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### NOTICE OF ANNUAL GENERAL MEETING OF THE NEW SOUTH WALES COUNCIL FOR CIVIL LIBERTIES INC.

to be held at

6.00pm on Wednesday 22 October 2003

At the Lady Mayoress' Room,  
Sydney Town Hall  
George Street, Sydney

*A nomination form is enclosed for all those CCL members wishing to nominate for a position on the CCL Committee for 2003/2004.*

*All motions on notice for consideration at the AGM must be received by the CCL office no later than **26 September 2003**.*

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### MOTION FOR ANNUAL GENERAL MEETING 2003

**Motion:** That the NSW Council for Civil Liberties alter its membership fees (Item No. 10 Rules) to read as follows:

\$25 Concession  
\$60 Ordinary (or Basic) Member  
\$120 Benefactor

and additionally,

\$60 Library membership  
\$1000 Affiliated Organisation.

Moved by NSW Council for Civil Liberties 2002-2003 Committee.

#### JOURNAL DEADLINE DATES

Material Deadline: 7<sup>th</sup> November 2003

Only email or disk documents and digital images will be accepted.  
Articles no longer than 1500 words and letters 100 words.

# **CIVIL LIBERTY**

Journal of the New South Wales Council for Civil Liberties Inc

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## **COMMITTEES 2002–2003**

### **Executive**

<i>Cameron Murphy</i>	President
<i>David Bernie</i>	Vice President
<i>Pauline Wright</i>	Vice President
<i>Jeremy Styles</i>	Secretary
<i>Susan Cleary</i>	Treasurer
<i>Stephen Blanks</i>	Assistant Secretary
<i>Peter Breen</i>	Committee Rep

### **Committee**

*Daniel Brezniak*  
*Ken Buckley*  
*Kep Enderby*  
*Adam Halstead*  
*Judith Henstock-Muru*  
*Joan Kersey*  
*David Leung*  
*Shaughn Morgan*  
*Doug Nicholson*  
*Natasha Posner*  
*Michael Walton*

*Susan Smith* Executive Secretary

*J.C. Cheadle* Honorary Auditor  
*W.L. Browne & Associates*

*Natasha Posner* Editor  
*David Leung* Designer

## **COMMITTEE MEETINGS**

Meetings are usually held at 6.30pm on the fourth Wednesday of the month, at the Council's office, 149 St Johns Rd, Glebe. Members are welcome to attend as observers.

## **SUBCOMMITTEE MEETINGS**

Subcommittees usually meet monthly. For further information please contact the Executive Secretary who can tell you when your subcommittee meets or put you in contact with the relevant Convenor.

### **Fundraising/Finance**

Convenor: Susan Cleary

### **Civil Rights/Censorship/Privacy**

Convenor: Doug Nicholson

### **Criminal Justice/Prisons**

Convenor: Peter Breen

### **ASIO/Increased Police Powers**

Convenor: David Bernie

### **Complaints**

Convenor: Tony Hay

Views expressed in this journal are not necessarily those of the editor or of the New South Wales Council for Civil Liberties Inc.

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# REPORTS

## PRESIDENT'S REPORT

There have been a number of disturbing developments in civil liberties issues since the last journal. We continue to see increases in police, protective services and intelligence agencies powers under the guise of 'improving security'. We also face resurgence in censorship, increasing government surveillance and a reduction in privacy. In the private sector, corporations such as Qantas have renewed efforts to bring in random drug testing of all employees at the expense of their right to privacy over personal medical information.

The Commonwealth Government passed legislation providing new powers for ASIO to detain and question anyone in Australia. They can now hold people incommunicado and potentially for indefinite periods of detention—even non-suspects.

While security powers are being increased there is little government action when it comes to the two Australians being unlawfully and immorally held in Guantanamo Bay in Cuba. Hicks and Habib have now been held, against their will, for almost two years by the American Government, clearly with the support of the Australian Government. They are yet to be accused of, charged, convicted or sentenced for any offence. The Australian Government finally decided to send the Justice Minister to the US on their behalf, and he managed to negotiate the removal of the death penalty for the two unaccused. Despite the Government's stated opposition to the death penalty and its action to remove it for Hicks, the Prime Minister has reignited debate around Australia about its 'merits'.

In spite of these setbacks there have also been a number of significant positive developments. Perhaps the two initiatives that stand out in the past few months are the NSW Government's move to legalise medicinal use of cannabis and the equalisation of the age of consent. In these areas of law we have been able to argue for and convince government to make significant changes that do protect our civil liberties and human rights.

The NSW Council of Civil Liberties (CCL) has also been very active in the Courts through the hard work of the legal panel. The website now contains a section on 'CCL in the Courts' which will provide regular updates on the interesting and important cases that we are involved in. In a recent case before the Supreme Court we ensured that the right to peaceful protest in NSW was still available.

Over the next few months it is imperative that NSWCCL not only continues its great work to protect our liberties in this difficult environment, but also works to strengthen our foundations—increase our membership and increase our effectiveness as an organisation. We are continually working on these issues through our committee and legal panel structure and would welcome active involvement from members. If you would like to contribute to this work, please contact the CCL office for further information.

**Cameron Murphy**  
President



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David Bernie and Cameron Murphy

## A NOTE OF THANKS FROM THE SECRETARY

By way of a short note, I will offer thanks to those members of the Council who have been active for the Council since the last journal.

Most heartfelt thanks are offered for the efforts undertaken by all those mentioned and those who I have erroneously omitted. Thanks go to: Cameron Murphy for his tireless media work, his lobbying of government and his work on complaints; David Bernie for his work similarly and for his court appearances which have all been remarkably successful; Stephen Blanks for his extensive pro-bono work, for his work on complaints, and for his maintenance of the legal panel; Tony Hay, who has recently joined us, for his extremely competent work in acting as complaints coordinator; Susie Cleary for her assiduous attention to her work as Treasurer and for her leadership on and proper concern for the state of the finances; and Joan Kersey for her competent and extremely effective work organizing fundraising lunches.

Thanks also must be offered to our committee members who provide argument, debate and oversight of the Council's policy agenda. In particular, thanks should be offered to Ken Buckley and Doug

Nicholson, whose motions on policy have been extremely well considered. Thanks are offered to the autonomous University of NSW Council for Civil Liberties, whose members have provided outstandingly high quality research and support on submissions and in cases run by the Council, and include David Leung and Michael Walton, who are also NSWCCL committee members.

Further thanks must be offered specifically to Natasha Posner and David Leung for their production of the Journal.

The highest praise and thanks must be offered to our indefatigable and simply wonderful Executive Secretary, Susan Smith—without her efforts the Council would be incapable of effective operation. She is invaluablely assisted by May to whom we are also most grateful.

I look forward to the ongoing work of these and other members and hope that the coming months will prove even more productive for the Council.

**Jeremy Styles**  
Secretary

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## **ASIO/INCREASED POLICE POWERS SUBCOMMITTEE REPORT**

The ASIO Bill has passed both Houses of Parliament and has been proclaimed to become law following a deal between the Opposition and the Government over various amendments.

We remain concerned that this law has passed and it represents one of the major infringements of Australian civil liberties since the attempt to ban the Communist Party in the 1950s. All the amendments made to the bill by the Opposition were beneficial, but our concern remains that the whole concept of the bill is fundamentally flawed. It still gives powers of detention to a body which is not accountable in any public way, and treats people simply suspected of having information, on the same level as people who may actually be suspected of involvement with a possible terrorist offence; and it could ultimately provide for indefinite detention despite some limited provisions that were inserted in the bill in an attempt to prevent this.

Regulations and protocols pursuant to the new Act will need to be made before its provisions are actually put into effect, but it is expected that these will be completed by the time of publication. The Opposition did succeed in having the Government agree to a sunset clause after a period of three years, although we note with concern that previous sunset clause provisions have simply been translated into indefinite

renewal. The bill represents a very major shift in the role of ASIO from an intelligence organization to an investigative organization with powers of detention. Hopefully, public interest in this matter will ensure that the bill is not automatically renewed at the end of the three year period. Even if citizens are not detained under the Act, we believe the very existence of these powers in a secret, unaccountable body, will affect the public mood, and the threatened use of these powers will be used by ASIO officers to intimidate Australian citizens.

**David Bernie**  
Vice President and Convenor, ASIO/Increased  
Police Powers Subcommittee

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## **FUNDRAISING LUNCHES**

The very successful program of lunches at Parliament House continues. Ian Cohen was our guest speaker at the lunch held on 4 July. His talk 'The Greens: In a world with a diminishing right to dissent' in which Ian drew on some of his own experiences, was very well received.

Professor David Brown from the Law Faculty at the University of NSW will be the speaker at the next lunch on 5 September. The title of his talk is 'Reflections on the 25th Anniversary of the Nagle Report'. In line with our new policy, members will have been contacted either by e-mail if possible, or by post.

In recognition that the lunches are a fundraising activity, the Council has decided to increase the payment from \$65 to \$85. The price might be further increased for some lunches. We hope our members will continue to give us their very valued support for these functions.

**Susan Cleary**  
Convenor, Fundraising/Finance Subcommittee

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## **PARLIAMENTARY UPDATE**

The NSW Parliament rose on 3 July for the winter break and is due to resume on 26 August 2003. As Members of Parliament are wont to do, many undertook parliamentary and study leave during this recess. Hence, information relating to policy releases is generally kept to a minimum.

The Commonwealth Parliament resumed sitting on Tuesday 12 August 2003 with the swearing in of Michael Jeffrey as Australia's Governor-General.

Of great interest to members of the CCL is the decision of the Police Minister, the Hon. John Watkins MP to suspend the NSW Innocence Panel and to

direct that it is not to accept any further applications. The panel was established in 2002 and accepted its first application in November of that year. Until its suspension, the panel had received 13 applications. The concept behind its establishment was to provide assistance to the Court regarding DNA testing for convicted prisoners who believe that forensic evidence may indicate an unjust or unsafe conviction.

In his press release, the Minister said that:

I'm suspending the operations of the Innocence Panel because I don't believe there are sufficient checks and balances to protect the victims of crime from further anguish.

The Chairperson of the Panel, Mervyn Finlay QC, has commenced a review to examine in part:

- the need for the panel,
- its membership,
- its structure,
- victims' safeguards,
- those who may apply to the panel, and
- what information may be disclosed, and to whom.

The NSW Premier, the Hon. Bob Carr MP, has also announced his view that his 'tort law' changes since 1999 to workers compensation, CTP greenslip legislation and public liability were a 'success'. In support of this contention the Premier relies upon the reduction of personal injury matters being commenced in the NSW Courts and the increased availability of insurance policies available to businesses in NSW. While the Premier may be correct about the statistics, another view is that people who have suffered an injury at work, in a motor vehicle or in a public space, may either not get above the harsh thresholds that have been imposed or are unable to obtain appropriate advice as to their rights.

A truer indication of any changes being effective in the community would be a reduction in premiums that are being imposed by insurance companies on consumers. Indeed it appears that premiums have not decreased. Thus, while 'big business' gets 'bigger', injured people and consumers remain unprotected and out of pocket.

The next update will provide a report on the Government's policy and legislative agenda as introduced into the NSW Parliament. It will also include a review of the NSW Alcohol Summit, which will be held at NSW Parliament between 26 to 29 August 2003.

**Shaughn Morgan**  
Committee Member

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# OBITUARIES

## R. J. B. (Bob) St John

1925–2003

Bob St. John was a foundation member of the Council for Civil Liberties (CCL) in 1963. At the time he was a junior barrister, having previously served as a gunner in the Australian Navy in the Second World War before studying for a law degree at Sydney University. He was a boxing blue and inter-varsity champion.

Generally speaking, Bob was a tough character. Yet he hated pomposity and bullying by people in authority. He had a very strong sense of justice and, like other young lawyers who joined the CCL in early days, he knew from experience in criminal law that much of the NSW Police Force was corrupt and many police unhesitatingly lied in court evidence. He was also drawn to the CCL because of his opposition to censorship.

Besides being active on the CCL Committee, Bob St. John was President from 1970 to 1974. After that, he became a judge, notably on the Australian Federal Court. He left the Court in 1985, evidently more comfortable in private practice than as an umpire. He was free again to be an advocate—and a shrewd one at that, very penetrating in cross-examination.

In the first decade of the CCL's activities, Bob St John was an unstinting contributor—not only in matters of law. He helped to raise funds by hosting huge bush barbeques on his (and Kep Enderby's) property at Bilpin. The prime attraction was a whole pig roasted on a spit. Bob got up at 5.00 am to light the fire, then continued basting the pig for lunch. Very enjoyable occasions!

Love of the bush was one aspect of Bob's character. He had many other interests, such as fishing. He was independent in outlook, with strong principles, tempered by a wry sense of humour. He was something of a loner, and forthright in opinions, which sometimes antagonised people. Withal, he was a man of integrity who could be relied upon to do what he said he would.

What attracted Bob to the CCL was that it was a body of like-minded people prepared to act and to comment upon areas of civil liberty which could not be dealt with through the courts. He also appreciated the fact that we were non-party in political matters and we were not bureaucratic—we could not afford to employ anyone, and our initial office address was a lecturer's room in Sydney University.

Bob St John's contribution to the CCL was most marked in his willingness to take court cases (once

they were approved by the Committee) with little or no fees charged by him. There were other lawyers who also did this, but Bob's efforts tended to be particularly significant.

He concentrated on cases involving underdogs, for example a harmless eccentric who used to walk around Kings Cross in his flowing beard and no shirt. He was frequently picked upon by police who lumbered him with 'offensive behaviour' after he refused to give more information than his name—Adam, or, after persistent questioning, Jesus Adam! He was actually a carpenter, though he did not tell the police this. Bob defended him in court on four occasions and won them all.

Bob St. John was particularly concerned to help Aborigines in trouble with police. Remember that the Aboriginal Legal Service was not established till 1970. Bob took on and won the first major CCL case, which concerned an Aborigine, Ken Brindle, who was an activist in the Aboriginal-Australian Fellowship. One day in 1963 Brindle, at the suggestion of Rev. Noffs, went to Newtown police station to enquire about an incident in which another Aborigine, Patrick Wedge, had apparently been found breaking into a kiosk on a railway station. Wedge ran away but was shot dead by a railway detective. Brindle's enquiries as to the facts of the matter resulted in a Newtown policeman, R. Armour, calling him 'a cheeky black bastard', punching him in the jaw and arresting him on a charge of using insulting words.

Bob St. John represented Brindle in court. As anticipated, the prosecution produced in evidence not only Armour, who denied punching Brindle, but six other police witnesses in support of Armour. They all asserted that Brindle was under the influence of alcohol at the time. Encouraged by Bob to elaborate, each police witness exaggerated further, so that by the end it seemed that Brindle must have been rolling drunk and abusing everyone in the police station.

Fortunately, Bob was able to bring reputable witnesses to prove that Brindle had not been drinking and was practically teetotal. The magistrate felt that the prosecution witnesses had lied, and Brindle was acquitted of the charge.

Bob went on to represent Brindle in a subsequent court claim for damages (for assault) against Armour. The court found in Brindle's favour and awarded him 400 pounds damages. It was a fine early victory for the CCL.

Bob took on many other cases for the CCL. One of which the writer has a clear memory, concerned defence of a student arrested for offensive behaviour in a street demonstration against Australian participation in the Vietnam war. The case was heard in Paddington court, before magistrate Locke who was notorious for giving short shrift to students in such circumstances. Bob had not gone far in his

methodical cross-examination of police witnesses when the magistrate intervened, in effect telling Bob to cut it short. Bob went on steadily as before, and Locke then told him that if he continued like this he would be reported to the Bar Council for his behaviour. Bob—known to his legal colleagues by the nickname of 'The Bear'—hunched his shoulders and said in no uncertain terms that he was representing his client as best he could.

As secretary of the CCL, I was present in court as an observer, sitting two rows behind Bob. In the intervening row sat his instructing solicitor—a good lawyer and a member of the CCL Committee but with virtually no experience of a criminal court. To my astonishment, I saw the solicitor agitatedly tugging Bob's gown from behind in an effort to stop him from antagonising the magistrate. Bob ignored the tugging and remained calmly defiant.

The outcome was that Locke did report St. John, but Bob was exonerated by the Bar Council. I recall the incident as a delightful put-down of authority by a great defender of civil liberties. He was made a life member of the CCL in 1975.

**Ken Buckley**  
**Committee Member**

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# ARTICLES

## UNFINISHED JOURNEY— INDIGENOUS SELF-DETERMINATION

**This article by Larissa Behrendt first appeared in Arena Magazine 58:24-27, April-May 2002. We thank her for permission to reproduce it here.**

*Setbacks and political reaction have led many to turn away from the difficult project of extending Indigenous rights. But it is only through completing the journey to full self-determination that true Indigenous liberation can be achieved.*

The Right have been active in asserting the notion of 'practical reconciliation' and implying that a rights agenda is the privilege of the elite. This lack of vision for indigenous policy is going to impede the way towards indigenous self-determination.

At the hand-over of the Final Report by the Council for Aboriginal Reconciliation, Prime Minister John Howard announced that his government rejected the recommendation of a treaty with Indigenous peoples, preferring instead to concentrate on the concept of 'practical reconciliation'. This 'practical reconciliation' described a reactive policy of government funding in targeted areas that relate to socio-economic disadvantage. He stated:

We are determined to design policy and structure administrative arrangements to address these very real issues and ensure standards in education and employment, health and housing improve to a significant degree.... That is why we place a great deal of emphasis on practical reconciliation.

### **The false promise**

The embrace of the 'practical reconciliation' policy was predicated in terms that clearly rejected the broader, rights-based recommendations of the Council in its document, *National Strategy for the Protection of Aboriginal and Torres Strait Islander Rights*, and it also rejected the treaty process recommended in the Council's draft legislation. Instead, it targets, only through policy, the main areas of socioeconomic disparity. To this end, Howard pointed to the amount he had spent on 'Indigenous-specific programmes':

**A measure of the genuineness of the government's commitment to practical reconciliation is that the \$2.3 billion now annually spent on Indigenous-specific programmes is, in real terms, a record for any government—Coalition or Labor.**

While policies for addressing these areas of disadvantage are vital, their importance demands that such policies be effective. For this reason, the notion of 'practical reconciliation' needs closer scrutiny. What Howard didn't detail in his claim of record spending is that his government's allocation of \$2.3 billion included money spent defending the Stolen Generations case brought by Peter Gunner and Lorna Cabillo in the Northern Territory. It also included the money that went to the various areas of the government arm that were actively trying to defeat Native Title claims. That is, counted in with the money allocated for specific policy areas is the money spent preventing the recognition and protection of Indigenous rights.

While money spent on a vision of 'practical reconciliation' has actively undermined Indigenous rights through litigation strategies, the proponents of this vision are also employing rhetoric to belittle the rights framework, particularly when it is in the form of a treaty. They claim it has no relevance to the issues facing Indigenous communities and that conversations by elites and intellectuals about big-picture, long-term and structural strategies like treaties, constitutional change and bills of rights, do not provide the answers to the questions facing the Indigenous communities. 'How will a treaty stop

the levels of violence and substance abuse in Indigenous communities?' they ask. Phrased that way, it can seem like a powerful argument; but it is a response that simplifies the problems, as well as the solutions to socio-economic disparity.

### **More 'benevolent' governance**

Simple solutions to complex problems as an approach to Indigenous policy have a long history. In his inaugural Charles Perkins Memorial Oration given at the University of Sydney on 25 October, 2001, Noel Pearson stated that the civil rights movement was just and right and correct, but noted that it had failed to deliver change. The reason, he asserts, lies in the failure of policy:

Maybe we should confront the possibility that the policy analysis and recommendations that have informed the past thirty years of determination may have been wrong. Our refusal to confront this possibility is a testament to the degree to which we will insist on our ideological indulgences ahead of diminishing social suffering.

Pearson can take much credit for bringing to the attention of mainstream Australia the issues of passive welfare dependency, endemic substance abuse and related violence within the Indigenous community of Cape York. For these key issues, a policy of 'practical reconciliation' that only seeks to address areas through benevolent policy making is not going to provide a solution. Instead, policies and programs are only going to respond to problems as they emerge. As such, they will not develop infrastructure and capacity that will reduce the occurrence and perpetuation of social and economic problems. Further, the reactionary policy making that 'practical reconciliation' embodies cannot guarantee that its current policies and programs are not creating a breeding ground for further economic, cultural and social problems. Without a long-term vision to work towards and without a reference to measure the limitations of policy, 'practical reconciliation' is not going to change systemic welfare dependency or any other structural issue.

### **The incorrect premise of equal rights**

While ineffective policy can be apportioned blame for the continual socio-economic disparity and social issues, we need to also question the assumptions that the 'civil rights' era created an equal playing field. The assertion that the 1967 referendum gave citizenship rights is one that continues to create myths about what the constitutional amendment actually achieved. It did give the federal government the power to make laws in relation to Indigenous peoples and included Indigenous people in the census. In relation to the alteration of the races' power, it is not even clear that the power can only be used for the benefit of Indigenous people. It did not 'remove the discrimination that our people are suffering in the mainstream economy'.

Perhaps the ground swell of support for Indigenous people in 1967 has led to a romanticising of what we gained by constitutional change at the time. It did not provide Indigenous people with the right to vote; it did not guarantee protection against racial discrimination' and it did not provide any guarantees for the protection of property interests. The repeal of the *Racial Discrimination Act 1975* from applying to certain parts of the *Native Title Act 1993* through the 1998 amendments illustrates how vulnerable Indigenous rights are and how erroneous the assumption of an equal playing field is.

The failure of the equal wages policy identified by Pearson was undermined by the failure to protect Indigenous rights. It was introduced into a context where Indigenous rights to land were not recognised, respected or enforced. It was a failure to protect inherent and fundamental rights in the first place that has led to many of the problems that we face today. There was no attempt to capacity build in Indigenous communities through education and employment opportunities. This context, one of lack of rights recognition and protection, can assist us with hindsight to see why the results of the equal wages policy were as devastating as they were. As Pearson points out in his Charles Perkins lecture: 'Our dispossession is the ultimate cause of our passive welfare dependency.'

This does not mean that the recognition of these rights was not 'heroic and correct'. What the failure of these policies shows is that there is not one quick fix to systemic legacies of colonization. Recognising this does not mean being fatalistic about welfare policy. Rather, it means ensuring that the responses are holistic and attempt structural change.

### **Linking policy to vision**

One reason why past policies have failed is that they have not made a connection with a broader vision of self-determination. By overlooking the broader rights issues, 'practical reconciliation' does not attack the systemic and institutionalized aspects of the impediments to socio-economic development. It fails to understand that the rights framework can—in the long term—deliver outcomes and the protection of rights that short-term policy measures can only alleviate. It fails to admit that the strategy to recognise and protect the rights of Indigenous peoples includes economic rights and property rights. The recognition and protection of those rights puts land under people's feet and can allow access to natural and other economic resources. For example, the recognition of native titles interests can return land to Indigenous communities, and the protection of Indigenous intellectual property rights can lead to protection of income and the protection of cultural heritage. These allow the basis for income generation, enterprise and self-sufficiency in Indigenous communities that have the ability to take advantage of those assets. So, despite being a long-term strategy, the rights agenda does have real outcomes that go to the heart of the socio-economic problems that policy can only react to. That is, protection of rights could work towards ensuring that Indigenous communities are economically self-sufficient.

Failure of policy is also a failure of institutional imagination. It is usually a replication and imposition of non-Indigenous policy, programs or structures onto Indigenous peoples without thought of cultural conflict or impact on social, cultural and kin relationships. Indigenous people have, however, already encapsulated a vision and have done so by the use of rights to describe political aspirations. The key is the concept of 'self-determination'. In this context, 'self-determination' is not policy defined by the government policy but describes an Indigenous political vision. Despite these cultural and geographical differences, there is much common ground in responses to the questions that seek aspirational answers: What do you want? When you say 'Aboriginal sovereignty' what do you mean? What do you want in a treaty?

There is already evidence as to what that vision of self-determination may look like. If we look at the contents of the Barunga statement, the Eva Valley statement and Patrick Dodson's Fourth Vincent Lingiari Memorial Lecture, 'Until the Chains are Broken', we can see the parameters of the claims in a spectrum of rights. The rights enmeshed in the concept of 'self-determination' include, I would argue, everything from the right not to be discriminated against, to the rights to enjoy language, culture and heritage, our rights to land, seas, waters and natural resources, the right to be educated and to work, the right to be economically self sufficient, the right to be involved in decision-making processes that impact upon our lives and the right to govern and manage our own affairs and our own communities. These rights that can be unpacked from the concept of 'self-determination' point to a vision that has been described as 'internal self-determination'. It is a vision of increased Indigenous autonomy *within* the structures of the Australian State.

The right to self-determination is recognised under international law in Article 1 of both of the canonical human rights documents, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Although the right is clearly recognised in these two instruments, there is much debate about the application of the content of self-determination as it applies to Indigenous people. I would argue, in light of what I have already said, that we, as Indigenous peoples, do not need to feel confined by the semantic debates under international law. Rather, the key to the way forward is in the concepts and rights that we have implied into the terms 'self-determination' and 'sovereignty' when we use those words to describe a vision of how we would like our communities to be and the way we want to live our lives as Indigenous peoples. This is an approach that takes the starting point for self-determination from the way in which it is expressed by Indigenous peoples at a grass-roots level, rather than by imposing

concepts as they have been developed in international forums on to Indigenous communities. It is a bottom-up, rather than top-down approach.

### **The Pearson thesis**

A danger of the Pearson thesis is that his experience in Cape York will be interpreted as being reflective of all Indigenous communities. Not all Indigenous communities are incapacitated or dysfunctional. Many have been able to establish community initiatives—medical services, legal services, drying out areas. Some have made their communities dry. To assume that we are all in the miserable state is to overlook the agency and achievements of Indigenous peoples and their communities across Australia. We need to ensure that the crisis in some communities does not stop the progression of others. We cannot deny self-determination where there is the clear capacity for it and we must move from a merely reactive response that focuses only on worst case scenarios rather than also fostering aspirational and best practices in communities where it can be achieved.

It may also be misinterpreted as implying that women and children are only victims in Indigenous communities when in fact we have been the biggest crusaders. In this area, Marcia Langton, Judy Atkinson, Boni Robertson, Winsome Matthews, Brownwyn Fredericks and many, many others have been quantifying, recording, offering suggestions and finding solutions to endemic levels of violence in Indigenous communities. These same women and their colleagues are often the ones who set up the community-based initiatives and institutions, the dry-out shelters, the medical centres, the community buses, when government policy fails. We can thank Pearson for gaining coverage that Indigenous women have been unable to gain. It is not an indictment of Pearson but of media and policy makers that Indigenous women cannot attract national media attention for these issues themselves.

### **Conclusions**

Dismissing the rights agenda and shutting down dialogues about broad picture solutions truncates and silences debates about rights. It also fails to understand the way we rank rights every day. Every day, courts and policy makers rank rights, the rights of directors against shareholder, the rights of a custodial parent against the rights of a non-custodial parent, the rights of an employer against the rights of a worker, doctor against patient, landlord against tenant. In every moral decision we make we are valuing and prioritizing rights.

It can sometimes be difficult to value those rights and choose one or the other but we do it and we ask judges to do it. And sometimes it is not hard to place one right over another. Pearson, and I agree with him, makes value judgements about rights in his thesis. Valuing rights of children to parents and freedom from violence against the asserted right to drink is stating that the rights of one are more important than the rights of another. When a policy decision is made to implement curfews or allow rights to drink we are making value judgements about rights. Policy makers who see their actions as separate to the rights agenda fail to appreciate the impact their decision-making has on the lives of those touched by their policies. Those who deny that policy making should take precedence over a consideration of the rights analysis exhibit an inability to understand the very real connection between the two.

A rejection of the rights agenda is also a rejection of the vision of Indigenous peoples for self-determination. It is patronizing to assert that Indigenous people who claim rights and express self-determination in the language of rights have no idea about the issues that affect our community and that we do not understand the solutions to problems faced by our own families. It is usually our personal experience with rights violations that have led us to work relentlessly on those issues and we would not be pursuing an agenda that we thought was a waste of our time. In many cases, our solutions are responses to things that have affected our lives and it is a pity that articulate, educated and vocal Indigenous people can be dismissed as having very little to do with their own communities.

As Pearson points out, the reasons for socio-economic problems are complex. Addressing the underlying issues will not help eradicate every problem. On the other hand, failure to deal with systemic issues will also not prevent other issues from continuing to plague our communities: passive welfare dependency, the breakdown of social ties, increased access to alcohol, legacies of past discrimination and colonisation. These are complex problems and they will need multifaceted solutions that will have to match short-term with long-term strategies. That is, they will have to match reactive policy to systemic and institutional change.

Although targeting of policy in specific socioeconomic areas is a vital aim of the short-term solutions, 'practical reconciliation' is not the tool by which to achieve this. Its targeting of problems is dubious since government money is also spent on extinguishing and truncating Indigenous rights. In addition, without an overall vision of where Indigenous communities should be going, the application of policy is going to be reactive and will not target structural and systemic change. Without a rights framework that seeks to protect the recognised rights of Indigenous peoples, there is no ability to create and protect the rights to economic self-sufficiency and Indigenous peoples, families and communities will only be dependant on welfare.

Practical reconciliation asks us to trust the government and rely on their benevolence. This is a big ask from the government that attempted to bring in the 10 point plan, trivialised the experiences of the stolen generations, refused to say 'sorry' and has sought to distance itself from the United Nations monitoring mechanisms that have been critical of its human rights record towards Indigenous people.

Although it is sometimes conceptualised that rights protections slowly improve over time, the recent experience of Aboriginal and Torres Strait Islander peoples in Australia proves this is not the case. As can be seen by the contents of the *Native Title Amendment Act 1998 (Cth)*, the days of governments actively truncating and extinguishing Indigenous rights are far from over.

What the rights agenda allows us to do is to debate standards so that the next time there is a sympathetic era in Australian politics, the vision to which we are working towards will be clearer. Only a strong rights framework will prevent the further extinguishments of these rights. We can see this in Canada where the implementation of s35(1) of the *Constitution Act 1982* placed the following provision into the Canadian Constitution: 'Aboriginal and treaty rights are hereby recognised and affirmed'. Native title in that jurisdiction cannot be extinguished by legislative whim. These reasons give some indications as to why the rights framework remains an attractive pathway towards breaking the legacies of colonisation.

It needs to be remembered that, whatever the feeling in 1967, there was little effective structural change as a result of that collective sympathy. The next time there is such a ground swell of support, the agenda for structural change should be more ambitious to ensure that the achievements of that moment leave a longer, more positive legacy.

**Larissa Behrendt** is Professor of Law and Indigenous Studies and the Director of the Jumbunna Indigenous House of Learning at the University of Technology, Sydney. Her book on Aboriginal rights protection is published by the Federation Press, and reviewed in this journal.

## THE RIGHT TO PROTEST—THE NEXT INSTALMENT

The Supreme Court recently affirmed the right of public assembly in a case where the NSW Commissioner of Police had sought to prohibit a protest outside the home of the Commonwealth Minister for Immigration in Pennant Hills. The protest was to highlight the difference in living conditions between the Minister responsible for the immigration detention system, and the detainees.

The Commissioner of Police sought an order under section 25 of the *Summary Offences Act 1988* to prohibit the assembly. The effect of such an order is to remove the statutory immunity from prosecution for unlawful public assembly and causing an obstruction in a public place. Under section 24 of the *Summary Offences Act 1988*, the immunity automatically applies to all participants in an assembly where the organiser has given at least seven days' notice to the police.



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The Council of Civil Liberties (CCL) has been concerned at the police practice which emerged earlier this year, of seeking to prohibit assemblies simply by a media release (see the last journal issue). This time, the police at least attempted to do the right thing by getting a Court order. However, they waited until the day before the planned assembly before going to Court, even though notice of the planned protest had been given by the organiser at least three weeks earlier. The CCL arranged legal representation for the organiser of the assembly, who was the convener of the Refugee Action Coalition.

The Court balanced the competing rights to privacy of the Minister and his family and neighbours, against the rights of freedom of expression and assembly, and refused to grant the order sought by the Commissioner. The Court reasoned that granting the order would not necessarily have prevented the assembly from going ahead, but would merely have deprived the participants of the limited immunities under section 24 of the *Summary Offences Act*.

The decision is cited as *Commissioner of Police v Rintoul* [2003] NSWSC 662, and a copy of the judgment is available through the CCL website.

Despite the Court decision, the police blockaded the street in which the assembly was to be held and



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prevented the demonstration from reaching the Minister's house. Some individuals were arrested for breaching the peace, but released without charge. At the time of writing, consideration is being given to whether legal action can be taken against the police for preventing the demonstration proceeding or for wrongful arrest.

**Stephen Blanks**  
Assistant Secretary

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## SCHOOLS AND POLICE

The Department of Education and Training has extensive guidelines covering police interviewing students at schools. The CCL recently received a complaint arising from a school's failure to follow the guidelines, which had the result of seriously compromising the legal rights of three students.

An incident had occurred at the school, and the deputy principal was concerned that there may have been illegal activity involved. Instead of seeking advice from the appropriate departmental sources, he called the local police for 'advice'. The police attended, but instead of giving advice, they proceeded to conduct an investigation. This involved interviewing students, without any notice having been given to their parents and without cautioning the students as to their legal right to not answer questions.

The investigation resulted in formal warnings being given to the students under the *Young Offenders Act 1997*. Formal warnings are permanent records of police action taken in relation to summary offences by children not involving violence. The CCL has long held concerns at the potential for children to be prejudiced by the system of formal warnings, because of the lack of procedural safeguards and review processes. For example, formal warnings can be given even if no offence has been committed—only an allegation that an offence has been committed is required, and there is no review or appeal process.

As a result of representations to the school arranged by the CCL, the formal warnings in this case were removed. However, this was achieved only because of a technicality—the suspected offence was not a summary offence but an indictable offence, and therefore not a type of offence for which a formal warning could be issued!

The police expressly state that they are not responsible for ensuring that the Department of Education and Training guidelines concerning police interviewing students at school are adhered to. This is a further matter for concern.

**Stephen Blanks**  
Assistant Secretary

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## MUSIC, COPYRIGHT AND THE UNIVERSITIES

The music industry has targeted universities in its campaign against copyright piracy. Three universities were recently ordered by the Federal Court to provide discovery of material, including confidential records of student and staff email and Internet usage, which may lead to record companies bringing proceedings for copyright infringement.

The music industry action has led to universities issuing warnings to staff and students about the possibility of disciplinary action under the university internal rules for copyright breaches. Some cases of disciplinary action against students have already been commenced even though no breaches of copyright have yet been found. The CCL has made representations to universities on behalf of students in such cases, and is participating in a campaign with student bodies to seek proper protections for email and Internet usage.

The universities each have comprehensive privacy management plans in place which hold out that appropriate procedures will be in place to protect confidential personal information about staff and students. However, these plans appear to be ineffective in the general climate of paranoia created by the music industry action.

The CCL is concerned at the privacy implications of the music industry action. Staff and students should be entitled to regard their communications through university IT facilities as private and confidential, just as telephone calls are. Otherwise academic freedom is compromised.

The Council is also concerned at the inherent unfairness in taking disciplinary action against students and staff for allegations of copyright infringement prior to any copyright infringement being proven in a Court.

One might well ask why universities are being put in the position of being surrogate law enforcers for the music industry. In a recently reported development, US Courts have rejected similar attempts by the music industry to force universities to deliver up student and staff records.

**Stephen Blanks**  
**Assistant Secretary**

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## THE PM COULD PROTECT US FROM THE DEATH PENALTY

By floating the idea that State Liberal opposition parties use the death penalty as a re-election policy (Sydney Morning Herald, 9/8/03), Prime Minister Howard has signalled a dangerous attack on our civil liberties and the most fundamental of our human rights: the right to life.

Mr Howard is correct to say that he does not have the power to impose the death penalty in a State such as Victoria. But what he fails to mention is that he *does* have the power to stop any State or Territory from re-introducing the death penalty. In 1991, Australia acceded to the *Second Optional Protocol to the International Covenant on Civil and Political Rights* ('OP2'). OP2 commits Australia to abolishing the death penalty. So the re-introduction of the death penalty in any State or Territory would violate international law and further tarnish our international reputation.

Since 1983, the High Court of Australia has consistently held that the Federal Parliament can override States to uphold our international obligations. In 1983 that power was used to protect the Franklin River in Tasmania. In the 1990s Paul Keating used this power to override anti-gay laws in Tasmania. If Mr Howard is willing, this same power can be used again to protect all Australians from the re-introduction of the death penalty by the States or Territories. In fact, Mr Howard does not even have to wait for the States or Territories to make the first move. The Federal Parliament already possesses all the necessary constitutional powers to pass legislation incorporating into Australian law the protections offered by OP2.

The Prime Minister is correct to say that the law can get it wrong—just ask Lindy Chamberlain or West Australia's John Button. And the NSW Premier is correct to say that, when it comes to the death penalty, a mistake is irreversible. The PM has the power to protect all Australians from the irreversible errors of law that will, on his own admission, inevitably result from a re-introduction of the death penalty in Australia.

If Mr Howard really believes that the death penalty is wrong, then he should act now to prevent its re-introduction and to protect the right to life of all Australians.

**Michael Walton & David Leung**  
**UNSW Council for Civil Liberties**

UNSWCCL can be contacted by emailing [unsw\\_ccl@yahoo.com.au](mailto:unsw_ccl@yahoo.com.au)

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## TRANSSEXUAL MARRIAGE

*On 20 May 2003, Rachel Wallbank from Wallbank's Legal delivered an inspirational address to UNSWCCL. Ms Wallbank, a graduate of the UNSW Law School, is the solicitor and counsel for the married couple in the recent Full Family Court appeal that confirmed the validity of the marriage of Kevin and Jennifer. That decision has since been followed around the world, in Florida and the European Court of Human Rights.*

### Facts

In 1998 Kevin & Jennifer received an inconclusive response to a letter they had written to the Attorney-General asking whether their proposed marriage would be legal. Kevin is a transsexual and was born a woman. Kevin & Jennifer found a marriage celebrant willing to perform the ceremony and were subsequently married in August 1999. In October 1999 Kevin & Jennifer sought a declaration of validity for their marriage from the Family Court of Australia. The Commonwealth Attorney-General intervened to oppose the application. This set the scene for a herculean battle for the rights of transsexuals to marry in Australia.

### The state of the law

The law in Australia on transsexual marriage was undeclared. There were two main common law decisions that might decide the case in Australia: one case from the UK; another from New Zealand. The case of *Corbett v Corbett (otherwise Ashley)* [1971] P83 was decided in the UK in the early 1970s. Ormrod J had found that gender is determined at birth by examining three biological factors: chromosomes, gonads, and genitals. His Honour's decision was influential throughout the common law world for many years to come.

In Australia there was also a line of authority that rejected the *Corbett* view: *R v Harris and McGuinness* (1988) 17 NSWLR 158, *Secretary, Department of Social Security v SRA* (1993) 118 ALR 467. These decisions recognised that a post-operative transsexual person could be treated as a member of his or her adopted sex for the purposes of criminal law and social security law. There was no decision on whether the same could be said for marriage law.

In 1995 a New Zealand court chose not to follow *Corbett*. In the case of *Attorney-General v Otahuhu Family Court* [1995] 1 NZLR 603 Ellis J found, as a matter of social justice and public policy, that if a transsexual has willingly undergone therapy and surgery to change his or her genitalia, then the law should accept the gender re-assignment.

All of these decisions were decisions at first instance, i.e. decisions of only one judge. Other cases in the US and the UK had unsuccessfully tried to overturn *Corbett*.

### **Preparing for Kevin & Jennifer's case**

It would appear that the obvious and safest choice for Ms Wallbank, representing Kevin and Jennifer, was to argue for the Australian authority to be extended to marriage law. This was, however, not an option for Kevin. The surgical procedure to construct male genitalia can be life-threatening. While Kevin had undergone hormone therapy and some surgery, because of his commitment to his young family, Kevin had decided not to proceed with this surgery. This meant that the Australian and New Zealand cases, which had all involved male-to-female post-operative transsexuals with fully reconstructed genitalia, might not necessarily cover Kevin.

The bold decision was taken not to argue the Australian and New Zealand cases in the Family Court, but rather to attack *Corbett* head-on. When fighting a human rights test case, Ms Wallbank says, it is important not to settle for half-measures, but rather to be courageous and to fight for full recognition and for human dignity.

While preparing the case Ms Wallbank soon discovered that a whole new vocabulary had to be created to explain the issues to the Court—terms such as 'brain sex' and 'a female of transgender background'. It was also important to distinguish the differences between transgender and transsexual people.

Ms Wallbank successfully applied to Chisholm J of the Family Court for test-case status. The granting of such status meant that Commonwealth funding became available to Kevin and Jennifer to defend their case.

### **The scientific evidence**

Ms Wallbank assembled and co-ordinated an international team of scientific experts, including Professor Milton Diamond, Professor of Anatomy and Reproductive Biology at the School of Medicine, University of Hawaii, Professors of Psychiatry Nathaniel McConaghy and Cornelius Greenway, and Professor Gooren from the Netherlands. The team included distinguished Australian experts such as Dr. Jan Walker from Sydney.

The evidence presented to the Court included accounts of how, during pregnancy, the foetus is exposed to 'hormonal baths' that act as switches, determining such things as the physical gender and the gender of the brain. The idea of 'brain sex', or the gender of the brain, was to prove important in the Family Court. Other evidence demonstrated that the brain mass of transsexuals more closely resembles that of their self-identified gender than that of their physical gender.

### **The court case**

The case was heard by Chisholm J of the Family Court of Australia. The Commonwealth Attorney-General, opposing the declaration of the validity of Kevin and Jennifer's marriage, argued purely on the law and did not adduce any evidence contradicting the scientific evidence presented by Ms Wallbank to the Court.

On 12 October 2001 Chisholm J handed down his decision. He concluded that:

- for the purpose of ascertaining the validity of a marriage under Australian law, the question whether a person is a man or a woman is to be determined as at the date of the marriage, not as at birth;
- the decision of *Corbett* does not represent Australian law;
- in Australian law, the terms 'man' and 'woman' include transsexuals in accordance with their sexual reassignment;
- having regard to all the circumstances, Kevin is a man. Factors supporting that conclusion include:
  - he had always perceived himself to be a male;
  - he was perceived by those who knew him to have had male characteristics since he was a young child;
  - prior to the marriage he went through a full process of transsexual re-assignment, involving hormone treatment and irreversible surgery, conducted by appropriately qualified medical practitioners;
  - at the time of the marriage, in appearance, characteristics and behaviour he was perceived as a man, and accepted as a man, by his family, friends and work colleagues;
  - he was accepted as a man for a variety of social and legal purposes, including name, and admission to an IVF program, and in relation to such events occurring after the marriage, there was evidence that his characteristics at the relevant times were no different from his characteristics at the time of the marriage;
  - his marriage as a man was accepted, in full knowledge of his circumstances, by his family, friends and work colleagues.

While Chisholm J did not find exclusively on the scientific evidence before him, he did state that the 'brain sex' theory was not the definitive legal test for ascertaining a person's gender. Instead he concluded that 'post-operative transsexuals will normally be members of their reassigned sex' (at [330]). He offered a list of relevant matters to be considered when determining the gender of a person at the time of marriage. The list includes (at [330]):

- the person's biological and physical characteristics at birth (including gonads, genitals and chromosomes);
- the person's life experiences, including the sex in which he or she is brought up and the person's attitude to it;
- the person's self-perception as a man or woman;
- the extent to which the person has functioned in society as a man or a woman;
- any hormonal, surgical or other medical sex reassignment treatments the person has undergone, and the consequences of such treatment; and
- the person's biological, psychological and physical characteristics at the time of the marriage, including (if they can be identified) any biological features of the person's brain that are associated with a particular sex.

### **The appeal**

The Federal Attorney-General appealed Chisholm J's decision to the Full Bench of the Family Court. The appeal was heard in February 2002. Ms Wallbank again conducted the case as both solicitor and counsel. She knew that all the decisions concerning transsexuals and marriage to date, throughout the common law world, had been decisions at first instance. This was to be the first appellate decision in any jurisdiction.

One year later, on 21 February 2003, the Full Court upheld Chisholm J's decision. In a unanimous decision, the Full Bench (which included the Chief Justice) concluded that:

...the social and legal institution of marriage as it pertains to Australia has undergone transformations that are referable to the environment and period in which the particular changes occurred. The concept of marriage therefore cannot, in our view, be correctly said to be one that is or ever was frozen in time. (at [87])

The same day, only hours after the Full Court decision, Judge Gerard O'Brien of the Sixth Circuit Court of Florida, having waited for the decision in Australia to be handed down, declared valid the marriage of a male of transsexual background. *Re Kevin* has also been followed by the European Court of Human Rights in overturning decisions of UK and Irish courts.

The Federal Government, to date, has not chosen to challenge the decision in the High Court of Australia. Given the lapse of time, it is now highly unlikely that it will happen.

### Conclusion

The *Corbett* decision has finally been laid to rest. The gender on a birth certificate, which is based purely on an examination of external genitalia at birth, is now only prima facie evidence of gender—it can no longer be considered conclusive. As Ms Wallbank says, what is between the ears is more determinative than what is between the legs.

The courage of Kevin and Jennifer and their legal counsel, Ms Rachel Wallbank, stands as inspiration for all those who struggle for human dignity and the right of all individuals to pursue their own ideal of happiness.

**Michael Walton**

**UNSW Council for Civil Liberties**

For more information, visit <http://www.nswccl.org.au/unswccl/>

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## *BOOK REVIEWS*

### ACHIEVING SOCIAL JUSTICE: INDIGENOUS RIGHTS AND AUSTRALIA'S FUTURE

Larissa Behrendt

The Federation Press (2003)

Reviewed by: **Daniel Brezniak**

The Prime Minister of Australia visits Cape York to see for himself the lives of the Northern Australian Aboriginals. Meanwhile a play 'Conversations with the Dead' opens to full houses in Sydney. In the newspapers, the Minister tries to justify his power to sack the elected head of ATSIC.

Never far from the hearts and minds of middle Australia is the continuing despair of Australian Aboriginals. Land rights, deaths in custody, the Aboriginal tent embassy, a preamble to the Constitution, the arguments concerning the numbers of deaths in Australia's frontier wars of the 19th and early 20th centuries and the 'stolen generations' are questions at the forefront of our national concerns. What it means to be an aboriginal in Australia is expressed in new books, theatre and dance.

A recent book by Larissa Behrendt with the title 'Achieving Social Justice: Indigenous Rights and Australia's future', published by the Federation Press, is a startling back to basics appraisal of what it all means and where it may all be going.

The book of 179 pages has seven chapters. The second chapter, 'The myth of law's neutrality: why formal equality doesn't work', studies different conceptions of justice in relation to property and equality. The third chapter about the Australian self-image, challenges the Australian self-image and discusses 'why recognition matters'. Behrendt develops the idea that only by authentic self-realization of the Aboriginal people, which she describes as 'a right', will there be a resolution of the two types of liberalism she has identified as 'difference-blind liberalism' and 'multi-cultural realism'.

The later chapters in the book, 'Indigenous aspirations: the starting point for rights protection' (chapter 4), 'New strategies, improved rights protection' (chapter 5) and 'Towards improved rights protection: Some first steps and some alternative futures' (chapter 6), are all part of a program of building rights and what Behrendt describes as 'substantive equality', effective participation, and legal pluralism.

The final chapter in the book is its most argumentative and includes a specific program for immediate change. Although her suggestions are not new, the value of her contribution is the identification in one place, one book, of the most important and pressing concerns for the realization of a mature Aboriginal and non-aboriginal relationship into the future.

Included in the broad survey which Behrendt undertakes, is the need for a Bill of Rights in Australia; and the compliance with obligations under ratified international human rights instruments, as well as the value of continued participation by indigenous people in the international arena. The book contains a brief study of the Australian constitutional protections and the incorporation of international human rights instruments into Australian domestic legislation.

This book will have a special place on the bookshelves of school libraries and in the thinking of young people coming to the broader debates and national concerns perhaps for the first time. It is a useful compendium of most of the ideas and programs, which are held by Aboriginal Australians to be the most important and pressing ingredients of any vision for the future. The book contains an impressive index and bibliography.

Professor Larissa Behrendt, herself aboriginal, is a Professor of law at the University of Technology in Sydney and a graduate from Harvard Law School.

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