11

Passing the Buck

Has the diffusion of responsibility for Aboriginal people in our Federation impeded closing the gap?

The Honourable Wayne Martin

I am greatly honoured to address this conference organised by a society which honours the first Chief Justice of Australia – a man who was also extremely influential in the formulation of the Constitution of Australia's federation. As we will see, Sir Samuel proposed the two provisions in the original Constitution which referred to Aboriginal people, and which were amended by a referendum held 50 years ago. Those amendments gave rise to concurrent State and Commonwealth responsibility for laws and policies relating to Aboriginal people, which is the topic of this paper.

The traditional owners

Given my topic, it is more than usually appropriate for me to commence by acknowledging the traditional owners of the lands on which we meet, the Whadjuk people, who form part of the great Noongar clan of south-western Australia, and by also acknowledging their continuing stewardship of these lands.

Visitors to Perth may not be aware that we meet on a place of particular significance to the Whadjuk Noongars. We meet on the banks of the river which we know as the Swan but which is known to the Whadjuk as Derbarl Yerrigan. In common with other bodies of fresh water on the coastal plain between the sea and the scarp to our east, Derbarl Yerrigan is one of the homes of the Wagyl, a serpentine creature of great significance to the culture and lore of the Whadjuk.

2017 – a significant year

Recently, the Treasurer of Western Australia, the Honourable Ben Wyatt, MLA, the first Aboriginal to be a Treasurer in an Australian government, noted that 2017 marks the anniversary of a number of significant milestones in the history of relations between Aboriginal and non-Aboriginal Australians. As I have noted, this year is the 50th anniversary of the 1967 referendum,[1] of which I will say more. It is the 25th anniversary of the decision of the High Court in *Mabo* which recognised native title.[2] And it is the 20th anniversary of the publication of *Bringing Them Home* dealing with the tragic consequences of the Stolen Generations.[3] Less auspiciously, perhaps, this year also marks the tenth anniversary of the Commonwealth intervention in Aboriginal affairs in the Northern Territory.[4] Different views might be held with respect to the desirability of that intervention but, on any view, it was an extremely significant development in inter-governmental relationships relating to Aboriginal people in Australia.

Temporal context

I do not mean to undermine the significance of these recent milestones by suggesting that they should be placed in the temporal context of Aboriginal occupation of the land now known as Australia. The 100 years or so since Federation, and

the 200 years or so since colonisation, need to be viewed in the context of the recent discovery that Aboriginal rock art in the Northern Territory is at least 65 000 years old. By contrast, the rock art in the caves of Lascaux, in France, is a mere 17 000 years old, and the oldest known French rock art, at Chauvet-Pont d'Arc cave is around 35 000 years old. The oldest known Chinese pottery is around 20 000 years old, and it was only about 16 000 years ago that humans are believed to have arrived in the Americas, only 11 700 years ago that the last Ice Age ended, and 5 000 years since the first known existence of the wheel. The responsibilities which this temporal context placed upon the colonists who disrupted one of the longest unbroken cultures on the planet have not been discharged well in the 200 years or so since colonisation.

Fanny Balbuk Yooreel

2017 is also the 110th anniversary of a less well-known event – namely, the death of Noongar woman, Fanny Balbuk Yooreel.[5] With the indecent haste to declare Aboriginal people a dying race evidenced in other parts of Australia,[6] Daisy Bates described Balbuk as the "last Perth woman".[7] She might more accurately have been described as an early Aboriginal land rights activist because, as Bates describes, throughout her life she raged and stormed at the usurpation of her traditional grounds. She was known for standing at the gates of Government House in Perth, reviling all who dwelt within, because the stone gates guarded by a sentry enclosed the burial ground of her grandmother.

Fanny Balbuk Yooreel is sitting in the front row, second from right, in this image of her from before 1907.

Balbuk was born on Heirisson Island, where a causeway now connects the land on either side of Derbarl Yerrigan. She grew up in that area. A straight track had led from that area to a swamp where Perth railway station now stands, and where Aboriginal women gathered jilgies (small freshwater crayfish) and vegetable food. The track passed very close to the land on which we are meeting. When fences were built, obstructing this traditional path (which is depicted on the map below), Balbuk would go through or over them. When a house was built on the path, she broke its fence palings with her digging stick and charged up the steps and through the rooms.[8]

Determination of Fanny Balbuk's journey between Yoonderup (Heirisson Island) and Lake Kingsford, traversing what is now the central business district of Perth on the Swan River.

Balbuk was viewed by the colonists as an annoying nuisance although, viewed in retrospect, her determination to maintain her traditional ways of life is truly inspirational. Her actions have been described by Aboriginal Elder and Professor Noel Nannup as a claim to her lawful and rightful inheritance as a Whadjuk *boordiya yorga* owner: "That was her songline, her dreaming. She just kept going and didn't take any notice of the new city going up. That's a story of defiance and determination."[9]

Aboriginal people and the Constitution

As Professor George Williams has observed:

> The *Australian Constitution* was not written as a people's constitution. Instead, it was a compact between the Australian colonies designed to meet, amongst other things, the needs of trade and commerce. Consequently, the Constitution says more about the marriage of the colonies and the powers of their progeny, the Commonwealth, than it does about the relationship between Australians and their government.[10]

Lowitja O'Donohue, inaugural chair of the Aboriginal and Torres Strait Islander Commission, wrote of the Constitution of Australia:

> It says very little about what it is to be Australian. It says practically nothing about how we find ourselves here – save being an amalgamation of former colonies. It says nothing of how we should behave towards each other as human beings and as Australians.[11]

While the preamble to the Constitution describes it as a compact between the people of five colonies,[12] the preamble makes no mention of the people who we now know occupied Australia for at least 65 000 years prior to the arrival of the colonists.

Aboriginal people are only mentioned twice in the Constitution as originally enacted and, since the 1967 referendum, are not mentioned at all. Until that referendum, section 51(xxvi) provided that the Commonwealth Parliament could legislate with respect to "the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws" [the races power]. And section 127 provided:

> In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted.

Legal discrimination against Aboriginal people

As we will see, the framers of the Constitution had in mind that the races power would be used by the Commonwealth Parliament to discriminate adversely against people of a particular race. Members of the Aboriginal race were not excluded from that power for the purpose of protecting them from adverse Commonwealth discrimination. They were excluded to ensure that the States were empowered to continue to legislate adversely against Aboriginal people without interference by the Commonwealth. Consistently with that approach, section 25 of the Constitution continues to provide that if the law of any State disqualifies "all persons of any race from voting, at elections for the more numerous House of the Parliament of the State", members of that race resident in that State are not to be counted for the purpose of "reckoning the number of the people of the State or of the Commonwealth".

These provisions were, and section 25 remains, indubitably racist.[13] As Professor Williams has pointed out, Edmund Barton, who later became Australia's first Prime Minister and also, in 1903, a member of the High Court, stated at the 1898 convention that the races power was necessary to enable the Commonwealth to "regulate the affairs of the people of coloured or inferior races who are in the Commonwealth".[14] In the first edition of Quick and Garran, the races power was described as enabling:

> the Parliament to deal with the people of any alien race after they have entered the Commonwealth; to localise them within defined areas, to restrict their migration, to confine them to certain occupations, or to give them

> special protection and secure their return after a certain period to the country whence they came.[15]

In that context it is hardly surprising that the Constitution of Australia does not contain any provision ensuring equal protection of the law to people of differing races, unlike other comparable constitutions, including the Constitution of the United States, or that the proposal by Andrew Inglis Clark, MHA, Attorney-General of Tasmania, to incorporate such a provision was roundly rejected.[16]

As Professor Williams has pointed out, the discriminatory treatment of Aboriginal people in the Constitution may be related to the fact that there were no representatives of the indigenous people of Australia, nor of any non-British ethnic communities at the conventions responsible for the formulation of the Constitution,[17] and, in most colonies, Aboriginal people were not qualified to vote for the delegates to the convention.

Professor Geoffrey Sawer has expressed surprise that the position of Aboriginal people was scarcely mentioned in the constitutional conventions. As he observed, writing in 1966:

> Today . . . it may seem shocking that the Federal Conferences and Conventions of 1890, 1891 and 1897-8 should have paid so little attention to [Aboriginal people's] position. It is not merely that the Founders treated aboriginal questions as a matter for the States. What is surprising is that the position of the aborigines was never even mentioned. The Conventions contained many men who were in general sensitive, humane, and conscious of religious and social duties to the less fortunate sections of the community, and Alfred Deakin in particular had an agonising sensitivity to such matters . . . . Yet so far as I can ascertain neither Deakin nor any other delegate ever suggested even in passing that there might be some

> national obligation to Australia's earliest inhabitants, nor does Deakin appear in any other context to have taken an interest in this question. As we shall see, the references in the Convention Debates to the abovementioned sections are of the scantiest. In those concerning section 51 (xxvi) the exclusion of the aborigines was never mentioned at all – it was simply taken for granted that they should be excluded; in those concerning section 127, the aborigines were mentioned, barely.[18]

A purported justification for a racist constitution

Professor Sawer also cited evidence given to the Royal Commission on the Constitution (1927-1929) by the infamous A.O. Neville, Chief Protector of Aborigines in Western Australia, in which he attributed the indifference of the framers to:

(a) the lack of any reliable count of the Aboriginal population; and
(b) the widespread view that Aborigines were a dying race whose future was unimportant.[19]

Neville's views draw a benign shroud over what was an unmistakeable assertion by the colonists of their racial superiority over the peoples whose lands they had usurped and a guarantee of their continuing power to pass laws which discriminated against those people, and the people of any other race considered inferior.

Sir Samuel Griffith's role in the Aboriginal provisions of the Constitution

Sir Samuel Griffith's role in the formulation of the Australian Constitution has been essayed by previous speakers at The Samuel Griffith Society,[20] and so I will limit my observations

to his role in relation to placitum (xxvi) of section 51 and section 127. Sir Samuel was responsible for both. During the 1897 debates, the provision that came to be known as the races power was referred to as "Sir Samuel Griffith's clause. He had a special knowledge of the matter,"[21] and it was Griffith who proposed the inclusion of the provision which became section 127.[22]

Preserving the powers of the States to enact racist laws

Griffith had proposed to the 1891 Convention that the power to make special laws applicable to people of a particular race should be exclusive to the Commonwealth, but proposed that laws with respect to Aboriginal (and Maori[23]) people should be excluded from that power.[24] Others, including Deakin, expressed concern that exclusivity would deprive the States of power to legislate with respect to people of different races,[25] in a context in which it is clear that he was speaking of legislation which discriminated adversely against such people. Sir John Forrest, then Premier of Western Australia, was unabashed in the expression of that view at the 1898 Federation Conference, where he argued:

> In my opinion the control of the people, of whatever colour they are, of whatever nationality they are, living in a state, should be in the control of the state, and for that reason I should like to see this sub-section [proposing that the race power be exclusive to the Commonwealth] omitted . . . .
>
> I do not see myself that this sub-section is necessary, because I hold that if it is passed the control of every one living in the state should be within the province of that state. Take the colony which I represent. We have made laws controlling a certain class of people. We have made a

law that no Asiatic or African alien can get a miner's right or do any gold mining. Does the Convention wish to take away from us, or, at any rate, not to give us, the power to continue to legislate in that direction? . . . I think I have some right to speak on this subject; and, no one, at any rate, will be able to say of me, or of the colony I represent, that we desire to encourage the introduction of coloured races, because ours is the only colony in Australia with a law at the present time which excludes from its territory coloured people. Other colonies have talked about it a great deal . . . .

. . . [We] can exclude them . . . unless they can read and write English they certainly can be excluded. I think that there is no desire on our part to do anything to encourage either in Western Australia, or any other part of Australia, undesirable immigrants. I take it that under clause 52 immigration is a subject within the [non-exclusive] power of the Federal Parliament to deal with. I would not mind if it were one of its exclusive powers. There may be difficulties in regard to the introduction of persons who are not altogether desirable. But I cannot for the life of me see why we should desire to give to the Federal Parliament the control of any person, whatever may be his nationality or his colour, who is living in a state. Surely the state can look after its own affairs . . . . I would like not to give this subject [to control residents according to race] a place in either clause 52 or clause 53, but to leave it as a matter to be dealt with by the local Parliaments in their wisdom and discretion.[26]

Some racist laws of Western Australia

The previous year, the Parliament of Western Australia had passed the *Immigration Restriction Test Act* 1897 (WA) for the

purpose of excluding immigrants from certain races, on grounds which were not explicitly racial, modelled on legislation which had been passed in Natal the same year. That course was adopted because legislation which was overtly racist – such as the *Chinese Immigration Restriction Act* 1889 (WA), or the *Coloured Races Restriction and Regulation Act* 1896 (NSW), was at risk of being disallowed by the Imperial Parliament at Westminster. The colony of Natal had faced a similar problem when endeavouring to pass laws which would exclude migrants from India. In order to avoid disallowance by the Imperial Parliament, the legislature of Natal passed a law providing that any person "who, when asked to do so by an officer appointed under this Act, shall fail to himself write out and sign, in the characters of any language of Europe, an application to the Colonial Secretary" was prohibited from entering the colony. This was the source of the "dictation test" embodied in the Western Australian legislation of 1897, and which became the cornerstone of Australia's racist immigration policies for decades, under the *Immigration Restriction Act* 1901 (Cth).[27]

Section 2(b) of the Western Australia Act provided, however, that it did not apply to any person of a class for whose immigration into Western Australia specific provision had been made by another law or by a scheme approved by the Governor. The *Chinese Immigration Restriction Act* 1889 was such a law, as it was still in force and it provided that ships could lawfully bring into Western Australia one Chinese passenger for each 500 tonnes of its registered tonnage. So, in 1899, when two Chinese men who had sailed to Cossack[28] from Singapore on SS *Karrakatta* failed the dictation test, the charges of illegal entry brought against them were dismissed because they were exempt from the operation of the 1897 Act. A Perth newspaper, the *Sunday Times*, asserted that this case demonstrated that the laws of the colony were:

> . . . merely farcical pretences designed to hoodwink the public into the belief that a system of exclusion prevails, while in reality every facility is afforded for Asiatic immigration.[29]

The Supreme Court of Western Australia applied the same laws the following year in the case of Choong Man Kit, who was found to be covered by the 1889 *Chinese Immigration Restriction Act*, rather than the 1897 *Immigration Restriction Act*, and who was therefore permitted to enter and remain.[30]

A Commonwealth racist law

Later the dictation test was used by the Commonwealth to exclude from Australia not only people of colour but anybody who was regarded as undesirable. The last person to pass the dictation test was Lorenco De Garra in 1909.[31] If a prospective entrant appeared proficient in English, but undesirable for some reason, the dictation test would be administered in another European language not known to the prospective entrant. The most infamous case of misuse of the dictation test occurred in 1934, when Egon Kisch, a socialist activist with a valid visa for entry to Australia, was administered a dictation test in Scottish Gaelic, because he spoke English and a number of other European languages fluently. By a majority[32] the High Court held that, as Scottish Gaelic was "an ancient form of speech spoken by a remnant of people inhabiting the remoter portion of the British Isles,"[33] it was not a European language within the meaning of the *Immigration Restriction Act*.[34] But I digress.

The Constitution, section 51(xxvi)

After reviewing the Convention debates and a number of secondary sources, Professor Sawer concluded that it was clear that the races power:

> . . . was intended to enable the Commonwealth to pass the sort of laws which before 1900 had been passed by many states concerning 'the Indian, Afghan and Syrian hawkers; the Chinese miners, laundrymen, market gardeners and furniture manufacturers; the Japanese settlers and Kanaka plantation labourers of Queensland, and the various coloured races employed in the pearl fisheries for Queensland and Western Australia.[35]

Given that context, and the history of State legislation to which I have referred, it is clear that the exemption of Aboriginal people from the non-exclusive legislative power to be conferred upon the Commonwealth under the Constitution was not for the purpose of protecting Aboriginal people from discriminatory laws to be passed by the Commonwealth, but rather for the purpose of ensuring that laws passed by the States discriminating against Aboriginal people were not jeopardised by inconsistent Commonwealth legislation and section 109 of the Constitution. So, the Parliament of Western Australia remained free to introduce a system of apartheid by the passage of the *Aborigines Act* 1905.[36]

The Constitution, section 127

Although it is clear that section 127 was proposed by Sir Samuel Griffith, its purpose is somewhat obscure. It seems that it was intended to exclude Aboriginal people from calculations made for the purpose of distributing funds and apportioning parliamentary seats[37] although, as Sawer points out, it was soon regarded as a qualification on the census and statistics power contained in section 51(xi). No definition of "Aboriginal natives" was provided for the purposes of section 127, and the Bureau of Census construed the expression as being limited to "full blood" Aboriginal people, and as not including Torres Strait Islanders.[38]

Sir Samuel Griffith

There is every reason to suppose the promotion by Sir Samuel Griffith of the only two provisions in the Australian Constitution which refer to Aboriginal people, and which, in one case, ensured that the States were able to pass laws discriminating against them and, in another case, expressly discriminated against Aboriginal people in the Constitution, were entirely consistent with the prevailing values and standards of the colonists at the time of the pre-federation debates. Griffith's advancement of these clauses, however, does not lead to the conclusion that he was sympathetic to the more extreme anti-Aboriginal sentiments of the day. To the contrary, Griffith was seen as a supporter of the advancement of Aboriginal people. As a politician in Queensland, he had actively promoted moves to ensure that the evidence of Aboriginal witnesses was admitted in legal proceedings and later, as Chief Justice of Queensland, directed a jury to treat the evidence of an Aboriginal witness with equal weight and respect as the evidence of any other.[39] A biographer notes that a press report of the day included him with "the black sympathisers".[40]

1901-1967

The constitutional provisions to which I have referred deprived the Commonwealth of specific legislative power with respect to Aboriginal people. The legislative power which remained exclusively with the States was utilised by a number of States, including most notably Western Australia, to pass appalling and egregious laws which discriminated against Aboriginal people. Those laws had many disastrous consequences, including the separation of Aboriginal children from their parents – a phenomenon which has become known as the Stolen Generations.[41]

Public sentiment changes (at last)

However, there developed a growing realisation that the constitutional provisions to which I have referred were an affront to contemporary Australian standards and values, accompanied by a perception that the strength and resources of the Commonwealth were needed to address the plight of many Aboriginal Australians. In 1961, the federal conference of the Australian Labor Party, at the instigation of Mr K. E. Beazley, MHR, resolved that section 127 of the Constitution and the exclusion of Aboriginal people from the races power should be deleted from the Constitution, and a bill to that effect was introduced into the Commonwealth Parliament by Mr Arthur Calwell, the Leader of the Opposition, in 1964. That bill lapsed, however, when the Parliament was dissolved.[42] Other bills proposing changes to the relevant provisions were introduced by Prime Minister Menzies in 1965, and by a government backbencher, Mr W. C. Wentworth, in 1966, and while they passed both Houses of Parliament neither went to a referendum.[43]

There had been significant developments on other fronts around this time. In 1962, the *Commonwealth Electoral Act* was amended to extend universal adult suffrage to Aboriginal people.[44] In 1963, Aboriginal people at Yirrkala presented a famous bark petition to the Commonwealth Parliament and, in April 1996, the Gurindji people famously went on strike and walked off Wave Hill cattle station in protest of their treatment.[45]

In 1967, Prime Minister Harold Holt introduced a bill to amend the Constitution which proposed the removal of the words, "other than the aboriginal race in any State," from section 51(xxvi) and the deletion of section 127. The bill was supported by the Opposition, and passed through the Parliament without controversy. Because of that parliamentary consensus, at the referendum that followed the only information supplied to

voters on those proposed changes to the Constitution supported a "yes" vote, and 91.8 percent of voters supported the change. This is the largest majority in favour of any referendum ever put to the Australian people.[46]

The Hindmarsh Island Bridge (*Kartinyeri*) case

The amendment to placitum (xxvi) of section 51 of the Constitution empowered the Commonwealth to legislate with respect to Aboriginal people. Nothing in the placitum expressly restricts the exercise of that power to legislation which is for the advantage or promotion of Aboriginal people. The question of whether such a restriction should be implied was considered by the High Court in the Hindmarsh Island Bridge (*Kartinyeri*) case.[47] The case concerned the validity of an amendment to the *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 to exclude the Hindmarsh Island Bridge area from its operation and protection, thereby precluding any claim for heritage protection of the area by Aboriginal women, who asserted that the area had traditionally been used for secret women's business.

Only four members of the Court directly addressed the question of whether the races power extended to legislation which was detrimental to or discriminatory against the people of any race. Justices Gummow and Hayne concluded that it did, whereas Justice Kirby dissented, on the ground that the power should not be construed as extending to laws detrimental to, or discriminatory against, the people of any race. Justice Gaudron considered that in order to come within the power, legislation must be reasonably capable of being viewed as appropriate and adapted to a relevant difference between the people of the race to whom the law is directed and the people of other races, and found it difficult to conceive circumstances in which adverse discrimination might satisfy that test. So, the question of whether the races power authorises legislation which is adverse to and

discriminates against people of any race must continue to be regarded as something of an open question.

Closing the gap

What is, however, clear is that the Commonwealth has used that power to legislate extensively in relation to Aboriginal people and has applied very significant resources, both financial and administrative, to the task of improving the living conditions of Aboriginal people. That general objective is often described by the catchphrase, "closing the gap," referring to the significant gap between the health, living conditions and circumstances of Aboriginal people, and non-Aboriginal people. Statistics identifying the gap in a number of specified areas are published annually by the Commonwealth Government, consistently with a formal commitment made by all Australian governments to achieve health equality within 25 years.[48] The latest report card shows that we are failing to close the gap in six out of the seven key indicators measured.

Closing the gap?

Life expectancy:

- **Target:** To close the gap in life expectancy between Indigenous and non-Indigenous Australians within a generation (by 2031).
- **Progress:** Indigenous Australians **die about 10 years younger** than non-Indigenous Australians, and that hasn't changed significantly.[49]

Child mortality:

- **Target:** To halve the gap in mortality rates for Indigenous children under five within a decade (by 2018).
- **Progress:** There has been **no significant decline in child mortality rates since 2008**, and child mortality rates actually increased slightly from 2014 to 2015.[50]

Employment:

- **Target**: Halve the gap in employment by 2018.
- **Progress**: The **Indigenous employment rate has fallen** since 2008, as has the non-Indigenous employment rate. The gap in 2014-15 was 24.2 percentage points, up from 21.2 percentage points in 2008.[51]

Reading & numeracy:

- **Target:** Halve the gap in reading and numeracy for Indigenous students by 2018.
- **Progress:** While some improvements are being made, of the eight areas measured (reading and numeracy for Years 3, 5, 7 and 9), **only year 9 numeracy is on track**.[52]

School attendance:

- **Target:** Close the gap in school attendance by the end of 2018.
- **Progress:** There has been **no meaningful change** in the Indigenous school attendance rate between 2014 and 2016.[53]

Early education:

- **Target**: 95% of all Indigenous four-year-olds enrolled in early childhood education by 2025.
- **Progress**: In 2015, **87 per cent of Indigenous children** were enrolled in early childhood education in the year before starting school, compared with 98 per cent of non-Indigenous children. The original target to ensure access for all Indigenous four-year-olds in remote communities to early childhood education expired unmet in 2013.[54]

Year 12 attainment:

- **Goal:** Halve the gap in Year 12 attainment by 2020.
- **Progress:** 61.5% of Indigenous students finished year 12 or equivalent in 2014-15, compared to 86.4% of non-Indigenous Australians. All states have seen increases in the percentage of Indigenous students finishing year 12, and **the report says this goal is on track for 2020**.[55]

The gross over-representation of Aboriginal people in the courts and prisons of Australia is not measured in the annual statement presented to the Commonwealth Parliament. Its omission has been controversial. Because that over-representation has increased very significantly since the report of the Royal Commission into Aboriginal Deaths in Custody in 1991, inclusion of that indicator would make a gloomy picture even gloomier.

Why are we failing?

The complexity of the issues associated with Aboriginal disadvantage defies any ready or simple explanation for our continuing failure to reduce the extent of that disadvantage in almost all of the key areas measured. Because this conference in

general, and this paper in particular, is focused upon issues connected with the structure of government in Australia, my comments will be restricted to the impact of those structures upon our continuing failure to reduce Aboriginal disadvantage. More specifically, I will endeavour to address the question of whether the diffusion of responsibility for Aboriginal people between State and Territory governments on the one hand, and the Commonwealth Government on the other, since 1967, has impeded progress in this area.

Commonwealth machinery of government

The machinery of government utilised by the Commonwealth in the 50 years since the 1967 referendum has been analysed in a paper recently published by the Indigenous Affairs Group (IAG) within the Department of the Prime Minister and Cabinet.[56] The paper identifies and addresses two recurrent underlying problems which are said to have characterised Commonwealth public policy in administration with respect to Aboriginal people over the last 50 years. Those problems are:

(a) whether and, if so, how to achieve the representation of Aboriginal and Torres Strait Islander people in the decision-making process; and
(b) how best to organise the machinery of government to maximise positive results.

Representation

The first issue was recently addressed by the statement which followed the Uluru conference, and is currently the subject of public discussion and debate. As such, it is a topic best avoided by a serving judge. The second issue, relating to the machinery of government, is more prosaic, and provides safer ground over which to venture.

Machinery of government

Following the successful passage of the referendum, on 2 November 1967, Prime Minister Holt announced the membership of the fledgling Council for Aboriginal Affairs, which would be supported by a new administrative unit to be known as the Office of Aboriginal Affairs. Two of Australia's most senior and well-respected officials – Dr H. C. (Nugget) Coombs and Mr Barrie Dexter, then Ambassador to Laos, were to serve on the Council, along with Professor William Stanner, a renowned anthropologist. During November and December 1967, work commenced in earnest on the new administrative regime, with the full and active support of the Prime Minister, Harold Holt. On 17 December 1967, however, Prime Minister Holt went for a swim at Cheviot Beach in Victoria and was never seen again.[57]

It has been reported that the incoming Prime Minister, John Gorton, lacked Holt's commitment to the cause of Aboriginal advancement. Previous levels of co-operation enjoyed by the fledgling Council and Office are said to have evaporated, the Office was reduced in status and staff, and the new Prime Minister would not meet with the Council which the previous Prime Minister had created.[58] Immediate responsibility was assigned to a W.C. Wentworth, Minister Assisting the Prime Minister for Aboriginal Affairs, who met the Council only occasionally.[59]

Volatility of policies and personnel

This inauspicious start to Commonwealth administration of Aboriginal affairs was followed by quite exceptional volatility and structural change during the next 50 years. The IAG reports that over that period there have been 10 different organisational structures for development and implementation of Commonwealth policy relating to Aboriginal issues, and 21

different ministers.[60] Nine of the ten organisational structural changes occurred within the past 30 years.[61] By contrast, in the USA, the Federal Bureau of Indian Affairs has been in existence since 1849.[62]

Structural volatility in the machinery of government in this area does not appear to have been limited to the Commonwealth. Looking, perhaps parochially, at Western Australia, since 1967 there have been 14 Ministers for Aboriginal Affairs,[63] even though there was no minister with responsibility for such matters for twelve of those years.[64] Since 1967, in Western Australia, there have been six different administrative agencies relating to Aboriginal affairs, with four over the last 30 years.[65]

The consequences of volatility

The consequences of these frequent changes in the machinery of government have been well described by the Indigenous Affairs Group:

> Changes in administrative orders and the machinery of government create complex problems in Indigenous affairs. Relationships of trust and good faith can take many years to build across cultures and are often centred on the commitment of a particular community and particular public servants. Such relationships are considered essential to 'working with' Aboriginal and Torres Strait Islander Australians. When these relationships suffer during machinery of government overhauls, not only do problematic gaps open in service delivery, but also widespread scepticism often emerges. Yet, the creative solutions that are needed for any policy in this arena can only be forged through strong trusting relationships that enable give and take on both sides. Where machinery changes introduce uncertainty, effectiveness suffers in the

short term and potentially into the longer term as well. Overcoming scepticism becomes a critical first task of the 'new administration' . . . and so it goes.

New policy requires a long trail of internal alignment from the government through the bureaucracy and on to staff engaged with Aboriginal and Torres Strait Islander communities. Explaining constant changes in ways that maintain confidence takes great skill. It takes time for officials to reconfigure narratives and to develop an approach that will keep faith with community while also delivering for government. Such work needs to be both deft and savvy, and such work is usually hidden from any calculation of the transaction costs.

It is plain from Barrie Dexter's account of the first 20 years of Aboriginal and Torres Strait Islander Affairs that he viewed the greatest impediments to designing programs and policies to aid the advancement of Aboriginal and Torres Strait Islander Australians were those that came from within government and the bureaucracy . . . .

Changes in the machinery and arrangements can lead to extensive loss of corporate memory, resulting in old ideas being circulated again and again without the knowledge or evaluation of their previous incarnation. This recycling has led to a deep sense of 'here we go again' and cynicism among many Aboriginal and Torres Strait Islander Australians and public servants who have stayed engaged for more than a few cycles. It is not good enough that we are unable to provide government with a longitudinal and well-evaluated map and view of the history of institutions, thought and policies in this important field. Such a commitment to knowing where we have come from and keeping this knowledge is critically important to improving our practice in Indigenous Affairs, and yet, our

commitment to knowledge development, and debate is widely lacking.[66]

Shifting the burden

The author of the paper has also drawn attention to the burden which such frequent changes in the machinery of government impose upon Aboriginal communities and leaders:

> Indigenous affairs knowledge and capability have not transferred well from one generation of public servants to the next, and public service generations within Indigenous affairs can be short. In the 50th year of the Commonwealth's administration of Indigenous affairs, it is time this knowledge and practice gap was addressed by the public service. The burden of knowledge transfer should not rest with Aboriginal and Torres Strait Islander communities and leaders, as it has often done in the past.[67]

The same observations can be made with respect to frequent structural change in the machinery utilised by State and Territory governments for the implementation of policy in this area. It seems to me to follow, inevitably, that the duplication of responsibility for Aboriginal affairs in State and Territory governments on the one hand, and the Commonwealth government on the other, has multiplied the adverse consequences of these frequent structural changes and knowledge gaps. If, as the Indigenous Affairs Group observes, frequent changes in governmental structure induce cynicism and lack of confidence by Aboriginal communities and their leaders, and impede the development of personal relationships which are so important to successful outcomes, the duplication of responsibility for those outcomes across two levels of

government must surely exacerbate these adverse consequences exponentially.

Over the last 11 years, I, in common with most of Australia's judiciary, have spent a disproportionate amount of time administering what mainstream society considers to be justice to Aboriginal Australians. As I have no personal experience of the development and administration of public policy relating to Aboriginal people in other areas, I consulted somebody who has extensive experience in that field – the Honourable Fred Chaney, AO, who was one of the 21 Commonwealth Ministers for Aboriginal Affairs to which I referred earlier, and who has spent his post-parliamentary career working with Aboriginal people. Chaney was good enough to meet with me,[68] and to provide me with a wide range of materials relating to public administration in this problematic field.

Indigenous policy since 1960

Some years ago Fred Chaney described Indigenous policy between 1960 and 2012 in these terms:

> . . . until 1972, programme delivery was a responsibility of the normal agencies of governments. Starting in 1972, responsibility was shifted to funded Aboriginal-controlled organisations, incorporated in the main under Aboriginal-specific legislation. This involved the funding of thousands of organisations annually across communities in remote, regional and urban communities. Line agencies retained (or over time regained) responsibility in some areas (health in particular) but also delivered services by funding Aboriginal-controlled organisations. Post ATSIC, line agencies resumed responsibility but, in line with current public service procedures, often used purchaser-provider models with Aboriginal organisations (with

departments acting as contract administrators rather than service deliverers).

Unsurprisingly, there have been regular concerns about failures in Aboriginal-controlled service delivery organisations, including complaints of maladministration, nepotism, and sometimes corruption. Such well-publicised problems became the public and political face of ATSIC and Aboriginal programs over that whole period. This is a problem in its own right – the failures of the few drowning out the efforts of the rest. If even 10 per cent of funded organisations were defective (and given the statistics for small business failure in the general community, 10 per cent failure would be a very good outcome), that would result in a 'scandal' per working day for the media to report and for ATSIC, the minister and the Government to respond to.[69]

The system is broken

In Fred Chaney's view, the system is broken, whatever its policy intentions may have been.[70] He cites Dillon and Westbury:

> What has not been recognised (at least within government) has been the extent to which government funding arrangements have reinforced community and organisational dysfunction . . . .
>
> How is it that governments at all levels, and of all political persuasions, have allowed this level of systemic failure for so long? Why is it that governments have found it easier to ignore systemic failure, while promoting worn out policy approaches that have proved unworkable?[71]

Some preconditions for success

As Fred Chaney points out, the Steering Committee for the Review of Government Service Provision (SCRGSP), a body

supported by the Productivity Commission, has identified a number of key preconditions for success of government policy – the lack of any one of which can and often does contribute to program failure:

- Cooperative approaches between indigenous people and government – often with the non-profit and private sectors as well.
- Community involvement in programme design and decision making – a "bottom up" rather than "top down" approach.
- Good governance – at organisation, community and government levels.
- Ongoing government support – including human, financial and physical resources.[72]

I see no reason to doubt the criticality of these preconditions for success. What I do doubt is the capacity to meet those preconditions in a governance structure which involves three levels of government – local, State or Territory, and Federal – in policy development and program delivery. Unless all levels of government act consistently and coherently, and speak with one voice in the short, medium and long term, the satisfaction of these preconditions for success will remain a distant chimera.

Regional and local policies and programs

During our meeting, Fred Chaney augmented the preconditions for success identified by SCRGSP were three additional preconditions. The first was that programs must be conceived, developed and delivered at a regional and local level.

A similar proposition was advanced 10 years ago by then Special Adviser on Indigenous Affairs, Lieutenant-General John Sanderson, (Rtd), AC, former Governor of Western Australia,

who went on to try to implement change through his role as Chairperson of the Indigenous Implementation Board;[73] and again, in 2016, by the taskforce appointed by the WA Government to review the delivery of State government programs relating to Aboriginal people in remote communities.[74] Perhaps the reason none of these recommendations has ever been implemented is that the development and delivery of policy at a regional level – say, for example, in respect of the Kimberley, the Pilbara, or north Queensland, cannot be translated readily into existing governance structures in Australia. Although regional development commissions are not an uncommon feature of government, such commissions tend to be focused on economic development, and it is rare for responsibility for program delivery to Aboriginal communities to be devolved to regional bodies. The legal powers and financial resources required to "close the gap" in relation to housing, education, health and justice are well beyond the reach of local governments. So, when critical decisions with respect to Aboriginal people in, say, the Kimberley continue to be made many thousands of kilometres away in both Perth and Canberra by people who may have very limited, if any, experience of conditions in the Kimberley, they are unlikely to respond effectively to the particular needs and interests of the people in that region.

Iterative program development

Another of Fred Chaney's preconditions for success is the capacity for programs to be delivered iteratively, in a way which enables them to be developed and improved over time. Ideally, after a program has been delivered or a policy implemented, its outcomes are measured, conclusions drawn with respect to aspects of the policy or program which were working, and those which were not, and improvements made. A governance

structure which allocates to various tiers of government concurrent responsibility for policy and program development and for delivery, at the same time these tiers are subject to volatile changes in policy and in personnel of the kind experienced in Aboriginal affairs in Australia, is not conducive to the achievement of this objective.

Proper legal frameworks

Fred Chaney is also firmly of the view that programs and policies must be developed in a proper legal framework. In his view, many policy initiatives have floundered in the past because of the lack of a proper statutory structure within which they can be implemented. As a consequence, government administrators were able to point to their statutory responsibilities as a justification for failing to act appropriately and effectively in the implementation of the relevant policy. This is another area in which the bifurcation of legislative responsibility for laws and policies relating to Aboriginal people is likely to impede rather than enhance achievement of this condition of success.

Silo-based policies

The programs and policies required to address the multifaceted disadvantage experienced by too many Aboriginal Australians must address areas commonly administered by separate agencies of each of State or Territory and Commonwealth governments in fields such as housing, health, education and justice. Dissatisfaction with the "silo-based" approach to policy and program delivery to Aboriginal people in these areas has been at a level of crescendo for many years. Both State and Commonwealth levels of government acknowledge the need for a whole-of-government approach but, in my respectful view, have generally failed to deliver.

Fred Chaney has drawn attention to five basic imperatives identified by management advisory committees advising the Commonwealth as essential pre-requisites for successful whole of government service delivery in this area, namely:

- substantial initial cross-agency-stakeholder agreement about the broad purposes to be pursued.
- use of the outcomes budget framework to pool resources and to create appropriate accountability frameworks.
- lead-agency staff empowered with sufficient authority to manage whole-of-government settings and to lead the engagement of local stakeholders.
- empowering these same managers to engage with relevant individuals and interests.
- ensure the individuals engaged in these latter roles have the appropriate networking, collaboration and entrepreneurial skills.[75]

Achievement of these imperatives is difficult enough in any one level of government, let alone achieving them simultaneously in each of two levels of government, supposed to be working side by side, co-operatively and collaboratively, on the same issues, in the same places.

Commonwealth program delivery

Fred Chaney has contrasted the imperatives identified by the management committees advising the Commonwealth with his experience of Commonwealth program delivery in these terms:

> In contrast, how does government seem to me? One year funding with no continuity guaranteed, onerous and hence costly reporting requirements, frequent policy changes,

> lengthy negotiations about working to shared objectives that are dropped without apology or explanation because priorities or policies have changed. Agreements are made and then not honoured. Two and a half years ago I attended a high-level meeting in a remote community, with officials from a number of departments, to discuss (since failed) policy changes being imposed against the will of the communities involved. The communities expressly agreed with the broad policy objectives of promoting training leading to employment, but argued that the changes the Commonwealth was implementing would not work. The most senior person present, a deputy secretary, contributed nothing and seemed to think that whatever the problem was, it was not his. Bad policy decisions had to be made to work by people living in some of the most difficult circumstances in Australia. The negative outcomes over the next two years were as predicted by the community and, over the course of that time, it became clear that the external agencies contracted by the Commonwealth had not understood and hence not implemented important elements of the program. Now there are high-level meetings trying to find an approach that will work in a practical way, although the legislative framework inhibits practical implementation.[76]

Put bluntly, if it is difficult for Commonwealth departments with some responsibility for the health, housing and education of Aboriginal people to work consultatively, co-operatively and collaboratively with Aboriginal people in regional and remote communities around Australia in order to address the particular needs and interests of the people in those communities, how much more difficult must it be for those agencies to work in conjunction with the corresponding agencies

of the relevant State or Territory government to achieve the same objective?

Summary and conclusion

Regrettably, I do not pretend to have a simple or ready answer to the conundrum presented by this analysis. Indeed, if there was a simple and ready answer, I expect we would have found it some time over the last 50 years since the Commonwealth was given legislative power in this field as a result of the 1967 referendum. The last decades of that period have been characterised by the express adoption of policies intended to address and ameliorate Aboriginal disadvantage by almost all political parties at State or Territory and Commonwealth level, and by very substantial expenditure of public funds in support of those policies.

Regrettably, recent decades have also been characterised by a failure to "close the gap" in almost all of the key indicators measured, and by ever-increasing Indigenous incarceration. I respectfully agree with Fred Chaney, AO, that our systems are broken and have clearly failed to achieve their objectives, whatever they may have been.

The States and Territories

Under current constitutional arrangements, the States and Territories have primary responsibility for the delivery of health, housing, education and justice services. If Aboriginal disadvantage is to be addressed successfully, it must be addressed in these key areas. Any attempt by the Commonwealth to duplicate the delivery of primary services in these areas would be inefficient and wasteful. It follows that the States and Territories must remain key players in developing the legal structures, policies and programs required. Ideally, the States and Territories will create structures which will enable devolution of

responsibility for such matters to regional and locally based decision-makers working in close cooperation and collaboration with the Aboriginal people in the communities to be affected by the policies and programs ideally delivered by Aboriginal organisations and entities.

The Commonwealth

Nor should the Commonwealth contemplate withdrawal from this field. 50 years ago more than 90 percent of those voting in a referendum supported amendment of our Constitution to provide the Commonwealth with legislative power relating to Aboriginal people. Under current fiscal arrangements, the provision of financial resources by the Commonwealth will be an essential component of the programs required to address the level of disadvantage currently experienced by too many Aboriginal Australians.

Where now?

So, if all levels of government must remain involved in the development of policies and programs in this area, how do we avoid the pitfalls of the past? At the risk of sounding like an ageing male Pollyanna, the level of public support for success in this area – a level of support which crosses political boundaries – should provide fertile ground for State and Territory cooperation and collaboration at a level which has been unprecedented in our Federation, outside times of war.

I do not believe, nor would I accept the proposition, that it is beyond human wit and ingenuity to devise an intergovernmental structure which would facilitate the achievement of the various preconditions and imperatives for policy success which have been identified by those with expertise in this area, and which I have endeavoured to set out in this paper. I do not underestimate the difficulty of designing and

implementing effective systems of intergovernmental action, given the volatility of changes in personnel and policy which have bedevilled this area of public administration. But those problems must be overcome if contemporary Australia is to provide meaningful redress for the disastrous consequences which colonisation has had upon one of the longest unbroken cultures on our planet.

Endnotes

Chief Justice Martin wishes to thank Dr Jeannine Purdy for her assistance in preparation of this paper; he, however, takes responsibility for opinions expressed and any errors.

1. The *Constitution Alteration (Aboriginals)* 1967 (Cth) made the constitutional changes in relation to Indigenous Australians that were supported by the 1967 referendum.

2. *Mabo & Ors v Queensland (No 2)* [1992] HCA 23; 175 CLR 1.

3. Human Rights and Equal Opportunity Commission, *Bringing them home: report of the national inquiry into the separation of Aboriginal and Torres Strait Islander children from their families* (1997).

4. "The intervention" is the colloquial name for the Northern Territory Emergency Response which was enacted through Commonwealth legislation in 2007, with bipartisan support (*Northern Territory Emergency Response* 2007 (Cth)).

5. Aboriginal History Research Unit, Department of Aboriginal Affairs WA, *Right Wrongs: '67 Referendum – WA 50 years on* (2017) 78.

6. For example, Truganini of the Nuenonne group in Tasmania has often and erroneously been described as "The last Tasmanian". Griffith also seems to have subscribed to the view that the Australian Aboriginal race would eventually disappear.

7. Daisy Bates, *The Passing of the Aborigines: A Lifetime spent among the Natives of Australia* (originally published 1938), chapter 7 – Last of the Bibbulmun Race (web edition as published by the University of Adelaide, last updated 17 December 2014, accessed 14 July 2017).

8. Ibid.

9. Perth City Council, *Karla Yarning map – Fighting for families, country, rights and recognition* (2014).

10. George Williams, "Race and the Australian Constitution", (2013) 28(1) *Australasian Parliamentary Review* 4, 5.

11. Quoted in Frank Brennan, *Securing a bountiful place for Aborigines and Torres Strait Islanders in a modern, free and tolerant Australia* (1994) 18; cited in Williams, note 13 above, 6.

12. Western Australia is not mentioned because at the time the Constitution was passed as an Act of the Imperial Parliament, the referendum to determine whether Western Australia would join the Federation had not been held.

13. Although the races power could also be used to advance the interests of a racial group: see, for example, the comments of Sir Samuel Griffith, 1891 Australasian Federation Conference (8 April 1891) 703. (The records of the 1890s Federal Conventions are available from the Parliament of Australia website at: parlinfo.aph.gov.au/parlInfo/search/search.w3p;adv=yes (accessed 7 August 2017)).

14. 1898 Australasian Federation Conference (27 January 1898) 228-229, cited in Williams, note 13 above, 7.

15. John Quick & R. R. Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901), cited in Williams, note 13 above, at 7. It is of note, however, that the races power is not restricted to aliens, and applies to any race in Australia whether immigrant or alien or not (Robert French, "The Race Power: A Constitutional Chimera", H.P. Lee & George Winterton (eds), *Australian Constitutional Landmarks* (2003) 180, 180.

16. See 1891 Australasian Federation Conference, Commonwealth of Australia Bill as adopted by the National Australasian Convention (9 April 1891) clause 17; 1898 Australasian Federation Conference (8 February 1898) 665-666; and Williams, note 13 above, at 7.

17. Nor any women: Williams, note 13 above, at 6.

18. Geoffrey Sawer, "The Australian Constitution and the Australian Aborigine" (1966) 2 *Federal Law Review* 17, 17-18.

19. Royal Commission on the Constitution (1927-1929), Minutes of Evidence, 488, cited in Sawer, note 21 above, 18.

20. See, for example, J. D. Heydon, "Sir Samuel Griffith and the Making of the Australian Constitution", *Upholding the Australian Constitution* (2012) 24, 17.

21. The Honourable Richard Edward O'Connor, MLC, QC, 1897 Australasian Federation Conference (19 April 1897) 832.

22. The Honourable Sir Samuel Walker Griffith, KCMG, QC, MP, 1891, Australasian Federation Conference (8 April 1891) 898-899. The clause had been in the bill as prepared by the drafting committee, but was struck out. Sir Samuel proposed to reinsert it.

23. Originally delegates from New Zealand were included in plans for a federal constitution with politicians from six Australian colonies: Parliament of Australia, Records of the Australasian Federal Conventions of the 1890s (accessed 8 August 2017).

24. 1891 Australasian Federation Conference (31 March 1891) 525; and see Bain Attwood & Andrew Markus, *The 1967 Referendum: Race, Power and the Australian Constitution* (2007) 1-2.

25. 1891 Australasian Federation Conference (8 April 1891) 703 and see French, note 18 above, 182.

26. 1898 Australasian Federation Conference (27 January 1898) 240-241.

27. Jeremy C. Martens, "Pioneering the Dictation Test? The creation and administration of *Western Australia's Immigration Restriction Act*, 1897-1901" (2013) 28 *Studies in Western Australian History* 47.

28. Cossack is a port on the north coast of Western Australia near Roebourne.

29. "The Yellow Curse. Chinese Admitted Free. Restriction Act a Farce" *West Australian Sunday Times* (21 January 1900) and see Martens, note 30 above, 63.

30. *Man Kit v Sampson* [1901] WALawRp 12; 3 WALR 71 (21 May 1901) and see Martens, note 30 above, 63.

31. See Martens, note 30 above, 47-48.

32. Starke, J, dissenting.

33. *R v Wilson* [1934] HCA 63; (1934) 52 CLR 234, per Dixon J at 245.

34. *R v Wilson* [1934] HCA 63; (1934) 52 CLR 234.

35. Sawer, note 21 above, 20, citing Harrison Moore, *The Constitution of the Commonwealth of Australia*, 2nd ed, 1910, 462.

36. If there was an award for the most appalling piece of legislation ever passed in Australia, the *Aborigines Act* 1905

(WA) would be a strong contender. It deprived Aboriginal people of the freedom to choose where they would live and work, authorised the forced separation of Aboriginal children from their families, and systematically excluded Aboriginal people from white society.

37. See 1897 Australasian Federation Conference (20 April 1897) 1020.

38. Sawer, note 21 above, 26. This restriction on counting "full blood" Aboriginal people continued to apply to official census data until the Constitution was changed – see Commonwealth Bureau of Census and Statistics, *Census of the Commonwealth, 30th June, 1961: Census Bulletin No 36 – Race of the Population Australia, States And Territories* (undated) 2-3.

39. Anthony J.H. Morris, QC, "The Trial of the Kenniff Brothers" (2002) 2(2) *Memoirs of the Queensland Museum: Cultural Heritage Series* 259, 261.

40. R.B. Joyce, "Griffith, Sir Samuel Walker (1845-1920)" *Australian Dictionary of Biography* (1983) (accessed 12 April 2017).

41. For a moving description of the consequences of these laws, see "The effect of early Australian laws on Aboriginal people: A personal perspective" by Sue Gordon, AM, originally published in (2005) 8 *Flinders Journal of Law Reform* 173 and republished in Hossein Esmaeili, Gus Worby & Simon Ulalka Tur (eds), *Indigenous Australians, Social Justice and Legal Reform: Honouring Elliott Johnston* (2016) 121.

42. French, note 18 above, 188.

43. French, note 18 above, 188. French notes that Menzies' bill was limited only to the removal of section 127; while he was not prepared to take the exclusionary term out of section 51(xxvi), he was sympathetic to repealing the provision altogether.

44. Sawer, note above, 24.

45. French, note above, 188.

46. French, note 18 above, 188-189.

47. *Kartinyeri v The Commonwealth* [1998] HCA 22; (1998) 195 CLR 337.

48. Australian Indigenous Health Info Net, "What is Closing the Gap?" (15 November 2016) (accessed 17 July 2017).

49. Department of the Prime Minister and Cabinet, *Closing the Gap: Prime Minister's Report 2017* (2017) 83. The most recent Indigenous life expectancy figures were published late in 2013 and showed a gap of 10.6 years for males and 9.5 years for females; between 2005-07 and 2010-12, there was a small reduction in the gap of 0.8 years for males and 0.1 years for females.

50. Department of the Prime Minister and Cabinet, note 52 above, 23. The report notes that the relatively small numbers involved result in fluctuations in the Indigenous child mortality rate each year.

51. Department of the Prime Minister and Cabinet, note 52 below, 53.

52. Department of the Prime Minister and Cabinet, note 52 above, 38, 39.

53. Department of the Prime Minister and Cabinet, note 52 above, 36.

54. Department of the Prime Minister and Cabinet, note 52 above, 26.

55. Department of the Prime Minister and Cabinet, note 52 above, 43.

56. Michelle Patterson, *50 years of Commonwealth Public Administration in Aboriginal and Torres Strait Islander Affairs: IAG Working Paper Series No. 1 - Machinery of Government in Aboriginal and Torres Strait Islander Affairs* (2017).

57. Gary Foley, "Harold Holt's death and why the 1967 referendum failed Indigenous people", *The Guardian* (Australian edition), 27 May 2017 (accessed 7 August 2017).

58. Gary Foley, note 60 above.

59. Gary Foley, note 60 above.

60. Patterson, note 57 above, 4.

61. Patterson, note 57 above, 15.

62. Patterson, note 59 above, 15.

63. Parliamentary Library Western Australia, "Aboriginal/Indigenous Affairs Minister of Western Australia" (as at 17 March 2017). The Parliamentary Library notes that there have been 23 Ministers in 11 different governments responsible for Indigenous Affairs since the introduction of a Native Affairs portfolio in the McLarty Liberal Government in 1947.

64. Education and Health Standing Committee, *Ways Forward – Beyond the Blame Game: Some Successful Initiatives in Remote Indigenous Communities in WA* (2008) 16-18. For 10 of the 12 years, there was a unique arrangement in WA with the Commonwealth Department of Aboriginal Affairs (DAA) in Western Australia being responsible for the administration of the State's *Aboriginal Affairs Planning Authority Act* 1972, with the exception of the Aboriginal Lands Trust, and the same officer, Mr Frank Gare, being the head of both the State's Aboriginal Affairs Planning Authority and the Commonwealth's DAA in Western Australia, Tensions over Aboriginal land rights saw this arrangement come to an end (at 22).

65. Going further back, since the administration of Aboriginal affairs was removed from the Colonial Secretary and entrusted to the Aborigines Protection Board in 1886 until the present, there have been 12 different agencies involved in administering this area, including, between 1920 and 1926, the Fisheries Department, which was responsible for Aboriginal affairs in the area below latitude 25 degrees south (State Records Office, Organisations & People – AU

WA A1200 – Aborigines Protection Board (accessed 13 July 2017). More recently, the Department of Aboriginal Affairs has been incorporated into Department of Planning, Lands and Heritage.

66. Patterson, note 59 above, 16.

67. Patterson, note 59 above, 3.

68. On 4 May 2017.

69. Fred Chaney, "The Indigenous policy experience 1960 to 2012" in Productivity Commission, *Better Indigenous Policies: The Role of Evaluation*, Roundtable Proceedings (2013) at 51, 57.

70. Chaney, note 72 above, 62.

71. Michael C. Dillon & Neil Westbury, *Beyond Humbug: Transforming Government Engagement With Indigenous Australia* (2007) 191-192 cited in Chaney, note 72 above, 58, 65.

72. Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators 2011* (2011) 10, 11 cited in Chaney, note 72 above, 58.

73. See, for example, Lt-General Sanderson's 2007 address, "Federal Renewal and Unity in Reconciliation: A Return to Government by the People", Order of Australia Association Annual Oration, 2007; and "The Indigenous Implementation Board", John Curtin Institute of Public Policy Forum, Perth, 15 May 2009.

74. Regional Services Reform Unit, *Resilient Families, Strong Communities: A roadmap for regional and remote Aboriginal communities* (2016).

75. Chaney, note 72 above, 59.

76. Chaney, note 72 above, 61-62.