

# Land, Rights, Laws: Issues of Native Title

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*The High Court Mabo decision in 1992 and the passing of the Commonwealth Native Title Act in 1993 mark a fundamental shift in the recognition of indigenous rights in Australia. The Act, like the High Court decision on which it is based, transforms the ways in which indigenous ownership of land may be formally recognised and incorporated within Australian legal and property regimes. The process of implementation, however, raises a number of crucial issues of concern to native title claimants and to other interested parties. Many of these will have to be decided in the courts. Nevertheless, information about and discussion of the issues are important for those needing to address the matters raised by the claim process.*

*This series of papers is designed to contribute to the information and discussion. The papers address the shift from notions of statutory land rights to the rights of indigenous peoples that pre-existed colonisation and exist within the broad spectrum of their human rights. Within these rights, land is an essential component.*

*This paper examines the links between ownership of land by indigenous people, both through native title and through other related ways of acquiring land such as the proposed National Indigenous Land Fund, and issues of the health of Aboriginal and Torres Strait Islander people. The writers are Barbara Flick and Brendan Nelson. Barbara Flick is the permanent Director of the Danila Dilba Aboriginal Health Service in Darwin. She is currently under contract to the Australian Medical Association. Dr Brendan Nelson is the Federal President of the Australian Medical Association.*

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## LAND AND INDIGENOUS HEALTH

**Barbara Flick and Brendan Nelson**

### **Introduction**

The right to 'the enjoyment of the highest attainable standard of physical and mental health' is affirmed in Article 12 of the *International Covenant on Economic, Social and Cultural Rights*. In our relatively prosperous nation, the possibility of a high standard of basic health services being available to all citizens is achievable.

It is a cruel irony that the people whose dispossession underwrote the creation of the very wealth that allows universal good health to be an achievable goal of public policy are now the

most unhealthy sector of the population. It is shameful that the health of Aboriginal and Torres Strait Islanders continues to deteriorate.

Politicians of all persuasions recognise the imperative of tackling Aboriginal health problems. However, the differences that exist in approaches to the problem are not just ones of priority. They run much deeper, to a basic comprehension of the concept of rights.

In the recent debate over the establishment of the National Indigenous Land Fund, some politicians and commentators have argued that grants of land to indigenous people should be conditional on evidence of improvements in health and other social conditions. Others have argued that land rights is not the answer and public funds should be focussed on programs to improve health, housing, education and employment. Yet others are attempting to distinguish between degrees of dispossession.

In this paper, we first explore the inter-relation between land and health and question the validity of demanding scientific evidence of a causal relationship between granting land to indigenous people and improvements in their health. We argue that Aboriginal and Torres Strait Islander people have a right to land because of the very fact that they are indigenous people - physical dispossession has been suffered by all groups and forms the basis of the disruption to indigenous lifestyles that underlies ill-health.

Indigenous people have a right to good health as well as to land. The right to health, unlike land rights, is not a special right based on being indigenous. It is a right to which all Australians are entitled - a right of citizenship. It is fundamental to a proper consideration of these questions that land and health are seen and valued as entitlements, not as matters of public charity.

**Rights as entitlements** When the High Court found that the Meriam people had a right 'as against the whole world to possession, occupation, use and enjoyment of the lands of the Murray Islands',<sup>1</sup> the judges did not qualify this by saying, 'as long as they could show that recognising this will improve their health'. The judges found that the Meriam people's rights arose as a result of their membership of Meriam society.

Justice Woodward, in his seminal inquiry into land rights, reflected on the aims of land rights. The first of them was, 'The doing of simple justice to a people who have been deprived of their land without their consent and without compensation'.<sup>2</sup>

The fundamental point of both the High Court judges in *Mabo* and Woodward in the land rights inquiry was that land rights are a collective right inherent to indigenous peoples. Land rights are entitlements which are not dependent on meeting a test of utilitarian criteria. They are, in a true sense, a birthright. The land rights campaign is a struggle for the *recognition* of their rights. The propensity of some politicians and commentators to demand evidence of the value and benefits of land rights is rooted in a failure to comprehend the nature of rights.

The High Court determined that the common law recognises native title as a title to land that survived colonisation and, where it has not been extinguished by valid acts of government, is capable of being asserted. As has been widely acknowledged, only a very small proportion of Aboriginal and Torres Strait Islander people will be able to successfully assert their native title rights directly.

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<sup>1</sup> *Mabo v Queensland (no 2)* (1992) 107 ALR I at 2.

<sup>2</sup> *Aboriginal Land Rights Commission, 2nd Report* (1974), Parliament of the Commonwealth of Australia, Parliamentary Paper No. 69, p2.

This was recognised by the High Court judges who, in their analysis of and commentary on the history and consequence of dispossession, provided a stimulus for government to redress 'a national legacy of unutterable shame'. The establishment of the National Indigenous Land Fund is part of the Commonwealth government's response to the *Mabo* decision.

That it is a *land* fund rather than, say, a health fund or a housing or education fund is recognition that the dispossession of indigenous peoples is at the root of the continuing problems they face: problems that arise from economic and social disempowerment. This too was recognised by Justice Woodward, whose list of the 'aims' of land rights also included, 'The provision of land holdings as a first essential step for people who are economically depressed and who have at present no real opportunity of achieving a normal Australian standard of living'.<sup>3</sup>

The recognition of indigenous interests in land should not turn on any test of improvements in living conditions or on degrees of dispossession. All Aboriginal and Torres Strait Islander people are entitled to land. Much has been written on the central place of land in an Aboriginal person's identity. To deny them access to a secure land base, whether they live in settled or remote Australia, can only contribute to their continuing economic and social disadvantage.

This means that the provisions of the Land Fund will need to be structured in a way that addresses particularly the land needs of those people who, through no action of their own doing, may not be able to prove the continuing link required to succeed in a claim under the Native Title Act. This should be done, however, not on the basis of degrees of dispossession but in terms of giving priority to those who have not had the advantage of statutory land provisions and who are least likely to be able to assert native title in terms of full beneficial ownership of land.

Having said that, it can also be acknowledged that the granting of title to land - reversing the sorry history of dispossession - is a basic step towards the improvement of the Aboriginal and Torres Strait Islander health profile. This fact was recognised by the Federal Council of the Australian Medical Association which, in August 1994, resolved to support 'measures which promote the ownership and control of land by indigenous people in order to provide an environment which will allow improvement in their health and well-being'.<sup>4</sup>

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<sup>3</sup>*Aboriginal Land Rights Commission, 2nd Report (1974)*, Parliament of the Commonwealth of Australia, Parliamentary Paper No. 69, p2.

<sup>4</sup>Australian Medical Association Federal Council, 18-19 August 1994, Resolution 33.

**Land rights and health - the links** There is no scientific study which proves or disproves that land ownership and health are directly linked. Nevertheless, there are numerous reports and studies which strongly imply a positive connection.

The House of Representatives Standing Committee on Aboriginal Affairs' 1987 inquiry into the outstation movement reported:

The Committee heard a great deal of qualitative evidence that the health of Aboriginal people in homeland centres is superior to that of Aboriginal people in the major communities. A number of reasons were given for the improved health situation of homelands people, including the smallness of the communities which reduced the risk of infectious disease, the superior diet of homelands people because of the availability of bush tucker and the lack of access of homeland dwellers to alcohol and petrol for sniffing.<sup>5</sup>

It should be noted, however, that the committee found a serious health disadvantage for homelands residents in their lack of access to primary health care services.

There is also an abundance of evidence about the superior nutritional value of bush tucker.<sup>6</sup> However, a scientifically established, measurable link between land ownership and good health is not only unnecessary; the search in itself may be counter-productive. As we argued above, rights do not require utilitarian justification.

Using western scientific methodology and demanding rigorous empirical evidence of benefit, as defined within this scientific approach, is a continuation of the patronising practice of imposition. It is saying, 'Our system of knowledge is superior', 'we can best design the test and analyse the result', 'we can prove what is best for you'. It is the opposite of what is needed.

For there to be any headway in addressing the indigenous health situation, a first essential step is that the indigenous people themselves have ownership of the problem and control of and responsibility for the solution. As Elliott Johnston QC said in his *National Report* of the Royal Commission into Aboriginal Deaths in Custody:

Substantial change in the situation of Aboriginal people in Australia will not occur unless government and non-Aboriginal society accept the necessity for Aboriginal people to be empowered to identify, effect and direct the changes which are required'.<sup>7</sup>

### **The central importance of self-determination and empowerment**

The fact is that, as a result of their dispossession and their ill-treatment by the colonising society, indigenous people have been disempowered, their community structures disrupted and their self-esteem trampled upon. A consequence is the spiritual or psycho-social malaise which afflicts much of indigenous Australia and variously surfaces in conditions such as drug and alcohol dependency and high suicide and accident rates. It doesn't take multiple science degrees to appreciate the impossibility of attaining good physical health under such conditions. As well, good health is of course not just a matter of physical well-being.

Indigenous ill-health is itself a symptom of a much deeper affliction. It will not be resolved just by concentrating on clinical treatment. The history of the Royal Commission into Aboriginal Deaths in Custody is telling. It was established in late 1987 and commenced examining the individual cases of death, anticipating that a full report would be presented

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<sup>5</sup>House of Representatives Standing Committee on Aboriginal Affairs, 1987, *Return to Country: The Aboriginal Homelands Movement in Australia*, AGPS, Canberra, pp247-248.

<sup>6</sup> For a recent example, see Maggiore, 1993, *Australian Aboriginal Studies* (1), AIATSIS, Canberra.

<sup>7</sup> Royal Commission into Aboriginal Deaths in Custody, 1991, *National Report*, AGPS, Canberra

twelve months later. But, after preliminary investigation, the Commission realised that the 'true dimensions of the tragic situation' required a broad investigation of the underlying causes.

Nearly four years later, the *National Report* of the Royal Commission identified the central importance of self-determination and empowerment. 'The thrust of this report is that the elimination of disadvantage requires an end of domination and an empowerment of Aboriginal people; that control of their lives, of their communities, must be returned to Aboriginal hands,' reported Commissioner Elliott Johnston QC.<sup>8</sup>

The foundation principles of empowerment and self-determination must inform every step of policy development. This requires, as Johnston identified, governments and bureaucrats to move beyond the practice of *consulting* with indigenous people and to start *negotiating* with them.

**What are the health problems?** It has been estimated that, when Captain Phillip's fleet arrived on the east coast of Australia in 1788, the health of the country's inhabitants was better than those of the immigrants.<sup>9</sup> It did not take many years for this to be inverted.

Today, indigenous peoples the world over suffer a poor health profile. Australia has the dubious distinction of being the only western country where the health of the indigenous adult population is not improving.<sup>10</sup> While infant mortality rates are one-fifth of the rates in the 1970s, there has been no improvement in adult life expectancy. Aboriginal and Torres Strait Islander people can expect to die fifteen to twenty years earlier than the rest of the population. This contrasts poorly with the statistics for North American Indians, where the gap in life expectancy has been narrowed to about three years.

Four conditions cause seventy percent of excess mortality: circulatory (26%), respiratory (22%), diabetes and its complications (12%), and accidents (10%).<sup>11</sup> All of these are controllable through preventative and treatment strategies.

In fact, modern medical science has the solution for many of the diseases which are prevalent in the indigenous population. We often know what needs to be done. We haven't yet learnt how to do it. And it is the 'how' which is most critical to an enduring solution.

### **Towards a solution**

The critical factor is to deliver health services in ways that address the immediate needs (the disease) but also contribute to overcoming what Bartlett and Legge have called the 'injuries of colonisation'.<sup>12</sup> We must attack the powerlessness that is the foundation of the psycho-social or spiritual disease which afflicts so many indigenous people in Australia.

Health care must be delivered in ways that contribute to rebuilding communities and raising self-esteem through empowerment. In the following sections, we discuss some of the ingredients which deserve consideration. It is by no means comprehensive.

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<sup>8</sup> Royal Commission into Aboriginal Deaths in Custody, 1991, *National Report*, Overview and Recommendations 1.17.6. AGPS, Canberra.

<sup>9</sup> Professor Max Kamien, cited in S. McIlraith, 1982, *Aboriginal Health and Lifestyle*, Australian Medical Association.

<sup>10</sup> Dr Ian Ring, Chief Epidemiologist, Queensland Department of Health, address to first Cape York Aboriginal Health Conference, Pajinka, September 1994.

<sup>11</sup> Statistics cited by Dr Brendan Nelson, 1994, *Australian Medicine*, Australian Medical Association, August 1.

<sup>12</sup> Bartlett, Ben and Legge, David, 1994, Supporting Aboriginal health services: ideas for discussion. Draft NCEPH Working Paper, July, Central Australian Aboriginal Congress and National Centre for Epidemiology and Population Health.

### ***Primary health care***

- Central to successful primary health care are the indigenous community-controlled health services.

We can no longer afford to be side-tracked by nonsensical arguments about mainstream service delivery in this area. While many working within the mainstream health system are hard-working, dedicated individuals, it is the system itself which is antithetical to the solution. It was in part the continuing inability of the mainstream health system to meet indigenous needs and aspirations that contributed to the evolution of the indigenous health services in the early 1970s.

As a result of these services, Aboriginal and Torres Strait Islander people have much better access to appropriate health care services today than they did twenty years ago. The services provide indigenous people with a service which belongs to them and where they feel wanted.

- The community-controlled services have also facilitated greater access to secondary and tertiary services through their referral links.

Regrettably, community-controlled health services remain grossly under-resourced.

It is beyond dispute that community-controlled health services do not receive an equitable share of public health funds.

There is an urgent need for increased funding to the services but,

- just as important, is the method of funding and system of accountability.

Although community health services generally attempt to provide comprehensive health care at the curative, educative and preventative level, within a framework of community development, ATSIIC, and previously DAA, imposes performance indicators based on narrow clinical criteria such as client-service contacts and changing disease patterns. Government officials who negotiate and monitor service (funding) agreements frequently display a lack of understanding of the comprehensive community development approach to health care. Consequently,

- the provision of clinical services is often assigned core status, while education, training, community development, and public health programs are marginalised as short-term special projects.

While few would argue against health services being accountable for the public funds that they receive, there is clearly a structural problem in the existing arrangements. The question of accountability has another dimension: Accountable to whom? The current model demands that the services answer first and foremost to the funding agency. This approach needs to be turned around in acknowledgment that, ultimately,

- it is to the local community that the health service is accountable.

The essential ingredient of the indigenous health services is that they are community-controlled. Policy and program direction are determined by community-elected governing boards and Aboriginal managers. It is ironic that services find it difficult to access:

- funds to develop and maintain management training programs and support programs for mechanisms of community control (eg, public meetings, governing board processes).

### ***Aboriginal Health Workers***

The central contribution of Aboriginal Health Workers has been widely recognised (see, for example, the National Aboriginal Health Strategy and the Royal Commission into Aboriginal Deaths in Custody *National Report*). Their roles vary enormously across the country: Aboriginal Health Workers are cross-cultural interpreters, community educators, front line clinicians and, most importantly, they have a close association with and intimate knowledge of the communities they serve.

However, there remains a basic lack of appreciation of their value and a lack of support for their professional development. Aboriginal Health Workers are critical to the formula required to successfully deliver primary health care.

- There needs to be more of them and there needs to be a means provided for them to continue to increase their skills and share their experiences.

### ***Environmental Health***

Modern medicine can cure a bacterial infection by the simple administration of antibiotics. But the poor sanitary conditions in which the bacteria thrive remain. On an immediate level, this requires resolution of environmental health problems that beset many Aboriginal communities, like poor housing and sanitation, the lack of clean water and safe sewerage and waste disposal systems. To this could be added other basic infrastructure, like decent roads, power and communication facilities - all of which are integral to a healthy environment.

- Their design, construction and maintenance must be done in intimate collaboration with their users.

The National Aboriginal Health Strategy estimated<sup>13</sup> that the provision of such basic infrastructure would require \$2500 million over a ten-year period. That is what it would take to enable Australia's indigenous peoples to 'catch-up' with what the rest of the population takes for granted, and illustrates the extent of past neglect or misconceived policies.

***Local control*** The state of Aboriginal health is a national disgrace. It demands a national response and one hopes that the current review of the National Aboriginal Health Strategy will guide that. It requires a dramatic increase in expenditure. However,

- while the problem requires national attention, the solutions must be locally controlled.

The recent formation of the Apunipima Cape York Health Council demonstrates that Aboriginal Health Workers and their community organisations are working together at finding local and regional solutions to their health problems. It is the responsibility of government to support and facilitate the development of such local and regional initiatives. The days of centralised control by the long-distance bureaucrat are over.

### **Conclusion**

In losing the land, Aboriginal people also lost the control over their environment that is the basis of good health. And just as Aboriginal health standards deteriorated as a consequence of colonisation, the solution will be directly affected by a reversal of the historical trend - a reversal set in train by the *Mabo* decision.

Far from the view which seeks to approach the Aboriginal health problem in isolation from land rights - or worse, seeks to qualify restitution of land by requiring proof of health advantage or greater degree of dispossession - a critical component to the answer is land. The dispossession of all the Aboriginal and Torres Strait Islander peoples of Australia not only 'underwrote the development of the nation', as Brennan J put it. It was also the root of indigenous disempowerment. And it is the sense of powerlessness which underlies the problem. Conversely, the solution is to be found, not in imposed, patronising administration of centrally-planned health programs, but in handing over the controls and empowering indigenous people at a local and regional level.

The best conceivable health programs will be forever frustrated if they are not integrated with programs to raise the social and economic standing of Aboriginal and Torres Strait Islander peoples - and that requires, as an essential basis, the restitution of land.

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<sup>13</sup> National Aboriginal Health Strategy Working Party, A National Aboriginal Health Strategy, March 1989.

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