

Dually Disadvantaged: The Impact of Anglo- European Law on Indigenous Australian Women

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Resist much, obey little.

Once unquestioning obedience, once fully enslaved.

- Walt Whitman

INTRODUCTION

The image of Australia held by most non-Australians is of a vast, dry island populated by beach-loving, beer-swilling, laid-back, 'bronzed Aussies.' Australia is known as the 'lucky country', where everyone gets a 'fair go'. The truth is, however, that Australia is a country strongly divided by racism.¹ Until very

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¹ This racism became evident recently in the debate following House of Representatives Member for Oxley Pauline Hanson's maiden speech to Parliament on 10 September 1996 in which she said:

We now have a situation where a type of reverse racism is applied to mainstream Australians by those who promote political correctness and those who control the various taxpayer funded 'industries' that flourish in our society servicing Aboriginals, multiculturalists and a host of other minority groups. . . . I talk about the . . . privileges Aboriginals enjoy over other Australians. . . . I challenge anyone to tell me how Aboriginals are disadvantaged when they can obtain three and five per cent housing loans denied to non-Aboriginals. . . . I draw the line when told I must pay and continue paying for something that happened over 200 years ago. Like most Australians, I worked for my land; no-one gave it to me.

Commonwealth of Australia Parliament *Parliamentary Debates (Hansard)* vol 8, 1996, 3860-3861 (10 September 1996). Ms Hanson recently established the One Nation Party, a political party dedicated to the views expressed in her maiden speech. Meetings of Hanson supporters and One Nation Party members across Australia have been the target of large protests and occasional violence as Australians with conflicting ideologies have come face

recently, racism and discrimination against Indigenous Australians were enshrined in law, resulting in gross discrimination and human rights violations. This tradition of racism, discrimination and human rights violations began with the arrival of English 'settlers'² on the Australian continent in 1788.

Before 1788, Indigenous Australians lived life vastly differently from the way most present-day Indigenous Australians live. The arrival of the English, and in particular, the English common law and legal system, radically changed the way Indigenous Australians worked, lived, and related to one another. These changes affected the lives of all Indigenous Australians, regardless of gender or age. However, the impact of the changes was not uniform. Although there is no doubt that both Indigenous men's and women's lives were drastically and irreparably altered by the imposition of 'white' law, women's lives, roles, and status in their own communities were especially vulnerable to change.

In this article, this writer examines the system of law imposed on Indigenous Australians by the English in 1788, discusses its impact on the lives of Indigenous women, and consider how it continues to disadvantage Indigenous women today. It is argued that Indigenous women were dually disadvantaged by the imposition of the English legal system, and by certain Western Australian legislation.³ These laws caused Indigenous women to be devalued both in the eyes of their own communities, and also in the eyes of white society. The imposition of common law rights of women resulted in Indigenous women being relegated to the private sphere of 'home and hearth' inhabited by English women of the time. They were forced into the English tradition of 'women as other' which ignores, marginalises, and renders invisible all women. The common law system of property ownership also robbed Indigenous women of the economic independence that they held in their traditional societies. Colonial 'acquisition' of land traditionally used for food gathering forced Indigenous women to rely on Indigenous men or the state for economic sustenance. They lost their control of the means of production, and accordingly, their value in both societies.

In Part I a brief review of the anthropological evidence of gender relations among Indigenous people on the Australian continent prior to contact with the English is provided. The evidence is presented that Indigenous women living in pre-contact society lived lives of economic and social independence from men. They controlled the means of food production, and were responsible for educating children. They had power and respect by reason of their roles in society.

In Part II, the nature of the English common law system as it existed in the late 18th century, and its devastating effect when imposed upon the lives of Indigenous women in Australia is considered. First, how the law of England came to be

to face on the issue of race.

² In this paper, wherever possible, the word 'contact' is used to describe the arrival of the English in Eastern Australia in 1788 and in Western Australia in 1829. The Australian High Court held in *Mabo v Queensland* No 2 (1992) 175 CLR 1 that regardless of the original presence of Indigenous people on the continent in 1788, Australia was a territory acquired by 'settlement' rather than invasion. This writer, however, consider use of the word 'settlement' to be disrespectful to the original inhabitants of this continent who experienced first hand the cruelty and hardship of the invasion of their land by the English.

³ The focus here is on the impact of colonial rule in Western Australia by way of example only. The effect nationwide was similar.

imposed on the Indigenous inhabitants of Australia is discussed. Next, to provide a background for understanding how and why this system effected the lives of Indigenous women, a critique of the English common law tradition is also provided, exposing its inherent patriarchy. The late 18th century common law system of property ownership and the rights of women at common law is then considered. Finally, the imposition of these aspects of the common law changed the lives of Indigenous women in their own communities, and in Anglo-Australian society is considered.

In Part III, the continued Anglo-Australian tradition of discrimination against Indigenous women in the years following contact by enacting a series of 'protection' Acts in the late 19th and early 20th centuries is discussed. The focus is on Western Australia's *Native Administration Act*, which promoted a legislative agenda of isolating Indigenous Australians from white society, and regulating relationships between Indigenous women and non-Indigenous men to prevent the birth of mixed-descent children. It is argued that this agenda was a continuation of the racist and sexist traditions inherited by Australia from the common law.

Finally, in Part IV, the present position of Indigenous women in Australian society is explored. It is concluded that their present status directly results from the racist and sexist common law tradition imposed in 1788 and continued through the present. It is argued that the result is a culture devastated by racism that will not heal until these issues are acknowledged and redressed.

PART I

PRE-CONTACT STATUS OF INDIGENOUS WOMEN

Indigenous people have inhabited the Australian continent for 50,000 to 55,000 years.⁴ The social structures and values that existed in Indigenous culture in 1788 emerged in Australia 5,000-15,000 years ago.⁵ It is widely believed that in 1788, there were 600 different Indigenous groups speaking 200 different languages inhabiting the Australian land-mass.⁶ Wide ranging environments created regional differences among how these different Indigenous groups lived.⁷ However, life for all Indigenous people was centred around the natural environment as the source of economic, social, and religious life.⁸

Prior to English contact with Indigenous Australian societies, Indigenous people kept their public and private accounts in forms other than writing.⁹ Accordingly, there are no first-hand reports of life and gender relations in Australia before the

⁴ H. McRae et al, *Aboriginal Legal Issues: Commentary and Materials* (Sydney: Law Book Company Ltd, 1991), 2.

⁵ *Id.* 3.

⁶ *Id.* 6. There is considerable dispute as to the number of Indigenous people living in Australia in 1788. Initially, that figure was considered to be about 300,000. However, recent investigations suggest that figure was probably closer to 750,000. *Id.* 6-7.

⁷ *Id.* 3.

⁸ *Ibid.*

⁹ N. Williams and L. Jolly, 'From Time Immemorial? Gender Relations in Aboriginal Societies Before 'White Contact'' . In K. Saunders and R. Evans (eds), *Gender Relations in Australia: Domination and Negotiation* (Sydney: Harcourt Brace Jovanovich, 1992), 9.

English arrived and chose to write about it.¹⁰ Understanding life in Australia prior to contact, therefore, has been a process of sifting through the written observations of the first English arrivals,¹¹ and listening to the accounts of life which have been handed down by Indigenous peoples through their oral history tradition. In addition, anthropological views of life in remote Indigenous communities with little or no contact with modern society have been useful in speculating what life was like for all Indigenous people before contact. Set out below is the view of Indigenous life and gender relations which emerges.

In pre-contact Indigenous societies, as in most societies, there was a division of labor based on gender.¹² Indigenous women produced up to 80% of the diet.¹³ Indigenous women went out daily in groups of women and children to hunt small animals, fish, gather foods, medicinal herbs, and ochre, and to collect raw materials for making string, baskets, utensils, and dyes.¹⁴ They went out daily, and were thus assured of daily food.¹⁵ During their gathering trips they were not supervised by men.¹⁶ They ate and rested as required during the day.¹⁷ Women spent the majority of their time with other women and with children, who they taught about their country and the appropriate way to behave in it.¹⁸ Thus, women played a key role in socialisation and education of children.

Men, on the other hand, generally hunted meat, which was considered the 'prized' portion of the diet.¹⁹ However, they did not hunt daily and thus were not guaranteed a daily source of food.²⁰ Women and children ate their daily fill as they gathered, and brought home only the excess for distribution to their menfolk.²¹ Men were required to contribute most of what they caught for distribution to others.²²

Distribution of food was pursuant to kinship obligations which were much wider than the European nuclear family unit.²³ In some groups, men gave the majority of their catch to their mothers and mothers-in-law for distribution.²⁴ Thus, a woman's portion of her husband's catch came from another women, not her husband.²⁵ In other groups, the hunter would distribute meat first to his father-in-law, then to himself and his wife and children, and finally to his sister's children, his wife's mother, and to other women related to him.²⁶ Although the system for meat

¹⁰ *Ibid.*

¹¹ This involves, among other things, assessing the background of the author, anticipated audience, and the historical context in which they were written. *Ibid.*

¹² *Id.* 14.

¹³ D. Bell and P. Ditton, *Law: the Old and the New* (Canberra: Aboriginal History, 1980), 19.

¹⁴ Williams and Jolly, *supra* n. 9 at 14.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ Bell and Ditton, *supra* n. 13 at 19.

²⁰ *Ibid.* See also Williams and Jolly, *supra* n. 9 at 14.

²¹ A. Hamilton, 'Aboriginal Women: The Means of Production'. In J. Mercer (ed), *The Other Half: Women in Australian Society* (Harmondsworth: Penguin Books, 1975), 171.

²² *Ibid.*

²³ Williams and Jolly, *supra* n. 9 at 14.

²⁴ Hamilton, *supra* n. 21.

²⁵ *Ibid.*

²⁶ Williams and Jolly, *supra* n. 9 at 14.

distribution system varied, women and children were usually not dependant upon their husbands/fathers for meat. They were not dependant upon men for food in any event because of their extensive gathering role.

Women lived their daily lives independent from men.²⁷ They decided amongst themselves where to go, what to do, where to gather food, and how to care for children.²⁸ Husbands did not control their wives' daily activities, nor could they impose sanctions such as cutting off a woman's food supply.²⁹ To the contrary, women were able to exercise power over men in subtle ways. For example, because women's gathering constituted the majority of food consumed by the group, women were often in charge of ensuring that they camped in areas with access to food resources.³⁰ Thus, women determined camp movements and locations.³¹ Women could also limit the amount of time men spent in ritual by demanding camp movement.³² These are examples of women's influence over their own lives, the lives of men, and the lives of their entire group.

Women were primarily responsible for child care.³³ They were accompanied by the children during food gathering activities, thus it was from the mother that children learned of their country, the law, kinship, land and dreaming.³⁴ Although much of women's time was spent engaged in child care and food gathering, it was considered to be a pleasure rather than a misery.³⁵ The role of mother and provider was one in which Indigenous women proudly acknowledged their responsibility to nourish society.³⁶

Women also had a significant role in the rituals of pre-contact Indigenous life. They often had separate but equally vital roles from men in many of the main rituals, such as male initiation.³⁷ They were centrally involved in death and mourning rituals, being charged with the responsibility for care of the bones and the public display of grief.³⁸ They also had their own rituals to which men were denied access. Women had primary responsibility for 'crisis of life' ceremonies, which included birth, first menstruation, and monitoring life progress.³⁹ Their responsibility for these rituals provided them with status in their own groups.

This sexual division of labour empowered Indigenous women in several ways. First, because women were able to feed themselves and their children without the assistance of men, they had economic independence. Second, because women spent most of their time teaching and socialising children, they had the power to ensure that knowledge of their country, food gathering and culture were instilled in each new generation. Third, women's responsibility for aspects of Indigenous

²⁷ Hamilton, *supra* n. 21 at 171.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ D. Bell, *Daughters of the Dreaming* (Minneapolis: University of Minnesota Press, 1993), 55.

³¹ *Ibid.*

³² *Ibid.*

³³ *Id.* 56.

³⁴ *Ibid.*

³⁵ *Id.* 52.

³⁶ *Ibid.*

³⁷ Williams and Jolly, *supra* n. 9 at 17.

³⁸ *Ibid.*

³⁹ Bell and Ditton, *supra* n. 13 at 16.

ritual life gave them status and value in their communities. Women's roles were vital to the existence of society, and could not be filled by men. Thus, women had significant value and independence in traditional Indigenous societies, and within the belief system of Indigenous society, women were viewed as objects of value.

PART II

ENGLISH LEGAL SYSTEM IMPOSED ON CONTACT: THE COMMON LAW

The Australian legal tradition is a received tradition.⁴⁰ It was received from the English upon contact, and had developed in England for seven hundred years before it reached Australian shores.⁴¹ It was influenced during these centuries by Greek, Roman, and Judaeo-Christian thought.⁴² It reflects these influences today, and understanding the law requires recognition of these influences.

In this section, I consider the nature of the English common law system as it existed in the late 18th century, and its devastating effect when imposed upon the lives of Indigenous women in Australia. In part A, I discuss how the law of England came to be imposed on the Indigenous inhabitants of Australia. In part B, to provide a background for understanding how and why this system effected the lives of Indigenous women, I undertake a critique of the English common law tradition, exposing its inherent patriarchy. In part C, I discuss the late 18th century common law system of property ownership, and women's rights at common law. Finally, in parts D and E, I consider how the imposition of these aspects of the common law, and how they changed the lives of Indigenous women in their own communities, and in Anglo-Australian society, is considered.

A. Imposition of the Common Law in Western Australia

On 22 August 1770 at Possession Island on the Cape York Peninsula, James Cook claimed possession of New South Wales, which at the time comprised the eastern half of the Australian continent, on behalf of the King of Great Britain.⁴³ He had instructions from the Admiralty to 'with the consent of the natives take possession of convenient situations in the country in the name of the King of Great Britain.'⁴⁴ Cook neither sought nor obtained consent of Indigenous Australians before claiming land for Great Britain.⁴⁵

English settlement in the western half of the continent occurred under similar circumstances. In a report to Governor Darling on 14 December 1826, Captain James Stirling recommended the Swan River as a desirable location for a trading, military, and naval station.⁴⁶ After discussing the matter with a consortium of private investors, the English Government agreed with promoters to grant land in the proposed colony in exchange for investment capital 'at the Rate of Forty Acres

⁴⁰ P. Parkinson, *Tradition and Change in Australian Law* (Sydney: Law Book Company Ltd, 1994), 3.

⁴¹ *Ibid.*

⁴² *Id.* 5.

⁴³ McRae et al, *supra* n. 4 at 10.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ *Western Australia v Commonwealth* (1995) 69 ALR 309, 315.

for every Sum of £3 so invested'.⁴⁷ In 1828, Captain Fremantle was chosen by the Admiralty to take formal possession of the 'Western side of New Holland in His Majesty's name'.⁴⁸ On 30 December 1828, Captain Stirling was appointed to command an expedition to form a settlement at the mouth of the Swan River (the site of present day Perth).⁴⁹ He was rewarded with 100,000 acres of his choice, and appointment as the Lieutenant Governor.⁵⁰

On 2 May 1829, Captain Fremantle took formal possession 'of the whole of the West Coast of New Holland in the name of His Britannic Majesty'.⁵¹ On 18 June 1829, Lieutenant Governor Stirling issued a proclamation that the 'Laws of the United Kingdom as far as they are applicable to the circumstances of the case do . . . immediately prevail and become security for the Rights, Privileges and Immunities of all His Majesty's Subjects found or residing in [the] Territory'.⁵² Lieutenant Governor Stirling's proclamation gave the Lieutenant Governor the power to grant *unoccupied* lands within the territory.⁵³ The *Swan River Act 1829* enacted by the British Parliament referred to settlement of 'wild and unoccupied lands'.⁵⁴

The characterisation of Western Australia as 'unoccupied' in 1829 is peculiar. Captain Stirling reported in 1827 that the area was occupied by Indigenous people, and shortly after arrival in 1829, a Major Lockyer noted that the 'Natives . . . are very *numerous* and fierce'.⁵⁵ What was actually meant by 'unoccupied', however, was 'unoccupied by [European] settlers'.⁵⁶ The occupation of the land by the Indigenous inhabitants was disregarded, and their interest in land was not acknowledged.⁵⁷

The reason for this is clear. William Blackstone described in 1765 the means by which the common law of England would become the law of a country which had previously been outside the King's dominion:

Plantations, or colonies in distant countries, are either such where the lands are claimed by right of occupancy only, by finding them desert [sic] and uncultivated, and peopling them from the mother country; or where, when already cultivated, they have been either gained by conquest, or ceded to us by treaties. And both these rights are founded upon the law of nature, or at least upon that of nations. But there is a difference between these two species of colonies, with respect to the laws by which they are bound. For it is held, that if an uninhabited country be discovered and planted by English subjects, all the English laws are immediately there in force. For as the law is the birthright of every subject, so wherever they go they carry their laws with them. *But in conquered or ceded countries, that have already laws of their own, the king may indeed alter and*

⁴⁷ *Ibid.*

⁴⁸ *id.* 316.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ *Id.* 317.

⁵⁵ *Ibid.* (emphasis added).

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

*change those laws; but, till he does actually change them, the antient [sic] laws of the country remain, unless such as are against the law of God, as in the case of an infidel country.*⁵⁸

By characterising the Australian continent as ‘desart and uncultivated’, the English justified their claim to Australia through ‘occupation’ or ‘settlement’, and their right to impose the law of England, the common law, as the law of the land. In doing so, they were entitled to ignore and supersede Indigenous law and customs, including Indigenous ownership of the land.

B. The Patriarchal Foundations of the English Common Law Tradition

The ‘laws of the United Kingdom’ which Lieutenant Governor Stirling proclaimed as the prevailing law of Western Australia in 1829 comprised the common law. The common law tradition was one of male domination of public life, with women being relegated to the private sphere of home and hearth.⁵⁹ The notion that women could or should play a role in public life was an alien one.⁶⁰ The legal profession was exclusively male, and the judiciary was drawn from the ranks of this exclusively male club.⁶¹

The English common law, therefore, was a product of a male supremacist society. During the formative years of the common law, England was ruled mainly by men (with the exception of the occasional female monarch). Men controlled the power, and those with the power in society designed its norms and institutions, drafted its constitution and legislation, and set its values.⁶² Women of the day could not vote, own property, and had no legal existence independent from their husbands or fathers. The common law developed as a legal system by men, for the benefit of men, to the exclusion and detriment of women. These are the hallmarks of a male supremacist society.⁶³

In a male supremacist society, the male point-of-view dominates civil society as the ‘objective’ view, and thus appears not to exist.⁶⁴ In England, under the aegis of this invisible standpoint, men dominated women and children, structured family and kinship rules and sexual mores to guarantee reproductive ownership, and created racial and class hierarchies.⁶⁵ The English common law incorporated these facts of social power into the law with two results: first, the common law system of domination became legitimate; and second, the social domination became invisible.⁶⁶ Male dominance was made to seem a feature of life rather than a construct imposed by the forces of a dominant group.⁶⁷

⁵⁸ W. Blackstone, *Commentaries on the Laws of England*, vol 1, Facsimile of Oxford; Clarendon Press, 1765, 104-105 (emphasis added, spelling as in original).

⁵⁹ Parkinson, *supra* n. 40 at 8-9.

⁶⁰ *Id.* 9.

⁶¹ *Ibid.*

⁶² C. MacKinnon, *Toward a Feminist Theory of the State*, Cambridge, Mass.; Harvard University Press, 1989, 238.

⁶³ *Ibid.*

⁶⁴ *Id.* 237.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ *Id.* 238.

Thus, the law imposed on Indigenous Australians in Western Australia in 1829 was grounded in male dominance rendered invisible and legitimate by the common law. It reflected the patriarchal state of English society at that time. As expected, the patriarchal nature of the common law became a dominant feature of the legal tradition in Western Australia.

C. The English Common Law

The formative years of the common law in England were between the 12th and 14th centuries.⁶⁸ During this period, a system of substantive and procedural law evolved from cases tried before the king's courts, and the government of England gradually became centralised.⁶⁹ Prior to the Norman Conquest, proprietary rights and disputes were resolved at a local level according to the customs of the village.⁷⁰ Resolution of disputes required invocation of a deity and trial by oath.⁷¹ This was replaced by a system of juries and the establishment of a central system of courts to hear disputes in the 12th century.⁷² This in turn led to the establishment of a body of substantive law.⁷³

By the 18th century, the substantive law of England was well established. This body of law comprised Lieutenant Governor Stirling's 'laws of the United Kingdom' which he imposed upon the colony of Western Australia in 1829. Two aspects of the substantive common law were responsible for the most significant changes to the lives and status of Indigenous women in Australia. These were the common law system of property ownership, and the rights of women at common law.

Property Ownership

Ownership of property at common law is derivative, and thus every chain of property ownership must begin somewhere. The common law position at the time of contract was that all land in the English realm was originally possessed and owned by the Crown.⁷⁴ Accordingly, subjects of the Crown could never acquire first title to real property.⁷⁵

The Crown could acquire new territory by 'act of state'.⁷⁶ As discussed in part A above, such acquisition was either derivative (meaning that title was acquired by conquest or cession from another ruler) or 'original' (meaning the land was not

⁶⁸ Parkinson, *supra* n. 40 at 68.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ *Id.* 70. For less serious matters, the plaintiff established a prima facie case by bringing a group of followers who were willing to swear an oath to support the claim. For more serious accusations, there was a trial by ordeal. Trial by ordeal involved an appeal to God to reveal the truth. For example, the ordeal of fire involved placing a hot piece of iron into the defendant's hand, and then binding it. If the burn festered after several days, God had decided against the defendant. *Ibid.*

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ K. McNeil, *Common Law Aboriginal Title*, Oxford; Clarendon Press, 1989, 11.

⁷⁵ *Ibid.*

⁷⁶ *Id.* 162.

previously held and pursuant to international law could be acquired by the English Crown).⁷⁷

Where the Crown's title was derivative, the Crown acquired all property rights held by the previous sovereign.⁷⁸ The Crown could also at the time of conquest or cession seize any and all land or chattels held privately, and the persons deprived of property would have no remedy.⁷⁹ However, once the territory was accepted into the dominions of the Crown, the subjects of the foreign sovereign became English subjects.⁸⁰ At this point, the Crown could no longer acquire property of its citizens through 'act of state.'⁸¹

Where the Crown acquired 'original' title through settling or occupying a previously uncolonised land, the common law provided that English laws were immediately in force.⁸² Thus, to the extent that English law was applicable to the settled territory and necessary to protect the rights of the English subjects, such law displaced Indigenous law.⁸³ On this basis, the Crown asserted possession and ownership of Western Australia and commenced distribution of the land.⁸⁴ From the moment that the Crown commenced distribution of land in the colony of Western Australia, the common law system of property ownership presided.

The common law system of land ownership recognises only that title which derives from the Crown, or which is created by the taking of previously freehold title held in abeyance by another.⁸⁵ Thus, at common law, the 'lowest and most imperfect' degree of title to real property at common law was 'mere naked possession', actual occupancy of the estate.⁸⁶ Although naked possession could be defeated by the rightful owner of the estate, until such time as the rightful owner divested the possessor of title, the possessor's actual possession was prima facie evidence of legal title in the possessor.⁸⁷ Further, such possession could, by passage of time, ripen into indefeasible title.⁸⁸

For some time, Indigenous people maintained actual possession of their lands despite the fact that the Crown had vested indefeasible title in others. However, as soon as the rightful title holder asserted title to the land, the naked possession of the Indigenous inhabitants was defeated.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ *Id.* 163.

⁸¹ *Id.* 164.

⁸² Blackstone, *supra* n. 58 at 105.

⁸³ McNeil, *supra* n. 74 at 181.

⁸⁴ Whether the Crown's actions in doing so were legitimate is not in issue for present purposes. The fact is that the Crown did commence distribution of land in Western Australia under the purported authority of the common law. It was the fact of this distribution which is relevant.

⁸⁵ McNeil, *supra* n. 74 at 11.

⁸⁶ Blackstone, *supra* n. 82 at 195.

⁸⁷ *Id.* 196.

⁸⁸ *Ibid.*

Rights of Women

At common law, women had essentially no existence independent from men. In his *Commentaries on the Laws of England*, William Blackstone set out the common law rights of 'persons' as existing in 1765.⁸⁹ He defined 'persons' as either natural persons or artificial persons.⁹⁰ However, when discussing the actual rights of persons, he reverted to a discussion of the 'absolute rights of every Englishman'.⁹¹

Blackstone summarised the rights of 'persons' as threefold: the right of personal security; the right of personal liberty; and the right of private property.⁹² He described the right of personal security as consisting of a 'person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation'.⁹³ The right of personal liberty preserves the personal liberty of 'individuals'.⁹⁴ These rights would appear by Blackstone's language to apply to all persons, male and female. However, a female could not seek recompense for a violation of either of these right on her own accord.⁹⁵ The third right, to personal property, appears by Blackstone's language to (at best) ignore or (at worst) exclude women.

The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only the laws of the land. . . . The laws of England are therefore, in point of honor and justice, extremely watchful in ascertaining and protecting this right. Upon this principle the great charter has declared that no freeman shall be disseised, or divested, of his freehold, or of his liberties, or free customs, but by the judgment of his peers, or by the law of the land.⁹⁶

Blackstone's discussion of the right of property ownership in relation to 'Englishmen' reflected the reality of the day that the restrictions the common law imposed on property ownership by female children⁹⁷ and married women⁹⁸ made it an unusual event for women to own property.

At common law, a father's power over his son's estates was as a guardian, and he was required to account to his son for the profits upon his son's coming of age.⁹⁹ Blackstone mentioned no corollary obligation of a father to his daughter. This suggests that a female child was not allowed to have an estate which vested solely in herself.

We know that it was theoretically possible for unmarried women over the age of majority to own property at common law because upon marriage, any property of a woman was vested in her husband solely. At common law, marriage united

⁸⁹ *Id.* 117-141.

⁹⁰ *Id.* 119.

⁹¹ *Id.* 123.

⁹² *Id.* 125.

⁹³ *Ibid.*

⁹⁴ *Id.* 130.

⁹⁵ *See infra* notes 99-100.

⁹⁶ *Id.* 134.

⁹⁷ *Id.* 441.

⁹⁸ *Id.* 421-433.

⁹⁹ *Id.* 441.

husband and wife as one person, with the 'very being or legal existence of the woman... suspended during the marriage'.¹⁰⁰

Upon this principle of a union of person in husband and wife, depends almost all of the legal rights, duties, and disabilities that either of them acquire by the marriage....If the wife be indebted before marriage, the husband is bound afterwards to pay the debt; for he has adopted her and her circumstances together. If the wife be injured in her person or property, she can bring no action for redress without her husband's concurrence, and in his name, as well as her own; neither can she be sued, without making the husband a defendant.¹⁰¹

Thus, a married woman had virtually no rights independent from her husband during marriage, nor from her father whilst an infant. As explained by Blackstone, 'so great a favourite is the female sex of the laws of England'.¹⁰²

D. The Effects of the English Common Law System on Indigenous Women's Place in Indigenous Society

As discussed in Part II above, prior to contact with white society, Indigenous women lived lives of relative autonomy and economic independence from men. There were strong divisions of labour and cultural duties on the basis of gender, but women's work was not devalued, and women were often in significant control of the daily workings of society.

The arrival of the English in Western Australia in 1829 with a system of property law that allowed them to claim ownership of the land with no recognition of the rights of the original dwellers was the 'beginning of the end' of this autonomy and economic independence for Indigenous women. The colonial government, under the supervision of Governor Stirling, began divesting Indigenous people of their land almost immediately upon arrival. Although it took many years to achieve its full effect, the dispossession of Indigenous people of their lands eventually robbed Indigenous women of their place in Indigenous society.

The pattern of dispossession gradually reduced access to traditional hunting and foraging grounds. Although this prevented both Indigenous men and women from supplying a traditional diet for their kinship groups, it effected women more drastically because they normally supplied eighty percent of the traditional diet. Without access to sufficient food, Indigenous men and women were forced to seek employment on stations, and paid employment disrupted the delicate balance of gender relations.

Indigenous people were employed on stations as early as the 1840's, and this work provided an alternative to their depleted traditional foods.¹⁰³ Bush skills and an intimate knowledge of their country made Indigenous Australians valued workers on stations.¹⁰⁴ Some Indigenous women proved to be skilled horse riders, and

¹⁰⁰ *Id.* 430.

¹⁰¹ *Id.* 430-431.

¹⁰² *Id.* 433.

¹⁰³ A. Haebich, *For Their Own Good: Aborigines and Government in the South West of Western Australia 1900-1940*, 2nd ed, Nedlands; UWA Press, 1992, 1-2.

¹⁰⁴ *Id.* 2.

worked on stations as drovers.¹⁰⁵ However, this area was increasingly taken over as a job for men only.¹⁰⁶ Because of the common law view that women were to be 'favoured' by the law, men were expected to provide for their wives and efforts to employ Indigenous Australians were directed at men, not women.¹⁰⁷ Women were often employed as domestics but unlike men, were not considered to be *entitled* to employment.¹⁰⁸ Strenuous efforts were made to ensure that all Indigenous men who were willing to work were given jobs, no matter how trivial or menial.¹⁰⁹ Indigenous women's resources, beyond their domestic services, were rarely utilised or recognised.¹¹⁰

As a result of the onset of paid labour, Indigenous women were increasingly forced to rely on Indigenous men as their source of economic support. It was no longer possible for women to provide eighty percent of the daily food consumed by the kinship group. This had two immediate results. First, women lost their role as primary food providers' and the accompanying status. Second, women and children became dependent upon men for survival, which drastically disrupted the power balance between Indigenous men and women. The result was that men now had all the bargaining power, and women had nothing.¹¹¹

The onset of social welfare benefits exacerbated the problem. Because the common law conceived the family as comprising a husband who supported a wife and children, social welfare benefits were paid to men on behalf of 'their' women and children. This ignored the social structure of Indigenous kinship groups, which resulted in further massive imbalance of power.¹¹² Because men did not traditionally provide the majority of economic support for women and children, they saw their wages and payments of social welfare benefits as their own, and resented the demands of their wives and children for support.¹¹³

The onset of a cash economy brought with it a whole new set of relationships over which women had no control.¹¹⁴ Before contact, food was harvested daily, and consumption focused on the present rather than the future.¹¹⁵ Wages and pensions, although providing a reliable income at set intervals, required the hoarding of resources, which was a subversion of the Indigenous mother's self-image.¹¹⁶

Further, the onset of the cash economy undermined women's role in the education and socialisation of children. When women gathered food, they were not just participating in an economic activity, they were also acting as educators.¹¹⁷

¹⁰⁵ M. A. Jebb and A. Haebich, 'Across the Great Divide: Gender Relations on Australian Frontiers'. In K. Saunders and R. Evans (eds), *Gender Relations in Australia: Domination and Negotiation*, Sydney; Harcourt Brace Jovanovich, 1992, 25.

¹⁰⁶ *Ibid.*

¹⁰⁷ Hamilton, *supra* n. 21 at 173.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ Jebb and Haebich, *supra* n. 105 at 26.

¹¹¹ Hamilton, *supra* n. 21 at 173-174.

¹¹² *Id.* 174.

¹¹³ *Ibid.*

¹¹⁴ Bell and Ditton, *supra* n. 13 at 16. As stated by one Indigenous woman, 'Money is not our way. We don't understand about money.' *Ibid.*

¹¹⁵ Hamilton, *supra* n. 21 at 174.

¹¹⁶ *Ibid.*

¹¹⁷ *Id.* 175.

Gathering required detailed knowledge of the bush, learned by small children from the actions and explanations of women.¹¹⁸ Once the ability and need to forage ceased, Indigenous women no longer served the role of primary educator and socialiser. Women who were once respected because they provided food and education suddenly could provide neither, and suffered a corresponding diminution in status.¹¹⁹

E. The Effects of the English Common Law System on Indigenous Women's Place in 'White' Society

As discussed above, at common law, women had virtually no existence independent from men. This position was a reflection in the common law of the patriarchal nature of English society of the day. When the English settled in Western Australia, they brought with them their biases and prejudices against women in general, and in particular, women of colour. White women of the day were culturally invisible, and upon contact with Indigenous women, the English imposed this social and cultural invisibility on Indigenous women as well.¹²⁰

Under the influence of the common law's patriarchal values, white society ignored Indigenous women completely except for two purposes: sex and labour.¹²¹ In the remote regions of the country, such as northern Western Australia, both were in short supply.¹²² Many settlers preferred to use women workers to men. One important reason was that they served a dual purpose: they worked, and they could be raped.¹²³

Indigenous women were kidnapped, raped, and exploited by the English in nearly every way imaginable.¹²⁴ They were often 'employed' on stations as domestic servants, where they were raped, and impregnated. Their failure to consent was ignored, and they gained a reputation in white society of moral permissiveness.¹²⁵ It was generally believed by the English that Indigenous women were happy in their sexual liaisons with white men in exchange for food, grog, and tobacco.¹²⁶ As stated by Raymond Evans:

With the onset of white colonization, women's traditional functions were either severely truncated and rendered marginal in a reconstituted social environment or utterly destroyed as their populations were decimated and their societies dismembered and fragmented. During this process the position of black women plummeted from being co-workers of equal importance to men in the balanced use of the environment to that of thoroughly exploited beasts of burden. It fell from being valuable human

¹¹⁸ *Ibid.*

¹¹⁹ *Id.* 175-76.

¹²⁰ J. Scutt, 'Invisible Women? Projecting White Cultural Invisibility on Black Australian Women', October 1990, 2 *Aboriginal Law Bulletin*, 4-5.

¹²¹ S-J. Hunt, 'Aboriginal Women and Colonial Authority: Northwestern Australia 1885-1905'. In J. Mackinolty & H. Radi (eds), *In Pursuit of Justice: Australian Women and the Law 1788-1979*, Sydney; Hale & Iremonger, 1979, 34.

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ Jebb and Haebich, *supra* n. 105 at 28.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

resources and partners within traditional sexual relationships to that of degraded and diseased sex objects and from being people of recognized spiritual worth to that of beings of virtual animal status in the eyes and the belief systems of their exploiters.¹²⁷

Exploitation of Indigenous women was not always by the hands of white men. There is significant evidence of exploitation of Indigenous women by white women.¹²⁸ There was gross inequality in female inter-relationships, especially in the domestic servant sphere.¹²⁹ In this context, the 'boss' was almost always female, and in some cases, Indigenous women were subjected to brutal treatment by white women.¹³⁰ Many young Indigenous women in domestic service believed that the treatment received from white women was worse than that from white men.¹³¹

The virtual absence of friendship between black and white women in colonial Australia, at the same time as sexual relationships between black women and white men were widespread, is an apparent paradox. Yet, it makes sense in the logic of colonial relations. In all colonial relations there was an assumption by the colonisers that they were inherently superior to the colonised . . . Since friendship is founded on notions of affinity and equality between individuals, it is not a condition to which colonial settings are conducive.¹³²

Conclusions

The patriarchal nature of the English common law system devastated the lives of Indigenous women in Australia. The English imposed their law on the Indigenous inhabitants of Australia without regard to the existing legal, societal and cultural systems. The system of property ownership and subjugation of women internalised in the common law was completely foreign to the Indigenous way of life, and was ultimately responsible for the disintegration of a delicate gender balance which had existed for thousands of years. The end result was the destruction of the role of Indigenous women in the eyes of their own society and a legacy of oppression and disrespect in the eyes of white Australians.

¹²⁷ *Ibid.*

¹²⁸ J. Huggins and T. Blake, 'Protection or Persecution? Gender Relations in the Era of Racial Segregation'. In K. Saunders and R. Evans (eds), *Gender Relations in Australia: Domination and Negotiation*, Sydney; Harcourt Brace Jovanovich, 1992, 54.

¹²⁹ *Ibid.*

¹³⁰ *Id.* 55.

¹³¹ *Ibid.*

¹³² *Ibid.*

PART III

WESTERN AUSTRALIAN LAW IMPOSED IN THE COMMON LAW TRADITION POST-CONTACT: THE 'PROTECTION' ACTS

Introduction

The colonisers of Western Australia, in the patriarchal and ethnocentric tradition of the common law, promoted an agenda of racism in the 20th century which resulted in further degradation and oppression of Indigenous women. Because the colonists feared the contamination of their English bloodline with 'native'¹³³ blood, they instituted a legislative agenda to isolate Indigenous Australians from white society, and to regulate relationships between Indigenous women and non-Indigenous men to prevent the birth of mixed-descent children. This legislative agenda took the form of 'protection' acts, which oppressed Indigenous men and women, under the aegis of protection. As an example of these 'protection' acts, the provisions of the *Native Administration Act 1905-1936* are discussed. This Act was enacted in furtherance of a racist agenda, which impacted this agenda on Indigenous women.¹³⁴

Historical Context

An understanding of the historical context in which the 'protection' Acts were enacted is crucial to understanding the Anglo-Australian agenda implemented by means of the 'protection' Acts. A brief discussion of the political and social climate in the colony which set the scene for the discriminatory legislation, is necessary.

In the early twentieth century in Western Australia, the law classified Indigenous Australians into three groups: 'Aboriginal natives'; 'half castes' who lived and associated with Aboriginal natives; and persons of Aboriginal descent who lived an English way of life.¹³⁵ Over half of the Indigenous population in the south of Western Australia was of mixed racial descent.¹³⁶ In the early days of settlement in Western Australia, there were few women of English descent living in the colony. There were reports from the early days of the Swan River colony of settlers intoxicating Indigenous men and then raping the women.¹³⁷ In the 1840's, marriages between young settlers and mission-trained Indigenous women were officially encouraged.¹³⁸ This, along with the 'widespread immorality' between

¹³³ (Read 'inferior')

¹³⁴ Note, however, that the *Native Administration Act 1905-1936* was not alone in furthering the racist and sexist agenda of the Western Australian people and their government. Amendments to the Act (including the *Native Administration Act Amendment Act 1941*), and other legislation, such as the *Native Welfare Act 1954* and the *Native Welfare Act Amendment Act 1960*, also overtly discriminated against Indigenous women. Likewise, the *Native Administration Act 1963*, which repealed all of the above legislation, continued in the oppressive and discriminatory tradition of the 1905-1936 Act. A thorough discussion of each of these Acts is, unfortunately, beyond the scope of this paper.

¹³⁵ Haebich, *supra* n. 103 at 47.

¹³⁶ *Id.* 48.

¹³⁷ *Ibid.*

¹³⁸ *Ibid.* Note, however, that the idea of marriage between a white woman and an Indigenous

Indigenous Australians and whites following the transportation of convicts to Western Australia in the 1850's contributed to the increase in the mixed-descent population noted during the 1870's.¹³⁹

The gradual increase in numbers of women of English-descent living in Western Australia in the 1890's resulted in a corresponding intolerance for miscegenation.¹⁴⁰ Mixed-descent persons were considered by the colonists to be in a state of racial and cultural 'limbo'.¹⁴¹ They were often described as having inherited the worst of both races.¹⁴² However, it was acknowledged that the mixed-descent children were 'half-British', and that they had as 'great a claim upon the white population as upon the Black'.¹⁴³ Accordingly, the colonists felt beholden to ensure that these children did not grow up to follow the ways of their 'black mothers'.¹⁴⁴ Rather, it was considered best for them to be trained in missions to take their 'lowly' place in the white community.¹⁴⁵

The Native Administration Act 1905-1936

'Aboriginal natives' were first regulated by legislation in Western Australia in the 1840's.¹⁴⁶ Over the years, the laws became increasingly discriminatory, restricting their access to alcohol and their presence in towns.¹⁴⁷ Commencing in the 1870's, Western Australia enacted the first in a series of Indigenous 'Protection' Acts which remained in effect in various forms until 1972.¹⁴⁸ These Acts were intended not to 'protect' Indigenous Australians, but rather to control and isolate them from the English population. The provisions of the *Native Administration Act 1905-1936* were enacted in furtherance of the agenda to isolate Indigenous people from white society, and to regulate relationships between Indigenous women and non-Indigenous men to prevent the birth of mixed-descent children.

man was considered so unconscionable as to be absurd. Jebb and Haebich, *supra* n. 105 at 34. The biography of missionary Ernest Gribble records the furore which resulted when his sister Ethel fell pregnant to and married an Indigenous man with whom she had been in love for many years. The Australian Board of Missions at first refused to believe that such a marriage existed. Upon confirmation by viewing the marriage certificate, Ethel's name was removed from their mission records. *Ibid.*

¹³⁹ Haebich, *supra* n. 103 at 48.

¹⁴⁰ *Id.* 49.

¹⁴¹ *Ibid.*

¹⁴² *Id.* 50.

¹⁴³ *Id.* 49.

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ *Id.* 47.

¹⁴⁷ *Ibid.*

¹⁴⁸ The Aboriginal Affairs Planning Authority Act (WA) 1972 repealed the Native Welfare Act 1963, which descended from the original Aborigines Protection Act 1886 and the Native Administration Act 1905-1936. The Aboriginal Affairs Planning Authority Act (WA) 1972 was concerned mainly with the establishment of the Aboriginal Affairs Planning Authority, a Commissioner for Aboriginal Planning, and an Aboriginal Affairs Advisory Council. It did not regulate the interpersonal relationships among Indigenous peoples, or between Indigenous persons and non-Indigenous persons.

The *Native Administration Act 1905-1936* ('the Act') was proclaimed on 27 April 1937.¹⁴⁹ The Act was a revised version of the *Aborigines Act 1905*, incorporating a wider definition of 'native', thus increasing the number of Indigenous Australians in its scope. It defined as 'native':

- a) any person of the full blood descended from the original inhabitants of Australia;
- b) subject to the exception stated in this definition any person of less than full blood who is descended from the original inhabitants of Australia or from their full blood descendant, excepting however any person who is -

a quadroon under twenty-one years of age who neither associates with or lives substantially after the manner of the class of persons mentioned in paragraph (a) in this definition unless such quadroon is ordered by a magistrate to be classed as a native under this Act;

a quadroon over twenty-one years of age, unless that person is by order of a magistrate ordered to be classed as a native under this Act, or requests that he be classed as a native under this Act; and

a person of less than quadroon blood who was born prior to the 31st day of December, 1936, unless such person expressly applies to be brought under this Act and the Minister consents.¹⁵⁰

All persons within the definition of 'native' were by the Act subjected to significant restrictions of liberty. Section 12 of the Act empowered the Minister to 'cause any native to be removed to and kept within the boundaries of a reserve, district, institution, or hospital'.¹⁵¹ Any native who refused was guilty of an offence under the Act. Exempt from the removal provisions in section 12 was, inter alia, 'a female lawfully married to and residing with a husband who is not himself a native . . .'.¹⁵²

The Act also imposed significant restrictions upon Indigenous interpersonal and familial relationships. Section 45 of the Act provided that:

- (1) No marriage of a native according to the laws of the State shall be celebrated unless and until the prescribed notice in writing has been given to the Commissioner.
- (2) On receipt of any notification under the provisions of this section, the Commissioner may object to the marriage by notice in writing, to be given in the prescribed time and manner, on all or any of the following grounds . . .
 - (d) that there are any other circumstances which render it advisable that the marriage should not take place.¹⁵³

¹⁴⁹ Haebich, *supra* n. 103 at 348.

¹⁵⁰ Native Administration Act 1905-1936 s2.

¹⁵¹ Native Administration Act 1905-1936 s12.

¹⁵² *Native Administration Act 1905-1936* s13(c). This provision was undoubtedly to protect the property rights of the non-native husband in his native wife rather than an attempt to increase the personal liberty of Indigenous women.

¹⁵³ Native Administration Act 1905-1936 s45.

Cohabitation was no escape from the restrictive provisions of the Act for Indigenous women who wished to marry non-Indigenous men. The Act also prohibited any person except a native from cohabiting with or having sexual intercourse with a native.¹⁵⁴

All Indigenous children, including mixed-descent children within the meaning of native as defined in section 2, were deemed by section 8 of the Act to be wards of the state:

The Commissioner shall be the legal guardian of every native child notwithstanding that the child has a parent or other relative living, until such child attains the age of twenty-one.¹⁵⁵

This provision vested in the Commissioner the power to remove Indigenous children from the custody of their parents to be raised in missions.¹⁵⁶ To compensate for the expense of raising Indigenous children in institutions, the Act provided in section 37 that:

- (1) Whenever a male child whose age does not exceed sixteen years or a female child whose age does not exceed eighteen years, and who in either case is the offspring of a native and some person other than a native is being maintained in a native institution at the cost of the Government, a protector may, with the approval of the Minister, apply to a justice of the peace for a summons to be served on the alleged father of such child for the purpose of obtaining contribution to the support of the child.

Section 37 (2) provided:

. . . Provided that no man shall be taken to be the father of any such child upon the evidence of the mother, unless her evidence is corroborated in some material particular.¹⁵⁷

There is no corollary provision in the Act for Indigenous mothers to sue non-Indigenous fathers for support of their children. As stated by Mr Paul Hasluck in 1941, the combined effect of the 1905 and 1935 Acts was '[a] system that confines the native within a legal status that has more in common with that of a born idiot than of any other class of British subject.'¹⁵⁸

¹⁵⁴ Native Administration Act 1905-1936 s46.

¹⁵⁵ Native Administration Act 1905-1936 s8.

¹⁵⁶ The ramifications of this provision and corresponding provisions in other Australian jurisdictions are described in the 1997 Human Rights and Equal Opportunity Commission Report *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*, Sydney, 1997.

¹⁵⁷ *Native Administration Act* s37. The tradition of not believing the evidence of Indigenous women unless corroborated by a white person apparently continues today. The *Australian* newspaper reported on 9 August 1995 that 'the Hindmarsh Island Bridge royal commission yesterday heard its *first* claims in support of the so-called women's business at the centre of the inquiry when a surprise witness gave evidence that she had recorded the secrets' existence almost 30 years ago.' K. Towers, 'Historian Backs Women's Secrets' *The Australian*, 9 August 1995, p 5 (emphasis added). To the contrary, at that time, the Royal Commission had heard a plethora of evidence from Indigenous women attesting to the existence of the secret women's business. What had not yet been heard was the evidence of a *white* woman who was willing to corroborate the story.

¹⁵⁸ P. Seaman, *The Aboriginal Land Inquiry Report* (Perth: Aboriginal Land Inquiry, 1984),

Effects of the Native Administration Act 1936-1905 on the Lives of Indigenous Women

These provisions of the *Native Administration Act 1905-1936* had a devastating impact on the lives of Indigenous women and their families. The most devastating provision of the Act was section 8. This section empowered the Department of Native Affairs to engage in biological and social engineering by forcibly removing Indigenous children from their families and placing them in government institutions to be trained in 'white civilisation and society.'¹⁵⁹ In New South Wales, similar legislation resulted in the forcible removal of more than 5,600 Indigenous children from their homes and families between 1883 and 1969.¹⁶⁰ The impact of this dislocation on the lives of these children and their families can never really be understood by white Australians. It is believed that there may be as many as 100,000 Indigenous Australians in Australia today who do not know their families or communities as a result of this policy.¹⁶¹ The view of Western Australians at the time was that it was 'maudlin sentiment' to consider the feelings of the Indigenous mothers to this practice.¹⁶² 'They forgot their children in twenty-four hours and as a rule . . . [were] glad to be rid of [them].'¹⁶³

The provisions of section 12 of the Act also had devastating consequences for the lives of Indigenous women and their families. The power held by the Department to forcibly remove and confine Indigenous Australians to reserves often resulted in the separation of families and the disruption of a traditional way of life. At the Carrolup settlement in Western Australia, children cut through canvas-walled dormitories to rejoin their parents in the settlement camp or in their home districts.¹⁶⁴ Uncontrollable children were removed to the Moore River settlement where their unfamiliarity with the people and the district would act as a deterrent to their absconding.¹⁶⁵

Moore River settlement was akin to a prison, where the residents were physically isolated from the rest of the world and communication with the world outside the settlement was restricted.¹⁶⁶ At Moore River, as well as other settlements, the Indigenous inmates had white gender roles forced on them, and thus Indigenous men were taught that Indigenous women's role was to serve and be subservient to them in all matters.¹⁶⁷

Section 13 of the Act exempted from the removal provisions of section 12 Indigenous women 'lawfully married to and residing with a husband who is not himself a native'. Accordingly, the provisions of the Act which prevented marriage between Indigenous and non-Indigenous Australians¹⁶⁸ not only restricted an Indigenous woman's right to engage in the marriage of her choice, but also denied her the power to escape the removal provisions of the Act. Section 46 of the Act

257.

¹⁵⁹ Haebich, *supra* n. 103 at 350-351.

¹⁶⁰ Huggins and Blake, *supra* n. 128 at 48.

¹⁶¹ *Ibid.*

¹⁶² Haebich, *supra* n. 103 at 82.

¹⁶³ *Ibid.*

¹⁶⁴ *Id.* 175.

¹⁶⁵ *Id.* 175-76.

¹⁶⁶ *Id.* 200.

¹⁶⁷ Huggins and Blake, *supra* n. 128 at 47.

¹⁶⁸ Native Administration Act s. 45.

prohibited sexual contact between Indigenous and non-Indigenous people, but ignored the general coercive nature of such contact.¹⁶⁹

The provisions of the *Native Administration Act 1905-1936* discussed above were enacted in furtherance of the agenda to isolate Indigenous Australians from white society and regulate relationships between Indigenous women and non-Indigenous men to prevent the birth of mixed-descent children. This tradition of discrimination and oppression continued with superseding legislation, the *Native Administration Act 1963*. The result was devastation of the Indigenous family and further degradation of the role of Indigenous women in their own and in white society. The discriminatory provisions of these Acts served to reinforce the patriarchal legal system imposed at contact with white colonisers.

PART IV

DUALLY DISADVANTAGED: RAMIFICATIONS AND THOUGHTS FOR THE FUTURE

Ramifications

The last remaining protection legislation, the *Native Administration Act 1963*, was repealed in 1972.¹⁷⁰ However, neither the absence of overtly discriminatory legislation post-1972 nor the passing of 25 years has remedied the disadvantage already suffered by Indigenous women. The racist and patriarchal assumptions from which the 'protection' legislation developed still exist, and still oppress Indigenous people, especially Indigenous women.¹⁷¹ Indigenous people continue to have a very high exposure to bureaucratic control of their lives.¹⁷² The police, courts, social welfare agencies, land administration agencies and a plethora of boards and councils continue to invade nearly every aspect of Indigenous peoples' lives.¹⁷³ However, despite this intrusion, the system is unable to protect Indigenous women from the economic disadvantage and physical violence they face in 'white' society and in their own communities.

¹⁶⁹ White men were rarely prosecuted for crimes against Indigenous women, even kidnapping and rape. Hunt, *supra* n. 121 at 37-38. In 1898 Constable S Logan reported that a prominent settler, Walter Nairn, was detaining two Indigenous women against their will 'wholly and solely' for sexual pleasure. He also reported he was informed 'that Caroline is assigned to Walter Nairn by the brother William who is a Protector of Aborigines. Caroline always refuses to sign until coerced with a dog-chain handled by William the Protector into doing so.' Another constable was sent to investigate but no charges were laid. He did not consider Nairn had been any worse than a great many others, not only in Murchison but all over the colony. The summing up of the case from the head of the department said: 'there seems no reason to believe that Messrs Nairn are cruel or even harsh with the Aborigines in their employ - but there is evidence of a very low morality, which I presume we cannot interfere with until the native women complain.' *Ibid.* The likelihood of such a complaint being heard was not great.

¹⁷⁰ Aboriginal Affairs Planning Authority Act (WA) 1972 s6(1).

¹⁷¹ J. C. R. Upton, 'By Violence, By Silence, By Control: The Marginalization of Aboriginal Women Under White and 'Black' Law', (1992) 18 *Melbourne University Law Review*, 871.

¹⁷² *Ibid.*

¹⁷³ *Ibid.*

Indigenous women and children are more likely than white women and children to live in poverty. 11.3% of Indigenous women were unemployed and looking for full or part time work in 1991, as opposed to only 5.7% of white women.¹⁷⁴ Indigenous women are more likely than white women to be employed in labouring or factory work (20.7% versus 13.8%), and are less likely to be employed in professional or managerial positions (12% versus 20.1%).¹⁷⁵ Eighteen percent of Indigenous sole parent families earn less than \$155 per week, as opposed to only 9% of non-Indigenous families.¹⁷⁶

Indigenous women also earn less than Indigenous men. Seventy-two percent of Indigenous women earned less than \$309 per week, whilst only 66.5% of Indigenous men earned below this figure. Even more telling, 22.5% of Indigenous men earned \$309 per week or more, as opposed to only 13.9% of Indigenous women.¹⁷⁷ Recent trends in secondary school retention rates show that Indigenous girls are more likely than Indigenous boys to remain at school through year 12.¹⁷⁸ However, both are significantly more likely to leave school than non-Indigenous children. The retention rate for non-Indigenous children through year 11 is 82.8% and through year 12 is 66%. For Indigenous children those rates are 36.9% and 17.4% respectively.¹⁷⁹

In addition to the economic disadvantage experienced by Indigenous women, they suffer distressing levels of physical violence at the hands of their own communities.¹⁸⁰ Violence against women is pervasive in Indigenous society.¹⁸¹ Indigenous women are more likely to be the victims of violence in their own homes and communities than anywhere else, including in police custody.¹⁸² This violence that Indigenous women suffer happens because Indigenous women have been silenced and robbed of their power and social status both in Indigenous and 'white' society.¹⁸³

Perhaps the most devastating and lingering consequence of the 'protection' legislation is the trauma experienced by many thousands of Indigenous women as a result of the policy of separation of Indigenous children from their families. Although this legacy has devastated all Indigenous Australians, both male and female, women were more likely than men to have directly experienced the horror of separation. As discussed above, the goal of the 'protection' legislation was isolation of Indigenous persons from the white population. Because mixed-descent children were considered to have a place (albeit a 'lowly'¹⁸⁴ one) in the white community, they too were to be isolated from the Indigenous community, to

¹⁷⁴ Australian Bureau of Statistics, 'Western Australia's Aboriginal People: 1991 Census of Population and Housing', 43 (2 September 1993).

¹⁷⁵ *Id.* 46.

¹⁷⁶ *Id.* 50.

¹⁷⁷ *Id.* 52.

¹⁷⁸ *Id.* 35.

¹⁷⁹ *Id.* 34.

¹⁸⁰ Upton, *supra* n. 171.

¹⁸¹ *Ibid.* However, it is certainly not a problem restricted to Indigenous society. A 1988 survey of Australians revealed that 20% of the population thinks it is acceptable for men to bash their wives in some circumstances. *Id.* 873.

¹⁸² *Id.* 872.

¹⁸³ *Id.* 873.

¹⁸⁴ Haebich, *supra* n. 103 at 49.

prevent them from following the ways of their 'black mothers'.¹⁸⁵ Mixed-descent children were often not recognised by their non-Indigenous fathers, living instead with their mothers in Indigenous communities. Thus, while there *may* have been a father to grieve the loss of his child, there almost *always* was a mother to experience that indescribable horror. The National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From their Families reported that few mothers were able to provide submissions to the Inquiry because 'Aboriginal women were unwilling and unable to speak about the immense pain, grief and anguish that losing their children had caused them. That pain was so strong that [Link-Up (NSW) was] unable to find a mother who had healed enough to be able to speak, and to share her experience with . . . the Commission.'¹⁸⁶

In addition to the personal grief experienced by Indigenous mothers whose children were stolen from them, Indigenous women also have experienced a unique loss by reason of their role as caretakers of the next generation. Indigenous women were traditionally responsible for child care, enjoying and proudly acknowledging their responsibility for nourishing society.¹⁸⁷ Accordingly, in addition to the expected grief associated with the loss of a child, Indigenous women also experienced a special loss of self-esteem and self-worth associated with their loss of their primary responsibility in the Indigenous community when their children were stolen. As reported to the Inquiry:

[H]ere is where our mothers were hurt most deeply. Here is where they were shamed and humiliated - they were deprived of the opportunity to participate in growing up the next generation. They were made to feel failures; unworthy of loving and caring for their own children; they were denied participation in the future of their community.¹⁸⁸

Thus, the ramifications of the racist and patriarchal 'protection' legislation (following on from the legacy of patriarchy and ethnocentrism imposed by the common law) is an 'underclass' of Indigenous women living in poverty, experiencing violence, and denied their power and status in both the Indigenous and non-Indigenous community. These women have been dually disadvantaged by the imposition of the English legal system, suffering discrimination on the basis of sex and race, which has resulted in them being devalued both in the eyes of their own communities as well as white society.

CONCLUSIONS AND THOUGHTS FOR THE FUTURE

The present status of Indigenous women in Australia is undeniably a result of the patriarchal and ethnocentric agenda imposed on them by English law upon contact in 1788, and continuing thereafter. The culture of racism that still thrives in Australia today¹⁸⁹ is a consequence of nearly 200 years of legally sanctioned discrimination and racism. This tradition has all but destroyed a proud and

¹⁸⁵ *Ibid.*

¹⁸⁶ Commonwealth of Australia, Human Rights and Equal Opportunity Commission, *supra* n. 156.

¹⁸⁷ Bell, *supra* n. 30 at 52.

¹⁸⁸ Commonwealth of Australia, Human Rights and Equal Opportunity Commission, *supra* n. 156.

¹⁸⁹ *Supra*, n. 1.

independent culture of Indigenous women. It has divided the Australian people, and turned them against one another.¹⁹⁰ Until these problems are acknowledged and redressed, there will be no possibility of real racial harmony in the 'lucky country'.

The pain and suffering of generations of Indigenous women by 200 years of legally sanctioned discrimination can never be reversed. The lives of these women have been irrevocably altered. However, it is not too late to learn from history; to try to reverse the trends established in the first 200 years of contact so that future generations of Indigenous women will not suffer the same fate as their mothers, aunts, and grandmothers.

The only way to prevent the disadvantage suffered by Indigenous women from continuing *ad infinitum* is to ask Indigenous women what they need to reverse these trends, and to provide them with whatever resources are necessary to accomplish this. Having been the direct victims of multiple forms of discrimination in both Indigenous and non-Indigenous society, Indigenous women are in the best position to know what is necessary to eliminate the 'underclass' and achieve reconciliation.

Indigenous women have recently had the opportunity to speak about what they need for reparation for the forced removal of their children by Australian state and territory governments. In April 1997, the Human Rights and Equal Opportunity Commission released its report documenting the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families. The findings of the Commission were that the removal of Indigenous children was a violation of common law rights and human rights, including the international prohibition of genocide.¹⁹¹ Based on the submissions made by Indigenous groups, the Commission recommended that reparations be made to those affected, consisting of:

1. acknowledgment and apology;
2. guarantees against repetition;
3. measures of restitution;
4. measures of rehabilitation; and
5. monetary compensation.¹⁹²

Acknowledgment and Apology

The Commission acknowledged that the first step in healing the victims of gross human rights violations is acknowledgment of the truth and delivery of an apology.¹⁹³ The Commission recommended formal apologies from all Australian Parliaments and police forces.¹⁹⁴ It also recommended formal apologies from

¹⁹⁰ *Ibid.*

¹⁹¹ Commonwealth of Australia, Human Rights and Equal Opportunity Commission, *supra* n. 156 at 277-278.

¹⁹² *Id.* 282 (Recommendation 3).

¹⁹³ *Id.* 284.

¹⁹⁴ *Id.* 287 (Recommendation 5a). While some state Parliaments, such as New South Wales and Western Australia, have already formally apologised, the Commonwealth Government

churches and other non-governmental agencies which played a role in the forcible removal of Indigenous children from their families.¹⁹⁵

Guarantees against repetition

The Commission identified the need to ensure that the tragedy of forced removal never be repeated.¹⁹⁶ To guarantee this, it recommended that Australian children be educated in the history and continuing effects of forced removal.¹⁹⁷ It also recommended that professionals dealing with Indigenous children and families, as well as undergraduate students training in these professions, receive training in the history and effects of forcible removal.¹⁹⁸

Measures of restitution

The Commission identified the need for restitution to re-establish, to whatever extent still possible, the situation prior to the gross violation of human rights, including access to traditional language, cultural knowledge, cultural responsibilities, and native title rights.¹⁹⁹ In response to this, it recommended that Indigenous organisations be funded to employ family reunion workers to travel with their clients to their countries, to provide community education into the effects of forcible removal, and to develop community genealogies to assist community leaders in decision making on return of those persons forcibly removed.²⁰⁰ The Commission also recommended that Indigenous language, culture and history centres be funded which would record and teach Indigenous languages,²⁰¹ and that funding be available for Indigenous organisations to undertake family history research to certify descent.²⁰²

Monetary compensation

There was considerable support among the submissions made to the Commission for monetary compensation, and the Commission recognised this need in its recommendations.²⁰³ It recommended the establishment of a National Compensation Fund to be administered by a Board comprised of Indigenous and non-Indigenous people appointed in consultation with Indigenous organisations to consider claims for monetary compensation.²⁰⁴ The Commission recommended that all persons entitled to compensation be paid a minimum lump sum payment from the Fund in recognition of the fact of removal.²⁰⁵

refuses to issue such an apology.

¹⁹⁵ *Id.* 292 (Recommendation 6).

¹⁹⁶ *Id.* 294.

¹⁹⁷ *Id.* 295 (Recommendation 8a).

¹⁹⁸ *Ibid.* (Recommendation 9a & b).

¹⁹⁹ *Id.* 296.

²⁰⁰ *Id.* 297 (Recommendation 11).

²⁰¹ *Id.* 300 (Recommendation 12a & b).

²⁰² *Id.* 301 (Recommendation 13).

²⁰³ *Id.* 302.

²⁰⁴ *Id.* 308-310 (Recommendations 15, 16a & 16b).

²⁰⁵ *Id.* 312 (Recommendation 18).

Implementation of the Recommendations of the Commission are a vital first step in the direction of reconciliation, justice for Indigenous women, and elimination of the 'underclass'. However, these Recommendations are directed solely at reparations for the forced removal of Indigenous children. The list of injustices suffered by Indigenous women as a result of the imposition of English law goes beyond this, as documented in this article. To avoid the perpetuation of a cycle of poverty, abuse, and disempowerment of Indigenous women, these women must be given the power and resources they need to remedy the problems they currently face. Only through vesting in Indigenous women the economic, social and political power to control their future can non-Indigenous Australians begin to reverse the tradition of racism and patriarchy and look toward reconciliation.