HOLDING ON TO THE 'HOPE OF LAW'[1]

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Today is a memorial of a different kind. We are all aware of the passing of former Prime Minister Gough Whitlam today and I hope to memorialise him with Elliott Johnston, because there are deep connections between the two, in public law anyway. But I also want to memorialise my grandmother, because without that troika of people I do not think I would be standing here in this forum with an audience such as this. But I do want to start off by acknowledging the Kaurna people. Uncle Lewis, your welcomes are always brief but very heartfelt. There are two other people that I also wish to highlight that, when I came to Adelaide in November 2001 on the second Australian Indigenous Leadership Centre course, Khatija Thomas, Simone Tur and myself, we were all 'roomies'. And Uncle Lewis was participating way back then in how we shape future leaders. One of the lessons that we took away from that was that if you call yourself a leader, then you are not a leader. So I am not going to take that brave step.

There are so many people in the room that are not just friends, but who have been quite important parts of my life to date, not just in friendship but certainly academically and I am going to 'out' Professor Daryle Rigney, Associate Professor Steve Hemming and Shaun Berg. We are active on two grants, one being the ARC linkage grant and the other an internal Melbourne University grant around Indigenous nation-building. It is the work of Daryle and Steve particularly that inspires me to be able to understand what it is that my grandmother used to say about what is the 'hope of law'. It

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[1] Text on which was based the Elliott Johnston Memorial Lecture, 2014, delivered at Flinders in the City, Victoria Square, Adelaide, on 21 October 2014 for Flinders University School of Law.

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was also the way she went about prosecuting that when, in the absence of everything else, hope is all that you have left. Despite this, it was not her that made me want to become a lawyer. There were many other reasons and although I am not sure whether those reasons were naïve at the time, I was going to change the world one court case at a time, one Aboriginal Legal Service at a time, which I believe is predominantly why so many Aboriginal people go into the law. Nonetheless my grandmother instilled in me that the law is something to be experienced, something to be repelled, and something that does damage to our people and in the midst of all of this, there is evidence that that is what was going on.

I had this very clear message coming from Nan about what is the hope of law. And it is not the hope of our law, as in Wiradjuri law, it is the hope of the western legal system. And so you have to tell that story – it actually has an origin. And it is not disconnected from Gough Whitlam and it is certainly not disconnected from the events around Gough Whitlam's sacking. There are times in your life that you remember events quite vividly, and I remember my mother and grandmother being absolutely distraught on the 11th of November 1975. I was young enough to know that something big was happening but not old enough to know the context. It was about Gough Whitlam's sacking, but it was also about the hope of law because it was what Gough Whitlam stood for back in the 1960s – immediately after the 1967 referendum and leading up to the 1969 election which he narrowly lost – as it was in that period that it was the hope of Aboriginal people that was starting to crystallise. There was a voice about what the dream was of what it meant to be included. What did citizenship mean? So, when the actions of 1975 occurred I remember thinking then, as I do now, that it was an event in my life that I will not forget.

Another day that I remember distinctly was driving home in the car from Dubbo to Trangie, this was in May 1982, and it was the week after the Koowarta decision.[2] The Koowarta decision was the first time that the High Court had tried to deal with the races power

[2] *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.

with respect to whether it could be used to implement the Racial Discrimination Act. It was put to the side, but it was this consciousness that had been started with Gough and certainly it had been started with Aboriginal people, because this was what was being held to them. If there are any Aboriginal people who lived in that period please accept that I do not for one moment profess to speak on your behalf, your experiences are yours. However, I can reflect on the stories that my mother and my grandmother told me about that time and what it meant for them, and as a consequence why hope should reside in all lawyers about what it can achieve, rather than what its effect was and continues to be.

So, it was 1982 and not long after that another big event occurred – and that brings us to Elliott Johnston – the Royal Commission into Aboriginal Deaths in Custody (RCIADIC). The 339 recommendations of the Royal Commission, stupidly I have them beside my bed and I refer to them still. They are still as relevant today as when Elliott Johnston was taking testimony, when he was hearing those horror stories and when he was shaping those recommendations in the hope that by implementing them, the law would actually become what it is that they hoped it would be. It has been – I would not say the Royal Commission itself was a failure – but there is time for us to start to reflect on the fact that there are now more Aboriginal and Torres Strait Islander people in custody, not necessarily on remand, but in custody than there were preceding the Royal Commission. The numbers are alarming. And we have deaths in custody at a rate that we have not seen since prior to the Royal Commission. So, are we going to reinvent the wheel or do we actually just need to get out there and put the lug nuts back on it? And, importantly, are we going to actually acknowledge that this has happened before? Elliott Johnston put in place the mechanisms so it would not happen again, but what we see is that he has not been listened to. And why and how did he get to the point where he could say as a western-trained lawyer, as a white man, that this was his law? He was actually putting into it an element of hope. It was not just because of his place on the Supreme Court, or representing clients, or whether it was his Communist associations and views about the way that a society should be just – he was one of the few

people that had the opportunity to do something and he did it in a spectacular way.

Who has read the 339 recommendations? On the one hand it is very alarming that they are still relevant, but it is also comforting to see the breadth or the hope that was instilled in those 339 recommendations. What the legal system could become *for* Aboriginal people, not *to* Aboriginal people and not consuming Aboriginal people. But what is the relationship between the concept of a western legal system and *our* legal system, because that is where the hope is. Indeed, when my grandmother was a young lady, growing up in New South Wales, Aboriginal people were controlled under the 'Flora and Fauna Act', because we were not human. And then we had the disastrous … well, let us just say that Federation was not a good time to be black, because it was genocidal in intent. The creation just before the Federation of half-cast and all of those things were the push away from Aboriginality, so that we would have no full-bloods, as full-bloods would die out because we were so backward – it was inevitable. You cannot make this up. Go into constitutional conventions of the 1890s and these were the words that were spoken. The reason that the Commonwealth was expressly forbidden from legislating with respect to Aboriginal and Torres Strait Islander peoples within section 51 was because it was the responsibility of the States "to smooth the pillow of the dying breed".

That is why the States had the capacity, the desire and the will to make sure Aboriginal and Torres Strait Islander people did not exist. That legal and policy framework was a spectacular failure, but it was a perpetuation of always placing Aboriginal people outside of the legal system. So when my grandmother speaks of the hope of being recognised, the hope of being treated with humanity and the hope of what the western legal system could be, it was not about her wanting to be in it – she just wanted to *exist*. And so that is what she said our role was as young, well I am not so young anymore, but when Aboriginal and Torres Strait Islander lawyers are going through law school it is the concept of hope that is experienced quite palpably in the classroom.

I know that there are some Aboriginal lawyers in the room – but when Aboriginal and Torres Strait Islander people go into law school, they experience things in the classroom that non-Indigenous people do not get. It is epistemologically very different; the position of law as it is coming to and being explained to you is that these are things that are happening to you, so you do not say that contracts are 'fun'. There is what it is to experience legal education while retaining the concept of hope, because the hope means that we never want to become part of you. We want to exist *with* you, because epistemologically we are geared to our own legal system. Not an Aboriginal legal system but a Wiradjuri legal system or a Kaurna legal system and this was the corpus of the Andrew Bolt case. I might look white, but I did not grow up in a way that I could say that I was anything other than Wiradjuri. That is all I knew, it was my way of thinking. So when I actually go into the law school and teach law, and I love public law, I love Australian Constitutional Law because it is such a cock-up – you get to play with it. It is fun to explain authority, to explain to people why it is that I am not and Aboriginal and Torres Strait Islander people cannot, will not and should not be subsumed by that legal system.

Nan used to say we had a gift, we walk in two worlds. There was never an explanation that one was better than the other. And if it is posited as a gift, you know that it creates the meeting place. When there is a meeting place, at that moment of coming together it sustains the two individuals – you do not exist out here. So what are all of these meeting places? When we are in law school we are told by our elders that we become translators. I am a western-trained lawyer, but I also exert Wiradjuri jurisprudence. That is just the gift. I am comfortable with it and I do not have to scream from the rooftops. I understand white law and I understand Wiradjuri law, and they coexist quite happily. It is trying to tell non-Indigenous people in law school that there is something else that this legal system has said through legal education and through the things that Elliott was trying to rally against, that there is an Aboriginal history. And when he was talking about an Aboriginal history he was talking about and is talking about Aboriginal ways of being, our own systems of governance. And then he was proved completely right. The same

year Mabo[3] was handed down, the same year the Royal Commission put forward its findings. What was Mabo about? It was about the hope of law. What is this concept of a burden on the radical title?

What you might know of the legislated Native Title Act[4] has got nothing to do with the concept of the 'meeting place' and the hope of law. According to the High Court in 1992 at the point of the lawful acquisition of Australia – and let us not pretend it was lawful, it was just that the wrong method of acquisition was applied – Aboriginal governance did not exist. So technically when people say the land was 'stolen' we have to have an argument about what that means. Because if we can run with the notion that it was a lawful acquisition, but that it was the wrong mode of acquisition (which was *terra nullius*), the concept of the burden of the radical title suggests that Aboriginal governance at 1788 was barnacled onto the governance and the way that structures and authority was to be distributed. The problem with Mabo is that we have had 200 years of really messing it up to actually say that we can start afresh, so we are just working our way through it. So the political sell was that we should implement the Native Title Act. The Native Title Act and its jurisprudence has moved so far away from the hope of law that – I do not say this very often and I rarely say it publicly – but very rarely do I agree with Noel Pearson. But on *this* issue, he and I are of one. The common law Native Title has become so far removed from the jurisprudence of the Native Title Act that it could be, at least conceivable, that we go back to the state-based common law because the jurisprudence has moved so far away from the common law that it is not covering the field. They are just possibilities and thankfully I am privileged in that I get to play with these possibilities.

For people who have been through Native Title or other processes of recognition, it all amounts to the same thing that my grandmother was talking about, which is that these are the points of recognition and that that system is recognising us. It does not create us, it does not sustain us and it certainly does not maintain us. But it can

3 *Mabo v Queensland (No 2)* ("Mabo") (1992) 175 CLR 1.
4 *Native Title Act 1993* (Cth).

recognise us and I think movement away from the gift or movement towards a fully-fledged acceptance of the gift is important, which in practice is two systems of law – we have legal plurality in Australia. We have it more than in one plane. We have the States, we have the Federal system so even in the white, western legal structure there is legal plurality. There are multiple jurisdictions operating all at once. And yet we have this inconceivable – in the western legal construct – capacity or ability to realise that there is more. Yet, every one of us will accept as a matter of fact that Aboriginal people were not just here first, but Aboriginal people – and when we say Aboriginal people it is that generic term, on the basis of being labelled or determined as an Aboriginal where you would have had certain things done to you or your family – we all exist as independent nations: Ngarrindjeri, Wiradjuri, Yorta Yorta. Nothing has actually interrupted it; the issue that confronts the legal system is its unwillingness to actually say that we cannot put this in it because we stuffed it up so badly that we are struggling to actually give it recognition in a form that is logical to itself.

Again it has nothing to do with how we exist. Who has seen the colourful map of Australia that represents the different nations? Would anyone deny that they are not nations?[5] So we can accept as a matter of fact that Australia has multiple jurisdictions and that prior to 1788 there were ways that our nations talked, operated, lived together – not so much together, but existed – on a continent for millennia. We came from this place, and yet we say that it still does not exist. Well, my job as a western-trained lawyer is to walk those two worlds, in order to put it into young aspiring lawyers' minds that there are multiple jurisdictions. I am not so much interested in saying to Aboriginal and Torres Strait Islander law students 'look there is another way of looking at it'. But I am interested in teaching the future judges, lawyers and politicians who go through Melbourne law school that the way that they have conceived of their legal system is moving and moving fairly rapidly.

[5] Only one person from the audience 'bravely' raised their hand.

And this again, that is what Gough Whitlam was saying about the fact that Australia has an Aboriginal history *in law*. He was a barrister that went on to push the limits of the executive power in a way that no other government had done up until that point. So we can all accept that Federation created a different structure but it also had people that were saying that the structure itself needs to change. How do we take people on that journey: that journey best symbolised by the sand going through Vincent Lingiari's hand? That promise that the state has recognised dispossession and wants to atone.

Then we have state apparatus that deals with land rights. We have the state – again, in 1983 … the 1980s were huge – in the 1980s there was the push that came from the 1970s and that came from the hope of Gough Whitlam, picked up in people like Elliott Johnston, like our grandmothers and like Uncle Lewis. The hope that this can be better, not for us, but for you because that was the time of which there was starting to be – and I do not like to use the term 'reconciliation' – but I think many Aboriginal and Torres Strait Islander people at that time reconciled with the language that we do not want to *be you*, we want to *be with you*. So we have to develop the language of saying that just because we can say that we can live with you does not mean that you can do everything to us or that you have the power to make us exist, non-exist, or to recognise us. Our Aboriginality has absolutely nothing to do with the white system. I do not know how much more I can press that.

That was the hope of law that my grandmother talks about. "I am still okay over here", she used to say, "I will not stop being a Wiradjuri woman but I want that system over there to give me the space to be this". And that is what it was about for her. Here was a person, a human being that had been told for the first 40 years of her life that she was not even human. She needed approval to love somebody; she needed approval to eat; she needed approval to serve. She was like many Aboriginal women and that was okay with her. What was not okay was that our generation post-those things, could not be able to and would not have these discussions with the non-Indigenous legal system – your legal system.

So there are many lawyers that are talking about – Shaun Berg included – we are all good at manipulating understandings of sovereignty. Aboriginal people have said, since the point of contact, we have never ceded sovereignty. What does that mean? Is that a political statement or a legal one? It is absolutely legal. It has been pushed to the side by non-Aboriginal people as something where not only do you not have sovereignty, our system is so set up that you do not exist as people so we do not even have to discuss sovereignty. But it was never part of political activism that Aboriginal people kept saying we have never ceded sovereignty. It was exercising jurisprudence in its raw form. It was one sovereign saying to another that we do not recognise you. We do not care if you do not recognise us because your recognition does not predate, it does not create us.

It has only been in the last 20 years that I have been told, been schooled that our activists, survivors of those intergenerational words of war or war of words – whichever it is supposed to be – that when our activists kept saying that we have never ceded sovereignty, somehow that was seen as a political action. No – there is another way to look at it. It was the exercise of their sovereignty. Not individual sovereignty, but on behalf of the group that they represented. It would be like Indonesia – perhaps it is not the day to talk about Gough Whitlam's recognition of the invasion of East Timor – but that is the kind of stuff, that is what sovereigns do. In legal terms they can accept or they can reject, or they can attempt to and then if they do things, they have got to be able to actually do it. In the absence of settlement or conquer and cession, we know that *terra nullius* was wrong at law and there was a language that was created. What is there? Has anyone stopped and thought, what does this actually mean? What is reconciliation? What is the hope? Because it was all for you, that Justice Brennan and Justice Deane could not deal with their Christian conscience anymore, and that is perfectly okay. That is why there was the common law.

Justice Brennan, who went on to become Chief Justice Brennan was a hardcore, black letter – not as in 'blackfella' – lawyer that, had it been an issue of statutory interpretation or constitutional

construction, he probably would have said "no, sorry". But it was based in the common law and it was based around their morality. And when you read the judgements of Justice Brennan and Justice Deane, you can sense – and almost taste – the Vatican come through. And it is no secret that that is the ilk of Christianity that those two particular judges adhered to.

Justice Toohey's judgement, it is absolutely stellar because Justice Toohey understood what it was all about. It was not about a mere property right that we can dick around with by the legislature, no they were going back saying that we have problems and we cannot fracture our own legal system, but we have to be able to explain it. So we have moved away legally from explaining it to say "let us create the smokescreen over – Native Title – here but we still have to deal with the issue of our legal system not making sense". In the absence of those three things: *terra nullius* has been kicked out; cession did not occur by everyone's admission, including the white legal system; there was no conquering by admission of the white legal system. So what have you got? You have got a problem.

So how do you start to unpick it? How do you actually start to say that this is the hope of law than Nan was talking about? It was about turning the mirror, it was about "look at what you have for you and it is not affecting me". For Nan, whatever term you wanted to put on it, she might not have been 'human at law' or it might have been the auspices of the 'Flora and Fauna Act' that controlled her every day, but her ontology or epistemology is Wiradjuri. What she was never denied and what the legal system cannot deny and I think this is what is running through modern conceptions of Aboriginality which are very specific to place or to country, is that it never interrupted her sense of that self. It never interrupted her ability to – they might not have publicly practiced law, they might not have publicly done things – but the fact that even after all of these things were recognised by the white legal system, those other things still went on and still continued. It is the whole point of Mabo, which is not just Native Title … but at 1788 you had to have a law and custom and you must maintain that law and custom, said another way and I get that you can take those concepts but guess what, that is a society.

And how do you actually have and sustain law and custom? You must have social conceptions of order and authority, and who gets to enforce order? So the legal system itself is saying it is one of those judicial inconsistencies – if it quacks like a duck, then somehow you will be bonking a sheep. It should be a duck.

We have to be able to understand this and pare it back to what it really is. Our Wiradjuri nation, we are in the process of reordering, renewing our sense of authority. Said another way, we are re-establishing our government. I know that there are other nations in Australia doing exactly the same thing. Nobody is offended by it, in fact people welcome it. People might want to get caught in semantics and say "well, you are not really a nation, you are asking me to explain this to you in English so we will call it what we need to so we can convey that message to you". If it is a nation, if it is a people or a group, what business is it of yours other than to accept it, because that is the exercise and practice of sovereignty? *That* has a new lease of life in the absence of *terra nullius*.

And that is where you realise that the man we are memorialising today, he had an idea that the legal system could change, not just how the legal system treats Aboriginal and Torres Strait Islander people. And a great deal of the Royal Commission recommendations were about the physical treatment of Aboriginal and Torres Strait Islander people in custody, but there were some of the recommendations that, read more broadly, are about the expression of the legal system: it must change and it must adapt. It created the concept of Indigenous, it created Aboriginality and it created the problem of over-policing. It created social dysfunction which we all can recognise, because that is what we are told. Aboriginal communities have been largely disadvantaged because of colonisation, because of the processes and policies implemented. But at the end of the day, we are still Aboriginal people with all our dysfunction. So, on the one hand you keep saying "that is who you are", but then on the other now you have to say that you really cannot participate.

There are some things that we know from the Royal Commission that will alleviate some of the disadvantage, such as engaging with Aboriginal and Torres Strait Islander people about issues that affect their everyday life. We know that Aboriginal people who have the ability and capacity to return to country actually get better physical health outcomes, as well as mental health outcomes. We know that Aboriginal and Torres Strait Islander people, if we go to school and have the opportunity to finish school, we have the capacity to create intergenerational change – these are all known. And yet, on the back of all of that we are still Aboriginal people and we are still exercising our sovereignty; we are still exercising our difference and we are still demanding of the white legal system the hope that my grandmother said I have to be able to explain in my lifetime in a way that she could not.

So, my message and what I take from the Royal Commission is our Aboriginal sovereignty and sovereignties has been going on – we are still Aboriginal and Torres Strait Islander people. It is your legal system that is in a state of flux. And we are more than happy to say that we hope that it gets better for you. On that note I will finish because I think it is important that when we memorialise, we do not place what those people stood for back in history. We have to reinvigorate what they stood for, what they were able to achieve because we have to have that shared sense of the future. But the shared sense of the future is where we are wedded to each other; we do not swallow each other.

Thank you very much for this opportunity.