INDIGENOUS AUSTRALIANS AND THE LEGAL PROFESSION

by Alexander Ward

The law has a special meaning for Aboriginal peoples and Torres Strait Islanders. Many regard the law as a framework for civil society, under which the innocent are protected and the guilty punished. Fundamental principles of the law have developed over time to ensure natural justice and the presumption of innocence for anyone accused of a crime and just recompense for anyone deprived of possessions. However, throughout the history of colonial settlement in Australia and even following Federation, for Indigenous Australians the law has often been used as a tool to arbitrarily deprive and oppress.

At the turn of the 20th century, Aboriginal peoples and Torres Strait Islanders were not recognised under the law as citizens of any of the former colonies and did not have any voting rights. At Federation in 1901, the Australian Constitution prevented any person deprived of such rights by a State from exercising ordinary citizens' voting rights at Federal elections.

It is well documented and recognised that Aboriginal peoples and Torres Strait Islanders were subject to grave mistreatment, including murder, discrimination, dislocation and forced removal from their families. In many cases these offensive acts were committed pursuant to official government policy or were sanctioned by laws such as the *Aboriginal Protection Acts*, *Half-Caste Acts* and *White Australia Policy*, introduced from the mid-19th century. In countless other cases, the law failed to protect Aborigines and Torres Strait Islanders because those with the power to act failed in their duty.

In Harper Lee's novel *To Kill A Mockingbird*, the enduring character Atticus Finch said:

> Courage is not a man with a gun in his hand. It's knowing you're licked before you begin but you begin anyway and you see it through no matter what. You rarely win, but sometimes you do.

This passage encourages one to think of great Indigenous activists such as John Koowarta, Vincent Lingiari, Eddie Mabo and Oodgeroo Noonuccal, whose bravery and leadership won them a special place in history. Their enduring victories were rare instances of justice against an overwhelming tide of injustice.

Throughout most of the last two centuries, Australia's legal system has struggled to deliver on the fundamental principle of equality before the law. Often, an Aboriginal defendant would have been the only Indigenous person in the courtroom, being tried under a system they did not understand, in a language they barely spoke. In such circumstances, justice was, at best, a relative concept.

Today, there is formal equality under Australian law. However, substantive equality is often undermined by historical failure to acknowledge cultural differences and accommodate different perspectives within our justice system. For example, the Commonwealth prevents consideration of an offender's customary laws and cultural background in bail and sentencing proceedings, despite strong concerns raised by the Law Council, the Australian Human Rights Commission and others.[1]

Aboriginal and Torres Strait Islander peoples continue to be imprisoned at a rate 14 times the national average,[2] substantially worse than at the time of the Royal Commission into Aboriginal Deaths in Custody. Given the wealth and prosperity of Australia, education and health outcomes for Indigenous Australians are unacceptable by any measure. More pointedly, the disparity of life-expectancy between Indigenous people and other Australians is a national disgrace.

As a case study in participation, the legal profession is no exception. It is not actually known how many Indigenous lawyers there are in Australia, as there is no formal mechanism to collect such data nationally. Statistics compiled by the Law Society of NSW indicate a promising trend, in which the number of Indigenous identifying solicitors has doubled from 46 in 2009 to 89 in 2010-11.[3] However, this still represents just over 1% of all NSW solicitors.[4] Anecdotally, it is understood that Indigenous representation in other jurisdictions may be similar or worse.

It must be recognised that factors underpinning Indigenous disadvantage, such as poor education outcomes, health and entrenched poverty, contribute to low rates of Indigenous enrolment and retention at universities and entry to the legal profession. However, there is much that the legal profession can do to address the causes and symptoms of Indigenous under-representation.

THE LAW COUNCIL'S POLICY STATEMENT

In February 2010, the Law Council of Australia launched its first Policy Statement on Indigenous Australians and the Legal Profession. The Policy Statement is particularly significant because it has been supported unanimously by the law societies and bar associations in all States and Territories. It is therefore likely to become one of the most widely referenced documents for legal professional associations developing policies affecting Indigenous Australians. Development of the Policy Statement commenced in 2007 and involved a targeted national consultation process with over 100 Indigenous organisations and individuals.

The Policy Statement is considered to be a first step in the reconciliation process. It commences with acknowledgement of Indigenous Australians as the original custodians of Australia, comprising many separate and distinct peoples and nations. It acknowledges Australia's history since colonisation, including discrimination, dispossession, oppression, slavery and other crimes committed against Indigenous peoples; in many cases with official imprimatur.

The Policy Statement recognises that the legal profession has an important role to play in the reconciliation process and in 'closing the gap' in life expectancy and living standards between Indigenous and non-Indigenous Australians. This must be achieved by reforming the legal system, educating the legal profession, promoting human rights and working in partnership with Indigenous Australians toward reconciliation.

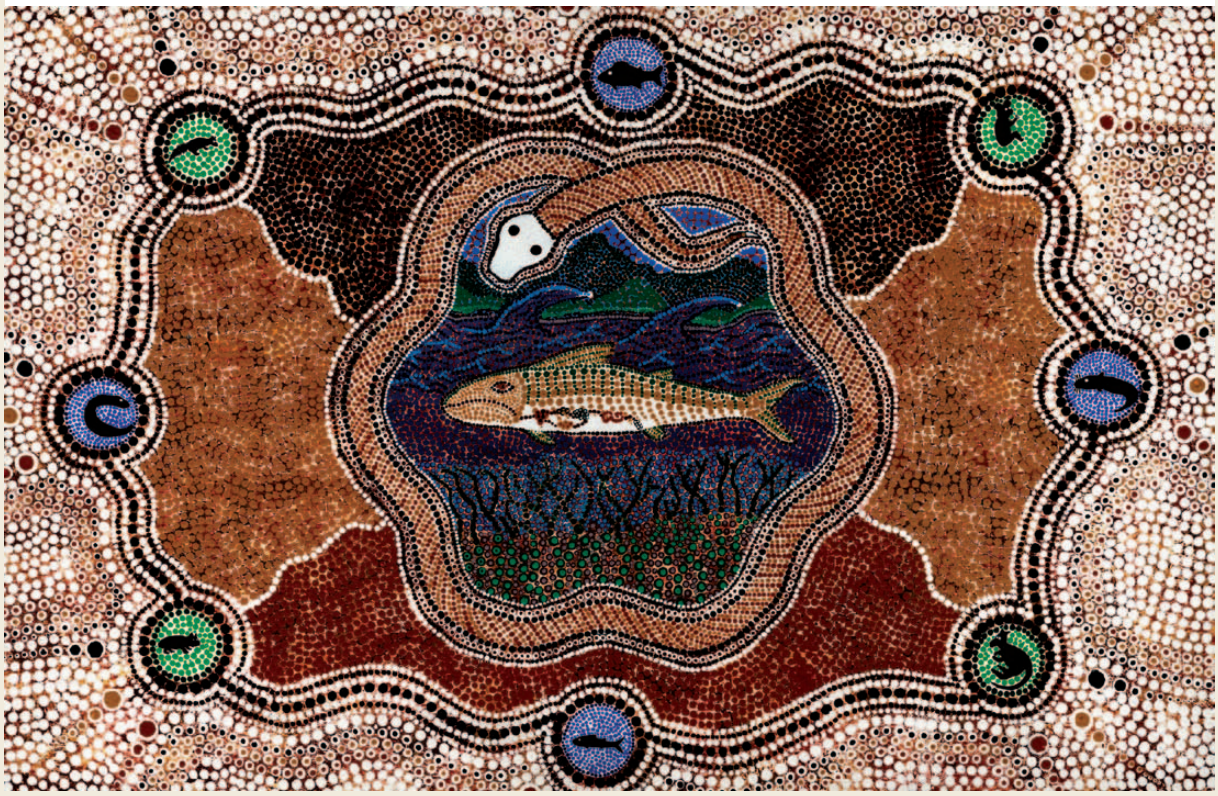
INDIGENOUS AUSTRALIANS AND THE LEGAL SYSTEM

Australia's legal system was not designed for the benefit of Aboriginal and Torres Strait Islander peoples. Even today the Constitution, which is the foundation stone of Australia's democracy, contains provisions designed with the intent of discriminating against Indigenous peoples.

While it is often argued by those who oppose Constitutional or legislative recognition of human rights that Australia's robust democracy and Parliamentary institutions are sufficient protection for minority groups, it is doubtful such a view would be shared by Aboriginal peoples and

Protection of Spirit 2003
Dorsey Smith

Acrylic on canvas, 610mm x 400mm



Torres Strait Islanders. Section 25 of the Constitution in fact requires denial of voting rights to racial groups excluded from voting in state elections (noting that, at the turn of the century, only Aboriginal peoples and Torres Strait Islanders were affected). In addition, s 51(xxvi) permits laws to be made both for the benefit and detriment of Indigenous peoples; and the absence of any Constitutional guarantee of racial equality and non-discrimination has seen Parliament suspend the operation of the *Racial Discrimination Act 1975* ('RDA') as recently as 2007.[5]

The recent commitment[6] by all major political parties to hold a referendum in the current term of Parliament to recognise the special place of the First Australians in our nation has created an opportunity to reset Australia's foundations. However, in order to give practical meaning to this recognition, there is a compelling argument for further amendments giving substantive effect to that recognition within the body of the Constitution. This might include removal of s 25 and amendment of s 51(xxvi) to prevent the making of laws to the detriment of Indigenous Australians. It could include incorporation of a guarantee of racial equality and a formal provision for the creation of agreements between Indigenous communities and the Commonwealth.

In addition, Australia must treat as a national emergency the factors underpinning appalling rates of Indigenous incarceration and deaths in custody. Indigenous adults make up just 1.9 per cent of the Australian population, but over 25 per cent of the prison population. In the past 10 years, the rate of imprisonment has increased by 51 per cent, from 1,248 to 1,892 prisoners per 100 000 adults.[7]

This is simply unacceptable and should be viewed as such by all governments. In 2009, the Social Justice Commissioner stated that 'over-representation of Indigenous people in the criminal justice system represents one of the most significant gaps between the life outcomes of Indigenous and non-Indigenous Australians,' however governments have yet to set a target to close the huge gap that exists in this area. [8]

Australia must make its legal system more meaningful and accessible for Aboriginal and Torres Strait Islander peoples by incorporating Indigenous perspectives into the law, better supporting Indigenous legal services and interpreters, and promoting and protecting land rights and cultural property rights.

INDIGENOUS AUSTRALIANS AND THE LEGAL PROFESSION

It is clear that the legal profession is an alien place for most Indigenous Australians. However, much can be done by the profession to address this, both in perception and reality.

The legal profession must take a greater role in mentoring and encouraging Indigenous lawyers and law students. Lawyers should also be encouraged to learn more about Indigenous cultures and to direct pro bono programs toward assisting Aboriginal people and Torres Strait Islanders in a range of areas.

It is encouraging to note that the legal profession has already started down this path, through the creation of Indigenous law scholarships,[9] mentoring programs (both for new solicitors and barristers), and celebrating the achievements of Indigenous lawyers (for example, through the Commonwealth Government's Indigenous Lawyer of the Year Award and Indigenous Law Student of the Year Award).

Much more can be achieved however, such as promoting the inclusion of cultural education in Continuing Legal Education programs, linking law practices with Indigenous communities and organisations, and investing in organisations which support Indigenous students through primary and secondary education so that they have the opportunity to study law.

PROTECTING AND PROMOTING HUMAN RIGHTS

It must be recognised that, in order for Indigenous peoples to enjoy human rights in the same way as all other Australians, enormous investment and commitment to address Indigenous disadvantage is required. The former Social Justice Commissioner, Dr William Jonas AM, once wrote that:

> The failure to provide us with the same opportunities as the rest of society in the past means that to now insist on identical treatment will simply confirm the position of Indigenous people at the lowest rungs of Australian society.[10]

There must therefore be commitment to provide not just formal equality, but substantive equality. Self-determination should not simply be offered – the institutions needed to realise self-determination should be established and supported. Everyone impacted by the law should have the means to understand it and participate fully in processes which affect them. There should also be commitment by governments to implement human rights instruments in domestic law, such as the *United Nations*

Declaration on the Rights of Indigenous Peoples. These should not be mere aspirations – there are very recent examples of human rights denials by governments, particularly the human rights of Aboriginal people in the Northern Territory under the Emergency Response.[11]

It is undeniable that focus must remain on the appalling living conditions in many remote Indigenous communities, including the cycles of alcohol abuse and violence. However, it is difficult to understand why these circumstances necessitated removal of the protection of the RDA. It is also concerning that the Commonwealth Government's re-instatement of the RDA in 2010 was accompanied by blunt refusal to incorporate a further provision that would ensure the RDA survives to the extent of inconsistency with any other Commonwealth enactment.

PARTNERSHIP AND RECONCILIATION

At the core of the Law Council's Policy Statement is a commitment to working in partnership with Indigenous Australians as the legal profession moves forward in the reconciliation process. Reconciliation means different things to different people. At its essence, however, reconciliation is about understanding, respect and opportunity. The legal profession has taken some great strides forward in this process, but needs to find new ways of reaching out to Indigenous peoples, to forge trust and create opportunities.

WHERE TO NOW?

The practical work has now begun toward implementing the Law Council's Policy Statement. The Law Council has launched its first Reconciliation Action Plan ('RAP'). The RAP program is an initiative of Reconciliation Australia, established in 2006 to celebrate the 40th anniversary of the successful 1967 referendum, which enabled the Commonwealth to legislate with respect to Aboriginal and Torres Straight Islander peoples. RAPs provide a vehicle for corporations, government entities and other organisations to implement practical measures to further reconciliation in Australia.

Many of the Law Council's constituent bodies, the law societies and bar associations of the states and territories, have also commenced development of RAPs, which should see substantial and meaningful initiatives to address Indigenous disadvantage. RAPs are a growing phenomenon, with many major organisations and state and federal government departments having already launched or concluded their plans. Despite the significant challenges, there are very good reasons to feel optimistic about the future. The first steps are being taken.

Alexander Ward is the President of the Law Council of Australia. The Law Council's Policy Statement on Indigenous Australians and the Legal Profession can be downloaded at <http://www.lawcouncil.asn.au/programs/national-policy/indigenous/policy-statement.cfm>.

1 The Commonwealth prevents consideration of the cultural background or customary laws observed by an offender in bail and sentencing proceedings under the *Crimes Amendment (Bail and Sentencing) Act 2006* (Cth) and the *Northern Territory National Emergency Response Act 2007* (Cth).

2 Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators 2011* (2011).

3 Urbis, '2010 Profile of Solicitors in NSW' (Final Report, Law Society of NSW, January 2011) 19.

4 Ibid.

5 The RDA was suspended by the Commonwealth to prevent challenges against the *Northern Territory National Emergency Response Act 2007* (Cth) ('Intervention'). It is not clear that suspension was technically necessary, as ordinary principles of statutory interpretation preclude invalidation of new legislation by older enactments.

6 See Jenny Macklin, 'Closing the Gap' (Election Policy, Australian Labor Party, 2010) 18; Coalition, '*Plan for Real Action for Indigenous Australians'* (Election Policy, Liberal Party of Australia, 2010) 4; and the agreement between the Australian Greens and the Australian Labor Partyto "[H]old referenda during the 43rd Parliament or at the next election on Indigenous constitutional recognition and recognition of local government in the Constitution." (The Australian Greens & The Australian Labor Party, *Agreement* (1 September 2010) 3(f) <http://greens.org.au/sites/greens.org.au/files/Australian Greens_ALP agreement.pdf>.

7 See generally above n 3, 4, 6.

8 Tom Calma AO, *Social Justice Report 2009* (Report, Australian Human Rights Commission, 2009) 30.

9 See, eg, the Law Council's John Koowarta Reconciliation Law Scholarship and the Law Institute of Victoria's Indigenous Scholarship, as well mentoring programs for law students in some jurisdictions.

10 William Jonas, *Social Justice Report 2000*, (Report, Human Rights and Equal Opportunity Commission, 2000) 19.

11 The 'NT Intervention' was initiated by the Commonwealth following the release of the *Little Children Are Sacred* report into violence and child sexual abuse in NT remote Aboriginal communities. The primary features of the Intervention included suspension of the RDA, income quarantining for Aboriginal welfare recipients, compulsory acquisition of around 70 Aboriginal townships (owned as freehold by Aboriginal communities under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth)), alcohol and pornography restrictions, and restraint on judicial discretion to consider cultural background in sentencing an Aboriginal offender.