Annual Sir Ronald Wilson Lecture 2012
8th August 2012

From the Doctrine of Discovery to the Recognition of Sovereignty

The Impact of the British/Australian Legal System on Aboriginal Western Australians from Colonisation to the Present

Adjunct Professor Dennis Eggington
Chief Executive Officer
Aboriginal Legal Service of Western Australia (Inc)

- and -

Director - National Congress of Australia’s First Peoples

Official Opening by Judge Mary Ann Yeats
Welcome to Country by Matthew McGuire
Featuring the film clip to ‘Thou Shalt Not Steal’ by Kev Carmody

CULTURAL WARNING
Aboriginal and Torres Strait Islander peoples are warned that this lecture contains images and references to people who have passed away

Video comments screened during this lecture have been transcribed for inclusion in this version
Acknowledgements
Thank you Judge Yeats for your introduction and to our brother Kev Carmody, an inspiration to us all.

Vice President of the Law Society of Western Australia, distinguished guests, ladies and gentlemen…I too would like to acknowledge the Traditional Owners upon whose Country we meet today - The Wadjuk People of the Nyungar Nation. In doing so I would also like to pay my respects to the Elders, past and present. A special thanks to Matthew McGuire for his Welcome to Country and ensuring that today we share a place that respects all. It’s always good to have the spirits looking after us.

Introduction
It is indeed a great honour to present the 2012 Sir Ronald Wilson Lecture. I met Sir Ron on a number of occasions and many of you will be aware of his role in the establishment of the Aboriginal Legal Service here in Perth in the early 1970s.

Today I want to explain the impact that British and Australian law has had on the First Peoples of Australia, and specifically on Aboriginal people here in Western Australia. I hope that a positive from my talk is an understanding of how we as a people feel about what has happened. I want to go beyond legal discourse. I want to discuss not just our very humanity but our very humility. To me, this captures the essence of Sir Ronald Wilson. A man who was small in stature, but gigantic as a social change agent through his own sense of humanity and his commitment to making our world a better place to live.

With this in mind I want to give you a personal account of the impact of Western law on our peoples, both from my own perspective and that of some other Aboriginal people, including Dr. Noel Nannup. Dr. Nannup is a highly respected Nyungar Elder, consultant, story-teller, Cultural mentor and Edith Cowan University’s Cultural Ambassador and he shares his views on the impact of western law upon Aboriginal people:

(Start Dr. Noel Nannup) “I think across the board that’s the Stolen Generation and personally it’s my Dad, because my Mum was taken away as well, but Dad was only 5 years old and anything to do with his Aboriginality he told me was flogged out of him by the time he was 7 so you know that’s a memory I carry. Also then of course you’ve also got a different law and in many instances when you think of Wongi people, Yamatji people even today they’re subject to two laws you know, they might commit an offence out there that’s really serious, they come down here they go through the legal system we’re all subjected to as Australians and then they go home and they have to go through Aboriginal law” (End Dr. Noel Nannup)

The impact of western law is also evident in contemporary life today, as Professor Colleen Hayward explains. A Senior Nyungar woman, Professor Hayward is the Head of Kurongkurl Katijin at Edith Cown University and this year was made a Member of the Order of Australia for her service to tertiary education and the advancement of the rights of Indigenous peoples particularly in law and justice, children’s health and social welfare.
(Start Professor Colleen Hayward) “For me, the major impact of Western law is summarised in a story of us going out for my brother’s birthday earlier this year. We were in Northbridge and all of the family was together and as we headed back to the car park where we were all parked there were about half a dozen police officers rousting quite a young Aboriginal man. He was clearly embarrassed to be in this situation and was just quiet, he was just quiet, he was surrounded, he didn’t do anything and clearly after a while when they told him to move along that’s what he did. But I did, what I always do which was stand close enough to not be in the way, but also close enough to observe clearly. My two brothers stood with me and for the whole time they looked at the ground and they looked at the ground because neither of them wanted to get into trouble by making eye contact with any of the police and they each stated quite independent of each other that they didn’t want to be tasered. Now that response in them, automatic and without prompting goes to the place of belonging and pride and self respect and until we can address those things so that we are all comfortable in our own country we still have a long way to go as a nation.”(End Professor Colleen Hayward)

We’ll hear from others throughout this lecture about the impact of western law upon Aboriginal people, as well as posing the question: “Does Aboriginal Customary Law have a place in Australia today’’?

Origins of Concept of Terra Nullius
The origins of the concept of Terra Nullius which have affected Indigenous peoples since colonisation do not lie in British law. They lie in the Catholic Church, and in a series of Papal Bulls¹, or ‘charters’, issued in the fifteenth century. Native American Steve Newcomb has described these Papal Bulls as effectively a declaration of war by the principalities and monarchies of Christendom against all non-Christian people.

These Papal Bulls and subsequent edicts and legal principles based upon them have been used for centuries to dispossess Indigenous peoples of their lands and to facilitate the transfer of land and its resources to colonising powers. This later became known as the ‘doctrine of discovery’ – hence my title. This doctrine asserted that Christian nations had a divine right to claim title over so-called ‘discovered’ land and to exercise authority over the inhabitants. Unsurprisingly, Indigenous peoples around the world have been fighting against this for over five hundred years.²

¹ A papal bull is a particular type of declaration issued by a Pope of the Catholic Church. It is named after the bulla that was appended to the end in order to authenticate it.

In Australia, the idea of *Terra Nullius* which came out of the doctrine of discovery is more familiar to us. In 1770 the British government’s official instruction to Captain Cook stated that he was “with the consent of the natives...and I emphasise that – with the consent of the natives” to take possession of convenient situations in the country in the name of the King of Great Britain, or if [he] found the country uninhabited, to take possession for His Majesty.”

Here’s some more view about how western law has impacted upon Aboriginal people...Les Malezer is from the Butchulla/Gubbi Gubbi peoples from south east Queensland and is the Co-Chair of the National Congress of Australia’s First Peoples:

(Start Les Malezer) “It’s quite clear looking back on the history not only of Australia but around the world, that for Indigenous peoples, the impact of colonisation has been devastating. It has lead to of course the taking of territories and resources but also massive destructions of populations...and a huge impact on cultures.... Indigenous peoples have found a way to survive through genocide policies, through massive action and so on and not only that but Indigenous peoples continue to survive in their territories, being able to maintain the bio-diversity that exists in their territories and to keep the environmental health of the world going and so on. This has been a very big contribution Indigenous peoples have made to the survival of the world over the past centuries and in Australia in particular it’s very important because this country is very much a spiritual country, it’s different from other parts of the world in many many ways but it’s very much a spiritual land and this country can only survive if that spiritual contact is maintained. Aboriginal people are so important for the continuing health of the land, the environment and the spirits that exist in this area” (End Les Malezer)

Sharing the Co-Chair role on the National Congress of Australia’s First Peoples is Jody Broun, a Yindjibarndi woman from the Pilbara here in Western Australia. For Jody, western law has impacted in a way that many of our people can relate to.

(Start Jody Broun): “I think because my mum is a member of the Stolen Generations I would have to say the laws that allowed children to be taken from their families has probably had the highest impact on myself and my family. You know we can’t go backwards but the reparations and the recompense for that sort of thing I think is really important and it’s something that is going to linger into the future because it has had such a widespread impact and it goes down through generations”. (End Jody Broun)

Aboriginal people and Torres Strait Islanders never gave our consent for our lands to be taken in the name of the British King, and our strong resistance to dispossession and defence of our

---

sovereignty continued through to this day. But this did not stop *Terra Nullius* becoming the basis of British colonial and later Australian law. Aboriginal sovereignty was deliberately denied, and Aboriginal lands declared ‘un-inhabited’ in a series of colonial statutes. This was in an international context of the application of Western legal systems to justify seizure and dispossession of Indigenous lands. In the United States in 1823, the Supreme Court in the celebrated case, *Johnson v. McIntosh*, asserted the doctrine of discovery over Indian lands. The case established that the United States, when it won independence in 1776, became a successor nation to the right of ‘discovery’ of non-Christian lands.

The Supreme Court claimed that Indians or Indigenous Americans had lost ‘their rights to complete sovereignty, as independent nations,’ and only retained a right of ‘occupancy’ in their lands. In other words, Indian nations were subject to the ultimate authority of the Christian nation, in this case the United States. The first peoples around the world have for centuries protested against these unjust laws which robbed us of our lands and provided a legal framework for destructive and genocidal attacks by the colonising powers on First Peoples and our cultures.

At the United Nations Permanent Forum on Indigenous Issues in May this year, Indigenous and native peoples condemned the continued use of the internationally recognised principle of “terra nullius” and called for the United Nations to repudiate the doctrine of discovery. In Australia, the doctrine of *Terra Nullius* and a body of colonial, then State and Federal laws targeting Aboriginal people, have been devastating for us. They have stripped us of our human rights and our inherent rights as the rightful owners of this Country and its resources. They have robbed us of our inheritance and changed forever our destiny and that rightful future. They have discriminated against us and committed acts of genocide on our peoples.

To fully understand the human impact of this legal attack goes far beyond any simple understanding of the laws themselves. What I seek to do today is to give you some sense of the impact of past and present laws on Aboriginal people but at the same time emphasise how Aboriginal law has endured. I will also talk about how the recognition within our Australian legal system of Aboriginal law and Aboriginal sovereignty is a major step towards reconciliation.

Before I share my own thoughts with you I’d like you to hear from a Palawa Elder. I was in Tasmania during NAIDOC Week in my capacity as a Director on the National Congress of Australia’s First Peoples. NAIDOC always brings people together to share in the celebration of our achievements and reflect upon where we stand in the history of this nation. I spoke with Rodney Dillon, an Indigenous Campaigner for Amnesty International about the impact of western law, in Tasmania:

---

4 / Steve Newcomb, ‘Five Hundred Years of Injustice’
(Start Rodney Dillon) “I think the impact of the law itself has been that its interfered with our culture as an Aboriginal person to keep your culture going, the destruction of the Living Marine Resources Act also the other acts the National Parks have got, they have completely tried to stop us from practicing our culture. In the ways they have denied us for 35 years to be able to be able to get mutton bird, they have denied us the right to be able to take the mutton fish and they’ve put laws in. Living Marine Resources Act has been that strong for Aboriginal people not to be able to practice their culture because they’ve been too frightened because there is such heavy fines so it’s been very destructive and there has been very little negotiations for us to keep practicing our culture”. (End Rodney Dillon)

To ensure that reconciliation survives as a core value of our national identity, we need to enshrine a respect for each other’s humanity, as Sir Ron Wilson and so many other Australian human rights activists have done before me.

I’ll start by describing my experience of this land as a Nyungar man, here in the country of my ancestors. A journey which I have been very fortunate to share with my family. I want to evoke for you a time when Nyungar country, culture and community were all protected by Nyungar law and spirituality.

Where we sit today, if we remove the floor, the walls and the ceiling it is possible to imagine a beautiful, powerful and awe inspiring natural environment, an environment created by Waugal. Waugal the great Nyungar creation spirit took the form of the serpent as it created this landscape. This journey of creation started inland and moved slowly to the coast.

Our story starts at ‘Ga–ra–katta’. This place is sacred to Waugal as it lies where the great serpent emerged and rested. It is now known as Mt Elisa and is where our WA Parliament House stands.

I want to take you on Waugal’s journey down the Derbal Yerrigan (this is the Swan River from Melville Waters to the ocean) before returning to Ga-ra- katta and Parliament House.

Refreshed and rested after emerging from Ga–ra-katta Waugal stretched, did full circle to the right allowing one last look back at this special resting spot before continuing its journey.
This last look created what we now call Matilda Bay.

Waugal for reasons known only to the great serpent moved in a circular motion creating the vast stretch of water called Doon-tan-boro the big pelican river, now known as Melville Waters.

It is still possible today to see where Waugal plunged deep into the ground and created Marran-dung-up, the place of deep water. You may know it better as Alfred Cove.

Waugal then goes due north once again, swimming in a circle, pushing rocks and soil to form river banks and mud flats.

This activity creates Min-der-up and Karrakatta known today as Freshwater and Mosman Bays.

Waugal again decides to rest and dives deep into the earth again creating the deep water holes along (Jena-lup), known today as Blackwall Reach.
Waugal then relieves itself. We know this because its goona or excrement can be seen today. It is Waugal’s goona that are the limestone cliffs of this area.

Waugal, now feeling relieved and cooled off from the deep cool water, makes one mighty turn before heading towards the coast creating Rocky Bay then turning around to finally go deep into the bank.

The caves found here are Waugal’s final resting place before making its way to the ocean and are named Ga-rung-up. The goona or limestone once again indicate a special place of rest.

Waugal is not the only creation spirit for this stretch of River.

The mouth of the river was also guarded during the creation time by seven dogs Dwerdas at Dwerda Wee-lar-din-up. The hill is now known as Cantonment Hill.

During the creation time, these dogs had to fight off a crocodile from the north stopping it from entering the Derbarl Yerrigan. One of the dogs bit off the tail of the crocodile. The crocodile sank to the mouth of the river forming the rocky bar at the river’s mouth. (Collard et al 1996)

Then the great serpent populated this place with all the plants and animals and finally his children, the Nyungar people. Waugal was kind to this place. The animals had soft padded feet and had very little impact on the beautiful flowers and plants that grew here. The Nyungar people took up all the most beautiful spots along the river. Places where the sweetest fruit grew and the water was fresh and cold. Life was good.

I try and make the journey from Perth to Fremantle along the river as much as I can. I will always go on one side of the river bank and come back on the other side. You see, I too have my favourite places as I follow this ancient dreaming tract.

Another place not far from here is the old Swan Brewery site. It’s a good place to fish - sometimes you can get the large dhu fish coming past as they go through the narrow part of the river.
This ancient resting place of the Waugal is important. It was here that you could get freshwater and hunt the yonga (kangaroo). Its Nyungar name is Goo-nini-up. It was the place where Nyungars would attend to the Waugal eggs and carry out ceremonies for this purpose. This was the land of the Mooro Nyungars and their great leader Yellagonga. It was a meeting place for inland Nyungars to come for male initiation and economic exchange. It was a recognised area for the trade route of red ochre. It was a place of plenty. The fishing was as good then as it is today. Crabs and prawns were on the diet – and frogs, long before they became famous through French cuisine.

Another favourite stop is the Claremont Jetty. This whole area had many freshwater springs and was considered a healing place. Hence the name - Freshwater Bay. Like then, it is still considered today as a special place to live. It seems it was always thought of as up-market. This was a favourite camping area for the Whadjuk Nyungars. I stop here during certain times of the year to throw out my crab nets off the jetty. It is a place I know I can get the Big Blue Manors.

The sand bar in Freshwater Bay is a favourite place for people to anchor their boats and drop their nets. The sandbar’s Nyungar name is Karrakatta and it would not surprise you to know it means ‘place of crabs’.

My last special place on this side of the river is at the shallow banks on the Northside of the Fremantle Traffic Bridge. This was a much favoured spot for the Mooro Nyungars who
would use this shallow place as a crossing en-route to Bibra Lake, Rockingham and Mandurah. To the Mooro, this too was a place of plenty.

This is very close to where the original mouth of the river was and the place where the Dog spirits fought with the crocodile. The shallow bank provides good fishing and this is especially good for flathead and flounder. It was here that an Eggington legend was born.

I was standing in the shallows of the river bank almost under the Fremantle Traffic Bridge. There I became aware that several dolphin were moving back and forward between where I was and the traffic bridge. This concerned me as I knew they would be scaring the fish away. To my astonishment a very large shadow began moving towards me. The water erupted into a boiling mass with thousands of fish exploding all around me. The dolphins in fact were doing the very opposite of what I feared. They were herding this very large school of mullet past me and up onto the bank. A once in a life time experience that will no doubt become a family favourite. A time when grand-pop swam with the dolphins and brought back fish for the whole family. Legend may have it that in fact Pop can speak dolphin and called them to bring in the fish! It is important to note that activities such as this have a long tradition in Nyungar history.

My first stop on my return journey is at the limestone cliffs at Blackwall Reach. As I have previously said our Nyungar name for this special place is Jenalup. Jena is Nyungar for foot and the suffix ‘up’ is Nyungar for place ‘of’. Jenalup therefore can be translated as the place where feet make a track. This area was, and remains, a special place. A place of fresh water and a connection to the spirituality of the Waugal. A place for women and children. We enjoy this area as it remains somewhat wild and un-tamed. It is good for fishing and I am of the opinion that many of our river fish shelter here in the deep water.

Our last place is Point Walter. We stop here because the jetty is a good place to fish and sometimes we have a BBQ here before heading home. This was good place for the women and children to cross the river, going along the long white sand bar. The sand bar’s white sand is called Dyoondalup meaning ‘place of white sand’. The white sand bar was created in
the Dreaming by the white hair of a women’s spirit ancestor falling down and landing in that part of the river.

On many occasions, this regular pilgrimage fills me with mixed emotions. I have to be honest and say that I do get angry when I look for all those special places and the haunts of our peoples. Why are we no longer there? What is it that continues to keep our places from us, treating us as strangers – as trespassers - in our own country? We are the oldest surviving culture in the world and have a rich tradition of culture and lore, but with the impact of western law, does Aboriginal Customary Law still have a rightful place in Australia?

(Start Dr. Noel Nannup) “I’m not sure you see, you’ve got to weigh the whole lot up, there’s a lot to weigh up and, at the same time, the old law I believe is slowly adjusting and adapting to the new way but you still get some of the floggings, or when the cars roll over and people are killed, I’ve witnessed that myself you know when I lived in the Kimberley and wouldn’t wish it on anybody but at the same time you weigh that up against the Westminster law if you like or whatever you have and it’s just as horrendous. Aboriginal people are not meant to be in prisons full stop”. (End Dr. Noel Nannup)

(Start Jody Broun) “I think customary law has got a place, I think where it really needs to be reinvigorated and it needs to be strong but it’s really connected to really strong culture and language and I think we can’t separate those things out. It needs to be respected and have its place within the broader legal system I think and to be taken account of in sentencing and things like that but more so I think it’s about how communities wrest back control of those sorts of things themselves”. (End Jody Broun)

(Start Les Malezer) “Aboriginal law still survives, there has been a tendency for people to think it’s gone and its going, that it’s been a concern to see, for example in the area of traditional health practices that these seem to be disappearing from the Aboriginal health systems when they shouldn’t be disappearing. There should be an emphasis to maintain that. So not only should the continuation of tradition and law be maintained it actually should be
strengthened there should be a return of people back to their cultural ceremonial obligations to land and so on and it’s because of the importance of the law that sets our social responsibilities, our social behaviours and so on and a big part of that is language and we have a great diversity of languages in Australia, between 250 and 600 languages and those languages are all destined to die out if nothing is done to change that so Congress has made a big issue of late of saying we must continue to strengthen our languages, our resolve there is that by strengthening our languages we continue the survival of the law, we get people back to doing cultural things such as walking on country and doing ceremony for country and so on and this is the way we’ve got to start thinking now, it’s not only about to university or getting into a home that we own and so it, it’s actually.. those are just means for us to continue to survive in the way we are meant to survive as indigenous peoples, 40,000 years or more in this country and 40,000 years or more into the future we have to survive and that’s our obligations” (End Les Malezer)

I look around and see the ground once protected by the soft pads of animals long gone. In its place the destruction caused by the hooves of those Papal Bulls sent to rob and plunder the lands of my ancestors. The theft of Aboriginal land has had the greatest impact on our peoples and remains at the heart of our struggle. That is why we use the phrase ‘was, is and always will be Aboriginal land’. That is why our continued calls for recognition of sovereignty are still echoing around this country of ours, as they have from 1770 onwards.

Now I would like to take you on another kind of journey.

Aboriginal Australians as British subjects were supposed to enjoy the same rights and protections as every other British subject. But that wasn’t to be. When Australia became a nation with a Federal constitution in 1901, the civil and political rights of Aboriginal people had already been undermined in several colonial statutes, even though in Western Australia and in other states, the right to equality before the law had been denied in the way that Aboriginal people were dealt with by the courts. The legacies of this endure today in extreme racial disparity in our justice system.

The combination of the White Australia Policy, one of the very first pieces of legislation passed in the new Federal Parliament in 1901, and the exclusion in the new Commonwealth
constitution of the power to make laws for Aboriginal Australians and other Indigenous peoples, meant that the oppressive and racially discriminatory regimes established in the States were left to flourish unimpeded. In Western Australia we had the notorious Aborigines Act of 1905. Aboriginal people in Western Australia still talk about this as an Act which took away so many rights that they had previously enjoyed, and condemned Aboriginal communities and families across the State to generations of poverty, segregation and the heartbreak of having their children taken away.

The 1905 Act which set the pattern of systemic abuse that continues today. Throughout the decades since we have protested at being denied citizenship in the country of our forebears. Rather than being frozen in time, these Acts do not sit uncomfortably in the past. Their tentacles span generations and reach deep into the present. We are still fighting for basic human rights today because of these past Acts of inhumanity.

The 1905 Act gave the Governor power to declare certain areas prohibited to Aboriginal people ‘not in lawful employment’, and to establish reserves to which unemployed Aboriginal people could be forcibly removed on orders of the Minister. Aboriginal people could also be arrested without warrant for offences against the Act and, if convicted, could be jailed for six months. If Aboriginal people left their employment without permission, they could be charged with an offence against the Act. Marriages between Aboriginal women and non-Aboriginal men required approval by the Chief Protector. The Minister was granted the power to exempt certain people of Aboriginal descent from the Act, but their certificates of exemption could be cancelled at any time. The Chief Protector was made the legal guardian of all Aboriginal children under the age of 16 years, and amendments in 1911 extended this power to guardianship over ‘illegitimate’ children against the rights of the mother.

These were the sections used by the Department to forcibly remove children from their families. Made for the so called ‘protection’ of Aboriginal people, these laws fostered systemic human rights abuses across Australia. Many non-Aboriginal people now are surprised to learn that these unjust and racist laws were not finally repealed in Western Australia until 1972, just forty years ago.
As with the laws that tried to deny Aboriginal sovereignty over land, we protested against these laws that sought to deny our civil and human rights. Among the many letters written to the government, Nyungar man John Kickett wrote to the Premier, Mr Griffiths, in 1918, protesting that while some of his people had enlisted in the Australian Imperial Force and were fighting in the trenches in France, his children had been refused permission by the Education Department to go to the local school in Quairading. As Kickett wrote, ‘My people are fighting for our King and Country Sir I think they should have the liberty of going to any State school’.5

A life-long activist for Aboriginal rights, Yamatji leader William Harris headed a delegation of Aboriginal people from around the State in 1928 to see the Premier, Mr Collier. Objecting to the ‘absurd regulations’ of the Aborigines Act - words that Harris used.

Aboriginal people gave evidence at the Moseley Royal Commission in 1934, and Nyungar men such as David Nannup complained that Chief Protector Auber Octavius Neville’s decision to incarcerate some of his children and grandchildren at Moore River Settlement was unfounded. Nannup hired a lawyer to argue that he and his family should not be subject to the Aborigines Act. Aboriginal witness John Egan also protested against coming under the control of the Department, and told the Commission that he wanted to ‘live where I can get work as a free Australian.’

Arthur Thompson wanted exemption from the 1905 Act so that he could get ‘his Rita’ out of Moore River Settlement.6 For those of you who don’t know, Moore River Settlement, north of Perth, was established by the Aborigines Department in 1918 as a segregated government institution to which Aboriginal children and town camp residents were forcibly removed, under powers conferred on the Minister in the Aborigines Act 1905.7

Evidence presented to the Moseley Royal Commission by Aboriginal former ‘inmates’ – that was the term used in the government records - inmates and their relatives, portrayed Moore River Settlement as a place of hunger, poverty and brutal punishment.8 Nyungar witness

---

7 / The Aborigines Act 1905, Section 12, stated that ‘The Minister may cause any aboriginal to be removed to and kept within the boundaries of a reserve, or to be removed from one reserve or district to another reserve or district and kept therein’. It was an offence to refuse such an order. Section 13 outlined the possible exceptions to those who could be removed to a reserve, mainly those in ‘lawful employment’ and women married to non-Aboriginal men.
8 / Moseley Royal Commission: Transcripts of evidence, Perth, 1934, see evidence of Mary Warmadean, John Egan Sr, John Egan Jnr, Melba Egan, Annie Morrison.
Alfred Mippy declared that he ‘would not stop there’, and that it was ‘the last place’ any Aboriginal person would want to go.⁹

Even Commissioner Moseley, who was generally sympathetic to the Aborigines Department and its staff in his report, described the settlement as ‘a woeful spectacle’. Under the disguise of being an educational institution for young Aboriginal children, in reality it was nothing more than a cheap source of labour.

Like the brave young girls in the true story, Rabbit Proof Fence, our people were incarcerated in places like Moore River for no reason other than that they were Aboriginal.

As a further illustration of how difficult it was for us to exercise our basic civil rights, during the 1934 Royal Commission, Chief Protector A.O. Neville, nicknamed ‘Neville the Devil’ by some, was able to cross examine the witnesses who were critical of his Department and its treatment of Aboriginal people. The Aboriginal witnesses knew that Mr Neville had the power to take away their children and to remove them and their families to squalid settlements like Moore River, yet they risked it to publicly protest against their treatment and to demand their rights as ‘free Australians’.

During the era of the civil rights movement of the 1960s, significant changes occurred for Aboriginal peoples in Australia. In 1962, finally after over half a century of federal democratic government, Aboriginal people and Torres Strait Islanders were accorded the same voting rights as other Australians in Commonwealth elections. In 1965, Charles Perkins led the Freedom Ride throughout country New South Wales to protest against racial segregation, and this campaign attracted widespread media attention.¹⁰

In 1966 Australia became a signatory to the International Convention on the Elimination of All Forms of Racial Discrimination. In 1967 Australians voted overwhelmingly in favour of changes to the Constitution which gave the Commonwealth government power to make laws for Aboriginal people and Torres Strait Islanders, a move for which our activists and their supporters had been campaigning for decades. This was the final challenge to the maintenance of racially discriminatory regimes in the States and Territories, and by the early 1970s most of these laws had been repealed.

But living conditions for most Aboriginal people and Torres Strait Islanders remained appalling bad, and by all major indices of health, housing, employment and imprisonment rates the gap between black and white Australians was huge.

With the election of the Whitlam Government in 1972, the fledgling Aboriginal legal aid organisations around Australia received a substantial boost in funding. They were confronted with a huge demand for their services when Aboriginal people for the first time had access to their own legal representation so that they could take their cases to court. And they pressed for land justice and to protest against what they knew was the fundamental wrong of dispossession.

The first major land rights court case was in 1971 with the case of *Miliripum v Nabalco*, when Yolgnu people from the Gove Peninsula in the Northern Territory Government took Nabalco Mining Company and the Commonwealth government to court in an effort to stop mining on their country and to assert their traditional land ownership. Justice Blackburn of the Northern Territory Supreme Court determined that although Yolgnu law was clearly a system of governance, it was not ‘part of the law of any part of Australia’. Although it’s an important precursor to the Mabo decision, *Miliripum v Nabalco* was a disappointment for those fighting for the recognition of traditional land rights. Further, recognition of Indigenous sovereignty was still far from the mainstream political agenda although it had always been on the agenda for Aboriginal rights campaigners.

In the late hours of Australia Day 1972, four men involved in the Black Power Movement - Michael Anderson, Billy Craigie, Bertie Williams and Tony Coorey - set up an umbrella outside Parliament House in Canberra with a sign saying “Aboriginal Embassy.” The word “embassy” was deliberately used to signify the lack of land rights that the Aboriginal people had in their own country. When the police were called the next morning they soon discovered that there was no law against camping on the crown land and the “Aboriginal Tent Embassy” was born.

In 1975, Australia finally implemented the provisions of the *International Convention on the Elimination of All Forms of Racial Discrimination* in domestic legislation by passing the *Racial Discrimination Act*.

On the fifth anniversary of the Tent Embassy in 1976, the *Aboriginal Land Rights (Northern Territory) Act* was passed by the Federal Parliament. This was the first law in Australia that enabled Aboriginal applicants to claim land if they could show evidence of their traditional association with that land. For successful claimants, land was granted in ‘fee simple’ (like a kind of communal freehold).

In the celebrated challenge led by Eddie Mabo on behalf of the Miriam people of Mer Island, the High Court of Australia finally shattered the legal fiction of *terra nullius* in 1992. The Court found in *Mabo v Queensland (No 2)* that Australia was in fact inhabited at the time of British occupation and that Torres Strait Islander people had legal rights to their traditional lands unless those rights were validly extinguished. The *Mabo* judgment recognised our rights to land. For those groups who could demonstrate that the laws and customs which supported land ownership pre-dated the declaration of British sovereignty, their native title was recognised under Australian law.

---

11 *Miliripum v Nabalco Pty Ltd and the Commonwealth* (1971) 17 FLR 141 at 143 per Blackburn J.
As Chief Justice Robert French recently wrote, the Mabo decision made recognition the ‘informing metaphor’ for the common law of native title. But while the Mabo decision was celebrated by Aboriginal and Torres Strait Islander peoples and our supporters as a recognition that the land always was ours, it was not a recognition of our sovereignty.

The Australian government initially responded to the decision with the Native Title Act 1993 and the establishment of the National Native Title Tribunal to administer the native title claims process. The Indigenous Land Corporation was established by legislation so that Aboriginal people and Torres Strait Islanders who did not have a chance of securing land through the native title process, were assisted to buy and manage land for their ‘economic, environmental, social or cultural benefits’.

The Keating Labor Government also committed to establishing a social justice package with a raft of measures to ameliorate Indigenous disadvantage, including addressing the legacies of dispossession and child removal policies. However, the Keating Government lost power prior to implementing this package and the succeeding Howard government ensured that it never happened.

Laws are the privilege of the prevailing government.

The Native Title Amendment Act 1998 then significantly increased the burden of proof for native title and sought to enshrine in legislation the ‘bucketloads of extinguishment’ of native title promised by the Deputy Prime Minister, Tim Fisher. The amendments to the Native Title Act were criticized by the UN Committee on the Elimination of Racial Discrimination, who suggested that the new legislation failed to meet Australia’s obligations under the UN Convention to which Australia was a signatory.

Under the Howard government we saw repeated attacks against the hard-won changes to Australian law. The Constitution as it currently stands is ineffective in protecting Indigenous Peoples from that most fundamental of all freedoms - the freedom from discrimination. Discrimination based on race is prohibited under the Racial Discrimination Act but because this is not constitutionally entrenched, it can be amended, suspended and even repealed through the passage of further federal legislation.

The Australian Parliament has suspended the Racial Discrimination Act on three occasions: each time adversely affecting the rights and fundamental freedoms of Indigenous Peoples’.

In 2007, this approach enabled the Northern Territory Emergency Response, also known as ‘the NT Intervention’. Under this legislative framework, the Australian Government prescribed 73 remote Northern Territory Aboriginal communities and sent in the Army. Medical teams were also sent to conduct compulsory sexual health checks on all Aboriginal children, a move which was strongly opposed by key Indigenous NGOs and mainstream medical professionals in Australia.

12 / French CJ 'Aboriginal identity'
Is it any wonder that the contortions of Australian law continue to provoke Indigenous protests? From the first acts of dispossession our sovereignty has never been ceded and compensation for the loss of land and resources has not been negotiated on a systematic or comprehensive basis. The doctrine of discovery has perpetuated legal and moral justifications for many laws and policies that repudiated the rights and interests of our people.

These laws and policies were justified and protected by the privilege of precedent handed down through British law. As lawyers – as rational, intelligent and compassionate human beings this is something you in this room have the clear ability to challenge. You have the skills to do so. All you need additionally is the heart.

As I have sought to show this afternoon, being an advocate for reform is not only about the Court room and challenging unjust laws from within the legal system. It is about educating yourselves and others, lobbying, acknowledging and condemning injustice. Because public perception affects government policy, and government policy affects the law and the law affects my people and yours. We need a real commitment to improve the lives of our people and to ensure adequate protection of human rights for all Australians.

To gain meaningful constitutional recognition of Indigenous Peoples, it must be developed in an environment where Aboriginal people’s sovereignty is not something we have to constantly fight for. It must be based on respect. Respect between one people and another. Some may see this as a mere tokenistic step. But no. The constitutional recognition of Indigenous Peoples is not only beneficial to our Indigenous futures, it is an integral part of the healing process between Indigenous and non-Indigenous Australians.

Much of the past is bleak and not just for Indigenous Australians. But let me finish on a positive note and a note that I am sure would have been shared by Sir Ronald Wilson.

My hope, and the hope I believe of all my people, is that one day our country will no longer need to rely on the long and arduous process of legal challenge. Instead we will all work towards a better deal for all Australians. And we will achieve that better deal. That better deal can only be founded on a common recognition of our shared humanity. Aboriginal people both now and in the past have challenged unjust laws and practices. As we have done so, we have helped to re-write our nation’s history. That challenging of unjust laws must continue. But to create a truly just society we must all – Indigenous and non-Indigenous – seek to challenge not only unjust laws but all injustices.

That is the road towards a truly just society. Thank you.
ACKNOWLEDGEMENTS

2012 Sir Ronald Wilson Lecture by Adjunct Professor Dennis Eggington
Chief Executive Officer, Aboriginal Legal Service of WA (ALSWA) www.als.org.au

- Acknowledging the Traditional Owners upon whose Country this lecture has taken place, The Wadjuk People of the Nyungar Nation;
- ‘Waagle–Rainbow Serpent’ artwork shown during the lecture by the late Shane Pickett reproduced with permission from Mossenson Galleries and the Estate of Shane Pickett;
- ALSWA historical mural (below) created for ALSWA by David Wirrpanda Foundation & Central Institute of Technology, Solid Futures students with artist Peter Farmer;
- ‘Dwerti’ song from Bilya CD courtesy Dr Richard Walley;
- ‘Thou Shalt Not Steal’ song courtesy Kev Carmody and Kobalt Music Publishing;
- Tent Embassy Koori Mail commemorative pages courtesy Kirstie Parker, Koori Mail;
- Photos of Aboriginal prisoners Rottnest (3045B/224), Aboriginal prisoners in chains (BA1341/74), Aboriginal prisoner Coolgardie (72B/91), Aboriginal prisoners Roebourne (8956B/1076) Belshaw and babies at Badjaling (061064PD) courtesy State Library of WA;
- Video editing by Pro Copy;
- Dennis Eggington gratefully acknowledges the support of his family, wife Louella, children & grandchildren, as well as Dr. Noel Nannup, Professor Colleen Hayward, Jody Broun, Les Malezer, Rodney Dillon, Jodi Hoffmann, Dr. Fiona Skyring and Prof. Gavin Mooney. Technical support by ALSWA’s Peter Coole.

The powerpoint presentation which accompanied the 2012 Sir Ronald Wilson Lecture can be viewed online at www.als.org.au
LYRICS TO THOU SHALT NOT STEAL BY KEV CARMODY
kevcarmody.com.au

In 1788 down Sydney Cove
The first boat-people land
Said sorry boys our gain’s your loss
We gonna steal your land
And if you break our new British laws
For sure you’re gonna hang
Or work your life like convicts
With chains on your neck and hands

CHORUS
They taught us
Oh Oh Black woman thou shalt not steal
Oh Oh Black man thou shalt not steal
We’re gonna civilize your Black barbaric lives
And teach you how to kneel
But your history couldn’t hide the genocide
The hypocrisy to us was real
’cause your Jesus said
you’re supposed to give the oppressed
a better deal

We say to you yes whiteman thou shalt not steal
Oh ya our land you’d better heal
Your science and technology Hey you can make a nuclear bomb
Development has increased the size to 3,000,000 megatons
But if you think that’s progress
I suggest your reasoning is unsound
You shoulda found out long ago
You best keep it in the ground
Job and me and Jesus sittin’
Underneath the Indooroopilly bridge
Watchin’ that blazin’ sun go down
Behind the tall tree’d mountain ridge
The land’s our heritage and spirit
Here the rightful culture’s Black
and we sittin’ here just wonderin’
When we get the land back

You talk of conservation
Keep the forest pristine green
Yet in 200 years your materialism
Has stripped the forests clean
A racist’s a contradiction
That’s understood by none
Mostly their left hand hold a bible
Their right hand holds a gun

‘Thou Shalt Not Steal’ can be viewed on Youtube