

**Who's Afraid of the Dark? : *Australia's  
Administration in Aboriginal Affairs***

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*A young man on his way home from a night on the town wanders around underneath a streetlight. He is seen by a policeman who approaches the young man and asks, "What are you doing?"*

*The young man replies, "I'm looking for my wallet".*

*The policeman asks, "Where did you lose it?"*

*The young man replies, "About two blocks back".*

*Confused the policeman then asks, "So why are you looking for it here?"*

*The young man looks at the policeman and says, "Because there's light".*

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## CHAPTER 1: *terra nullius* SOCIAL POLICY

Over the last twenty-five years, Aboriginal affairs have been the recipient of substantial monetary assistance from the public purse. Throughout this period, programs designed to redress social and economic disparities between black and white Australians have been initiated by federal, state and territory governments. In conjunction with these strategies, new arrangements of Aboriginal representation to all levels of government and their agents have also evolved. As a result of these changing administrative relationships, the Aboriginal role has emerged from that of isolated recipient of bureaucratic process to intimate participation with decision-making responsibilities in the administration itself.

This continuing, albeit gradual process of review in the administration of Aboriginal affairs, has led to major administrative reforms and efforts. In more recent times these include National Park Joint Management Committees, establishment of the Aboriginal and Torres Strait Islander Commission, the Royal Commission into Aboriginal Deaths in Custody, the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families and Reconciliation. With some pressure from the international community, these measures reflect changing societal values and responsiveness to the aspirations and roles that Aboriginal people are demanding for themselves.

Despite this attention, the *repertoire* of social ills confronting Aboriginal people still mirror those of the past compounded by the addition of many 'contemporary' issues. This situation has led to frequent reviews of programs, structures and policy platforms

articulated by governments at all levels in their collective response to the ‘Aboriginal’ problem. However, how have these reviews contributed towards understanding past and current initiatives? The continuing shortfall in policy outcomes would indicate that very little has been learnt. John Hewson summed up this disillusionment,

In the past 15 years the Government has probably spent \$17-18 billion. Yet the improvement in Aboriginal health, education, housing and employment has fallen way short of reasonable expectation. Although there have been audits of some programs, of ATSIC and of some Land Councils, there has not been a satisfactory explanation as to why, that’s to the satisfaction of both Aboriginal and non-Aboriginal Australians.<sup>1</sup>

Such comments, of course, are not surprising given the diverse range of opinions amongst ‘interested stakeholders’, Aboriginal people included, about how to alleviate popular descriptions of ‘Aboriginal disadvantage’, welfare dependency and underlying issues as described by the Royal Commission into Aboriginal Deaths in Custody. Collectively, attempts to understand the reasons for policy failings have developed around notions of inadequate resources, poor administrative practice or the imposition of multi-layered administrative controls of accountability to government. More recently, self-determination is being questioned as a failing policy and welfare dependency has re-emerged. But does the collective content of these arguments enhance the understanding of issues confronting Aboriginal people and the apparent lack of success by public policy responses to them? Or do they more accurately reflect re-runs of the same ideological statements from both the Right, and the Left as well as the security and comfort in their own ‘feel good’ rhetoric?

In this dissertation I argue that Australia’s administration of Aboriginal Affairs since

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<sup>1</sup> Hewson, J. “Take the thorny road to reconciliation”, *Financial Review*, 23<sup>rd</sup> October 1998 p.41

1897 has operated from a premise of non-recognition under policies of assimilation. The term I use to describe this administration is *terra nullius* social policy. The term refers to the context in which Aboriginal people and issues confronting them are considered. I demonstrate that the values that ground Australian political culture, institutions and administrative structures consider Aboriginal people in an ‘all australian’ context, rather than a context that recognises their status as Aboriginal people. From this premise, I analyse the application of *terra nullius* in administrative practices to refer to the subject of the phrase, the “no-one”.

In the administrative application of *terra nullius* social policy, it is argued and demonstrated that government initiatives have merely undergone technical adjustments designed to retain assimilationist practices, rather than advance the recognition of Aboriginal people in Australia as Aboriginal people. Under the ‘flat iron’ of Australian egalitarianism, the rhetoric of equality and ‘all australian’ has persistently circumscribed the relationship between Aboriginal and non-Aboriginal people. In terms of agenda and policy, non-Aboriginal values, perspectives and assumptions dominate and control the power of definition. This domination has characterised Aboriginal relations with the state through the colonial experience, federation and contemporary practices. However, the most significant ‘change’ in this relationship is the co-optation of Aboriginal people into non-Aboriginal administrative structures on the assumption that such mechanisms can adequately accommodate Aboriginal rights and interests.

Since the 1970s the experience in Aboriginal affairs has been to gradually maximise the participation of Aboriginal people into mainstream administrative structures. This

participation has modeled new approaches not only in the way Aboriginal interests are mobilised amongst themselves, but also to government. With this practice the onus for change falls upon Aboriginal people. The fixed element in this approach is that institutions in which Aboriginal people are encouraged to participate do not structurally change. That is, the values, which underlie the design and determine the outcomes of these structures, have been retained. Any administrative adjustments adapted to accommodate new participatory arrangements are purely technical. At the end of it all, Aboriginal people are still dealing with institutions and processes that are imposed. Not only are these institutions and processes inadequate to Aboriginal culture and experience, they perpetuate the process of colonisation. The mechanism through which this domination is currently maintained is the participatory fora of a managerialist model of public administration. Although these fora represent a shift from an earlier model, which operated in a context of conflict, to a model that now operates in a context of ‘consensus’, the administrative practice of *terra nullius* in social policy prevails.

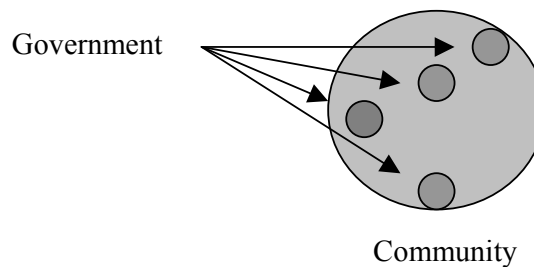
These processes are consistent with models identified by Boldt as practices of both institutional and internal assimilation.<sup>2</sup> The intention of these models is to process Aboriginal people through the application and operation of mainstream administrative institutions. It involves the establishment of Aboriginal organisations and forums, which are seen by government agencies to represent the views and concerns of Aboriginal people about specific issues. The participation of Aboriginal people in these structures primarily serves to legitimate bureaucratic involvement in Aboriginal communities. A secondary element is that such participation confirms the

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<sup>2</sup> Boldt, M. Governments in conflict?: provinces and Indian nations in Canada, University of Toronto Press, Toronto. 1988

appropriateness and acceptance by Aboriginal people that such frameworks can assist in the positive promotion of Aboriginal interests.

The reality of these impositions is that they polarise the Aboriginal community to ensure easier access for governments and their agents to manage Aboriginal issues. They implant white middle management structures between governments and Aboriginal communities thus serving to establish an agency's own set of 'experts', a trend in Aboriginal involvement with bureaucracies since the Whitlam Government.



It is a process that can be described as an 'unholy trinity'; an agenda that aims to control, contain and manage Aboriginal affairs. It can be concluded then, that processes which set out to establish middle management structures to serve the functional interests of funding agencies, only succeed in establishing an Aboriginal polity which they can identify, because they do not understand the one that already exists.

Kwame Dawes speaking out about cultural appropriation in relation to funding agencies that provide support to artists in Canada comments;

This mainstream network of funding agencies persists with a conservatism that shies from any fundamental philosophical or structural change, opting instead for a mechanism that is able to absorb new ideas and new ways of approaching



certain issues within the already existing structure. And herein lies the reality that non-white peoples are in no way gaining a significant power base in these organisations. The fact is that the hierarchical structures continues to produce and implement policies that suit its own interests while using tried and proven strategies of divide and conquer to disarm the call for fundamental change that is coming from non-white groups all over the country, and from the non-white individuals who are coopted into the system.<sup>3</sup>

By using their 'experts', funding agencies do not feel the need to consult with the community at large. They can legitimate their involvement and accountability needs by consulting with middle management structures they themselves have established.

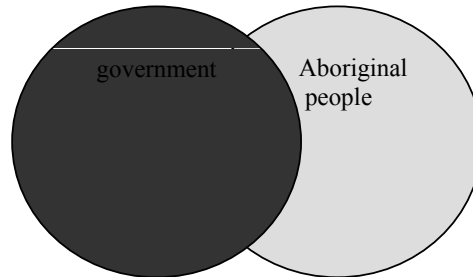
Aboriginal people, who are now mediators of this new model, then impose the rhetorical assumptions and definitions of government upon Aboriginal communities. This evolution is described as internal assimilation, where the definitions and characteristics of Aboriginal people, so often described from a white perspective, are being imposed by Aboriginal people themselves. This is the modern expression of *terra nullius*. The benefit of this practice is that it insulates government by providing an effective shield from the scrutiny and demands of Aboriginal people on the outer of this interface. In so doing, a buffer between Aboriginal people and government is established. This strategy has been successful in establishing an effective 'comfort zone' created by a public relations exercise under the guise of Aboriginal empowerment. Although this public image of government 'isolation' and 'non-interference' provides a powerful symbolic image, its reality however is assimilationist, a means of consolidating the myth of *terra nullius*.

In the application of participatory models, Aboriginal input is limited not by default, but by design. Aboriginal input is limited because representation must be consistent

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<sup>3</sup> "Re-Appropriating Cultural Appropriation", *Fuse Magazine*. Vol. 16 No. 5 & 6, Summer 1993 p.8

with the parameters in which these mechanisms operate. This is ‘censorship’ at source because the context in which representation occurs cannot receive and articulate the voice of Aboriginal autonomy.



Aboriginal participation in non-Aboriginal jurisdictions

This fact alone is a clear indication that the authority managing these processes exists at a higher level than that of the participants. Despite this acknowledged deficiency, often described in statements such as: ‘they still don’t listen’, Aboriginal representation continues to utilise these processes to promote the interests of Aboriginal people. These measures of containment exist in the form of legislative frameworks that drive the operations of such fora. The establishment of the Aboriginal and Torres Strait Islander Commission, Aboriginal Justice Advisory Committees, and National Park Joint Management Committees are not intended to legitimate Aboriginal knowledge and values, rather, they are designed to impose the image of the ‘other’. The voice of Aboriginal people operating in these fora does not reflect the voice that speaks from the position of Aboriginal autonomy, but from the voice of the prompter.

Because the emphasis of critique and accountability is situated in the application of practice and not in the location of context, questioning the values underpinning

Australia's political and administrative institutions is non-existent in the explanation for failed policy. Consequently, problem identification processes and evaluation methods utilised by administrative practices have failed to recognise that values promote assumptions. These assumptions not only influence how we understand problems but how we then approach searching for a solution. In other words, values provide a context for the explanation of the social fabric.

Political culture and political institutions reinforce these explanations. Galligan describes political culture as

encompassing the set of shared ideas, assumptions, preferences and customs that are usually taken for granted in a political system but are essential to its operation. Political culture is reflected in the design and functioning of political institutions, and is a significant factor in accounting for political habits and rhetoric.<sup>4</sup>

The exclusion of values in determining 'problems' and in the evaluation of public policy efforts, contrasts with the findings of the Royal Commission into Aboriginal Deaths in Custody

...it is deceptive indeed to assume that 'colonial Australia' ended with the coming of the twentieth century, or that successful British settlement meant the end of 'colonialistic' relations between Aboriginal people and non-Aboriginal people. These relations were entrenched not only by acts of dispossession but also by a wide variety of ideas, beliefs, and economic, legal, political and social structures which institutionalized and perpetuated them.<sup>5</sup>

This description by the Royal Commission illustrates the structural deficiencies in mainstream institutions to issues confronting Aboriginal people. The comments

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<sup>4</sup> Galligan, B. "Political Culture and institutional design" *Towards an Australian Bill of Rights*, (ed) Phillip Alston Centre for International and Public Law, Australian National University Canberra and the Human Rights and Equal Opportunity Commission Sydney. 1994 p.58

<sup>5</sup> *Royal Commission into Aboriginal Deaths in Custody*, 1991, Vol. 2 Ch.10 p.5

explicitly relate structures to values. That is, the cultural assumptions and values that direct a particular view of society predicate institutions.

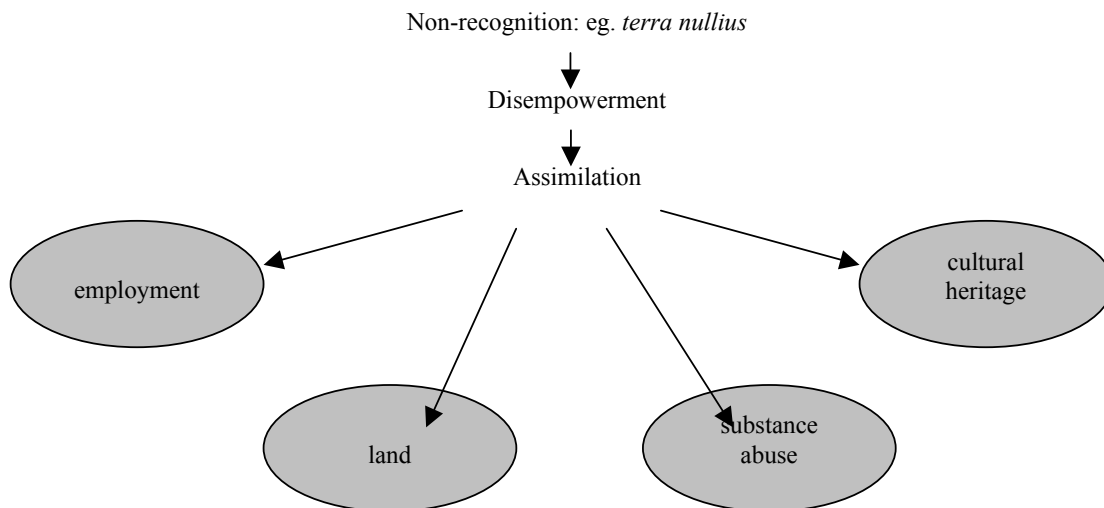
According to the Royal Commission, past policies in Aboriginal affairs were premised by the belief that it was appropriate to confer mainstream values upon Aboriginal people. It is unfortunate however, that these views are expressed in the past tense. Unfortunate, because such views promote the assumption that the values, which shaped past Australian legal, political and social structures, are not currently reinforced in contemporary institutions. This is a misconception. The promotion of egalitarianism in white Australian culture is not a contemporary phenomenon. As a value to preserve and protect it is well embedded in Australian political thought. Despite its ageing influence it is just as prominent now as it was in shaping Australia federation. To think of values purely in the linear measurements described by the Royal Commission, produces a common flaw in current evaluation and problem-identification processes. That is, in the attempt to find solutions to the range of issues confronting Aboriginal people, there is a tendency to respond to the symbolic image represented by these values rather than the context in which they are played out.

Clearly then, attention to the procedural mechanisms of program delivery will offer little assistance to redressing these structural deficiencies. However, this focus is very effective at directing responses towards symptoms rather than causes. Current evaluation and problem-identification practices consider Australian political culture an irrelevant influence in the methods used to identify problems, propose solutions and evaluate policy outcomes in Aboriginal Affairs. On the contrary, the values that

shape this culture are an integral point of reference that is excluded in such exercises.

The Royal Commission into Aboriginal Deaths in Custody articulated such a framework. The Royal Commission identified the systemic influences shaping contemporary Aboriginal circumstance by providing an overview of Australia's administration in Aboriginal Affairs. This overview placed particular emphasis on causality and structural characteristics. The Royal Commission concluded that independent issues such as unemployment, land, substance abuse and education were all inter-related and that no one particular issue held a determining influence in shaping contemporary circumstances for Aboriginal people in Australia.<sup>6</sup>

To understand the systemic influences, there is a need to identify how these issues are inter-related and how such influences are maintained. The Royal Commission recognised these influences as products of assimilationist policies, which in turn were products of an historical process of disempowerment. This process of disempowerment is a product of non-recognition by colonial and Australian Governments at both Commonwealth and State levels to recognise Aboriginal people as Aboriginal people and respond to Aboriginal needs and issues within this context.



<sup>6</sup> Royal Commission into Aboriginal Deaths in Custody, 1991 Vol.4 Ch. 26 p. 3

It is these aspects which the Royal Commission identifies as systemic influences.

The great lesson that stands out is that non-Aboriginals who currently hold virtually all the power in dealing with Aboriginals, have to give up the usually well-intentioned efforts to do things for or to Aboriginals, to give up the assumption that they know what is best for Aboriginals...who have to be led, educated, manipulated and re-shaped into the image of the dominant community. Instead Aboriginals must be recognised for what they are, a people in their own right with their own culture, history, values...<sup>7</sup>

This connection between structural deficiencies and values should be paramount in the evaluation of public policy in Aboriginal affairs. Australia's political and administrative structures are themselves products of design to ensure that specific outcomes are produced. These outcomes are determined by the values that shape Australian political culture. To alter the structures that Aboriginal people are encouraged to participate in, requires more than just a change in process, procedure, regulation or legislation. Fundamentally, it requires a change in the context in which Aboriginal people and the issues impacting upon them are viewed. These views were expressed by Justice Mathews in the 1996 Report to Senator John Herron regarding the Hindmarsh application for protection, which comments;

The events precipitated by the bridge proposal have thus far revealed many deficiencies in Commonwealth laws designed to preserve and protect areas and objects of traditional Aboriginal significance...Some are attributable to poor drafting of the legislation...However the most pervasive of the deficiencies is much more difficult to rectify than a piece of legislation. It reflects the fundamental differences between the introduced common law system and the legal system of the indigenous oral culture. This latest episode in the Hindmarsh Island bridge saga has provided graphic illustration as to how little our apparently beneficial heritage legislation has accommodated to the realities of Aboriginal culture.<sup>8</sup>

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<sup>7</sup> Royal Commission into Aboriginal Deaths in Custody Regional Report on Inquiry in New South Wales, Victoria and Tasmania, 1991. p. 29

<sup>8</sup> Commonwealth Hindmarsh Island Report, 27<sup>th</sup> June 1996 p.1

It is the nature of the relationship between Aboriginal people and government that requires evaluation not just the mechanisms of participatory models that sustain existing and past practices. In particular, the frames of reference used to identify 'the problem', as identified by the Royal Commission into Aboriginal Deaths in Custody, requires further consideration. Despite experience and many official government reports, it would appear that the confusion surrounding the differentiation between *causes* and *symptoms* still remains. Fundamentally, mainstream methods of policy analysis have neglected to question the values that underpin Australia's political and administrative institutions. In 1992 the legal fiction of *terra nullius* was buried by the Australian High Court in relation to land and settlement. Unfortunately, Australia's political institutions, administrative structures and practices in Aboriginal affairs have been unable to lose that history in social policy.

## CHAPTER 2: POLICY EVALUATION

*Values are like marked trails in the wilderness. Afraid of getting lost, we often neglect to take the less-travelled road and then tend to forget that someone did the marking for us, thus implanting his or her ideas as to what was worth exploring, at what effort and risk<sup>9</sup>*

The process of Reconciliation is attempting to promote a whole new approach to the way in which we view the past and present relationships between Aboriginal and non-Aboriginal Australians. It is a process supported by the Australian government, which passed The Council for Aboriginal Reconciliation Act in 1991. Bill Hollingsworth described this process as consisting of three basic elements: to encourage people to understand and reassess the past, to dissolve prejudice and arrogance by educating Australians about Aboriginal culture and achievements, and to bring about an understanding of the unique position of Aboriginal and Torres Strait Islander peoples as the Aboriginal peoples of Australia.<sup>10</sup> But by whose philosophies of recognition and equity is this new perspective to be framed? Is Australia sincere as a nation to recognise Aboriginal people as Aboriginal people, or is it just a ‘feel good’ exercise for mainstream Australia?

Since the re-election of the Howard Government in 1999 there have been frequent public commitments affirming the process of reconciliation. These commitments encompass an acknowledgment of mistakes colonial and Australian governments have made in responding to issues impacting upon Aboriginal people. As commented by various Ministers, these mistakes are framed in an historical context that situates

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<sup>9</sup> Dery, D. Problem Definition in Policy Analysis, University Press of Kansas, 1984, p.116

<sup>10</sup> Hollingsworth, B. “Self-Determination and Reconciliation” in Aboriginal Self-determination in Australia (ed) Christine Fletcher Aboriginal Studies Press Canberra 1994 p. 57



‘mistakes’ to the early periods of dispossession and marginalisation that occurred. As commented by Senator John Herron, ‘you’ve got to put the past behind you’.<sup>11</sup> Such attitudes conflict with the theory of public policy evaluation. If the intention of public policy evaluation is the improvement of policymaking, then an understanding of how the present was created is essential.<sup>12</sup>

The process of evaluation plays a vital role within the public policy cycle. Primarily, the overall effect of the evaluation stage is to ensure government accountability by analysing the effectiveness of government policy. This enables government to study whether or not a particular policy is meeting its stated objectives. That is, government and the public may be placed in a position to examine, and possibly confirm, whether the policy strategies are consistent with the policy objectives.

However, the importance of evaluation is not limited to reporting on the impact of policy. Recommendations that may result from the evaluation stage have influence upon other stages within the public policy cycle such as problem identification, policy formulation and policy implementation. Evaluation can have this effect because it operates and introduces another perspective, that is, praxis. The evaluation stage addresses the working reality of a policy as it flows through the machinery of government, reaches the target group and assesses the effects of that policy on the particular group.

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<sup>11</sup> McCabe, H. “Heron vows to never say sorry”, The Daily Telegraph, 23<sup>rd</sup> October 1998, p. 2

<sup>12</sup> Anderson, C.W. “Political Philosophy, Practical Reason, and Policy Analysis” in Confronting Values in Policy Analysis, (eds) Frank Fischer & John Forester, Sage Publications. 1987 p.22

Critical to the evaluation process is the distinction between policy outputs and policy impact. Policy outputs relate to the observable indicators of what it is that governments do. Policy impact refers to the extent to which a policy output has accomplished its stipulated goals.<sup>13</sup> Consequently, interrelated methods of evaluation research have emerged from this distinction.

To successfully contribute in the public policy cycle, evaluation activities must be organised around the four questions of what, how, when and by whom evaluation should be conducted.<sup>14</sup> However, even before commencing evaluation activities, it is important to remove as many assumptions as possible from the process. A prevailing myth among many laypersons is that once government sets its mind to do something and allocates sufficient funds, its goals will be achieved - at least in great part.<sup>15</sup>

Assumptions must first be identified as assumptions.

Such an opportunity exists in policy evaluation. Policy evaluation attempts to assess the impact of a program or policy on the problem.<sup>16</sup> May describes this method as policy learning.<sup>17</sup> As argued by Howlett and Ramish, the greatest benefit of policy evaluation is not the direct results that it generates but the process of policy learning that accompanies it.<sup>18</sup> Nachmias argues,

At the heart of all policy evaluation research activities is the idea of causality;

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<sup>13</sup> Nachmias, D. Public Policy Evaluation Approaches and Methods, St Martins Press New York 1979

<sup>14</sup> Hasan, A. "Evaluation Of Employment, Training And Social Programmes: An Overview Of Issues", in Evaluating Labour Market And Social Programmes, OECD Paris 1991.

<sup>15</sup> Nachmias, D. Public Policy Evaluation Approaches and Methods, St Martins Press New York 1979 p. 2

<sup>16</sup> Bridgman, P. & Davis, G. Australian Policy Handbook, St Leonards: Allen & Unwin 1998 and Bingham, R. & Felbinger, C. Evaluation in Practice: A Methodological Approach, Longman new York, 1989.

<sup>17</sup> May, P. "Policy Learning and Failure", Journal of Public Policy, Vol. 12 No.4 1992

<sup>18</sup> Howlett, M. & Ramesh, M. Studying Public Policy: Policy Cycles and Policy Subsystems, Toronto: Oxford University Press, 1995 p. 170

that is, a policy is expected to produce a change in the target population in the direction and of the magnitude intended by the policy makers.<sup>19</sup>

However, it should not be assumed that policy evaluation methods would expose structural weaknesses if policy goals and objectives are maintained as the benchmark for evaluation. Policy makers may learn that a certain program does or does not achieve certain objectives, but how would this inform policy makers about the adequacy of the objectives being pursued?<sup>20</sup> While it may create opportunities for changes relating to processes and people, structural impediments may be largely ignored. Underpinning these assumptions is the methodology used to define the problem. All policy analysis methodologies contain certain assumptions about what issues are worth analyzing, what facts are important to look at, what the public good consists of, and so on, and all of these assumptions result in giving a normative slant to the final policy recommendations. To be clear, the argument here is not that analysts may be personally biased but that the analytic methodologies themselves are.<sup>21</sup>

Anderson argues that because policy analysis derives from political philosophy, it is relativistic and contextual.<sup>22</sup> It is an argument consistent with Galligan's description of political culture and its influence in the design of administrative structures. To further illustrate these two points, Australia's political philosophy is grounded in a liberal democratic tradition. The major political protagonists of this tradition are

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<sup>19</sup> Nachmias, D. Public Policy Evaluation Approaches and Methods, St Martins Press New York 1979 p. 7

<sup>20</sup> Dery, D. Problem Definition in Policy Analysis, University Press of Kansas, 1984, p. 115

<sup>21</sup> Amy, D.J. "Can Policy Analysis Be Ethical", in Confronting Values in Policy Analysis (eds) Fischer, F. & Forester, J. Sage Publications 1987, p. 49

<sup>22</sup> Anderson, C.W. "Political Philosophy, Practical Reason, and Policy Analysis" in Confronting Values in Policy Analysis (eds) Fischer, F. & Forester, J. Sage Publications 1987, p. 26

represented by the political Left and Right of Australian politics. Although the various political parties in Australia present alternative reform models to redress the 'Aboriginal problem', these proposed reforms are limited by the liberal democratic tradition that bound them.

The critical point here is the context within which problem definition occurs. If the task of the policy analyst is to formulate the problem, the context within which this formulation occurs impacts on the kinds of solutions proposed. While there are differences and varied forms of policy analysis, these differences occur within a shared philosophical context. This is consistent with open systems of policy analysis where external influences or differences have opportunities for expression. That is, in open systems it should always be possible to end up somewhere other than where one began.<sup>23</sup>

Establishing this discourse is, however, problematic due to the many dimensions of public administration. Esman discusses the multi-dimensional aspects of public administration in influencing social, political and cultural perspectives within society grouping them into major categories such as economic growth, equity, capacity, and empowerment.<sup>24</sup> These dimensions are consistent with the administrative theory of Bjur and Zomorrodian.<sup>25</sup> They define administrative theory as referring to the conceptual descriptions of how the administrative system is organised, how functional roles and relationships are defined within the institutions responsible for achieving

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<sup>23</sup> Amy, D.J. "Can Policy Analysis Be Ethical", in Confronting Values in Policy Analysis (eds) Fischer, F. & Forester, J. Sage Publications 1987, p. 42

<sup>24</sup> Esman, M. Management Dimensions of Development: Perspectives and Strategies, Kumarian Press, USA 1991

<sup>25</sup> Bjur, W. & Zomorrodian, A. "Towards Indigenous Theories of Administration: An International Perspective", International Review of Administrative Sciences 52, No. 4 1986

societal goals, and how people are engaged in such functions and relationships within the organisation.

These descriptions are influenced by cultural assumptions that formulate a society's worldview. Esman promotes Western values of social justice, which are inseparable from the ideals of equality of opportunity. To give these abstractions some substance we need to ask: what does poverty look like? What does opportunity look like? Are such ideals universal concepts that can be defined with substantial universal agreement? External influences that are grounded in a context that situates Aboriginal people in their culture and recognises them as Aboriginal people, can not be validated by these systems. Aboriginal people do not share mainstream Australia's philosophical context when they articulate responses to issues that confront them as a collective group.

If problem formulation is bound by the political context, does this formulation merely restrict the range of choice? This is a question that Aboriginal people need to, but rarely consider. That is, prescriptive options or incremental probability should not frame such considerations. To do so further induces Aboriginal people to be subservient to the reality of mainstream Australia and the values that shape this reality. To define a problem is to choose what goals or values to aim at, what values to sacrifice, what counts as a solution, and what kind of means to consider.<sup>26</sup> The existing power relationship between Aboriginal people and government and the mechanisms used to sustain this relationship indicate that Aboriginal values, goals, rights and interests are largely excluded from this critical phase of problem definition.

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<sup>26</sup> Dery, D. Problem Definition in Policy Analysis, University Press of Kansas, 1984, p.116

As argued by Dery, if the conception of the problem is wrong, the solution to the problem as conceived will not solve the problem, as it exists.<sup>27</sup> In a context framed by Australian political culture, policy formulation simply provides the promotion of new strategies for old ideas.

In raising key deficiencies in contemporary arguments used to explain consistent policy failure, this paper examines existing problem definition processes. A common aspect in these arguments is that the evaluation of failing policy performance in Aboriginal affairs is restricted to processes within political and administrative structures. This attention to process ignores the relationship between structures and processes. That is, processes exist and operate within structures designed and influenced by values. Whether they are political, administrative or legal, these institutions reflect, reinforce and produce outcomes that are consistent with the white Australian values upon which they are based.

This lack of attention to the values that shape and drive political and administrative institutions diminishes not only the capacity to critically analyse the structures themselves, but also, the capacity to understand the construction of problems; the issues of causality. The repercussions of this blind spot in existing problem-identification and evaluation exercises, is that structural deficiencies are excluded from re-examination. That is, the intended outcomes of solutions currently offered to Aboriginal people are accepted as appropriate. But when these solutions fail to deliver the 'expected change' the problem is investigated at the level of implementation. At this level, the only elements that can be changed are process and

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<sup>27</sup> Dery, D. Problem Definition in Policy Analysis, University Press of Kansas, 1984, p.4

strategies.

Ackoff argues solutions to problems become obsolete even if the problems to which they are addressed do not.<sup>28</sup> Problem definition therefore needs to respond to the structural deficiencies that shape and define a ‘problem’, rather than the symptoms such deficiencies produce. This is a clear indication that the conceptions of problems need to be considered at a level much deeper than the administrative process of application where interventionist strategies can be initiated.

The emphasis for policy evaluation is therefore to shift the focus of evaluation activity away from what a policy is doing, towards why the policy was activated. This provides the opportunities for policy learning. May describes policy learning in two forms, as instrumental learning and social policy learning.<sup>29</sup> Instrumental learning focuses upon the implementation designs of policies and programs. Social policy learning considers the social construction of policy problems. It is the area of social policy learning that is of interest here. If we are to seriously evaluate the issue of causality, then the processes used to identify the construction of social problems must also be exposed to re-examination.

Fischer argues that changing such approaches moves the process of evaluation from situational validation to systems - level vindication as a move from a first-to second-order evaluation.<sup>30</sup> In essence, the essential task is a reappraisal of the normative. This approach is consistent with the arguments Amy presents for the inclusion of ethics in policy analysis. In particular, the methodology associated with problem

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<sup>28</sup> cited in William M. Dunn, Public Policy Analysis, Prentice Hall, 1994 p. 141

<sup>29</sup> May, P. “Policy Learning and Failure”, Journal of Public Policy, Vol. 12 No.4 1992

definition. Amy describes ethical analysis as involving the examination of clashing normative perspectives'.<sup>31</sup>

Yet despite the efforts of Aboriginal and non-Aboriginal challenges to the Australian normative in political discourses, public administrators have been reluctant to pursue or encapsulate such a debate. Impeding such discussion is the persistence of mainstream political and administrative institutions to consider Aboriginal people in an 'all Australian' context.

How then, have these values and dimensions been upheld and applied to Australia's public administration in Aboriginal affairs? It is evident that under utilitarian practices, Aboriginal people in Australia are excluded from defining the values that the political system and its instruments are charged to effect, while at the same time Aboriginal people are 'considered' to be included in the acceptance of these values. Consequently, Aboriginal people have been encouraged to adapt to programs and administrative structures designed by non-Aboriginal perspectives. It is an approach that has yielded few successes.

Adapting reform to indigenous needs had merely resulted in the adjustments of techniques at the periphery. Western approaches should be more concerned with ideology and thorough going societal changes not just management.<sup>32</sup>

A recent challenge was clearly articulated by the Royal Commission into Aboriginal Deaths in Custody. However, public policy in Aboriginal affairs has been unable to meet this challenge on the normative. In fact, the Report itself contributes to this

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<sup>30</sup> Fischer, F. *Evaluating Public Policy*, Nelson-Hall Publishers. Chicago 1995 p. 59

<sup>31</sup> Amy, D. J. "Can Policy Analysis be Ethical", in *Confronting Values in Policy Analysis*, (eds) Frank Fischer & John Forester, Sage Publications. 1987 p. 54

<sup>32</sup> Caiden, G. *Administrative Reform Comes of Age*, Walter de Gruyter Berlin 1991 p. 58



inactivity with a qualifying comment that suggests the problems confronting Aboriginal people are not particular to Aboriginal people.<sup>33</sup> Despite the earlier description by Wooten on past government practices intent on conforming Aboriginal people and the history associated with this intent, there is a clear intention to umbrella Aboriginal and non-Aboriginal issues collectively. Consequently, causality becomes irrelevant as an indicator for possible solutions. This situation reflects how policy evaluation can be limited if confined to “expected changes” as argued by Nachmias. It confines the understanding of issues to process, as identified by Caiden, and leads to generalised comments grasping for answers.

The issues in understanding the social construction of problems, illustrates the efforts yet to be achieved in public policy evaluation in relation to Aboriginal issues in Australia. Current policy evaluation practices still confined themselves to benchmarks set by the stated policy goals and objectives. As a result, governments continue to promote policies that reflect mainstream values in the context of which they are understood. That is, despite their values and intentions, they are bound by the cultural assumptions of their intellectual context.<sup>34</sup>

### **What is a problem?**

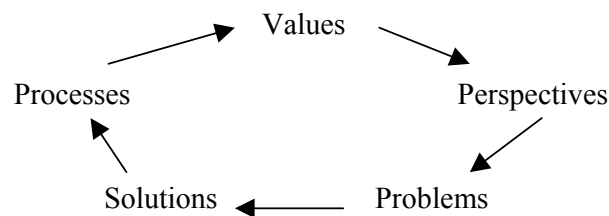
Foremost to understanding the social construction of problems, are the processes used to determine what is a problem. A problem can be defined as a difference of perspective. Perspectives are shaped by the values we hold. That is, values give us our worldview. But values also provide solutions to ‘problems’ so that the balance of

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<sup>33</sup> Wooten, J. Royal Commission into Aboriginal Deaths in Custody: Regional Report on Inquiry in New South Wales, Victoria and Tasmania. Australian Government Publishing Service. Canberra 1991 p. 26

<sup>34</sup> Stokes, G. & Yardi, R. The Political Thought of C.D. Rowley (unpublished paper) 1998 p. 2

the worldview can be restored. Solutions therefore require processes that legitimise the values used to determine the ‘problem’. Aboriginal people are encouraged to enter into this discourse, and we do on issues such as native title, substance abuse, employment, cultural heritage and law and order. However, the values that this discourse upholds are not Aboriginal, they belong to mainstream. Thus, the solutions will not be, and cannot be Aboriginal solutions. Basically, what is being maintained is a discourse of authenticity.<sup>35</sup> It is a discourse that authenticates the values used to determine the problem.



Consequently, existing practices seek the involvement of Aboriginal people into structures and process that are directed by mainstream values. Although this may reflect notions of procedural fairness within administrative practice, it does not equate with a recognition of Aboriginal people as Aboriginal people. Such practices are familiar with the process of institutional assimilation and further consolidate the myth of *terra nullius* in administrative practice.

Operating in a political context framed by white Australian values, public administration has become a tool of disempowerment and assimilation. The problem-definition processes used by political and administrative institutions perpetuate Aboriginal engagement on the periphery of issues through these participatory

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<sup>35</sup> Rose, D. B. “Histories and Rituals: Land Claims in the Territory”, in *Indigenous Legal Issues*, Heather McRae, Garth Nettheim, Laura Beacroft. LBC Information Services, Second Edition. Sydney 1997 p.187

management arrangements. This is a clear reflection of how problem structuring is embedded in a political process where ‘the definition of alternatives is the supreme instrument of power’.<sup>36</sup> The formulation of a problem is heavily influenced by the assumptions that different policy stakeholders-legislators, agency administrators, business leaders, consumer groups bring to a given problem situation. In turn, different formulations of the problem shape the ways that policy issues are defined.<sup>37</sup> But it is the way in which these formulations themselves are defined that requires closer scrutiny from policy makers in Aboriginal affairs.

Existing methods of problem definition consider Aboriginal people and the issues impacting upon them from the perspective of an ‘all Australian’ context. Because this politics of non-recognition places Aboriginal people within mainstream structures, the historical process of disempowerment, referred to by the Royal Commission into Aboriginal Deaths in Custody, is perpetuated. Assimilationist practices are also free to dominate, operating as they do, within a discourse of authenticity. This discourse has promoted the establishment of participatory models enabling institutional assimilationist practices to occur and internal assimilation to emerge. For such mechanisms to work effectively, the friction between causality and commonality of social problems needs to be minimised. This has been achieved by locating issues confronting Aboriginal people in a contemporary context to the extent that history becomes irrelevant. In the business of providing solutions maybe there should be more critical analysis in determining the problem. As argued by Dery, apparently it takes more than ideas in order to change policy.<sup>38</sup>

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<sup>36</sup> Schattschneider, E. E. *The Semi sovereign People* Holt, Rinehart and Winston, New York, 1960 p.68

<sup>37</sup> William M. Dunn, *Public Policy Analysis*, Prentice Hall, 1994 p. 143

<sup>38</sup> Dery, D. *Problem Definition in Policy Analysis*, University Press of Kansas, 1984, p.119

### CHAPTER 3: RECONSTRUCTING THE ABORIGINAL AUSTRALIAN

From the beginning of white invasion, the very category ‘Aborigine’ assisted in the process of colonisation. By categorising Aboriginal people as a ‘primordial or primitive other’, whites also asserted the superiority of their own collective European identity.<sup>39</sup> Such conceptions provided part of the rationale for the dispossession and removal of Aboriginal people from their lands, a violent attempt of elimination, and the denial of their political rights.<sup>40</sup> Although much has been written by Aboriginal and non-Aboriginal authors, about Aboriginal attempts to alter these conceptions, it remains questionable if these descriptions have offered ‘real’, as opposed to ‘imagined’ insights, in articulating the relationships between Aboriginal and non-Aboriginal Australia. What has been described and perceived as ‘real’ by these authors, may in fact be a product about Aboriginal people, which was originally constructed from the imagination of white Australians. Jack Davis wrote;

For the average Aboriginal today whether he is tribalised or not, life is one continuous struggle. Although he pays his taxes, if he is a town or city dweller the electric light and rental bills, he is at a distinct disadvantage because of his inheritance of his Aboriginality from the White Man’s Past.<sup>41</sup>

This inheritance has underpinned Aboriginal political movements from the 1930s to the 1990s. In the 1930s such movements pursued their efforts on ‘similarities’ with non-Aboriginal Australians. The primary issues for these writers was the widespread denial of justice and equality, and the limited conceptions of Aboriginal identity upon

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<sup>39</sup> Stokes, G. “Citizenship and Aboriginality: Two Conceptions of identity in Aboriginal Political Thought” in The Politics of Identity in Australia, (ed) Geoffrey Stokes, Cambridge University Press 1997 p. 158

<sup>40</sup> *ibid*

<sup>41</sup> Stokes, G. “Citizenship and Aboriginality: Two Conceptions of identity in Aboriginal Political Thought” in The Politics of Identity in Australia, (ed) Geoffrey Stokes, Cambridge University Press 1997 p. 165

which state governments based their policies.<sup>42</sup> It was a political movement looking for rights, that is citizenship, that could be bestowed. However, after the 1967 referendum, Aboriginal political movements situated themselves in the discourse of ‘difference’. The Aboriginal Tent Embassy, the Aboriginal flag and more recently, native title, are examples of this expression.

But is this difference theirs or ours? Are we still relying upon the Aboriginality we ‘inherited’ from the white man’s past to identify ourselves? The current representation of Aboriginality, while speaking the rhetoric of ‘difference’, situates Aboriginal people in the position of ‘other’. It is continually delivered from a position of subordination to that of white Australia. That is, the ‘Aboriginal position’ is presented in a way that has been influenced by the capacity and commitment of government to recognise and respond to our assertions as Aboriginal people. As discussed in the previous chapter, if the political reality has such an influence in shaping Aboriginal positions then it seems highly unlikely that what is being proposed is not, in a pure form, an Aboriginal position. Therefore, such pragmatic approaches operating under the guise of assertions of ‘Aboriginality’ are in actual fact, representations coming from within the discourse of the ‘other’. They represent a movement not so much about the advancement of Aboriginality that has ownership, authorship and authority in Aboriginal people themselves, but a movement that could be described as false radicalism.

What is important here is the way in which we understand and promote our

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<sup>42</sup> Stokes, G. “Citizenship and Aboriginality: Two Conceptions of identity in Aboriginal Political Thought” in The Politics of Identity in Australia, (ed) Geoffrey Stokes, Cambridge University Press 1997 p. 160

‘difference’. In particular, looking at ourselves from the point of view of our own definition and authority. That is: as subjects. The discourse of ‘difference’ is explicitly tied to the status of Aboriginal people as described by Michael Dodson,

...the fundamental rationale for current policies of social justice should not rest on the past absence of rights or on plain citizenship entitlements. It should rest on the special identity and entitlements of indigenous Australians by virtue of our status as indigenous peoples.<sup>43</sup>

Unfortunately, our representations of ‘Aboriginality’ undermine the very status upon which we articulate our difference because we place ourselves within their paradigms of ‘object’ and ‘other’. For example, on principles of empowerment we continually seek to have control and ownership of decision-making processes based on our status as Aboriginal people. However, when we apply these principles we avail ourselves to being involved in mainstream decision-making structures. When we do become involved, we share our decision-making capacities; we have no control or ownership over them. We continue to accept such outcomes largely because we have yet to fully articulate ourselves outside of ‘their’ paradigms. Subsequently, all we really achieve is to provide credibility to processes whose structural characteristics are influenced by the discourse of the ‘other’.

Within these paradigms, Aboriginal participation is always promoted in the positive in the belief that it is better to be involved in the process to ensure some input.

However, the limited influence of this input not only leads to a contamination of the Aboriginal perspective, but it also serves to legitimise white Australian definitions and processes of Aboriginality. If we continue to present a description of ourselves

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<sup>43</sup> Dodson, P. “Public Administration of Aboriginal Affairs has not been Humane Enough” Canberra Bulletin of Public Administration, No. 73 September 1993 p. 9

that has been constructed in the discourse of the 'other', we only serve to legitimate that discourse and our position within it.

As a people we need to develop approaches that enable us to value the gains of Aboriginal participation in administrative arrangements. This requires a shift in evaluation practices where the benchmarks are set not by white Australia, but by us. Unfortunately, the articulation of our own Aboriginality outside of such descriptions represents the developments we have yet to make. To do this successfully requires of us an understanding of how modern practices of containment are articulated and maintained by government. As Hart argues,

...new technological advances and the materialism it generated should not be confused with a sea change in ideologies that suggest the colonised do not endure the same oppressive regime as in the beginning, the middle or in the present historical context. Postcolonialism merely represents another calibration of politics that nomadically hunts and gathers inside the discursive landscape established by colonialism and the dispossession of the invaded...<sup>44</sup>

Aboriginal people continually find themselves enmeshed in the terms of a debate with regard to rights that exist above those entitlements found within citizenship, yet governments respond with legislative frameworks of containment, operating through processes that reduce the right to a right that *is bestowed to* Aboriginal people. Such outcomes represent the difficulty we have in articulating a difference, which is ours. Many, if not all of our current representations by Aboriginal political movements, organisations and individuals, bring with them a heavy emphasis that describes an Aboriginal position that situates itself as the 'other'. This is a reactive measure to existing practices that operates from within mainstream paradigms that allow us to be

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<sup>44</sup> Hart, V. unpublished paper 1998 p. 9

accommodated, contained, suppressed and acted upon as 'objects'.

There has been much description of Aboriginal approaches to balance this relationship, however, until recent times, little attention has been focused upon how the perceptions of mainstream Australia are maintained and considered inappropriate. In creating these perceptions *utilitarianism*, *equality* and *egalitarianism*, have been key positions taken by white Australia to deter Aboriginal movements of resistance to assimilation and facilitate mainstream practices of containment.

The shortcomings evident in the administration of Aboriginal affairs have an historical basis. The influence of Benthamism as the guiding tenor of the penal and colonial enterprise in Australia is clearly evident. Collins gives a closer examination of Bentham's philosophy supporting the assertions of other writers to the prominence of Benthamism in shaping Australia's political thought.<sup>45</sup> Utilitarianism, legalism and positivism are all significant aspects of this philosophy. Hancock, provides the classic description of Australian political culture:

Australian democracy has come to look upon the state as a vast public utility, whose duty it is to provide the greatest happiness for the greatest number.<sup>46</sup>

This utilitarian character is a major influence of Australia's modern political system. However, the quantitative nature of this political culture negates opportunities for Aboriginal people as a minority group to define their roles and themselves. This politics of exclusion indicates how the operational assumptions influencing

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<sup>45</sup> Collins, H. "Political Ideology in Australia: The Distinctiveness of a Benthamite Society", in Australia: The Daedalus Symposium (ed) Stephen Graubar, Australia. 1985

<sup>46</sup> cited in Rowse, T. "Political Culture: A Concept and Its ideologies" in Critical Essays in Australian Politics, Graeme Duncan Edward Arnold Pty Ltd Melbourne 1978 p. 6



administrative practices are, in themselves, reductionist. Unfortunately, there is little recognition of the major contribution these assumptions have had in the failure of administrative practices to respond positively towards Aboriginal interests, definitions and values.

The utilitarian psychology in Australia legitimizes the pursuit of interest, while the dominance of the ideology negates the possibility of a genuine battle of ideas.<sup>47</sup>

This platform of utilitarianism has become unquestioned and embedded within Australian political thought from which notions of equality and egalitarianism arise. As fundamental premises they reveal themselves in many forms, but their most blatant displays occur during debates on Aboriginal land rights under the banner of 'all australians'. Under this banner, Aboriginal people are mutually included as members of the wider Australian community, while at the same time socially and politically excluded as Aboriginal people. It is a clear reflection of the power relationship that exists between Aboriginal people and government. More precisely, it illustrates the capacity of the dominant group to define the existence of the 'Other' and subject the 'Other' to these descriptions.

Power is exercised epistemologically in the dual practices of naming and evaluating...These practices of naming and knowledge construction deny all autonomy to those so named and imagined, extending power, control, authority and domination over them...<sup>48</sup>

Goldberg's description enables Aboriginal people to place in context the comments by Jack Davis concerning whose Aboriginality we, as a collective group, have been

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<sup>47</sup> Collins, H. "Political Ideology in Australia: The Distinctiveness of a Benthamite Society" in Australia: The Daedalus Symposium, (ed) Stephen Graubar, Angus & Robertson. Australia 1985 p. 155

<sup>48</sup> Goldberg, D. Racist Culture: Philosophy and the Politics of Meaning, Blackwell, Cambridge USA 1993 p. 150

articulating. In reference to the production of knowledge, Goldberg acknowledges the role of philosophical thinking in establishing racialised discourse and the role of philosophical thinking in both critique and articulation of one's own discourse. In Australia, utilitarianism, liberalism and equality are paradigms defined and advanced by white Australia as the norms within which racialised discourse has been conducted.

Goldberg argues that the articulation of race within these paradigms has been normalised through modernity. Goldberg refers to modernity as a general period emerging from the sixteenth century in the historical formation that has come to be called 'the West'.<sup>49</sup> The modern project has emerged in terms of a broad sweep of social and intellectual conditions such as the commodification and capital accumulation of market based societies and the political conception of rational self-interested subjects. Modernity manifests itself in the fixing of the social in terms of bureaucracy, of the political in terms of the law, and of the economic in terms of the laws of the market.<sup>50</sup> Basic to modernity's conception is the nation state as Subject whose social subjects are individuals divorced from the particularities of identity and culture. It is the rights of these social subjects that dictate the concerns of liberalism.<sup>51</sup> Individualism and equality are key foundations of its principles.

Yet, neither the paradigms, rights nor self-definition has been authored by Aboriginal people as subjects. Utilitarianism would seem to dictate that the rights of the 'other' are consistent with the rights of 'all australians'. The discourse of difference asserted by the 'other' therefore must take the form of asserting Aboriginal rights based on

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<sup>49</sup> Goldberg, D. Racist Culture: Philosophy and the Politics of Meaning, Blackwell, Cambridge USA 1993 p. 3

<sup>50</sup> *ibid*

<sup>51</sup> *ibid*

difference that exceeds base egalitarian levels. What is needed for the 'other', is a fundamental change in discourse in which Aboriginal people constitute themselves as subjects rather than as objects or things that can be placed in relation to white Australia. A subject defines itself by its own authority. A group as subject defines who 'they' are and this dialectically sets up the 'other/s' in relation to the subject. This act of self-definition and assertion creates the subject. The subject may aggress against the 'other', may liaise with the 'other', tolerate the 'other', and acknowledge the 'other' in its own terms, eg. equality, discrimination, or special consideration. At no time however, does the subject have to accept the 'other/s' paradigms and self-definition. The task remains for the 'other' to refuse to position itself in the subject's dialectical and discourse of difference and to reposition itself outside this discourse and to define itself as subject.

Issues surrounding the Royal Commission into Aboriginal Deaths in Custody illustrate Aboriginal compliance to accept descriptions of Aboriginality and a reluctance to position themselves outside of such descriptions. The Royal Commission identified that the issues confronting Aboriginal Australians were inter-related. Despite identifying these lateral relationships, issues such as unemployment, health, substance abuse and education are continually espoused as the underlying issues representing Aboriginal disadvantage. In responding to these social problems, governments have co-ordinated their responses through vertical structures, reflecting what they consider to be a 'whole of government approach' to address 'underlying issues'. This sort of response is indicative of Goldberg's representation of power. The underlying issues of non-recognition, disempowerment and assimilation operate laterally not vertically, nor does responding to the symptoms these influences have

shaped respond to the structural deficiencies already identified. Yet Aboriginal people have taken on the government's identification of not only what the problems are, but also how best to address them.

Under *terra nullius* social policy, government initiatives in the administration of Aboriginal affairs have merely undergone mechanical adjustments, designed to retain rather than challenge or advance the recognition of Aboriginal people as Aboriginal people. Aboriginal people are not recognised by white Australia and its institutions as Aboriginal people; we are not recognised as an Aboriginal race with our own cultural values. Although previous government policies and programs have been based upon a partial recognition of 'difference', it is not considered a 'difference' of exclusion. As Duffy argues,

It seems the only right Indigenous peoples in Australia have is the right to do what they want as long as it satisfies the non-Indigenous ways of doing things.<sup>52</sup>

For all intent and purposes, governments have created conceptions of morality and in so doing decided who is capable of moral action and who is subjected to it, who is capable of moral autonomy and who should be directed.<sup>53</sup>

The rights of Aboriginal people to self-determination was a major underlying theme of Australian public policy in Aboriginal affairs prior to the election of the Howard

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<sup>52</sup> Duffy, M. "Back to assimilation? What's new!" Land Rights Queensland June-July 1996 p. 19

<sup>53</sup> Goldberg, D. Racist Culture: Philosophy and the Politics of Meaning, Blackwell, Cambridge USA 1993 p. 148

Government. Article three of the Draft Declaration on the Rights of Indigenous Peoples states,

Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.<sup>54</sup>

From an Aboriginal perspective the principle of self-determination is fundamentally based upon rights. However, the rights of Aboriginal people can not be recognised in government mechanisms that limit Aboriginal activity to a participatory and advisory role. Aboriginal interpretations of Australia's rhetoric for self-determination, would argue that governments have failed to translate successfully these rights into domestic policy. Jull comments that the view of indigenous peoples as more than objects of White 'good' works or control appears to be a true threshold.<sup>55</sup> This threshold will continue to exist while Australia's political and knowledge production institutions refuse to recognise the validity of Aboriginal knowledge and Aboriginality.

Admitting the other's subjectivity is at once to give up epistemological and political control; it is to admit scientific and administrative inefficiency.<sup>56</sup>

The Howard Coalition Government has moved away from self-determination as a platform for Aboriginal policy, and is currently pursuing strategies of economic independence and self-empowerment under a policy of full equality of opportunity.<sup>57</sup> For Aboriginal people this is not uncharted territory. Paul Hasluck Minister for Territories in the Menzies' Governments from 1951 until 1966, promoted full equality

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<sup>54</sup> An Interpretation and Explanation of: The Draft Declaration on The Rights of Indigenous Peoples, A Report for the Australian National Internship Program and the Department of Foreign Affairs and Trade, June 1995

<sup>55</sup> Jull, P. Australian Nationhood and Outback Indigenous Peoples, North Australian Research Unit, Australian National University. Darwin 1991 p. 21

<sup>56</sup> Goldberg, D. Racist Culture: Philosophy and the Politics of Meaning, Blackwell, Cambridge USA 1993 p. 152

<sup>57</sup> Stramandinoli, G. "Herron's Plan: self-empowerment" in ATSIC News Summer 1997 p.7

of opportunity under assimilationist policies in the 1960s. In 1926, a report from the New South Wales Aboriginal Welfare Board made its intentions clear as to the placement of Aboriginal children with white families by stating;

...the superior standard of life would pave the way for the absorption of these people into the general population.<sup>58</sup>

We, as a people and participants, have experienced the application of the current Federal Government policies towards Aboriginal people. The question we need to be asking is how does the context of current policies differ from those of the past?

Goldberg's critique provides an alternative analysis towards understanding not only how the Australian experience has evolved, but also how it is maintained. It describes and identifies the processes of non-recognition or 'irrelevant categories' of past liberal moral theorists from which Australian egalitarianism has emerged. More importantly, in association with our own experiences, it provides another tool to critique whether or not the 'difference' Aboriginal people have been articulating is indeed an 'Aboriginality' inherited from the white man's past.

If Australia is to be progressive in establishing new institutions that focus upon actively supporting the principles of self-determination as understood by Aboriginal people, there must be clear definition and understanding of the terms of reference. Without this commitment, governments will continue to tinker at the periphery with technical-administrative measures that only serve to promote Aboriginal dependency to bureaucratic mechanisms, rather than create effective new institutions operating from the basis of Aboriginal autonomy. As a consequence of systemic influences

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<sup>58</sup> Read, P. "The Stolen Generations: The Removal of Aboriginal Children in N.S.W. 1883-1969", Occasional paper No.1 1982 p. 2

identified by the Royal Commission into Aboriginal Deaths in Custody, the instruments for recognition and self-definition cannot be singular or local in their response.

Fundamental to creating that change is the recognition of Aboriginal people as a people, as a race, as a culture. The description illustrated by Mathews in chapter One demonstrates the inability of the existing system to relate to ideas or a currency other than its own. In the political discussion between government and Aboriginal people, the exchange between black and white is grounded in an all white currency – that of assimilation - because this is the only currency they understand. As the dominant cultural group, they are empowered to state what the medium of exchange will be; what ‘currency’ the process is going to use. When Aboriginal people enter these processes, they encounter the reality that only one currency can be dealt in, and *it is not Aboriginal*. This alienates Aboriginal people from [our] own valuables, [our] own non-negotiables and seduces Aboriginal people to give these up in exchange for the opportunity to spend the white currency.<sup>59</sup> Under current administrative practices, Aboriginal people make themselves available to processes that can only imagine the Aboriginal reality. I say imagined, because no recognition of Aboriginal people can exist outside the white frames of reference that direct mainstream legal, political and social institutions seeking Aboriginal involvement.

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<sup>59</sup> Lynda Brownsey August 1999, private correspondence in possession of the author.

## CHAPTER 4: ABORIGINAL DEATHS IN CUSTODY

The Australian Government has made a substantial investment to address the over-representation of Aboriginal people in the criminal justice system. Following the Royal Commission into Aboriginal Deaths in Custody and consideration by Commonwealth and State Governments towards implementing the Commission's 339 recommendations, little evidence seems to have been made in reducing Aboriginal incarceration rates and Aboriginal deaths in custody. The Commission's report identified that the causes for Aboriginal over-representation were systemic. It also identified two levels at which to address these systemic influences; a local response through the criminal justice system or alternatively, to tackle the fundamental issues - the relationship between indigenous people and government - created by an historical process of Aboriginal disempowerment.

Despite an injection of funds in excess of \$500 million, Aboriginal incarceration rates have risen nationally. The attention of Commonwealth and State Government programs designed to divert Aboriginal and Torres Strait Islanders from the criminal justice system, have in fact seen incarceration rates rise. Statistics kept by the Australian Institute of Criminology, show that the numbers of indigenous prisoners has risen from 2166 in 1991 to 3750 in 1998.<sup>60</sup> Given that the fundamental objective of the recommendations of the Royal Commission into Aboriginal Deaths in Custody was to reduce incarceration rates, the assessment of current practices could only be reviewed as failing.

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<sup>60</sup> Australian Institute of Criminology, [http://www.aic.gov.au/research/corrections/stats/ti\\_137-ext/index.html](http://www.aic.gov.au/research/corrections/stats/ti_137-ext/index.html)



Popular explanations for these failings have confined themselves to questions about the commitment of government to not just implement the recommendations, but to implement them effectively. But are the recommendations themselves an appropriate response to the issues they were designed to redress?

The argument presented here is that the recommendations suggested by the Commission predominantly pursue a local response. That is, a response which is heavily activated within the criminal justice system. In this context, the recommendations can only service a need to sensitise points within this system which were seen to impact negatively on Aboriginal people. The starting position is therefore located within the criminal justice system, which realigns the way we differentiate between causes and symptoms.

Within public administration this is more commonly referred to as goal displacement. The fundamental objective of the Royal Commission's recommendations was to reduce incarceration rates; yet, government responses have directed their efforts towards stopping deaths in custody. The confusion is such that the establishment of new administrative mechanisms designed to incorporate Aboriginal participation are themselves contained within false parameters. In essence, the practical reality and application of this localised response is to apply band-aid treatment to internal administrative procedures in ignorance of the systemic nature of the cause. As a response, the recommendations limit the capacity of governments to address the fundamental issues as identified by the Commission's report.

## **Background**

The high incidence of Aboriginal deaths in police custody became an international embarrassment for the Australian government during the 1980s. To find out why these deaths were occurring, the federal government established a Royal Commission in October 1987. Commissioner Johnston explained that the task given to the Commission was to inquire into the deaths found to fall within jurisdiction and to enquire into any subsequent action taken in respect of each of those deaths including the conduct of coronial, police and other inquires and any other things that were not done but ought to have been done.<sup>61</sup> This Letters Patent was later amended after Commissioner Muirhead successfully argued that the task should not be limited to understanding how the deaths occurred, but to know why they died, that is, that for the purpose of reporting on any underlying issues associated with those deaths.<sup>62</sup> The Royal Commission proceeded to investigate the deaths of ninety-nine Aboriginal people that occurred in the custody of police or juvenile detention institutions between 1st January 1980 and 31st May 1989. At a substantial cost, the findings of this Commission were released in May 1991.

Central to the outcome of this investigation, was the identification and explanation of underlying issues. As stated earlier, these influences are represented by assimilationist practices, disempowerment and the non-recognition of Aboriginal people as Aboriginal people. This aspect is critical because it sets the framework underpinning the intentions of the recommendations. An integral component of this framework was the recognition that historical and systemic influences have shaped

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<sup>61</sup> Royal Commission into Aboriginal Deaths in Custody-National Report-Overview and Recommendations, Australian Government Publishing Service, Canberra 1991 p.2

<sup>62</sup> *ibid*

and determined contemporary issues that bring Aboriginal people into contact with the criminal justice system. These influences were sustained in mainstream political, legal and social institutions. From this background, the Report's conclusions can be summarised into three key findings. That;

- a) the causes for Aboriginal over-representation in the criminal justice system are both systemic and historical
- b) the empowerment of Aboriginal people is a basic requirement towards eliminating Aboriginal 'disadvantage' and non-Aboriginal domination
- c) changes to the criminal justice system alone will not have a significant impact on reducing incarceration rates

### **The Recommendations**

Since the Royal Commission handed down its findings and recommendations, there has been much bureaucratic activity but nothing in the way of positive results regarding lower incarceration rates. Current attempts to explain away these failings have commonly focused upon the lack of commitment by governments to implement the recommendations, or identifying shortcomings in the administrative processes by which recommendations themselves are implemented. The general findings of Cunneen and McDonald acknowledge the failure of governments to adequately implement recommendations, thus, contributing to unnecessary incarceration.<sup>63</sup> The findings of Dodson's Report identified the failure of State governments to implement recommendations of the Royal Commission into Aboriginal Deaths in Custody.<sup>64</sup>

At this level, examination of government responses is isolated to a problem of

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<sup>63</sup> Cunneen, C. & McDonald, D. Keeping Aboriginal and Torres Strait Islander People Out of Custody. Office of Public Affairs, ATSIC, Canberra. 1997.

<sup>64</sup> Indigenous Deaths in Custody 1989 – 1996, Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner. October 1996

implementation. From this position it can be argued that incarceration rates are increasing because recommendations are not being implemented, or not being implemented effectively. However, can this argument be sustained?

Dodson's Report identifies 118 recommendations from the Royal Commission's final Report breached by State and Territory governments. Of these 84 or 71% can only be effective with a pre-condition of incarceration. That is, to be implemented the recommendation requires the physical presence of an inmate. A further breakdown reveals that 26 or 22% require a death in custody before the recommendation can be effectively implemented. Of the remaining 34 recommendations, 24 become effective within the criminal justice system. These recommendations largely suggest alternative methods of operations within the criminal justice system. In total, the combinations of recommendations that require a pre-condition of incarceration and those that operate within the criminal justice system represent 108 (91%) of the 118 recommendations identified by Dodson's Report.

In Chapter 26 Vol. 4 of the Royal Commission into Aboriginal Deaths in Custody, it is emphasised that,

*...changes to the operation of the criminal justice system alone will not have a significant impact on the number of Aboriginal persons entering into custody or the number of those who die in custody...*<sup>65</sup>

Despite this emphasis, the recommendations examined in Dodson's report reveals a heavy concentration within the criminal justice system. Only a vivid imagination could conclude and argue that 'lack of commitment' to implement the

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<sup>65</sup> Royal Commission into Aboriginal Deaths in Custody, 1991. Vol. 4 Ch.26 p. 1

recommendations can be blamed for increasing rates of incarceration when incarceration is a predominate feature for their effective implementation.

Underlying these explanations is a belief that the recommendations are appropriate. In light of the evidence we need to reconsider our perceptions of why so little has been achieved. *Is the problem one of implementation? Or, Is the problem directly related to what is being implemented?*

To measure the capacity of the recommendations to respond to the key findings raised earlier, it needs to be identified where the recommendations themselves become activated. To maintain consistency with these key findings, recommendations are grouped into sections that identify,

- a) recommendations activated within the criminal justice system
- b) recommendations activated by government outside the criminal justice system
- c) recommendations involving Aboriginal participation with government outside the criminal justice system
- d) recommendations activated by Aboriginal people outside the criminal justice system.

The placement of recommendations within these categories identifies that of the 339 recommendations,

- a) 192 or 56.5% are activated within the criminal justice system
- b) 76 or 22.5% are activated by government outside the criminal justice system
- c) 69 or 20.5% involve Aboriginal participation with government outside the criminal justice system
- d) 2 or .5% activated by Aboriginal people outside the criminal justice system.

In this analysis 56.5% of the recommendations are activated within the criminal justice system. It then falls upon the remaining 43.5% to empower Aboriginal people and address the systemic and historical influences which bring Aboriginal people into

contact with the criminal justice system.

This analysis reveals that 22.5% of the total recommendations activated outside of the criminal justice system remain the prerogative of Commonwealth or State/Territory Governments. These recommendations do not require the input of Aboriginal people to initiate the implementation process. If the recommendations maintain that implementation is the sole prerogative of governments, it is difficult to imagine that somehow Aboriginal people are breaking down assimilationist practices, or empowering themselves within these processes. More importantly, where is the recognition of Aboriginal people as Aboriginal people if the power to initiate does not reside with them?

20.5% of recommendations activated outside of the criminal justice system seek Aboriginal involvement within mainstream decision-making structures. Participation in decision-making bodies is often seen as an empowering process, however, as discussed in the previous chapters, participation in mainstream institutions, under existing arrangements, excludes the representation of Aboriginal people as Aboriginal people. Nor do these arrangements reflect the context in which empowerment was described by Johnston who stated,

The thrust of this report is that the elimination of disadvantage requires an end of domination and an empowerment of Aboriginal people; that control of their lives of their communities must be returned to Aboriginal hands.<sup>66</sup>

In relation to empowerment, it is noticeable that what was considered to be the thrust of the report has produced 2 out of 339 recommendations that are activated by

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<sup>66</sup> Royal Commission into Aboriginal Deaths in Custody-National Report-Overview and Recommendations, Australian Government Publishing Service, Canberra 1991 p. 15

Aboriginal people themselves, that is, independent of government and separate from the criminal justice system.

### **The context for application**

This analysis clearly highlights inconsistencies between the key findings of the Royal Commission and the recommendations. Somewhere between penning the ‘thrust of the report’ and the drafting of recommendations, insights went missing. But it is not just where the recommendations direct the work of Aboriginal and non-Aboriginal people that betrays the Commission’s intention. It is also reflected in the organising of participatory arrangements between Aboriginal people and government. That is, how Aboriginal interests are framed for interaction with Government. The establishment of the Queensland Aboriginal Justice Advisory Committee will be used as a model to illustrate the issues asserted in this and previous chapters.

Recommendation 2 of the Royal Commission states;

That subject to the adoption by governments of this recommendation and the concurrence of Aboriginal communities and appropriate organisations, there be established in each State and Territory an independent Aboriginal Justice Advisory Committee to provide each government with advice on Aboriginal perceptions of criminal justice matters, and on the implementation of the recommendations of this report.

The Aboriginal Justice Advisory Committee in each State should be drawn from, and represent, a network of similar local or regionally based communities which can provide the State Advisory Committee with information of the views of Aboriginal people. It is most important that the views of people living outside the urban centres be incorporated.<sup>67</sup>

The Queensland Minister for Justice and Attorney General officially appointed the

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<sup>67</sup> Royal Commission into Aboriginal Deaths in Custody-National Report-Overview and Recommendations, Australian Government Publishing Service, Canberra 1991 p. 32

Queensland Aboriginal Justice Advisory Committee on May 31 1993. The five members of the committee are appointed for two-year terms, and operate under the following terms of reference:

- provide government with informed advice on Aboriginal and Torres Strait Islander views on criminal justice matters and on the implementation of the Royal Commission recommendations concerning the criminal justice system;
- propose changes to policies which affect the operation of the criminal justice system;
- develop programs for crime prevention and social control which enhance Aboriginal and Torres Strait Islander self-management and autonomy;
- develop and encourage programs which increase the recruitment of Aboriginal and Torres Strait Islander people to the staff of criminal justice agencies; and
- arrange for the dissemination on policies and programs between different agencies and between parallel bodies in different states <sup>68</sup>

It could be argued that the Queensland AJAC successfully met the requirements of the above terms of reference. The committee consulted with Aboriginal communities throughout the state so that they could be informed of criminal justice matters as they impact at the regional or local level.

The Committee also undertook a number of major projects including;

- Justices of the Peace Training Program
- Coroner's Act 1958 Review and Post-Death Investigations Submission
- Cross-Cultural Training for the Judiciary
- Customary Law Discussion paper
- investigated the administration of Juvenile Justice
- Criminal Justice and Aboriginal and Torres Strait Islander Women <sup>69</sup>

While these developments symbolise a greater awareness and response to the needs of

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<sup>68</sup> Report of the Aboriginal Justice Advisory Committee, 1995 p. 6

<sup>69</sup> *ibid*

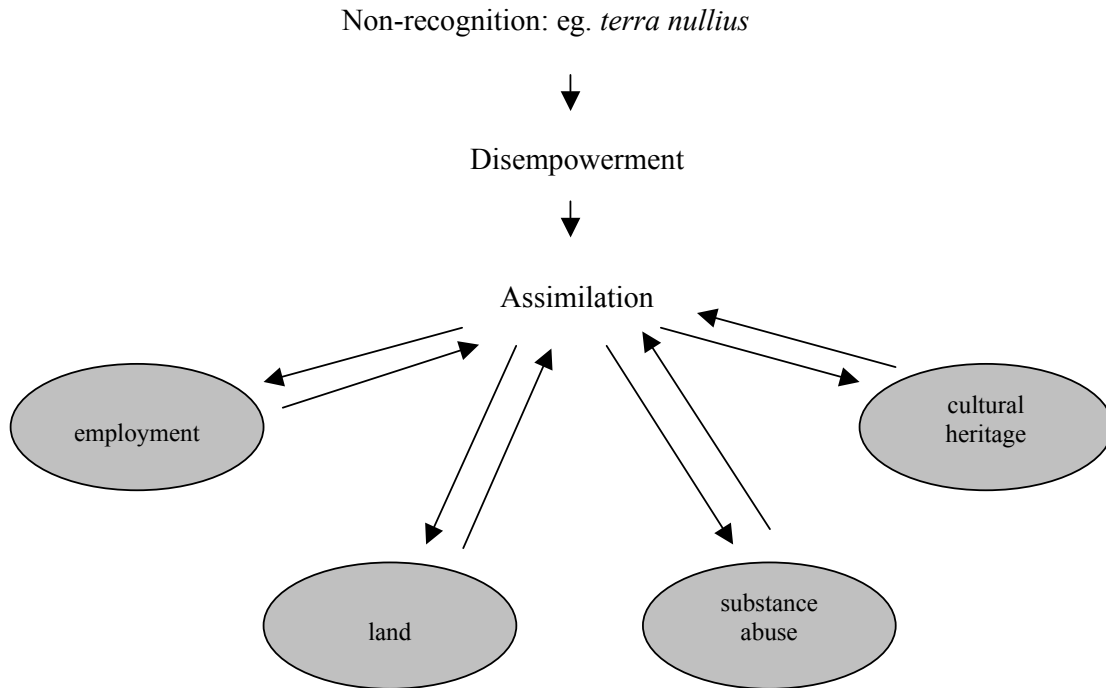


Aboriginal people as they interface with the criminal justice system, they do not support the key findings or the thrust of the Royal Commission's Report.

The language within the terms of reference upon which the Queensland AJAC operated, implies that Aboriginal people take a passive position to the implementation of the Commission's recommendations, while the government plays the pro-active role in determining how these recommendations will be implemented. Aboriginal people in this capacity provide, propose, develop and arrange. These are not words that promote empowerment as referred to by Johnston. The practical reality is government defines the policy goals, defines the context in which the goals are to be pursued and the roles and responsibilities of Aboriginal people in pursuing those goals in the prescribed context.

The issue of empowerment represents a critical component where clear inconsistencies can be established between recommendations and key findings of the Royal Commission. The arguments presented here have illustrated that the location of where recommendations are activated and the proposed framework of Aboriginal representation fails the Commission's own test regarding the description of what empowerment should look like. But this is not the only inconsistency. As commented in chapter one, the Royal Commission into Aboriginal Deaths in Custody provided an historical and structural examination of Australia's administration in Aboriginal affairs. The Commission found that these historical and systemic influences were significant factors in shaping contemporary Aboriginal circumstance. However, the recommendations do not respond to these structural deficiencies. Rather, the emphasis as directed by the recommendations respond to the symptoms

these deficiencies produce. That is, issues such as health, education, land, substance abuse, economic development and housing, provide the primary thrust of the recommendations instead of confronting the influences that shaped such circumstances.



This is of course another critical inconsistency between the recommendations and the key findings of the report. Rather than redress these structural deficiencies there is an attempt to further incorporate Aboriginal people into the very systems influential in creating the circumstances in the first instance. This is in contrast to the Commission's own findings as commented in chapter one where values direct the structure and function of political, legal and social institutions. This of course leads to the question; *can you reform assimilationist structures from within?* The only answer to this is no. Clearly evident is the inability of the Commissioners to escape their own cultural assumptions. As discussed in chapter two, the discourse of authenticity that Aboriginal people are encouraged into is a true threshold. The fact that one of the

Commissioners was Aboriginal does not nullify this conclusion, but reinforces the arguments suggested in chapter three of how we ourselves are prepared to offload our own valuables in order to participate within mainstream institutions. This is indicated by the activities Aboriginal people enter into in response to their own over-representation.

Whereas the Report emphasised the need to empower Aboriginal people, current strategies and programs focus on 'Aboriginal problem behaviour'. To deal with the issue of 'Aboriginal problem behaviour', governments are pursuing a policy of 'indigenisation'. Indigenisation is the recruitment of indigenous people to staff the components of the criminal justice system, which directly interface with indigenous people.<sup>70</sup> It is a policy which focuses the attention on accommodating and adjusting Aboriginal people, 'as the problem', in the system. At the point of interface, all this policy does is change the colour scheme of service delivery. McRae comments;

...as many overseas and Australian researchers have recognised, analysis of this kind indulges in blaming the victim, an approach which, by focussing on the supposed inadequacies of the victim, deflects attention away from the inadequacies of the system where the problems really lie.<sup>71</sup>

Havemann cites William Ryan's critique of the "Blaming the victim ideology which states the problem-definition that underpins it

...attributes defect and inadequacy to the malignant nature of poverty, injustice, slum life, and racial difficulties. The stigma that marks the victim and accounts for his victimization as an acquired stigma, a stigma of social, rather than genetic in origin. But the stigma, the defect, the fatal differences - though derived in the past from environmental forces - is still located within the victim...It is a brilliant ideology for justifying a perverse form of social action designed to change, not society, as one might expect, but rather

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<sup>70</sup> Havemann, P. Law and Order for Canada's Indigenous People, Prairie Justice Research, Regina 1984 p. 131

<sup>71</sup> McRae, H. Aboriginal Legal Issues, The Law Book Company Ltd, 1991 p.245

society's victim.<sup>72</sup>

Government proposals, as part of the implementation of the Deaths in Custody recommendations, are largely founded upon this ideology. For example, programs which offer Justice of the Peace training within Aboriginal communities, the establishment of Aboriginal Police Liaison Officers, court room interpreters, oral rather than written pre-sentencing reports and the Aboriginal Witness project, attribute the problem of Aboriginal over-representation to Aboriginal 'problem-behaviour'. Subsequently, government programs largely focus on changing Aboriginal 'problem behaviour' on those before the courts. These are technical changes within an existing system. This approach aims at fine-tuning current programs by accommodating or adjusting Aboriginal people to their own over-representation in the system.

The Australian Law Reform Commission commented on the inadequacies of indigenisation as a solution;

The appointment of Aborigines as justices of the peace and magistrates is unlikely to go very far towards reducing the number of Aborigines coming into contact with the criminal justice system, nor does it go any way towards the recognition of Aboriginal customary laws. Taken alone it seems an insufficient response to the present situation...the history of indigenisation as a policy in other countries with ethnic minorities is not encouraging.<sup>73</sup>

The Royal Commission itself put forward the view that,

The problem with the indigenisation of government services including the criminal justice system, is that indigenous peoples continue to be subordinate and peripheral to policy-making and decision-making processes. Indigenous staff also often suffer from painful conflicts of interests-being accountable to their people in a personal sense, but usually powerless within the structures of their profession.<sup>74</sup>

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<sup>72</sup> Havemann, P. Law and Order for Canada's Indigenous People, Prairie Justice Research, Regina 1984 p. 6

<sup>73</sup> Australian Law Reform Commission, 1986. The Recognition of Aboriginal Customary Laws Report No.31 Vol. 2 para 837

<sup>74</sup> Royal Commission into Aboriginal Deaths in Custody, 1991. Vol. 3 Ch.22 p.82

A policy of indigenisation seeks answers to the wrong questions. The questions and ongoing strategies Australian governments need to consider are not those that seek to assimilate Aboriginal people, but rather, those that seek to empower Aboriginal mechanisms of mediation. The Canadian experiences have revealed that under a policy of indigenisation, symptoms have become confused with causes in the explanations for Aboriginal over-involvement.<sup>75</sup> Australia has been reluctant to learn from Canadian experiences to ensure that those same mistakes are not repeated.

The Royal Commission commented that, with loss of independence goes a loss of self esteem.<sup>76</sup> Yet, efforts to revive this 'self esteem' do not reflect independence as being independent, but as a component within the wider jurisdiction of a higher authority. As an incorporatist model the method is assimilationist and is again inconsistent with the Royal Commission's own finding that,

...the assimilationist policy assumed that their culture and way of life is without value and that we confer a favour on them by assimilating them into our ways...<sup>77</sup>

Such expressions are indicative of many that consider themselves sympathetic to Aboriginal issues but when articulating these sympathies, 'the words don't fit the mouth'.

The last five years have seen governments adopt a managerialist approach towards implementing the recommendations of the Royal Commission into Aboriginal Deaths

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<sup>75</sup>Havemann, P. Law and Order for Canada's Indigenous People, Prairie Justice Research, Regina 1984 p. 128

<sup>76</sup>Royal Commission into Aboriginal Deaths in Custody, 1991. Vol. 1 Ch. 1 p.9

<sup>77</sup> *ibid*

in Custody. This approach has failed to address the systemic causes of Aboriginal over-representation in the criminal justice system. Rather, the response by governments has been to localise the nature of the 'problem', offering technical modifications to existing administrative practices. Instrumental to this managerialist approach was the development of a participatory model of consultation that imposes a context of false consensus upon participatory fora. These models are consistent with practices of institutional assimilation where Aboriginal people are merged into the applications and practices of mainstream administrative institutions. As mediators and clones of this new model they then impose the rhetorical assumptions and definitions upon Aboriginal people and communities. This is internal assimilation, where the definitions and characteristics of the 'other' are being imposed by Aboriginal people themselves. For example, the Justices of the Peace training program received support from members of the judiciary and Queensland's AJAC committee despite the fact that the program implies that Aboriginal people are at fault for their own over-representation.

The fundamental objective of the Royal Commission's report was to set the policy and social goals for reducing the incarceration rates of Aboriginal people. Under a managerialist approach and as directed by these recommendations, governments have largely focused on stopping deaths in custody to achieve quantifiable output based objectives that would localise the response, preserve a symbolic image and contain and restructure political conflict. This is again inconsistent with the key findings of the Royal Commission which stated,

the over-representation of Aboriginal people in custody (and the deaths of some of them) are part of the ongoing conflict between 'colonizer' and

‘colonized’.<sup>78</sup>

This view was also intimated by Mathews in chapter one. It would appear then that the basic flaw of the Commission's recommendations is their failure to promote and redress the fundamental issues of disempowerment, systemic and historical influences that they themselves identified as creating the circumstances that bring Aboriginal people into contact with the criminal justice system.

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<sup>78</sup> Royal Commission into Aboriginal Deaths in Custody, 1991. Vol. 2 Ch. 10 p.4

## CHAPTER 5: SELF-DETERMINATION

In April 1999, an article by Rosemary Neill was critical of the lack of moral courage by both sides of Australian politics to debate the repetitive failure of government policies in Aboriginal affairs.<sup>79</sup> In describing the current the state of play, Neill brings together common arguments of both the Left and Right used to explain away this deficiency. The opinions provided focussed upon the concept of self-determination. Not surprisingly, Neill puts forward the suggestion that such a debate should respond to the question of why self-determination is falling spectacularly short of its objectives, tens of billions of dollars and 27 years after its adoption by the Whitlam government.<sup>80</sup>

It is not possible within this paper to fully explore Neill's question; however, it is possible to put forward some general comments such a debate might include. This chapter briefly comments on the interpretation of self-determination in international law in relation to nation states. Australian government policies and practices pursued under the rhetoric of self-determination are then examined against this international interpretation with an emphasis on administrative arrangements between Aboriginal people and government. Both international interpretations and Australia's domestic application of self-determination are then examined against Aboriginal meanings of what self-determination requires. The outcome of this analysis indicates that self-determination for Aboriginal people may in fact be a vehicle of promise on the road to nowhere.

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<sup>79</sup> Neill, R. "The debate we don't dare have", *The Weekend Australian* April 24-25 pp. 22-23

<sup>80</sup> *ibid*



## **The international interpretation**

The rights of people to self-determination is firmly located in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>81</sup> Article 1 of both covenants state:

All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.<sup>82</sup>

However, this description of self-determination is insufficient in providing a succinct definition. The statement itself can only have real meaning in the evaluation of the contexts in which these words are portrayed. That is, to examine the rhetoric of self-determination against behaviour. The Human Rights Committee (HRC) established to supervise implementation of the ICCPR, has held the view that the right of self-determination has significance for the internal constitutional and political order of States.<sup>83</sup> A former member of the Committee, Roslyn Higgins, has summarised this practice:

What then is this right of self-determination that the peoples of an independent country are entitled to? It is the right to determine their own political and economic and social destiny...[T]he idea of self-determination as the right to determine one's own destiny, and not to have it imposed from above, goes right back to the beginning of the Committee's work.<sup>84</sup>

A report of Colombia which commented on how all the peoples of its country had the opportunity to participate in the political and social structures, to change the

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<sup>81</sup> Indigenous Legal Issues, Heather McRae, Garth Nettheim, Laura Beacroft. LBC Information Services, Second Edition. Sydney 1997 p. 474

<sup>82</sup> Pritchard, S. Indigenous Peoples, the United Nations and Human Rights, Federation Press Australia 1998 p.186

<sup>83</sup> Pritchard, S. Indigenous Peoples, the United Nations and Human Rights, Federation Press Australia 1998 p.187

<sup>84</sup> *ibid*

government through elections, to contribute to the formulation of policy, and to determine events was evidenced to illustrate an enactment of this description.<sup>85</sup> In its comments on the report, the HRC expressed satisfaction that the approach of the State party to the right of peoples to self-determination 'has been in line with the development of participatory democracy and that Colombia is making real efforts to achieve full equality for minority groups'.<sup>86</sup>

This understanding of self-determination poses some serious considerations for Aboriginal people. Firstly, self-determination is underpinned by notions of equality; secondly, its application operates within the existing instruments of nation states; and thirdly, self-determination is encapsulated in democratic principles and practices. Both the ICCPR and ICESCR contain strong non-discrimination provisions that account for the equality issues.<sup>87</sup> As far as protecting the interests of nation states, Reynolds argues that the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States ensures that the needs of states took precedence.<sup>88</sup> Within this declaration it also contains,

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country...

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<sup>85</sup> Pritchard, S. Indigenous Peoples, the United Nations and Human Rights, Federation Press Australia 1998 p.188

<sup>86</sup> *ibid*

<sup>87</sup> Indigenous Legal Issues, Heather McRae, Garth Nettheim, Laura Beacroft. LBC Information Services, Second Edition. Sydney 1997 p. 474

<sup>88</sup> Reynolds. H. Aboriginal Sovereignty, Allen & Unwin. Sydney 1996 p. 164

The territorial integrity and political independence of the State are inviolable.<sup>89</sup>

James Anaya observed that self-determination should be understood,

...as a right of cultural groupings to the political, institutions necessary to allow them to exist and develop according to their distinctive characteristics. The institutions and degree of autonomy, necessarily, will vary as the circumstances of each case vary. And in determining the required conditions for a claimant group, decisionmakers must weigh in the human rights of others. While not precluded independent statehood will be justified only in rare instances. Such a formulation of self-determination, I believe, will advance global peace and stability consistent with international law's normative trends.<sup>90</sup>

Anaya's comments clearly allow for the possibility of independent statehood, however, the vagaries of how 'cultural groupings' access political institutions are sufficient to perpetuate existing practices of institutional assimilation. From these descriptions it is clear that self-determination was not designed for the great variety of peoples who found themselves within the borders of new states or for indigenous minorities in New World settler societies.<sup>91</sup> On this basis, Aboriginal people need to consider the appropriateness of self-determination as a political vehicle, if it can only be pursued in a context that protects the rights and interests of nation states. As Boldt argues,

Colonized aboriginal peoples such as Indians in Canada were bypassed by the 'wave' of third-world liberation from colonialism following the Second World War. Now, there is a new wave of liberation building worldwide. This time the energy is coming from ethnically defined 'peoples' who, not unlike Indians in Canada, are trapped against their will within the borders of larger nation-states.<sup>92</sup>

The Draft Declaration on the Rights of Indigenous Peoples is still being debated in the

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<sup>89</sup> *ibid*

<sup>90</sup> Reynolds. H. Aboriginal Sovereignty, Allen & Unwin. Sydney 1996 p. 171

<sup>91</sup> Reynolds. H. Aboriginal Sovereignty, Allen & Unwin. Sydney 1996 p. 163

<sup>92</sup> Reynolds. H. Aboriginal Sovereignty, Allen & Unwin. Sydney 1996 p. 174

Commission for Human Rights (CHR), which comprises representatives of 53 governments.<sup>93</sup> The Australian Government has taken the following position on the Draft Declaration on the Rights of Indigenous Peoples;

Ministers have recently considered the Australian Government's approach to the negotiations on the Draft Declaration on the Rights of Indigenous Peoples. They confirmed Australia's continued participation in the Working Group on the Draft Declaration in order to promote the development of an instrument which is broadly consistent with national interest and with domestic policy and legislation.<sup>94</sup>

It is likely that the CHR will be less sympathetic to indigenous peoples aspirations as framed in the Draft Declaration.<sup>95</sup> Whatever the outcomes of these debates it is important to consider them in the context stipulated by the Principles of Internal Law Concerning Friendly Relations and Co-operation Among States. These principles will guard the perimeter of any advantages gained by Aboriginal peoples.

### **Australia's domestic interpretation and application**

How then has Australia's domestic policy translated the international interpretation of self-determination? One of the most common criticisms of self-determination as practiced in Australia is lack of definition. Pat O'Shane comments, "the Left...simply embracing self-determination without actually defining what is meant by it is definitely a major problem".<sup>96</sup>

The Whitlam Government, from 1972 to 1975, introduced self-determination as a

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<sup>93</sup> Indigenous Legal Issues, Heather McRae, Garth Nettheim, Laura Beacroft. LBC Information Services, Second Edition. Sydney 1997 p. 475

<sup>94</sup> United Nation's Working Group on Human Rights, 3<sup>rd</sup> Session October-November 1997 p.22

<sup>95</sup> Indigenous Legal Issues, Heather McRae, Garth Nettheim, Laura Beacroft. LBC Information Services, Second Edition. Sydney 1997 p. 475 <sup>95</sup> Neill, R. "The debate we don't dare have", *The Weekend Australian* April 24-25 pp. 22-23

<sup>96</sup> Neill, R. "The debate we don't dare have", *The Weekend Australian* April 24-25 pp. 22-23

policy option for Australia's administration in Aboriginal affairs. In enunciating the rhetoric of this policy, Whitlam spoke of the reversal of "two hundred years of despoliation, injustice and discrimination" and declared that the objective of his Government was to "restore to the Aboriginal people their lost power of self-determination in economic, social and political affairs".<sup>97</sup> But as Robbins argues, the underpinning concepts of rights and equality were never clearly elaborated, leaving the context in which the policy was to be implemented essentially vague.<sup>98</sup>

Bennett suggests there are at least two definitions for this term: the politicians' definition and the literal definition preferred by most Aboriginal people.<sup>99</sup> Government applications of self-determination, between 1972 and 1996, have built upon exercises that incorporate Aboriginal involvement into existing structures, which then assign roles and responsibilities consistent with power-sharing arrangements. According to government, these practices represent Aboriginal ownership and control over their own decision-making processes. It is seen to give effect to self-determination as a policy of practical application as opposed to a policy of theoretical abstractions.

These practices have produced a range of Aboriginal organisations delivering social services, major 'peak body' structures such as the Aboriginal and Torres Strait Islander Commission of which elected representation is a central component of the organisation, and Native Title Representative Bodies. Other examples include

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<sup>97</sup> Robbins, E. Self Determination or Welfare Colonialism: Aborigines and Federal Policy-Making, Thesis submitted for the Degree of Doctor of Philosophy, Flinders University, South Australia. May 1994 p.129

<sup>98</sup> *ibid*

<sup>99</sup> Bennett, S. White Politics and Black Australians, Allen & Unwin 1999 p.195

Aboriginal Justice Advisory Committees and National Park Joint Management Committees. All of these mechanisms and many others not mentioned provide opportunities for Aboriginal people to make comment and participate in Australia's social, political and legal institutions. To assess the consistency of these practices with the HRC interpretation of self-determination, the appropriateness of these mechanisms in meeting Aboriginal demands of greater control are essentially irrelevant. This is not to undervalue the inadequacies of infrastructure and services to Aboriginal people and communities that government and non-government reports continue to identify, this paper could not do those issues justice. The question to be asked here is *are these practices in line with the development of participatory democracy, and do they reflect efforts to achieve full equality for minority groups?* The answer to this question is that they do.

The Queensland Legislative Standards Act 1992 reflects the comments of the HRC. This Act is an attempt to ensure that legislation before the parliament is consistent with 'fundamental legislative principles' that seek to protect the rights and liberties of individuals and the institution of parliament. These requirements test new legislation and are therefore significant in shaping the way in which laws are framed in Queensland. For the protection of Aboriginal interests, the Legislative Standards Act 1992 seeks to ensure that new legislation has sufficient regard to Aboriginal tradition. As articulated during the second reading, the Legislative Standards Bill was encapsulating Westminster democracy.

The groups that suffered most when Westminster democracy arrived in the colony of New South Wales-the groups that lost almost all-were the indigenes. In Queensland, these groups are the Aborigines and Islanders. Whites, ...might celebrate the British tradition of democracy; they have nothing to celebrate. This Bill injects into the drafting of legislation in Queensland

consideration for Aboriginal tradition and Island customs.<sup>100</sup>

It seems rather naive to suggest that the consideration of Aboriginal tradition within a Westminster system, can restore to Aboriginal people ‘what was lost’, when, as stated above, it was these very same people who suffered most when this western system of democracy was introduced. It holds the belief that despite the distinct cultures, values and interests of Aboriginal people, in the broad consensus of the values that underpin Australia’s political institutions they are considered in common.

For example, in relation to cultural heritage practices, the recognition of ‘traditions and customs’ is an initiator for arrangements of co-management with the state.

Within these practices there is an opportunity for Aboriginal people to manage these areas on their own. What is interesting in the management transfer is that this can only eventuate when Aboriginal people themselves are sufficiently operative in non-Aboriginal land management practices. The recognition of ‘traditions and customs’ has somehow become irrelevant. It would appear that the application of sufficient regard to Aboriginal tradition is used as a mechanism to include Aboriginal people into consultative process regarding issues that impact upon them. Unfortunately, the initiation of processes, which primarily account for and reflect the notion of procedural fairness, does not equate with the recognition of Aboriginal people as Aboriginal people.

As Justice Mathews determined during the review of the Hindmarsh application, the most fundamental inadequacies can be found in the attempt of an introduced European common law system to protect these rights without recognising Aboriginal

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<sup>100</sup> Parliamentary Debates Queensland Legislative Assembly 21 May 1992 p. 5505

legal systems. To reapply this theme, if the Westminster system of democracy and law secures the rights and liberties of individuals, where does the balance of justice lie for a people whose systems are founded upon the rights of the collective.

There is a common belief that a Westminster system is appropriate to accommodate Aboriginal interests and that Aboriginal representation within such a system can only be advantageous for Aboriginal people. To give a hypothetical example surrounding the Hindmarsh Island incident, if the Minister of Aboriginal Affairs had been a woman and supported an application for protection, it would have been difficult for the Minister to state the reasons why such protection was afforded. It would not have been possible for the Minister to ask male members of the House to leave because of the content of explanation. Can such a system truly allow Aboriginal values to operate? Despite these observations, the practices themselves are reflective of international understandings of what self-determination demands.

### **An Aboriginal critique**

As suggested by Bennett, some Aboriginal people have a more literal understanding of what self-determination requires. Brennan makes the point:

There is now a domestic meaning of self-determination which connotes more than self-management. It incorporates the notion that indigenous organisations and representatives should be able to shape policy for their people and not simply manage government programs, run co-operative enterprises and administer local government functions for communities which happen to be indigenous.<sup>101</sup>

As discussed in Chapter 3, Aboriginal ownership and control over decision-making processes is key to Aboriginal empowerment, an aspect also supported by the Royal

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<sup>101</sup> cited in Neill, N. & Handley, R. Retreat from Injustice, The Federation Press. Sydney 1994 p.394



Commission into Aboriginal Deaths in Custody. For self-determination, the ability to freely determine and freely pursue is likewise a key element. To set up an Aboriginal critique of existing practices under the rhetoric of self-determination, a definition for self-management makes an important point of contrast. Jull describes self-management as,

... a delegated function whereby a group or some type of formal authority carries out tasks with funds and program design determined by others outside the group or region. A welfare office on indigenous land may be staffed by local people and may hand out the cheques and carry out other welfare functions within the guidelines of a higher authority.<sup>102</sup>

The collective content of Jull's definition of self-management and the HRC interpretation of self-determination would suggest that the distinction between the two is determined by the level at which Aboriginal activity in institutional frameworks occur. Using Galligan's description of political culture, *How do you change the outcomes of structures without changing the values that design them?* If self-determination is to be placed as an apparatus within the nation state and be directed by the values of the nation state, there can be no reality for Aboriginal interpretations of self-determination. Having Aboriginal representation in participatory fora does not in itself reflect Aboriginal requirements for self-determination. As Robbins argued, the irony of imposing a cultural notion of representation in the name of "self-determination" seems to have eluded the government.<sup>103</sup>

The above descriptions and Jull's definition of self-management, in particular the

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<sup>102</sup> Jull, P. The Politics of Northern Frontiers, Australian national University. North Australian Research Unit. Darwin 1991 p. 54

<sup>103</sup> Robbins, E. Self Determination or Welfare Colonialism: Aborigines and Federal Policy-Making, Thesis submitted for the Degree of Doctor of Philosophy, Flinders University, South Australia. May 1994 p.131

reference to a higher authority implies that self-determination can only proceed under self-management practices. When Aboriginal people practice this understanding of self-determination, they themselves become ‘brokers’ or ‘Aboriginal experts’ for government agencies. By operating within government and not Aboriginal institutions, Aboriginal people, as mentioned earlier, insulate government from the pressure of conflict. They themselves accept and identify with the definitions that ‘outsiders’ have imposed on Aboriginal people. As ‘Aboriginal experts’ they then mediate this definition to Aboriginal people and communities, and construct their relationship to government in this image. In this practice ‘Aboriginal experts’ are both ‘captives and captors’ of an image constructed by others outside the group.<sup>104</sup> As a tool for co-option and containment it is most effective.

Yet despite the knowledge and habits Aboriginal people have gathered about the operations of these ‘inclusive’ models, they persistently seduce us. This may be a reflection of the relationships of power between black and white in Australia; it may also reflect an urgency to embrace what we perceive as ‘new’ at the expense of our own cultural and historical baggage. Lois O’ Donoghue, former Chairperson of the Aboriginal and Torres Strait Islander Commission, gave this expression of self-determination,

The report of the Royal Commission into Aboriginal Deaths in Custody underlined its recommendations with a call to governments to give greater effect to the principles of self-determination. This will entail the recognition by governments that we are distinct peoples within the Australian nation, and we do have collective rights. Self-determination as a concept is not something which can be tacked onto program design or introduced through piecemeal consultation. It has to be accepted as a policy objective that pervades the relationships of indigenous peoples to the wider community.

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<sup>104</sup> Hart, V. unpublished paper 1996

Clearly, aspirations of self-determination have broadened considerably both for governments and among Aboriginal and Torres Strait Islanders peoples in the past decade. We now see in the power-sharing arrangements of our federalist system, and in the variety of forms of community and territorial self-government which it incorporates, further opportunities for Aboriginal peoples to more fully participate in determining their own affairs within the Australian community.<sup>105</sup>

The interesting feature of these comments is the movement away from rights to participation. Having Aboriginal people managing or participating in mainstream institutions does not necessarily mean that the deficiencies of those practices are made inoperative. To use a theme argued by Fanon, the reality of such practices indicate that Aboriginal people have simply inherited the legacy of these institutions.<sup>106</sup> Likewise, Higgins comments about the idea of self-determination as the right to determine ones' own destiny, and not to have it imposed, falls away against the experiences of Aboriginal people in Australia. The outcome of Aboriginal participation in mainstream institutions under existing arrangements can be nothing else but imposed.

Although this participatory expression of self-determination has appeal to many black and white Australians, there are some that do not consider current practices as a true expression of self-determination. All that has been achieved over the years is that the former domination by white pastoralists and missionaries has been replaced by domination by white public servants and employees.<sup>107</sup> As other commentaries have noted, the practice of institutional assimilation obscures this reality.<sup>108</sup> This practice,

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<sup>105</sup> O' Donoghue, L. "Australian Government and Self-Determination" in Aboriginal Self-Determination In Australia, Fletcher, C. (ed). Aboriginal Studies Press, Canberra. 1994 p. 4

<sup>106</sup> (cited in) The Human Rights Reader, (ed) Micheline Ishay. Routledge, New York. 1997 p. 313

<sup>107</sup> (cited in) <sup>107</sup> Bennett, S. White Politics and Black Australians, Allen & Unwin 1999 p.141

<sup>108</sup> See Collmann, J. "Clients, Cooptation and Bureaucratic Discipline", Social Analysis 9. 1981 p.49 and Cowlshaw, G. Black, White or Brindle. Race in rural Australia. Cambridge. Cambridge University Press 1988 p.135

which has facilitated their own frustrations, is a significance influence for raising the question of why self-determination is failing. As Neill states,

Most Australians are aware that the money and good intentions channelled into Aboriginal affairs during the past 30 years or so are having little tangible effect on indigenous well-being and want to know why. Many people – black and white – no longer believe indigenous disadvantage can be exclusively blamed on white oppression.<sup>109</sup>

Such comments are certainly simplistic and reflect the popular critiques of self-determination. Firstly, there is the emphasis that money and ‘good intentions’ are sufficient criterion to alleviate ‘Aboriginal disadvantage’. Secondly, the lack of success from Aboriginal participation within mainstream funding institutions coupled with ‘Aboriginal management’ of the welfare dollar, are considerate enough for mainstream Australia to disown Aboriginal disadvantage as an outcome of colonisation and to place it as a phenomena that exists within Aboriginal people. The articulation of these views by Aboriginal people themselves, are commonly heard in statements such as ‘things are better for us now than they were fifteen years ago’. The problem with such statements is that the primary source of legitimacy for the concept of disadvantage is withdrawn. Disadvantage maintains its legitimacy through the comparative analysis of social indicators among Aboriginal and non-Aboriginal people. However, when we evaluate the gains amongst ourselves we eliminate this comparison and claim ownership for ‘disadvantage’, as a phenomenon that exists within Aboriginal people. Although this ownership sits quite comfortably with the current and popular urgings of ‘responsibility’; it offers little towards a greater understanding of these issues at the source.

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<sup>109</sup> Neill, R. “The debate we don’t dare have”, *The Weekend Australian* April 24-25 pp. 22-23

The comments of the Royal Commission into Aboriginal Deaths in Custody, identified that Aboriginal circumstances were perpetuated and institutionalised within the social, legal and political frameworks of the Australian state. Yet a critique of the values that design such structures has gone amiss in the analysis of public policy in Aboriginal affairs. This allows for simplistic explanations despite an accepted knowledge that the label of oppression white australia would like to discard, and the ‘disadvantage’ they wish to share with Aboriginal people, operates in subtle ways.

For example, when One Nation spoke about its policies for Aboriginal affairs, they were described as racists, even though the policies themselves were framed around the rhetoric of equality and ‘all australians’. That is, Aboriginal and non-Aboriginal people should all be treated the same. Under existing practices, Aboriginal people have seen the establishment of the Aboriginal and Torres Strait Islander Commission, which apart from an elected arm, operates like any other bureaucracy. In cultural heritage issues, the Queensland Aboriginal Land Act 1991 enables Aboriginal people to claim land. Successful claims can be leased back under co-management arrangements with the state. However it is non-Aboriginal land management practices that dominate these arrangements. There has also been a growth of Aboriginal organisations many of which mirror mainstream organisational structures. The programs these organisations deliver to communities are likewise similar to programs accessed by non-Aboriginal people apart from the obvious colour scheme of service delivery. In all of these practices there already exists a trend of conformity, for Aboriginal people to operate in a like manner to non-Aboriginal people. What then is the difference in outcomes between One Nation’s policies promoting the rhetoric of equality and ‘all australians’ and those of current practices? Only the process. It is

ironic that while there appears to be no middle ground in the views both sides of the political fence advocate, there is substantial common agreement in the premise from which such disparate views are articulated. It clearly reflects Anderson's comments about the shared political philosophy this discourse operates within.

As outlined in chapter 1, the influences that have shaped contemporary Aboriginal circumstance are both historical and systemic in origin. It is therefore necessary that any serious discussion about the failure of self-determination to positively respond to these issues must also include an examination of how these influences are dealt with. The Royal Commission into Aboriginal Deaths in Custody identified that non-recognition of Aboriginal people as Aboriginal people led to an historical process of disempowerment which then led to the development of assimilationist practices. Australian Government policies and practices, including the role of Aboriginal 'brokers', have attempted to redress these circumstances by responding through the very structures which shaped and created these circumstances. That is, Aboriginal people use the same institutions that deal with these issues for non-Aboriginal people. As described in chapter four, simply because a commonality of issues can be determined, it does not necessarily mean the causes which shaped such circumstances are similar. Such a practice is indefensibly and contrary to its public rhetoric. However, in the eyes of the HRC, these practices are consistent with the conditions conducive for self-determination to proceed, for all peoples.

## CHAPTER 6: CONCLUSION

*Governments cannot take our rights away; they can only reduce our capacity to enjoy them.*<sup>110</sup>

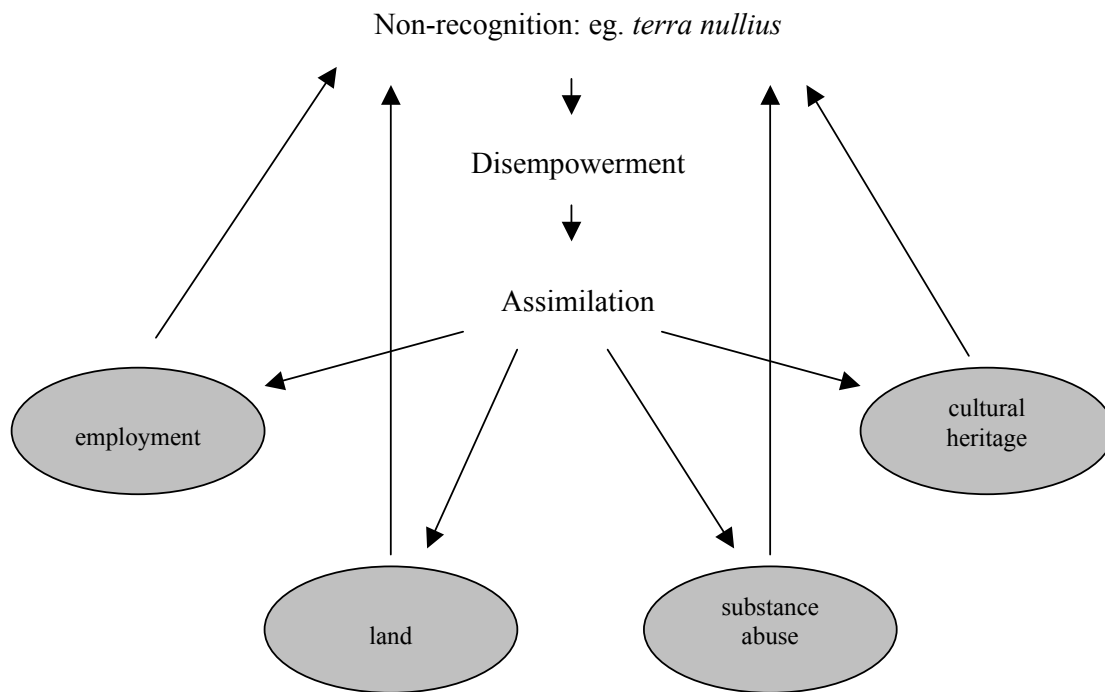
This dissertation has the unenviable task of selling a problem. As commented by Hewson in Chapter One, the outcomes of government efforts, by both the major political parties, have performed well below expectation without adequate explanation. The critique offered in this paper suggests that explanations for consistent policy failure are more informative when the values used to determine ‘Aboriginal problems’ and subsequent government action are examined. As illustrated in Chapters Two and Four, the confusion in differentiating between causes and symptoms reflects an emphasis upon processes not structures, an emphasis on the content of policy, not the context. Subsequently, current evaluation strategies explore the relationship between the rhetoric of expected change and the program. As discussed in Chapter Two, evaluation theory suggests the focus would be better placed upon the rhetoric of expected change and the problem so that policy learning can occur. Evaluation outcomes conducted by the former model, has developed an industry rich in resources looking for solutions. But little attention has been given to the processes that determine; *what is the problem?*

The arguments presented in this paper have explored the relationship between government action and the problem as perceived by governments and many Aboriginal people alike. The methodology used to conduct this examination is grounded in history and Aboriginal experience. As identified by the Royal Commission into Aboriginal Deaths in Custody, issues such as land, education,

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<sup>110</sup> Collins, L. unpublished manuscript

employment, housing and substance abuse did not appear in a vacuum. They are interrelated and interconnected, but the influences that operate laterally to link these issues have yet to be redressed. If these issues are products of non-recognition, disempowerment and assimilationist practices then surely such influences must represent the underlying issues. Any response, which does not directly impact upon these influences, is symptomatic and allows the dispossession to continue as well as the reinvention and assimilation of Aboriginal people.



However, raising the level of debate will be no easy task. Responding to the symbolism that Australia's societal institutions promote, represents the single largest hurdle Aboriginal and non-Aboriginal people have yet to confront. Allied with this symbolism is a discourse of authenticity that facilitates Aboriginal and non-Aboriginal discussion and limits not only the articulation of Aboriginal interests, but



also how these interests are understood. As discussed in Chapter Two and Three, if the values this discourse upholds are mainstream, there can be no place for an Aboriginal context. In such a setting Aboriginal people may well ask *do we really speak English?*

This dominance of mainstream values is not surprising and should be accepted as a natural development given the improbability that white australia could divorce itself from its own cultural values and assumptions in responding to issues confronting Aboriginal people. The irony is, as demonstrated in previous chapters; this is exactly what Aboriginal people are asked to do in the participatory arrangements that have evolved under the rhetoric of self-determination. While Aboriginal people continue to be considered in an ‘all australian’ context, *terra nullius* social policy will continue to meander through legislative frameworks as identified by Mathews. It will maintain our interest at the periphery and beyond, rather than attempting to understand *how did we get here?*

Over the last few years a range of solutions have been put forward for Governments, Aboriginal and non-Aboriginal people to consider. While it is not possible to study these proposals in depth, a general overview of where the problem is located is sufficient to assess what some have to offer.

Geoffrey Partington has suggested that, “advocates of separatism should look afresh at the results of their own policies and at the assimilationist case they often contemptuously dismiss without thought”.<sup>111</sup> Apart from the colour scheme of service

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<sup>111</sup> Partington, P. *Hasluck versus Coombs*, Quakers Hill Press. Sydney. 1996 p. 153

delivery, there is very little to suggest that separatist policies have been tried. It is true that the processes for delivering services has changed, but the values that designed the structures these processes operate within have not altered. Rather than rebuild Australia's institutional frameworks, office re-fits are considered far more appropriate. The inclusion of Aboriginal people within mainstream institutions illustrates this point.

Partington's distinction of 'separatist' is largely identified through the existence of programs or policies for Aboriginal people and programs and policies for all other Australians. It is premised by the belief that Aboriginal people should not consider themselves anything other than 'all Australian'. Such a scope of analysis is too limiting to provide adequate explanation for failure. Of course the assumption being made here is that assimilation failed to adequately address the causes of Aboriginal circumstance during the era this policy was 'officially' applied. Partington would argue that under assimilationist policies the 1950s and 1960s were decades of greater Aboriginal progress than those of the 1980s.<sup>112</sup> But as argued by Rowse, the practice of assimilation conferred rights more easily than it engineered new social forms.<sup>113</sup> To clarify this point, the rights conferred were mainstream not Aboriginal. That is, it was easier to confer Aboriginal access to rights and entitlements mainstream Australia considered appropriate for all Australians, rather than endorse the rights and entitlements consistent with a status that recognises Aboriginal people as Aboriginal people.

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<sup>112</sup> Partington, P. *Hasluck versus Coombs*, Quakers Hill Press. Sydney. 1996 p. 65

<sup>113</sup> Rowse, T. "Indigenous Citizenship and Self-determination: The Problem of Shared Responsibilities", in *Citizenship and Indigenous Australians*, (eds) Nicolas Peterson & Will Sanders. Cambridge University Press 1998 p.98

With a preoccupation on content and process, structures and values are considered irrelevant elements in Partington's critique. It is ironic that when these elements are introduced into the analysis, the 'separatist' practices criticised by Partington are likely to be the most successful practices of assimilation Aboriginal people have encountered.

Noel Pearson has recently argued that it is welfare dependency for which solutions must be sought. The argument presented by Pearson attributes this social condition to overlapping and uncoordinated responses by government in the delivery of services. Pearson's arguments also locate the problem at the level of the recipient, using the liberal rhetoric of individual responsibility and the Aboriginal practice of reciprocity. From this point Pearson makes a distinction between positive and negative welfare which immediately undermines the consistency of argument against welfare dependency. That is, some welfare dependency is good, some bad. But even this distinction is further reduced until it is understood that negative welfare refers to social security payments. It is a reductive theory of explanation for a symptom not a cause and is further illustrated in Pearson's comments that,

“...the provision of income support to able bodied working aged adults without reciprocity is the source of our social problems and the starting place for any solutions”.<sup>114</sup>

Aboriginal people may well ask *whatever happened to dispossession and terra nullius?* The reductive nature of Pearson's comment is inconsistent with an argument proposing to eliminate welfare dependency. It is the conditions created by welfare dependency that the above comment addresses not the influences that create the

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<sup>114</sup> “From Cape York to Campbelltown – Rebuilding Communities”, The Brisbane Institute 26<sup>th</sup> July 1999

dependency.

Basically, the argument is circular. For example, in forums addressing Aboriginal deaths in custody, it is said that if economic development on Aboriginal communities is successful, people would have better jobs, get better housing, have better health, which would lead to greater benefits from education and lower incarceration rates. Government representatives who work in health have argued that, if health is improved the benefits of education will also improve which means people will obtain better jobs, live in better houses and reduce incarceration rates. Dependent upon which symptom is considered dominant the general argument has popularity.

Solutions premised by these strategies treat history and Aboriginal experience as irrelevant tools for policy analysis. The outcomes of such analysis situate problems in contemporary settings from which the liberal rhetoric of individual responsibility can rationalise the circumstance. The encroachment of restorative justice strategies is indicative of this statement.

Another inconsistency in the proposal put forward by Pearson is the location of the problem at welfare dependency. The full participation of Aboriginal people in social welfare legislation is a relatively recent phenomenon. As described by Gray,

...up until the 1940s the social welfare legislation contained specific exclusions relating to Aboriginal people. From 1941 child endowment did become available for Aboriginal people who were not 'nomadic' or whose child was not 'wholly or mainly dependent upon the Commonwealth or State for support. From 1942 maternity allowance and age and invalid pensions also became available to Aboriginal people who were 'exempt' from the laws of their State or territory relating to Aboriginal people, or where no such provisions for exemption existed, were judged by the Director General of

Social services to be of sufficient ‘character, standard of intelligence and development. From 1944 this last phrase was also used, theoretically at least, to allow some Aboriginal qualification for unemployment and sickness benefits. However, the general rule was still exclusion and the numbers of Aboriginal people being paid under these exceptional provisions during the 1940s was extremely small.<sup>115</sup>

If the intention of welfare was to abate these circumstances, then the issues that need to be redressed were prevalent long before the full participation of Aboriginal people in social welfare legislation.

The arguments of individual responsibility are also inconsistent. It was governments, and not Aboriginal people, that identified the problems to which social welfare legislation would address. Nor were Aboriginal people ‘involved’, until recently, in the formulation of the content in social welfare legislation. Thirdly, Aboriginal people did not ‘control’ the processes of implementation of this content. As argued in previous chapters, the frames of reference used to respond to issues impacting on Aboriginal people have always been white. The argument asserted here is that dependency is built into the system, as opposed to a development initiated by Aboriginal people. It is simply inappropriate for Aboriginal people to claim ownership for welfare dependency on the back of recent tokenistic relations with governments and their agents. Pearson himself argued

It has become patently obvious that the passivity and disempowerment of our welfare condition is, together with racism and the legacy of our colonial dispossession, the fundamental causes of dysfunction in our society.<sup>116</sup>

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<sup>115</sup> Gray, G. “From Nomadism to Citizenship: A P Elkin and Aboriginal Advancement” in Citizenship and Indigenous Australians, (eds) Nicolas Peterson & Will Sanders. Cambridge University Press 1998 p.64

<sup>116</sup> “From Cape York to Campbelltown – Rebuilding Communities”, The Brisbane Institute 26<sup>th</sup> July 1999

Yet despite this acknowledgment, key aspects of the fundamental causes of dysfunction as suggested by Pearson, have escaped the attention of his own proposal. It would appear that Pearson's argument has adopted the definition of welfare dependency used by the Aboriginal Employment Development Policy, which equated welfare dependency to unemployment benefits.<sup>117</sup> As commented by Altman and Smith the definition is somewhat narrow.<sup>118</sup> In the holistic response that Pearson is arguing for, solutions must redress those fundamental causes of dysfunction. Yet the only alterations proposed amount to technical administrative adjustments within existing frameworks to establish an interface for Aboriginal and government negotiations. Whilst such arrangements will have symbolic significance, they ultimately retain the management paradigms identified by Caiden. Against a methodology of history and Aboriginal experience, such solutions will continue to substitute symptoms for causes, leaving 'the fundamental causes of dysfunction in our society', unattended. As argued by Mulgan, "With the passing of time, the question of the legitimacy of a regime turns less on its origins than on its present behaviour".<sup>119</sup>

Chesterman and Galligan have argued that possibilities for the advancement of Aboriginal rights rest in three key areas: the development of the common law on Aboriginal rights; the possibility of a negotiated treaty; and constitutional reform.<sup>120</sup> The opportunity to advance Aboriginal rights within common law is in stark contrast with the findings of Mathews, history and Aboriginal experience. How can Aboriginal people assert their rights as Aboriginal people when the common law fails

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<sup>117</sup> Altman, J. C. & Smith, D.E. Estimating the reliance of Aboriginal Australians on welfare: some policy implications, Centre for Aboriginal Economic Policy Research No.19/1992 p.1

<sup>118</sup> *ibid*

<sup>119</sup> Mulgan, R. "Citizenship and Legitimacy in Post-colonial Australia" in Citizenship and Indigenous Australians. (eds) Nicolas Peterson & Will Sanders. Cambridge University Press 1998 p.186

<sup>120</sup> Chesterman, J. & Galligan, B. Citizens without Rights, Cambridge University Press, 1997 p. 216

to recognise Aboriginal legal systems? Under these conditions, the protection of Aboriginal rights and interests afforded under the common law system can only be conditional. For example, it has been claimed that the recognition of customary law under native title had significantly altered the relationships between Aboriginal and non-Aboriginal people in Australia. McLaughlin argues that the recognition of customary law under native title is only a tool that is used by anthropologists to describe Aboriginal people, for a white judge in a white legal system to make a determination about whether such rights exist.<sup>121</sup> Under this description, the determination gives effect to those rights only through the order of a court and not the customary law right.<sup>122</sup> The recognition of customary law is therefore subordinate to mainstream law. Australian history, mostly written and described by non-Aboriginal people, consistently illustrates how the rights and interests of Aboriginal people have always been subordinate to mainstream. *Where then is the significant change in this relationship?*

Working through a treaty or constitutional reform is a more appropriate vehicle for consideration, because both have the capacity to change the nature of the relationship between Aboriginal people and the federal government. Whereas the judiciary will never undermine its own authority, the legislature does have the authority to recognise Aboriginal people as Aboriginal people and act upon this recognition. Consequently, the opportunities to establish a national framework that can influence local responses can be achieved. As Jull comments;

...the development of systems relevant to and manageable by local indigenous communities involves the transfer of authority to indigenous entities at both

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<sup>121</sup> McLaughlin, R. "some problems and issues in the recognition of indigenous customary law", Aboriginal Law Bulletin. Vol. 3 No. 82 July 1996 p.5

<sup>122</sup> *ibid*

local and national levels. Experience elsewhere in OECD countries suggests that the two produce the best results when proceeding in tandem. That is, it is local authority which is needed to actually improve individual lives, but national influence or direct power is needed to create the conditions and the frameworks for local power to be transferred.<sup>123</sup>

To many, this statement would appear contradictory to the arguments expressed previously. Many would argue that seeking the recognition of Aboriginal people as Aboriginal people from the legislature is reflective of the same devolved system of power-sharing arrangements criticised earlier. The earlier descriptions of devolved power-sharing arrangements placed Aboriginal people within existing institutional arrangements or through new umbrella institutions governments themselves have established, eg. ATSIC, for the ‘benefit’ of Aboriginal people. The recognition sought in this paper refers to the authority and legitimacy of Aboriginal legal systems to operate under their own direction rather than act as components of mainstream institutional frameworks. This should not be confused with a secessionist movement seeking political sovereignty. Rather, the intention of this ‘framework’, for want of a better term, is seeking the recognition of Aboriginal cultural sovereignty. It is seeking the formal recognition of Aboriginal institutions and authority at the national level so that Aboriginal communities at the local level can freely determine their own aspirations under the direction of their own systems. Regardless of how Aboriginal people choose to obtain this recognition, the reality that there has to be an interface cannot be avoided. It would seem appropriate that such a meeting take place at the point where mainstream values are initially activated; the institutional arrangements of the Australian State. Reynolds states:

The unique status sought by Aboriginal people and Islanders relates to their membership of the first nations, not to special rights acquired from the state.

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<sup>123</sup> Jull, P. Australian Nationhood and Outback Indigenous Peoples, North Australian Research Unit, Australian national University, Darwin. 1991 p.21



They are citizens of the state, not of the nation; theirs is a civic, not an ethnic, loyalty. But the paradox is that their commitment to the state may be enhanced by the fact that it alone can underwrite and protect indigenous nationalism and self-government from inimical forces both within Australia and without.<sup>124</sup>

However, such an arrangement can never occur in isolation of other changes. Apart from the recognition of Aboriginal legal systems Aboriginal people need to consider issues such as, constitutional protection and guarantees, land rights in full, the elevation of Aboriginal issues as a national issue to remove the confusion of shared responsibilities as a result of the 1967 referendum and new financial arrangements between Aboriginal people and the federal government. More knowledgeable people than myself would make further contributions to ensure a consistency this cultural recognition requires. To put this into some kind of context, there are numerous Commonwealth and State Acts and Regulations that make specific reference to Aboriginal people in Queensland. These legislative frameworks have impact on issues such as, health, education, housing, employment, environment, law and justice, land, local government, fisheries, forestry, aged care and children. To state the obvious, they impact and set conditions upon Aboriginal lifestyles. The passive context in which Aboriginal 'traditions and customs' are 'considered' in these legislative frameworks, negates real opportunities for Aboriginal people to practice their law within the application of existing legislation. Australian federalism can accommodate such recognition.

If sovereignty could be divided one way in 1901 there can be no reason, in principle, why it cannot be cut again to create a new level of government that would allow Aboriginal and Islander communities to run their own internal affairs in ways already apparent in the external territories of Cocos-keeling, Christmas and Norfolk Islands.<sup>125</sup>

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<sup>124</sup> Reynolds, H. "Sovereignty" in *Citizenship and Indigenous Australians*. (eds) Nicolas Peterson & Will Sanders. Cambridge University Press 1998 p. 214

<sup>125</sup> Reynolds, H. "Sovereignty" in *Citizenship and Indigenous Australians*. (eds) Nicolas Peterson & Will Sanders. Cambridge University Press 1998 p. 213

Arguments against such recognition and the arrangements needed to secure them, contain the very sentiments identified as the primary problem in responding to 'Aboriginal' issues. That is, the only interface that can exist between black and white is one dominated by the terms and conditions set by white Australia. The fundamental task in this paper has been to acknowledge the negative impact of white frames of reference that describe Aboriginal people for appropriate inclusion in white institutions.

Another argument against such arrangements is the assertion that such a framework sanctions apartheid practices. Apartheid practices are popularly understood as the application of separate laws between peoples on the basis of race, one law for 'them', one law for 'us'. But apartheid practices are more than just having separate laws for the purposes of separate development. They are founded on an action by the dominant cultural/political group to withdraw rights and entitlements from other members of the citizenry on the basis of race. It is the management of citizens under racial categories for the purpose of excluding those rights and entitlements to be found in the status of 'citizen of the state'. For example, excluding Aboriginal people from the right to vote was an apartheid practice. The framework being suggested seeks the recognition of Aboriginal people as Aboriginal people and the subsequent rights and entitlements consistent with that status, which exceed the offerings of Australian citizenship. Consequently, how can an arrangement that recognises Aboriginal cultural sovereignty be accused of apartheid practices when the rights recognised for Aboriginal people are rights white Australians don't have in the first place?

The issue of 'cultural diversity' will also promote arguments against a national

framework. Many academics and interested writers of Aboriginal studies would probably disagree with attempts to initiate a process, which is seen to be creating commonalities amongst Aboriginal people. For example Morse comments;

Writing about the condition of Aboriginal People in broad terms fails to disclose the brutal impact of the processes of colonization, economic destabilization and acculturation...Generalities also mask the diversities that exist, as well as the cultural, political and economic revival that has begun in Aboriginal communities. Aboriginal People are not all the same nor do they all face the same problems.<sup>126</sup>

This view expressed by Morse represents the general description of what cultural diversity is and the appropriate policy response to accommodate it. However, it is a response, which fails to recognise that unity can be expressed through diversity. The description by Morse relies upon markers identifying different needs and concerns, different historical experiences, different socio-economic backgrounds and geographic location. The problem with this perception of ‘cultural diversity’, is that it polarises Aboriginal experiences as separate events, isolated and independent. It excludes the most obvious observation that from the first day of colonisation, Aboriginal people have lived a shared social experience.

Regardless of geographic location, historical experience, contemporary needs and concerns or socio-economic backgrounds, Aboriginal people across this country have felt the impact of white systems of governance and the practices of non-recognition applied to their own. Despite the wide literary recognition, the markers currently used to identify ‘cultural diversity’ ignore the commonality of this event. These markers only reflect the consequences of this event and mirror current evaluation practices of

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<sup>126</sup> Morse, B. Aboriginal Peoples and The Law: Indian, Metis, and Inuit Rights in Canada, Carleton University Press. Ottawa Canada 1991 p. 12

starting from the periphery and extending outwards. It is another contribution to the confusion in differentiating between causes and symptoms.

The introduction of Christianity to Aboriginal communities will offer some clarity to this analysis. Diggs argued that because there were many Aboriginal laws and languages it was not possible to speak in general terms about Aboriginal spirituality.<sup>127</sup> This is a descriptive explanation of what is seen; not an informative explanation of what is understood. Cowan illustrates that when ‘guardians’ spoke about land and law there was a consistency among the principles being applied.<sup>128</sup> These included land and law are one, the importance of human participation and responsibility and the importance of this relationship to the present reality. Regardless of geographic location these principles were applied. What Diggs described as diversity was the regional variation and application of shared principles and appears to be unable to distinguish between the foundations of individual group customs and key principles that inform Aboriginal law.

Current understandings of cultural diversity have retained this theologian critique. It is a practice, which has positioned the influence of cultural diversity as a negative, rather than as a positive expression of Aboriginal lifestyles. The question needed to be considered is how to design policies that not only accommodate Aboriginal cultural diversity, but also recognise and deliver Aboriginal authority. Establishing a process of policy formulation, which is based on identifying key principles, may be seen as standardising the Aboriginal response to individual issues.

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<sup>127</sup> Diggs, M. “Missionaries & Cross Cultural Situations”, Compass Theology Review. Vol.27, Spring 1993

<sup>128</sup> Cowan, J. Sacred Places in Australia. Simon & Schuster, New South Wales 1991

On the contrary, it is a response, which standardises the recognition of Aboriginal authority that will allow individual communities to apply what they consider to be appropriate responses to particular issues. It will enhance diversity, not mask it. The task ahead for Aboriginal peoples in Australia is to move the issue of cultural diversity into a positive expression of Aboriginal values. This can be achieved with the recognition that there are key principles and events which underpin and unite Aboriginal people. If policy makers are to avoid the ad hoc practices of the past, then the drafting of new policy must accommodate diversity, not be formulated by it.

This dissertation has argued and demonstrated that the failure of mainstream approaches to redress Aboriginal circumstance originates not at the level of implementation, but in the methodology and context in which problems themselves are framed. Despite the acknowledgment of the Royal Commission into Aboriginal Deaths in Custody that issues such as land, education, economic development and health are all interrelated, there has been little attempt by public policy analysts to redress the influences that maintain this constant interaction. Consequently, governments have relied upon the symbolisms and rhetoric of their own cultural assumptions to persevere with 'well intentioned' but symptomatic ambitions.

In pursuit of Johnston's definition of empowerment, governments at all levels need to understand that it will not be achieved until Aboriginal communities can secure authority over issues that directly impact upon them. This entails accountability not to governments, but to the Aboriginal community. Increasing responsibility to government without authority will only produce negative outcomes for the community and the programs, which are imposed upon them. Firstly, it will create false

expectations as to what outcomes the community can realistically achieve. Secondly, without authority, indigenous communities will become dependent upon the program and bureaucratic mechanisms, which operate it. Thirdly, Aboriginal participation will decline when it is realised that the community's initial expectations cannot be met. Therefore, a program originally intended to increase Aboriginal responsibility and participation as an administrative bridge from dependency towards 'a measure' of autonomy will only create further dependency and frustration, unless the community is recognised as having authority, ownership and control of its own agenda. Anything other than community initiative and control falls into the area of outside imposition - no matter how well meaning.<sup>129</sup>

It is therefore not just the physical acts of government responses to issues confronting Aboriginal people that need to be re-thought; it also requires a rethink of how these issues are framed for policy responses. Robbins comments,

Participants in the policy process may see the problems facing Aborigines as disease or discrimination rather than a dilemma of liberal theory. But notions of rights, freedoms and the relationship between the individual and the state are crucial ingredients of the way in which Aboriginal rights are framed as a policy issue.<sup>130</sup>

It has been demonstrated that 'Aboriginal' issues have been framed within the same mainstream values that direct the provision of social, political and legal institutions

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<sup>129</sup> Sykes, R. "Self-determination: Implications for Criminal Justice Policy Makers", In Justice Programs for Aboriginal and other Indigenous Communities: Australia, New Zealand, Canada, Fiji, Papua New Guinea. Proceedings from Aboriginal Justice Workshop No.1 (ed) C. Hazelhurst. Australian Institute of Criminology 1995 p. 27

<sup>130</sup> Robbins, E. Self Determination or Welfare Colonialism: Aborigines and Federal Policy-Making. Thesis submitted for the Degree of Doctor of Philosophy, Flinders University, South Australia. May 1994 p.10

and practices for all Australians. Operating in this ‘all Australian’ context, a politics of non-recognition has been maintained.

Bureaucratic indifference thus shielded the state from both accountability and the responsibility to do more than react half-heartedly, in a patronising and ad hoc way, to a situation imbued with elements of racial and cultural genocide. In a general sense this neglect was indicative of the collective exclusion of indigenous people, on racial and cultural grounds, from the colonial community and the resulting consequential socio-political location outside its boundaries of a great many individuals identifiable as Aboriginal. However, it also facilitated the inclusion of many Aboriginal people within the boundaries of the body politic, but their inclusion was conditional upon the erasure of their difference.<sup>131</sup>

This description by Wood of Australian colonial and commonwealth government policies from the mid nineteenth to the mid twentieth century is very much consistent with the analysis of current practices presented in this paper. It is the nature of the relationship; the context in which choices are to operate that creates the inequality that Aboriginal groups confront.<sup>132</sup> It is therefore the context of this relationship that needs to be changed.

History and Aboriginal experience are very much forgotten tools of policy analysis in Aboriginal affairs. Excluding these aspects reduces the understanding of these issues to a contemporary context that can only describe symptoms. It provides half the solution to half of the problem. Alleviating ‘Aboriginal’ disadvantage can only be redressed by responding to both the causes and symptoms. To carry out one in isolation of the other will perpetuate deficient explanation for ‘well intentioned’

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<sup>131</sup> Wood, M. “Nineteenth Century Bureaucratic Constructions of Indigenous Identities in new South Wales”, in *Citizenship and Indigenous Australians*, (eds) Nicolas Peterson & Will Sanders. Cambridge University Press 1998 p. 50

<sup>132</sup> Robbins, E. *Self Determination or Welfare Colonialism: Aborigines and Federal Policy-Making*. Thesis submitted for the Degree of Doctor of Philosophy, Flinders University, South Australia. May 1994 p.9

efforts.

A framework built upon the recognition of Aboriginal cultural sovereignty is possible and practical within Australia's federal structure. However, the current political and popular climate to 'leave the past behind us' means it will not be an easy task.

Against this prevailing Australian pioneering spirit, Aboriginal people, policy analysts and government need to keep in mind that the difficulty of the task does not make it impractical, only difficult.

If Aboriginal people can only see themselves through the eyes of mainstream social, legal and political institutions, then we ourselves will perpetuate the myths they have about us. If we continue to stand in front of white mirrors accepting white explanations for 'Aboriginal' problems, failings and solutions then we will only see distorted reflections. The only honesty to be seen in these images is that Australia has never truly departed from the Benelong experiment. A true reflection of Aboriginal realities can only be achieved in a context that recognises Aboriginal people as Aboriginal people. However, under existing arrangements the only equality mainstream Australia is prepared to offer us is theirs.



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