



**35th Annual Australia and New Zealand Law and  
History Society Conference**

***Aboriginal People at the Periphery***

Address

by

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Chief Justice of Western Australia**

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Curtin Law School, Perth

## **Introduction**

I am greatly honoured to have been invited to address this annual conference of the Australia and New Zealand Law and History Society. The founders of this Society are to be commended for their prescience in their appreciation of the desirability of an organisation committed to the study and analysis of the symbiotic relationship between law and history. I describe that relationship as symbiotic because, generally speaking, laws are often the product of the historical circumstances preceding their passage or, in the case of the common law, the product of history in the form of precedential decisions of previous courts. On the other hand, the annals of history are often shaped or at least significantly influenced by the laws governing the people whose history is under consideration.

I would like to particularly welcome those who have travelled from other places to attend this conference which, almost by definition, means you have travelled a long distance to be here. I sincerely hope that you enjoy your stay in our beautiful City and that time might permit you the opportunity to see a little more of our vast State.

## **The traditional owners**

Given the topic of my address it is more than usually important for me to commence by acknowledging the traditional owners of the lands on which we meet, the Whadjuk people, who form part of the great Noongar clan of south-western Australia, and by acknowledging their

Elders past and present and acknowledging their continuing stewardship of these lands.

I would also like to acknowledge the conspicuous commitment and contribution which Curtin University, the host of this conference, makes to Aboriginal reconciliation in a variety of ways.

It is appropriate to put the topic of my paper into a temporal perspective. My paper concerns the interaction between the original inhabitants of Western Australia and the laws which the colonists brought with them from Britain, and modified to suit their purposes.<sup>1</sup> In temporal terms, the history of Western Australia since colonisation is a miniscule proportion of the history of this part of the world since human occupation. Estimates of the period of human occupation vary, but using a relatively conservative estimate of around 50,000 years, the period since colonisation is less than half of 1% of the total period since this part of the world was occupied by one of the longest continual cultural groupings known to the planet and certainly the oldest outside of Africa.<sup>2</sup>

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<sup>1</sup> I am greatly indebted to Dr Jeannine Purdy for the research utilised in this paper. However, responsibility for the views expressed, and any errors, is mine alone. The views expressed are the personal views of the author, and should not be taken to reflect the view of any court.

<sup>2</sup> Australian Geographic, 'DNA confirms Aboriginal culture one of Earth's oldest' *Australian Geographic*, 23 September 2011.

## A O Neville - Chief Protector of Aborigines

Another reason why it is more than usually important to acknowledge the original inhabitants arises from the fact that this building housed the office of Mr Auber Octavius Neville between 1922 - 1945. A O Neville held the office of Chief Protector of Aborigines between 1915 - 1936, and later served as Commissioner of Native Affairs between 1936 - 1940. Although various offices of 'Protector' of 'Natives' and 'Aborigines' had existed previously, the office of 'Chief Protector' of Aborigines was formally established by the infamous *Aborigines Act 1905* (WA) which provided the legislative regime for a form of apartheid which was to characterise relations between Aboriginal people and non-Aboriginal people in Western Australia for much of the 20th Century. I will say a little more of the Act later in this paper.

A O Neville is undoubtedly a controversial figure. Although differing views have been expressed with respect to his motives, given what is now well-established,<sup>3</sup> there cannot be any real doubt that his actions had a disastrous effect upon generations of Aboriginal people in this State and continue to influence the living circumstances of many Aboriginal people in Western Australia to this day, through the inter-generational trauma which has shaped the lives of many contemporary Aboriginal Western Australians.

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<sup>3</sup> See, for example, *Bringing them home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children and their Families* (1997); Anna Haebich, *Broken Circles: Fragmenting Indigenous Families 1800-2000* (2000); Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015) and the on-going work of Australia's Royal Commission into Institutional Responses to Child Sexual Abuse (2013- ).

## **The Swan River Colony**

Members of the Society will no doubt be aware that Tasmania, Victoria, Queensland and much of New Zealand were all originally part of the Colony of New South Wales.<sup>4</sup> By contrast, the colonies formed in South Australia and Western Australia were initiated with specific authority from the United Kingdom. The colony in Western Australia, which was initially known as the Swan River Colony, was instigated by Sir James Stirling (1791 - 1865), its first Governor, as a business enterprise. Stirling had considerable difficulty in persuading the Colonial Office that the creation of a colony in the vicinity of the Swan River was a good idea. A biographer has described his efforts in these terms:

In London his persistent arguments attracted the attention of investors and speculators, who joined him in badgering the Colonial Office to grant them government sanctions and land concessions. Stirling himself was not committed to any particular form of colonization, having a 'bounty of ideas' on the subject ... At one time he favoured floating a syndicate like the Australian Agricultural Co, and at another the formation of an association such as had founded Georgia and Pennsylvania, but he was always insistent that no convicts should be sent out with the settlers. In May 1828 a change in the British government brought Sir George Murray, a friend of the Stirling family, into charge of the Colonial Office; his parliamentary assistant, Horace Twiss, was also a friend of the Stirlings. After some delay it was decided to establish a colony in New Holland under the direct control of the British government, and superintended initially by Stirling: a bill would soon be brought before parliament to provide for its government; private capitalists and syndicates would be

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<sup>4</sup> Phillip's instructions included that he was to become Governor of the territory 'extending from the Northern Cape or Extremity of the Coast called Cape York in the Latitude of Ten Degrees thirty seven Minutes south, to the Southern Extremity of the said Territory of New South Wales, or South Cape, in the Latitude of Forty three Degrees Thirty nine Minutes south, and of all the Country Inland to the Westward as far as the One hundred and Thirty fifth Degree of East Longitude, reckoning from the Meridian of Greenwich including all the Islands adjacent in the Pacific - Ocean within the Latitudes aforesaid of 10° 37' South, and 43° 39' South' (Governor Phillip's Instructions 25 April 1787 (GB)).

allotted land in the proposed settlement according to the amount of capital and the money they spent on fares and equipment; priority of choice would be given only to those who arrived before the end of 1830, and no syndicate or company would be the exclusive patron and proprietor of the settlement.

On 2 May 1829 Captain C H Fremantle of the *Challenger* took possession, at the mouth of the Swan River, of the whole of Australia which was not then included within the boundaries of New South Wales. Stirling, who arrived later with his family and civil officials in the storeship *Parmelia*, proclaimed the foundation of the colony on 18 June.<sup>5</sup>

### **A colony founded on bluff**

Stirling set out for the Swan River before the legislation authorising the foundation of the colony and providing for its government had been introduced into the British Parliament.<sup>6</sup> Indeed, Stirling had no way of knowing whether this legislation had been passed at the time he proclaimed the foundation of the colony.<sup>7</sup>

Stirling's authority was scant and later he observed:

I believe I am the first Governor who ever formed a settlement without Commission, Laws, Instructions and Salary.<sup>8</sup>

The Museum of Australian Democracy describes Stirling's authority as having 'rested on bluff' although that, like Stirling's observation, seems to be something of an exaggeration, as he had received

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<sup>5</sup> F K Crowley, 'Stirling, Sir James (1791 - 1865)' (1967) *Australian Dictionary of Biography* (accessed 10 November 2016).

<sup>6</sup> Museum of Australian Democracy, Documenting a Democracy - Commission appointing Stirling Governor and Commander-in-Chief 4 March 1831 (UK) (accessed 11 November 2016).

<sup>7</sup> In fact the *Western Australia Act 1829* (UK) had been passed on 14 May 1829.

<sup>8</sup> Museum of Australian Democracy, above note 6.

Instructions from the Colonial Secretary even if he lacked the sanction of law. Those Instructions recorded that it had:

been resolved by His Majesty's Government to occupy the Port on the Western Coast of New Holland, at the Mouth of the River called 'Swan River', with the adjacent Territory, for the purpose of forming a Settlement there.<sup>9</sup>

The Instructions were however cast in very general terms. The Instructions given to Stirling with respect to law and governance were few and vague. The Instructions relevantly provided:

As Swan River and the adjacent Territory are not within the limits of any existing Colony, difficulties may easily be anticipated in the course of your proceedings, from the absence of all Civil Institutions, Legislative, Judicial, or Financial.

Until provision can be made, in due form of Law, for the Government of the projected Colony, the difficulties, to which I refer, must be combated, and will, I trust, be overcome by your own firmness and discretion.

You will assume the Title of Lieutenant Governor ...

You will cause it to be understood that His Majesty has granted to you the power of making all necessary locations of Land.

For your guidance, in this respect, ample instructions will, at a future period, be prepared.

...

You will endeavour to settle, with the consent of the parties concerned, a Court of Arbitration for the decision of such questions of Civil Rights as may arise between the early Settlers, and, until a more regular form of administering Justice can be organised.

...

With these few and general Instructions for your guidance, assisted by the oral and written Communications, which have taken place between yourself and this Department, you will, I trust, be able to surmount the

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<sup>9</sup> Lieutenant-Governor Stirling's Instructions 30 December 1828 (UK).

difficulties to which you may be exposed at the outset, enhanced, although they will be by want of any regular commission for administering the Government.

An Instruction of that nature, accompanied with all the requisite Instructions, will be transmitted to you, as soon as the indispensable forms of proceeding in such cases will allow.<sup>10</sup>

The Instructions to Stirling were silent as to the Aboriginal inhabitants of the land to be colonised. However, the Colonial Secretary had included with Stirling's Instructions a copy of the Instructions which had previously been provided to Governor Phillip of New South Wales, with a direction that Stirling should adhere to those Instructions 'as closely as circumstances will admit'.<sup>11</sup> Governor Phillip's Instructions included a direction to:

endeavour by every possible means to open an Intercourse with the ~~Savages~~ Natives and to conciliate their affections, enjoining all Our Subjects to live in amity and kindness with them. And if any of Our Subjects shall wantonly destroy them, or give them any unnecessary Interruption in the exercise of their several occupations. It is our Will and Pleasure that you do cause such offenders to be brought to punishment according to the degree of the Offence.<sup>12</sup>

Significantly, Governor Phillip's Instructions made no reference to the protection or recognition of the Aboriginal people's interest in the lands which they had occupied for millennia. The 'terra nullius' approach to colonisation is also evident in the *Western Australia Act 1829* (UK), which not only ignores Aboriginal people as occupants of the new colony but implicitly denies their capacity to possess property or to exercise sovereignty when it records that:

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<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> Governor Phillip's Instructions 25 April 1787 (GB).

Diverse (?) of His Majesty's subjects have by the ... consent of His Majesty effected a settlement upon certain wild and unoccupied lands on the western coast of New Holland and the islands adjacent which settlements ... are known by the name of Western Australia.<sup>13</sup>

The apparent discrepancy between the Act which denies that the lands were occupied, and the Instructions given to Phillip and later to Stirling and which refer to the manner in which the inhabitants were to be treated, can no doubt be explained pragmatically by the inconvenience of the truth to British imperial expansion plans.

When Stirling proclaimed the existence of the new colony on 18 June 1829 he asserted dominion over the territory of Western Australia and declared that the laws of the United Kingdom would 'immediately prevail and become Security for the Rights, Privileges and Immunities of all His Majesty's Subjects', or at least 'as far as they are applicable to the Circumstances of the Case'.<sup>14</sup>

Consistently with the Instructions given to Governor Phillip, Stirling included reference to the protection of the Aboriginal inhabitants of the lands being colonised in his proclamation, in the following terms:

And whereas the Protection of Laws doth of Right belong to all People whatsoever who may come or be found within the Territory aforesaid. I do hereby give Notice that if any Person or Persons shall be convicted of behaving in a fraudulent [sic], cruel, or felonious Manner towards the Aborigines [sic] of the Country, such Person or Persons will be liable to be prosecuted and tried for the Offence, as if the same had been committed against any other of His Majesty's subjects.<sup>15</sup>

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<sup>13</sup> Preamble to the *Western Australia Act 1829* (UK).

<sup>14</sup> Lieutenant-Governor Stirling's Proclamation of the Colony 18 June 1829 (UK).

<sup>15</sup> *Ibid.*

So, although the entitlement of the Aboriginal inhabitants to the protection of colonial laws bearing upon their physical safety was recognised from the earliest days of the new colony, no reference was made to any rights of personal property or to their prior occupation of or interest in the land which was being appropriated by the colonists. A dispatch sent to Stirling in 1831 from the Colonial Office described the colony as 'a Territory acquired by mere rights of occupancy, & not by conquest'.<sup>16</sup> The source of the asserted 'rights' is not identified, but seems to have been assumed.

In a context in which the colonists asserted 'rights of occupancy' over lands with which they had no association, and which had been occupied by Aboriginal people for countless millennia, it is perhaps not surprising that the lofty sentiments relating to the protection of Aboriginal people espoused by Stirling at the time he proclaimed the colony were not matched by the subsequent actions of the colonists, or indeed by his own actions.

### **Midgegooroo & Yagan**

The colonists asserted rights to the exclusive occupation of land which had totemic, social, economic and spiritual meaning for Aboriginal people. Apart from everything else it also provided them with the basic necessities of life: food, water and shelter. The colonists introduced practices for the cultivation of crops and the rearing of livestock together with notions of personal rights to property and land

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<sup>16</sup> Despatch No 2 re legal and judicial subjects 28 April 1831 (UK).

which were foreign to Aboriginal culture. To use modern parlance, but with more basis in fact than is often the case, these changes constituted an 'existential threat' to Aboriginal people, such that clashes with the colonists were inevitable. Midgegooroo and his son Yagan, leaders of the Whadjuk people living in and around the new colony, were prominent in these clashes. The South West Aboriginal Land and Sea Council has described the conflict in the following terms:

Criticisms of Noongar people often reflected a poor or non-existent understanding of Noongar law. Noongars who were 'stealing', for example, livestock and other food-sources, were engaging in what they saw as a system of reciprocity... [such] events led to Yagan [a Noongar leader and resistance fighter during the early years of the Swan River Colony], becoming an outlaw.

In 1831 Smedley, a servant of homesteader Archibald Butler, shot at a group of Noongar people caught harvesting potatoes and fowls, and killed one of them. In retaliation, Yagan and Midgegooroo speared another of Butler's servants. To the settlers, this act was seen as the unlawful killing of an innocent man. To Noongar people, tribal law required that a member of Smedley's 'family-group' also be killed.<sup>17</sup>

There were other examples of such clashes, and on one occasion Yagan was saved from execution by the intervention of Mr Robert Lyon, an outspoken settler who had become a defender of the 'Aboriginal cause'.<sup>18</sup>

However, by 1833 Stirling issued a proclamation declaring Yagan and Midgegooroo to be outlaws 'deprived of the protection of the British laws' after they were suspected of leading a party of Aboriginal people

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<sup>17</sup> South West Aboriginal Land and Sea Council, Kaartdijin Noongar - Noongar Knowledge - Yagan (accessed 11 November 2016).

<sup>18</sup> Ibid.

that had killed two settlers near Bulls Creek (now a suburb of Perth). The Governor's proclamation authorised and commanded any person to capture or assist in capturing the two men 'dead or alive' and offered significant financial rewards as an incentive.<sup>19</sup>

Midgegoroo was captured in 1833. Having been declared to be beyond the protection of British law, he was denied a trial and summarily executed by firing squad on land now occupied by the Deanery of the Anglican Archdiocese of Perth.<sup>20</sup> A local newspaper reported that the 'whole arrangement and execution after the death warrant was handed over to the Civil Authorities, did not occupy half an hour', and that the execution prompted 'loud and vehement exultation' from some amongst the assembled crowd.<sup>21</sup>

Yagan met his fate a little later in 1833. The South West Aboriginal Land and Sea Council describe his demise in these terms:

[Yagan] eluded capture until July 1833 when he was shot by two young shepherd boys on the Upper Swan ... 'Yagan's head, brutally hacked from his body, was wedged into a hollow tree stump and slowly preserved in the smoke of gum leaves. After several months the lank hair was combed, a band of possum fur string was wrapped around the forehead and a pair of red and black cockatoo feathers added for effect'. The head was then taken to England aboard the *Cornwallis* in September 1833 to be held at the Liverpool Museum.<sup>22</sup>

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<sup>19</sup> 'Proclamation', *The Perth Gazette and Western Australian Journal*, 4 May 1833, 70.

<sup>20</sup> At the corner of Pier Street and St George's Terrace.

<sup>21</sup> 'Execution', *The Perth Gazette and Western Australian Journal* (25 May 1833) 83.

<sup>22</sup> South West Aboriginal Land and Sea Council, above note 17.

However, before its display at the Liverpool Museum, Yagan's preserved head was first exhibited at Mr Pettigrew's *conversazione* during the season at his house in Saville Street in London. According to a Perth newspaper:

The rooms were crowded, and many objects of exceeding interest were exhibited to the scientific visitors. Among others we noticed a head peculiarly preserved, which was said to be that of Yagan, the celebrated chief at Swan River settlement.<sup>23</sup>

The repatriation of Yagan's head to his country became a matter of controversy in the latter part of the last century. Thankfully, albeit belatedly, the head was returned to Noongar country in 1997.

### **The Binjareb (Pinjarra) massacre**

Stirling was visiting England when Midgegooroo and Yagan were executed. However, he returned to news of more clashes between the colonists and the Aboriginal people, this time between the colonists and the Binjareb people, who also form part of the Noongar Clan, and who are the traditional owners of the land in the area which the colonists anglicised as 'Pinjarra'. The events which followed upon Stirling's return have been described by earlier white historians as a battle, but are now customarily described as a massacre. The State Heritage Council has described what occurred:

After Stirling's return to the colony from England in August, Peel lobbied for increased military protection in the Pinjarra District. On 25 October, the Perth Gazette published a short paragraph stating that Stirling's 'Exploring Party' had departed on a ten day expedition. On 25 October, James Stirling and John Septimus Roe rode out of Perth, meeting up with

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<sup>23</sup> 'Yagan's Head', *The Perth Gazette and Western Australian Journal*, 13 December 1834, 406.

various persons on their way to the Pinjarra District. By 27 October, their party numbered 25 people ... They had been informed that a sizeable band of Nyungars were camped on the river near the present site of Pinjarra, and they made camp in striking distance of this location. On 28 October, Stirling sent Ellis, Norcott and three of his troopers across the river, around to the west of the camp, for the purpose of ascertaining whether they were the tribe who speared Nesbit and Barron ... An eyewitness account states that Ellis' party initiated the attack against the retreating Nyungars, and that the Aborigines were unprepared for battle. However, Stirling's account suggests that he acted in self-defence. As the Nyungars attempted to slide down into the river, the parties on the eastern bank opened fire. Survivors scattered into the bush and were chased by Stirling's horseman: the firing continuing for upwards of an hour. The Europeans sustained two injuries. Corporal Heffron was wounded in the arm by a spear, and Ellis received concussion from either a spear blow or a fall from his horse. Ellis stayed in a coma for two weeks and died of his injuries on 14 November. The number of Nyungars killed has been much contested. Stirling's official report to Britain stated that fifteen Nyungar men were killed in the exchange. Roe estimated that between fifteen and twenty had died, while an eyewitness put the figure at more than thirty.<sup>24</sup>

It has been noted elsewhere that:

All accounts acknowledge that women and children were numbered amongst the dead. Oral histories handed down amongst the Binjareb give a much higher casualty figure. The results for the Binjareb were devastating. If a person died, their totem animal or plant could not be eaten by any member of the tribe for a year. With so many dying at once, the tribe's food sources were severely compromised. This allowed surrounding groups to exploit the weakness of the once powerful Binjareb.<sup>25</sup>

### **Rottnest Island - Western Australia's Alcatraz**

Rottnest Island is situated 18 km off the coast of Western Australia, adjacent to the Port of Fremantle which lies in the mouth of the Swan River. Its Noongar name is Wadjemup, which means 'where the

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<sup>24</sup> State Heritage Council, Pinjarra Massacre Site (accessed 11 November 2016).

<sup>25</sup> Mandurah Community Museum, Pinjarra Battle/Massacre 1834 (accessed 11 November 2016).

spirits go',<sup>26</sup> but the name more commonly used now arose from the name given to the island by the Dutch explorers who visited over a century before Stirling's expedition. The Dutch thought that the Quokkas, which are native to the island<sup>27</sup> were large rats, and named the island accordingly, although in fact they are marsupials which resemble a small wallaby.<sup>28</sup> It has beautiful beaches and bays, replete with coral and fish, and has been a favourite recreational and holiday destination for the residents of Perth, and a prominent tourist attraction, for about 100 years.

Rottneest's contemporary image as an island beach resort belies its wretched history as a place of imprisonment and death for hundreds of Aboriginal men over the nearly 100 years it was used as an Aboriginal prison.<sup>29</sup>

It is a potent symbol of the way in which Aboriginal people were kept at the periphery - imprisoned pursuant to colonial laws in circumstances which very often led to their death, while at the same time being excluded from the protection of many of the colonial laws that were imposed upon them.

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<sup>26</sup> South West Aboriginal Land and Sea Council, Kaartdijin Noongar - Noongar Knowledge – Language – Place Names (accessed 30 November 2016).

<sup>27</sup> And formerly parts of the mainland.

<sup>28</sup> Wallabies and Kangaroos of course being unknown to the early Dutch explorers.

<sup>29</sup> Generally the time frame cited is 1838-1931. However references to the length of time that Rottneest operated as a prison are not always consistent. This varies according to factors such as whether the calculations are based its actual operations as opposed to its legislated commission as a prison, or whether the reference includes its time as an annex of Fremantle prison between 1903-1931 and the short time it was closed as a prison, between 1880 and 1885.

It seems that the use of Rottnest as a place for the containment of Aboriginals thought to be truculent<sup>30</sup> was an attractive prospect from the early days of the Swan River Colony. In 1839 the local newspaper observed that the:

island of Rottnest has been long pointed out as a proper and secure retreat for the reception of her Majesty's refractory blacks (the natives). An establishment was formed there some months back, under the superintendence of Mr Welch, and a small military force ...<sup>31</sup>

However, the same newspaper reported that as a result of 'the natives [having] twice made their escape; some alteration in the system' was 'found to be required' and Welch was replaced by Superintendent Henry Vincent.<sup>32</sup>

Early reports of the establishment of the Aboriginal prison were positive. In March 1840 a party which included the Governor, the Surveyor General and the Protector of Aborigines visited the island and reported that:

Within the short space of seven months, a salt-store and a large convenient stone dwelling-house, with suitable sheds and out-buildings for the accommodation of the military and the convicts, have been erected; the Gaol of Fremantle supplied with a considerable quantity of fire-wood, and above 50 tons of salt of a superior quality collected ready for exportation; all of which has been effected by the spirited exertions of Mr Vincent with the sole assistance of the labor (wholly manual) of six native convicts and a white prisoner. It is most gratifying to learn what beneficial results are thus derivable from the labors of a class of men who, when in the enjoyment of freedom, are so radically indolent and unprofitable; and we may confidently anticipate, that at no very distant period, the establishment

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<sup>30</sup> But who were probably doing no more than going about their traditional lives.

<sup>31</sup> 'Escape of natives from Rottnest', *Perth Gazette and Western Australian Journal*, 10 August 1839, 126.

<sup>32</sup> *Ibid.*

at Rottnest will cease to be a source of expenditure to the Local Government.<sup>33</sup>

### **The Rottnest Island Prison Act 1840 (WA)**

It is no small irony that the first legislation in which any specific reference is made to the Aboriginal inhabitants of the colony of Western Australia is 'an Act to constitute the Island of Rottnest a legal prison' (1840) for the purpose of incarcerating the original inhabitants of the colony - out of sight and out of mind of the colonists. The preamble to the Act attempts to put a compassionate gloss upon the creation of this antipodean Alcatraz by asserting that it was:

deemed expedient to provide some place within the limits of the Colony of Western Australia, in which such of the Aboriginal race as are sentenced to transportation or imprisonment or committed for trial, or in any other manner committed to custody, may be conveniently kept, in order that they may be instructed in useful knowledge and gradually trained in the habits of civilized life. And whereas all the ordinary modes of restraint have been found insufficient to insure their safe keeping in any jail, and a continued close confinement is particularly prejudicial to their health, as being so uncongenial with their ordinary habits; and whereas, the Island of Rottnest appears peculiarly suitable for their detention, inasmuch as a greater degree of personal liberty may be allowed consistently with their safe custody, on account of the isolated situation of that place, and the consequent difficulty of escape therefrom.<sup>34</sup>

A less sympathetic and more realistic view of the prison, and its superintendent has been provided by Noongar researcher Dr Glen Stasiuk:<sup>35</sup>

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<sup>33</sup> *Perth Gazette and Western Australian Journal*, Saturday 11 April 1840, 2.

<sup>34</sup> *Prison at Rottnest* (1840), Preamble.

<sup>35</sup> Lecturer and Senior Indigenous Researcher at Murdoch University and a maternal descendent of the Minang-Wadjari Nyungars.

... conditions deteriorated when Henry Vincent began his long reign as superintendent.

The mining of limestone and building of the prison began. Vincent was loose with his use of the cat o' nine tails. Prisoners were worked ruthlessly in the heat, inadequately clothed and chained together at night.

'Henry Vincent was barbaric. He would beat prisoners, kick them' ....

'There's evidence he got clips and ripped a prisoner's beard clean out. Another time he beat a prisoner to death with a set of keys.

'He would hang prisoners sentenced to death in front of lore men who were about to return to the mainland, as a warning to the community that if they break the law, this is what could happen to you.

'He had no problem with shooting prisoners if they didn't do as they were told. He chained them up at night with a long pole system. It was hell on earth.'<sup>36</sup>

In 1843, Vincent was charged with 'cruel treatment of a native prisoner', Wanehop, who had died in October 1840. A newspaper report of his trial asserted that he was acquitted on the basis that the whipping inflicted on the deceased would not have been 'sufficient in point of severity or mode of infliction to produce any such malady as that which seized the deceased the following day'.<sup>37</sup>

The same newspaper reported that although Wanehop had been suffering from 'an incipient stage of the disorder' at the time of being whipped, 'as he had never previously complained of illness it was

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<sup>36</sup> Kristi Melville, 'Rottnest Island: Black prison to white playground' Radio National, ABC News online, 25 October 2016 (accessed 14 November 2016). Dr Stasiuk notes that Vincent still has a cottage and a street named after him, and plaques in his honour: 'Prisoners died under his watch and he's commemorated but these Aboriginal prisoners aren't'.

<sup>37</sup> 'Rottnest Establishment' *Perth Gazette and Western Australian Journal*, 14 January 1843, 2.

natural for the superintendent to treat the sudden plea of illness as a pretext for avoiding labour'.<sup>38</sup>

An assessment of the cruel and inhumane treatment of Aboriginal prisoners on Rottnest Island which can be reasonably assumed to be objective and impartial has been provided by the Carceral Archipelago Project.<sup>39</sup> That project has produced the following report of Vincent's behaviour:

At regular intervals in Rottnest's 60 years as a prison, deaths in custody sparked inquiries into the poor treatment of the Aboriginal inmates. In 1840 [Protector] of Aborigines Charles Symmons and Prosecutor George Fletcher Moore investigated the death of 3 convicts. They noted inadequate clothing, poor rations and threadbare blankets. In 1846 Superintendent Henry Vincent was investigated (and acquitted) after allegations were made that he had murdered and buried a number of Indigenous prisoners, as well as ripped off part of an ear of an inmate named Charlie. Twenty years later his son's violent behaviour as Assistant Warden came under scrutiny. William was implicated in the suspicious death of an elderly inmate named Dehan in 1865. Several people testified that the superintendent's son, William Vincent, beat Dehan in the face with a set of keys. Dehan was found dead the next morning – less than a month after arriving on the island. Henry Vincent and his son tried to cover up the assault by burying the prisoner quickly. When the body was exhumed by order of the governor a full week later, the doctor ruled the cause of death as disease of the lung. Nevertheless, William Vincent's brutal attack on an old man was considered sufficient breach of duty to receive a sentence of 3 months hard labour. Yet, only apathy towards the fate of the surviving Aboriginal prisoners can explain why further inquiry was not made into the superintendent that condoned this kind of violence.<sup>40</sup>

Henry Vincent's son William was tried by the first Chief Justice of Western Australia, Sir Alexander Burt. A local newspaper reported

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<sup>38</sup> Ibid.

<sup>39</sup> Funded by the European Research Council and based in the School of History at the University of Leicester.

<sup>40</sup> Convict Voyages, 'Rottnest Island: A prison for the Indigenous Australian Convicts' (accessed 14 November 2016).

the reasons given at the time the sentence of 3 months imprisonment was imposed in the following terms:

His Honor the Chief Justice, in very touching terms, brought home to the prisoner the serious offence which had been laid to his charge. He could not but conceive that the assault he committed upon Dehan was the result of an angry feeling and un-checked passion. No doubt he had already undergone some punishment, from the feeling that he had brought such disgrace upon his family; he was therefore inclined to deal leniently with him, but such conduct could not be allowed to pass unmarked. He hoped that at the termination of his imprisonment, he would endeavour to reform his past life, and carefully pursue an honourable and respectable living, but he would never again render himself eligible for government employment.<sup>41</sup>

Given the severity of the penalties customarily imposed at the time, a sentence of only 3 months imprisonment for an assault causing death can only be explained by reference to the race of the victim.

The Carceral Archipelago Project has described the prison and its inmates in the following terms:

In the 1840s most of Rottnest's convicts came from the immediate vicinity of the coast south of Fremantle, and a small cluster west of Albany. As the settlement frontier pushed northwards Rottnest's inmates came from further and further afield in Western Australia. Western Australia encompassed a third of Australia's entire landmass, so many Indigenous convicts were transported over hundreds of kilometres on foot and by ship ... On these journeys the Indigenous prisoners were often scantily clad, or even naked, and chained around the neck, arms and legs. An Indigenous prisoner known as Benjamin described how he walked naked for over 700 km between Eyre Sand Patch to Albany with a bullock chain around his neck. All these routes took convicts to Fremantle, where they would be held at Round House Prison awaiting a boat, and good enough weather, to be transported by pilot boat or steamer to Rottnest's Thomson Bay.

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<sup>41</sup> *The Inquirer and Commercial News*, 10 January 1866, 3. It appears that William Vincent was subsequently employed in the police force ("The "Native Blue Book", *The West Australian* 2 November 1886, 3).

The places in which Rottnest's convicts were arrested mirror the movement of settlers from the coastline into the interior of Western Australia. Brought up against an occupying force who were often violent towards them, Indigenous people responded with resistance. Such acts of frontier warfare became criminalised as 'murder' or 'assault'. For these actions Indigenous people were held accountable in a court of law far more often than their European counterparts. The majority of Nyungar people who were sentenced to death for these crimes had their sentences commuted to imprisonment on Rottnest Island. The British also criminalised certain aspects of Indigenous politics, including spearing to kill or in the leg as retribution for former wrongs. More often the prisoners on Rottnest had been convicted for misunderstanding or not recognising European claims to territory and livestock. An inmate on Rottnest named Brandy said: 'I came here for killing a sheep. I saw the sheep had strayed, and my woman said 'kill it,' and I did so.' During the second half of the nineteenth century several acts were passed to make it easier to sentence Indigenous people to longer sentences of imprisonment, alongside corporal punishment such as flogging. In the 1850s most prisoners on Rottnest were sentenced to one year or less, by the 1880s the majority were serving one year or more. For example, Mullong and Billy received 2-year sentences to Rottnest for the minor crime of petty theft in August 1876. At trial Indigenous people were severely disadvantaged. Not only were they being tried by a European judge and jury forcing them to communicate through an interpreter, they usually did not understand the system of justice. It was not uncommon for Indigenous people to confess to spearing a sheep belong to a certain settler, simply because they had done so in the past ...<sup>42</sup>

The same project described the consequences of this sorry period of Western Australia's penal history in these terms:

It was the unnecessary deaths of Indigenous convicts - in the plural this time - that prompted a second inquiry into Rottnest in 1883. In August of that year an epidemic of influenza broke out at the prison ... With the onset of a wet winter, these conditions became deadly - claiming the lives of more than 50 men. While the commission was investigating Rottnest, 100 convicts fell ill with a measles epidemic that was ravaging the colony at large. These diseases sped rapidly as extreme overcrowding left 4 Aboriginal convicts sharing small cells, with an average sleeping space just 60 cm wide. A correspondent for *The Perth Daily News* described how 'prisoners at night are packed away in their cells like sardines in a box, having to lie down head to feet alternately to make room.' The Forrest Inquiry delved deep into the daily life on the island and concluded that confinement was preferable to being worked in irons in the colony, but

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<sup>42</sup> Convict Voyages, above note 40.

that health must be improved ... However, in 1896 a further commission still found the quod inadequate for housing convicts, describing cells as draughty and cold. A contributing factor to the sickness of many was the psychological trauma of being separated from their homeland and their communities. Henry Trigg described how 'The prisoners will sit down and weep most bitterly ... when they see the smoke from the fires' from their homes on the mainland. Over the course of 79 years as an Aboriginal prison Rottnest claimed the lives of around 373 men. A further 25 died whilst serving their sentences or being transported to Rottnest on the mainland, bringing the total up to around 400.<sup>43</sup>

### **Historical respect**

Dr Glen Stasiuk observes that Superintendent Henry Vincent still has a cottage and a street named after him, and plaques in his honour: 'Prisoners died under his watch and he's commemorated but these Aboriginal prisoners aren't'.<sup>44</sup>

More than 25 years ago there was sufficient community concern with respect to the number of Aboriginal people dying in custody to cause a wide-ranging Royal Commission to be conducted. More recently, concern at the treatment of Aboriginal children in detention in the Northern Territory prompted the appointment of another Royal Commission. In my view the same sentiments which prompted those community responses would very likely sustain a programme of significantly greater recognition and respect for the more than 400 Aboriginal people whose deaths were caused by their imprisonment at Rottnest and the many more who suffered cruel and inhumane treatment at the hands of their gaolers. I do not suggest that

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<sup>43</sup> Ibid.

<sup>44</sup> Kristi Melville, above note 36 .

there is no reference to this history presented to visitors to the island, but I do suggest that more could be done, given the scale of the slaughter and misery inflicted.

It is not for me to suggest what form of greater recognition and respect is appropriate but I believe that our community, if appraised of all the facts of this wretched history would readily accept arrangements which continued to encourage the use of the island as a recreational resort while at the same time providing appropriate mechanisms and meaningful symbols of recognition and respect for the extraordinary suffering, misery and death which the colonists inflicted upon the Aboriginal people incarcerated on that island.

### **Another law specifically for Aboriginal people**

Another law specifically for Aboriginal people in Western Australia was passed in 1840 when 'an Act to allow the Aboriginal natives of Western Australia to give information and evidence in criminal cases, and to enable magistrates to award summary punishment, for certain offences' was passed. The preamble to the Act explains its purpose:

WHEREAS many of the forms, requisites, and provisions of the English law have been found to be wholly inapplicable to the Aboriginal Inhabitants of the Territory of Western Australia, inasmuch as there is strong reason to believe, that these people are entirely ignorant of the existence of any future state of rewards and punishments, and do not acknowledge any form or mode of adjuration as binding upon them, in consequence of which much failure of justice ensues, and many serious offences and crimes, which have been committed with their privacy only, are unavoidably suffered to pass unpunished; And whereas it is expedient to advise some means whereby such offences may be punished with greater facility and certainty than are at present attainable.

Generally speaking the Act modified the general law, but only in respect of Aboriginal people, in two significant respects:

- (a) it authorised the taking of evidence from Aboriginal people in criminal matters only on the basis of an affirmation or declaration to tell the truth, rather than an oath; and
- (b) two or more justices of the peace were empowered to imprison Aboriginal people for up to 12 months, upon conviction of any offence or:

If it shall appear to such Justices that it would be more satisfactory to the friends of the offender, and likely to operate beneficially as a general example in such a case, it shall be lawful for the said Justices to substitute the punishment of whipping, with any number of stripes not exceeding 24, provided that the punishment of whipping shall only be inflicted in the case of male offenders.<sup>45</sup>

The Act was the subject of an extensive exchange between the Governor of Western Australia<sup>46</sup> and the Colonial Office in England. The government in England was opposed to any differentiation between the laws applicable to the Aboriginal subjects of His Majesty and the laws applicable to the colonists. The colonists argued that the differentiation was beneficial to the Aboriginal people by enhancing their capacity to provide evidence and by providing a more flexible punishment regime appropriate to the particular circumstances of Aboriginal offenders. The latter proposition is particularly dubious, as the effect of the Act was to expose Aboriginal offenders to a range of punishments to which non-Aboriginal offenders were not subject. The

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<sup>45</sup> Act of 1840, No 8, s 6.

<sup>46</sup> Governor John Hutt.

government in England also objected to the colonists' proposal to limit Aboriginal evidence to only criminal cases, pointing out that 'if their evidence was admitted in criminal cases, where life and death were concerned, [there should be] no right to exclude it in civil cases'. The colonists (ultimately unsuccessfully) argued however that:

so limiting the reception of native evidence was not so strange as it had been made to appear; it was admitted in criminal cases, because they had rights of person, but it was excluded in civil cases, because they had no right of property...the aborigines had no civil polity, and were therefore not entitled to give evidence in civil cases.<sup>47</sup>

### **Aboriginal people at the periphery**

This brief and admittedly superficial consideration of the relationship between the Aboriginal people and the colonists in the early days of the colony reveals the various ways in which the original inhabitants of the colonised land were pushed not only to the periphery of the colony, but also to the periphery of the British law which the colonists brought with them and modified specifically for Aboriginal people. While expressly avowing that the physical safety of the original inhabitants of the lands colonised would be protected under British law, and purporting to justify modifications of that law applicable only to Aboriginal people by reference to their best interests:

- (a) the British Parliament falsely asserted that the lands of the colony were 'unoccupied';<sup>48</sup>

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<sup>47</sup> 'Legislative Council, Thursday, Nov 18, 1841', *Inquirer*, 24 November 1841, 4.

<sup>48</sup> In the *Western Australia Act 1829*.

- (b) the land which the Aboriginal peoples of Western Australia had inhabited for millennia were expropriated by the colonists pursuant to their asserted 'rights of occupancy';
- (c) specific individual Aboriginal people were excluded from the protection of British law by a declaration of outlawry, and executed without trial, after which one of those persons was subjected to the degradation of his head being placed on display as an amusement in England;
- (d) the Governor himself led a group of soldiers who killed a significant number of Aboriginal men, women and children sheltering on the banks of the Murray River near Pinjarra;
- (e) a prison exclusively for Aboriginal prisoners was established off the coast at which prisoners were treated with cruelty and inhumanity, as a result of which more than 400 died;
- (f) Aboriginal offenders were to be exposed to penalties after summary conviction before justices of the peace to which non-Aboriginal offenders were not subject;
- (g) Aboriginal people were promised the colonial law's protection of their rights as 'a person' at the same time that law denied any recognition, let alone protection, of their property, society or sovereignty.

The lofty sentiments expressed by the settlers, which perhaps had the purpose of appeasing the imperial government in London, were not only belied by their actions but by the colonial laws as well; these took

Aboriginal people to the periphery of the colony, of the law as it applied to others, and indeed to the periphery of what it means to be human.

### **Maintaining Aboriginal people at the periphery**

Up to this point in my paper I have been addressing the earliest days of the Swan River Colony and the maintenance of the prison on Rottnest throughout the 19th Century. Space and time do not permit analysis at the same level of detail of the subsequent history of the colony, and in due course the State of Western Australia. It is sufficient to observe, by reference to a few significant aspects of the subsequent history which follow, that Aboriginal people have been maintained at the periphery, and indeed pushed beyond it through most, if not all of that history.

### **Section 70 of the Constitution Act 1889 (WA)**

Section 70 of the Act for the Constitution of Western Australia of 1889 provided that either £5,000 or 1% of the gross revenue of the colony, whichever was the greater, was to be set aside and provided to the Aborigines Protection Board for expenditure upon the welfare of Aboriginal people pursuant to the provisions of the *Aborigines Protection Act 1886*. I have described elsewhere the importance attached to this provision in London.<sup>49</sup> I have also described elsewhere the manner in which the colonists agreed to the provision as

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<sup>49</sup> *Too Many Cooks? Parliament, the Courts and the Scrutiny of Delegated Legislation* (Address to the Australian-New Zealand Scrutiny of Legislation Conference, Perth, 12 July 2016).

the price for obtaining the grant of responsible government from the parliament at Westminster and then immediately sought to repudiate the deal by purporting to repeal the section. The various attempts to repeal the section descended to a level of farce, although the colonists were ultimately successful and the section was ultimately repealed with only very little benefit having been conferred upon the Aboriginal people pursuant to its terms.

### **The Aborigines Act 1905 (WA)**

I have already mentioned the infamous *Aborigines Act 1905 (WA)*. Many of its provisions appear abhorrent to contemporary eyes. They had the capacity and effect of removing Aboriginal people from the periphery into a physical and legal regime which was quite separate and distinct from the State of Western Australia. Under its terms, the Governor could declare areas of the State to be areas which Aboriginal people were prohibited from entering, as well as declare areas to be Aboriginal reserves. The Minister could order the removal of unemployed Aboriginal people to reserves under warrant. Aboriginal people were not permitted to move from one place to another without the permission of the protector and the giving of sureties. The Chief Protector<sup>50</sup> was given legal guardianship of virtually all children of Aboriginal descent up to the age of 16, together with the right to move needy or orphaned children from their homes to missions or other institutions. This power was the original source of the phenomenon later known as the 'Stolen Generations'. The Chief Protector also had

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<sup>50</sup> In due course, Mr A O Neville.

the power to manage the property of Aboriginal people with or without their permission. An Aboriginal woman was not permitted to marry a non-Aboriginal man without the permission of the Chief Protector. Honorary Protectors controlled access to employment of all 'Aboriginal natives' and 'half-caste' women and male 'half-castes' to the age of 14 through a system of permits and agreements. Protectors could order Aboriginal people to move their camps away from towns and municipalities and could call in the police to assist in this duty. Police and justices of the peace were granted special powers over Aboriginal people - they could order loitering or 'indecently dressed' Aboriginal people to leave the vicinity of towns.<sup>51</sup>

### **The Native Administration Act 1936 (WA)**

Many of the more repressive provisions in the 1905 Act were continued by the *Native Administration Act 1936 (WA)* and some were extended, with the Chief Protector, for example, being made the legal guardian of 'every native child notwithstanding that the child has a parent or other relative living' until the age of 21.<sup>52</sup>

### **The Natives (Citizenship Rights) Act 1944 (WA)**

The *Natives (Citizenship Rights) Act 1944 (WA)* authorised the grant of what was described as 'citizenship' to Aboriginal people provided that they established, to the satisfaction of a magistrate that they were

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<sup>51</sup> For a more detailed description of the effect of the Act see Jeannine Purdy, *Colonialism, Economics, the Law and Resistance in Western Australia*, 2010.

<sup>52</sup> *Aborigines Act Amendment Act 1936 (WA)* s 7. Again, for a more detailed description of the provisions of *the Native Administration Act 1936 (WA)*, see *ibid.*

adult, literate, of 'industrious habits and good behaviour' and had completely severed any connections with other Aboriginal people, and had adopted a 'civilised life'. If these conditions were satisfied, the applicant would be granted a certificate of citizenship which deemed the holder to be 'no longer a native or Aborigine', thereby removing the legal impediments attached to the status of Aboriginal, including the prohibition upon the consumption of alcohol. This extraordinarily patronising piece of legislation required Aboriginal people to choose between their culture, traditions, family and friends on the one hand, and the rights and privileges associated with full membership of the society created by the colonists on the other.

### **An historian's view**

Sir Paul Hasluck was a founding member and secretary of the Royal WA Historical Society, an historian, journalist, senior politician, including a term as Commonwealth Minister for Aboriginal Affairs, and later Governor-General of Australia. In 1934, writing under his pseudonym, 'Polygon', he analysed 100 years of the treatment of Aboriginal people under the title 'Is Extinction Inevitable?: protective measures in the past'.<sup>53</sup> Hasluck wrote:

One reason why the story of black and white is such a sorry one is that in the whole century there has been no settled or clearly-grasped idea of what the blacks were to do or become. There has never been any settled policy, unless, in recent years, a consistent effort for the amelioration of their general condition - a work not vastly different from that of the SPCA [Society for the Prevention of Cruelty to Animals] - can be called a policy. No one has inquired exhaustively whether they can be absorbed in the community or whether they can all be sheltered from the community, or

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<sup>53</sup> Published in *The West Australian*, Friday, 9 March 1934.

what place they can take permanently in the general scheme of things. Not only has there been no policy directed towards the future; but there seems to have been a tacit understanding that they must inevitably die out.

The title to the article is shocking to contemporary sensitivities, but can fairly be assumed to represent the sentiment of the day. For example, Daisy Bates published, *The Passing of the Aborigines: a lifetime spent among the natives of Australia* just four years later. Hasluck's description of government policy as akin to the work of preventing cruelty to animals might also appear offensive to contemporary readers, although perhaps not inaccurate, given that he was writing a short time after responsibility for the administration of arrangements relating to the welfare of Aboriginal people had passed to the Department of Fisheries, and were conducted from the building in which this conference is being held.<sup>54</sup> It is also to be remembered that Hasluck was writing during the currency of the apartheid regime created under the 1905 Act, and only shortly before the passage of the *Native Administration Act 1936*, which continued and indeed expanded upon many of the offensive provisions of the 1905 Act. At the time he was writing, Aboriginal people had been moved beyond the periphery of mainstream society and into separate and distinct physical and legal territory.

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<sup>54</sup> Notably between 1922 - 1925, the functions of Chief Protector were administered through the amalgamated 'Department of Aborigines and Fisheries', after which it was replaced by the Fisheries Department (with responsibility for Aboriginal matters below latitude 25 degrees) and the Department of the North West until 1926 (Find & Connect, *Western Australia - Organisation: Department of Aborigines and Fisheries (1909 - 1920)*' (2016) (accessed 9 November 2016); Find & Connect, *'Western Australia - Organisation: Fisheries Department (1920 - 1964)*' (2016) (accessed 9 November 2016)).

The theme of this conference includes the purpose of investigating 'the law and rules that arose from [the] colonial milieu: an amalgam of the colonial and imperial law, the informal law of the Anglo-settlers and the law of local and indigenous societies in the colonial territory, all of which gradually coalesced into the colonial and national states which exist today'. In Western Australia, there has never been a legal amalgam which has included the laws of local and indigenous societies. As I have noted, the very existence of Aboriginal people as occupiers of this country was denied in the Act authorising the settlement of the colony, the lands they occupied were expropriated by the settlers who placated their masters in England by espousing equal and beneficial treatment of Aboriginal people while at the same time killing and incarcerating many of them, while denying them any recognition, let alone protection of their property, society and sovereignty, ultimately formalising this regime with legislation which deprived them of many of the normal incidents of humanity and which applied during the first half of the 20th century.

### **The tide turns (slowly) and at last?**

Happily, the last 60 years or so have seen some beneficial changes in the law and policy relating to Aboriginal Western Australians. Time and space do not permit detailed analysis of that period, but a few significant landmarks can be identified including:

- (a) conferral of the right to vote upon Aboriginal people in Western Australia 1962;

- (b) passage of a referendum in 1967 which repealed s 127 of the Constitution of the Commonwealth (which had prevented Aboriginal people being counted in the census and for the purposes of Commonwealth electorates) and which also conferred upon the Commonwealth the power to legislate in respect of Aboriginal people;
- (c) the recognition of native title by the High Court in the *Mabo* decision in 1992;
- (d) the *Constitution Amendment (Recognition of Aboriginal People) Act 2015* (WA) which amended the *Constitution Act 1889* (WA) by including recognition of the Aboriginal people as the first people of Western Australia and the traditional custodians of the land, and recording the desire of the Parliament to effect a reconciliation with the Aboriginal people of Western Australia;
- (e) earlier this year the Parliament of Western Australia passed the *Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Act 2016* (WA), which is the first act of the Western Australian Parliament partly written in Aboriginal language and which extensively acknowledges the Noongar people as the traditional inhabitants of the south-west of the State 'since time immemorial' and which also acknowledges and honours the Noongar people as the traditional owners of the Noongar lands and recognises the living and cultural, spiritual, familial and social relationships that the Noongar people have with those lands and the significant and unique contribution that the Noongar people have made, are making and will continue to

make to the heritage, cultural identity, community and economy of the State.

At least one more significant step remains to be taken in the process of restoring Aboriginal people to their rightful place in the centre of our community as the original inhabitants of the land we now share. Recently the Chief Justice of Australia observed that:

The history of Australia's first people looms over the [history of the British colonisers dating back to the late 18th century and their successors, and of the migrants who have come to Australia over the past 50 years or so]... it dwarfs in its temporal sweep the history which has given rise to the Commonwealth Constitution, the Constitutions of the States, the laws made under them and, indeed, the Court on which I sit.

To recognise the Indigenous people of Australia in the Constitution as the first people of the continent is to do no more than to recognise in a fuller way our own identity as Australians, for our history is part of that identity. Constitutional recognition is not about singling out one race over others for special mention. It is about acknowledging that Australia's beginnings stretch back over millennia before 1 January 1901 when the Constitution of the Commonwealth was proclaimed.<sup>55</sup>

The appropriate recognition of Aboriginal people in the Constitution of the Commonwealth, together with the repeal of provisions in that Constitution which are either adversely discriminatory or authorise adversely discriminatory action remains undone. I am sure that many Australians share my wish that this step be taken as soon as

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<sup>55</sup> Chief Justice Robert French AC, 'Legal Change and Social Change' (2016 National Indigenous Legal Conference, Canberra, 5 September 2016).

appropriate terms of amendment can be agreed between all relevant parties (including, of course, representatives of the Aboriginal and Torres Strait Islander peoples) and obtain bipartisan support.

### **Much more remains to be done**

The legal emancipation of a cultural grouping kept at or beyond the periphery for almost 200 years has had unintended consequences in some parts of the State. The repeal of provisions which discriminated against Aboriginal people in the area of wages, entitlement to pensions and entitlement to alcohol, although entirely proper and justifiable have had the consequence that in parts of the Kimberley and elsewhere Aboriginal people were turned off the cattle stations operating on their traditional lands, deprived of employment and provided with welfare payments and access to alcohol. In towns like Halls Creek and Fitzroy Crossing communities have been created which did not correspond to traditional cultural groupings. The courts of Western Australia have seen far too many of the consequences of these regrettable developments. Those more recent events compounded the historical mistreatment of Aboriginal people I outlined earlier and have contributed to the continuing grossly disproportionate over-representation of Aboriginal people in the courts and prisons of Western Australia.<sup>56</sup> The tragic truth is that in many respects the Rottnest Island Prison continues to symbolise the relationship between Aboriginal and non-Aboriginal Western Australians.

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<sup>56</sup> A subject upon which I have spoken and written many times - see [www.supremecourt.wa.gov.au](http://www.supremecourt.wa.gov.au)

The significance of laws which do not, by their terms, discriminate against Aboriginal people but which have a disproportionate effect upon Aboriginal people should not be overlooked in this context. Examples of such laws include the laws of Western Australia relating to the service of 'move-on' notices which, if not obeyed, constitute an offence, three strikes laws relating to mandatory sentencing, and traffic laws which are entirely reasonable when applied to the residents of metropolitan Perth but which operate unfairly and ineffectively in remote parts of Western Australia. If we are serious about returning Aboriginal people from the periphery of our community, attention must be directed to laws which apply equally to all Western Australians not only as a matter of form, but also as a matter of substance.

### **A happier note on which to finish**

Two weeks ago I travelled through the Kimberley, visiting the towns to which I have referred and a number of remote communities. I also had the benefit of speaking to a number of Western Australians working in a wide variety of government agencies who are deeply and sincerely committed to improving the living conditions of Aboriginal people in that part of our State. For the first time I have come away from that beautiful and important region of Australia with a sense of cautious optimism, rather than pessimism. Alcohol restrictions and other social improvements have transformed Halls Creek and Fitzroy Crossing, and the Commonwealth policy of 'Empowering Communities' will, if implemented, provide Aboriginal people with

the opportunity to take responsibility for their own lives and living circumstances. That policy approach is also generally reflected in the important work being done by the Regional Services Reform Unit under the leadership of Mr Grahame Searle. Those efforts, if supported by State and Commonwealth governments, and if replicated in other parts of our vast State, have the capacity to bring the descendants of the original inhabitants of the land which my forebears occupied almost 200 years ago from the periphery of our society into the place of prominence which they should rightfully enjoy as their birthright.

Wayne Martin AC  
Chief Justice of Western Australia