

The Criminal Lawyers Association of the Northern Territory

Twelfth Biennial Conference

Key Note Address – Patrick Dodson

RECOGNITION AND INCLUSIVENESS OF ALL OUR DIVERSITY

*Acknowledgement of the Balinese People

*Thanks and acknowledgement for inviting me to address you all.

The President and members of the Criminal Lawyers Association of the Northern Territory;
Delegates and Guests

As you drive from Denpasar Airport you will perhaps notice the statue of the Imam Bonjol a leader of the Indonesian resistance to Dutch Colonial power in the early 19th century, at the same time that the colonial endeavour was well under way in Australia. The Imam was a leader of the Paderis, who were a nationalist movement originating from West Sumatra but involved across the archipelago. The Paderis believed that by strengthening the culture and laws of their faith and opposing the social distortions of drinking, gambling and opium encouraged by the Dutch that the society would be strengthened and secured.

But as tended to happen with the Colonial endeavour the muskets of the Dutch prevailed over the faith and trust of the people.

In the final battle between the Paderis and the Dutch the Imam led wave after wave of his followers into certain death sustained only by their faith in the rightness of their cause.

Australia claims to be a modern society, imbued with the values enshrined in the Universal Declaration of Human Rights and with a sense of reflective wisdom about the appalling immorality and consequences of global colonisation, racism and genocide. The current relationship that exists between Australia's First Peoples and the nation state is incompatible with the status that Australia claims in the global community.

The Australian Nation has reached a point in its history where the pernicious philosophy and policies of assimilating Native Peoples into Anglo Australian society and the absurd denial of the worth of our laws customs and languages must be confronted.

The resurgence of overt assimilation in Australian public policy and institutional practice in recent years is particularly disturbing. In the period of the Howard Government, the attack on Indigenous inherent rights that went in tandem with promoting mainstreaming, under the catch-cry of practical reconciliation, was an effective political wedge in a wider ideological contest that was generally referred to as the culture wars.

Just as John Howard claimed in the aftermath of his 1996 election victory that he had torched the elite guardians of public discourse thus allowing people the freedom to discuss issues of race, culture and Australian nationalism without the so called constraints of "political correctness", Kevin Rudd has declared that his 2007 election victory buried the culture wars.

That the well known media chorus of triumphant neo cons and neo liberals are now largely silent is testimony to the influential role that John Howard played as an ideological war lord.

Yet with the guns of the culture wars apparently silenced, the fact that the Rudd Government continues to implement the essential features of its predecessor's Indigenous public policy demands a rigorous scrutiny of the historic relationship between the Australian nation and Indigenous people.

To understand Indigenous people's position within the Australian nation we must look beyond the vagaries of public policy to the ideological root of Australian nation building – terra nullius. The supreme cultural force behind empire and conquest whose name need never be spoken.

Instead it spoke through the voices and actions of English explorers, colonial administrators and frontier squatters as the original owners and occupiers of the lands of Australia were dispossessed and brutally colonised.

The native peoples were stripped of their humanity from the outset!

"Terra nullius thinking" reduced Aboriginal people to the status of flora and fauna and blinded the British to the elaborate social organisation and religious relationship to land those human societies had developed in Australia over countless millennia.

The customary laws, practices, and institutional mechanisms of the aboriginal societies' governance was disregarded in the British and colonial confidence that their justification and superiority lay in the concepts of discovery, conquest or occupation. The constructed legal fiction terra nullius combined with the sovereignty of the crown would truck no interference to the colonial and subsequent nation building imperatives'.

For Aboriginal people the dye had been cast a century before colonisation when English seafarer William Dampier visited the Kimberley coast in northern Western Australia, and described the people he saw as "the most miserable on earth".

This contempt by frontier colonisers for the people they dispossessed made formal British colonial policy often irrelevant and disingenuous.

It comes as no surprise to hear the Justice of the Peace who remanded the most recent Aboriginal man to die in custody in Western Australia describe that senior Cultural Boss as just another drunken Aboriginal when assigning him a berth in a death wagon destined for Kalgoorlie, 400 kilometres away, with no water or cooling in the middle of January.

He was simply echoing Dampier's ill informed view of three centuries earlier!

King George the Third's formal instructions for Captain James Cook to take possession of Australia "with the consent of the natives" stands as a lonely edifice to an imperial colonial design that never happened.

Terra nullius was a colonial mindset that framed policy and practice which unleashed unfathomable destruction on a people numbering over one million and it flew in the face of British policy intent.

Land greed and returns on investment would underpin the colonists' motivations much as the returns on the public sector outlays do today.

The Mabo and Wik High Court decisions decreed terra nullius to be a legal fiction. But it was a fiction the High Court said in Mabo, which enabled the parcel by parcel dispossession of Aboriginal land that underwrote the new nation.

In this history of unutterable shame, a nation was born with a foundation document predicated on the complete disappearance of Aboriginal people. Our people were not allowed to be counted in the census and the states, which had been born from the old British colonies, would have responsibility for "soothing the dying pillow".

The Commonwealth and State governments oversaw regimes where tens of thousands of Aboriginal people were maintained in church missions and government reserves with minimal public support. Feudal pastoral landlords with inordinate power over people's lives and institutional networks managed family separation and biological absorption.

When Aboriginal people did not disappear, but instead grew in population, governments embarked on the most elaborate legal and institutional programs imaginable to assimilate Aboriginals into white Australia.

By this time in the history of the relationship the Sovereignty of the Crown and laws made by its institutions and authority would sanction heinous actions to destroy our race.

The Australian Parliament would eventually recognise and apologise for the darkest aspects of the assimilation period and with it Prime Minister Rudd committed the nation to turn a new page in history.

I would contend that this nation has yet to turn that page

The Rudd Government's Closing the Gap Indigenous policy strategy - embraced by all the Australian jurisdictions under a COAG framework – is at its core, assimilationist. Indigenous people's culture, language and traditional authority are being systematically eroded and assailed by the interlocking features of the strategy. Its overriding character is that it sanctions and empowers State and Territory Governments through legislative and funding agreements to integrate Indigenous people into the nation's mainstream economic and governmental fabric.

Its key elements are these;

- Public investment for housing and community infrastructure will be restricted to large settlements with the obvious intention that hundreds of smaller Homelands on Aboriginal land will wither on the vine.
- Funding for new and refurbished housing will be conditional on community's surrendering their title to living area lands under long term leases so that government can collect the rent, manage evictions and promote individual ownership.
- Demolition of the CDEP scheme aims to pressure Aboriginal people to move location into mainstream employment but more likely into the catchment of welfare.
- Government management of welfare recipients' income and punishing parents whose children do not attend school.
- Subjecting Aboriginal children to mainstream literacy and numeracy assessments regardless of their traditional cultural and language attachment.

The COAG Closing the gap strategy is a comprehensive assault on Indigenous people's culture and their connection to traditional country. Regardless of its pernicious intent, the overwhelming evidence from world history is that assimilation does not lift people's standard of living.

Its hallmarks are to destroy indigenous cultures, customary law structures, governance arrangements, and to force people into the monocultural imperatives' of the colonial entrenched rulers.

There is also no evidence to suggest that our state and territory governments are capable of managing the lives of Indigenous people with fairness and equity. In fact, past and contemporary history tells us that the opposite is true.

Why you may ask is such commentary about resurgent assimilation policies relevant to criminal justice in the Northern Territory?

The allegations made about customary law being used by all Aboriginal men, without exception, to justify violence and sexual abuse of minors as the principle cause for the alleged moral and social decay in the Aboriginal communities.

Customary law was also alleged to be the shield behind which the so called paedophile and pornography rings operated. And if there was any one brave enough to protest the morality or legality of the intervention they were deemed as supporters of paedophilia or customary law in support of violence and child abuse.

The wash up of this "interventionist mentality" is that there have been relatively few arrests for large outlays of public money but more importantly there are now legislators, legal practitioners and police who think of customary law as a total aberration on the western justice system.

The only place for Aboriginal people is in jail or prison. Preferably prison because then serious behaviour modification can begin toward the goals of assimilation.

In cases where customary law and practices have led to a person being charged with an offence Judges and Magistrates, as a result of the Intervention legislation cannot take these traditional laws, customs and values into account when sentencing. Certainly, being tried against the truth of customary law, as opposed to any fabrication of it does not appear to allow inquiry, investigation and consideration.

We are a nation state trapped in perpetual conflict with native peoples. And the more governments use its agents of authority to subjugate Indigenous people, the greater will be the despair, anger and passive resistance. And the consequence will be Indigenous people clogging our courts and filling our jails in ever increasing numbers.

My friend, Lt. General John Sanderson, former head of the Australian Army and current advisor to the Western Australian Government, has described the levels of Aboriginal imprisonment in Australia's north as akin to civil war.

But the fraught relationship between the Australian nation and its first peoples cannot be confined to geographic regions or to a section of the population: it represents a failure of nation-hood.

And that failure manifests itself in so many ways every day. To highlight the crisis of social discord that is at the core of our nation's history let me describe a recent ABC news bulletin I heard where the first three items concerned Indigenous people.

- ❖ One was a story about inhumane treatment of an Aboriginal man transported in a faulty prison van in searing heat over several hundred kilometres in Western Australia's goldfields. The circumstances of his tragic death prompted the State Coroner to ask whether Australia in the 21st century could describe itself as a civilised society.
- ❖ The second related to the small wheat belt town of Narrogin, in Western Australia's south, where Aboriginal families had kept their children from school claiming that they were subjected to racism. The Western Australian Government and the Education Department argued that the issue was simply about a small group of students with behavioural problems. But the Shire Council's response spoke about a deeper reality. It promised to develop a reconciliation plan for the town, fly the Aboriginal flag at the council's offices and educate the wider community about the region's Aboriginal history and culture.
- ❖ The last item referred to the second anniversary of the Northern Territory Intervention. The Federal Minister commented positively on the progress of the Intervention claiming that women and children were much safer now than before the Intervention.
- ❖ It prompted a retort from a well known Indigenous activist, that if Aboriginal people living in prescribed Northern Territory lands were truly happy with the Intervention, it would be them saying it – not the Australian Government.

That news bulletin was a snapshot of Australia and its relationship with native peoples in 2009. It is far cry from the celebration in 1975 at Wattie Creek when an Australian Prime Minister

symbolically poured red sand through the hands of Vincent Lingiari in transferring the title deeds to an area excised out of Vestey's properties to the Gurindji.

The Old man replied to the then Prime Ministers gesture with poetic brevity: "We are all mates now".

Lingiari spoke of a nation in a process of healing and reconciliation.

The Woodward Royal Commission was complete and its recommendation quickly translated into the Northern Territory Aboriginal Land Rights Bill which Gough Whitlam introduced to Parliament, but did not survive as Prime Minister to see it passed into Law.

But those were times of a different political bi-partisanship regarding the First Australians. The Northern Territory Aboriginal Land Rights Act was one of the first legislative enactments of Malcolm Fraser's Prime Ministership.

I wonder what the old Gurindji man would have thought 32 years later, when in another act of political bi-partisanship the Australian Parliament passed the Northern Territory Emergency Response Bill. That Act subjected almost fifty thousand people living on Aboriginal Land – almost all of whom live in the federal electorate that bears the old man's name – to conditions of government paternal management that no other Australians living outside prison have to endure.

Whatever one's views on the Northern Territory Intervention, it is certainly not an act of mateship.

The Racial Discrimination Act remains suspended and is a damning indictment on the Australian body politic. To suggest that the Intervention is a special measure because of claims that Aboriginal people will enjoy a benefit is a misreading of both the wording and spirit of the Racial Discrimination Act.

There was no consultation and therefore no informed consent from those people subjected to the Northern Territory Emergency Response measures. It was simply imposed "for their own good" in the manner of Arthur Phillip and all his successors.

In my view the Intervention has breached Australia's treaty obligations to eliminate all forms of racial discrimination within our nation and therefore it has undermined Australia's international standing on human rights.

It may be obvious to you that my views on this matter run counter to the views publicly stated by some other Aboriginal people as well as others who have shaped the Indigenous public policy orthodoxy that has currently captured the thinking of governments.

It has been said by some people committed to improving the lives of Indigenous people that when it comes to a contest over the recognition of Indigenous rights and social order, the latter should take priority.

This represents the gaping problem in public debate over the position of native peoples in the Australian nation. The notion that Indigenous rights and social order is somehow in conflict is a false binary.

I too am a firm adherent to the quest for social order. But where others manufacture in their imagination a conflict between Indigenous rights and social order, I see them as in-divisible. I don't believe as a matter of public policy, that one can be achieved without the other.

The notion of imposing social order through coercive action of governments that aims to instill the values of individualism by breaking down Indigenous kinship relationships and communal ownership of land that is underpinned by customary law is a paradox.

I challenge any one to cite an example where social order has been achieved and maintained through attacking the social and cultural pillars of a minority group in order that it conforms to the values of the dominant society. It certainly did not work in Northern Ireland or Franco's Spain or more recently in Sarkozy's France where the external symbols of a people's religious beliefs are described as impediments to their freedom as citizens.

The fact that we as a nation are even debating this issue in 2009 defies historical wisdom.

Why then has the nation drifted into this nonsensical ideological debate that has shaped current public policy that continually affects the lives of Aboriginal people and the relationship they have with the nation state.

At one level we can dissect that ideological debate.

The neo-liberal orthodoxy of the past three decades, which in the wake of global economic collapse is under serious intellectual and moral challenge, argues that social order is developed and maintained by the pursuit of individual economic interests and the personal and family responsibility values that flows naturally from that pursuit.

In a nutshell that is the philosophical underpinning of the welfare reform policy agenda and the Northern Territory Intervention. One has to only read the speeches of Mal Brough in his whirlwind tenure as Indigenous Affairs Minister to appreciate the religious zeal of the Howard Government's policy agenda.

To summarise the Brough diatribe - Communal Land, Traditional decision making and Customary Law were evil forces that were holding back Aboriginal people from taking their rightful place in "enlightened" civilization.

The Northern Territory Aboriginal Land Rights Act and other policies of the Whitlam and Fraser Governments had interrupted the evolutionary assimilation journey.

Land Rights; permits, CDEP, and Aboriginal community governance over services were edifices from a misguided historical era that impeded Aboriginal people's pathway to the promised land of western modernity.

And with the emotional issue of child sexual abuse and the Northern Territory's inaction on the Little Children are Sacred Report Brough found the keys to the bulldozer and possibly the downstream positives for a looming election contest. He was wrong.

That Indigenous public policy can be captured by such a narrow ideological agenda speaks volumes about the fragile political position of Aboriginal peoples within the modern Australian nation State. It highlights how vulnerable and unprotected Indigenous people are without a treaty or constitutional substantive recognition.

We are like dinghy without an anchor in a turbulent sea. We are swept along, often violently, in which ever way the wind blows. And in the first decade of the twenty first century Aboriginal people have been buffeted by a political gale; a windstorm fanned by elements of the media using vitriolic language penned by both journalists and commentators and right wing ideological think tanks hoping to land killer blows to extinguish us forever.

The noise of the storm may have abated since the election of the Rudd Government but its prevailing force remains in place with one notable difference. Compared to the ideological zeal of Howard and Brough's assimilation crusade, Rudd's approach to Indigenous policy is absent of any philosophical conviction.

The Closing the Gap Strategy is rudderless in terms of underlying policy explanation.

There is a great danger that assimilation will come to be seen as benign and the natural order of things by the dominant society and that its virulent impact on Aboriginal people will increasingly be viewed by non indigenous Australians as banal and necessary – a position that flies in the face of Australia's obligation under the United Nations Declaration on Indigenous Rights.

When I was appointed Royal Commissioner in 1989 to inquire into the underlying issues relating to Aboriginal deaths in custody in Western Australia the Indigenous imprisonment rate was about a third of the entire prison population which was seen then as a crisis of our justice system. That figure is now approaching 50%, a fact which passes almost without public comment.

It took a coronial inquiry and ABC's Four Corners to bring people onto the streets in protest; eighteen months after the appalling death of an Aboriginal man in a police lock up in Western

Australia. In 1983 there were riots and nationwide protests in the immediate aftermath of the killing of John Pat at the hands of police in north Western Australia.

Four Corners twenty six years later still finds itself exposing the failures of our criminal justice institutions to show basic Duty of Care to people caught within their net - John Pat in 1983 and Mr Ward a quarter of century later.

At least someone at the ABC still cares enough to expose the crime.

What concerns me is that the relentless demand to assimilate will exhaust the Aboriginal community into pervasive passivity. The dominant society, becoming more concerned with the diminishment of their own material circumstances, will crawl into the shade of ill informed populism and its simplistic solutions wrapped in the cloth of law and order and welfare management and allow Governments to smother our laws, customs and languages under the guise of benevolent care and interest. Principles of justice and decency can it appears be acceptable so long as they are bent like a boomerang.

While this cycle of denial continues Australia will remain trapped in retarded nationhood – chained to our colonial past yet yearning for recognition and global admiration for upholding the highest standards of human rights.

What is required in Australia is a different conversation with new terms of reference about the position of Indigenous people in Australian nationhood. It has to be strategic and facilitated. In my view internationally facilitated because we can no longer hear each other.

The First Peoples of Australia should be viewed as critically important to a renewed nation building effort, not as marginalised people who are viewed by a significant section of the dominant society in terms similar to that expressed by William Dampier in 1688.

Indigenous society and culture should be recognised and celebrated for its intrinsic worth and the potential quality it brings to the shaping of a modern nation.

Customary law and traditional language should be recognised, respected and protected as fundamental to the survival of Indigenous society and an inclusive nation.

Innovative public and private investment should be developed to help maintain Indigenous people to live on their traditional country and to build sustainable economies that draw from Indigenous cultural knowledge and expertise.

This sort of conversation leads to different outcomes than the current assimilationist discourse which is premised on deriding Native People's society and culture. From a platform of recognising Indigenous people a different reform agenda can be imagined.

Dysfunctional governance and service delivery arrangements can be reshaped for the benefit of all, if there is a focus upon regional governance and greater reform of wealth to the regions. Thereby renewing the federation that still fails to fully incorporate Indigenous people into the nation despite the 1967 Constitutional amendment.

Land management systems designed for a nineteenth century colonial extractive economy must be reformed to include the cultural dimension of Aboriginal connection to land and resources as well as promoting sustainable economic initiatives such as tourism and new opportunities from climate change.

A new Australian Dialogue must result in the extinguishment of the terra nullius mindset that continues to shape public policy and the institutional arrangements that trap so many Indigenous people in despair and diminish all Australians.

The High Court in Mabo formally decreed terra nullius a legal fiction, but when Australian institutional and popular culture expel it from any form of acceptability, the nation will have an opportunity to write into its constitution a positive recognition of Indigenous culture just as New Zealand and Canada have done with such pride.

It is from the stand point of recognition and inclusiveness of all our diversity a different Australia will be built.

The Imam Bonjol whose statue I referred to earlier eventually died in exile on the island of Sulawesi at the age of 92 in 1864, defeated in battle but not in belief. I'm sure that his legacy was greater than a simple statue along a highway on a tourist island in the Indian Ocean.

It is always good to be reminded when you visit another people's country that the values and beliefs that you hold in your heart are shared across time and place and even if a harsh price is paid for those beliefs it will never diminish the integrity of the belief and values.

Kulia