Reggie Smith*, unreported, 509 Northern Territory Supreme Court, 29 May 1980.

81 Audrey Bolger cited in Chris Cunneen, *Judicial Racism*, Australian Institute of Criminology <<http://www.aic.gov.au/publications/proceedings/21/Cunneen.pdf>> accessed 6 October 2004.

82 *R v Narjic* cited in Chris Cunneen, above n 43, 128.

83 *Millhouse J, Mungkilli, Martin and Mintuma* (Unreported South Australian Supreme Court, 20 March 1991, Millhouse J).

for the colonial attitudes that have seen the sexuality of aboriginal women demeaned, devalued and degraded. The result of these messages given to aboriginal women by their contact with the criminal justice system would only reinforce any sense of worthlessness and lack of respect that sexual assault and abuse have scarred them with.<sup>84</sup>

On appeal in the Pascoe case Riley J stated that:

Whilst proper recognition of claims to mitigation of sentence must be accorded and such claims will include relevant aspects of customary law, the court must be influenced by the need to protect members of the community including women and children from behaviour which the wider community regards as inappropriate.<sup>85</sup>

And in *R v Daniel*<sup>86</sup> Fitzgerald P observed that:

It would be grossly offensive for the legal system to devalue the humanity and dignity of members of Aboriginal communities or to exacerbate any lack of self esteem felt within those communities by reason of our history and their living conditions . . . Aboriginal women and children who live in deprived communities or circumstances should not also be deprived of the laws' protection . . . they are entitled to equality of treatment in the laws' responses to offences against them, not to some lesser response because of their race and living conditions.<sup>87</sup>

In *Edwards*, Muirhead J commented that, "I am just not prepared to regard assaults of aboriginal women as a lesser evil to assaults committed on other Australian women."<sup>88</sup> In *Amagula v White*,<sup>89</sup> Kearney J expressed the view that:

The courts must do what they can to see that the pervasive violence against women in Aboriginal communities is reduced. There is a fairly widespread belief that it is acceptable for men to bash their wives in some circumstances; this belief must be erased.<sup>90</sup>

It is interesting nevertheless to consider the recent controversy generated by an Australian Broadcasting Commission program *Lateline* that documented the intractable problem of violence and sexual assault in Aboriginal communities.<sup>91</sup> The Northern Territory Crown Prosecutor Nanette Rogers made allegations and reported cases that have occurred in the Northern Territory. However these stories and cases were not new.

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84 Professor Larissa Behrendt, "Law Stories and Life Stories: Aboriginal Women, The Law and Australian Society" (Speech delivered at the 2004 Clare Burton Memorial Lecture, Hyatt Regency Perth, 24 September 2004).

85 *Hales v Jamilmira* [2003] NTCA 9.

86 *R v Daniel* (1997) 94 A Crim R 96, 127.

87 *Ibid.*

88 *Edwards* (Unreported Northern Territory Supreme Court, 1981, SCC No 155, 156 1981).

89 Supreme Court of the Northern Territory, unreported, 7 January 1998.

90 Angel J expressed his agreement with this passage in *The Queen v Chula* (Supreme Court of the Northern Territory, unreported, 20 May 1998).

91 Australian Broadcasting Corporation, "Crown Prosecutor speaks out about abuse in Central Australia", *Lateline*, 15 May 2006 <<http://www.abc.net.au/lateline/content/2006/s1639127.htm>> accessed 4 July 2006.



For over three decades Aboriginal women themselves have highlighted the serious problem of violence and sexual abuse in Aboriginal communities using the same examples and stories.<sup>92</sup> In fact, many of these Aboriginal women were conducting state inquiries or reports into violence and sexual assault against Aboriginal women and children. The failure of Aboriginal women to gain serious traction on this issue, whether in the media, among policy makers or political representatives at any level of government, raises important questions about why Aboriginal women are consistently ignored, yet the single television appearance of a white woman instigates a national crisis. It raises questions and highlights the difficulties Aboriginal women face in influencing public policy, and more precisely in influencing the democratic process in Australia. It proves how our public institutions fail to respond to Indigenous peoples in Australia.

## Conclusion

In concluding it is interesting to note that even campaigns for reform of our public institutions eschew Indigenous peoples interests in the name of pragmatism. Contemporary campaigns for institutional reform such as advocacy for a Bill of Rights or for an Australian Republic frequently use the convenience of Indigenous peoples' misfortune manifest in health statistics or socio-economic exclusion, to give weight to their advocacy for institutional reform. Interestingly enough however, more often than not Indigenous peoples' specific demands are eschewed in favour of "pragmatism" and minimalism.<sup>93</sup> For example, in relation to an Australian Republic, engagement with Indigenous peoples and reconciliation is viewed so controversial it could possibly derail a future referendum. In fact, in a recent Senate inquiry into an Australian Republic, the movement didn't make a single reference to Indigenous peoples or the significance of ending the colonial project, except to announce that perhaps it would

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92 See generally, Audrey Bolger, *Aboriginal Women and Violence* (1991); Boni Robertson, *The Aboriginal and Torres Strait Islander Women's Task Force on Violence Report (State of Queensland) 2000*; S Gordon, K Hallahan, and D Henry, *Putting the Picture Together, Inquiry into the Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities* (Department of Premier and Cabinet, Western Australia 2002); Sonia Smallacombe, "Speaking Positions on Indigenous Violence" 2004 (30) *Hecate* 47-55; Sharon Payne, "Aboriginal Women and The Law" in Chris Cunneen (ed), *Aboriginal Perspectives on Criminal Justice* (1992) 31; Melissa Lucashenko, "Violence Against Indigenous Women: Public and Private Dimensions" in Sandy Cook and Judith Bessant (eds), *Women's Encounters with Violence: Australian Experiences* (1997) 147; Melissa Lucashenko and Odette Best, "Women Bashing: An Urban Aboriginal Perspective" (1995) 14 (1) *Social Alternatives* 19-22; Larissa Behrendt, "Law Stories and Life Stories: Aboriginal Women, The Law and Australian Society" (2005) 20 *Australian Feminist Studies* 245; Hannah McGlade, "Our Own Backyards" (2003) 5 (23) *Indigenous Law Bulletin* 6; Judy Atkinson, "Violence Against Aboriginal Women: Reconstitution of Community Law—The Way Forward" (1990) 2 *Aboriginal Law Bulletin* 6; Judy Atkinson, "Violence in Aboriginal Australia: Colonisation and its Impact and Gender" (1990) 3 *Refractory Girl* 4-9.

93 See Mark McKenna, *This Country: A Reconciled Republic?* (2004); "Reservations were expressed about the wisdom of identifying one group within the ACT community for special treatment in relation to a Bill of Rights": *Towards an ACT Human Rights Act*, Report of the ACT Bill of Rights Consultative Committee, 101.

be important to have an Aboriginal word for the President. In the case of a Bill of Rights, the inclusion of an indigenous specific right is eschewed in favour of a broad based non-discrimination clause, which is considered more pragmatic and politically palatable to a “racist” electorate who, as in the case of the ACT Bill of Rights inquiry, “would feel as if they did not have a stake in the rights regime”.<sup>94</sup>

In 2006 the poor track record of Australian public institutions’ attitudes toward Indigenous peoples is well established and remains undiminished. The indifference or psychological *terra nullius* remains relatively unexamined, yet this indifference continues to fuel Indigenous detachment from Australian institutions. The solution is perhaps a combination of reforms that Indigenous and non-Indigenous Australians have been advocating for: a Bill of Rights, a process toward a Treaty between Indigenous and non-Indigenous Australia, Indigenous seats of parliament, a national political representative model, new preamble or an apology. These are the kinds of solutions that are overlooked and disparaged because of the politicisation of Indigenous issues and the aligning of such reforms with the “left” or the “elite”. Public debate on indigenous issues has been co-opted by ideology. The reforms mentioned above are viewed as symbolic and therefore “wishy washy”, yet Australians as a nation understand the importance of symbolism upon a sense of nationhood and inclusion: ANZAC, Kokoda, Gallipoli, the wattle on the lapel, the settler, the farmer. These stories are a combination of mythology and history. Indigenous peoples have not played any role in state building in Australia. Such reforms would constitute a message of inclusion and deliver a sense of belonging for Indigenous peoples in the state. The future Indigenous Australia depends as much upon those communities working through dysfunction and poverty themselves as it does upon Australians accepting that our public institutions are evolving, not already concluded.

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94 Ibid, 102.