The Minor Amendments also includes the interesting suggestions of former Justice Wilcox being judicial recognition of matters other than native title, this might include recognition of say, traditional ownership[15]. This is a very constructive amendment that obviously needs to be explored in the context of how that power might be exercised.

Conclusion

I agree that behavioural change is critical to faster, fairer and more cost effective outcomes. I also agree that the recent amendments are a move in the right direction. But those amendments alone will not evoke the necessary behavioural change. In fact the changes associated with implementing the amendments are likely to add yet another layer of confusion and effort upon an already change-fatigued environment.

We need to introduce the other limbs to the reform programme as soon as possible; not in two, three or four years' time. If the changes were made and made quickly, the system stands a good chance of reducing 30 years of work down to 10. In fact why not aim for five years! After all "there is no passion to be found in playing small".

Kevin Smith, CEO Queensland South Native Title Services at the 2009 National Indigenous Legal Conference in Adelaide.

Kevin Smith is also a member of the Native Title Research Unit Advisory Committee.

[15] The new s87(4) states "without limiting subsection (2) or (3), if the order under that subsection involves the Court making a determination of native title, the Court may also make an order under this subsection that gives effect to terms of the agreement that involve matters other than native title".

Native Title in Context: Report from the 2009 National Indigenous Legal Conference

By Cynthia Ganesharajah, Research Officer NTRU

As a part of professional development a colleague and I were afforded the opportunity to travel to Adelaide and participate in the 2009 National Indigenous Legal Conference.[16] For me, the Conference highlighted the importance of recognising and being continually aware, that native title does not exist in a vacuum. Rather, it is important to understand the role of native title within broader discussions about self-determination, sovereignty and non-discrimination.

At the Conference Federal Attorney General Robert McClelland spoke about closing the gap, creating partnerships, and Aboriginal and Torres Strait Islander peoples taking responsibility for their own communities. Yet, it is difficult to see why, or even how, Aboriginal and Torres Strait Islander peoples should, or could, take primary responsibility for the end product of successive government policies. As pointed out by Dr Irene Watson in her keynote address, the role of colonisation in producing dysfunction and impairing capacity is often overlooked. Dr Watson further argued that the colonisation of Aboriginal and Torres Strait Islander peoples is ongoing. The acknowledgement of this continuing colonisation is a necessary precursor to decolonisation and discussions of sovereignty.

Interestingly, Dr Watson maintained that the underlying rationale for the continuing colonisation of, or at least discrimination against, Aboriginal and Torres Strait Islander peoples is control. In my view, racism also plays a major role. This was highlighted in a presentation by Professor George Williams who spoke about the Australian Constitution and Indigenous people. As a foundational governing document, and the highest

[16] Selected papers are available at: http://www.nilcsa2009.com/

source of law in Australia, the Australian Constitution is a critical component of Australia's governance framework. Since its inception, the Constitution has contained overt references to race that have had a negative impact for Aboriginal and Torres Strait Islander peoples. Despite the amendments during the 1967 referendum, the Constitution fails to adequately represent and recognise Aboriginal and Torres Strait Islander peoples.[17]

The most obvious example of deliberate disempowerment, for reasons of control and racism, is the Northern Territory Emergency Response. However, systemic racism is also evidenced in the results of a number of coronial inquiries over the years. In his presentation on coronial reform, Professor Ray Watterson referred to excerpts of coronial reports and highlighted the repeated usage of phrases such as 'communication breakdown' 'system failure' and 'avoidable and unfortunate deaths'.[18]

In the context of these critical issues and others I found myself thinking about the broader context of those Aboriginal and Torres Strait Islander peoples who are fighting for recognition of native title or who are trying to make sense of what their native title means. Given the context of lack of control and systemic discrimination, native title is perhaps all the more important because it has the potential to be empowering and restorative. Despite this potential, at times, the current native title system seems to have the opposite effect. Although Justice Mansfield, in his presentation about the current state of native title was very optimistic,[19] a more realist assessment was made by Kevin Smith, Chief Executive Officer of Queensland South Native Title Services. In Kevin Smith's view, the recent amendments present a lost opportunity. This lost opportunity is all the more concerning given the broader context of Indigenous affairs in Australia.

There is a still a long way to go before self-determination, sovereignty and non-discrimination for Aboriginal and Torres Strait Islander peoples. However, the presentations at the 2009 National Indigenous Legal Conference highlighted that these issues are still very much on the national agenda.

[17] At the 1967 referendum both sections 51(xxvi) and 127 were amended to remove overt references to Aboriginal people. However, section 25 implicitly recognises that a State can disqualify people of a particular race from voting. For more see, G Williams, 'After the Apology: Recognising Indigenous Peoples and their Rights in the Australian Constitution', presentation at the National Indigenous Legal Conference 2009, Adelaide, 24 September 2009.

[18] R Watterson, 'Coroners and Indigenous death' presentation at the National Indigenous Legal Conference 2009, Adelaide, 24 September 2009. See also Australian Coronial Reform Working Group, 'Australian Coronial Reform – The Way Forward', Australian Coronial Reform Working Group, 2009.

[19] The Hon. Justice Mansfield, 'Native Title – Where are we now?', presentation at the National Indigenous Legal Conference 2009, Adelaide, 24 September 2009.

Observations from the National Indigenous Legal Conference - Water and Native Title

By Ingrid Hammer, Research Assistant NTRU

One of the concurrent sessions held at the 2009 National Indigenous Legal Conference was on the topic of Indigenous rights in water. Associate Professor Poh-Ling Tan from Griffith Law School and Solicitor, Ms Virginia Falk spoke of the complexity of water rights under the National Water Initiative (NWI), State and Territory regimes and how native title rights and interest are accounted for.

Incontestably, water is the buzz word flying around the government and private enterprise at a rate of knots. Climate change, water rights, irrigation, licences and natural flows are all catchphrases that dominate the headlines but the rights and interest of Indigenous people receive comparatively little exposure.

Poh-Ling Tan began the session by outlining the NWI and the situation of Indigenous rights under the scheme. What greatly surprised many participants was the lack of prominence that Indigenous participation and rights to water resources are afforded under the NWI. Most concerning is the largely discretionary language that is utilised in referring to Indigenous interests. Terminology such as 'wherever possible'[20] in referring to Indigenous

[20] Intergovernmental Agreement of a National Water Initiative Between the Commonwealth of Australia and the Governments of New South Wales, Victoria, Queensland, South Australia, the