CONSTITUTIONAL RECOGNITION DOES NOT FORECLOSE ON ABORIGINAL SOVEREIGNTY

by Megan Davis

Since January, when the Expert Panel on the Recognition of Aboriginal and Torres Strait Islanders in the Constitution ('the Expert Panel') handed its final report to the Prime Minister, there has been growing momentum in the campaign for a referendum on this issue.[1] The Federal Government has allocated $10 million toward an education campaign; taking up a recommendation from the Expert Panel as to the low level of civics knowledge in the community. Of course, what form 'recognition' will take is less clear. Although it has been important that, given the toxic nature of contemporary politics in Australia, the political sector has by and large not commented or intervened in either a favorable or adversarial way to the issue of recognition.

As members of the Expert Panel we found that the vast majority of Aboriginal and Torres Strait Islander people are in favor of constitutional reform. This was evident at the consultations and in submissions from the community. However, the nature of adversarial politics in Indigenous affairs is no different to other areas of politics such as climate change or education reform; it elicits automatic reactionary and contrarian positions. The project of constitutional reform though is particularly vulnerable to misinformation because of the low civics literacy in Australia. Aside from the frequently cited statistics that eight out of 44 referendums have succeeded and successful referendums require bi-partisan support, there is minimal and limited knowledge about the Constitution and how it works.

Take for example the claim that the Expert Panel's recommendation for a new head of power to make laws for Aboriginal and Torres Strait Islander people[2] would lead to the reintroduction of child bride practices—this is despite that the recommended section 51A is a 'head of power' which means it is a power for the Commonwealth to make laws. It provides authority or legitimacy to the Commonwealth's desire to make legislation in a particular area. To assert that section 51A, or section 51(xxvi) of the Constitution for that matter, can support legislation reintroducing child bride practices in Aboriginal communities is to assert that the Commonwealth Government may in the future desire to introduce such a right. This claim is a fiction.

Another claim has been that section 51(xxvi) will have no impact on Aboriginal peoples' lives. This is despite the fact that such a power and its previous incarnation supported much legislation that has benefitted Aboriginal and Torres Strait Islander peoples, such as: the *World Heritage Properties Conservation Act 1983* (Cth); the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth); the *Native Title Act 1993* (Cth); and, the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth).

Another claim, the focus of this brief comment, is that any constitutional recognition or reform would negate Aboriginal claims to sovereignty. Sovereignty was an issue raised by many Aboriginal and Torres Strait Islander peoples in the course of the work of the Expert Panel. In our report, the Panel was open about the many communities who raised the issue of sovereignty and the voices of those who raised such concerns were recorded. This is why an entire chapter was devoted to the issue.

From the outset it is useful to note what 'sovereignty' may mean. This is important because it does have different meanings. Submissions to the Expert Panel and consultations in Aboriginal communities showed that sovereignty means different things to different communities. In 2004, Brenda Gunn, George Williams and Sean Brennan explored the different meanings of sovereignty in the context of their treaty research.[3] They found that, 'Indigenous uses of the term vary, just as they do in non-Indigenous contexts' and that some use sovereignty in an external context and others in an internal context.

The external use of the word sovereignty is captured in the proposal of the Aboriginal Provisional Government for an Aboriginal Nation:

> a nation exercising total jurisdiction over its communities to the exclusion of all others. A nation whose land base is at least all

> crown lands, so called. A nation able to raise its own economy and provide for its people.[4]

The internal aspect, according to Gunn, Williams and Brennan, reflects contemporary Indigenous politics with:

> language of 'governance' and 'jurisdiction' as exercised by Indigenous 'polities' [and it] also corresponds with the long-term political campaign waged by Indigenous peoples and their supporters using another term borrowed from international law and Western political thought: 'self-determination'.[5]

Gunn et al. also argue that some Indigenous peoples and nations frame their sovereignty claims in a popular rather than institutional sense, '[i]t is the basic power in the hands of Indigenous people, as individuals and as groups, to determine their futures'.[6] They conclude that:

> A range of Indigenous views exist, and some seek to challenge authority in the external sense of the word sovereignty. But it is equally important to recognise that others adopt an internal perspective. They seek to re- negotiate the place of Indigenous peoples within the Australian nation-state, based on their inherent rights and their identity as the first peoples of this continent. That vision of an Australia where, in practical terms, sovereignty is shared or 'pooled' is, as it happens, consistent with the way the concept has evolved in Western thought – the original absolute and monolithic sovereign is a myth, the reality today is qualified sovereignty.[7]

Our report reflected the diverse views of Aboriginal and Torres Strait Islander peoples, for example: Tom Trevorrow, the chairperson of the Ngarrindjeri Regional Authority in South Australia, agreed that sovereignty should be among the principles driving discussion of constitutional change, but said that for him the term sovereignty had a broader meaning: 'Ngarrindjeri will continue to assert to Government its own sovereignty over its own people, place and knowledge'.[8]

It is well known that the Expert Panel adopted a methodology for determining which recommendations it would make to the Federal Government. The methodology was that any recommendation must: contribute to a more unified and reconciled nation; be of benefit to and accord with the wishes of Aboriginal and Torres Strait Islander peoples; be capable of being supported by an overwhelming majority of Australians from across the political and social spectrums; and, be technically and legally sound.[9]

It would come as no surprise to Aboriginal and Torres Strait Islander people that constitutional recognition of the sovereign status of Aboriginal and Torres Strait Islander peoples would be highly contested by many Australians and would jeopardise broad public support for the Expert Panel's recommendations. Similarly, it would come as no surprise that qualitative research found that 'sovereignty' and 'self-determination' were poorly understood concepts and there were similar diverse understandings of sovereignty in the non-Indigenous community as there were in the Indigenous community.

The Expert Panel sought legal advice as to the impact of constitutional recognition on Aboriginal sovereignty. That advice confirmed that:

> the sovereignty of the Commonwealth of Australia and its constituent and subordinate polities, the States and Territories, like that of their predecessors, the Imperial British Crown and its Australian colonies, does not depend on any act of original or confirmatory acquiescence by or on behalf of Aboriginal and Torres Strait Islander peoples.[10]

The constitutional legal position on sovereignty is that:

> recognition of Aboriginal and Torres Strait Islander peoples in the Constitution as equal citizens could not foreclose on the question of how Australia was settled. Nor should constitutional recognition in general have any detrimental effect, beyond what may already have been suffered, on future projects aimed at a greater place for customary law in the governance of Australia.[11]

This is still the position. Here, it is useful to refer to the work of Professor Robert A. Williams on sovereignty and constitutionalism. He has issued caution about Indigenous peoples buying into settler colonial logic when they situate their struggle in the legal frameworks of the coloniser. He argues that by asking the state to recognise 'sovereignty' under their system one is accepting of the foundational principles of the doctrine of discovery that has abrogated and extinguished Aboriginal rights.[12]

The Constitution is not a place for conversations about sovereignty. As the Expert Panel argued:

> The High Court has developed its own 'working definition' of sovereignty and Australia's legal system continues to operate accordingly. The judiciary is only one arm of government, however, and questions of settlement and legitimacy continue to be agitated in parliament and in discussion with government and in the public arena.[13]

This latest version of constitutional recognition is an important project for Aboriginal and Torres Strait Islander communities. It is a pragmatic approach aimed at, among other things, ameliorating a flaw in the constitutional alteration of section 51(xxvi) in 1967. When this provision

was amended in a 1967 referendum to remove the words '… other than the aboriginal people in any State…' it conferred upon the Federal Parliament the power to make laws with respect to Indigenous peoples. However, it did not stipulate that such laws would be for the 'benefit'. Rather, High Court jurisprudence supports an argument that there is nothing in section 51(xxvi) to prevent its adverse application against a people of any race.[14]

Similarly, the Expert Panel argues that a non-discrimination clause is an integral part of a package of amendments to recognise Aboriginal and Torres Strait Islander peoples in the Constitution.[15] Australia's commitment to the principle of racial non-discrimination is reflected in the *Racial Discrimination Act 1975* (Cth) and is accepted in legislation and policy in all Australian jurisdictions. By constitutionalising non-discrimination, only the Commonwealth Parliament will have an additional burden placed on it. The fact is that the submissions to the Expert Panel overwhelmingly supported a racial non-discrimination provision and argued in favour of the principle of racial equality: and it was our job to reflect what the community including the Aboriginal and Torres Strait Islander people was thinking.

The view of the Expert Panel was that such a provision was reasonable. The practical need for this is based on real experiences of Indigenous people of discrimination at the hands of the Commonwealth Parliament. For example, the Northern Territory Emergency Response, the Native Title Act and the Wik amendments. These were commonly cited as examples in community consultations in Aboriginal communities. Finally, a prohibition on racial discrimination reinforced by submissions, public consultations and polling was that this was indeed about 'recognition' of Indigenous people. As Noel Pearson has responded to those who say that non-discrimination is not about 'recognition':

> Elimination of racial discrimination is inherently related to Indigenous recognition because Indigenous people in Australia, more than any other group, suffered much racial discrimination in the past. So extreme was the discrimination against Indigenous people, it initially even denied that we existed. Hence, Indigenous Australians were not recognised. Then, Indigenous people were explicitly excluded in our Constitution. Still today, we are subject to racially targeted laws with no requirement that such laws be beneficial, and no prohibition against adverse discrimination.[16]

When Newspoll conducted national surveys of Australians on the topic of constitutional recognition of Aboriginal and Torres Strait Islander peoples and related issues of constitutional reform, the final Newspoll survey confirmed that, as at 28 October, 2011, 80 per cent of respondents were in favour of amending the Constitution so that there is a new guarantee against laws that discriminate on the basis of race, colour or ethnic origin.

To conclude, constitutional recognition—whether amendment of the race power or a non-discrimination clause—does not foreclose on the question of sovereignty. The Australian legal system is a system that was received from the Imperial British Crown. Aboriginal people have never consented nor ceded. Sovereignty did not pass from Aboriginal people to the settlers.[17]

Megan Davis is a member of the Expert Panel on the Recognition of Aboriginal and Torres Strait Islanders in the Constitution, a Professor of Law and Director of the Indigenous Law Centre, UNSW, and a UN expert member of the United Nations Permanent Forum on Indigenous Peoples.

1 Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander People in the Constitution: Report of the Expert Panel* (Canberra, 2012) 211 <http://www.youmeunity.org.au/final-report>.

2 The Panel recommends that: a new section 51A is adopted [in the Constitution] to recognise Aboriginal and Torres Strait Islander peoples and to preserve the Australian Government's ability to pass laws for the benefit of Aboriginal and Torres Strait Islander Peoples.

3 Sean Brennan, Brenda Gunn and George Williams, 'Treaty – What's Sovereignty Got To Do With It?' (Issues Paper No 2, UNSW, January 2004) 2 <http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/mdocs/Issues_Paper2.pdf>.

4 Ibid.

5 Ibid.

6 Ibid.

7 Ibid.

8 Expert Panel, above n 1, 211.

9 Ibid.

10 Ibid 212.

11 Ibid.

12 Robert A Williams Jr, *Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America* (University of Minnesota Press, 2005) 151.

13 Brennan et al., above n 3, 7.

14 Expert Panel, above n 1, 151.

15 Ibid xviii.

16 Noel Pearson, 'A Letter to the Australian People', Submission No 3619 to Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution*, 2012.

17 Expert Panel, above n 1.

AN INTERVIEW
WITH ROBYNNE QUIGGIN

by Robert McCreery

Robynne Quiggin is descended from the Wiradjuri people of central western New South Wales. She has worked as a solicitor, senior policy officer and lecturer in Indigenous legal issues. In addition, she has participated in various international forums addressing Indigenous Knowledge, biodiversity and human rights issues. Robynne is currently the Senior Manager of the Australian Securities & Investments Commission's Indigenous Outreach Program.

Photo by Kerstin Styche. Image courtesy of AIATSIS Audiovisual Archive.

You have been a lawyer for many years. What made you want to study law and be a practising lawyer?

It was a combination of great people, both inspiring and supportive, and an internal moral compass that desired a fair, just and kind world.

I saw law as one of the key mechaanisms driving society and social change—I was brought up with a deep belief that everyone was entitled to opportunity and support in life, and that it was the job of the legal and political structures in society to provide that opportunity and support. I saw a lot of injustice in the world, and had been on the receiving end of some. I found that a very disempowering experience and I saw law as a way of becoming more personally empowered and a way to make a positive contribution to equality and justice for other people. I also saw the legal system impact on friends and family, and I was aware that we all felt it was an inaccessible, confusing system that often served the interests of anyone but us.

One of the key influences was the time I saw Marcia Langton on telly in my twenties. She was talking passionately about land rights and the importance of using education to achieve outcomes for Aboriginal and Torres Strait Islander peoples. Her passion and direct manner resonated with me, and left a lasting impression. Jenny Munroe was another Aboriginal woman who inspired me for her tireless community work, and the particular kindness she showed me at a couple of rough times in my own life.

I wasn't convinced I wanted to practice when I first started studying, and it was really the encouragement of people including Angus Corbett at UNSW, barristers Jim Macken, John Parnell, Sarah Pritchard and Susan Phillips and my family that encouraged me to give it a go. I then started to meet women solicitors like Margaret Donaldson, my boss at the Human Rights Commission. She had this incredible methodical way of thinking, great intellect and impressive yarns about the High Court. I also met Terri Janke in her first years of legal practice. She was writing *Our Culture: Our Future*, bringing up babies and planning to set up her own business. That's a tall order, and I remain in awe of her focus, generosity of spirit, and good humour! My first job as a solicitor was with Terri Janke & Company. Everybody's first job in a profession is a period 'with training wheels' and it was great to have that opportunity with such an innovative lawyer.

Having this encouragement from practitioners and seeing people working in their fields made legal practice feel more accessible and achievable.

Prior to joining ASIC you worked as a consultant on many issues including intellectual property and you've also been an academic. What are the most useful skills you learnt while in those roles?

Working with the law has taught me to think in a systematic way, it disciplined my thinking. I didn't like that at first, I wanted more freedom and flexibility. I wanted it to be 'the vibe your honour' like in *The Castle*, but studying law is a discipline and while it can be stretched to accommodate different arguments, it's like an elastic band that can only be stretched so far. There were times I was quite disappointed and disillusioned by the limitations and it felt quite confining.

Working as an intellectual property lawyer, mostly for Indigenous clients was a wonderful way to utilise the law for the protection of culture, knowledge and artistic expression. Intellectual property laws are not without their limits when it comes to Indigenous culture because they're designed to protect economic rights, but it's important to maximise the use of all the tools we have at our disposal. So, apart from the technical legal skills I learned, I also learned how to use the strengths and weaknesses of the legal tools available.

In a similar way, academia allowed a kind of creativity, thoughtfulness and capacity for reflection and debate that isn't always available when it comes to applying the law in practice. Again, there's a need for discipline and rigour, but the absence of the need for clients and turning the income over to keep a business afloat gives a different dynamic to the workplace. I don't want to give the impression that academic life is without restrictions, because there is always the need to balance teaching and research. Research is incredibly important to the development of Indigenous policy and I greatly admire the Indigenous researchers who provide a platform for sound policy development.

You're currently working as the Senior Manager on the ASIC Indigenous Outreach Program. How did you become involved in this area of law?

My first experience with consumer rights and financial literacy opened my eyes to the importance of financial inclusion to ensure a safe, comfortable life. Many family disputes and crimes are linked to financial pressures, and freedom from financial stress allows us to be creative, happier and more active in other areas of life. So, while we're often talking about money and financial arrangements, we're really talking about rights and quality of life.

One of the first jobs I had as a consultant and later solicitor-director of Vincent-Quiggin Legal & Consulting Services was to work on resources providing information about banking and credit for Indigenous people. I was invited to undertake the work by a dear school friend, Gordon Renouf, a lawyer with many years of experience in consumer policy, legal services, stakeholder engagement and campaign communications.

I began by writing a comic for Streetwize Communications (commissioned by ASIC) about banking and credit issues for Indigenous consumers, and then Gordon and I co-wrote ASIC's publication *Dealing with Book-Up: A Guide* and the shorter version *Dealing with Book-Up: Key Facts.* It was great to work with Gordon because he has so much experience in this area, and I really learned a lot.

I was really inspired by the people I met working to assist and empower Aboriginal and Torres Strait Islander People to exercise their rights as consumers. I was also shocked to learn of the kinds of practices people were subject to including the ways they are targeted by unscrupulous traders. The common practice of holding consumers' ATM cards and insisting they disclose their PINs in order to access the informal credit known as 'book up' remains one of the most problematic.

It's an interesting area of law with lots of intellectual and practical challenges to keep lawyers interested. It also has a practical impact on people's day to day lives, which is attractive to those of us interested in using our skills to improve conditions for Aboriginal and Torres Strait Islander People. I manage a terrific, committed team who really care about getting good outcomes.

What is ASIC's 'MoneySmart' all about?

MoneySmart is ASIC's consumer website. It has tips and tools to help people make the most of their money. It's free and easy to navigate. The website has more than 25 calculators and apps and explains money concepts through case studies, videos and quizzes. It has a special section to help Indigenous consumers. ASIC is the regulator of financial services and has a focus on three outcomes: confident and informed investors and financial consumers; fair and efficient financial markets; and, efficient registration and licensing.

What kind of information do you provide for Aboriginal and Torres Strait Islander People about money?

ASIC's Indigenous Outreach Program works to assist

Aboriginal and Torres Strait Islander People to be confident and informed consumers, and we want them to be able to operate in fair and efficient markets. Access to financial products like banking services, insurance and credit products and superannuation is important to everyone. We all need these services. Our work focuses on informing consumers in urban, rural and remote areas about financial products and encouraging them to make informed decisions about them.

We have a suite of Indigenous specific publications which are available online and can be provided free of charge in hardcopy. We also deliver workshops and provide information to individual consumers, organisations and government.

There are a number of organisations and government departments providing financial literacy information and programs to Aboriginal and Torres Strait Islander Peoples on the ground and we work closely with them. Programs like 'My Moola', recently launched by First Nations Foundation are designed for face to face delivery to community members in a culturally appropriate way. Other organisations such as ICAN and Centacare (Wilcannia-Forbes) provide financial counselling and practical information to community members, and we really value their work. FaHCSIA also funds Money Management Workers who are generally working in organisations providing assistance to Aboriginal and Torres Strait Islander consumers. All these agencies provide face to face services, and we try to support them with resources, information and referrals about regulatory issues.

We value the stakeholders delivering these programs and encourage Aboriginal and Torres Strait Islander Peoples to participate in them. We encourage these organisations to bring us the regulatory issues impacting on their clients. For example, if a community is targeted by poor practice or unlawful conduct we rely on our relationships with stakeholders working directly with individual Aboriginal and Torres Strait Islander people to report this conduct so we can take action.

The information we provide to individual consumers is tailored to their particular circumstances, but there are some fundamental messages that serve everyone well. For example, we suggest everyone think about their needs, review the amount of money coming in and prioritise spending, get as informed as you can and don't sign anything before you understand it and have had a chance to think it over. We strongly advise people to resist pressure selling, especially door to door sales practices. There are some great 'Do Not Knock' campaigns providing stickers for people to put on their door, and providing suggestions on ways to handle pushy salespeople. We also encourage people to have aspirations, and make the best use of their money whether they have a lot or a little.

How do you make sure the information is accessible?

A big part of our work is thinking about how to make complex (and I confess, sometimes a bit boring) information about financial products accessible, relevant and interesting. We use different forms of media including radio and online resources and we are exploring using social media.

What advice do you have for young Indigenous women wanting to work in the legal profession?

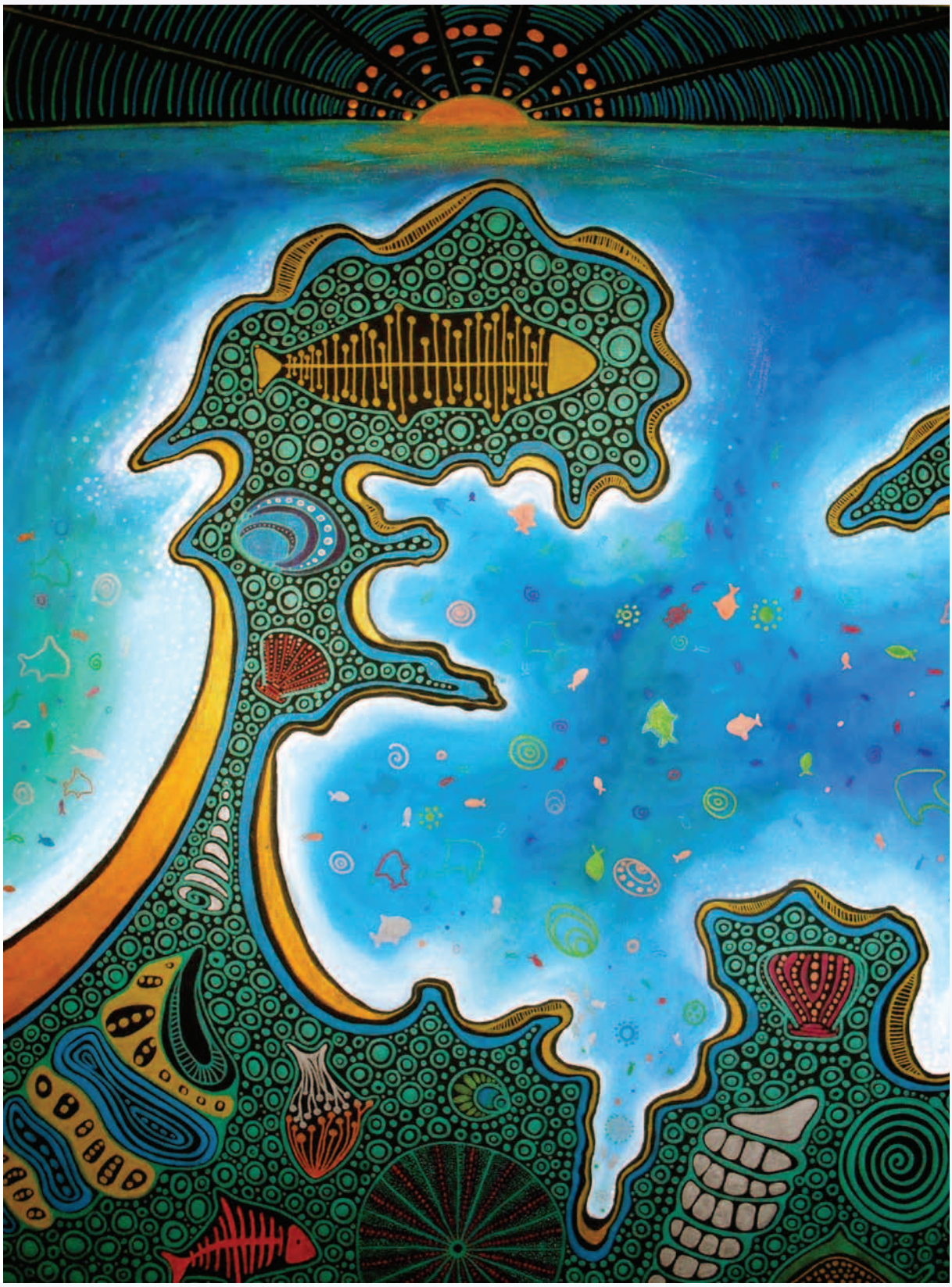
Give it a go!! You have nothing to lose! Don't be put off or discouraged by people who tell you it's hard. Talk to women who are working in the profession, talk to women who will encourage you, give it a go and see if you like it!! If you don't like it, don't worry, there are so many other things to do with a law degree and you'll never regret having given it a go, and you will learn new skills. If you like it, so much the better!!

Aside from your area of work, what do you think is the greatest challenge facing Aboriginal and Torres Strait Islander People in terms of the law?

I think the greatest legal challenge is addressing the underlying discrimination that still afflicts Australian society. I sometimes despair at the rising number of Indigenous people who are incarcerated and continue to die in jail. I am at a loss to understand why no individual has ever been found culpable for any of the appallingly high number of cases of our people who have died in custody. I am also shocked that when we finally had successful prosecution of racial vilification, so many people raised freedom of speech arguments rather than celebrating a judicial finding that we are not allowed to racially vilify each other.

The underlying and remaining challenge is removing all discrimination against people based on their identity as Aboriginal and Torres Strait Islander people and the ways people express that identity—institutional discrimination does seem to be surprisingly intractable. There have been so many advances, so much great work, great art, great writing, great thinking, great partnerships and extraordinary goodwill among Aboriginal and Torres Strait

Islander people and the broader Australian community, but there are also incidents of discrimination that harm, hurt, discourage and disadvantage people. We need to remain vigilant in our recognition of these incidents and our objection to them. On a final note, it's not a legal challenge, but I also think we need to keep focused on the good news: the new ways of thinking about education and economic development, active maintenance of language and culture, engagement with international rights discourse and other achievements of individuals, communities and organisations. We're coming up to the Deadlys again, and I look back at the NAIDOC awards and am reminded that we really have amazing people doing some outstanding work. ■



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