

## Legal Process Assignment

### History of Aboriginal/white relations in Australia

In 1788, when Australia was laid claim to by the British, Aboriginal peoples who were the first inhabitants, were forced to accept English law due to the fact the British used the doctrine to settle a land that was practically unoccupied. In effect, they claimed that the 'land belonged to no-one' or in other words was terra nullius. The Aboriginal peoples believe they 'belonged' to the land - meaning that the land supported their needs of food, shelter and clothing. This was ignored by the British as that did not fit well with Australia being unoccupied.<sup>1</sup>

Since Australia was occupied by the British, the Aboriginal Peoples have been treated extremely badly. Their land was taken from them and half-caste children were stolen to assimilate in white communities. The 'plan' was to remove the Aboriginal Peoples from their land and on to Government controlled reserves. The white settlers believed that the Aboriginal Peoples would eventually die off and then their land could be sold off as farm land. When this wasn't occurring, as there were children who were growing up, the Aboriginal Protection Board pressured the State Government for stronger power to deal with them.

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<sup>1</sup> Greta Bird, Legal Process Study Guide, Southern Cross University 2009, 3.2

In 1909 the *Aboriginal Protection Act*<sup>2</sup> was passed through state parliament which did give the board full control over the lives of Aboriginal Peoples in New South Wales, s 11 stated 'The board may... by indenture bind or cause to bound the child of any aborigine, or the neglected child of any person apparently having an admixture of aboriginal blood in his veins, to be apprenticed to any master...'<sup>3</sup>. Some of the children were sent to live with families while others were sent to homes such as Cootamundra Aboriginal Girls Training Home where Aboriginal girls were trained as domestic servants, and boys were sent to Kinchella Home for Aborigine Boys for a brief training as farm labourers and handymen.<sup>4</sup>

The Aboriginal people have only ever wanted an apology for wrongs done to them or was said by Faye Lyman<sup>5</sup> in the *Many Voices* oral history at the National Library of Australia 'Personally, I don't want people to say 'I'm sorry Faye'...I just want them to understand the hurt, what happened when we were initially separated, and just understand the society, what they have done...You don't belong in either world. I can't explain it hurts so much'. The 13<sup>th</sup> of February 2008, which is now, referred to as National Sorry Day, saw apology speeches from Prime Minister Kevin Rudd and Dr

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<sup>2</sup> *Aboriginal Protection Act* 1909 (NSW)

<sup>3</sup> Above n.7, 2

<sup>4</sup> Department of Aboriginal Affairs, *Do by the S... Reference: Disc as n. G... CE*, Department of Aboriginal Affairs, Canberra, Updated, Reading 3.2 Legal Process Study Guide, Southern Cross University

<sup>5</sup> Dr Brendan Nelson, National Sorry Day speech to Mr Speaker, Members of Parliament, visitors and all Australians at the 42<sup>nd</sup> Parliament, 13 February 2008

Brendan Nelson expressing how sorry they were for wrongdoings done to the Aboriginal people, since European settlement.

### Proposed Policy

The proposed Commonwealth Government policy to 'close the gap' between Aboriginal and non-Aboriginal people and to achieve equality by quarantining half the welfare entitlements of Aboriginal people living in rural and remote communities if children are not sent to boarding schools in larger communities is, in the writers opinion, not a completely well thought out policy. Where is the equality when the Government is planning on holding half their welfare payments? This is discrimination at its worst and is a continuation of what the Aboriginal people have been suffering from, for many generations. There is no equity here - what about the non-Aboriginal families who may like to send their children to boarding school to give them a better life than the one they had.

Article 36 of the United Nations Commission on Human Rights provides that: 'Indigenous peoples have the right to the recognition, observance and enforcement of treaties and other constructive arrangements ...., according to their original spirit and intent, and other constructive arrangements.'<sup>6</sup>

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<sup>6</sup> Paul Patton, 'Reconciliation, Aboriginal Rights and Constitutional Paradox in Australia' (2001) 15 *Australian Indigenous Law Journal* 15, UN Doc E/CN 4/1995/2, E/CN 4/Sub 2/1994/56 at 105 (1994). Reprinted as an appendix in Anaya, s James *Indigenous Peoples in the New World* Oxford University Press Oxford 2000 at 207-16, Reading 3.10, LAW00111 Legal Process Unit, Southern Cross University

The commitment by the Australian Government to achieve equality may never be truly realised, as on occasion substantive equality is required. This is where people are treated differently in order to rectify past injustice and have an equal outcome. What is required is a democratic approach to overcome the debilitating effects of lack of education, poverty and general neglect that the Aboriginal people have been suffering. The case of *Gerhard v Brown*<sup>7</sup> clearly illustrates that what could probably be described as 'reverse racism', where the case revolved around s19 (1) of the *Pitjatjantjara Land Rights Act*,<sup>8</sup> as well as infringing the *Racial Discrimination Act*<sup>9</sup>, where it is stated:

*"A person (not being a Pitjatjantjara) who enters on the lands without permission of Anangu Pitjatjantjara is guilty of an offence and liable to a penalty..."*

There is 'no magic bullet that will repair the unacceptable social justice outcomes faced by Aboriginal people...' states Linda Burney, in the Vincent Lingiary Memorial Lecture<sup>10</sup> and she further states '(P)lans devised by primarily non-Aboriginal people in city towers far from the communities that will have to wear them simply will not work. Local solutions for local issues'. A saving grace is that there are some Aboriginal leaders who do

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<sup>7</sup> (1985) 159 CLR 70

<sup>8</sup> Greta Bird, Topic 7 Access and Equity: equality before the law, Legal Process Society GACE, Southern Cross University, 7.2

<sup>9</sup> 1975 (Cth)

<sup>10</sup> Linda Burney, ABC Away, September 1, 2006, 13, Reading 3.18, Legal Process Society GACE, Southern Cross University

support the policy so that it is not those in ivory towers who will hopefully have the final word.

### Analysis of the Policy

The proposed policy of closing the gap between life expectancy and life chances does have its merits as we do require equality in Australia, however a policy to quarantine half the welfare entitlements of Aboriginal people living in rural and remote communities, if children are not sent to boarding schools in larger communities or cities is akin to going back in time.

Mistakes from the past (from the early 1900's through to 1970) have been realised so a repeat should not occur. Taking children from their parents and the only life they have ever known may have an adverse reaction.

When children were taken in the past, complaints were put forward to authorities during this period but were not acted upon at that time. One example is a newspaper article<sup>11</sup> from 1925 at which time four Aboriginal children were taken from their parents just prior to Christmas. The children were well fed and clothed by their parents - who were not aware that their children were to be removed. The writer has a belief that unless a child is being abused in any way they should remain with their parents and not even the government should remove them. Sending a child to

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<sup>11</sup> Sydney Morning Herald, 10 January 1925

boarding school as a result of one's own wishes is another story all together, especially if one does not have to pay for this education. It should not be a forced occurrence, but due to lack of knowledge and previous fear of becoming part of a new stolen generation, there will be a

need to educate parents in their local communities by Aboriginal leaders who support this policy.

Many Aboriginal parents whose children were taken from them in the past, were illiterate and their children were taken without understanding exactly what was going to happen, they placed a thumbprint on a form of request which was to supposedly give their child a 'western education'.<sup>12</sup> If children were to be taken from their parents in 2010 and placed in boarding school, their parents would have a better understanding of their rights, or if they did not there are now advocates who would become involved. There have been cases that have tried to gain compensation from the Government due to being from the 'stolen generation'. One of which has not been successful for the applicants is the case of *Kruger & Ors v The Commonwealth of Australia*; *Bray & Ors v The Commonwealth of Australia*<sup>13</sup> where the plaintiffs were removed from their families as small children and had been detained in Aboriginal institutions or reserves. They

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<sup>12</sup> Irene Watson, "There is no Possibility of Rights without Law: so Until Then, Don't Thumb Print or Sign Anything!" (2000) 5 (1) *Wedge no. 4*, 4

<sup>13</sup> 146 ALR 126

claimed declaratory relief and damages against the Commonwealth for being removed from their families and communities and claimed that their removals infringed certain constitutional rights and freedoms.<sup>14</sup> Another case was that of *Cubillo v Commonwealth* (2000)<sup>15</sup> where Lorna Cubillo and Peter Gunner were removed from their homes and placed in to the Retta Dixon Home and St Mary's Hostel respectively. Due to the amount of time that had passed from when they were removed, it was in fact, history on trial due to documents being lost and key witnesses were dead, infirm or missing.<sup>16</sup> None of the applicants were successful in gaining compensation.

Welfare for the Indigenous people has not been as advantageous as what may have been expected. Aboriginal lawyer Noel Pearson<sup>17</sup> states that when his people received citizenship in 1967 was a mixed blessing - there was recognition of their human rights and land rights but at the same they got work-free income and the availability of alcohol. This has caused a social vortex - idle time, money and alcohol and it is now well entrenched in the Cape York communities. There is now 93% of their people living on welfare. The issue is now not just alcohol or gambling - it is now illicit drugs and is caused through the break down in social order and values. In conjunction with Westpac Bank, Noel and his brother, Gerhardt have set up

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<sup>14</sup> Buti, T, "Kruger and Bray and the Common Law" (1998) 21 (1) *ANZLJ* 233

<sup>15</sup> 174 ALR 97

<sup>16</sup> Pam O'Connor, "History on Trial: Cubillo and Gunner v The commonwealth of Australia" (2001) 26 (1) *Alternative Law Journal* 27-31, Reading 3.6 Legal Process Study Guide, Southern Cross University

<sup>17</sup> Above n.8

the Indigenous Enterprise Partnerships which have introduced a Family Income Management program which through education in the remote communities and schools, enables people control over their own lives. As Noel says it is enabling people to feel proud. In the writer's view, perhaps the Aboriginal Advisory Committee (AAC) should speak with Noel and Gerhardt about what they are doing in Cape York and instill values back into the Aboriginals people's lives. There has been success in other countries with instilling value back in the lives of Indigenous Peoples. The Canadian Government has had success with their Indigenous peoples in Kanesatake.<sup>18</sup> The government drafted 55 police officers from 18 other native communities around Quebec to fight what was going on and to enable policies focusing on health, education, employment and law-and-order to maximise the quality of life for these people - rather than policies of separatism and autonomy.

There really does need to be a stronger national policy on educational outcomes - especially with pre-school and middle years' education - this it is said, will unlock the cycle of poverty. Aboriginal Studies should be mandatory for teacher training and students in schools. Programs that enhance pride and self-esteem in Aboriginal young people by way of

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<sup>18</sup> Janet Albrechtsen, 'Canadians teach us the folly of autonomy for Aborigines', ~~the~~ ~~ABC~~, 28 January, 2004



teaching Aboriginal languages would be valuable.<sup>19</sup> Our close neighbours, New Zealand have had success with incorporating the traditional Maori language into everyday life - from street signs, television shows (with English captions) as well as teaching the language in schools. Although there are many, many different dialects and languages here with the Aboriginal peoples, it may be that there will be many languages taught in

different regions, depending on the dialect/language spoken by the original tribe of the area.

In the writers belief, the above mentioned policy is in its infancy and requires more research and involvement of Aboriginal Communities and the Australian Government.

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<sup>19</sup> Ibid, 14

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