ABORIGINAL WOMEN AND THE RIGHT TO SELF-DETERMINATION: A CAPABILITIES APPROACH TO CONSTITUTIONAL REFORM

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ABSTRACT

The right to self-determination underpins the normative framework of Indigenous peoples' rights. It is now recognised in international law in the United Nations Declaration on the Rights of Indigenous Peoples. This thesis argues that the right to self-determination as it is recognised in international law, and as it is translated by the state and constructed by the Aboriginal political domain, does not pay adequate attention to the situation of Indigenous women. It is a framework that does not take the lives of women into account but is based on male lives. This thesis questions whether the right to self-determination in its current form promotes Aboriginal women’s capability to freely determine their political status and freely pursue their economic, social and cultural development.

Aboriginal women in Australia are the most disadvantaged and marginalised group in Australia and this thesis examines how the undernourished concept of self-determination has affected the lives of Australian Aboriginal women. It studies how the male construction of self-determination has manifested in distorted policy-making and judicial decisions that impact negatively upon Aboriginal women. Having identified the shortcomings of the right to self-determination for Aboriginal women, this thesis suggests an alternative approach to achieving self-determination, based upon the capabilities theory developed by Amartya Sen and Martha Nussbaum.

The thesis explores in particular one aspect of Martha Nussbaum’s theory of capabilities, a constitutional guarantee to equality. The potential of this alternative constitutional approach is explored with reference to two case studies. The first is the Aboriginal and Torres Strait Islander Commission, which reflected an institutional approach to self-determination. The second case study entails an analysis of Canada’s constitutional patriation process, which is an example of a constitutional approach to self-determination. This thesis argues that, in order for self-determination to enrich Aboriginal women’s lives, Aboriginal women must first reach a threshold-level of capabilities in which they are able to live a dignified human life. This is more likely to occur as a consequence of constitutional reform than an institutional approach to self-determination.
DECLARATION

This is to certify that:

(i) The thesis comprises only my original work towards a PhD;
(ii) Due acknowledgement has been made in the text to all other material used; and
(iii) The thesis is less than 100 000 words in length, exclusive of bibliography.

Megan Jane Davis
10 June 2010
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INTRODUCTION

The Aboriginal movement in Australia has little ideology. ... There are a few vague dreams about; a few catch-phrases are mouthed — 'self-determination', 'land rights', compensation', 'an independent state', 'black liberation', 'we must get back our Aboriginality' — but there is no coherent drive to achieve any of these things.¹

We have failed to examine or critique what has been happening over time — within our communities. We have failed to maintain a careful watch over the changes which have occurred in our cultural values and practices. We have pretended to ourselves and the outside world that we still maintain a purity of our cultural values. Yet if this were true we would not be experiencing the social and cultural trauma which is facing us today. For too long now, we have allowed the red, black and yellow flag to dominate our lives in a negative sense of defiance and protest.²

There is very little written in Australia about Aboriginal women and self-determination, a concept with a long pedigree in international law and politics and a relatively more recent history in the politics of Indigenous peoples. The statements quoted above, made by Aboriginal women during the so-called 'self-determination era' of Australian policy in Indigenous affairs (1972–2005), reflect an unease about the Aboriginal political domain and its discursive rights agenda. Such statements are rarely aired publicly. This is because the collective nature of Aboriginal culture means that intra-cultural tensions and divisions are played down, especially as they relate to Aboriginal women.

This thesis questions whether the right of self-determination, particularly as it has operated in international law, Australian policy and Aboriginal politics, is able to facilitate Aboriginal women’s capability to freely determine their political status and freely pursue their economic, social and cultural development. This is an important question because Aboriginal women in Australia are the most vulnerable and marginalised group of any in Australian society. They are routinely subjected to violence and high levels of stress, and are regularly positioned by statistical data in the lowest categories of economic and social status. Despite the extensive chronicling of these facts, they are not taken into account in the context of Indigenous peoples’ rights and self-determination.

This thesis argues that the right to self-determination, as it is recognised in international law, translated by the state into domestic law and adopted by Aboriginal communities,

¹ Hilary Saunders quoted in Kevin Gilbert, Living Black: Blacks Talk to Kevin Gilbert (1977) 93.
frequently marginalises or excludes Aboriginal women from decisions that are made about their lives. This thesis investigates how each of these three domains — international law, the state and Aboriginal politics — construct Aboriginal women within the norm of self-determination and articulates an approach to conceptualising the right to self-determination for Indigenous peoples that is inclusive of Aboriginal women. This alternative approach involves the adoption of the ‘capabilities’ approach pioneered by Amartya Sen and Martha Nussbaum as a better framework for the advancement of Indigenous rights.

This thesis first examines international law as the primary domain in which the norm of self-determination has evolved. In order to identify the shortcomings in how Indigenous peoples’ right to self-determination is currently understood, it is necessary to chart the history of the right to self-determination in international law. Chapter One maps the development of self-determination from a political theory during the Enlightenment period to its evolution into a legal norm during the decolonisation era. This history is critical to a better understanding of why it is that the modern right to self-determination in international law pays no attention to Aboriginal women. Chapter One also surveys Indigenous peoples’ engagement with the United Nations system and how that activity led to the standard-setting exercise that resulted in the United Nations Declaration on the Rights of Indigenous Peoples (‘UNDRIP’) adopted in 2007. Chapter One concludes by considering how Aboriginal women feature within the normative framework of the UNDRIP and international law more broadly. The UNDRIP privileges an institutional approach to self-determination expressly precluding secession and committing Indigenous peoples to maintaining and developing their own representative institutions. The state-centric nature of the right to self-determination means that very little attention has been paid to how Aboriginal women are characterised within the collective.

Chapter Two examines another domain influential in fashioning the right to self-determination, the state. This chapter considers how the right to self-determination is translated domestically from international law by the state and how that affects Aboriginal women. Chapter Two focuses on the period known as the self-determination era when

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successive Australian Commonwealth governments had a formal policy of self-determination (1972–2005).

Chapter Two discusses the challenges faced by Aboriginal women, as seen through their own eyes, during the self-determination era. The chapter analyses a number of significant reports of the period, including a comprehensive national report on Aboriginal and Torres Strait Islander women commissioned by the Commonwealth Government — the only report of this kind in Australia’s history. Chapter Two then considers the way the state responded to Aboriginal women’s issues during this period. It begins by explaining the culture of institutional racism which skews the way the state responds to Indigenous peoples’ issues. Next, the chapter raises intersectionality as significant to the way Aboriginal women experience Australian public institutions. Intersectionality means Aboriginal women’s disadvantage is compounded by both race and gender. Two examples are then used to demonstrate the state’s inertia and/or indifference toward Aboriginal women during the era of self-determination. Firstly, Aboriginal women’s exclusion from the Royal Commission into Aboriginal Deaths in Custody is analysed; and secondly, the example of distorted customary law — or bullshit law — is examined in regard to the way Aboriginal men have succeeded in having their sentences mitigated for violent crimes against Aboriginal women on the basis of cultural practice or belief. Chapter Two demonstrates that, despite the state’s long-standing and continuing awareness of the distinct and unique challenges faced by Aboriginal women, the state has largely failed to respond to the circumstances of women and privileged the response to the challenges of Aboriginal men. At this point the right to self-determination emerges as being blind to issues of gender, discursive and not fully fleshed and located only between the collective and the state.

The third and final domain that is influential in the development of the right to self-determination — the Aboriginal political domain — is explored in Chapter Three. The term ‘Aboriginal political domain’ is employed as a broad concept encompassing those individuals and groups that constitute the Aboriginal rights movement. This includes Aboriginal activists, Aboriginal academics, Aboriginal writers and singers, and Aboriginal organisations including land councils and service providers. This chapter surveys how the
Aboriginal political domain writes and speaks of self-determination, and here we see that the self-determination project has been primarily tied to land and to the *Racial Discrimination Act 1975* (Cth), which is the domestic expression of the United Nations *Convention on the Elimination of All Forms of Racial Discrimination*.

Chapter Three reveals within the realm of Aboriginal politics a one-dimensional, universalist notion of Aboriginal self-determination. The chapter draws on a body of literature that reinforces a series of deeply ingrained cultural narratives: that race trumps gender; that Aboriginal men have suffered more than Aboriginal women in colonisation; and that Aboriginal women’s experiences are utterly incomprehensible to other women. Chapter Three critically engages with this literature arguing that these narratives work to obfuscate the interpersonal nature of the violence prevalent in communities between Aboriginal men and Aboriginal women. Deployed primarily as a political tool in the adversarial battle between the colonisers and first peoples, the privileging of race and concomitant marginalisation of gender in the right to self-determination has ultimately been to the detriment of Aboriginal women’s wellbeing and bodily integrity.

Having established the exigency of developing an alternative way of understanding the right to self-determination in the first three chapters, Chapter Four addresses the question of how to reframe the right to self-determination in ways that are inclusive of Aboriginal women. Chapter Four introduces Martha Nussbaum’s capabilities approach as an alternative approach that has not been applied to the situation of Aboriginal women and the right to self-determination in Australia or elsewhere. Nussbaum developed her concept of capabilities from a concern for the way women in many parts of the world lack the material and political support for basic human functions. Chapter Four argues that the capabilities approach is a useful framework for understanding the right to self-determination. It enlivens the traditional rights advocacy that has dominated the Aboriginal political domain in a way that gives specificity and shape to the language of human rights.

The use of Nussbaum’s list of functional human capabilities in this thesis is aimed at transforming the conversation in Australia about self-determination. In particular this

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thesis explores one aspect of Nussbaum's theory, constitutional guarantees to fundamental human capabilities. According to Nussbaum, if a state is making or remaking its constitution, it ought to draw on the capabilities approach as a framework for selecting those entitlements that should be guaranteed by the state. Constitutional entrenchment means that the state is compelled to respect, prioritise and resource fundamental political rights which ensure that all citizens meet the basic threshold of capabilities that is required to live a dignified human life.

Chapter Five develops the idea of applying the capabilities approach to the right to self-determination and Aboriginal rights discourse by evaluating the effectiveness of the traditional, non-constitutional, statutory approach to self-determination in Australia. There is a particular focus on the Aboriginal and Torres Strait Islander Commission ('ATSIC'), an independent statutory commission that was an expression of successive Commonwealth governments' formal support for the right to self-determination, during the self-determination era. Applying the capabilities approach to the situation of Aboriginal women during the ATSIC period, it becomes clear that Aboriginal women did not fare well under this institutional approach and their economic, social and cultural development was seriously undermined.

Chapter Six explains how the constitutional entrenchment of rights (re)shapes the right to self-determination. Here Canada is used as a case study of constitutional reform. In Canada, the movement in the early 1980s towards constitutional 'patriation' led to the entrenchment of Indigenous-specific rights in the Canadian Constitution alongside fundamental rights and freedoms in the Canadian Charter of Rights and Freedoms. Evidence suggests that Aboriginal women in Canada fare better in terms of political voice and legal rights than their Australian counterparts, and it is argued in this chapter that this is largely the result of the entrenchment of rights in the Canadian Constitution. Chapter Six highlights the way that a constitutional conversation can alter the normative framework of self-determination. The chapter ends by considering Aboriginal women and the legal and extra-legal transformative value of constitutional reform.
The thesis concludes by arguing for a shift in the conversation about the right to self-determination in Australia. It advocates for the constitutional guarantee of rights that are more likely to enable Aboriginal women to reach a minimum threshold of capabilities required to achieve self-determination. The goal of the right to self-determination should not be solely a question of what is best for the community but also a question of how individuals within the group are faring based on capability and functioning: *what is she actually able to do and to be?*

The strength of the capabilities approach is its inclusivity. It can successfully negotiate the male-dominated Indigenous rights terrain in Australia because it is not a women-specific framework *per se.* Instead the approach means providing a more accurate and community-engaged way of understanding and measuring the right to self-determination: *what are* Aboriginal women actually able to do and be as opposed to what *ought* Aboriginal women be able to do and be? The constitutional aspect is critical because entrenchment of rights should compel the state to provide the material and political support required to deliver citizens the minimum threshold required for a dignified human life. Such an approach is more likely (than the institutional, non-constitutional approach) to marshal the combined capabilities that are vital to enabling Aboriginal women to realise the right to self-determination.

**A Note on Terminology**

In this thesis I will use the term ‘Indigenous peoples’ in an international legal sense because that is the term used in international instruments and in international discussions about Indigenous peoples’ issues. When referring to those international legal norms in an Australian context I will continue to use ‘Indigenous peoples’. Furthermore in the Australian context the policy of the Commonwealth and state governments is to use the term ‘Indigenous peoples’ to define all Indigenous peoples, which includes Aboriginal peoples and Torres Strait Islander peoples in Australia. When this occurs I will use the term ‘Indigenous peoples’. When I refer to the ‘Indigenous political domain’ I am referring to both Aboriginal and Torres Strait Islander rights advocates and activists. However, this thesis is focused primarily on Aboriginal women. For this reason I generally use the term ‘Aboriginal’ to distinguish from Torres Strait Islanders living in the Torres Strait and on the
mainland. Where I can identify the specific Aboriginal clan of an Aboriginal woman or man, I do so. In the context of Canada, I mainly adopt the term ‘Aboriginal women’ as inclusive of Indian, Metis and Inuit women. I interchange the use of ‘Indigenous’, ‘Indian’ and ‘Aboriginal’ where required. Finally in parts of this entire thesis when it cannot be avoided I may use the term ‘Aboriginal women’ with a broad brush.
CHAPTER ONE: THE RIGHT TO SELF-DETERMINATION IN INTERNATIONAL LAW

I  INTRODUCTION

Indigenous peoples around the world invoke the right to self-determination as the normative basis of their relationship with the state. This has been influenced by the development of international human rights law and Indigenous peoples’ engagement with the United Nations. For most Indigenous peoples, the right to self-determination involves exercising control over their own communities and participating in decision-making processes and the design of policies and programs that affect their communities. These aspects of self-determination are generally referred to as ‘internal’ features of the right, and are reflected in the UN Declaration on the Rights of Indigenous Peoples (‘UNDRIP’), as adopted by the UN General Assembly in 2007.

Yet there remain obstacles to Indigenous peoples’ right to self-determination, especially because in recent history self-determination has been equated with decolonisation. This concept of self-determination, known as the ‘saltwater’ or ‘bluewater’ thesis, historically limited self-determination to non-self-governing colonies separated by the sea from their administering territory, and thereby excluded internal groups from the right to self-determination. As a result, the right to self-determination became synonymous, at least in the minds of states, with threats to state sovereignty and questions about territorial integrity and secession. To characterise the right to self-determination in such a limited fashion, however, is to ignore many of the developments over the last half century. This chapter aims to capture the evolving nature of self-determination and explore why Indigenous peoples attach such significance to the right to self-determination. Establishing this is

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important in order to understand how Indigenous women are situated in the normative framework of Indigenous peoples' right to self-determination.

This chapter begins with the historical transformation of the political concept of self-determination into a legal right. This background reveals the tension in international law regarding the internal and external aspects of self-determination and thus identifies the difficulties some states have with the right to self-determination as a result of that bifurcation. Next is an exploration of Indigenous peoples' adoption of self-determination as anchoring their internal struggles within the state. Accordingly this part focuses on Indigenous peoples' engagement with international institutions (predominantly the UN system), which has been characterised by Indigenous peoples as an expression of 'external' self-determination, and the development of Indigenous-specific mechanisms. In particular it focuses on the elaboration of the UNDRIP in two working groups of the UN Commission on Human Rights where the right to self-determination was so controversial that it delayed the adoption of a final draft for 11 years. The chapter concludes with a discussion of how Indigenous women are characterised within the normative framework of self-determination in international law.

II BACKGROUND: SELF-DETERMINATION IN INTERNATIONAL LAW

A The Historical Development of Self-Determination in International Law

The principle of self-determination is regarded as having its genesis in the Enlightenment.\(^5\) It developed as a response to the concentration and abuse of power over many centuries in unaccountable institutions such as the monarchy and the church.\(^6\) The principle of self-determination emphasised the right of peoples to participate in the internal governance of the state and that the state should be self-governing — free from external interference and accountable to the citizenry for decisions that are made.\(^7\) The principle of self-determination influenced the French and American revolutions and, as Antonio Cassese has

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observed of this period, the ‘self’ of the state shifted and was no longer located in the monarch but in the citizens of the state.\(^8\)

Prior to World War Two, self-determination remained more of a political concept than a legal right. This was evident in the *Aaland Islands* case, in which the International Committee of Jurists considered the position of the Aaland Islanders — Swedish-speaking Finns who wanted to become independent of Finland and join Sweden.\(^9\) Originally the Aaland Islands belonged to Sweden; however, they came into the possession of Russia in 1809 and then eventually Finland.\(^10\) Finland argued that if the Aaland Islands were permitted to become part of Sweden this would undermine the territorial integrity of the newly independent Finland. The International Committee of Jurists, which had been engaged by the League of Nations to provide an advisory opinion, held that while self-determination was said to be a part of ‘modern political thought’ it was not ‘upon the same footing as a positive rule of the Law of Nations’ and therefore not a right to secede.\(^11\)

During the interwar period the most significant advance in elucidating the principle of self-determination was the proposal by United States President Woodrow Wilson to include a right to self-determination in the *Covenant of the League of Nations*.\(^12\) Wilson’s proposal contributed to the nascent idea in international affairs of the right to self-determination as having both an external and internal form.\(^13\) Wilson proposed that:

> The Contracting Powers unite in guaranteeing to each other political independence and territorial integrity; but it is understood between them that such territorial adjustments, if any, as may in the future become necessary by reason of changes in present racial and political relationships, pursuant to the principle of self-determination, and also such territorial readjustments as may in the judgment of three fourths of the Delegates be demanded by the welfare and manifest interest of the people concerned, may be affected if

\(^8\) Cassese, *Self-Determination of Peoples*, above n 6, 5.


\(^10\) Cassese, *Self-Determination of Peoples*, above n 6, 27.


agreeable to those peoples; and that territorial changes may in equity involve material compensation.14

Wilson insisted that the interests of populations within territories conquered by the Allies be taken into account.15 This reflected an emerging idea in international law that the legitimacy of the internal governance of a state was contingent upon the expression of the popular will through the direct participation of the people in electing their government. President Wilson was unsuccessful in his endeavour — partly because there was no international consensus that self-determination was a legal right.16 Yet his idea foreshadowed an argument that would flourish after World War Two.

Prior to the end of World War Two in 1941 British Prime Minister Winston Churchill and United States President Franklin Roosevelt signed a declaration known as the *Atlantic Charter*. The Charter expressed common principles of the Allies during the war and after the war on which to ‘base their hopes for a better future for the world’.17 The Charter listed eight points, which included ‘self-government’, described as ‘respect for the right of all peoples to choose the form of government under which they will live’, and the desire to see ‘no territorial changes that do not accord with the freely expressed wishes of the peoples concerned’.18

The reference to ‘self-government’ was controversial because it implied a right to self-determination. There were concerns about the post-World War Two timing of the *Atlantic Charter* and how nationalists would interpret its provisions.19 According to Kimball, some states considered the reference to self-government as contradictory to the aims of the allies because ‘self-determination was read by nationalists to mean independence and independence carried the message of immediacy’.20 Although the language of ‘self-

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14 Lansing, above n 13, 94.
15 See Point 5 of Woodrow Wilson Speech, Paris Peace Conference, 8 January 1918: ‘A free open-minded and absolutely impartial adjustment of all colonial claims, based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the populations concerned must have equal weight with the equitable claims of the government whose title is to be determined’: reprinted in Cassese, *Self-Determination of Peoples*, above n 6, 21.
16 See generally Cassese, *Self-Determination of Peoples*, above n 6, 22.
17 *Atlantic Charter* (1941).
18 Ibid.
20 Ibid.
government' was used and not 'self-determination', there was a call for clarifications to be made because of the universal application of the Charter and the failure to distinguish between the two concepts.\(^{21}\) The controversy that followed the inclusion of self-determination in the *Atlantic Charter* reveals that the right still remained unsettled in international law.

**B Self-Determination in the UN Charter**

The *UN Charter* was drafted and developed following the end of World War Two.\(^{22}\) It was mostly drafted during the 1994 Dumbarton Oaks Conference and finalised at the UN Conference on International Organization held in San Francisco in 1945 (the ‘San Francisco Conference’). The right to self-determination did not feature in the discussions leading to the creation of the *UN Charter* or in the Dumbarton Oaks Proposals which produced the draft charter.

It was only at the San Francisco Conference, following a proposal by the Soviet Union, that the concept of self-determination was accepted by the Foreign Ministers of the ‘Big Four’ (the United States, Britain, the USSR and France) and made its way into the Charter as a sponsors’ amendment. Russell notes that:

> the Soviet Union ‘attached first-rate importance’ to the newly added principles of ‘equality and the self-determination of nations’. These goals would ‘draw [the] particular attention of the populations of colonies and mandated territories,’ which would help to realize them sooner. ... This should be promoted by the United Nations, which must act to expedite ‘the realization of the principles of equality and self-determination of nations’.\(^{23}\)

There were two reasons for the Soviet enthusiasm for the inclusion of self-determination in the *UN Charter*. One reason was that self-determination had long been recognised as a part of the socialist movement.\(^{24}\) Stalin had said in 1913:

> The right of self-determination means that a nation may arrange its life in the way it wishes. It has the right to arrange its life on the basis of autonomy. It has the right to

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\(^{21}\) Ibid 92.

\(^{22}\) *Charter of the United Nations*.


enter into federal relations with other nations. It has the right to complete secession. Nations are sovereign, and all nations are equal.25

Self-determination was a part of Soviet foreign policy, and was a leading principle of the Soviet Union. The Soviet proposal included a right of secession and a prohibition on annexation.26 The second reason for Soviet support of self-determination was that it represented an opportunity for the Soviet Union to weaken the power-base of its European rivals and allies given that the power and influence of those and other European countries lay in their overseas colonial territories. It was in the interests of the Soviet Union to support a principle that would come to be used as the basis for widespread decolonisation and ultimately weaken European power.

In the end, self-determination was mentioned twice in the UN Charter, in Articles 1(2) and 55.27 Article 1 includes in the purposes of the UN: ‘to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace’. Article 55 lists the goals the UN promotes in the interest of international economic and social co-operation ‘with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples’.

Still, after the inclusion of self-determination in the UN Charter, supported by the ‘strange alliance’ between Wilson and Stalin, international law remained uncertain about the content of the right to self-determination.28 Its recognition in international legal instruments continued to oscillate between the ‘flowery and loose rhetoric of freedom and liberation’, and the ‘dry and tight language of legal disclaimers’. It unequivocally precluded the right to secession from existing states.29

25 Ibid.
27 Charter of the United Nations.
28 Cassese, Self-Determination of Peoples, above n 6, 6.
29 Ibid.
C  Self-Determination and Decolonisation

By 1960 many UN members argued that the organisation was working too slowly on decolonising non-self-governing territories and the next step in the development of the principle of self-determination was the General Assembly’s adoption of the Declaration on the Granting of Independence to Colonial Countries and Peoples (‘Resolution 1514’). Resolution 1514 was adopted in December 1960, establishing the normative basis of independence for colonial territories. Resolution 1514 elucidated self-determination in the colonial context as the right of all peoples to ‘freely determine their political status and freely pursue their economic, social and cultural development’. Even so, any attempt to disrupt the national unity and territorial integrity of the state was resolved to be incompatible with the purposes of the UN Charter.

D  Taking Shape: Self-Determination as a Human Right

Following the UN Charter, the Universal Declaration on Human Rights (‘UDHR’) was adopted in 1948. The UDHR made no reference to the right to self-determination. Given the inclusion of self-determination in the UN Charter, the USSR questioned the lack of reference to the right to self-determination during the drafting sessions of the UDHR, particularly in relation to the provisions on non-discrimination and non-self-governing territories. Even so the Western states argued that the references to self-determination in the UN Charter constituted broad guidelines for the UN and did not have any application to member states as a right with legal obligations.

Nevertheless after the UDHR was adopted consensus formed toward the development of a human rights treaty to transform fundamental human rights principles into legally binding rights. Western states pushed for the development of two treaties, one addressing civil and political rights and the other economic, social and cultural rights. There was a tension...
between the Western states, which favoured the elaboration of civil and political rights, and the Soviet Union, which advocated the need for both covenants to recognise the right of all peoples to self-determination.\textsuperscript{37} In the end the Soviet Union succeeded in its approach because it was supported by developing countries.\textsuperscript{38}

In 1966, the right to self-determination was recognised in Article 1 of the \textit{International Covenant on Civil and Political Rights} (\textit{ICCPR}).\textsuperscript{39} It was also recognised in identical terms in Article 1 of the \textit{International Covenant on Economic and Social, Cultural Rights} (\textit{ICESCR}): ‘All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development’.\textsuperscript{40} This language was adopted from the second operative paragraph of Resolution 1514.\textsuperscript{41} It is noteworthy that at this point the primary concern of the Soviet Union, the main sponsor of self-determination, was for a right for colonial peoples to self-determination with the self-determination of minorities a secondary concern.\textsuperscript{42}

It was not until 1970, when the General Assembly adopted the \textit{Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations} (\textit{Friendly Relations Declaration}), that the right to self-determination began to outgrow the decolonisation context.\textsuperscript{43} The \textit{Friendly Relations Declaration} went further than any other international instrument in enumerating the content of the right to self-determination.\textsuperscript{44}

\textit{By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development.}
development, and every State has the duty to respect this right in accordance with the provisions of the Charter.44

The Declaration also included a disclaimer against any action that would compromise the territorial integrity of the state.

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.45

The cumulative impact of the debates and discussions during the drafting sessions of the ICCPR, ICESCR and the Friendly Relations Declaration, signalled a shift in the way in which self-determination was being perceived by states and claimed by Indigenous peoples.46 The debates about the inclusion of self-determination moved beyond traditional statist concerns about state sovereignty and involved deeper examination of the term ‘peoples’ and the meaning of self-determination for peoples internally within the state.

E The International Court of Justice and Self-Determination

Through its advisory opinions, especially since the 1970s, the International Court of Justice (‘ICJ’) has also been influential in the development of self-determination in international law. The ICJ advisory opinions in Namibia (1971)47 and Western Sahara (1975)48 reinforced the validity of the principle of self-determination and the importance of the freely expressed wishes of the people of a territory, though it limited the principle to non-self-governing territories. In Namibia, the Court held that ‘the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them’.49

Western Sahara, the Court made reference to the recognition of the right to self-determination in Articles 1 and 55 of the UN Charter, and held that:

[The] validity of the principle of self-determination, defined as the need to pay regard to the freely expressed will of peoples, is not affected by the fact that in certain cases the General Assembly has dispensed with the requirement of consulting the inhabitants of a given territory.50

Self-determination was also raised in the 1995 East Timor case.51 In this case, Portugal commenced proceedings in the ICJ against Australia in relation to the 1989 treaty between Australia and Indonesia on the exploitation of resources in the Timor Gap. Portugal claimed that the treaty constituted an unlawful act by Australia because it infringed the rights of East Timor to self-determination and permanent sovereignty over its resources.

The East Timor case did not deal directly with the question of self-determination because it was dismissed on jurisdictional grounds. However, the Court recognised the erga omnes character of the right to self-determination — an obligation that all states have to each other as a matter of international law. While the ruling did not affect the outcome of the case, it was significant nonetheless.

In the Court’s view, Portugal’s assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an erga omnes character, is ir reproachable. The principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court ... it is one of the essential principles of contemporary international law.52

The erga omnes nature of the right to self-determination was further confirmed to be of universal application in the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory in 2004.53

F Self-Determination and Democratic Governance: From Decolonisation to Democratisation

At the end of the Cold War greater focus came to be directed toward the internal governance of states as an aspect of self-determination. This was largely because, until

51 East Timor (Portugal v Australia) (Judgment) [1995] ICJ Rep 90.
52 Ibid 102.
53 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 136.
then, there had been no international consensus on how the internal affairs of a state should be organised: ‘The United Nations, an organisation founded on the principle of sovereign equality of ideologically diverse States, seemed an unlikely vehicle to further a specific mode of internal governance’.

Nonetheless following the end of communism as a viable political system, arguments emerged in international law about democratic governance as ‘the foundation of political legitimacy’. This theory was popularised by Francis Fukuyama as ‘the end of history’ — meaning that market-based liberal democracy had triumphed over communism. Thomas Franck postulated self-determination as being at ‘the core of the democratic entitlement’ constituting the ‘right of a people in an established territory to determine its collective political destiny in a democratic fashion’. This norm, Franck argued, was derived from the international principle of the right to self-determination, the ‘oldest democratic entitlement’. Franck’s thesis sought to establish democratic governance as a ‘normative rule of the international system’. The norm of democratic governance is also said to derive from the right to political participation as established in the UN Charter, Article 21 of the UDHR and Article 25 of the ICCPR:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:
(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

57 Franck, above n 55, 52.
58 Ibid.
59 Ibid 46.
(c) To have access, on general terms of equality, to public service in his country. Free and fair, periodic, multi-party elections embody this entitlement. The development of this notion of the right to democratic governance signals a shift in the international understanding of the right to self-determination from decolonisation to democratisation. This has been bolstered by the support of major international institutions such as the European Union and Organization of American States, which require political democracy as a condition of membership and use democratisation as a 'carrot and stick approach' with respect to legal recognition of new states and governments or the provision of development aid.

G Conclusion

This section has revealed the ambivalence of international law toward self-determination and the ambiguity of its status as a legal right of peoples. There was a shift in the understanding of self-determination from a political principle to a legal right following the period of decolonisation and the Friendly Relations Declaration in 1961. Decolonisation marked a change in the way self-determination was characterised by states and by international law. Furthermore, the end of the Cold War in 1989 saw an emerging broadening of the right to self-determination emphasising the political participation of peoples as crucial to the exercise of the internal aspect of self-determination.

III The Development of the Indigenous Right to Self-Determination in International Law

The first record of Indigenous peoples’ engagement with the international state system was in the 1920s. A Haudenosaunee delegation appealed to the League of Nations to resolve the issue of sovereignty between the Iroquois Confederacy and Canada, and a Maori leader, T W Ratana, petitioned King George and the League of Nations over the dishonouring of the Treaty of Waitangi. The notion of Indigenous peoples’ rights in international law was taken up as early as the 1930s by the International Labour Organization ('ILO'), whose

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60 ICCPR art 25. See also Human Rights Committee, General Comment 25, UN Doc CCPR/C/21/Rev.1/Add.7 (1996).
61 Marks, above n 54, 542.
62 Fox and Roth, above n 54, 8.
activities led to the development of the first comprehensive, Indigenous-specific instrument in international law, the 1957 *ILO Convention 107 on Indigenous and Tribal Populations* ('*ILO 107*').

In 1949, the General Assembly showed its first recorded interest in Indigenous issues with the adoption of a resolution recommending that the Economic and Social Council ('ECOSOC') report on the social problems of the Indigenous peoples of North America. In response some states challenged the General Assembly’s authority to make such a resolution and this led to the development of a working procedure that such studies could not be undertaken unless requested by the relevant states. In the case of the Indigenous peoples of North America no such request was ever submitted.

The 1960s is regarded as the watershed decade for Indigenous peoples’ international advocacy as it saw greater equality of access to education for Indigenous peoples around the world. For Indigenous peoples, the right to self-determination as an inherent right underpinning an Indigenous normative framework, began to gather momentum in this decade. Particularly attractive was the idea that self-determination could facilitate special political arrangements within the state in order to enhance the way Indigenous peoples determine their lives. This knowledge of the developing discourse of human rights and the UN system led to an international movement for the survival of Indigenous culture demanding the right to maintain Indigenous control over decision-making, Indigenous government structures, customary laws and traditional lands, territories and resources.

### A The Cobo Report

The first serious response by the UN to Indigenous peoples’ rights as a human rights issue was in 1971 when the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities commissioned Special Rapporteur José R Martinez Cobo to

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66 UN ESCOR, 11th sess, 397th mtg, UN Doc E/SR 397 (1950).

67 Anaya, above n 63, 57.

68 Ibid.
conduct a comprehensive study of discrimination against Indigenous peoples. The Cobo report was the first detailed UN study into the ways in which Indigenous peoples suffer discrimination. Taking two decades to complete, the study was broad-ranging and covered issues of discrimination in health, housing, education, cultural rights, land rights, political rights and the administration of justice. One outcome of the Cobo report was a definition of Indigenous peoples. Cobo produced a ‘working definition’ of Indigenous peoples as:

those [peoples] ... having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories [who] consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system.

While this definition is frequently cited, it is not an official UN definition because Indigenous peoples have argued at the UN that Indigenous identity should not be prescribed by states. For this reason the UN encourages a policy of self-identification. According to the UN Permanent Forum on Indigenous Issues, while no formal universal definition of ‘Indigenous peoples’ is necessary, for practical purposes the Cobo definition is the accepted understanding. However, for some states the Cobo definition is unacceptable — in particular some Asian and African member states have argued in the past that Indigenous peoples as defined by Cobo do not exist in their regions and as such they have preferred to conflate ‘Indigenous’ with ‘minority’ groups.

The right to self-determination was central to the final recommendations of the Cobo report in 1983. Cobo described the right to self-determination as a ‘basic pre-condition’ for Indigenous peoples’ enjoyment of their fundamental rights and that self-determination existed at many levels including the political and economic, social and cultural.
characterised the internal connotation of self-determination for Indigenous peoples as follows: ‘a people or group possessing a definite territory may be autonomous in the sense of possessing a separate and distinct administrative structure and judicial system, determined by and intrinsic to that people or group’. Cobo went further to state that in the ‘widest sense of its “external” connotations this right means the right to constitute a state and includes the right to choose various forms of association with other political communities’.

During the period following the Cobo report Indigenous peoples began to form alliances with other civil society groups in order to bolster support for their legal activism internationally. In 1977 a non-governmental organisation (‘NGO’) conference was held in Geneva on discrimination against Indigenous populations in the Americas. This conference exposed more Indigenous peoples to the UN system and over time the Indigenous presence at UN human rights forums increased. The UN estimated that this international movement represented Indigenous populations numbering over 300 million worldwide in over 70 different states. This movement called for greater scrutiny of the way states, hitherto shielded by state sovereignty, treated Indigenous peoples.

Dalee Sambo Dorough, one of the key figures in the international Indigenous movement, saw this advocacy as an external expression of self-determination:

This false dichotomy [between ‘internal’ and ‘external’ self-determination] has been set up by States in order to confine indigenous peoples’ right to self-determination to one of domestic or State prescription. … The expressions of indigenous peoples in this seminar, at the UN … and other international fora are examples of the external exercise of the right to self-determination. We, ourselves, are expressing our worldviews and perspectives on the

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74 Ibid.
75 Ibid.
78 Ibid.
international plane, and making our voices heard outside of or external to our own communities. And, this is one aspect of the right to self-determination.79

This advocacy for self-determination brought the world’s attention to the contemporary manifestations of dispossession. Regardless of the diverse economic, political and social situations in which Indigenous peoples live, their experiences reflected a universal narrative of dispossession from lands, loss of autonomy and control, loss of languages and institutional discrimination in domestic laws and policies. Even so, long before the UN began work on the Cobo report in the 1970s, the ILO had been engaged in Indigenous peoples’ issues.

B  International Labour Organization

Finalised in 1957, ILO 107 was the first international instrument that recognised Indigenous peoples' unique rights. ILO 107 included rights to traditional land, equality and non-discrimination in employment opportunities, protection against forced displacement and promotion and protection of cultural rights. ILO 107 was heavily criticised by Indigenous peoples because it failed to recognise the right to self-determination expressly and sought to characterise Indigenous peoples as constituting simply one of many minority groups that make up the state.80 It promoted the assimilation and integration of Indigenous peoples into the dominant society of the state, referred to Indigenous ‘populations’, not peoples, and described them as ‘less advanced’.81 Eventually a new ILO convention was developed in response to Indigenous criticisms.82

The 1989 ILO Convention 169 on Indigenous and Tribal Populations (‘ILO 169’) takes a vastly different approach to Indigenous peoples’ rights than its predecessor.83 ILO 169

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acknowledges the importance of Indigenous peoples’ own legal and cultural institutions and their right to exist as distinct groups within national societies. This philosophy is reflected in the preamble, which recognises ‘the aspirations of Indigenous peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live’. ILO 169 also enumerates state obligations to consult with Indigenous peoples on the legislative and administrative measures that affect them. As at 1 May 2010, ILO 169 has 21 ratifications.

The ILO 169 is still criticised by Indigenous peoples because it is said to remain ‘assimilationist in character’. One of the main criticisms stems from the drafting process. Indigenous peoples felt they were excluded from the negotiations. Though this is partly due to the tripartite ILO processes — involving governments, unions and employers — Indigenous peoples were not able to speak at the formal drafting meetings and were only invited to the union meetings.

Textual criticisms of the ILO 169 include the manner in which land and territories provisions restrict recognition of land to only those lands Indigenous peoples own and occupy today, with no regard to rights to land that Indigenous peoples used to own and occupy. Also, the word ‘peoples’ was only used on the proviso that the following disclaimer was included: ‘the use of the term “peoples” in this convention shall not be construed as having any implications as regards the rights which may attach to the term under international law’. For Indigenous peoples the suggestion that they are not entitled to the right to self-determination in international law and the explicit rejection of the idea that Indigenous peoples cannot secede was discriminatory and a denial of the right to self-

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84 ILO 169.
85 ILO 169, preambular paragraph 5. See Barsh, above n 80.
86 These are by Argentina, Bolivia, Brazil, Central African Republic, Chile, Columbia, Costa Rica, Denmark, Dominica, Ecuador, Fiji, Guatemala, Honduras, Mexico, Nepal, Netherlands, Norway, Paraguay, Peru, Spain and Venezuela.
determination. Even though Indigenous peoples have consistently emphasised that in most cases secession is not the desired outcome of Indigenous self-determination, Indigenous peoples’ objection to the ILO 169’s disclaimer and their protest at the implicit denial of Indigenous peoples’ right to form a new state no doubt contributed to ongoing state concerns about Indigenous peoples’ right to self-determination and associated concerns about sovereignty and territorial integrity. Finally, neither of the ILO Conventions dealt with Indigenous women’s issues in any specific way and there was no differentiation between the rights or needs of Aboriginal women and men. Meanwhile many Indigenous groups have actively discouraged their states from ratifying the ILO 169 while waiting for a more comprehensive instrument to emerge in international law.

C  UN Mechanisms on Indigenous Issues

The following are UN human rights mechanisms that have been established as a result of Indigenous peoples’ advocacy. The conceptual framework of the right to self-determination of Indigenous peoples has been developed in these bodies.

1  Working Group on Indigenous Populations

The first specialised UN mechanism to examine Indigenous issues was the Working Group on Indigenous Populations (‘WGIP’). The WGIP was established in 1982 by the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, as authorised by the ECOSOC. It was a body of five experts and its mandate was to review ‘developments pertaining to the promotion and protection of the human rights and fundamental freedoms of Indigenous populations’ and ‘to give special attention to the evolution of standards concerning the rights of such populations’. The WGIP title included the word ‘populations’ instead of ‘peoples’ in order to avoid the political problems that would inevitably arise with the use of the latter. It was argued by states that the word

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90 Ibid.
‘peoples’ would give rise to a legal obligation to recognise collective rights and, in particular, the right to secede.94

The WGIP attracted the highest number of participants for a UN working group in the UN human rights system — frequently over 1000 people. Although the WGIP could not hear specific grievances about states, it was flexible enough to permit Indigenous peoples to voice serious concerns about ongoing human rights violations.95 Each year the WGIP had a thematic mandate and this enabled the examination of a diverse range of human rights issues; for example, the right to development, education, children and youth, conflict and health. The right to self-determination was never a theme of the WGIP because of the political problems associated with the right in its application to Indigenous peoples.

Responding to state sensitivities concerning Indigenous self-determination in a 1993 working paper, the WGIP described Indigenous peoples as ‘unquestionably “peoples” in every political, social, cultural and ethnological meaning of this term’.96 The working paper argued that it was

neither logical nor scientific to treat them as the same ‘peoples’ as their neighbours, who obviously have different languages, histories and cultures ... The United Nations should not pretend, for the sake of a convenient legal fiction, that those differences do not exist.97

This statement reflects what Antonio Cassese sees as states’ arbitrary approach to the application of self-determination and the need for a more workable way in international law to determine who is entitled to self-determination.98 As the working paper states:

Certain Governments have sought to narrow the definition of ‘peoples’ in order to limit the number of groups entitled to exercise a claim to self-determination. On the contrary, indigenous groups, supported by many eminent international lawyers, have pressed for a broader application of the term ‘peoples’ before different forums of the United Nations system, and in particular before the Working Group on Indigenous Populations.99

95 Ibid.
97 Ibid [7]–[8].
98 Cassese, Self-Determination of Peoples, above n 6, 32.
99 Daes, above n 96, [4].
The WGIP was concluded in 2007. Its discussion and debate about Indigenous peoples’ status in international human rights law contributed to the development of the right to self-determination as a legal concept. The WGIP’s standard setting mandate enabled it to respond substantively to the historical and contemporary experiences raised by Indigenous peoples during the mandated ‘review of developments’ within states. At the suggestion of Indigenous peoples, an international legal instrument elaborating the rights of Indigenous peoples became the main goal of the WGIP.\textsuperscript{100} During the fourth session of the WGIP in 1985 the experts resolved to elaborate a draft declaration on Indigenous peoples’ rights.

In its time, the WGIP successfully advocated for the establishment of a permanent UN mechanism to deal with Indigenous issues, an international decade on Indigenous peoples and a Special Rapporteur to examine the human rights situation of Indigenous peoples.\textsuperscript{101} One of the most significant developments to emerge from the WGIP was the establishment of the international Indigenous caucus. The Indigenous caucus is the name given to the informal alliance of Indigenous representatives and organisations that attend UN meetings. The caucus decides upon strategy and other approaches pertaining to the advancement of Indigenous issues within the UN.

2 \textit{The International Decades of the World’s Indigenous Peoples}

The UN adopts international decades as a mechanism to raise awareness about specific issues and to encourage UN agency collaboration on particular themes or issues. In 1993 the General Assembly passed a resolution declaring an \textit{International Decade of the World’s Indigenous People} (1995–2004).\textsuperscript{102} The Decade, the first of two such decades so far, was proclaimed with a view to strengthening partnerships between UN agencies and Indigenous peoples and increasing awareness of the human rights issues facing Indigenous peoples around the world, its slogan being: ‘Indigenous People: Partnership in Action’. The first Decade had two main goals: the establishment of a permanent UN body to deal with Indigenous issues and the adoption of a UN declaration on the rights of Indigenous peoples.


\textsuperscript{101} See \textit{Implementation of the Programme of Activities of the International Decade of the World’s Indigenous People: Note by the Secretary-General}, UN Doc A/58/289 (2003).

\textsuperscript{102} \textit{International Decade of the World’s Indigenous People}, GA Res 48/163, UN GAOR, 48\textsuperscript{th} sess, Supp (No 49) at 281, UN Doc A/48/29 (1993).
In the achievement of these goals the first Decade is regarded as a success, for it led to the establishment in 2000 of the Permanent Forum on Indigenous Issues and the adoption in 2007 of the UNDRIP.

In 2005 the General Assembly adopted a resolution proclaiming the Second International Decade of the World’s Indigenous People. The Second International Decade has five main objectives: the promotion of non-discrimination and inclusion of Indigenous peoples in the development of laws, policies, resources, programs and projects; the promotion of full and effective participation of Indigenous peoples in decisions made about their lives; the redefinition of development policies to include cultural and linguistic diversity of Indigenous peoples; the adoption of targeted policies, programs, projects and budgets for the development of Indigenous peoples; and the development of strong monitoring mechanisms for accountability at the international, regional and national level.

3 Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People

In 2001, the CHR appointed a Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people. The mandate of the Special Rapporteur is to collate and exchange information on Indigenous peoples with relevant sources such as governments, Indigenous communities and NGOs. The Special Rapporteur must also make proposals and recommendations to the Human Rights Council for appropriate measures to be taken to improve the status of Indigenous peoples, their freedoms and human rights.

The first Rapporteur was Rodolfo Stavenhagen and the current Special Rapporteur is James Anaya. Stavenhagen’s term as Special Rapporteur is regarded as being successful because of the substantial work and research he undertook in visits to Guatemala, the Philippines, Mexico, Chile, Colombia, Canada, South Africa, New Zealand, Ecuador, Kenya and

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Bolivia, and on thematic issues such as education and the administration of justice.\textsuperscript{106} Reflecting the pre-UNDRIP period of his work, only some of Stavenhagen’s reports refer to the right to self-determination, and he acknowledged in his work that the right to self-determination is not always viewed positively by states.\textsuperscript{107}

The current Special Rapporteur, Professor James Anaya, began his post-UNDRIP term in 2009 and has already referred to the right to self-determination in a report to the Human Rights Council on the state’s duty to consult. Anaya argues that the right to self-determination is a ‘foundational right’ without which Indigenous peoples’ human rights both collectively and individually cannot be fully enjoyed.\textsuperscript{108} He argues that states have a duty to consult premised on Indigenous peoples’ marginalisation and disadvantaged position in regard to ‘normal democratic and representative processes’.\textsuperscript{109} Anaya asserts

\begin{itemize}
  \item \textsuperscript{109} Ibid [42].
\end{itemize}
that this duty derives from the right to self-determination which finds its normative basis in the UNDRIP and ILO 169.\textsuperscript{110}

\section*{4 UN Permanent Forum on Indigenous Issues}

Advocacy for a permanent UN body to deal with Indigenous issues originated in the WGIP. In 1993, the General Assembly called upon the CHR to consider the establishment of a permanent forum for Indigenous peoples’ issues within the UN system.\textsuperscript{111} The CHR subsequently requested the WGIP to examine the possibility of a permanent forum in 1994 and the WGIP recommended that further consultations be held.\textsuperscript{112} The General Assembly endorsed the WGIP recommendations for further UN-funded consultations in 1994.\textsuperscript{113} There were two working groups held to discuss the details of a permanent body. The first workshop was held 26–28 June 1995 in Copenhagen, Denmark and the second workshop was held in Santiago, Chile in June 1997.\textsuperscript{114} The workshops discussed issues such as location of a forum, the mandate and the membership. Significantly Indigenous peoples argued that the mandate should include promotion and protection of the right to self-determination for Indigenous peoples.\textsuperscript{115}

The second workshop in 1997 focused on the perennial issues of nomenclature: ‘peoples’ versus ‘people’.\textsuperscript{116} Indigenous peoples argued that the permanent forum should use the term Indigenous ‘peoples’ in its title. Many of the state participants at this workshop expressed the view that the use of the word ‘peoples’ would suggest a right to self-

\textsuperscript{110} Ibid [38]–[41].
\textsuperscript{111} International Decade of the World’s Indigenous People, GA Res 48/163, UN GAOR, 48th sess, Supp (No 49) at 281, UN Doc A/48/29 (1993).
determination for Indigenous peoples, the right to secession and permanent sovereignty over natural resources. At this workshop some Indigenous peoples even suggested that the permanent body be established under the mandate of the UN Trusteeship Council.

On 28 July 2000, the ECOSOC approved the establishment of the Permanent Forum on Indigenous Issues (‘PFII’) to be constituted by both Indigenous experts and representatives of states. The forum was called the Permanent Forum on Indigenous ‘Issues’ instead of the Permanent Forum on Indigenous ‘Peoples’ to avoid any legal implications stemming from the use of Indigenous ‘peoples’. The resolution established the PFII as an advisory body to ECOSOC with a mandate to discuss Indigenous issues relating to economic and social development, culture, the environment, education, health and human rights. According to the UN mandate, the Permanent Forum is specifically expected to: (a) provide advice and recommendations on Indigenous issues to the Council, as well as to programs, funds and agencies of the UN through the Council; (b) raise awareness and promote the integration and co-ordination of activities relating to the Indigenous issues within the UN system; and (c) to prepare and disseminate information on Indigenous issues.

The Forum has sixteen members who are independent experts and serve for a term of three years. Eight members are Indigenous and eight are state members. The Indigenous members are appointed by the President of ECOSOC and represent the seven Indigenous regions of the world: Africa; Asia; Central and South America and the Caribbean; the Arctic; Central and Eastern Europe, Russian Federation, Central Asia and Transcaucasia; North America; and the Pacific. The state members are elected by ECOSOC on the basis of the five UN regional groups: Africa, Asia, Eastern Europe, Latin American and the Caribbean, and Western Europe and other states. While the mandate does not expressly provide for equal gender representation it states that ECOSOC should take into account representativeness and equal opportunity for all Indigenous peoples.

117 Ibid.
118 Ibid [31].
120 Ibid [1].
While the PFII was seen as a major development in the international legal activism of Indigenous peoples, it has also been met with some scepticism in Indigenous circles. These critics argue that the PFII domesticates Indigenous issues within Western political structures and rigid working procedures and agendas to control the dissemination of information about human rights violations against Indigenous peoples and to avoid consideration of Indigenous peoples' right to self-determination. Indeed even after the adoption of the UNDRIP, the PFII has thus far found it too politically sensitive to devote a session to the theme of the right to self-determination and what it means for Indigenous peoples and for states in practice.

5  The Commission on Human Rights Inter-sessional Working Group Elaborating a Draft UN Declaration on the Rights of Indigenous Peoples

The CHR established an open-ended inter-sessional working group (‘CHRWG’) in 1995 to follow on from the WGIP’s work in drafting an international legal instrument on Indigenous rights. The final text of the Draft Declaration on the Rights of Indigenous Peoples (‘Draft Declaration’) was concluded by the WGIP in 1993 and was followed by a technical review by the Secretariat. The purpose of elaborating an international human rights instrument was to address the protection gap in legal standards pertaining to Indigenous peoples raised in WGIP. Each article was said to be a reflection on the contemporary and historical experiences of Indigenous peoples around the world.

Every paragraph of the Draft Declaration is based upon known instances of the violations of the human rights of indigenous peoples. There is nothing theoretical, abstract, or speculative about the substantive content of the Draft Declaration. ... The Draft Declaration ... began from a cry from the indigenous peoples for justice, and it is drafted to confirm that the international standards which apply to all peoples of the world apply to indigenous

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For Indigenous peoples, the right to self-determination was the cornerstone of the Draft Declaration. Article 3 of the draft text provided that ‘Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development’. In 1993, the Indigenous caucus declared to the WGIP that ‘[t]he right of self-determination is the heart and soul of the declaration. We will not consent to any language which limits or curtails the right of self-determination.’

The 1995 CHRWG, being a CHR working group, would have normally required Indigenous peoples to have ECOSOC NGO consultative status to participate in its activities. This is because consultative status is a precondition for participation by non-state actors in the more restrictive UN bodies such as ECOSOC. In the case of this working group, however, special arrangements were made to ensure broad Indigenous participation by granting Indigenous peoples observer status. A specialist procedure was agreed upon and annexed to the resolution establishing the working group, permitting those without ECOSOC consultative status to apply to the Indigenous Secretariat at the Office of the High Commissioner of Human Rights for authorisation to attend the meeting. In determining authorisation the Secretariat took into consideration the objectives and expertise of the Indigenous organisation and consulted the relevant member state. The UN Voluntary Fund for Indigenous Populations, established during the first International

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Decade of the World’s Indigenous Peoples, also provided funding for Indigenous peoples to attend the working groups in Geneva.

From the outset, however, the right to self-determination in the text caused controversy among states. States were effectively divided into two uneven camps, those in favour of Indigenous peoples’ right to self-determination and those opposed. The majority of states, including, for example, Colombia, Cuba, Guatemala, Fiji, Bolivia, Switzerland, Pakistan, Finland, Norway and Mexico, supported the Indigenous right to self-determination. Other states such as the United States and United Kingdom raised concerns about the implications of Indigenous peoples’ right to self-determination vis-à-vis state sovereignty and territorial integrity. There were also concerns about non-interference and the financial implications of many socio-economic dimensions of self-determination. The substantive debates over the right to self-determination will be discussed further after consideration of the final UN mechanism on Indigenous rights, the Expert Mechanism on the Rights of Indigenous Peoples.

There was also tension within the Indigenous caucus over drafting strategy on self-determination. During the CHRWG’s second session the Indigenous caucus adopted a no-change approach to drafting and called for the immediate adoption of the text without change, amendment or deletion. Indigenous representatives maintained that any alteration of the text would be ‘tantamount to tacit endorsement of the inevitability of textual change, and to shift power to those States most aggressively seeking to dismember

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the existing Declaration. By the third session the Indigenous position to reject any amendment to the text was entrenched. However, by 2003, states were drafting an alternative text in the absence of Indigenous input and tension developed in the Indigenous caucus about the no-change strategy. In 2004 the Asian Indigenous and Tribal Peoples Network submitted a statement criticising the Indigenous position:

The adoption of the ‘no change’ position by the Indigenous Caucus appears to be unreasonable, even to sympathetic countries. ... Ultimately, it all boils down to whether indigenous peoples will give up their infamous ‘no change’ position ... It is a delusion to think that indigenous peoples cause is advanced by sticking to present stalemate situation [sic]. Unless something drastic happens, after the deluge of the International Decade, the [CHRWG] will end up being a damp squib.

Some Indigenous representatives who supported the no-change position argued that they had stronger Indigenous rights protection within their own states (eg, treaty rights, constitutional recognition) and therefore would not support the redrafting of the text. However, during the 2004 session, Indigenous peoples abandoned the no-change tactic and began to negotiate on the Draft Declaration text.

6 Expert Mechanism on the Rights of Indigenous Peoples

The most recent UN mechanism established on the rights of Indigenous peoples was created by the Human Rights Council in 2007 to replace the UNWGIP. The Expert Mechanism on the Rights of Indigenous Peoples (‘EMRIP’) is a subsidiary expert mechanism with a specific mandate to conduct thematic studies and provide research-based advice to the Human Rights Council as well as submit proposals to the Council for future work on Indigenous peoples’ rights. To date the EMRIP has focused on best practice in education. Despite the adoption of UNDRIP, the right to self-determination remains

137 Ibid.
sensitive in the UN system, and so the EMRIP has been approved by the HRC to conduct research into the carefully worded project of ‘Indigenous peoples’ right to participate in decision-making’.

D Self-Determination and the UNDRIP

1 Collective Rights Versus Individual Rights

The UNDRIP recognises Indigenous peoples’ right to self-determination through its emphasis on collective rights. This creates a tension between the inherently individual nature of Western human rights and Indigenous peoples’ rights. The use of the word ‘peoples’ attracted considerable debate in the early stages of the CHRWG. Indeed the enormous amount of time taken to debate the ‘peoples’ question led to a compromise between Indigenous peoples and states whereby the Secretariat would ensure that the letter ‘s’ was bracketed in the word ‘peoples’. Each year the official UN working group report was qualified with the following statement:

This report is solely a record of the debate and does not imply acceptance of the usage of either the expression ‘indigenous peoples’ or ‘indigenous people’. In this report both terms are used without prejudice to the positions of particular delegations, where divergence of approach remains.

In establishing the legitimacy of collective rights, Indigenous observers made reference to the extensive jurisprudence of the UN human rights supervisory bodies, promoting the recognition of collective rights as fundamental to the enjoyment of individual human rights. It should be noted, however, that the supervisory mechanism of the ICCPR, the
Human Rights Committee, has provided no jurisprudence on the substance of the right to self-determination in ICCPR Article 1, simply precluding its consideration in individual communications under the Optional Protocol to the ICCPR.\textsuperscript{143}

Indigenous observers referred to a number of existing international legal instruments to support the argument that collective rights were already recognised in international law — for example, ILO 169 and the International Convention on the Elimination of All Forms of Racial Discrimination (‘ICERD’).\textsuperscript{144} The 1981 African Charter on Human and Peoples’ Rights also provides recognition of Indigenous peoples’ claims to collective rights.\textsuperscript{145} The 1978 UNESCO Declaration on Race and Racial Prejudice, the 2001 UNESCO Declaration on Cultural Diversity and the 1993 Convention on Biological Diversity affirm collective rights.\textsuperscript{146}

\section*{2 Qualifying Self-Determination}

Despite the legal authority raised by Indigenous observers there remained statist concerns regarding destabilisation of territorial integrity through the vehicle of collective rights. As Chairperson Chavez of the CHRWG summed up during the eighth session in 2002:

\begin{quote}
Some States can accept the use of the term ‘indigenous peoples’ pending consideration of the issue in the context of discussions on the right to self-determination. Other States cannot accept the use of the term ‘indigenous peoples’, in part because of the implications this term may have in international law, including with respect to self-determination and individual and collective rights. Some delegations have suggested other terms in the declaration, such as ‘indigenous individuals’, ‘persons belonging to an indigenous group’, ‘indigenous
\end{quote}


\textsuperscript{144} See, eg, Convention on Biological Diversity, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993) art 8(j).
In order to break the impasse over the Indigenous right to self-determination, it was conceded by Indigenous peoples during the 10th CHRWG session, that specific reference had to be made to the Friendly Relations Declaration to guarantee state sovereignty. The Chairperson attempted to assuage those states primarily concerned about self-determination — the United States, Australia and New Zealand — by creating an additional paragraph to Article 3 which was referred to in the working group sessions as ‘Article 3 bis’. This involved inserting in a modified form the language of Article 31 from the Draft Declaration to accompany the self-determination provision. Article 3 bis read:

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

At the time, Benedict Kingsbury observed of the CHRWG that it was unfortunate that ‘the legal instantiation of self-determination upon which the claims of indigenous peoples have drawn most is the law established for decolonisation of extra-European colonies of European states’. Indeed many jurists supported the position that the right to self-determination, as enumerated in the UN Charter, cannot be limited to the colonial context.

Literal as well as more comprehensive interpretation supports the evidence that the words ‘all peoples have the right …’, in Article 1 refer to any people irrespective of the international political status of the territory it inhabits. It applies, then, not

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148 Article 31 of the Draft Declaration reads: ‘Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.’
only to the peoples of territories that have not yet attained independence, but also to those of independent and sovereign states.\(^{152}\)

Indigenous observers also drew attention to the fact that some scholars argue the right to self-determination is *jus cogens* (a peremptory norm) under international law.\(^{153}\) For example, Gros Espiell has said that ‘[n]o one can challenge the fact that, in light of contemporary international realities, the principle of self-determination necessarily possesses the character of *jus cogens*’.\(^{154}\) As a peremptory norm, this would mean that the right to self-determination cannot be derogated from by states.

Even so, despite Indigenous efforts to counter state attempts to qualify the right to self-determination, it was the combination of Article 3 and Article 3 bis that was accepted by those combative states as a compromise, and consequently the Human Rights Council, as the agreed text. Article 3 bis became Article 4 in the final text. In addition, to counter state fears about secession, Indigenous peoples supported another qualification to Article 3. This involved the insertion of a new article, Article 46, which contained the safeguard clause from the *Friendly Relations Declaration* to guarantee the territorial integrity of states. In fact Article 46 became a catch-all provision to arrest state fears about the implications of the recognition of cultural rights for municipal legal systems and concerns about the impact of such a declaration upon the rule of law. Article 46 reads:

1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law, and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.


3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.

Once this breakthrough was reached the re-drafting and compromise on all the other relevant articles was swift. In 2005, the Chairperson sent the final draft to the newly established Human Rights Council. In its first session in June 2006, the Council adopted the Chairperson’s text with a recorded vote of 30 votes in favour to 2 against and 12 abstentions.155 The text then moved to the General Assembly where it was sent to the Social, Humanitarian and Cultural Committee (commonly known as the ‘Third Committee’) to be considered. Although Indigenous peoples expected the UNDRIP to be passed by the General Assembly in 2006, there was a lack of consensus in the Third Committee on the draft text. In particular African states needed more time to consider the implications of the right to self-determination for their legal systems and sought deferral of the Declaration.

3 The African Group and the Right to Self-Determination

The African concerns mirrored the main sticking points of the CHRWG: the right to self-determination, collective rights, the definition of Indigenous peoples and state sovereignty. The African Group questioned whether the right to self-determination ‘may be wrongly interpreted and understood as the granting of a unilateral right to self-determination and a possible cessation [sic] to a specific section of the national population, thus threatening the political unity and territorial integrity of any country’.156 Rwanda submitted to the Third Committee that the Declaration ‘established divisive policies and set a bad precedent. It isolated groups and incited them to establish their own institutions alongside central existing ones. That would weaken [African] States as a whole and hinder their recovery processes’.157 Namibia then proposed an amendment that the Third Committee defer

consideration of the Declaration for a year.\textsuperscript{158} The Committee decided to defer to allow time for further consultations.\textsuperscript{159}

In the year following the deferral, the Assembly of the African Union identified the fundamental questions to be examined in consultations: the definition of Indigenous peoples; the right to self-determination; ownership of land and resources; establishment of distinct political and economic institutions; and national and territorial integrity.\textsuperscript{160} The African Commission on Human and Peoples' Rights requested the Working Group of Experts on Indigenous Populations to respond to the African Group's concerns about the Declaration.\textsuperscript{161}

The \textit{Advisory Opinion on the United Nations Declaration on the Rights of Indigenous Peoples} was handed down in May 2007.\textsuperscript{162} On the right to self-determination the Advisory Opinion concluded that self-determination had evolved since decolonisation:

\begin{quote}
the notion of self-determination has evolved with the development of the international visibility of the claims made by indigenous populations whose right to self-determination is exercised within the standards and according to the modalities which are compatible with the territorial integrity of the Nation States to which they belong.\textsuperscript{163}
\end{quote}

The Advisory Opinion reiterated the consensus that had been achieved in the CHRWG — that self-determination can only be exercised in the context of Article 46 which reaffirms the safeguard on territorial integrity in the \textit{Friendly Relations Declaration}.

Some African states had concerns about the implications of recognising 'Indigenous peoples' as a group which may equate to special treatment of Indigenous peoples over other citizens. In this instance, the Advisory Opinion invoked the international law of

\begin{thebibliography}{9}
\bibitem{158} The UN Third Committee adopted the Namibian amendment by a recorded vote of 82 in favour, 67 against and 25 abstentions.
\bibitem{162} Ibid.
\bibitem{163} Ibid [22].
\end{thebibliography}
substantive equality stating that the recognition or identification of ‘Indigenous peoples’ is not about ‘protecting the rights of a certain category of citizens over and above others’, nor does it ‘create a hierarchy between national communities, but rather tries to guarantee the equal enjoyment of the rights and freedoms on behalf of groups, which have been historically marginalized’. As a result of African concerns about the definition of Indigenous peoples, the African group successfully inserted into the UNDRIP preamble these words: ‘Recognizing that the situation of indigenous peoples varies from region to region and from country to country’. With the African concerns assuaged, on 13 September 2007, the General Assembly adopted the UNDRIP, with a recorded vote of 143 in favour, 4 against and 11 abstentions.

4 The Right to Self-Determination Post-UNDRIP: What Does it Mean in Practice?

The rights recognised in the UNDRIP are deliberately grouped into several identifiable themes: the right to self-determination; life, integrity and security; cultural, religious, spiritual and linguistic identity; education and public information; participatory rights; lands and resources; and the exercise of self-determination. It should be noted, however, that the UNDRIP in its entirety can be read as an expression of what the right to self-determination means in practical terms for Indigenous peoples.

The cluster of Articles 1–6 recognises general principles surrounding rights to nationality, self-determination, equality and freedom from adverse discrimination. This cluster includes Article 3 that affirms the Indigenous right to self-determination and Article 4 which extends this right to self-government and autonomy in relation to internal and local affairs. Articles 7–10 recognise rights to life, integrity and security. Articles 11–13 pertain to culture, spirituality and linguistic identity, including the right to practice and revitalise cultural traditions and customs as well as the right to maintain, protect and develop past, present and future manifestations of Indigenous culture. Articles 14–17 deal with Indigenous rights to education, information and labour rights, including the right of all children to education by the state as well as the right to establish and control Indigenous educational systems and institutions.

164 Ibid [19].
Articles 18–23 are participatory rights that enable special measures for immediate, effective and continuing improvement of Indigenous economic and social conditions in the areas of employment, vocational training and retraining, housing, sanitation, health and social security. This section also provides that states shall take measures to ensure that Indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

The most controversial section of the UNDRIP is the cluster of Articles 24–31. Article 26, for example, provides that Indigenous peoples have the right to own, develop, control and use the lands and territories which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by states to prevent any interference with, alienation of or encroachment upon these rights.

Articles 32–36 explain how the right to self-determination can be implemented, including matters relating to internal local affairs such as culture, education, information, media, housing, employment, social welfare, economic activities, land and resources, and the environment. This section empowers Indigenous peoples with the right to determine citizenship in accordance with customs and tradition. Most notably it empowers Indigenous peoples to promote and maintain traditional judicial customs, procedures and practices.

The UNDRIP also gives guidance to states on how these substantive rights can be implemented within domestic legal and political systems. Article 37 recognises the right of Indigenous peoples to conclude treaties, agreements or other constructive arrangements with states. Article 38 provides that the state, in co-operation with Indigenous peoples, shall take appropriate measures including legislative measures to achieve the ends of the UNDRIP; and Article 39 states that Indigenous peoples have the right of access to financial and technical assistance from states for the enjoyment of the rights recognised in the UNDRIP. Articles 40–46 are implementation provisions expounding the role of the state and international organisations in recognising the rights provided in the UNDRIP. Article
46 of the Declaration renders all the articles subject to existing international and domestic law. This means that the rights are relative and must be balanced with the rights of others.

The UNDRIP is a non-binding declaration of the General Assembly or 'soft' international law. An aspirational document, the UNDRIP provides a framework that states can adopt in their relationship with Indigenous peoples, and may guide them in the development of domestic law and policy. The text creates no new rights in international law nor does it create any binding legal obligations in domestic legal systems. Many of the articles in the UNDRIP are recognised in other international instruments and or are affirmations of putative international norms as well as evolving human rights standards pertaining to Indigenous peoples. The UNDRIP is also replete with rights that are not commonly accepted as binding legal standards.

It is possible that eventually some articles contained in the UNDRIP will develop over time to become binding norms and have effect in law. This could occur if those rights contained in the Declaration were observed by enough states that they became elevated to the level of customary international law, or alternatively if the Declaration became a convention, in which signatory states became legally bound by the instrument. It has been said by some commentators that several articles in the Declaration already constitute emerging customary international law on Indigenous peoples' rights, however, it cannot be said that the entire text does so. For aspirational principles to emerge as customary international law they require both evidence of practice among states and the belief that such practice is obligatory — opinio juris. According to the International Court of Justice such acts must amount to settled practice:

But they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The

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need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*.\(^{167}\)

James Anaya is optimistic about the way in which an emerging rule can crystallise into a binding norm of customary law. According to Anaya ‘interactive patterns around concrete events are not the only — or necessarily required — material elements constitutive of customary norms’.\(^{168}\) Anaya argues that

> With the advent of modern international intergovernmental institutions and enhanced communications media, states and other relevant actors increasingly engage in prescriptive dialogue. Especially in multilateral settings, explicit communication of this sort may itself bring about a convergence of understanding and expectation about rules ... It is thus increasingly understood that explicit communication among authoritative actors, whether or not in association with concrete events, is a form of practice that builds customary rules.\(^{169}\)

In support of Anaya’s position, many Indigenous and non-Indigenous commentators refer to the fact that the Declaration, when in draft form, was used extensively by Indigenous advocates and by international bodies and organisations, as well as by governments in municipal contexts. However, it is likely that only a few of the articles in the UNDRIP could ever be elevated to the level of customary international law because it is notoriously difficult to reach the threshold required to prove state practice and *opinio juris*.

E Indigenous Rights in the UNDRIP Era

What does self-determination mean in a post-UNDRIP polity domestically? The political struggles of Indigenous peoples represent a challenge for democracies in accommodating cultural difference. The pursuit by political theorists of a theoretical justification to recognise distinct Indigenous peoples’ rights, without disrupting the liberal democratic commitment to equality before the law, has been difficult and constantly challenged. The main approach adopted by political theorists is a combination of recognition of distinct rights on this basis of culture; and rights based on democratic commitment to equality and multiculturalism.

The position that Indigenous peoples have inherent and distinct cultural rights in addition to their citizenship rights is evidenced by the voluminous literature propounding the

168 Anaya, above n 63, 62.
169 Ibid.
advantages of liberal democracy in protecting group rights and reconciling that with individual rights. Will Kymlicka, for example, advances the argument for ‘group differentiated’ rights in accommodating Indigenous difference within the liberal democratic polity and views Indigenous arguments as cultural claims, not simply political claims. A more acute version of this approach calls for a radical revisiting of public institutions to accommodate Indigenous sovereignty because denial of Aboriginal sovereignty and self-determination calls into question our commitment to democracy. This view posits that injustice cannot be rectified simply by Indigenous peoples ‘being equally represented in our political and economic institutions and placed within normal statistical distributions in social indicators’. Rather this position ‘means in practice taking the institutions of the settler state apart’. The contemporary approach that configures Indigenous peoples’ claims as an aspect of the multicultural or plural democratic polity points to international human rights law as underpinning this claim rather than Aboriginal culture. This approach advances special rights only as temporary remedial rights to redress historical wrongs.

In this case Indigenous jurist James Anaya’s exposition of self-determination is frequently cited by scholars. Anaya distinguishes between substantive and remedial self-determination. He effectively divides substantive self-determination in two: constitutive and ongoing self-determination. Constitutive self-determination concerns the establishment of governing institutional arrangements, and requires that such arrangements reflect the collective will of the people or peoples governed. The ongoing aspect of self-determination means that those arrangements, independently of the processes that created
them, must establish a system of governance that enables individuals and groups to make meaningful choices about their lives.\textsuperscript{177} Remedial self-determination refers to the actions or measures that must be taken where the substantive elements of self-determination have been violated (the most obvious example being decolonisation).\textsuperscript{178}

The adoption of the \textit{UNDRIP} is an endorsement of Anaya’s approach because it undertakes a positive project for the realisation of self-determination as well as prescribing the remedial aspects of self-determination that states should commit to in order to achieve equality and provide redress for historical wrongs. Nevertheless, the \textit{UNDRIP} era will only enhance the scrutiny of the tension between individual and collective rights with respect to the content of self-determination. Kymlicka queries Anaya’s claim that Indigenous peoples have the same substantive right to self-determination as other national groups with the only difference being that the Indigenous claim includes remedial rights to remedy historical wrongs.\textsuperscript{179} Kymlicka is critical of the cultural argument for self-determination, because the element of ‘cultural integrity’ only explains the benign aspects of culture such as language, and avoids what many Indigenous peoples fail to scrutinise; namely the complex issues that flow from ‘cultural integrity’.\textsuperscript{180} This failure to interrogate ‘cultural integrity’ means eschewing conversations about violence routinely committed against women and children in communities or even the use of traditional methods for punishment that may violate the fundamental human rights of the individual — in Australia, spearing or payback, for example.\textsuperscript{181} According to Kymlicka, whether or not a polity is accepting of the norm of cultural integrity, will depend on whether it ‘provides a justification for maintaining oppressive traditions’.\textsuperscript{182}

Tim Rowse also takes issue with the avoidance of tackling ‘cultural integrity’ but more specifically engages with Indigenous discourses in Australia regarding Indigenous rights. Rowse argues that Indigenous intellectuals insufficiently explain the justification for and content of special and distinct rights — a not uncommon critique of Indigenous political

\textsuperscript{177} Ibid 105.  
\textsuperscript{178} Ibid 107.  
\textsuperscript{180} Ibid.  
\textsuperscript{181} Ibid 131.  
\textsuperscript{182} Ibid.
This is important to Rowse because sovereignty and self-determination of the kinds claimed by Indigenous peoples are a departure from the rights that all citizens, including Indigenous peoples, are entitled to. For Rowse, more work has to be done to develop the argument for distinct rights.

It is likely that, in the context of Indigenous self-determination, attention will eventually shift from the preoccupation with self-determination and issues of state sovereignty to the tensions between individual rights and collective rights. Even though the adoption of the UNDRIP appears to be a confirmation of the legitimacy of collective rights, tension persists about the most appropriate way to resolve conflicts between the rights of the group and rights of individuals within that group. The question remains: how do Aboriginal communities have conversations about these conflicts? The UNDRIP provides little guidance on the reconciliation of individual rights with group rights, except to say that: ‘Indigenous peoples have the rights to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognised in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law’. Also relevant here is the caution issued in Article 34: Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards. The difficulty remains however that very little guidance is given as to how this can be done. Now that the UNDRIP has more or less settled the territorial question, a paradigm shift is required, in order to render self-determination less state-centric and encourage a more culturally introspective form.

F Conclusion

This section has traced how Indigenous peoples’ advocacy at the UN has influenced the development of Indigenous peoples’ right to self-determination in international law. In the absence of internal arrangements to facilitate the exercise of self-determination, the international human rights system has empowered Indigenous peoples with the language and mechanisms to articulate a framework for reform domestically. Indigenous peoples consider their engagement with international institutions and Indigenous peoples around the

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184 UNDRIP art 1 (emphasis added).
world to be an expression of their ‘external’ self-determination. The UNDRIP evidences the effectiveness of Indigenous advocacy at the UN and highlights the way international human rights law has the potential to transform Indigenous peoples’ lives.

In terms of the development of the right to self-determination, the adoption of the UNDRIP by the General Assembly reflects a growing acceptance in international law that Indigenous peoples are entitled to collectively enjoy the right to self-determination. Although the UNDRIP being a declaration of the General Assembly, is non-binding, it is nevertheless an international instrument that evidences recognised and developing standards in international law. The ambiguity that exists in international law pertaining to Indigenous peoples’ right to self-determination is, as always in international law, primarily a political issue more than it is a legal one.

IV Aboriginal Women and Self-Determination in International Law

Thus far this chapter has mapped how the right to self-determination has developed in international law and then in regard to the development of Indigenous peoples’ right to self-determination. I will now turn to the question of how Aboriginal women are situated within the UNDRIP framework.

Generally Indigenous women are not recognised in the Indigenous-specific international instruments because of the presumption that Indigenous women fall under the category of ‘Indigenous peoples’. The Draft Declaration was the first international instrument where Indigenous women were recognised specifically. In this case, the Draft Declaration specifically mentioned women in one article, prescribing special measures for economic and social conditions: ‘Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and disabled persons.’ This lone reference to women in the draft text reveals the assumptions made by the drafters of the text and international law about Indigenous women. It reinforces dominant stereotypes in international law about women and women’s experiences – that women’s unique experiences, needs and aspirations are to be considered only in the context of Indigenous

185 Draft Declaration.
186 Draft Declaration art 22.
elders, youth, children and persons with disabilities and even then only in the context of special measures which are temporary actions taken to achieve substantive equality, rather than in the context of important and enduring differences.

In the UNDRIP as adopted by the General Assembly in 2007 there are three instances where Indigenous women are specifically mentioned. Echoing the Draft Declaration, Article 21(2) calls upon states to pay ‘particular attention’ to the ‘rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the context of special measures to improve economic and social conditions’ (emphasis added). Article 22 reads as follows:

1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.
2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

Read together, Article 21(2) and Article 22(1) emphasise the ‘special needs’ of Indigenous women, which perpetuates ‘the stereotype of woman as victim ... unable to take control over her own life’. Article 22(2) provides that states shall take measures to ensure that Indigenous women enjoy full protection and guarantees against all forms of violence and discrimination. This paragraph was not in the original draft but emerged late in the day from informal consultations at the CHRWG 11th session in 2005–06. There is no recorded debate over either the substance or form of the new paragraph added to Article 22. Neither is there any Indigenous or non-Indigenous feminist analysis of how women are considered in the UNDRIP.

Article 22(2) is expressed in mandatory terms that states ‘shall’ take measures, which means that there is a positive duty upon states to take active measures to ensure the full

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protection and guarantees against all forms of violence and discrimination. The use of the expressions full and all forms suggest that there is an absolute responsibility on the part of the state to provide that protection. This responsibility is qualified, however, requiring states to first consult and work with Indigenous peoples, which is consistent with the UNDRIP's emphasis upon consultation and partnership.

Article 22(2) effectively restates existing international law regarding the protection of women and children against violence and discrimination and envisages the potential for both direct and indirect discrimination. It acknowledges that the historical and ongoing susceptibility of Indigenous women to violence is significant enough to activate state responsibility. Article 22(2) references general international law regarding prohibitions against violence and discrimination; race-specific rights and protections; women's rights and protections; children's rights and protections; recognition of compound vulnerabilities of Indigenous women and children; and Indigenous action in conjunction with state responsibility in this area.

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194 UDHR art 12; ICCPR arts 17, 23(1); ICESCR art 10; CROC art 30; Committee on the Elimination of Racial Discrimination, General Recommendation 25: Gender Related Dimensions of Racial Discrimination, 56th sess, UN Doc A/55/18, Annex V at 152 (2000); World Conference Against
Aboriginal women in the UNDRIP emerge as people of special needs; and the state's responsibility to protect augments Indigenous women's position as one of vulnerability within Indigenous communities. It entrenches in international law the inequalities that exist within states and Indigenous communities that marginalise and neglect Indigenous women by emphasising their 'rights and special needs'. This in some ways normalises the violence that is directed at women within Indigenous communities. As Catherine Iorns observed of Article 22 of the Draft Declaration, it would be 'much more preferable ... to focus on the positive rights of women to participation in decision-making and government and thereby to focus on the structures that perpetuate their oppression'.

Here, the conflict between individual and collective rights is clear because of the potential for some aspects of the UNDRIP to marginalise women — for example, the recognition of Indigenous legal systems and customary law. Recognising and promoting these rights may entrench or formalise in international law the inequities of domestic legal systems that legitimise gendered customary practices such as promised marriage. The UNDRIP may exacerbate the tensions between customary Aboriginal law and the rights of the individual as recognised in international human rights standards. Of the UNDRIP in draft form, Bigge and von Briesen remarked:

The Draft Declaration on the Rights of Indigenous Peoples ... increases these tensions, if only by reemphasizing the importance of the self-determination of groups without detailing protections against discrimination based on sex. While these customary systems are

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Magaya v Magaya, Judgment No SC 210/98 [1999] 3 LRC 35 (Supreme Court of Zimbabwe, 16 February 1999).
intended to be ‘in accordance with internationally recognized human rights norms,’ there is no itemization of such norms and thus no specific recourse against such discrimination.198

Aside from the women-specific provisions in the UNDRIP, international law provides little guidance as to how Aboriginal women are situated within the normative framework of the right to self-determination. After all, international law sets minimum standards for states and it is left to the state to determine in consultation and co-operation with Indigenous peoples, how the right to self-determination is to be achieved internally.199 Thus, much depends on how Aboriginal women’s rights are recognised and implemented by domestic legal systems.

V Conclusion

This chapter has described the significance of the right to self-determination for Indigenous peoples. For Indigenous peoples, the right to self-determination encapsulates their desire to maintain control over their lives and communities. The principle of self-determination transformed from the ‘self’ as constituted by the monarch to the ‘self’ as constituted by the state. Following the decolonisation era, the notion of self-determination as a legal right expanded beyond sole considerations of state sovereignty, to a consideration of the ‘self’ as constituted by the ‘peoples’ within the state. However, there will always remain a degree of ambivalence in international law about self-determination, manifest in statist concerns about sovereignty and territorial integrity. Although the adoption of the UNDRIP in 2007 reflects an international acceptance of the Indigenous right to self-determination, the ‘self’ as constituted by ‘Indigenous peoples’, does not entirely resolve the ambiguity or the sensitivity surrounding the norm.

This thesis is concerned with how Aboriginal women are characterised within the ‘self’ of Indigenous peoples’ right to self-determination. This chapter has looked to international legal instruments to ascertain an understanding of what the right to self-determination means for Aboriginal women. For the most part, international law is silent on the position of Aboriginal women, as evidenced by international instruments such as the UNDRIP and ILO 169 which appear to assume that the experiences of Indigenous men and women within


199 See UNDRIP art 38.
the state are equivalent. Women are mentioned in the *UNDRIP* but only in a way that pre-empts their discrimination and subjection to violence.

The next chapter is directed to the domestic situation of Aboriginal women in Australia. The concept of self-determination is flawed because of its mistaken assumption about the shared experiences of Indigenous men and women within the state. It is important to assess the contemporary situation of Aboriginal women in order to gain a deeper understanding of how self-determination has been translated in Australia, the limitations of the right to self-determination and the potential for the right to self-determination to improve the lives of Aboriginal women.
CHAPTER TWO: WHO ARE ABORIGINAL WOMEN? SELF-DETERMINATION AND THE STATE

I  INTRODUCTION

Influenced by developments in international human rights law, especially the adoption of the *International Convention on the Elimination of All Forms of Racial Discrimination*\(^1\) in 1965, the Commonwealth Labor Government in Australia introduced a self-determination policy in 1972 for Indigenous peoples.\(^2\) This policy had bipartisan support for over 30 years until the demise of the Aboriginal and Torres Strait Islander Commission (‘ATSIC’) in 2005.

Chapter 1 mapped the development of the right to self-determination in international law. It concluded that the normative developments in international law regarding Indigenous peoples’ right to self-determination do not elicit any significant understanding of what self-determination means for Aboriginal women. This is because of the undifferentiated way Indigenous peoples’ right to self-determination is defined in international law. This chapter will explore how the right to self-determination has been translated by one particular state, Australia. It is fundamentally concerned with the experiences of Aboriginal women in Australia during the period known as the ‘self-determination era’ when the right to self-determination had formal bipartisan support in the Australian polity. The self-determination era began in 1972 and lasted to 2005 with the repeal of the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) (the ‘ATSIC Act’). The era was dominated by political debates about Aboriginal sovereignty, Aboriginal land rights and political representation.\(^3\)

This chapter is divided into two main parts. The first, Part II, provides an insight into the lives of Aboriginal women in Australia during the self-determination era. It describes the everyday challenges Aboriginal women experienced and to a large extent still experience,

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in their daily lives. This information is drawn from the voices of Aboriginal women themselves recorded during this time: in *Women’s Business*, a 1986 report by the Commonwealth Government’s only comprehensive taskforce on Aboriginal women, and in *Finding Common Ground*, the product of the first international Indigenous women’s conference, held in Adelaide in 1989. Both of these sources are dated mid-way through the self-determination era. Part II ends with the most recent Australian Bureau of Statistics census snapshot of the health, employment and education situation of Aboriginal women at the end of the self-determination era.

Part III expands on this picture by providing specific examples of the state’s response to the problems of Aboriginal women to illustrate the skewed way the right to self-determination operates in practice. Here, a prominent feature of Aboriginal political discourse, institutional racism, is discussed. Of all public institutions, the legal system best illustrates the inertia of the state’s response to the issues of Aboriginal women. The examples that will be discussed are the Royal Commission into Aboriginal Deaths in Custody (‘RCIADIC’) and the use of Aboriginal customary law to mitigate violent offences committed against Aboriginal women.

II BACKGROUND TO THE SITUATION OF ABORIGINAL WOMEN IN AUSTRALIA

While Aboriginal women have long been the subject of anthropological study, until recently little attention has been given to the political, economic and social aspirations of Aboriginal women. The adoption of a policy of self-determination for Indigenous peoples by the Commonwealth Government meant that the developing norm of self-determination became state-centric – focused on the state – and less attention was paid to how the right to self-determination should be managed internally within Indigenous groups themselves, especially in regard to Aboriginal women and gender equality. After 1972, public institutions and policies emerged that would enable consultation with Aboriginal and

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Torres Strait Islander people, including women. The consultations drawn upon below were conducted by Aboriginal women for Aboriginal women. These reports predate ATSIC. Women-only platforms like these were inevitably superseded by ATSIC, yet the value of such forums is reflected in the comprehensive picture of Aboriginal women’s aspirations that can be drawn from these pivotal reports.

A The Women’s Business Report

1 The Aboriginal Women’s Taskforce

In 1979, a seminar on Aboriginal land rights was held in Sydney. Three hundred Aboriginal and Torres Strait Islander people attended and identified a lack of information being gathered about Aboriginal and Torres Strait Islander women. The seminar passed a motion to have an Aboriginal women’s taskforce established, the seminar recommending:

That the Prime Minister establish immediately a Task Force on Aboriginal women with its main terms of reference — the role and status of Aboriginal women in the Aboriginal Land Rights [sic]. The Task Force [should] consist of representatives of Aboriginal women from the following non-governmental bodies:
- Aboriginal Land Councils
- Aboriginal Lands Trusts
- National Aboriginal Conference and any other Aboriginal organisations working towards the achievement of Aboriginal Lands Rights.

It took three years of organisation before the Commonwealth Aboriginal women’s taskforce was established in August 1981.

The terms of reference of the taskforce were to: inquire into the involvement of Aboriginal women in land rights, health, housing, education, employment, legal aid, culture and child care (with particular reference to adoption and fostering of Aboriginal children); seek to have Aboriginal women identify their critical needs in these areas; and make recommendations to the Commonwealth on what action may be taken to meet any identified needs. The terms of reference required the taskforce to consult with as many Aboriginal women as possible, spread over as wide a geographical area as possible. The taskforce interviewed Aboriginal women from 195 diverse communities including urban

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7 For example, the National Aboriginal Consultative Committee (1973–76) and the National Aboriginal Conference (1977–85).
8 Daylight and Johnstone, above n 4, 85.
9 Ibid.
10 Ibid 86.
and rural areas, remote communities and town camps, former missions and reserves and communities on commercial enterprises such as pastoral properties or mining operations.\textsuperscript{11} The final report, \textit{Women’s Business}, was published in 1986.\textsuperscript{12}

Today the report remains the first and only document to have been commissioned by the Commonwealth Government providing a comprehensive study of Aboriginal women’s issues based on consultation with Aboriginal women. It was intended to be a unique contribution to the Commonwealth Government’s knowledge of the needs and views of Aboriginal women. The interviews revealed the daily struggle of Aboriginal women. The authors of the report were Aboriginal women, Phyllis Daylight and Mary Johnstone. They noted, then in 1986, that Aboriginal women had never before been consulted by the Commonwealth Government.

The report was groundbreaking in many ways. It found that separating issues of health, housing, education, employment, legal aid, child care, land rights and culture was impossible because they were interlinked.\textsuperscript{13} It also found Aboriginal women viewed themselves as a ‘forgotten group’ who despaired for the future of their children and felt that they had no control over their lives.\textsuperscript{14} And the report revealed for the first time the profound amount of stress Aboriginal women were enduring within communities:

> Women ensure that clothes, food and sleeping arrangements are provided for all the family members residing with them. Stress and tension are ever present because the struggle is accompanied by low incomes, little education or training, and unemployment. Drug and alcohol abuse, poor health and early deaths are all too often the result for those who cannot cope with the continual pressure which affects all members of the family.\textsuperscript{15}

The report confirmed that Aboriginal families revolve around Aboriginal women and ‘depend upon them to counter outside influences and maintain the strength and togetherness of their families’.\textsuperscript{16} Indeed it had been the case that, while men were acting out the trauma of colonisation through drinking and anti-social behaviour, Aboriginal women’s role as the centre of families, of communities and of culture had become even more critical. In this

\textsuperscript{11} Ibid 3.
\textsuperscript{12} Ibid.
\textsuperscript{13} Ibid.
\textsuperscript{14} Ibid 41.
\textsuperscript{15} Ibid 2.
\textsuperscript{16} Ibid.
way women were 'heavily relied upon for the continuation of Aboriginal values and practices within their family', placing an enormous burden on Aboriginal women who were also dealing with their own trauma.\textsuperscript{17} As the report revealed, the issues Aboriginal women have had to traverse in looking after the well-being of their communities, families and selves are diverse. The following is a description of some of the main issues raised by the women.

2  \textit{Housing}

The chief concern among Aboriginal women was the state of housing.\textsuperscript{18} Women noted a chronic shortage of housing and complained that existing housing had been poorly designed.\textsuperscript{19} The available housing was viewed as inappropriate for Aboriginal culture and had poor or non-existent maintenance. Women also expressed dismay at the lengthy waiting lists for state housing.\textsuperscript{20} Coupled with low income and large utilities payments, the cost of housing was regarded by Aboriginal women as too high.\textsuperscript{21} The Aboriginal women interviewed discounted the suggestion of private housing because of high rental costs and widespread discrimination in the private rental market toward Aboriginal tenants.\textsuperscript{22} The most frequently cited example of this discrimination was described to the authors in the following way:

I went into the estate agent and was told that the house I was asking about had just been rented. I didn't believe them and asked my friend who is white to go and say that she was interested in the same house. She was told that it was still available and would she like to look at the premises and then fill out the application form.\textsuperscript{23}

3  \textit{Education}

Aboriginal women acknowledged the importance of education for social mobility.\textsuperscript{24} They expressed a desire to become more involved in their children's learning and schooling; however, they did not feel confident in attending school committees because of poor language skills.\textsuperscript{25} Aboriginal women found that their children's experience of schooling

\begin{thebibliography}{9}
\bibitem{17} Ibid.
\bibitem{18} Ibid 4.
\bibitem{19} Ibid 5.
\bibitem{20} Ibid.
\bibitem{21} Ibid.
\bibitem{22} Ibid 5.
\bibitem{23} Ibid 50.
\bibitem{24} Ibid.
\bibitem{25} Ibid 25.
\end{thebibliography}
was similar to theirs, with low teacher expectations and low self-confidence in their ability to learn.

Aboriginal women know that if they can express themselves clearly and confidently in standard English then they are considered (by non-Aboriginal people) to be articulate, educated and worth listening to. Those who have difficulty expressing themselves in the ‘accepted’ way are all too often brushed aside. For these women the task of communicating with non-Aboriginal people can be frustrating. They feel themselves inadequate and so are unwilling to express their concerns to administrators, teachers, medical practitioners and so on.26

Having said that, the taskforce found that a significant factor in Aboriginal women’s success was their motivation for pursuing education.27 Aboriginal women who were studying or had successfully studied cited a number of reasons for doing so, including increasing their job opportunities, increasing their skill levels and ‘getting the piece of paper’ that white people place so much value on.28 Those women who pursued study said that their confidence had increased since completing courses and they were now able to put their ideas and problems to non-Aboriginal people. They now felt at ease speaking to teachers, administrators, community advisers, health workers and the taskforce. They said one of the significant benefits was that they could help their children and other family members with their own studies.

4 Health

Those interviewed were reluctant to discuss health problems or to disclose any information about their own health.29 The discussion focused mainly on the provision of health services. Women felt reticent about seeking medical attention and speaking openly about health issues to medical professionals.30 They said they felt ‘put down’ and patronised by white health professionals.31

Alcohol abuse and the social and physical effects of alcohol were major concerns for the women consulted.32 Aboriginal women said they suffered from domestic violence, rape and

26 Ibid.
27 Ibid.
28 Ibid 75.
29 Ibid 6.
31 Ibid.
32 Ibid 7.
murder as a direct result of alcohol abuse; and because of alcohol, children were neglected and were sometimes affected by foetal alcohol syndrome. Petrol sniffing was a relatively new concern at the time and was discussed extensively by women, especially in remote and regional areas, and particularly for its destructive effects on Indigenous youth. The taskforce noted that one of the authors was warned by one community not to walk around at night or she would be risking her life. The report revealed that women and girls were particularly vulnerable to assault by gangs of petrol-sniffing teenagers.

For women from remote areas a major concern was the stress of pregnancy. Aboriginal women from remote communities were removed for up to six weeks before the birth of a child. In these circumstances Aboriginal women said they experienced loneliness and cultural isolation and were particularly distressed by the fact that no accommodation was provided for the family. Further issues raised included the failure to take Aboriginal law into account during the birth and the presence of non-Aboriginal men at the birth (which is often regarded as traditional women’s business).

Another health issue raised by Aboriginal women in all communities was the lack of sexual education for women and young girls. According to the women interviewed, Aboriginal culture is passed on in a unified way as a part of daily life, and the passing on of knowledge of any aspect of the culture, including sex education, was ‘adversely affected when the cultural life practice and the relationship to land [was] disrupted’. Aboriginal women said that they did not understand contraception and they were reluctant to seek help. There was a sense that Aboriginal women felt they had no control over the sexual aspects of their lives.

33 Ibid.
34 Ibid.
35 Ibid.
36 Ibid 6.
37 Ibid.
38 Ibid.
39 Ibid.
40 Ibid 63.
41 Ibid.
5  Employment

The authors emphasised that 'unemployment' was raised as an issue rather than 'employment'. At the time of the commissioning of the report, most Aboriginal women lived on welfare benefits rather than paid employment. Aboriginal women interviewed said welfare was a necessity rather than a choice. In seeking employment they were perceived as having low education levels, had a lack of job opportunities and were often stereotyped by prospective employers as being 'dirty, lazy and unreliable'. Many of the women interviewed had experienced discrimination in applying for jobs and in the workplace.

Aboriginal women said they wanted to work and did not want to be on welfare benefits. They expressed the feeling that life on a permanently low income offers 'little hope for the future'. However, the women emphasised that employment was crucial to improving their standard of living, reducing their dependence upon welfare assistance and taking control over their lives. It is not surprising that so few Aboriginal women were in employment at the time of the report given the overwhelming conclusion that it was women that kept communities running.

6  Access to Justice

Access to justice and legal aid was raised by Aboriginal women as a critical concern because Aboriginal families have such frequent interactions with the criminal justice system. Aboriginal women from regional and remote areas raised the problem of conflict between common law and Aboriginal law. These women also reported that neither they nor the community understood what the 'white' law was and did not know when they were committing a crime. Urban Aboriginal women noted that there was insufficient legal aid staff to deal with civil matters or educate people in the community about the law and

42  Ibid 8.
43  Ibid.
44  Ibid.
45  Ibid.
46  Ibid.
47  Ibid.
48  Ibid 76.
49  Ibid.
50  Ibid 9.
51  Ibid.
indicated that Aboriginal people did not understand terms used in legal documents. These observations were consistent with the overall tenor of the report which identified a lack of elementary knowledge about civics, law, government services and programs. For example, there was little knowledge about how to deal with governments when applying for project funding or state benefits, and even about how to make enquiries to white counter-staff. 

Finally, many women criticised non-Aboriginal parole officers for lacking cultural sensitivity and knowledge about Aboriginal history. They said this meant these officers were ill-equipped to deal with rehabilitation and alcohol-related crimes such as murder, rape and assault.

7 Land Rights

Land rights were viewed by the women as a mechanism aimed at maintaining the integrity of Aboriginal culture. The law originates from the land and every facet of Aboriginal culture is derived from it. Land rights were raised by women as a way in which women’s self-esteem, dignity and self-determination could be engendered.

Aboriginal women’s connection to land, and their role as custodians in caring for country, was described as being as fundamental to the culture as Aboriginal men’s role. However, there was a sense from the report that Aboriginal women felt disenfranchised from the land rights process. In particular Aboriginal women in urban and remote communities spoke about the lack of information and knowledge about land rights legislation in their jurisdiction. Many of the women interviewed said that the main reason for the lack of understanding was the language used by government departments when disseminating information to communities about land rights regimes.

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52 Ibid.
53 Ibid 3.
54 Ibid 4.
55 Ibid 9.
56 Ibid.
Women spoke of their desire to be fairly recognised as custodians of land who, like men, have rights and responsibilities for land. The concern about being excluded from land rights is supported by the work of anthropologists, including Diane Bell and Aboriginal scholar Marcia Langton, who have written on the privileging of men in land rights. For example, Bell investigated a land claim under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (‘ALRA’), made by the Kaititja and Alyawarra people and investigated by the Central Land Council. Bell reported that the officers met primarily with men and only asked women for information regarding genealogies and traditional foods.  

Langton has noted the same bias in her work on land rights commissions, explaining that the ALRA has a male patrilineage bias, because ‘only the evidence of men went to provide primary spiritual affiliation of the group to a site or sites on the land and common spiritual responsibility of the group’.  

The women interviewed said that they ‘should be consulted before decisions are made on matters relating to land rights’ and that ‘women should be represented on land councils around the country’. Aboriginal women in the Northern Territory felt that they should have greater representation on the Northern Land Council, the Central Land Council and the Kimberley Land Council. The women reported that ‘in the old way no man spoke for them about their land like the way it is being done now’. The women said that if they had better representation they could contribute to discussions on local issues affecting them, such as the distribution of royalties among the community.  

As an illustration of the significance of this sense of exclusion, during the period the taskforce was undergoing its consultations, there was a protest in 1985 of Pitjatjantjara women in Adelaide. They objected to the way in which they were being excluded from the land claims process:

Pitjatjantjara women protested at their exclusion [from land rights negotiations]. They hired buses to bring them to Adelaide when their male relatives came south for negotiations so as

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60 Daylight and Johnstone, above n 4, 10.  
61 Ibid 63.  
62 Ibid.
to ensure they were not entirely neglected. But the Premier and his various advisers talked only with the men. The press, along with everyone else, largely ignored the presence of the women so that few outsiders even realised that the women were there, let alone knew how they felt.\textsuperscript{63}

As a consequence of this exclusion of women from land councils, many of the land councils have responded by establishing Women’s Councils in order for women to have a voice. One example of this is Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women’s Council, (‘NPYWC’) which was established in 1980.\textsuperscript{64} NPYWC emerged during the late 1970s and the Pitjantjatjara land rights struggle. Aboriginal women felt that their views had been ignored and decided to establish an organisation that could represent their position. The overall tenor of the land rights section of the report was that land rights and caring for country were critical to Aboriginal women’s spiritual and cultural development but that Aboriginal women felt excluded from the process.

8 \textit{The Right to Self-Determination}

The report recorded ‘the desire of Aboriginal women to control their own lives and to become independent of the welfare system’.\textsuperscript{65} Aboriginal women expressed frustration that they ‘cannot demonstrate their intelligence, capability and reliability because they are treated as though they cannot take responsibility or make decisions’.\textsuperscript{66} In not wanting to rely on welfare for their livelihood, women expressed the view that they were ‘tired of being expected to accept without question such an existence’.\textsuperscript{67} On the one hand, they wanted opportunities to ensure that their children would have options to end the cycle of dependency; yet, on the other hand, the women felt powerless to do anything about their children’s schooling, employment prospects and futures.\textsuperscript{68}

The \textit{Women’s Business} report was the beginning of the Australian Government’s heightened awareness of the way in which Aboriginal women live. The intention was that


\textsuperscript{65} Daylight and Johnstone, above n 4, 3.

\textsuperscript{66} Ibid 4.

\textsuperscript{67} Ibid.

\textsuperscript{68} Ibid 2–3.
the report assist governments to deliver appropriate and adequate services and programs to Aboriginal women. There were 94 detailed and specific recommendations of *Women's Business* in the areas of housing, education, health, fostering and adoption, employment, crime, punishment and legal aid, land rights and community service. Two decades later few of the 94 recommendations have been implemented. In the 24 years since the report was published Aboriginal women’s situation has changed very little.

The publication of the report, however, contributed to the momentum for Aboriginal women’s gatherings. Three years later, *Finding Common Ground*, the first Indigenous Women’s Conference, was held in Adelaide.69 In 1990, to counter the domination of men’s voices in setting the agenda for Aboriginal affairs, the New South Wales Aboriginal Women’s Conference was held as a follow-up to *Finding Common Ground*. In particular some women were unhappy with Charles Perkins’s draft Commonwealth policy on self-determination, *New Directions for Aboriginal Affairs 1990*.70 In June 1993, the Aboriginal Women’s Legal Issues Conference was also held in New South Wales to discuss the difficulties that Aboriginal women face in accessing the legal system, particularly as victims of violence.71

**B The Finding Common Ground Conference**

*Finding Common Ground* was the report of the first international Indigenous women’s conference held in Adelaide on 7 July 1989. The conference was attended by Aboriginal women from around the world including North, Central and South America, Japan, India, Scandinavia, New Zealand and the South Pacific. Germane to the work of the conference was the fact that, in Australia, ‘Indigenous women have not fared as well as their male counterparts’.72 The conference’s *Declaration of Unity* expressed the desire to ‘find common ground in our issues, demands, aspirations and struggles’, and called upon governments to commit to self-determination.73 The keynote speaker, Ngarrindjeri woman Natascha McNamara, stated, ‘Aboriginal women have a great need for freedom to think, to

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69 *Finding Common Ground*, above n 4.
72 *Finding Common Ground*, above n 4, 4, Appendix III.
73 Ibid 6.
speak, to play, to do and most importantly the freedom to disagree’. Dominating the conference was the theme that such freedom was lacking. Like Women's Business, the conference discussed land rights and questioned why Aboriginal women were excluded from the process. Conference participants also objected to the waste of public resources for the promotion of ‘window dressing activities, particularly art and sport, whilst Aboriginal children experience hunger and life threatening illnesses’. The major issues addressed by the conference are sketched below.

1 Economic Development

Economic development was raised at the conference because it enables independence. However, ‘development’ in the conventional welfare–economic sense was criticised by women as being inconsistent with the basic values of Aboriginal culture: ‘in the past we would catch and share the kangaroo, the dugong and the food — we are now impelled to sell the kangaroo or the dugong’. While women acknowledged that development was crucial to employment and fostering independent enterprises, which were needed to ‘obtain a degree of independence’, they admitted that Aboriginal value systems would be challenged: ‘we will have to change our value systems, many customs will change and cultural foundations of thousands of years will be challenged and in many cases undermined’.

2 Service Delivery

Service delivery for Aboriginal women was raised as a major challenge and underfunding exacerbated the problem. The lack of funding meant that Aboriginal women could not afford to tackle serious issues in their communities. One of the recommendations from the conference was that ‘funding be provided to train and employ more Aboriginal people, to deal as a priority with the issue of child abuse, rape, incest, child sexual abuse, physical abuse, verbal abuse and emotional abuse’. The conference recommended funding for the establishment of refuges for Aboriginal men and women to deal with domestic violence and family fighting and killing.

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74 Ibid 5.
75 Ibid.
76 Ibid Appendix III.
77 Ibid Appendix III.
78 Ibid 11.
3  Leadership

The conference questioned the male-dominated Indigenous political leadership more explicitly than the Women's Business report: 'Black men may perhaps be more inclined to be comfortable with men in power rather than women. Today black men ... are finding a complete woman a threat'.  The claim was made that 'black men are not necessarily innocent of the chauvinist attitudes ... creeping into Aboriginal society particularly with the advent of more visible and vocal Aboriginal and Islander women groups'. Nevertheless there was still an acknowledgment that men have 'further to fall' because of the way in which culture had been disrupted by the dominant society, and it was suggested that men, suffer a worse loss of identity and sense of dislocation than women.

4  Violence

Most of the recommendations from the conference were based on the priority that should be given to address violence against Aboriginal women and children. A workshop was conducted on the survival of children and it recommended that funding be provided to train and employ more Aboriginal people to deal with 'child abuse, rape, incest, child sexual abuse, physical abuse, verbal abuse and emotional abuse'. Dealing with petrol sniffing and alcohol in a way that is consistent with 'our traditional ways' was recommended by the Pitjantjatjara women as the way they could achieve self-determination. Like Women's Business, Finding Common Ground identified violence, land rights and service delivery as critical areas of concern for Aboriginal women. It also revealed that Aboriginal women felt as if they were not listened to.

C  Aboriginal Women Today

This section presents the most recent statistical snapshot of Aboriginal women in Australia today, recorded by the Australian Bureau of Statistics ('ABS') in the 2006 census. It is important to see how the situation of Aboriginal women has changed since the reports in 1986 and 1989. According to the ABS, the most recent national population census in 2006

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79  Ibid vii.
80  Ibid.
81  Ibid.
82  Ibid ii.
83  Ibid.
84  Ibid vii.
estimates the Indigenous resident population of Australia as 517,200 or 2.5 per cent of the total population. Of that population, 463,900 or 90 per cent were estimated as being of Aboriginal origin only, with the other 10 per cent being either Torres Strait Islander or both Aboriginal and Torres Strait Islander. In 2006, 31 per cent of Indigenous people in Australia lived in major cities. The remaining Indigenous population was evenly distributed across inner regional, outer regional and remote/very remote Australia combined. The median weekly individual income of Indigenous Australians over 15 years was $278 compared with the median income for non-Indigenous Australia at $473.

Aboriginal women constitute 51 per cent of the Aboriginal population. According to the 2007 ABS *Health and Wellbeing of Aboriginal and Torres Strait Islander Women* report, Aboriginal and Torres Strait Islander women are:

affected by a complex range of socioeconomic and environmental factors. Indigenous women are more likely than non-Indigenous women to be unemployed, to have carer responsibilities for children other than their own, to receive welfare payments and to have finished school at an earlier age. Indigenous women are also more likely to be a victim of violence and to live in communities where violence is prevalent.

In relation to the health of Indigenous women, their life expectancy rate at birth is estimated to be 65 years, which is 17 years lower than for non-Indigenous Australian females. Indigenous females experience higher age-specific death rates than non-Indigenous women in every age group. The suicide rate for Indigenous females aged 0–24 years was five times that of non-Indigenous females in the same age group. However, for ages 45–54,
the Indigenous female suicide rate is similar to if not lower than that for non-Indigenous females.\textsuperscript{93} While Indigenous men have higher rates of suicide than women, Indigenous women have higher rates of suicide attempts.\textsuperscript{94}

1 \textit{Violence}

Indigenous women are four times more likely to be the victim of indictable assaults, three times more likely to be the victim of summary assaults and twice as likely to be the victims of rape and sex offences as non-Indigenous women.\textsuperscript{95} Young Indigenous women are more likely to have been a victim of physical or threatened violence than their non-Indigenous counterparts.\textsuperscript{96} Over half of Indigenous women who had been a victim of physical or threatened violence had primary caring responsibility for a child aged 12 years or under. Assault is a significant cause of death for Indigenous women — nine to 23 times greater than the equivalent age-specific rates for non-Indigenous females.\textsuperscript{97} In fact since the RCIADIC, ‘Indigenous people’s involvement within the criminal justice system has continued to deteriorate’.\textsuperscript{98} Aboriginal women are over-represented in the criminal justice system.\textsuperscript{99} Between 2002 and 2006, Indigenous women’s imprisonment increased by 34 per cent compared to 22 per cent for Indigenous men.\textsuperscript{100} The increase in Aboriginal women’s imprisonment is related to a number of factors, including the doubling of rates of substantiated notifications of child abuse and neglect for Indigenous children.\textsuperscript{101}

2 \textit{Health}

Poor health is the primary factor in Aboriginal women’s mortality rate with the main causes of ‘excess deaths’ being diseases of the circulatory system, external causes (intentional self-
harm, homicide and assault), endocrine, nutritional, metabolic, respiratory and digestive diseases, certain infectious and parasitic diseases, mental and behavioural disorders and certain prenatal conditions. In 2004–05, 85 per cent of Indigenous women aged 18 years and over reported at least one long-term health condition compared with 77 per cent of Indigenous men. The prevalence of multiple conditions was also higher among Indigenous women, with 68 per cent reporting two or more long-term conditions compared with 58 per cent of Indigenous men. Indigenous women with a long-term health condition were more likely to report high/very high levels of psychological distress than women with no long-term health condition. Indigenous women were more likely than Indigenous men to report high/very high levels of psychological distress. Crucially, rates were similar for women living in both non-remote and remote areas.

The ABS ‘gauge of happiness’ questions, designed to determine the psychological distress statistics, were based upon questions about how often women ‘felt nervous’, ‘without hope’ or ‘so sad that nothing could cheer you up’. Interestingly, the ABS statistics show that women who reported feeling happy all/most of the time were more likely than those who reported feeling happy a little/none of the time to be employed, to report excellent/very good health, to have finished school and to have access to higher household incomes. Thus it is important to understand why Aboriginal women are not in employment.

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102 Australian Bureau of Statistics and Australian Institute of Health and Welfare, above n 92, 163. ‘Excess deaths’ means the total number of Indigenous deaths minus the number of deaths that would have been expected if Aboriginal and Torres Strait Islander people had the same mortality rate as non-Indigenous Australians.


104 Ibid.

105 Ibid.

106 Australian Bureau of Statistics and Australian Institute of Health and Welfare, above n 92, 110 (32 per cent compared with 21 per cent).


109 Ibid.
3 Employment

Recent statistics show that Indigenous women are ‘less likely’ to participate in the labour market than non-Indigenous women. According to the Centre for Aboriginal Economic Policy Research (‘CAEPR’) there are many variables that lead to Aboriginal women’s poor participation in the labour market: educational factors, difficulty in communicating in English, and interaction with the justice system (i.e., history of arrest, reducing probability of participating in the labour force). Another significant factor in Aboriginal women’s poor participation is the location of residence — women are ‘less likely to move in response to employment opportunities than other Australians and to be more influenced by social and cultural factors’. Aboriginal women are also more likely to be the carers, affecting their capacity to work. CAEPR research on Aboriginal women’s labour force participation emphasises ‘the importance of providing support to Indigenous families with children’, as this support unambiguously improves Indigenous welfare as it expands the developmental options available to children and will expand the capacity to realise the preferences of many mothers who want to participate in the labour market. … Access to and availability of affordable child care are likely to be key issues.

4 Education

While there is little research specifically on the effects of education level on health in Aboriginal and Torres Strait Islander communities, it is well established that higher levels of educational attainment correlate with better health, parental education and child health. The ABS posits that one reason for the correlation between health and education is that healthier individuals are more likely to undertake education. Also, it has been suggested that education leads to better health outcomes because of an individual’s improved knowledge about health, and because those with higher educational attainment have higher incomes and better working conditions than people in low-status jobs. Well-educated

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111 Ibid 8.
112 Ibid 9.
113 Ibid.
115 Ibid.
116 Ibid.
people may also feel ‘a greater sense of control over their lives and their health, and have higher levels of social support’.

In regard to educational attainment, Indigenous men and women reflect similar rates of low educational attainment when compared with non-Indigenous Australians. Non-Indigenous Australians are twice as likely as Indigenous Australians to have an Advanced Diploma or Diploma, and four times more likely to have a Bachelor degree. For Indigenous men and women, the Year 12 completion rate is around 36 per cent for those aged between 18–24 years. Indigenous people living in urban areas are more likely to complete Year 12 than those living in regional and remote areas. Consistent with CAEPR’s research, there is a well-established correlation between educational attainment and employment and income. Those Indigenous men and women who complete Year 12 are twice as likely as other Indigenous people to have employment.

Indigenous men and women have the same rate of non-school qualifications through the completion of vocational education and training. This is mostly at a Certificate/Diploma level with only a small proportion of Indigenous men or women (four per cent) attaining a Bachelor degree. The majority of Indigenous people with higher-level degrees, however, are female and Indigenous women are twice as likely as Indigenous men to have an Advanced Diploma or Diploma and one-and-a-half times as likely to have a Bachelor degree.

5 Conclusion

A comparison of the reports from the late ’80s with data from the post-self-determination era reveals that Aboriginal women still inhabit a situation of serious disadvantage in Australian society. This is compounded by the fact that Aboriginal women are marginalised in both mainstream Australia and Aboriginal communities. Aboriginal women’s capacity to improve their lives through education and employment is still affected

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117 Ibid.
118 Ibid 19.
119 Ibid 17.
120 Ibid.
121 Ibid 20.
122 Ibid 18.
123 Ibid.
by the fact that Aboriginal women are the primary carers both in their immediate family and the Aboriginal community at large. This limits their ability to attain the qualifications and skills necessary to be socially mobile. Furthermore, in both remote and non-remote areas poor health remains the primary factor in Aboriginal women’s mortality rate and is exacerbated by very high levels of psychological distress. The earlier reports noted Aboriginal women’s heightened concern about violence in communities and the post-self-determination data shows that very little has changed. Aboriginal women are still experiencing high levels of violence in communities and Aboriginal women’s imprisonment has exceeded the rate of Indigenous men.

One of the most important features of the Women’s Business report in 1986 was Aboriginal women’s continual reference to consultation and self-determination as integral to making inroads into the disadvantage experienced by Indigenous peoples. Notably, according to the report’s authors, Aboriginal women universally remarked that they would never provide such detailed information about their lives if the consultants had not been Aboriginal women themselves. The authors quoted a statement they heard repeated by Aboriginal women: ‘You do recognise that we would not be telling you these things if you were not an Aboriginal women?’ Today, the problem is not in identifying what the issues are but more about how the state listens and responds to the challenges.

### III Aboriginal Women and the Legal System

The first part of this chapter has described the exclusion and disadvantage of Aboriginal women. This part now examines how the state responds when Aboriginal women’s issues arise in the course of its engagement with Indigenous peoples. It discusses the problem of institutional racism for Aboriginal women and then focuses on the Australian legal system because of the frequency of Aboriginal women’s interactions with the law.

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124 Daylight and Johnstone, above n 4, vi.
A Institutional Racism and Aboriginal Women

Indigenous people have frequently spoken of institutional racism in Australia. Institutional racism refers to the factual and ideological exclusion of Indigenous peoples in their interactions with the state. There is substantial literature examining institutional racism across a broad cross-section of law and policy, although it lacks a gender analysis. Institutional racism was considered by the RCIADIC as a contributing factor to the over-representation of Aboriginal people in custody and their involvement in the criminal justice system:

When Aboriginal people say they lived with racism every day they are not meaning to say that all day, every day they met non-Aboriginal people who insulted them and called them names (some of the time, of course, they did), but that every day the system of inequality put them down. They are talking about the laws, the systems, that were put in place pursuant to the laws which operate every day whether the people who operate the system are well meaning and helpful or personally racist.

This experience of historical and contemporary institutional racism has resulted in Indigenous people’s dislocation from public institutions such as the parliament, the legal system and the bureaucracy. This is exacerbated by the fact that Australia is the only common law country without a treaty with Indigenous peoples. There has been no constitutional recognition given to the status of Aboriginal and Torres Strait Islander peoples in the Australian Constitution, nor has there been such recognition of their inherent and pre-existing rights.

For Aboriginal women, institutional racism is intersectional – compounded by a ‘dual oppression’ or ‘dual disadvantage’ which has been identified by Indigenous women and

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127 See Commonwealth, RCIADIC, National Report, above n 5, vol 2, [12.1.27].
black women internationally. This dual oppression refers to discrimination by virtue of race as well as sex. The first Annual Report on the implementation of RCIADIC’s recommendations acknowledged that ‘the level of discrimination experienced by Aboriginal women and Torres Strait Islander women is compounded by the combination of their race and gender and the … dual disadvantage experienced by Aboriginal women and Torres Strait Islander women’. The Human Rights and Equal Opportunity Commission (now the Australian Human Rights Commission) has also identified intersectional discrimination as a problem for Aboriginal women, emphasising that it cannot be understood by merely adding together the consequences of race, class and gender discrimination. That is, an indigenous woman’s life is not simply the sum of the sexism she experiences because she is a women plus the racism she experiences because she is indigenous plus the disadvantage she experiences because of poverty and exclusion from services. A person may be discriminated against in qualitatively different ways as a consequence of the combination of the aspects of their identity.

There have been few reports in Australia on how Aboriginal women experience intersectional discrimination. In 2001, the Public Interest Advocacy Centre and Wirringa Baiya Aboriginal Women’s Legal Centre conducted 73 focus groups with Indigenous women from a range of urban, regional and rural communities in New South Wales. In the consultations Aboriginal women said they experienced discrimination on a regular and severe basis. According to the women interviewed, the discrimination suffered was on the grounds of race, which took place in many areas of life, including in shops, the workplace, the rental market and schools, and by pubs, clubs and the police. The report found that discrimination experienced as a woman and as an Aboriginal person cannot be easily separated:

133 Ibid 56.
134 Ibid 48.
This intersection is particularly significant in light of the law’s tendency to imply identities by its general statements. If the ‘reasonable person’ is implicitly white, then the ‘Indigenous person’ is implicitly male. This may mean that issues of Indigenous affairs become male issues, and consultation with Indigenous peoples becomes consultation with Indigenous men.\textsuperscript{135} 

A similar report into discrimination experienced by Aboriginal women in Brisbane conducted in 2000 noted the impact that intersectional discrimination has on the life of Aboriginal women.\textsuperscript{136}

This intersectionality or dual oppression has been identified by the United Nations as a major problem for racialised women: ‘All women and particularly racialised women ... run the risk of gender discrimination in the judicial process’.\textsuperscript{137} The UN Human Rights Committee has highlighted intersectionality as a consideration that states like Australia should take into account when addressing discrimination against women: ‘Discrimination against women is often intertwined with discrimination on other grounds such as race ... [S]tates parties should address the ways in which any instances of discrimination on other grounds affect women in a particular way’.\textsuperscript{138} Similarly, the UN Committee on the Elimination of Racial Discrimination has stated that:

> racial discrimination does not always affect women and men equally or in the same way. There are circumstances in which racial discrimination only or primarily affects women, or affects women in a different way or to a different degree than men. Such racial discrimination will often escape detection if there is no explicit recognition or acknowledgement of the different life experiences of women and men, in areas of both public and private life ....\textsuperscript{139}

There remains a lack of acknowledgment of the different life experiences between Aboriginal men and women today. Laws and policies are aimed at the standardised concept of ‘Indigenous peoples’, frequently with the consequence that challenges specific to Aboriginal women are overlooked. It is much easier for the state apparatus to focus on one generic area of policy reform (eg, health) because it requires less policy nuance, less

\begin{footnotesize}
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  \item \textsuperscript{135} Ibid 11.
  \item \textsuperscript{136} Anne Coleman, \textit{Sister, It Happens to Me Everyday: An Exploration of the Needs of and Responses to Indigenous Women in Brisbane’s Inner City Public Spaces} (2000).
  \item \textsuperscript{138} Human Rights Committee, \textit{General Comment 28: Equality of Rights Between Men and Women (Article 3)}, 68\textsuperscript{th} sess, [30], UN Doc CCPR/C/21/Rev.1/Add.10 (2000).
  \item \textsuperscript{139} Committee on the Elimination of Racial Discrimination, \textit{General Recommendation 25: Gender Related Dimensions of Racial Discrimination}, 56\textsuperscript{th} sess, [1], UN Doc A/55/18, Annex V at 152 (2000).
\end{itemize}
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funding and amorphous statistical targets. However, it also results in a failure to take legislative and policy action to reform those areas that may be gender-specific.

In Australia, the conundrum of the contemporary framework of Indigenous self-determination is that the content and process of self-determination is predicated on a vague principle of consultation by governments with ‘Indigenous peoples’. But what does it mean to consult? As it is currently understood self-determination refers to the collective ‘self’ and consultation is conducted with those stakeholders the state recognises as legitimate. They are usually Aboriginal organisations, corporations, representative bodies or land councils. Yet over three decades of consultation with these groups that make up the collective ‘self’ have to a large extent ignored the marginalisation and violence experienced by Aboriginal women.

Despite the substantial evidence demonstrating the extent of violence and sexual assault against Aboriginal women and girl-children, the Australian state has avoided the issue because of the ambiguity over the meaning of self-determination, and because of the emotional Indigenous attachment to the concept. The Aboriginal community has avoided facing up to the marginalisation of women. There is self-censorship because of a genuine and well-founded fear of racism and prejudice. Even so, since the end of the formal self-determination era, what has changed? Today many Aboriginal people turn to the language of the United Nations Declaration on the Rights of Indigenous Peoples, but while this provides a general, universal framework for consultation with Indigenous groups it provides little guidance as to the mechanics of consultation in the context of the relationships between men and women. This is because the state is patriarchal and while there is no discernable shift in the state-centric way self-determination is conceptualised, race and gender will continue to be blurred and consequently Aboriginal women’s power will always be weakened and their choices diminished.

B Aboriginal Women and the Legal System

This section provides two case studies of the way in which the state has sought to respond to the problems faced by Aboriginal women during the self-determination era and failed to adopt an intersectional approach. The first case study is the RCIADIC, which failed to adequately consider Aboriginal women in its inquiry into Aboriginal deaths in custody.
The Royal Commission into Aboriginal Deaths in Custody

The RCIADIC was established in October 1987 following national outrage over the number of Aboriginal deaths in custody. The RCIADIC investigated 99 deaths that had occurred between 1 January 1980 and 31 May 1989, in prisons, police stations or juvenile detention institutions. According to the RCIADIC, it was a revealing commentary on the life experience of Aboriginal people in 1987 and of their history that it would have been assumed by so many Aboriginal people that many, if not most, of the deaths would have been murder committed if not on behalf of the State at least by officers of the State.

One significant finding of the RCIADIC was that the deaths in custody investigated were not the product of deliberate violence or brutality of police or prison officers. Another was that Aboriginal people did not die in custody at a greater rate than non-Aboriginal people; rather they were simply in custody at much higher rates. The RCIADIC did, however, find that there was a lack of regard for the duty of care that is owed to persons in custody by police officers and prison officers. At the time of the National Report, the degree of Aboriginal over-representation in custody was 29 times greater than the rate for non-Indigenous people — the 99 who died in custody were victims of that. The report examined the implications of over-representation including the role played by the history of colonisation in that statistic.

Of the 99 deaths investigated, only 11 were women. After the report was handed down, questions were raised about the failure of the RCIADIC to investigate Aboriginal women’s deaths in custody and their interactions with the criminal justice system. These voices

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140 Commonwealth, RCIADIC, National Report, above n 5.
141 Ibid vol 1, 1.
142 Ibid [1.1.3].
143 Ibid.
144 Ibid [1.3.2].
145 Ibid [1.2.3].
146 Ibid.
challenged the RCIADIC’s position that, at the time of the Royal Commission, Indigenous women were in a better position than Indigenous men.\textsuperscript{148} Indeed the \textit{National Report} described colonisation as having a lesser impact on Aboriginal women than on Aboriginal men, arguing that women were shielded from the ravages of colonisation because of their role as mothers:

For women ... although not even motherhood is an absolute or unquestioned position, the bearing or raising of children does provide a stable basis from which entry into adulthood and the negotiation of status may be undertaken. Moreover, the division of labour defined in relation to the domestic and public spheres is also related to gender roles. Precisely because of this, the impact of colonization has been different for men and for women. Despite the enormous changes effected, women’s roles in the domestic sphere and their tasks — nurturing, providing food, ‘worrying for the ‘lations’ — have not substantially altered. The public sphere, and hence the context of men’s role and status, is precisely the area that has been most under attack in the transformation to a new order. The group most sociably vulnerable in these processes are young men.\textsuperscript{149}

Similarly Commissioner Patrick Dodson observed that

Aboriginal women have been instrumental in withstanding the enforced cultural indoctrination, ironically, through their role as culture bearers .... While forced cultural change has had substantial impact on the traditional role of Aboriginal men, Aboriginal women even though they have been exposed to the same cultural forces have basically retained the role of gatherer and child carer.\textsuperscript{150}

The Report also canvassed the idea that the competition for affection between non-Indigenous men and Indigenous men for Aboriginal women was a possible contributing factor to men committing suicide.\textsuperscript{151}

Elena Marchetti investigated the role of gender in the RCIADIC’s work in a doctoral thesis, which is to date the only comprehensive gender analysis of the RCIADIC.\textsuperscript{152} In her thesis, Marchetti examined the official RCIADIC reports, comparing them to texts prepared by the Aboriginal issues units (‘AIU’), semi-independent research units that organised meetings and conducted interviews with Aboriginal people and their organisations. These units had to report to each regional commissioner of the RCIADIC, constituting the ‘Indigenous

\begin{footnotesize}
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\item \textsuperscript{148} Marchetti, \textit{Women and Gender in the Royal Commission}, above n 147, 178.
\item \textsuperscript{149} Commonwealth, RCIADIC, \textit{National Report}, above n 5, vol 2, 90.
\item \textsuperscript{150} Commonwealth, RCIADIC, \textit{Regional Report of Inquiry into Underlying Issues in Western Australia}, (1991) vol 1, 376.
\item \textsuperscript{151} Ibid; Marchetti, \textit{Women and Gender in the Royal Commission}, above n 147, 181.
\item \textsuperscript{152} Howe, above n 147; Audrey Bolger, \textit{Aboriginal Women and Violence} (1991).
\end{enumerate}
\end{footnotesize}
voice’ in the investigation. The AIU texts were to inform RCIADIC’s regional and national reports.

Marchetti found that the AIU texts raised extensive issues regarding the problems of Aboriginal women. These included the prevalence of family violence and alcohol abuse; the violent treatment of Indigenous women by police; the need for victims of violence to be provided with access to legal representation; the need to recognise women’s customary law; the problems with accessing appropriate hospital care when giving birth; lack of support from partners; and the need for women to be employed in the criminal justice system. Yet, as Marchetti noted, the final, official RCIADIC texts did not reflect these issues:

'[a]side from the topics of housing, offending patterns of Indigenous women, visiting family members in prison, and informing families of a death in custody and of post-death investigations, other problems which concerned Indigenous women were not reported in the official RCIADIC reports to the same extent as in the AIU texts. This was particularly apparent in relation to the topics of family violence, police treatment of Indigenous women, the importance of employing Indigenous women in various service roles, and birthing facilities. Notably, the official RCIADIC reports lacked a gender specific analysis of the problems that had the most harmful impact on Indigenous women: family violence and police treatment of Indigenous women.'

Marchetti concluded that because the majority of the deaths investigated were men it ‘supported the assumption [now embedded in the criminal justice sector] that young Indigenous males were more disadvantaged than Indigenous females’. In her interviews with people who worked on the RCIADIC, Marchetti found that there was no gender analysis applied, because the focus of the inquiry was ‘race’. There was no explicit or conscious agreement to ignore Indigenous women; ‘instead the oversight had occurred unconsciously’. Even so, Marchetti also found that almost half of the people interviewed understood that the focus of the inquiry was Indigenous males. On this the National Report was explicit:

Aboriginal juveniles particularly males require very particular consideration in this Report ... Whilst the increasing involvement of Aboriginal females in the juvenile and adult justice

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154 Ibid 8.
155 Ibid.
156 Marchetti, Women and Gender in the Royal Commission, above n 147, 215.
system and the deaths of some of them is a matter of great concern, overwhelmingly the
typical portrait of the Aboriginal deaths in custody was that of young males.\textsuperscript{158}

According to Marchetti, ‘the problems facing Indigenous people were therefore assumed to
primarily relate to males’.\textsuperscript{159}

Even though empirically the research on which RCIADIC was based found that young
Indigenous men did suffer many disadvantages and were ‘greatly marginalised’, important
statistics emerged at the time that the number of deaths of Indigenous women by alcohol-
related murders was more than the deaths in custody for the period of RCIADIC. Marchetti
found that, in New South Wales between 1968 and 1981, 43 per cent of homicides were
within the family and almost 47 per cent of female victims of homicide were killed by their
spouse, compared to 10 per cent of male victims.\textsuperscript{160} In Queensland the data that was
collected from former missions and reserves during the period 1987–89 indicated the death
rate of Indigenous women was four times that of all Australian women as compared with
Indigenous men whose death rate was three times that of Australian men.\textsuperscript{161}

Marchetti concluded that, despite these alarming statistics about the deaths of Aboriginal
women at the time — due mainly to interpersonal violence between Aboriginal men and
Aboriginal women — the problems concerning Indigenous women were ‘overshadowed by
the problems facing Indigenous “people”, which in reality equated to problems facing
Indigenous men’.\textsuperscript{162} Audrey Bolger made the same point in her 1991 report \textit{Aboriginal
Women and Violence}. Bolger noted that during 1987 and 1988 three Aboriginal men died
in custody in the Northern Territory (and no Aboriginal women) yet in 1987 and 1988 of
the 39 homicides recorded in the Northern Territory, 17 of them were Aboriginal women.

When the number of Aboriginal people dying in custody was brought to public attention it
caused such consternation that the Royal Commission was set up, and rightly so. Yet the
fact that Aboriginal women particularly suffer far greater violence in their own
communities and are much more likely to be killed and injured in and around their own
homes has caused no similar public outrage.\textsuperscript{163}

\textsuperscript{158} Ibid.
\textsuperscript{159} Ibid.
\textsuperscript{160} Ibid.
\textsuperscript{161} Ibid.
\textsuperscript{162} Ibid.
\textsuperscript{163} Bolger, above n 152, 3.
Nevertheless Marchetti argues that the RCIADIC has been unfairly criticised for ignoring Aboriginal women \textit{per se}, noting that, in fact, Aboriginal women are mentioned in numerous parts of the report and recommendations and were therefore not ‘ignored’. For Marchetti, critics unfairly base their conclusions \textit{only} on the content of the \textit{National Report} and the recommendations. She says that Indigenous people’s own reflections on the RCIADIC are informed by conscious and unconscious race and gender bias. According to Marchetti, ‘community rights and concerns about male deaths in custody weren’t raised by Indigenous women because it was culturally inappropriate for them to discuss individual rights and female deaths’. And because RCIADIC was ignorant of these ‘norms’, they did not use a methodology that would have allowed female voices to surface. Marchetti cites Aboriginal scholar Moreton-Robinson as evidence of the existence of this cultural norm: ‘Indigenous women give priority to the collective rights of Indigenous peoples rather than the individual rights of citizenship’. One of the RCIADIC commissioners interviewed by Marchetti noted that, while Aboriginal women were active participants in the Commission’s consultations, they rarely expressed concerns related specifically to women. The non-Indigenous lawyers of RCIADIC said it was up to Indigenous women to raise their own issues and not for non-Indigenous people to force the issues.

For Marchetti, the rationale for her research was to explain \textit{why} RCIADIC did not take an intersectional approach. She concluded that, among many things, the RCIADIC’s Letters Patent were restrictive, Aboriginal women did not want an intersectional approach, and while women were excluded in a sense, ‘ultimately [the exclusion] occurred unintentionally’. According to Marchetti, ‘the commissioners conducted a predominantly legally directed investigation about “race” without realizing that by doing so, Indigenous males would be favoured’. Marchetti concluded that the absence of an intersectional analysis occurred ‘unintentionally’, despite the fact that her entire analysis is about how

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\textsuperscript{165} Ibid.
\textsuperscript{166} Ibid 167.
\textsuperscript{167} Ibid 161.
\textsuperscript{168} Ibid 162.
\textsuperscript{169} Ibid.
\textsuperscript{170} Ibid 169.
\textsuperscript{171} Ibid.
Western legal processes and liberal legal ideology 'erase' the experiences of women.\textsuperscript{172}

Marchetti also added a personal note:

[i]t has not been easy to summarise how the RCIADIC considered or portrayed problems relating to Indigenous women. Researching and writing ... has made me more sympathetic to the task the RCIADIC was required to undertake. The information and material available for the RCIADIC to use was enormous, and deciding what material to use and how to interpret that material would not have been an easy or enviable task.\textsuperscript{173}

Yet was the substantial omission of Aboriginal women unintentional? The absence of due consideration of Aboriginal women in the publicly available text of a national report is arguably equivalent to the state ignoring them. Since the RCIADIC, there has been an increase in the overall national Indigenous women’s prison population by nearly 50 per cent.\textsuperscript{174} Indigenous women are reported to be the fastest growing prison population and incarceration rates for women have increased more rapidly than for men.\textsuperscript{175} According to the Aboriginal and Torres Strait Islander Social Justice Commissioner, in Queensland in 2003, 45.3 per cent of Indigenous female inmates were sentenced for a violent crime, 28.3 per cent for property crime, 24.5 per cent for other crimes.\textsuperscript{176}

Many of the people interviewed by Marchetti said that, if the inquiry was held today, the focus might have been different given the dramatic increase in the rate of imprisonment of Indigenous females since the late 1980s. But is there a possible relationship between RCIADIC’s failure to consider Aboriginal women and the doubling of Aboriginal women’s imprisonment since the RCIADIC? If anything RCIADIC is symptomatic of broader government failure and neglect. While it would be difficult to establish a direct correlation between the omission of women in the report and the actual commission of a crime, the lack of attention given to Aboriginal women’s issues in reports like those of the RCIADIC may be a salient factor in the increasing imprisonment rate. Aside from the Social Justice Commissioner’s own examination of the escalating crisis of the over-representation of Aboriginal women, there has been little public attention given to this growing crisis.

\textsuperscript{172} Ibid.
\textsuperscript{173} Marchetti, Women and Gender in the Royal Commission, above n 147, 210.
\textsuperscript{175} Ibid.
\textsuperscript{176} Ibid 17. These ‘other’ crimes include: social security fraud, procedures offences, unlawful possession of weapons, driving-related offences and drug offences.
The RCIADIC report was a confirmation of an unquestioned and untested assumption that men have suffered more than women under colonial and post-colonial regimes. This has become consolidated in the male narrative of Indigenous politics, often convincing even Aboriginal women themselves. Yet there is no evidence at all to suggest that either sex fared worse than the other as a result of colonisation. The impact of colonisation upon men cannot be compared with the impact of colonisation upon women. The assertion by men that women fared better because they were shielded from the impact of colonisation in their roles as mothers, carers and/or domestic servants is coloured by the fact that domestic work is not afforded the same value as men’s work. Caring, nurturing and serving, conventionally female functions, are presented as less important than the role of Aboriginal men. The patriarchal devaluing of women’s roles in non-Aboriginal society has inevitably influenced Indigenous communities. As Scutt has observed about the invisibility of Aboriginal women:

in the dominant culture, white women are unlikely to be seen … as ‘landowners’, ‘business leaders’, bearers of (worth-while and significant) traditions … It is therefore hardly surprising if Aboriginal women’s views and realities are less likely to be taken into account.\textsuperscript{177}

The legacy of the RCIADIC has not dramatically changed the situation of Aboriginal incarceration. But for Aboriginal women it has got even worse. It is true that the terms of reference of the RCIADIC were limited and did not include a gender analysis. But it is also true that the commissioners had some discretion in the way in which the investigation was conducted.

The RCIADIC’s greatest legacy was to give prominence to the image of the Aboriginal prisoner as male when today the prison population is increasingly female. This exacerbates the situation described in the \textit{Women’s Business} report in 1986. That report revealed the great stress Aboriginal women live under daily because of the responsibilities they have in maintaining not only their own families but entire communities. If mothers are incarcerated, then it is grandmothers who are looking after the children.

RCIADIC was established one year after the publication of \textit{Women’s Business}, yet the report was not cross-referenced once. The RCIADIC put the right to self-determination at

\textsuperscript{177} Scutt, above n 63, 4.
the forefront of its work, arguing that Aboriginal people must be consulted as a matter of urgency on law and policy decisions made about their lives. But like all of the discourse surrounding self-determination this needed to be unpacked. In the case of self-determination as practiced by and envisioned in the RCIADIC’s own work, the ‘self’ was male.

2 ‘Bullshit Law’: The Distortion of Aboriginal Law

The second case study examining the way the state responded to the problems that emerged for Aboriginal women during the self-determination era relating to the (mis)use of Aboriginal customary law in the domestic legal system. A preoccupation of law reform for decades, the recognition of Aboriginal law is piecemeal and haphazard. Australian legislatures have for the most part been reluctant to recognise Aboriginal law formally even though Aboriginal law is already taken into account in varying contexts throughout the Australian legal system. Aboriginal women have emphasised the importance of Aboriginal law to their culture; however, they have also raised serious questions about men invoking Aboriginal law to justify crimes against Aboriginal women. The controversy about the practice of Aboriginal law being used to mitigate sentences in sexual assault cases against Aboriginal women has been referred to as distorted customary law or bullshit law. The problem with the use of Aboriginal customary law in courts is that it has always been difficult for courts to determine what constitutes Aboriginal custom.

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179 See, eg, Aboriginal Land Rights (Northern Territory) Act 1976 (Cth); Native Title Act 1993 (Cth); Aboriginal Affairs Planning Authority Act 1972 (WA); Adoption Act 1988 (SA); Adoption Act 1984 (Vic); Adoption Act 2000 (NSW); Adoption of Children Act 1994 (NT); De Facto Relationships Act 1984 (NSW); Administration and Probate Act 1979 (NT) div 4A; Family Provision Act 1979 (NT) s 7(1A).


Sharon Payne, an Aboriginal lawyer, explains the term *bullshit law* as: ‘a distortion of traditional law used as a justification for assault and rape of women. It is ironic that the imposition of the white man’s law on traditional law has resulted in the newest one.’\(^{183}\) Citing Aboriginal women, Bolger has said that ‘[t]here are now three kinds of violence in Aboriginal society — alcoholic violence, traditional violence and bullshit traditional violence’.\(^{184}\) According to Bolger, bullshit traditional violence is ‘the sort of assault on women which takes place today for illegitimate reasons, often by drunken men which they then attempt to justify as a traditional right’.\(^{185}\)

Lawyers from Aboriginal and Torres Strait Islander legal services have often provided evidence of Aboriginal law as sanctioning violence or sexual abuse against Aboriginal women or children. In the 1980 case *R v Lane*, the Aboriginal defendants were accused of the rape of an Aboriginal woman who later died.\(^{186}\) The judge stated that rape was ‘not considered as seriously in Aboriginal communities as it is in the white community’, that ‘the chastity of women is not as importantly regarded as in white communities’ and that the ‘violation of an Aboriginal woman’s integrity is not nearly as significant as it is in a white community’.\(^{187}\) Bolger observed that: ‘The defence adduced evidence, all obtained from non-Aboriginal males, to show that rape was not a very serious crime in Aboriginal society and that by approaching the men and asking for a cigarette the woman may have been seen as inviting the men to join her’.\(^{188}\) The difficulty in determining what constitutes Aboriginal custom arises, as Chris Cunneen has noted, from the fact that ‘the determination as to what is Aboriginal culture or tradition is derived from a male perspective’.\(^{189}\)

In the 1991 case of *R v Mungkilli, Martin and Mintuma*, the South Australian Supreme Court stated that rape was not acceptable in Aboriginal communities but not ‘regarded with the seriousness that it is by the white people’.\(^{190}\) In *R v Williams*, Williams had been charged with the murder of an Aboriginal woman who had allegedly been taunting him

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183 Payne, above n 180, 71.
184 Bolger, above n 152, 50.
185 Ibid.
186 *R v Lane* (Unreported, Northern Territory Supreme Court, 29 May 1980).
187 Ibid.
188 Bolger, above n 152, 81.
about disclosing customary secrets.\textsuperscript{191} Wells J took this into account when sentencing. The lawyers presented evidence that the community wanted to deliver traditional punishment and Williams received a two-year suspended sentence for murder of an Aboriginal woman contingent upon his receiving 12 months of tribal instruction from elders. Williams received a traditional punishment of spearing through the thigh. The Australian Law Reform Commission in its 1986 inquiry into the recognition of Aboriginal customary law considered this case problematic because Williams then went on to commit further assaults on a number of Aboriginal women.\textsuperscript{192}

In \textit{Hales v Jamilmira}, the defendant was a 50-year-old Aboriginal male, Jackie Pascoe, who used Aboriginal law in defence of statutory rape.\textsuperscript{193} The female victim, aged 15, who was referred to as ‘A’ in the proceedings, was promised to Pascoe under Burarra culture and had been under pressure to fulfil her cultural obligations to have sexual relations. In August 2001, ‘A’ was taken to Pascoe’s outstation, east of Maningrida, and the couple had sexual intercourse. Initially the Director of Public Prosecutions charged Pascoe with rape; however, that was reduced to unlawful intercourse with a minor. Pascoe was convicted and sentenced. During sentencing, Pascoe understood that his offence was carnal knowledge. In a recorded interview at Maningrida Police Station, Pascoe stated that: ‘She is my promised wife. I have rights to touch her body’ and that ‘it’s Aboriginal custom, my culture. She is my promised wife’.\textsuperscript{194} The Northern Territory Supreme Court recognised that Pascoe held a reasonably sophisticated knowledge of the criminal law. Gallop J reduced the magistrate’s sentence of four months to one-day imprisonment, and in his reasoning stated of the victim: ‘She didn’t need protection from white law[,] she knew what was expected of her. … It’s very surprising to me [Pascoe] was charged at all’.\textsuperscript{195} The decision was not appealed until media coverage led to community outrage about the decision.\textsuperscript{196} On appeal Riley J in the Northern Territory Court of Appeal stated:

\begin{footnotes}
\item[191] \textit{R v Williams} (1976) 14 SASR 1.
\item[192] Australian Law Reform Commission, above n 178, vol 1, [492].
\item[194] \textit{Hales v Jamilmira} [2003] NTCA 9, [5].
\item[196] Ibid.
\end{footnotes}
Whilst proper recognition of claims to mitigation of sentence must be accorded and such claims will include relevant aspects of customary law, the court must be influenced by the need to protect members of the community including women and children from behaviour which the wider community regards as inappropriate.  

After the decision in *Hales v Jamilmira*, legislation was introduced to prohibit promised marriage in the Northern Territory. This was welcomed by many Aboriginal women. However, it was criticised by Aboriginal political leaders such as Galarrwuy Yunipingu who argued that Western political systems were imposing their beliefs upon Aboriginal law. *Hales v Jamilmira* drew national attention to the disparaging sentencing comments about Aboriginal women over two decades. Larissa Behrendt has argued that colonial responses to Aboriginal women’s sexuality continue to inform sentencing comments:

Colonial notions that Aboriginal women are ‘easy sexual sport’ have also contributed to the perception that incidents of sexual assault are the fault of Aboriginal women. While behaviour and treatment of Aboriginal men is often contextualised within the process of colonisation, no context is provided for the colonial attitudes that have seen the sexuality of Aboriginal women demeaned, devalued and degraded. The result of these messages given to Aboriginal women by their contact with the criminal justice system would only reinforce any sense of worthlessness and lack of respect that sexual assault and abuse have scarred them with.

Despite this, the sentencing trend of permitting the mitigation of sentences on the basis of cultural violence against Aboriginal women has been arrested to an extent, with Australia’s engagement with international human rights law. There is a growing body of case law that questions Aboriginal law on the basis of Australia’s international human rights law obligations. This has been an important development for Aboriginal women. For example, in *R v Daniel*, a case involving the sexual assault of an Aboriginal woman in Kowanyama, Fitzgerald P said:

It would be grossly offensive for the legal system to devalue the humanity and dignity of members of Aboriginal communities or to exacerbate any lack of self-esteem felt within those communities by reason of our history and their living conditions. ... Aboriginal women and children who live in deprived communities or circumstances should not also be

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197 *Hales v Jamilmira* [2003] NTCA 9, [33].
deprived of the law's protection. ... [T]hey are entitled to equality of treatment in the law's responses to offences against them, not to some lesser response because of their race and living conditions.201

In *R v Edwards*, Muirhead J commented that: 'I am just not prepared to regard assaults of Aboriginal women as a lesser evil to assaults committed on other Australian women'.202 In *Ashley v Materna*, the Northern Territory Supreme Court agreed with the magistrate's dismissal of a defence argument for the mitigation of sentencing involving the assault of an Aboriginal woman. In sentencing the magistrate stated:

Now this may be conduct ... which justifies action of this nature by you in Aboriginal law, but quite clearly as a matter of public policy the court cannot take it into account except perhaps in the most minor way.... Women, including Aboriginal women, stand equal to men in the law of the Northern Territory and, if Aboriginal traditional laws do come to receive recognition in whatever form by the general law of the Territory, I think it is highly unlikely, in view of international treaties that Australia has signed, if a law such as has been explained to me will have any standing because it is — I regret to have to say this to you in the presence of Elders, but it is, in my view, of such a nature that people in many countries would hold it to be discriminatory and I believe the Discrimination Boards of this country and missions and whatever would call it discriminatory.203

Bailey J in *Ashley v Materna* also commented that:

In the absence of evidence as to the obligatory nature of the alleged law and the consequences for non-compliance, elevation of a morally indefensible practice to the status of 'customary law' to which courts could or should have regard would be to invite ridicule of the courts and make a mockery of the fundamental principle that all people stand equal before the law.204

In *Amagula v White*, Kearney J expressed the view that: 'The courts must do what they can to see that the pervasive violence against women in Aboriginal communities is reduced. There is a fairly widespread belief that it is acceptable for men to bash their wives in some circumstances; this belief must be erased'.205 In *R v Wurrarama* it was stated that: 'whilst it must be acknowledged that the “criminal law is a hopelessly blunt instrument of social policy” ... and that the courts “cannot deal with the “root problem””, the courts must and will do what they can to deter the violence'.206

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204 Ibid.
While *bullshit law* is limited to those areas where Aboriginal law is practised, cases are emerging of the way in which *dysfunction* in Aboriginal communities or culture is used to mitigate crimes against Aboriginal women and children. Again this highlights the way in which the legal system renders Aboriginal women invisible. One example of this is *R v KU* (the ‘*Aurukun case*’), where a 10-year-old Aboriginal girl had been gang raped by three adults and several juveniles.207 The defendants pleaded guilty. In sentencing submissions, the prosecutor, Steve Carter, submitted to the Queensland District Court that the children were ‘very naughty’ for doing what they did, but that it was ‘a form of childish experimentation, rather than one child being prevailed upon by another’.208 Carter sought supervisory or probationary orders and no custodial penalties for any of the offenders, including the adults nor did he submit a victim impact material. The sentencing judge heard submissions in mitigation of sentence on behalf of each defendant based on their dysfunctional community upbringing. In the District Court, Judge Bradley remarked:

All of you have pleaded guilty to having sex with a 10 year old girl ... All of you have to understand that you cannot have sex with a girl under 16. If you do, you are breaking the law, and if you are found out, then you will be brought to Court and you could end up in goal. I accept that the girl involved ... was not forced and that she probably agreed to have sex with all of you, but you were taking advantage of a 10 year old girl and she needs to be protected, and young girls generally in this community need to be protected. ... Some of you are still children yourselves. Others of you are adults, but I am treating you all equally in terms of the behaviour. I am not treating any of you as the ringleader or anything like that.209

Judge Bradley sentenced each of the adults to six months imprisonment suspended immediately for 12 months and sentenced each of the juveniles to 12 months probation without conviction. The *Aurukun case* led to national and international media coverage and public condemnation.210 The Queensland Attorney-General subsequently appealed the

208 Ibid [19].
209 Ibid [72].
decision. In the Queensland Court of Appeal, it was found that Judge Bradley gave too much weight to the dysfunctional nature of the community and the history of disadvantage suffered by the male offenders, without having received any evidence establishing that the individual offenders had actually suffered by virtue of that history and disadvantage.211

During the appeal period, the Queensland Attorney-General engaged Peter Davis, a Senior Counsel, to conduct a review of similar cases in Cape York. Davis's *Review of Cape York Sentences* was released to the public after the appeal and revealed the haphazard way in which the Queensland Director of Public Prosecutions deals with these cases.212 Regarding the *Aurukun case*, Davis found that no Victim Impact Statement was tendered. He also found that there was no attempt to refer the judge to the relevant legislation, comparative sentences or the various statements of principle that have been made by the Court of Appeal relating to the sentencing of offenders (especially juvenile offenders) for sexual offences. There was a failure, said Davis, to properly distinguish between offenders in the *Aurukun case*: the offenders were of differing ages, had differing levels of culpability and had differing criminal histories, yet the submissions and sentencing judgment treated the offenders together.

To refer back to the discussion on RCIADIC and its pervasive influence in Indigenous affairs, the prosecutor in the *Aurukun case* said that the most critical factor he took into account in making submissions was the Queensland Aboriginal and Torres Strait Islander Justice Agreement — a highly regarded outcome of the RCIADIC recommendations — which argues against custodial sentences for Indigenous offenders where possible.213 In fact, despite the primary significance the prosecutor attached to the Justice Agreement, in a

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211 *R v KU* [2008] QCA 154, [133].
legal sense it is barely relevant to sentencing, especially compared to the relevant legislative provisions to which the Court in *Aurukun* should have been referred. Davis's report concluded that the judge received virtually no assistance at all from the Crown prosecutor in determining an appropriate sentence for the perpetrators.214

The examples of *bullshit law* and the community/cultural dysfunction defence reveal the vulnerability of Aboriginal women. These examples highlight the level of inertia in the system when it comes to protecting the human rights of Aboriginal women and girl-children. The *Aurukun* case showed a reluctance to take seriously the crime of rape committed against an Aboriginal girl and the privileging of a document such as the Justice Agreement over the fundamental rights of the victim and her entitlement to equality before the law. This is an example of how male-dominated narratives of culture combine to diminish the dignity of women's lives.

**C Conclusion**

Though the Australian legal system is replete with institutional racism, discussions of the problem rarely consider specifically the unique challenges of Aboriginal women. Indeed the adversarial politicking that comes with the political domain, in which the monolithic state is pitted against a collective of 'Indigenous peoples', means that Aboriginal women are not likely to question their exclusion. The two examples discussed here, RCIADIC and *bullshit law*, illustrate the different ways in which Aboriginal women are marginalised from their own communities and excluded from the rule of law. How can the right to self-determination be reconfigured to permit Aboriginal women the space to have conversations about their lives, their exclusions and their aspirations without being filtered through a standardised normative framework that essentialises their lives?

**IV Conclusion**

Chapter 1 revealed that international legal instruments provide little insight into what the right to self-determination means for Aboriginal women. In this chapter, which turned to the state and Aboriginal women's experiences during the self-determination era, a picture

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214 Davis, above n 212, 2.
emerged of a notion of self-determination where women are lost within the male narrative that drives Indigenous politics.

This chapter began by describing the challenges faced by Aboriginal women during the self-determination era. In particular it highlighted those challenges Aboriginal women faced in the legal system during the period and the state's response to those problems. It also raised questions about the capacity of Aboriginal women to enjoy self-determination especially when Indigenous rights are based on a narrative which is calibrated according to the dominant idea of what it means to be Indigenous, and this invariably is male. It is the male prisoner, the male spiritual custodian of culture, the male victim of colonisation, the male perpetrator as victim.

A community that routinely commits and permits violence against women over a period of three decades of apparent self-determination cannot continue to assert that it has respect and value for women's humanity. The evidence of endemic violence against Aboriginal women in communities negates the claim that women are valued in Aboriginal society. It does not help Aboriginal women if the focus, in response to the violence against them, is on how traditional communities were 'separate but equal' and how that respect toward Aboriginal women must be restored. Rather, the focus must be on establishing a conceptual framework for Aboriginal women's lives as they are lived today by which Aboriginal women's interests and unique needs can be untangled from the 'collective'.

The right to self-determination has never been prescriptive enough. It lacks specificity because it is both an abstract human right and also primarily employed as a political tool. In Australia, the focus has been on land rights and the creation of institutions to deliver self-determination. This has meant that less time has been given to determining what the content of self-determination may mean to Aboriginal people living in both Indigenous and non-Indigenous communities. Moreover, because self-determination is state-centric, attempts to define the content pay too much attention to the relationship with the state and too little is given to Aboriginal peoples' relationships with each other. The next chapter

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thus deals with the Aboriginal political domain, how it constructs the right to self-determination and how Aboriginal women feature in that framework.
CHAPTER THREE: INDIGENOUS POLITICAL DISCOURSE AND ABORIGINAL WOMEN’S RIGHT TO SELF-DETERMINATION

I  INTRODUCTION

Having considered the limitations of the right to self-determination in international law in Chapter 1, and Aboriginal women’s marginalisation within the Australian state in Chapter 2, this chapter problematises Indigenous political discourse on the right to self-determination. It is not possible to examine Aboriginal women’s issues productively and develop an alternative approach to conceptualising the right to self-determination if Aboriginal women are not understood in their cultural and historical context. The aim of this chapter is to explore the way in which the right to self-determination has been developed by the Australian Indigenous community and to understand how Aboriginal women are positioned substantively within that discourse.

Part II examines the self-determination project in the Aboriginal political domain focusing on two aspects of Aboriginal political activism germane to the achievement of self-determination: land rights and the ‘rights agenda’. Next, this section will discuss how the Northern Territory Emergency Response, commonly known as the Northern Territory Intervention, represents a critical juncture in the history of Aboriginal rights activism because it has highlighted the inherent tension between collective rights/land rights/racial equality rights and individual rights/Aboriginal women’s rights/gender equality rights.

Part III then explores how the academic and political writing of Aboriginal women has contributed to the development of an Indigenous political theory of self-determination. This literature reveals the way Aboriginal women writers have understood the female Aboriginal ‘self’ in self-determination. To date, this literature’s main achievement has been to disrupt any synthesis between feminist theory and Aboriginal women by aligning Aboriginal women’s interests with those of Aboriginal men. This literature was groundbreaking in its time and valuable to the task of emphasising the importance of the right to self-determination for Aboriginal women. I will argue, however, that, unwittingly but cumulatively, this literature contributed to narratives that have been harmful to the situation of Aboriginal women.
A The Politics of Self-Determination

The right to self-determination is fundamental to Indigenous political advocacy.\(^1\) It is reflected in a number of Indigenous political statements including the Day of Mourning (1938),\(^2\) the Yirrkala Bark Petitions (1963),\(^3\) the Larrakia Petitions (1972),\(^4\) Makarrata (1979–80),\(^5\) the Barunga Statement (1988),\(^6\) the Eva Valley Statement (1993),\(^7\) the Kalkaringi Statement (1999),\(^8\) and the Council for Aboriginal Reconciliation’s *Declaration Towards Reconciliation* (2001),\(^9\) and the *Yolngu and Bininj Leaders Statement of Intent* (2008).

These political statements present the explicit goal of Indigenous activism as the achievement of land rights from which the right to self-determination can be realised.\(^10\) As Larissa Behrendt and Nicole Watson note, ‘dispossession and theft of traditional land has been a hallmark of the colonisation process, so it is little wonder that the focus for political movements by Aboriginal people would be on reclaiming that land’.\(^11\) Collectively these political statements have played an important role in the construction of Indigenous identity.

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\(^3\) ‘Yirrkala Bark Petitions’ reproduced in ibid 231.

\(^4\) ‘Larrakia Petitions’ reproduced in ibid 227.


None of these statements on self-determination mentions Aboriginal women. This is because the notion of 'Indigenous peoples' that features in these statements is taken to be inclusive of all Aboriginal and Torres Strait Islander peoples. Indigenous political activism in Australia, like many social movements, is strengthened the projection of universality. Thus ‘Indigenous peoples’, as a political term, infers a unified collective with common political goals and shared values. The absence of any detailed examination of Aboriginal women’s ideas about self-determination can in part be attributed to the nature of political activism which has its ‘own political scene with its own internal dynamics and tensions’. Sarah Maddison argues that these tensions can obscure and obstruct political aims.

The universal Aboriginal identity resists gender analysis. To specify any rights claim based on gender detracts or draws attention away from the core business of Aboriginal rights — the right to self-determination. As Aboriginal scholar Aileen Moreton-Robinson argues, ‘the goals of Indigenous women and men’s self-determination are underpinned and informed by the inter-substantiation of relations between Indigenous land, spirit, place, ancestors and bodies’.

Yet the evidence suggests that Aboriginal women have been disadvantaged by this universal political approach. According to Maddison, despite many Aboriginal people’s assertion of the importance of healthy disagreement within the community:

[there is a strong tendency for Aboriginal people to smother tensions and disagreements. Given the intense media interest in any sign of trouble in Aboriginal communities, there is a prevailing pressure on communities to appear trouble free, meaning that many less prominent community issues are sidelined from general discussion, and often remain unresolved.

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12 Ibid.
14 Maddison, above n 1, xxvii.
16 Maddison, above n 1, xxx.
B  Aboriginal Land Rights

Most common law jurisdictions have used public law mechanisms to respond to Aboriginal claims for self-determination.17 In Australia, in the absence of treaties, legislation has been the primary approach. The first statutory framework to deal extensively with Aboriginal people was that put in place under state and Commonwealth legislation aimed at the control and ‘protection’ of Aboriginal people.18 However, it was land rights activism, which arguably began with the Gurindji strike at Wave Hill Station in the Northern Territory in 1966, that influenced the development of statutory mechanisms designed to deliver land rights, and therefore the right to self-determination, to Aboriginal communities.19

The Commonwealth Government responded to land rights activism with the development of the Aboriginal Land Rights Act (Northern Territory) Act 1976 (Cth) ('ALRA'). The other statutory mechanism enacted around the same time was the Aboriginal Councils and Associations Act 1976 (Cth), which was aimed at providing Aboriginal organisations with a corporate structure for delivering self-determination.

Today the ALRA has an esteemed place in Aboriginal history. It is revered as the first comprehensive land rights legislation, passed during a period regarded by many Aboriginal people as characterised by the most successful relationship with an Australian Prime Minister, Gough Whitlam.20 It is associated by Aboriginal people with the beginning of the self-determination era. Over time the ALRA has resulted in 44 per cent of the Northern Territory being handed back to Aboriginal people.21 The question rarely asked, however, is how this has benefited Aboriginal women — that Aboriginal women have been equal beneficiaries of the ALRA is taken as given.

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18 See, eg, Aboriginal Protection and Restriction of the Sale of Opium Act 1897 (Qld); Aboriginal Protections Act 1909 (NSW); Northern Territory Aboriginals Act 1910 (SA); Aboriginals Ordinance 1911 (Cth); Aboriginals Ordinance 1918 (Cth); Welfare Ordinance 1953 (Cth); Aboriginal and Torres Strait Islanders Affairs Act 1965 (Qld); Aborigines Act 1911 (SA); Aborigines Act 1934 (SA); Aboriginal Affairs Act 1962 (SA); Aborigines Protection Act 1886 (WA); Aborigines Act 1905 (WA); Native Welfare Act 1963 (WA); Natives Administration Act 1905–36 (Vic); Aborigines Act 1890 (Vic); Cape Barren Island Reserve Act 1912 (Tas).
20 The legislation was ultimately passed by Malcolm Fraser’s Government.
It has been said that the development of the ALRA was influenced by anthropologists who were ‘agents of colonisation’ in a ‘sympathetic collaboration’ with government bureaucracy. Anthropologists helped government bureaucrats develop policy on the ‘Aboriginal problem’. In doing so they often described not the realities of post-contact societies but, as Geoffrey Gray observes, a ‘pristine, pre-contact culture’. Thus, from the outset of the self-determination era, Australian public institutions ignored the status of women in Aboriginal society.

The research, consultation, drafting and enactment of the ALRA was mostly undertaken by men and therefore privileged the stories of Aboriginal men. The concept of Aboriginal people, as a collective, was considered to be undifferentiated and male. Marcia Langton has argued that the male patrilineal bias embedded in the ALRA occurred because only men’s evidence ‘went to provide primary spiritual affiliation of the group to a site or sites on the land and common spiritual responsibility of the group’. Anthropologist Diane Bell has also argued that the statutory/anthropological narrative of land rights privileges Aboriginal men. Western ideas of sexuality and stereotypes of women influenced the early anthropologists who regarded Aboriginal women as ‘the other’. Bell refers to the problem as ‘Man Equals Culture’ and argues that:

Within Australia the tendency has been for male fieldworkers to study male institutions and subsequently to offer analyses which purport to examine the totality of Aboriginal society. Evaluation of female institutions has been based too often on male informants’ opinions,

23 Ibid.
27 See references cited in ibid.
refracted through the eyes of male ethnographers and explained by means of the concepts of male-oriented anthropology.\textsuperscript{31}

Many female anthropologists, Indigenous and non-Indigenous, have observed that the ALRA does not take ‘full cognisance of women’s rights in land, or matrilineal lines of descent and inheritance’.\textsuperscript{32} Peter Sutton has also noted that ‘patrifiliation has been the privileged pathway to land rights under classical Aboriginal tenure systems’.\textsuperscript{33} Fay Gale has argued that as a consequence of the relegation of Aboriginal women to a subordinate position the land rights narrative has ‘penetrated all future Aboriginal–white relations’.\textsuperscript{34}

The privileging of Aboriginal men by Australia’s public institutions has given them an elevated status. It has provided Aboriginal men with opportunities for leadership and experience in decision-making and negotiating that Aboriginal women do not have because Aboriginal men are constructed as the purveyors of culture.

1 Exercising ‘Informal’ Power in Land Rights

A response to the claim that Aboriginal land politics is male-dominated is that Aboriginal women exercise substantial informal power. The neglect of Aboriginal women in the land rights context is countered by their informal power in communities.\textsuperscript{35} The assertion that Aboriginal women have significant informal power is embedded in Indigenous political discourse.

\textsuperscript{31} Ibid.
\textsuperscript{33} Peter Sutton, \textit{Native Title and the Descent of Rights} (1998).
\textsuperscript{34} Gale, above n 25, 382.
For example, according to Wiradjuri scholar Larissa Behrendt, it never occurred to her ‘that women weren’t powerful within my own community ... it always seemed to me that in our community women had an enormous amount of power’. Janet Hunt and Diane Smith argue that, while Aboriginal women are usually outnumbered by men in organisations, older women play influential roles in community decision-making through informal processes. According to Hunt and Smith, ‘[f]orcing western notions of gender equity onto Indigenous groups and their formal governance bodies is unlikely to be the best way to ensure that women have the opportunity to exercise their influence and decision making’.

Sandy Toussaint, Myrna Tonkinson and David Trigger, who have written about Aboriginal women and lands rights, argue that because Aboriginal women have informal community influence in land rights decisions and because Aboriginal senior women are out-living Aboriginal men, Aboriginal women’s knowledge ‘eventually’ finds public expression. They argue that Aboriginal women were dominant in politicking ‘within the Aboriginal domain’. Even though the leading representatives of Aboriginal parties to the negotiations were male, Toussaint et al argue that this evidence ‘do[es] not support any conclusion that women’s interests have been relegated to a second-class position in the course of negotiations over land claims and resource development projects’. They contend that ‘[t]he rise of matrification as a principle within Indigenous law concerning relations with land, has been commensurate with the expression of female agency in negotiations, and both are evidence of a general increase of women’s influence and role’. Further it is claimed that in many communities Aboriginal women are ‘influential behind the scenes in initiating claims and negotiating different interests within their communities’.

My argument is not to challenge the idea that Aboriginal women work hard behind the scenes, or that they are occasionally involved in negotiating mining agreements, but rather

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36 Larissa Behrendt cited in Maddison, above n 1, 197.
37 Hunt and Smith, above n 35, 9.
38 Toussaint, Tonkinson and Trigger, above n 35, 174.
39 Ibid 172.
40 Ibid 173.
41 Ibid.
42 Brock, above n 26, 12.
that the informal power narrative is problematic. The question is whether informal power or influence equates to real decision-making power and agency. Toussaint et al’s evidence of the informal power of Aboriginal women in the Century Mine negotiations is, for example, in striking contrast to the claims made by Aboriginal anthropologist, Marcia Langton, that the Aboriginal women living on that country (Wik country) live in fear and constant violence.\textsuperscript{43} Langton was criticising the anti-Intervention campaign conducted by Women for Wik in 2007. Women for Wik is an organisation of non-Indigenous women who advocate for native title and land rights (‘and the cowardly [Aboriginal] men who hide behind their skirts’); and Langton accused them of privileging land rights over the right of Aboriginal women to live free from violence.\textsuperscript{44}

The contrast between the claims of Toussaint et al and Langton’s picture of the women living in Cape York suggests that the informal power narrative supports the agenda of adversarial politicking against the state. It reinforces a singular political strategy and eschews formal decision-making power of women as ‘Western’. Supporters of the ‘informal power of women’ narrative do not indicate how this informal agency is measured. At best, anecdotal evidence is presented as somehow representative of informal agency in Aboriginal communities.

Another question is whether this supposed informal power is partially an adaptation to exclusion or marginalisation from positions of power rather than an exercise of choice; a reflection of women’s limited opportunities to garner skills that would make them suitable for such positions, rather than an organic development in Aboriginal political organisation. The \textit{Women’s Business} report, discussed in Chapter 2, painted a picture of Aboriginal women running communities and organisations but also aspiring to decision-making roles and exercising more control over land rights, employment, education and child-care. To this extent the conflation of informal power with actual decision-making power is at odds with Aboriginal women’s aspirations.


\textsuperscript{44} Ibid 161.
Self-determination has developed in a skewed way with land rights as its centre. Land rights are the normative basis of the right to self-determination. The gendered impact of the land rights regime on Aboriginal women is rarely examined because land rights are taken to be beneficial for the entire group, including Aboriginal women. Raising questions about gender inequality can be interpreted as a threat to Aboriginal culture.

The over-reliance or over-emphasis on land rights and/or representative bodies as definitive of Aboriginal self-determination promotes an impoverished form of self-determination. Tim Rowse questions the deployment of land rights or the Indigenous jurisdiction as the anchor for Aboriginal aspirations to self-determination. He claims that the normative framework of the Indigenous jurisdiction is informed entirely by state acts: constitutional recognition of the Indigenous population; recognition of customary law in land rights and native title legislation and ad hoc recognition by the common law; recognition of the Indigenous land estate; and recognition of corporate capacity of self-government. Rowse argues for an alternative approach to self-determination 'that does not presuppose the coherence of this assemblage of recognitions'. He writes that 'we should avoid thinking that a bounded land estate is a metonym for jurisdiction'. However, the newly established national Indigenous representative body, the National Congress for Australia's First Peoples, is a company limited by guarantee and continues the tradition in Aboriginal Australia of 'corporate' self-determination. For many Aboriginal people the right to self-determination cannot be truly achieved or exercised without a land base. This explains the dominance of land rights and the aggressive defence of the Indigenous jurisdiction. The price, however, has been the loss of an inclusive concept of the right to self-determination.

Further contributing to the skewed nature of self-determination is the tension in the selective application of international human rights law by the Aboriginal political domain. The use of international human rights law tends to be weighted towards the Racial Discrimination Act 1975 (Cth) ('RDA'), which is the domestic expression of the
International Convention on the Elimination of All Forms of Racial Discrimination.\textsuperscript{49} The reason for this is that the RDA underpins the state and Commonwealth land rights regimes permitting the state to enact legislation that benefits Aboriginal people in order to achieve substantive equality. Rowse notes that when Aboriginal people are arguing for international human rights law they are in fact postulating ‘a jurisdiction that is porous to the norms and laws of the wider world and riven with tension between sexes and generations that an appeal to a common identity can no longer and should no longer contain’.\textsuperscript{50} This should animate a more inclusive and multi-faceted concept of self-determination. Yet to date the Aboriginal political domain has not been ‘porous’ to an expanded iteration of international human rights norms that is inclusive of Aboriginal women’s rights.

\textbf{C \hspace{0.5em} The Rights Agenda}

This next section examines the ‘rights agenda’. It explores how the dominance of Aboriginal male leadership as the mode of authority in the Aboriginal political domain means that even those ‘norms and laws of the wider world’, especially international human rights law, are selectively applied by Aboriginal men in order to preserve male power.

The rights agenda was formally adopted and rehearsed in the native title policies and politics of the Aboriginal and Torres Strait Islander Commission (‘ATSIC’) during the late 1990s, the Council for Aboriginal Reconciliation and the Aboriginal and Torres Strait Islander Social Justice Commissioner.\textsuperscript{51} The Indigenous rights agenda is an all-encompassing term that refers to the advocacy for recognition of Indigenous rights and improved human rights protection underpinned by international human rights law.


\textsuperscript{50} Rowse, ‘The National Emergency and Indigenous Jurisdictions’, above n 45, 52.

The aim of the rights agenda is twofold. First, it seeks the recognition and enforcement of civil and political rights and economic, social and cultural rights (also referred to as citizenship rights). Second, it calls for the recognition of culturally distinct Indigenous rights, a task which has been boosted by the Australian government’s endorsement of the UNDRIP. Thus the rights agenda is a two-pronged project, seeking protection for both the rights inherent to all human beings and rights by virtue of being Indigenous.

During its most active phase, the ATSIC era, the rights agenda involved numerous international activities. These included ATSIC’s presence at the United Nations Working Group on Indigenous Populations and the Commission on Human Rights working group elaborating a draft Declaration on the rights of Indigenous peoples, the establishment of a permanent Indigenous representative in Geneva, as well as complaints to UN supervisory bodies such as the Committee on the Elimination of Racial Discrimination. The rights agenda also saw the revival of the campaign for a treaty between Indigenous people and the state, momentum for which had lapsed in the 1980s.

Although the ATSIC policies and programs were neutral in appearance, they had a gendered impact upon the Indigenous community. Neither the treaty campaign nor ATSIC’s international advocacy at the UN promoted Aboriginal women’s rights. This was consistent with the mode of Aboriginal activism that promotes Aboriginal and Torres Strait Islander peoples as homogenous.

1 Violence Against Women and the Rights Agenda

The gender-blind nature of the rights agenda was most acute as national concern developed about the level of violence against Aboriginal women in Aboriginal communities. During

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53 See ATSIC and Australian Institute for Aboriginal and Torres Strait Islander Studies, Treaty: Let’s Get it Right! (2002) 137.
55 The archived ATSIC website lists its policy issues as: land; Indigenous rights; law and justice; education; disadvantage; inquiries; Australian collaboration; ‘our family’; economic development; and consumer issues: ATSIC <http://pandora.nla.gov.au/pan/41033/20060106-0000/ATSIC/default.html> at 26 May 2010.
ATSIC’s treaty campaign and the expansion of its international agenda, ATSIC was criticised for failing to adopt a domestic violence policy, and prioritise domestic violence in its budget and policy agenda. And in 1996, when the Commonwealth Government cut $470 million from the ATSIC budget, the Office of Indigenous Women and the Community and Youth Support Scheme were abolished by the ATSIC Board to save costs, meaning the end of significant women’s programs including the Family Violence Intervention Program.

More broadly, ATSIC failed to take leadership on the issue of violence against women in communities despite the overwhelming evidence at the time that violence against Aboriginal women was endemic in Indigenous communities. According to Harry Blagg, the profile of violence in Aboriginal communities ‘challenges criminological orthodoxy’, and Aboriginal women and children are the most repeatedly and multiply victimised section of Australian society. The statistics show that Aboriginal women are far more likely to be victims than men. For example, 75 per cent of female Indigenous homicide involves a male-intimate partner, compared with 44 per cent in the non-Indigenous community.

Explanations for ATSIC’s inertia on dealing with violence against women include the cultural shame that comes with such violence, fear of police and fear of violence being used as a political wedge against ATSIC. The most scrutinised explanation of ATSIC’s inaction is that domestic violence is regarded as ‘family violence’ for Aboriginal and Torres Strait Islander peoples and family violence is considered unique to Indigenous communities because it reflects their unique experiences of colonisation. The frequently cited report *Tjumpharni: Family Violence in Indigenous Australia* defines family violence as:

beating of a wife or other family members, homicide, suicide and other self inflicted injury, rape, child abuse and child sexual abuse. When we talk of family violence we need to remember that we are not talking about serious physical injury alone but also verbal


60 Ibid.
harassment, psychological and emotional abuse, and economic deprivation, which although as devastating are even more difficult to quantify than physical abuse.61

The narrative of family violence is that it is a consequence of colonisation which is itself violence perpetrated against Indigenous peoples by the state.62 When ATSIC, in response to political and public pressure, belatedly developed its policy on violence against Aboriginal women in 2003, the policy was cushioned in a language promoting awareness of ‘family violence’ and was benignly titled Our Family.63 In the official wording, ‘women’ appears only once alongside ‘children’ and ‘men’, who all require ‘the same rights before the law and their interests must be represented equally in public policy’.64 This is raised here as a salient point because it demonstrates the cultural aversion to the use of language that emphasises the interpersonal and one-sided nature of the violence, which is primarily perpetrated by men against women.65 It fails to capture the gendered nature of the violence despite the overwhelming evidence demonstrating the disproportionate impact of violence in communities upon Aboriginal women.66

Thus ‘the state’ is placed squarely as the perpetrator of the violence:

It is violence to move people forcibly from their place of birth and to dump them in strange places ... It is violence to separate family members by policy or by designed economic hardship and necessity. It is violence to classify people by race in order to deny privileges to some and heap privileges on others. It is violence to systematically deny the most basic human rights in the service of such a system. The obvious physical violence that reaches wide attention is the merest tip of the iceberg of such ignored, routinized, structural violence.67

62 Judy Atkinson, Trauma Trails (2002).
65 Sally Engle Merry, Gender Violence: A Cultural Perspective (2009) 27.
It is also maintained that ‘gender’ is not relevant in the discussion about ‘family violence’, because gender does not mean the same thing to Aboriginal women as it does to non-Indigenous women. According to Judy Atkinson and Carol Atkinson, unlike non-Indigenous women, Aboriginal women, ‘[d]o not have a purely gendered experience of violence that renders them powerless. They along with their men ... continue to experience, the racist violence of the State’. 68

This is revealing because it supports the argument that self-determination, as it is articulated in an Indigenous-Australian sense, is state-focused. Here a national representative body, the domestic expression of the right to self-determination, minimises the issue of violence toward women as being the consequence of the state’s structural violence. The obfuscation of the interpersonal nature of the violence between Aboriginal men and Aboriginal women reveals the poverty of the conceptual structure underpinning the right to self-determination. And the characterisation of Aboriginal women’s gender as being incomprehensible to non-Indigenous women means that the power of an intersectional approach is diminished.

2 The Rights Agenda and the End of ATSIC

Amidst the controversy over ATSIC and Aboriginal violence, the Federal Government moved to abolish it. Prime Minister John Howard’s longstanding ideological opposition to an Indigenous representative body was a significant part of the Government’s motivation to dismantle ATSIC. Moreover, by this point he had bipartisan support for its abolition from the Australian Labor Party. Yet Howard’s poor relationship with Aboriginal Australia, and what many Aboriginal people argue was his racism toward Aboriginal people, meant that ATSIC’s deficient response to violence against women was obscured behind the perceived reason for ATSIC’s abolition — the rights agenda. 69 Conversely, non-Indigenous media and commentators argued that ATSIC failed because it did not deliver substantial

improvement in Aboriginal disadvantage and because of the poor behaviour of its national leadership.\textsuperscript{70}

According to Moreton-Robinson, the media supported the state’s agenda to dismantle ATSIC and unfairly attacked what she describes as two ATSIC Indigenous ‘patriarchs’ who were ‘represented as rapists, thugs and thieves’.\textsuperscript{71} These two ‘patriarchs’ — Chairperson Geoff Clark and his Deputy Chairperson ‘Sugar’ Ray Robinson — were at the time being investigated, and were subsequently charged, for sexual assault and misappropriation of funds respectively. Moreton-Robinson argues that the Government, in concert with the media, ‘staged Indigenous affairs as a theatre of criminality and pathology’ simply because ATSIC had changed itself from a model of self-determination that advocated decision-making to a model of self-determination that advocated Indigenous rights.\textsuperscript{72} Here, racism is deployed as the evaluative lens through which to view developments in Indigenous affairs, such as the abolition of ATSIC. The fact that self-determination as manifest in the \textit{Aboriginal and Torres Strait Islander Commission Act 1989} (Cth) had very little impact upon the daily lives of Aboriginal women, was largely overlooked by the Indigenous political domain in the wash-up after ATSIC.

Moreton-Robinson is right in saying that the Government did want to abolish ATSIC. However, in the context of Aboriginal women and the right to self-determination, what is relevant here is the potential to continue conversations about uncomfortable and sensitive issues such as the routine violence against Aboriginal women without diverting the conversation away to the state. This illustrates one of the major limitations of the way in which self-determination is conceived. In fact, toward the end of ATSIC, Aboriginal leaders such as Noel Pearson and Pat Dodson also raised questions about the ‘poorly defined’ way self-determination had become configured during the self-determination era.\textsuperscript{73}


\textsuperscript{72} Aileen Moreton-Robinson, ‘Introduction’ in Moreton-Robinson (ed), ibid 5.

\textsuperscript{73} See Noel Pearson, ‘However Muddied the Waters May Be, Don’t Throw the Baby Out Too’, \textit{The Sydney Morning Herald} (Sydney), 16 April 1996, 8; Patrick Dodson, ‘Aborigines’ Sense of Siege’, \textit{The Sydney Morning Herald} (Sydney), 15 April 1996, 13.

D The Northern Territory Emergency Response

The federal implementation of the Northern Territory Emergency Response (‘NTER’), or Intervention, in 2007 represented a critical juncture in the Aboriginal rights movement, by bringing to the surface unspoken tensions in Aboriginal rights advocacy. The NTER was the Federal Government’s emergency response to the findings of the 2007 Ampe Akelyernemane Meke Mekarle — ‘Little Children Are Sacred’: Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse (‘Little Children Are Sacred Report’). The report found evidence of widespread violence and abuse of Aboriginal children and women in Northern Territory remote Aboriginal communities.

As a result of the NTER, Aboriginal communities in the Northern Territory as well as across Australia were subject to intense scrutiny over the extent of the violence. For the most part, the response of the Aboriginal political domain to the Intervention oscillated between outrage and scepticism. The immediate focus of the outrage was on the derogation from the ALRA through the granting of 99-year leases over Aboriginal townships and the suspension of the RDA. The Commonwealth’s power to enact the

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77 See generally Jon Altman and Melinda Hinkson (eds), Coercive Reconciliation: Stabilise, Normalise, Exit Aboriginal Australia (2007).
NTER legislation was unsuccessfully challenged by several Aboriginal people in the High Court in *Wurridjal v Commonwealth*.

Another result of the NTER was a complaint by a number of Aboriginal Territorians to the UN Committee on the Elimination of Racial Discrimination (‘CERD’). A request for urgent action under CERD’s early warning/urgent action procedure, the CERD complaint reveals some of the tension evident in the debate. The complaint emphasised the lack of prior consultation in the design and implementation of the NTER ‘special measures’. And the lack of consultation was used as evidence of the specious motives of the Federal Government manipulating women and children’s welfare as a ruse for a grab of Aboriginal land.

The NTER was and remains viewed as a violation of human rights because Aboriginal traditional owners and land councils had not been consulted on the NTER’s amendments to the *ALRA* and other legislative measures, and because the pinnacle of Aboriginal self-determination in Australia, the *RDA*, had been suspended. Aboriginal people argued that the NTER was a ‘Trojan horse’ designed to open up Aboriginal land to non-Aboriginal interests.

Public debate was polarised between political commentators who argued that it was the right to self-determination that led to the circumstances calling forth the NTER and Aboriginal people who argued that it was the absence of ‘true’ self-determination that created the conditions of dysfunction. Conservative commentators argued that there was overwhelming evidence that inalienable land tenure under the *ALRA* was an obstacle to

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economic development for Aboriginal communities.\textsuperscript{83} They pointed out that many of the prescribed communities live in poverty and experience serious alcohol-related violence and abuse. The Aboriginal protest countered that legislative design and socio-economic barriers had been obstacles to the economic development of land and/or Aboriginal people did not want to alienate the land.\textsuperscript{84} Hence the violence in communities was the manifestation of poverty and state neglect.

Still the Aboriginal political domain has struggled with the public scrutiny of the dialectical tension between rights to land and the rights of women and children.\textsuperscript{85} Tim Rowse argues that ‘questions about the timing and political motivation of the national emergency have rapidly faded in importance’, because no one has disproved the basis for the findings of abuse in the Little Children Are Sacred.\textsuperscript{86} Yet many Aboriginal commentators remain concerned with the question of political motivation.

For the first time there has been a very public and sustained division between Aboriginal leaders on this point.\textsuperscript{87} A feature of this divide is the way Aboriginal women have been deployed in the media to represent the binary positions. For example, Yuendumu woman Bess Price was represented as the media spokeswoman who supported the NTER, and Kaytetye-Arrernte woman Barbara Shaw was the spokeswoman from the prescribed


\textsuperscript{84} See Turner and Watson, above n 81.


communities' alliance who opposed the NTER. Curiously while there are many Aboriginal men who live in the prescribed communities who both support and oppose the NTER measures, there is no sustained public face of Aboriginal men in the debate. It is emblematic of the fact that Aboriginal politics designates Aboriginal women as spokespeople when it is under pressure for its treatment of women and children.

Another feature of the skewed Aboriginal response has been an emphasis on the unfairness of negative representations of Aboriginal men in the media. Similar to the way the concept of 'family' violence is applied as a euphemism which obscures the interpersonal nature of the violence that occurs in Aboriginal communities, the intense focus attached to the media’s demonising of Aboriginal men, has arguably supplanted the actual violence against women as the germane issue in the NTER.

Given the volume of literature and commentary that challenges the legitimacy and motives of the NTER's land measures it is evident that the Aboriginal domain can effectively and convincingly discharge a defence of Aboriginal land rights. What is of interest to this enquiry is that, as a consequence of the poorly developed concept of the right to self-determination, the Aboriginal political domain equivocated on issues of women’s rights. Moreover, the impoverished concept of the right to self-determination meant that the Aboriginal polity was ill-prepared philosophically and politically to deal with any rights arguments other than land rights and the RDA, both substantive frameworks that have been granted by the state.

E Conclusion

The right to self-determination has been manufactured to exclude Aboriginal women. While it can be understood how this has occurred, especially given the intrinsic value of land in Aboriginal cultures and the connection to land that Aboriginal people enjoy, the right to self-determination is unconnected to the lives of Aboriginal women.

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89 See generally Altman and Hinkson, above n 77.
The debate about the NTER has brought to the surface the (once unspoken) tension in Indigenous self-determination between land rights and Aboriginal women’s rights. Aboriginal advocacy for land rights and human rights have, until now, been skewed toward the male perspective. While the response of the Aboriginal polity to the NTER indicates that the undifferentiated, standardised mode of Aboriginal politics is strongly entrenched, the growing tension between Aboriginal self-determination as currently configured and the rights of Aboriginal women represents a critical juncture in Aboriginal rights. As Rowse has argued, the project of Indigenous self-determination requires a continuing critique of two traditions, not one. It is too early to tell whether the NTER may have opened up the space for different conceptions of what the ‘self’ in self-determination is.90

III ABORIGINAL WOMEN’S WRITING ON SELF-DETERMINATION

Part III turns to examine Aboriginal women’s political and academic writing to broaden the exposition of how the right to self-determination is constructed in the Aboriginal political domain. The literature reveals pressure both explicit and implied for Aboriginal women to be silent on gender issues. Even where Aboriginal women’s writings give insight into what self-determination means for women, it is always prefaced with the commitment to the ‘struggle’ against the state for self-determination and sovereignty.

The body of writing by Aboriginal women on their experiences can be divided into four general themes: critical engagement with feminist theory and its utility to Aboriginal women’s lives, an allegiance to race over gender, the question of who can speak for whom on matters of violence, and finally the ‘colonisation is to blame’ narrative.

A Theme 1: Critique of Feminism

There is a well-established body of Indigenous scholarship challenging the approaches of academic disciplines to Indigenous issues.91 Aboriginal women writers have been at the

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forefront of this endeavour in their engagement with feminism, especially Aileen Moreton-Robinson and Tanganekald-Meintangk woman Irene Watson.

This literature shows that feminist theory has had a strong influence upon the way some Aboriginal women have framed their ideas and articulated their interests. Feminist theory has been most useful in conceptualising Indigenous women’s marginalisation within the legal system. Professor Boni Robertson, who authored the 2000 Queensland Government report *Aboriginal and Torres Strait Islander Women’s Task Force on Violence*, has noted that ‘feminist theories provide a general understanding for women … Whatever the interpretation of feminism, however, at its most fundamental level, it is based upon the notion of patriarchy’. Marcia Langton has also recognised that, ‘without the concerted effort of feminists to raise the issue of domestic violence over the past two or more decades, Aboriginal women would face a grim future’.

However, the literature that critically engages with feminist theory on this issue — Langton, Huggins, Moreton-Robinson, Lucaschenko, Behrendt, O’Shane and

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92 Aboriginal and Torres Strait Islander Women’s Task Force on Violence, above n 58, 45, [2.4].


94 Ibid; Marcia Langton, ‘Looking at Aboriginal Women and Power: Fundamental Misunderstandings in the Literature and New Insights’ (Speech delivered at the Australian and New Zealand Association for the Advancement of Science, Monash University, 1985).


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Watson takes issue with the way feminist theory focuses solely on the relationship between men and women. According to this argument, feminism fails to acknowledge the role of racism in their power relations with Aboriginal women.

Moreton-Robinson’s treatise on Aboriginal women and feminism, *Talkin’ Up to the White Woman*, is the most comprehensive critique of feminism. She argues that white feminists and Aboriginal women come from very different cultures, epistemologies, and socio-economic circumstances which separate their politics and analysis of experience. Unless the complexity of those power differences is interrogated then Aboriginal women cannot engage with feminism on equal grounds. Moreton-Robinson critiques the ‘middle-class white woman’ as being deployed and constituted historically as the ‘bearer of true womanhood’. This positions Indigenous women as a ‘little bit woman’. She affirms Jackie Huggins’s argument that white feminists represent Aboriginal women as based on a menial or sexual image: as more sensual but less cerebral, more interesting perhaps but less intellectual, more passive but less critical, more emotional but less analytical, more exotic but less articulate, more withdrawn but less direct, more cultured but less stimulating, more oppressed but less political than [white women] are.

For Moreton-Robinson, Aboriginal women’s challenge to white feminism is informed by sovereignty. She argues that ‘[w]e do not want to be white. Our politics are about achieving self-determination as a people’. Similarly Irene Watson has written powerfully about whiteness and feminism, arguing that the only way forward for Aboriginal women is through reclaiming our right to self-determination and sovereignty.

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101 Moreton-Robinson, *Talkin’ Up to the White Woman*, above n 26, 123.
102 Ibid 124.
103 Ibid.
104 Ibid.
105 Jackie Huggins cited in ibid.
106 Ibid 184.
107 Watson, ‘Power of the Muldarbi, the Road to its Demise’, above n 100, 44.
Aboriginal women’s suspicion of feminism was reported in ATSIC’s audit of its own programs for Aboriginal and Torres Strait Islander women.\(^\text{108}\) When asked about ATSIC’s responsiveness to Aboriginal women’s needs, the report quoted Aboriginal women as saying they did not want to be ‘locked into the constraints of a particularly feminist framework. Particularly when feminism in this country, our country, is constructed within a dominant white culture that benefit from the dispossession and oppression of indigenous people’.\(^\text{109}\) That narrative was echoed in a statement made by an Aboriginal woman in 2001 about ATSIC’s failure to deal with Aboriginal male violence against Aboriginal women. This statement was reported in the media: ‘women do not want to lock their men out forever. That’s a very big feminist thing, but not in these communities. They just want the violence to stop’.\(^\text{110}\) Similarly on the issue of feminism, the former head of the Secretariat of National Aboriginal Islander Child Care, Muriel Bamblett, has said that she ‘wouldn’t want to be in a position where I don’t have men beside me and around me ... I don’t want to be walking up the street with my husband on one side of the street marching for men’s rights and me marching for women’.\(^\text{111}\)

Much of the disputation of feminist theory mirrors the scholarship of African-American women and draws extensively from that literature.\(^\text{112}\) The intersectionality between race and gender expounded by critical race theory has been seized upon by Aboriginal women as an effective evaluative tool in understanding Aboriginal women’s experiences.\(^\text{113}\)

In their critique of feminism, Aboriginal women have questioned the complicity of white women in the oppression of Aboriginal women, seeking to posit women’s disempowerment as being more central to the experience of being an Aboriginal woman than gender.\(^\text{114}\) This

\(^{108}\) ATSIC Office of Evaluation and Audit, above n 54.  
\(^{109}\) Ibid 25.  
\(^{111}\) Muriel Bamblett cited in Maddison, above n 1, 203.  
\(^{114}\) Moreton-Robinson, Talkin’ Up to the White Woman, above n 26; Behrendt, ‘Aboriginal Women and the White Lies of the Feminist Movement’, above n 98.
is emphasised by Behrendt in an analysis of the relationship between feminism and Aboriginal women:

Aboriginal women have been oppressed by white women. White women were missionaries that attempted to destroy Aboriginal culture. They used the slave labour of Aboriginal women in their homes. White women were the wives, mothers and sisters of those who violently raped Aboriginal women and children and brutally murdered Aboriginal people. White women can be as racist as white men. White women have benefited economically from the dispossession of Aboriginal people.\textsuperscript{115}

In a letter to \textit{Women’s Studies International Forum}, Huggins contended that, before Indigenous women can establish a relationship with white women, there needs to be an acknowledgment by white women of the role they have played in the oppression of Aboriginal women and the benefit white women have enjoyed from the nature of power relations between them and Indigenous women.\textsuperscript{116} According to Huggins, ‘our fight is against the state, the system, social injustices, and primarily racism, far in excess of patriarchy’:

We realise that our internal conflicts have been exacerbated by colonisation and white women have always been a part of that process ... Our country was colonised on both a racial and sexually imperialistic base. In many cases our women considered white women worse than men in their treatment of Aboriginal women, particularly in the domestic service field.\textsuperscript{117}

According to this literature, by failing to acknowledge the power differential between Indigenous and non-Indigenous women, Western and Australian feminism avoids consideration of the complexities of race and power that underpin the white feminist position.

\textbf{B \hspace{1em} Theme 2: Allegiance to Race over Gender}

A second and related theme of the literature is the allegiance that Aboriginal women have to their race before their gender. This means that, when it comes to political issues, matters of race take precedence over matters of gender. Huggins, who has frequently written on the challenges of Indigenous women in political leadership, identifies racism and sexism as the core challenges of her work; yet her ‘first identity is that of my race. So with all the trials

\textsuperscript{117} Ibid.
and tribulations of being a female Aboriginal leader, that is what I feel I face up to first. Accordingly, my deepest connection and priority is to Indigenous people'.  

Similarly Moreton-Robinson contends that, 'Indigenous women have given priority to the collective rights of Indigenous people rather than the individual rights of citizenship' because of the experiences of racism and the exigency of identity. Identity politics drives the allegiance to race over gender  

because the white dominant culture treats us differently, that we know what it means to be an Aborigine. The fact that we can feel our Aboriginality more strongly than our gender is a reflection that the repercussions of racism in Australia are often greater than those of sexism.

Writing in 1993, Aboriginal academic Larissa Behrendt described why it was that Aboriginal women are politically aligned with Aboriginal men:  

Aboriginal women fought beside Aboriginal men for the right to vote the right to keep our children, the right to get our land back and have our sovereignty recognised. The already tight-knit Aboriginal community is bonded even more closely by the experience of racism. The fight against unjust police practices and violations of human rights has united the Aboriginal community. Aboriginal women feel that to turn against Aboriginal men and start treating them as the enemy is divisive and denies the strong cultural and political ties between Aboriginal people of both sexes.

Behrendt emphasised that although Aboriginal men oppressed Aboriginal women, Aboriginal women would resist turning against Aboriginal men and 'treating them as the enemy'. In 2005, Moreton-Robinson described the allegiance in the following way:  

Indigenous women are politically and culturally aligned with Indigenous men because irrespective of gender we are tied through our obligations and reciprocity to our kin and country and we share a common history of colonisation. Individual accomplishment, ambition, property ownership and rights are the essential values of patriarchal whiteness, whereas the family and kinship system in Indigenous communities means that Indigenous


119 Moreton-Robinson, Talkin’ Up to the White Woman, above n 26, 160.

120 Behrendt, ‘Aboriginal Women and the White Lies of the Feminist Movement’, above n 98, 41.

121 Ibid 32.

122 Ibid.
women’s individual aims and objectives are often subordinated to those of family and community.\textsuperscript{123}

Notably, in juxtaposing ‘white’ values of ‘individual accomplishment, ambition and property ownership and rights’ against the family and kinship system of Aboriginal communities, Moreton-Robinson says that Aboriginal women’s aims and objectives are ‘subordinated’ to the family and community. It is clear from this theme that Aboriginal women’s identity is configured as a singular identity, and often conflated with the interests of the family and community.

C \textit{Theme 3: Who Speaks for Whom?}

The theme ‘who speaks for whom?’ refers to the controversy over whether non-Indigenous feminists can speak out on Aboriginal women’s issues such as violence and rape. In 1989 Diane Bell published an article co-authored by an Aboriginal woman, Topsy Nelson, in \textit{Women’s Studies International Forum}, arguing that, unlike African-American women, Indigenous women had failed to adopt feminisms to engage with the problem of intra-racial rape.\textsuperscript{124} Bell argued that it was the role of feminists, whether Indigenous or not, to contribute to this debate because violence against women is important for all women to combat: for Bell, no matter how unpleasant the task may be, feminist social scientists do have a responsibility to identify and analyse those factors which render women vulnerable to violence. The fact that the violence is happening to women of another ethnic or racial group cannot be a reason for ignoring the abuse.\textsuperscript{125}

Bell wrote that ‘feminists need to reopen the theoretical debates, to create the space within which a critique of rape may emerge, to allow the courts to set aside their assumptions regarding the abuse of Aboriginal women, to give protection to the women’.\textsuperscript{126} Bell also referred to the paucity of Aboriginal women in Aboriginal leadership:

\begin{quote}
Initial contact with those who ‘opened’ the territory to white settlement was male to male ... thus, we find it is men who have been groomed as community spokespersons, it is their
\end{quote}

\textsuperscript{123} Moreton-Robinson, ‘Patriarchal Whiteness, Self-Determination and Indigenous Women’, above n 15, 66.
\textsuperscript{124} Diane Bell and Topsy Nelson, ‘Speaking About Rape is Everyone’s Business’ (1989) 12 \textit{Women’s Studies International Forum} 403.
\textsuperscript{125} Ibid; Huggins et al, above n 116.
\textsuperscript{126} Bell and Nelson, above n 124, 414.
power based which has been legitimated, deemed the negotiating forum, not women’s … [T]he subtleties of traditional gender arrangements were conveniently ignored … [M]en found a more accommodating niche in the male oriented political institutions of the dominant society than did women.\textsuperscript{127}

A formal response authored jointly by a number of Aboriginal women in a ‘Letter to the Editor’ to *Women’s Studies International Forum* was characterised by condemnation. Jackie Huggins and her numerous co-authors wrote that rape in Indigenous communities was not everybody’s issue but rather it was the business of Indigenous people:

> We dispute the central proposition that rape is ‘everyone’s business.’ What this reflects is white imperialism of others’ cultures which are theirs to appropriate, criticise and castigate. One may well see rape as being everyone’s business from a privileged white, middle-class perspective, however, when you are black and powerless it is a different story. Blacks have to face the individual, communal and societal consequences that whites do not have to endure.\textsuperscript{128}

The criticism of Bell included the charge that she had co-authored a paper with a traditional woman, Topsy Nelson, to position herself as having cultural sanction to comment on this issue.\textsuperscript{129} In regard to Topsy’s authorship, Huggins et al wrote that:

> We find it amazing and unethical that her name has been placed as an author rather than that of chief informant. With all due respect, Topsy is an older traditional Aboriginal woman who speaks English as a second language and the analysis of the type in Bell’s article highly academic.\textsuperscript{130}

The letter suggested that ‘Bell’s paper makes us not want to work with white women, thus destroying some of the already good work that has gone before’.\textsuperscript{131} Huggins et al also wrote that encouraging non-Indigenous enquiry into issues such as intra-racial violence risks being ‘misinterpreted by racists in the wider community’.\textsuperscript{132}

Writing of the controversy later, Moreton-Robinson stated that Bell deployed the ‘subject position middle-class white woman to speak for [Aboriginal women] as the authoritative voice of the all-knowing subject’.\textsuperscript{133} Bell positioned white women, according to Moreton-

\begin{footnotesize}
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\item[127] Ibid 408.
\item[128] Huggins et al, above n 116, 506.
\item[129] Moreton-Robinson, ‘Tiddas Talkin’ Up to the White Woman’, above n 96, 68.
\item[130] Huggins et al, above n 116, 506.
\item[131] Ibid 507.
\item[132] Ibid 506.
\item[133] Moreton-Robinson, *Talkin’ Up to the White Woman*, above n 26, 112.
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Robinson, as the universal norm from which to judge and implied that white radical feminists have the solutions to Indigenous intra-racial rape.\textsuperscript{134} For Moreton-Robinson, Bell’s approach meant that Indigenous women were infantilised and positioned as ‘children’ unable to develop strategies to deal with the problem of inter-racial rape.\textsuperscript{135}

In the 20 years since the Bell/Huggins debate, it has dominated the literature on feminism and the Aboriginal ‘other’ in Australia.\textsuperscript{136} This is because it was the first time that the complexities of the power relations between white Australian women and Indigenous women were raised by Aboriginal women. Yet rarely has the discussion move beyond a descriptive explanation of the controversy. Frequently the discussion of the Bell/Huggins debate contains a caveat that white women are now cautious about discussing Aboriginal women’s issues. Yet this caution has been detrimental to Aboriginal women’s capacity to develop alliances with the women’s movement on issues of concern for Aboriginal women that receive no traction in the Aboriginal political domain. I will deal with the consequences of this caution in more detail below; however, the Bell/Huggins controversy leads to the final theme of the literature, the notion that ‘colonisation is to blame’. This theme underpins all of the others because it is the common experiences of colonisation that are, for Aboriginal women writers, what augmented their relationship with Aboriginal men.

**D Theme 4: Colonisation is to Blame**

The ‘colonisation is to blame’ literature advances the argument that the problem of violence and misogyny is a consequence of the dysfunction and poverty in Aboriginal communities, which in turn are the result of colonisation.\textsuperscript{137} Judy Atkinson offers a concise version of the

\begin{itemize}
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narrative: violent behaviour ‘becomes the norm in families where there have been cumulative intergenerational impacts of trauma on trauma on trauma, expressing themselves in present generations [as] violence on self and on others’.138

This body of literature objects to what it perceives as the essentialist approach taken by outsiders to the complex social problems in Indigenous communities. It argues that these social problems are manifest in the state–Indigenous interface — the Australian legal system and political system — as opposed to between Aboriginal men and women. This is particularly the case when it comes to family violence.139

According to the ‘colonisation is to blame’ argument, the non-Indigenous approaches to the problem of domestic violence and sexual assault too easily overlook the impact of colonisation upon Indigenous communities and how that manifests in violence against women and children.140 The non-Indigenous approach is viewed as applying a Western epistemology to a complex situation. This Western episteme is accused of being universal, middle-class and incapable of understanding the Indigenous position.141

The literature rehearses familiar stories about the multifaceted nature of Aboriginal disadvantage and that violence cannot be separated from the history of European and Indigenous relations.142 The narrative of colonisation has been repeated in numerous state and federal reports, typically insisting that the ‘family’ violence and abuse experienced by Aboriginal women ‘defy simple categorisation’.143 Broadly, this violence includes clan and

140 Atkinson, Trauma Trails, above n 62, 65.
141 See, eg, Moreton-Robinson, Talkin’ Up to the White Woman, above n 26; Larissa Behrendt and Nicole Watson, ‘Good Intentions are Not Good Enough’, Australian Literary Review, The Australian (Sydney), 2 May 2007.
143 Blagg, Crime, Aboriginality and the Decolonisation of Justice, above n 59, 139; See generally ibid; Mow, above n 61; Aboriginal and Torres Strait Islander Women’s Task Force on Violence, above n 58; New South Wales Child Sexual Assault Taskforce, Breaking the Silence: Creating the Future: Addressing Child Sexual Assault in Aboriginal Communities in NSW (2006).
family feuds; jealous fights and ‘jealousing’ behaviour; alcohol- and drug-fuelled violence; neglect of kinship obligations; and economic deprivation.144

Thus when it comes to the issue of violence against women the position is that violence and especially sexual violence, is the legacy of colonisation. Atkinson has argued against feminist interrogations of domestic violence. Violence is intergenerational and directly a result of colonisation, says Atkinson, who prefers not to describe violence personally or interpersonally but rather to focus on the mode of violence.145 The notion that colonisation is to blame is now deeply embedded in the literature dealing with family violence and in Aboriginal political discourse, but the usefulness of this narrative has been questioned by Aboriginal leaders Noel Pearson, Marcia Langton and anthropologist Peter Sutton.146

E The Impact of Aboriginal Women’s Writing Upon the Right to Self-Determination

The political writing of Aboriginal women is critical to a deeper understanding of how the right to self-determination is configured in Aboriginal politics. This literature is viewed as contributing to the Aboriginal resistance to the state. Yet, given the evidence of Aboriginal women’s marginalisation in Australia today, the task of examining how Aboriginal women’s writing has helped to shape the right to self-determination necessitates a critical lens.

There are explicit and implicit ways in which Aboriginal women’s writing has influenced the construction of the right to self-determination. For example, the RCIADIC has influenced the narrative that privileges Aboriginal men’s suffering in the criminal justice system. Elena Marchetti’s research on the gendered nature of the RCIADIC, discussed in Chapter 2, refers to Moreton-Robinson as supporting RCIADIC’s justification that Aboriginal women’s interests are aligned with Aboriginal men’s and Aboriginal women ‘privilege’ the community over their individual rights and concerns.147

144 Blagg, Crime, Aboriginality and the Decolonisation of Justice, above n 59, 145.
145 Atkinson, Trauma Trails, above n 62, 35.
There are more subtle or indirect ways in which the literature influences the Aboriginal community. It is argued here that cumulatively the themes evident in the literature have had an impact upon Indigenous politics in two ways. First the themes have created a ‘gatekeeper’ approach to violence against Aboriginal women that is often misinterpreted as silence. Second, they have contributed to the projection of stock narratives about what Aboriginal women think or should think onto the culture and Aboriginal women themselves. It is useful to analyse these two effects in the context of violence against Aboriginal women.

1 The Gatekeeper Approach

One of the allegations made against Aboriginal women and the Aboriginal community in general is that there is an organised silence when it comes to discussing the problem of violence against women in Aboriginal communities. This perception of silence can be extrapolated from two statements: ‘colonisation is to blame’ and ‘it occurs in white communities as well’. These defences are frequently deployed in Aboriginal writing and political discourse. They obfuscate the issue of violence, and are characterised by a defensiveness that shields Aboriginal communities from the scrutiny of external parties. In the first instance they invite a discussion about the complexities of the historical narrative of colonisation instead of an immediate engagement with the issue of violence. They set up the violence paradigm as being one between Aboriginal people and the settler-state instead of between Aboriginal women and Aboriginal men.

As can be seen in Atkinson’s approach there is a tendency to avoid engagement with violence in an interpersonal sense (ie, man against woman). Indeed it has been said that ‘attempts by Indigenous writing to place the violence within its historical and structural context can appear to condone or at least lessen the crime’. Melissa Lucashenko argues:

Although individual Black women struggled in the past to highlight the issues of domestic violence, rape, child abuse, and parental neglect, it has taken until now to have these problems even acknowledged by Aboriginal men. There is still widespread denial among

148 Nowra, above n 137; Kimm, above n 137; Neill, White Out, above n 70.
149 Behrendt and Watson, ‘Shifting Ground’, above n 11, 94.
150 See, eg, ibid.
Aboriginal communities about these sensitive topics. Land rights, poverty, police brutality, and poor health status are much more palatable issues for debate, because they do not require an explicit examination of power relations within the Black community. In the situation in which Black men are dispossessed, brutalized by police, and generally as poor and unhealthy as Black women, it is seen as unproblematic in the Black community for Black women to ‘talk up’ about the injustices of the State. Talking about the bashings, rapes, murders, and incest for which Black men themselves are responsible, however, is seen as threatening in the extreme.\textsuperscript{152}

Since the NTER, Aboriginal Australia is sensitive to these allegations. To counter this, the Australian Human Rights Commission’s Aboriginal and Torres Strait Islander Social Justice Commissioner compiled a volume of its interventions on child abuse and sexual assault to illustrate the depth of concern in the community about this issue. Even so, in this compilation the Social Justice Commissioner acknowledged that a ‘code of silence’ does exist in Aboriginal communities. According to Commissioner this is because Aboriginal women’s first priority is their community, not their own welfare:

> The identity of many Indigenous women is bound to their experience as Indigenous people. Rather than sharing a common experience of sexism binding them with non-Indigenous women, this may bind them more to their community including the men of the community ... [A] consequence of this is that an Indigenous woman may be unable or unwilling to fragment their identity by leaving the community, kin, family or partners’ ...\textsuperscript{153}

Still, since the NTER, the Aboriginal political domain has sought to refute the accusation of ‘silence’ by referring to countless government reports and academic publications to illustrate that Aboriginal women have in fact been speaking up.\textsuperscript{154} A literature search of the \textit{Indigenous Law Bulletin} (formerly the \textit{Aboriginal Law Bulletin} and published since 1981) produces an archive of over 60 articles, mostly written by Aboriginal women decades prior to the NTER, detailing the problem of child abuse, ‘family’ violence and alcoholism in


\textsuperscript{153} HREOC, above n 61, 6.

Aboriginal communities.\textsuperscript{155} But what can be extrapolated from the survey of the literature is that, for those Aboriginal women (almost entirely academics and professionals) who do speak up, the critique is universally aimed at the state.

This is the power of the ‘colonisation is to blame’ narrative. As has already been argued, the principal site of interrogation is that which exists between the state and Aboriginal people. Aboriginal rights are almost exclusively situated against the state and rarely between each other. Marcia Langton and Noel Pearson have criticised the dominance of the ‘colonisation is to blame’ approach to Aboriginal disadvantage and dysfunction. They argue that, while colonisation is to blame for destructive behaviours, it is not mutually exclusive of asking Aboriginal men to take responsibility for their behaviour.\textsuperscript{156} In the end, colonisation does not excuse the violence.

Blagg argues the problem of family violence is used by Indigenous people as a tool for the ‘retelling of the story of “settlement” which foregrounds its devastating impact on their culture’ rather than it describing ‘a discrete social problem or a specific set of power relationships’.\textsuperscript{157} While there is a cognisance that the destructive impact of colonisation upon Aboriginal communities manifests in Aboriginal men’s treatment of Aboriginal women, there is also an insistence that Aboriginal men and women are equal, and that we alone have the answers to the problems that plague communities despite the evidence to the contrary. There is an irredentist tenor to this literature.

The literature also reveals an implicit and explicit pressure on Aboriginal women to construct their identity as a singular identity. It is this singular identity, in practice, that constitutes the gatekeeper approach. While there is lip service given to the notion that


\textsuperscript{156} See Pearson, Our Right to Take Responsibility, above n 146; Langton, ‘Trapped in the Aboriginal Reality Show’, above n 43.

\textsuperscript{157} Harry Blagg, Crisis Intervention in Aboriginal Family Violence: Strategies and Models for Western Australia (2000) 2.
Aboriginal culture and identity is fluid, this is counterintuitive because cultures are by their very nature conservative. And while there is rhetoric about embracing the multiple identities of Aboriginal Australians (manifest, for instance, in the statistical frequency of inter-marriage between Indigenous and non-Indigenous Australians), neither the political literature examined above, nor the Indigenous rights discourse reflect that diversity in any meaningful way. On this point Noel Pearson has said, ‘I have long considered that we labour under impoverished conceptions of identity ... It is simply not possible to understand traditional Aboriginal identity in a singular, reductive way’. This is important because the lack of freedom in determining one’s identity does not permit individuals the space to contest culture. This especially affects women.

The conflation of gender with race muddies thinking on violence and prevents open and free debate on the issue. Such reasoning encourages an ‘uncritical acceptance of conformist behaviour’ and constitutes a conservative approach that ‘works in the direction of shielding old customs and practices from intelligent scrutiny’. This obfuscates the seriousness of the challenges that Aboriginal women face in terms of intra-collective violence.

Finally, it is evident from the paucity of literature that few non-Indigenous feminists engage in the issue of Aboriginal women’s violence. The absence of feminists’ voices from the debate surrounding the NTER is an example of that (with a notable exception being Diane Bell, who has suggested that the NTER vindicates her position in the Bell/Huggins debate). Non-Aboriginal feminists explicitly refer to the Bell/Huggins controversy as militating against their involvement in Aboriginal women’s issues and Aboriginal women’s rights. Adrian Howe, a white feminist, has produced the only feminist account of the NTER — though she made clear her consciousness of the risk of weighing into the debate. Howe notes that the legacy of the Bell/Huggins debate has been an era of ‘retreatism’, where

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161 Howe, above n 87.
dominant feminist speakers avoid speaking altogether. Yet interestingly the result of retreatism has been to consolidate the power of the dominant paradigm. The concern with the analysis of the Bell/Huggins debate is that it does not resolve the problem of violence. It also presumes that Aboriginal women alone have the power and resources to address the problem and represent their own interests. Howe draws upon the work of theorist Gayatri Spivak who has questioned the usefulness of the ‘who should speak’ question arguing that the more appropriate question is: ‘who will listen’. Given the literature proves that Aboriginal women do identify the issues that are affecting them and frequently speak out on those issues, this ‘who will listen’ question, is the next step for Aboriginal women to pursue. We must move away from the theoretical rut created in the wake of the Bell/Huggins debacle.

2 Stock-Standard Narratives Projected Back onto Culture

All cultures develop narratives in order to honour history and tradition and to control the behaviour of the group. This has certainly been the case globally when it comes to culture and the oppression of women. In the 1980s at the Finding Common Ground conference an Aboriginal woman said that:

We have failed to examine or critique what has been happening over time — within our communities. We have failed to maintain a careful watch over the changes which have occurred in our cultural values and practices. We have pretended to ourselves and the outside world that we still maintain a purity of our cultural values. Yet if this were true we would not be experiencing the social and cultural trauma which is facing us today. For too long now, we have allowed the red, black and yellow flag to dominate our lives in a negative sense of defiance and protest.

This statement, from an Aboriginal women’s conference two decades ago, is significant because the standard narrative developed by Aboriginal politics about the superiority of Aboriginal culture exercises a powerful influence on Aboriginal women. Anthropologist Francesca Merlan writes that it is relatively easy for fieldworkers to elicit declarations from Aboriginal people ‘of the superior constancy and groundedness of their culture’.

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163 Ibid 47.
165 Merlan, More Than Rights, above n 85.
Conversely it can be difficult to elicit concerns from Aboriginal women of the challenges they face within the collective.

There are contradictions in the narratives that are deployed by Indigenous political discourse about what is and is not Aboriginal culture. On the one hand, Aboriginal men and women are said to be equal despite there being no gender divisions in traditional society; but on the other hand, Aboriginal women’s identity is conflated with the community’s welfare thereby restricting, in practice, their freedom to make choices about their lives.

There is a range of narratives that work against Aboriginal women’s freedom. The first is the notion that Aboriginal men and Aboriginal women were ‘equal but separate’ in pre-colonial societies; the second is the narrative that Aboriginal women have fared better than Aboriginal men as a consequence of colonisation; and the third standard narrative is that feminism essentialises Aboriginal women.

(a) Equal But Separate

Aboriginal pre-contact relations are frequently constructed as egalitarian, where men and women were equal, having distinct yet equal roles in Aboriginal societies. Although the ‘equal but separate’ notion is contested in some anthropological and contemporary Indigenous writing, the narrative is enduring. Merlan has drawn out the variations in the literature regarding the role of Aboriginal women: Aboriginal women were subordinate; Aboriginal women were equal but separate; Aboriginal women and men were interdependent. Peter Sutton argues that there is no country-holding group in Aboriginal Australia that was matrilineal — rather, any true matrilateral and matrilineal institutions in Aboriginal Australia were social and not territorial. He says the resistance to this is ideological rather than evidentiary. Palawah Aboriginal scholar Kyllie Cripps questions the

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166 Peter Sutton argues that, though there is little evidence for it, the Indigenous narrative is so ingrained it is a difficult topic for him to raise in public debate: Sutton, *Native Title and the Descent of Rights*, above n 33, 40.
168 Sutton, *Native Title and the Descent of Rights*, above n 33, 40.
relevance of ‘equal but separate’ narrative altogether. She argues that we can never really know the status of pre-contact relationships; we can only know what they are now.169

Yet ‘equal but separate’ dominates the surveyed literature of Aboriginal women and it is clearly used as a response to deflect any scrutiny of the unequal relations between Aboriginal men and women in communities. The narrative positing pre-contact Aboriginal culture as superior means, firstly, that Aboriginal political strategy and cultural norms are not questioned and, secondly, that these norms are therefore slow to change. I am not questioning the truth of the ‘equal but separate’ narrative but how it is deployed in the political domain and how it impacts upon Aboriginal women’s freedom to make decisions about their lives.

(b) Women Have Fared Better Under Colonisation

The next narrative is that men have suffered more than women during colonisation. This was reflected in the RCIADIC, that in the post-colonial era Indigenous women were ‘in a better position than Indigenous males’.170 This has already been discussed in Chapter 2 in regard to the RCIADIC.171 The narrative fails to appreciate the different experiences of men and women today. It is not useful to compare the experiences of Aboriginal men and women. By whose standards should such comparisons be judged? Many Aboriginal women frequently agree that colonisation has impacted upon men more severely than women because they had ‘controlled the society, had been the chief sacred and political figures’ and therefore had ‘further to fall’.172 This reveals an inconsistency with the idea that Aboriginal women were equal but separate — if this were the case then surely Aboriginal women would have just as far to fall as a result of colonisation.

Following the intense media scrutiny of violence in Aboriginal communities as a result of the NTER, Aboriginal men met in Alice Springs and issued a public apology to Aboriginal

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170 Elena Marchetti, Women and Gender in the Royal Commission into Aboriginal Deaths in Custody (2009) 181.


women and children for the violence men have perpetrated against them. The apology included a reminder of the impact of colonisation on Aboriginal male behaviours and reinforced the standard narrative about how Aboriginal men have suffered greater than Aboriginal women:

When you add to this the rapid changes in the role of males within that colonising society and the consequent dislocation of Aboriginal males and their struggle to define new self-images, it is no wonder that Aboriginal males may struggle to make sense of the contemporary world. And if those critical views of us as Aboriginal males are expressed with no effort to understand our cultural values, or the pressures caused by the colonial relationships and contemporary social transformations, then we become alienated from this society. This alienation is at the core of the struggle for male health and wellbeing, as it acts to debase men, stripping away their dignity and the meaning in their lives.

A corollary to this narrative is the enduring notion that Aboriginal women are doing better than Aboriginal men because of the mode of colonisation. As already discussed, in the RCIADIC it was suggested that, for Aboriginal women, ‘the bearing or raising of children does provide a stable basis from which entry into adulthood and the negotiation of status may be undertaken’. RCIADIC argued that Aboriginal women benefited because their historical and contemporary roles in the private sphere concerned provision of food, nurturing and looking after family, in contrast to men, whose roles and status were the most ‘under attack in the transformation to a new order’. Indeed the high rates of young Indigenous pregnancy have been deemed as ‘protective’ in that pregnancy is said to provide ‘economic resources of maternal benefits denied to males’ as well as ‘access to motherhood, an ego-ideal valued by the majority culture’. Thus Paul Memmott et al in Violence in Indigenous Communities assert that, in contrast to men’s declining status, the status of women in post-traditional communities is increasing. In particular the authors refer to the ability of women to receive welfare:

In some cases, men’s helplessness is perpetuated by their reliance on women for access into a cash economy. In the 1970s, Indigenous women as mothers and invalids were the first to receive welfare benefits and thus brought significant economic resources into their

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174 Ibid.
175 Commonwealth, RCIADIC, National Report, above n 66, vol 2, 90.
176 Ibid. See also Commonwealth, RCIADIC, Regional Report of Inquiry, above n 171, vol 1, 376.
178 Memmott et al, above n 142, 29.
communities. For Indigenous men dispossessed of their own roles ... access to and reliance on women continues to be of significant importance.179

Thus Aboriginal women have been shielded from the ravages of colonisation because of their role as mothers and nurturers. The introduction of social security meant that they had more independence whereas Aboriginal men were diminished because they had to rely on Aboriginal women for income support. This reliance on Aboriginal women is viewed in the literature as deleterious to Aboriginal men’s self-esteem.180

Less attention is given to how this ‘reliance on women’ has transformed into a situation of intimidation, harassment and often violence against Aboriginal women, known as ‘humbugging’.181 Humbugging — which means putting pressure on relatives or friends for money in Aboriginal Australian patois — is categorised by Blagg as another form of ‘family’ violence with its genesis in colonisation.182 The problem of humbugging was one of the reasons given by former Prime Minister John Howard for the welfare quarantining that was introduced with the NTER in 2007. He gave the following example: a responsible carer for her grandchild faces intimidation and threats of violence from intoxicated young men if she does not go to an automatic teller and hand over money.183 Although generosity and sharing is recognised as being integral to Aboriginal culture, the proclivity toward humbugging in both urban and remote Aboriginal communities has been detrimental to Aboriginal women and is known to result in violence against Aboriginal women, especially Aboriginal grandmothers.

Historian Raymond Evans challenges the narrative that women have fared better under colonisation:

... colonialism represented a process of severe loss rather than substantive gain for most Aboriginal women: that the traumas of capture, rape, prostitution, concubinage, venereal disease, institutionalisation and the production (and often forcible removal) of so-called

179 Ibid. See also Hunter, above n 177, 272.
180 Memmott et al, above n 142, 29.
182 Anthropologist Nicolas Peterson has also studied the cultural activity of demand-sharing and the pressure for generosity, which he argues is characteristic of foraging communities: Nicolas Peterson, ‘Demand Sharing: Reciprocity and the Pressure for Generosity Among Foragers’ (1993) 95 American Anthropologist 860.
183 John Howard cited in Kearney, above n 181.
‘half-caste’ children substantially outweighed any putative benefits, in relation to promises of European reciprocation, payment for services rendered or better accommodation and survival conditions, provided closer to the rumpled beds of white men. Even without factoring in the many other difficult labour roles, largely in the domestic service arena, which these women were required to perform for little reward, or the generally denigratory way they continued to be regarded and treated in white society, it seems clear that their lot remained an extremely deprived and perilous one.\(^{184}\)

Of Aboriginal women today, he says that their stoical cultural survival in the face of all of these ‘dehumanising’ experiences, is all the more remarkable when the ‘full quotient of their lengthy endurance under the rigours of colonialism is considered’.\(^{185}\) Langton also problematises the dominance of the ‘women fared better’ narrative by arguing that it is used to ‘preserve male dominance in ideology, in structures and relationships’.\(^{186}\) Langton argues that ultimately ‘anomie, poverty and the rigours of the struggle to survive, allow Aboriginal men to use force, arbitrarily, to inhibit and terrorise women, and to cast them as whipping posts for their frustrations’.\(^{187}\)

\((c)\) Anti-Essentialism

One of the major criticisms Aboriginal women writers have of feminism is that its proponents are white and middle-class. This accusation generalises feminist writers and positions the experiences of Aboriginal women as inexplicable to middle-class white women. While such criticism is valid — how can a non-Aboriginal woman truly understand Aboriginal women’s experiences? — it lacks depth because it fails to interrogate the problems beyond race and the socio-economic privilege of white feminists. The anti-essentialism of Aboriginal women writers fails to seriously engage with the structural issues and neglects the practical reform that is essential in order to make the state listen to the voices of Aboriginal women.

As the literature survey above revealed, there is a tendency amongst Aboriginal political writers to romanticise Aboriginal communities as homogenous, yet rarely do those writers interrogate their own socio-economic status. It replicates the flaw of essentialism that Indigenous women themselves have found in feminist theory. Overlooking the nuances in

\(^{185}\) Ibid.
\(^{186}\) Langton, ‘Feminism: What Do Aboriginal Women Gain?’, above n 93, 8.
\(^{187}\) Ibid.
the relationship between Aboriginal women and Aboriginal men emboldens the political strategy centred on the notion of ‘Indigenous peoples’ but simultaneously risks essentialising Aboriginal women’s experiences. Other Aboriginal scholars like Martin Nakata and Yin Paradies have also raised essentialism and the reductionism of Aboriginal identities as a significant problem.188

Socio-economic class (like violence) is rarely spoken about publicly in Aboriginal politics. The fact that the majority of Aboriginal women’s writing originates from an Aboriginal middle-class is conveniently overlooked because of the importance of the appearance of an egalitarian Aboriginal political community. It is only in recent years, with increased attention on the dysfunction in remote communities and the epidemic levels of violence against women, that the disparity between the lives of Aboriginal people in these communities and the ‘east coast’ Aboriginal political commentariat has been stark enough to draw comment.

Anthropologist Fay Gale notes that it has been in the more Westernised communities (as opposed to remote communities) where Aboriginal women have been able to exert political influence in a way Aboriginal women in remote communities have not.189 For example, Bess Price from Yuendumu, a prescribed remote community under the NTER, says of her experience:

I grew up in Yuendumu, and I myself have been a victim, I have scars that decorate my body. I have seen violence towards women every day of my life, and these are my close relatives I’m talking about. A grand-daughter, who’s a punching bag, whose jaw was broken who doesn’t know how to say no and that enough’s enough.190

Another example is Yolgnu woman Banduk Marika, who stated that there was a romanticised view of her home in northeast Arnhem Land when in fact ‘women are told and expected to be belted. We’re not supposed to put up a fight against it; we are supposed to take it’.191

189 Gale, above n 25, 393.
190 Price, above n 88.
There needs to be greater specificity about the diversity of the Aboriginal community in terms of who positions themselves where and about how culture is spoken about. It is important to ask the question: who is writing? It is the question Aboriginal scholars ask of other disciplines. In his book The Politics of Suffering, Peter Sutton forcefully makes the point about how influential these narratives can be for future generations:

At the national level many members of such elites tend to live in the suburbs, are not normally based in Aboriginal communities among kin, choose partners who are not Indigenous and enjoy the lifestyle of their (and my) professional class. These are usually people who have attained their standing through talent, dedicated hard work and formal education. Given such people are at times identified as 'role models' for oncoming youth, the way they frame or take part in debate on issues ... will be very important in the years ahead.

While the writing and advocacy of such people may be politically influential, it is probably more reflective of the views of Aboriginal women who have been able to exert political clout in more Westernised communities as a result of their education and socio-economic status. Such influence is not typical of most Aboriginal women in Australia, for whom the fight for recognition 'has been largely unheeded'.

As Jill Singer has observed, while 'some Aboriginal women who have risen to positions of power in white society appear to be turning their backs on feminist principles ... less "successful" Aboriginal women embrace them'. For example, Topsy Nelson, the Aboriginal woman suggested to have been exploited by Diane Bell, was supported by the Pitjantjatjara women of Central Australia. With the agreement of those women, Nelson co-authored the paper to raise the problem of intra-racial rape as a serious issue in Aboriginal communities — according to Nelson and the other Pitjantjatjara women, it is Aboriginal women in remote areas who bear the brunt of alcohol abuse and domestic violence. In a 2002 Western Australian Government inquiry led by Sue Gordon, it was

194 Gale, above n 25, 393.
found that many Aboriginal women prefer the term ‘domestic violence’ to ‘family violence’ because the latter ‘makes it sound nice’. Yet Aboriginal women’s understanding of the significance of the language used around violence receives little traction in the political literature that asserts that ‘family violence’ is a more appropriate term.

How do we really know what Aboriginal women know, desire and think? Amartya Sen has written about this tendency of groups to muzzle ‘many-sided human beings into one dimension’ through the ‘ascription of singular identities’. The problem with the reductionist approach is that it disregards the importance of autonomy in the decisions that Aboriginal women make about their lives. It may be that, in prescribing a universal project in which Indigenous women’s aims and objectives are aligned automatically with men’s, a ‘neglect of autonomy’ is socialised. As Sen argues, communitarian thinkers tend to argue a dominant communal identity as ‘only a matter of self-realization, not of choice’.

This is salient to the experiences of Aboriginal women. The ‘self’ in self-determination equals ‘man’. This is not necessarily a conscious choice. There are many factors at play, including the gatekeeper approach and the stock-standard narratives that influence the way Aboriginal women think. In fact in much of the literature surveyed above it is evident that this dominant identity is regarded as a matter of ‘self-realisation’. The communal identity is privileged over the female self, a fact that is not only evident in the literature surveyed but also borne out by the evidence of Aboriginal women’s marginalisation. It is embedded in the language of family violence, especially when Aboriginal women use words that seek to minimise violence that has been committed against them, and when they describe the violence in innocuous language. In her research, Palawah scholar Kyllie Cripps has found that Indigenous women often use language to diminish violence and its consequences. Women use the language of ‘we were arguing’, or ‘my husband was acting up’, or ‘it was just a little fight’, when in fact the women interviewed had been raped or physically

199 Sen, above n 160, 8.
201 Sen, above n 160, 5.
Oblivious to this, the literature insists that this interpersonal violence of rape and assault can be conflated with ‘economic deprivation’ — as in ATSIC’s definition of family violence, for instance.

As I have already reiterated, the experiences of colonised Aboriginal women are different to the experiences of non-Indigenous women; and the latter cannot speak in the place of Aboriginal women. But the essentialising of Aboriginal women means that the voices of other women, who do not conform, are stifled and the collective position limits Aboriginal women’s ability to speak out. Essentialism has a political value — it did during the Bell/Huggins debate and it does in contemporary Aboriginal political advocacy — but it is also reductionist and limits the opportunities to work with other groups (such as non-Indigenous feminists) to develop strategies for law and policy reform that has a day-to-day impact on the way people live their lives.

F Conclusion

 Aboriginal women have noted how feminism has been crucial to establishing Aboriginal women’s own voice within the realm of Aboriginal politics. Yet, rather than providing a stepping stone to further alliance on issues facing Aboriginal women in Australia, the relationship between Aboriginal women and feminism has faltered. The assumption of an automatic allegiance to race over gender prevents a deeper examination of the problems in Aboriginal communities and cuts off opportunities for alliances with civil society that can work to bring about change.

One of the challenges of the women’s movement has always been the tension between the political value of essentialism and the intersectional mode of analysis adopted by Indigenous women. Sally Merry argues that consciously adopted essentialism in the battered women’s movement — that all women are subordinated by gender violence — was an effective political strategy because activists could argue that it does affect all women. According to Merry, naming a problem is vital to organising a social movement

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203 Merry, above n 65, 15.
and a response to the problem. She says it is a subtle cultural technology that defines the scope of an issue and ‘channels a response’.

I would argue that Aboriginal women’s capacity to mobilise the women’s movement and develop important and necessary alliances with civil society groups in order to tackle violence has been hampered by the enduring legacy of the Bell/Huggins debate. Howe argues that feminists have avoided taking a position on the NTER because of this legacy. Re-engagement with feminism will become a vital aspect of the development of Aboriginal women’s rights in the future. The only way to gain traction on the issues that affect Aboriginal women’s lives outside of the Aboriginal political realm, for example child-care, casual employment and flexible workplace conditions, is through alliances with groups in the women’s movement who have the capacity and resources to advocate together with Aboriginal women. The cut and thrust of the political arena means that Aboriginal women’s priorities are overlooked. Aboriginal women must take advantage of the common challenges of women in order to influence the political and legal system.

IV Conclusion

Part III detailed Aboriginal women’s political and academic writing on self-determination and discussed how it has shaped the right to self-determination in the Aboriginal political domain. A feature of this body of writing is a critique of feminist theory and its inability to understand the experiences of Aboriginal women. In expounding the issues that are unique to Aboriginal women, this literature asserts that colonisation, not gender, is the dominant factor shaping Aboriginal women’s identity and is the reason for Aboriginal women’s alliance with Aboriginal men.

The political writing surveyed has been pivotal to a deeper understanding of Aboriginal women’s experiences. At the same time, this body of work, like both international law and Aboriginal peoples’ engagement with the state, falls short of prescribing ways to improve the lives of Aboriginal women beyond that of the nominal recognition of the right to self-determination. In this vein, it is apparent that land rights have informed the discourse of

204 Ibid 28.
205 Ibid.
206 Howe, above n 87.
self-determination and more recently the rights agenda thus inculcating Aboriginal women’s ‘self’ as being secondary to the interests of the collective. In any event the Aboriginal notion of the right to self-determination remains discursive and amorphous. Certainly much of the writing surveyed above pre-dates the NTER and reflects a period in time when Indigenous women’s voices were impoverished by a utilitarian Indigenous governance structure and a unified political voice emboldened by meta-narratives that deflected scrutiny.

Aboriginal communities are diverse in geography, population and socio-economic status. Langton makes the point that ‘the lives of women and children in Yuendumu, Katherine and Halls Creek are not the same as those in western Sydney, where a large number of Sydney’s Indigenous population live’.207 While these differences are celebrated in the context of novel writing or ‘life writing’ by Aboriginal women, such differences have been obscured when it comes to the scholarly writing of Aboriginal women.208 It has been established how influential this political writing is in relation to Australian public institutions and more importantly Aboriginal communities. The way forward is to reconceptualise the right to self-determination in a way that captures the stark differences in the life experiences of Aboriginal women in rural and remote communities as well as urban, middle-class communities.209

It should not be the case that a choice needs to be made between ‘self’ and community. A new conceptual framework is required so that in each community Aboriginal women can make the choices that are unique to their own material and social contexts. An alliance with men should not be determinative of Aboriginal women’s cultural membership, nor should such an alliance come at the expense of women’s bodily integrity and freedom to speak out. Yet at present it may be that Aboriginal women’s voices have become trapped by the narratives used by Indigenous peoples to theorise violence, gender and race.210

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208 See generally Holding Up the Sky: Aboriginal Women Speak (1999); Rita Huggins and Jackie Huggins, Auntie Rita (1994); Ruby Langford, Don’t Take Your Love to Town (1988); Sally Morgan, My Place (1987).
210 Bell and Nelson, above n 124, 407.
Demonstrating the shortcomings of the right to self-determination as recognised in international law, as translated by the state and as articulated by Aboriginal political discourse is a first step toward understanding the conceptual limitations of the right to self-determination. The next step is to formulate a normative response to these limitations.

The following chapter seeks to take this next step by introducing Martha Nussbaum’s capabilities theory. Given the breadth of the problems Aboriginal women experience as a result of the incomplete nature of the right to self-determination, the capabilities approach is a more specific and structured approach to achieving meaningful self-determination for Aboriginal women than that allowed by international human rights instruments such as the UNDRIP or Indigenous political statements.
I have argued thus far that the right to self-determination as recognised in international law and as translated by the Australian state has marginalised Aboriginal women. They have not always been included in the benefits of self-determination including land rights, leadership and employment opportunities. In addition, I have argued that the Aboriginal politics of self-determination, which is anchored in the belief that Aboriginal communities have the solutions to the problems that afflict their communities, gives no consideration to the different life experiences and aspirations of Aboriginal men and Aboriginal women. Aboriginal people can only ever achieve true self-determination if both men and women secure the fundamental rights and freedoms necessary to live a fully human life and to make choices freely. The right to self-determination, as a conceptual framework, must become more specific and personalised in order to be capable of reflecting what self-determination means for Aboriginal women in their daily lives. In Australia, where Aboriginal groups and Aboriginal women are highly localised in terms of geography and culture, this can only be elucidated in a context-specific way.

This chapter introduces an alternative normative framework for understanding the right to self-determination. The capabilities approach to human functioning, as elaborated by Martha Nussbaum, provides an evaluative framework for the articulation of the right to self-determination in a way that international human rights instruments and Indigenous political statements do not. It shifts the question about peoples’ well-being from an account of the nominal recognition of human rights to a question of what people are actually able to be and do. The capabilities approach provides a complementary framework to Indigenous advocacy for self-determination — a discursive approach that promotes a single identity and is too often abstracted from and incongruous with the daily lives of Aboriginal
women. The capabilities approach enlivens rights advocacy in a way that gives specificity and shape to the vocabulary of self-determination, especially for Aboriginal women.

Part II of this chapter begins by explaining the capabilities theory, which was developed in response to the correlation between women, poverty and sex inequality in developing countries. It then engages with common criticisms of Nussbaum’s capabilities theory. Next, Part III argues that the capabilities approach is a useful approach for reconceptualising the right to self-determination in Australia, because it has clear synergy with contemporary Aboriginal rights issues. Part III also distinguishes my approach from other attempts to apply Sen’s capabilities approach in Australia.

II THE CAPABILITIES APPROACH

A Measuring Inequality

The capabilities approach is a normative framework based on the empirical work of economist Amartya Sen and philosopher Martha Nussbaum. Sen identified shortcomings in the way that quality of life was traditionally measured by economists. He noted that the quality of life of citizens within nations was ranked according to crude and inexact measurements of income and consumption. According to Sen, while wealthy developed nations can marshal and distribute significant resources to their citizens, there is no

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measurement of the equality of that distribution.\textsuperscript{5} Thus, it is not possible to extrapolate from such a homogenous approach to quality of life how health, education levels, race or gender inform the use of these resources.

Nussbaum’s work has built on and refined Sen’s approach focusing on the correlation between women, poverty and sex inequality.\textsuperscript{6} Nussbaum’s theory is based on fieldwork conducted in developing countries, mainly India.\textsuperscript{7} Nussbaum’s motivation to further develop the capabilities approach came after her observation that women in many cultures are not treated as individuals with their own needs and aspirations:

Women in much of the world lack support for fundamental functions of a human life. They are less well nourished than men, less healthy, more vulnerable to physical violence and sexual abuse. They are much less likely than men to be literate, and still less likely to have pre-professional or technical education. Should they attempt to enter the workplace, they face greater obstacles, including intimidation from family or spouse, sex discrimination in hiring and sexual harassment in the workplace — all, frequently, without effective legal recourse.\textsuperscript{8}

So far the capabilities approach has been applied in the context of development policy. Most notably it has changed the way the United Nations Development Programme’s (‘UNDP’) \textit{Human Development Reports} have been produced since 1990.\textsuperscript{9} In this case, the capabilities approach shifted the measurement of how individuals fare within a state, from a measurement of per capita household income or consumption according to an economy’s gross domestic product (‘GDP’), to an evaluation of capabilities. When a country’s report

\textsuperscript{5} Ibid.
\textsuperscript{7} Martha Nussbaum, \textit{Women and Human Development: The Capabilities Approach} (2000) 5.
is based solely on GDP, it is not possible to determine the quality of a human being’s life, because GDP does not take into account inequality between citizens. In adopting a normative evaluation of the quality of life based on capabilities, quality of life can be more accurately measured from specific and nuanced information such as health status or educational attainment.

In measuring what people are actually able to do and be, the capabilities approach pays attention to a citizen’s ability to achieve (capability). In this way, the capabilities approach is not a theory of social justice but is an evaluative tool or framework in which the traditional indicator of welfare economics, utility, is replaced by the freedom to be and do. For instance, the UNDP’s Human Development Reports’ Human Development Index, empirically measures aspects of well-being as opposed to applying a cost–benefit analysis of well-being.10

The other strength of the capabilities approach is that it repudiates the standard utilitarian philosophy that informs public decision-making in contemporary liberal democracies. The central tenet of the utilitarian ethic is that individuals are primarily motivated by the pursuit of happiness and are therefore hyper-vigilant to law and legislation that constrains the greatest good for the greatest number.11 Utilitarians are therefore attuned to the actions of the state that may impinge on the maximisation of an individual’s pleasure or satisfaction.12 Because contemporary market-based liberal democracies are inculcated with the utilitarian ethic, this influence manifests itself in a political and public policy culture, where policy decisions are formulated on the basis of achieving the greatest good for the greatest number.13 This political culture eschews minority interests because they are viewed as diminishing opportunities or diverting resources away from measures that should be aimed at increasing the satisfaction of the majority.

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11 Andrew Heywood, Political Ideologies (1992) 35.
The capabilities approach takes the position that a cost–benefit analysis of human well-being or of state policies cannot tell us the information we need to understand how humans actually live their lives.\textsuperscript{14} Utilitarian economics does not take into account the cultural pressures that affect individuals' preferences and desires in life because it assumes that people are rational agents seeking to maximise utility regardless of the pressures or norms of tradition.\textsuperscript{15} Thus if we do not have information about how people actually choose to live their lives then we cannot improve people's lives.

An example of this utilitarian ethic in the context of Australian Aboriginal affairs can be seen in the record levels of expenditure boasted by the Commonwealth Government in Indigenous affairs in 2007. While promoting the spending as a solution to Indigenous disadvantage, the Commonwealth Government failed to measure the actual outcomes of such expenditure.\textsuperscript{16} In 2008, the Aboriginal and Torres Strait Islander Social Justice Commissioner asked, 'since when did the size of input become more important than the intended outcomes?', and questioned why the record expenditure was emphasised by the Government when there was no measurement of the effects of this funding.\textsuperscript{17} In fact, a proportion of the record funding included Commonwealth monies expended on legal fees for farmers and pastoralists challenging Aboriginal native title claims in the court system.\textsuperscript{18} This demonstrates what Sen has described as the 'informational poverty' of the utilitarian calculus in the task of understanding how people live their daily lives.\textsuperscript{19} An impersonal figure or amount does not tell us how the money is spent and who is actually benefiting.

As an evaluative framework, capabilities theory is based on the premise that in order to live a valuable human life a person must have the freedom to make choices about how they live their life. To enjoy that freedom, one must have the capabilities in order to do and be: to work, to be healthy, to read, to care, to love, to be well fed or to have shelter. These

\textsuperscript{15} Ibid 945.
\textsuperscript{17} Ibid.
\textsuperscript{18} Debra Jopson, 'Money That's Black and White and Spent All Over', The Sydney Morning Herald (Sydney), 16 March 2001; Tom Calma, 'Still Riding for Freedom — An Aboriginal and Torres Strait Islander Human Rights Agenda for the Twenty-First Century' (Speech delivered at the Charles Perkins AO Memorial Oration, University of Sydney, 23 October 2008).
\textsuperscript{19} Amartya Sen, 'Personal Utilities and Public Judgements: Or What's Wrong with Welfare Economics?' (1979) 89 Economics Journal 537.
examples, to work, to be healthy, to read, etc, are known as functionings. In order to realise them individuals must first have capability – the opportunity or the freedom to realise the functionings. This means that, rather than judging quality of life according to people’s satisfactions or how many resources they are theoretically able to command, the capability approach asks: what are they actually able to do or to be?^{20}

B  Nussbaum’s Capabilities Approach

Nussbaum points out that the idea of capabilities is not novel, but in fact has always run deeply in Western philosophy and legal thought. The notion of capabilities is based on ‘the idea that all human beings are precious, deserving of respect and support, and that the worth of all human beings is equal’.^{21} Nussbaum’s theory is firmly rooted in Aristotelian and Marxist traditions of true human functioning.^{22} Aristotle held the view that the goal of any good political system should be that ‘anyone whatsoever might do well and live a flourishing life’.^{23} Marx, influenced by Aristotle, observed that the senses of a human being can only operate at an animal level if the human being is not cultivated by appropriate education, by leisure and play, by self-expression, and by establishing valuable associations with other humans.^{24}

Nussbaum traces the different versions of capabilities, from Aristotle, to the Stoics, to early religious thinkers who wrote of capabilities, to the 18th century when Adam Smith wrote about capabilities, arguing that free public education should be guaranteed in order for people to live free lives and make decisions about their lives.^{25} Nussbaum argues that the notion of capabilities influenced the development of American constitutional thought, including that of James Madison, one of the principal authors of the American Constitution, and Thomas Paine, who wrote of human opportunity and capabilities.^{26} Nussbaum also notes that in the 19th century Thomas Hill Green of the British Liberal party drew upon Aristotle in his writings on liberal legislation and freedom of contract to argue that sex

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^{20} Nussbaum, Women and Human Development, above n 7, 12.
^{22} Nussbaum, Women and Human Development, above n 7, 13.
^{24} See, eg, Karl Marx, The Economic and Philosophical Manuscripts of 1844 (1988) XXII, 56.
^{25} Nussbaum, ‘Constitutions and Capabilities’, above n 21, 33.
^{26} Ibid 46.
equality, compulsory education and healthcare were critical to providing real human freedom.27

According to Nussbaum the fundamental question for all of these thinkers was: what are people able to be and do? Influenced by the idea of human flourishing, Nussbaum emphasises each person as an end, worthy of a dignified life, and views the individual as being capable and needy as opposed to the notion that the individual is equal and independent.28

1 Women Living in Poverty

In the case of women, Nussbaum has found that poverty affects what women hope for, what they love, what they fear and what they are able to do.29 Fundamental to Nussbaum’s approach is her concern that women limit their expectations: women adjust to the expectations their culture and community have of them. This is known as ‘adaptive preferences’, which means that culture and cultural practices limit or neglect women’s autonomy.30

According to Nussbaum, poor or uneducated women frequently exhibit adaptive preferences or preference deformation.31 Therefore utilitarianism, especially in measuring inequality, does not address the fact that women and the poor are generally satisfied with having less and expecting less. For instance, it may be that because land rights are the normative benchmark for Aboriginal self-determination, Aboriginal women aspire to land rights even if they are not included in decision-making about the land or if such land title never actually improves their lives. Another example is the strong cultural pressure not to report the violence or discuss or complain about violence. This pressure influences the

27 Ibid 55.
28 See generally Nussbaum, ‘Women’s Capabilities and Social Justice’, above n 3; Nussbaum, Sex and Social Justice, above n 3.
29 Nussbaum, ‘Women’s Capabilities and Social Justice’, above n 3, 222.
behaviour of Aboriginal women, as evidenced by statistics of under-reporting of violence against women.32

Nussbaum argues that when it comes to women living in poverty, preferences are malleable, and are often shaped by tradition and intimidation.33 According to Nussbaum, 'we should not underrate the extent to which such differences in options construct differences in thought; neither, however, should we overrate these differences, thinking of them as creating an [Indian] “essence” utterly incomprehensible to other imaginations'.34 Thus Nussbaum rejects the preference-based account of social choice because it fails to 'conduct a critical scrutiny of preference and desire that would reveal the many ways in which habit, fear, low expectations, and unjust background conditions deform people's choices and even their wishes for their own lives'.35 This point is reflected in the discussion in Chapter 3 about the way in which Aboriginal discourse on family violence repeatedly insists that Aboriginal women are not oppressed, do not have an issue with patriarchy, and are equal in the political struggle against the state.36 The way that this has affected Aboriginal women's thinking has not been scrutinised. The literature rests on the assumption that the experience of Aboriginal women is utterly incomprehensible to anyone else.

2 Categories of Capabilities

Nussbaum’s capabilities approach begins from the position that all human beings are born with ‘natural’ or ‘luck governed’ goods over which the state has no control. Here Nussbaum draws upon John Rawls’s idea of natural goods that we predominantly acquire by virtue of chance.37 For example, genetic health or emotional health is something the

33 Nussbaum, Women and Human Development, above n 7, 115.
34 Ibid 31.
35 Ibid 114. See also Nussbaum, Sex and Social Justice, above n 3, 151.
36 Cripps, above n 32, 6.
state cannot influence. The state can, however, deliver the social basis of capabilities that makes up for the difference that occurs because of a lack of 'natural' or 'luck governed' goods. While the government cannot provide the good, it can provide the social basis of capabilities. Nussbaum uses the case of emotional health, saying the government cannot do a lot to make women emotionally healthy, but it can influence those emotions 'through suitable policies as family law, rape law and public safety'.

For Nussbaum, there are essentially three types of capabilities: innate capabilities, internal capabilities and combined capabilities. Innate capabilities are those basic capabilities that all individuals have and are necessary in order to develop the more advanced capabilities. Nussbaum uses an example of infants, who are born with practical reason and imagination, but cannot exercise these without education. Internal capabilities are the inherent state of the person herself that is necessary for conditions for the exercise of the requisite functions. Here, Nussbaum uses an example of a woman who has not suffered genital mutilation, but who has the internal capability for sexual pleasure. Combined capabilities are internal and external capabilities combined together that permit an individual to exercise a function. Nussbaum illustrates this with reference to a woman who is not mutilated but secluded and forbidden to leave the house, and who has internal but not combined capability for sexual expression, as well as political participation or work. Nussbaum argues that it is the goal of public policy to provide combined capabilities through education and health care.

3 A List of Central Human Capabilities

Nussbaum has criticised Sen’s version of the capabilities approach because he provides no guidance on the most important capabilities. While Sen endorses health and education rights in the formulation of the Human Development Reports’ quality of life measurement, he fails, says Nussbaum, to acknowledge explicitly those rights as fundamental to the

38 Nussbaum, Women and Human Development, above n 7, 82.
39 Nussbaum, Sex and Social Justice, above n 3, 44.
40 Ibid.
41 Ibid.
42 Ibid.
Any political project that has as its aim the protection of basic liberties, argues Nussbaum, must articulate 'forthrightly' some of the basic freedoms required to live a dignified life.

Nussbaum has devised a list of ten central human capabilities; any life that lacks any of these capabilities falls short of being a good human life. Nussbaum considers the list to be 'open-ended' and 'non-exhaustive' and therefore unfixed and open to change.

- **Life.** Being able to live to the end of a human life of normal length; not dying prematurely or before one's life is so reduced as to be not worth living.
- **Bodily health and integrity.** Being able to have good health, including reproductive health; being adequately nourished; being able to have adequate shelter.
- **Bodily integrity.** Being able to move freely from place to place; being able to be secure against violent assault, including sexual assault, marital rape, and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction.
- **Senses, imagination, and thought.** Being able to use the senses; being able to imagine, to think, and to reason — and to do these things in a 'truly human' way, a way informed and cultivated by an adequate education, including, but by no means limited to, literacy and basic mathematical and scientific training; being able to use imagination and thought in connection with experiencing and producing expressive works and events of one's own choice (religious, literary, musical, etc); being able to use one's mind in ways protected by guarantees of freedom of expression with respect to both political and artistic speech and freedom or religious exercise; being able to have pleasurable experiences and to avoid nonbeneficial pain
- **Emotions.** Being able to have attachments to things and persons outside ourselves; being able to love those who love and care for us; being able to grieve at their absence; in general, being able to love, to grieve, to experience longing, gratitude, and justified anger; not having one's emotional developing blighted by fear or anxiety. (Supporting this capability means supporting forms of human association that can be shown to be crucial in their development).
- **Practical reason.** Being able to form a conception of the good and to engage in critical reflection about the planning of one's own life. (This entails protection for the liberty of conscience).
- **Affiliation.** (a) Being able to live for and in relation to others, to recognise and show concern for other human beings, to engage in various forms of social interaction; being able to imagine the situation of another and to have compassion for that situation; having the capability for both justice and friendship. (Protecting this capability means, once again, protecting institutions that constitute such forms of affiliation, and also protecting the freedoms of assembly and political speech.) (b) Having the social bases of self-respect and nonhumiliation; being able to be treated as a dignified being whose worth is equal to that of others. (This entails provisions of non-discrimination).

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44 Nussbaum, 'Capabilities as Fundamental Entitlements', above n 43, 44.
45 Ibid.
47 Ibid.
• Other species. Being able to live with concern for and in relation to animals, plants, and the world of nature.
• Play. Being able to laugh. To play, to enjoy recreational activities.
• Control over one's environment. (a) Political: being able to participate effectively in political choices that govern one's life; having the rights of political participation, free speech, and freedom of association. (b) Material: being able to hold property (both land and movable goods); having the right to seek employment on an equal basis with others; having the freedom from unwarranted search and seizure. In work, being able to work as a human being, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers.48

Nussbaum frankly describes the list as 'universalist' and 'essentialist' because it is asking us to focus on what is common to all human life rather than on the differences.49 Nussbaum is interested in capability, not functioning, because once citizens reach the basic threshold of these capabilities, it is up to them to decide how they wish to live their life: 'citizens must be left free to determine their course after that'.50 This is what is referred to as 'thin universalism'; because even though the capabilities on the list are universal, they represent a threshold which the state must meet in order that its citizens live a dignified life. The decisions an individual makes after reaching that threshold are not the concern of the capabilities approach: 'the person with plenty of food may always choose to fast, but there is a great difference between fasting and starving, and it is this difference I wish to capture'.51

Nussbaum calls the capabilities approach a 'species' of the human rights approach because its goal is to ensure that people function in areas of central importance to a society.52 While the capabilities approach argues for the same entitlements as the human rights movement — civil, political, economic and social — it does away with the 'facile' distinction between civil and political rights and economic, social and cultural rights.53 Nussbaum argues that the language of capabilities is more accurate than rights: 'the language of capabilities gives

48 Nussbaum’s list has changed slightly over time in response to her fieldwork in India and a need for greater emphasis on bodily integrity, dignity and non-humiliation: Nussbaum, Women and Human Development, above n 7, 78.
49 Nussbaum, ‘Human Capabilities, Female Human Beings’, above n 3, 63.
50 Nussbaum, Sex and Social Justice, above n 3, 44.
51 Nussbaum, Women and Human Development, above n 7, 87.
53 Ibid.
important precision and supplementation to the language of rights'. The capabilities approach supplements the nominal recognition of human rights as 'all rights, understood as entitlements to capabilities, have material and social preconditions, and all require government action'. Therefore the capabilities approach transforms the work of human rights from a narrow focus on legal guarantees and entitlements to an approach that changes the way in which public policy and law views human rights. It shifts the focus of rights discussions away from legal instruments to the effectiveness of laws and how they actually improve individual’s capabilities. A benefit of the affinity between human rights and the capabilities approach is that universal rights have international standards and significant bodies of treaty jurisprudence that underpin them, which provides a readily accessible normative benchmark from which to judge.

For Nussbaum, a defined list provides a better guide for public policy than the concept of utility in understanding what constitutes a good human life. As already discussed, this is because utility is imprecise and impersonal, whereas the capabilities approach is about designing a measurement that captures more realistically the lives that people live. Here, Nussbaum critiques Sen’s capabilities approach directly: the UNDP measures, which were influenced by Sen, measure health and educational attainment yet in terms understanding what level of health provision or what standard of education is expected and delivered in a just society, Sen is ‘basically silent’.

According to Nussbaum each of the listed capabilities has an institutional and material aspect and each is a right that requires government attention, funding and resources. The list is deliberately general in order to allow for plural negotiation of the specification of each capability. To that end, Nussbaum allows room for the capabilities approach to be tailored to the unique, context-specific situations that exist within states.

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54 Martha Nussbaum, ‘Poverty and Human Functionings: Capabilities as Fundamental Entitlements’ in David Grusky, S Ravi Kanbur and Amartya Sen (eds), Poverty and Inequality (2006) 47, 52.
56 Nussbaum, ‘Capabilities as Fundamental Entitlements’, above n 43, 35.
57 Nussbaum, Sex and Social Justice, above n 3, 42.
Nussbaum argues that the capabilities approach can be implemented in three ways: through an annual state-sponsored Human Development Report detailing how capabilities are distributed throughout the state; through administrative and regulatory agencies which measure their achievements in terms of capabilities as opposed to undertaking cost–benefit analyses; and, if a state is making or remaking its constitution, by drawing on the capabilities approach as a source for the articulation of fundamental entitlements. This thesis will argue that the third approach complements Aboriginal aspirations for self-determination.

Constitutional protection provides a counterpoint to the utilitarian politics of Australia in which cultural claims on the state are dismissed as ‘special interest’. This Australian utilitarian ethic has been noted by scholars. Utilitarianism is closely associated with majoritarianism which promotes the elevation of the interests of the majority in a community in regards to governance and decision-making. Nussbaum explains that:

History shows us that legislative majorities are susceptible to panic and polarisation; they can easily be led to demonize unpopular minorities and to seek restrictions of their rights. If rights of the most fundamental type can be removed as the result of a hasty popular judgment, minorities will enjoy less security and a nation’s citizens will, hence, enjoy less equality.

A feature of Australian utilitarianism is the majoritarianism that Nussbaum describes. Such majoritarianism can skew public policy-making so that the interests of the majority outweigh minority interests, like those of the poor, religious minorities or Aboriginal people. In this way, a utilitarian polity can be illiberal, because it discourages individuals from pursuing interests that are different to those of the majority. For this reason,

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60 Nussbaum, ‘Constitutions and Capabilities’, above n 21, 56.

61 Heywood, above n 11.
entrenchment of capabilities in a written constitution is a more effective safeguard of the rights of minorities, because capabilities are given force through the rule of law, an independent judiciary and review of legislation.62

Indeed this is why constitutional reform is one of the main thrusts of contemporary Aboriginal political discourse.63 This advocacy focuses on constitutional change as the only way to guarantee recognition and respect for Indigenous rights far removed from the unpredictability of the political arena, and includes recognition of Aboriginal and Torres Strait Islander peoples in the preamble to the Constitution,64 substantive constitutional recognition of Indigenous peoples' rights,65 a treaty agreement entrenched in the Constitution66 and designated parliamentary seats.67

62 Nussbaum, 'Constitutions and Capabilities', above n 21, 56.
65 See generally Senate Standing Committee on Constitutional and Legal Affairs, Parliament of Australia, Two Hundred Years Later ... Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Feasibility of a Compact or ‘Makarrata’ Between the Commonwealth and Aboriginal People (1983) 67; Gatjil Djerrkura, ‘Making the Republic Important to a Majority of Australians’ in John Uhr (ed), The Australian Republic: The Case for Yes (1999) 92, 96; Garth Nettheim, ‘Reconciliation and the Constitution’ (1999) 22 University of New South Wales Law Journal 625; Brennan et al, above n 1, 138.
Yet the Indigenous constitutional reform agenda in Australia is discursive, with its success wholly contingent on the interest and/or sympathy of the government of the day. Both formal and substantive equality and recognition of difference are fundamental features of the reform agenda. Yet it fails to engage with the many complex issues that may arise from such arrangements, not the least being potential conflicts between recognition of Aboriginal law, and Australia’s human rights obligations. Perhaps the greatest weakness in the Indigenous constitutional change project is the inability of its proponents to explain how the constitutional recognition of Indigenous peoples will improve the lives of Aboriginal people. This is where Nussbaum’s approach is useful.

The capabilities approach is valuable because the list of central human capabilities identified by Nussbaum represents political goals that should form the basis for constitutional debate and ultimately should be recognised in a country’s constitution. Nussbaum confronts the belief traditionally held by citizens in democracies that basic constitutional entitlements should be understood as negative freedom or prohibitions against state action. For example, in the United States, the state is not obligated to take affirmative action on rights, but it is compelled to not take action that would impede freedom. Nussbaum uses the example of the First and Fourteenth Amendments to the United States Constitution, which is imbued with negative phrasing concerning state action. The First Amendment reads:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and petition the Government for a redress of grievances.

The Fourteenth Amendment states:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This liberal constitutional tradition results in a rights culture where, if the state keeps its ‘hands off’, the nominal rights of citizens are considered to be recognised and protected and

the state does not have an obligation to take this any further. According to Nussbaum, ‘[t]his phraseology, deriving from the Enlightenment tradition of negative liberty, leaves things notoriously indeterminate as to whether impediments supplied by the market, of private actors, are to be considered violations of fundamental rights of citizens’. Thus in the case of women, material and institutional resources (including legal and social acceptance of the legitimacy of women’s claims) are essential if women are to be in a position to actually exercise fundamental rights.

On the other hand Nussbaum prefers the positive phrasing of the Indian Constitution. For example, Article 19 recognises the protection of certain rights regarding freedom of speech:

(1) All citizens shall have the right:
   (a) To freedom of speech and expression;
   (b) to assemble peaceably and without arms;
   (c) to form associations or unions;
   (d) to move freely throughout the territory of India ...

Nussbaum also points to how the Indian Constitution permits affirmative action programs that benefit women or lower castes. Nussbaum argues that positive phrasing in a constitution is needed if states are to enable traditionally marginalised groups like women to achieve full equality. She argues that the capabilities approach accords with the Indian Constitution because, in order to cut through in terms of rights protection, the state must be forced to do rather than be directed as to what not to do.

What of the argument that rights entrenched in a constitution ‘freeze’ rights in a particular era with specific values? Nussbaum claims that the capabilities approach provides a malleable conceptual framework that can be used to read rights in a way that will always reflect the contemporary lives of citizens. Courts are regularly faced with and regularly refer to human rights standards in the course of their work. The capabilities culture

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68 Nussbaum, ‘Poverty and Human Functionings’, above n 54, 54.
69 Nussbaum, Sex and Social Justice, above n 3, 54.
71 Ibid.
requires the judiciary to interpret laws according to the way citizens live, as opposed to adopting an originalist interpretation.

5 A Framework for a Constitution-Based Capabilities Theory

Nussbaum's attention to constitutional reform, though relatively under-developed, is a unique aspect of her version of the capabilities approach. The constitutional dimension is novel because Nussbaum understands that the capabilities approach can only have an impact if it has real consequence. Nussbaum has recently further elucidated the idea of a constitution-based capabilities theory and has developed an eight-point blueprint to further distinguish the capabilities theory from other constitutional reforms.

First, Nussbaum argues that the list of capabilities is an entitlement not a charity. This means that it is the right of every citizen to have equal rights in the specified areas in the list because they reflect fundamental human rights. It is important for the state to understand that these are not rights that the state is 'granting' to citizens for which they must be grateful; rather, they are inherent human rights. Second, the political goal of capabilities is combined capability not notional freedom, meaning that capabilities require state action for their support. Third, Nussbaum argues that the capabilities approach focuses on capabilities, whereas utilitarianism focuses on satisfactions or desire. Nussbaum argues that desire is malleable and inconstant and women who have been told for centuries that they should not pursue education may not demand an education. She maintains that the absence of rebellion against a deprivation does not 'justify ignoring it'; thus the capabilities approach is aimed at what people are actually able to do and be, and not what people desire or aspire to in order to be satisfied.

Fourth, Nussbaum contends that each person is an end — every person is valuable and worthy of respect. Therefore the government should not promote the greatest good for the greatest number to the exclusion of some citizens but should rather look at the functioning

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73 Nussbaum, 'Constitutions and Capabilities', above n 21, 13.
74 Ibid 14.
75 Ibid.
76 Ibid.
77 Ibid.
of every person.  

Fifth, Nussbaum argues that capabilities are plural and non-commensurable opportunities, which means that capabilities are distinct and different in quality.  

Sixth, Nussbaum argues that the capabilities approach in a constitutional framework means that people's power of choice is central to the framework. This is easily illustrated with reference to Australia and the manner and form that is required to amend the *Australian Constitution*: a national majority of citizens and a majority of citizens in a majority of states. Following on from the importance of choice, Nussbaum maintains that there is a special role for education in the capabilities approach. This is because, for people to have the fundamental functionings that enable them to do and to be what they want in their lives, people must have powers of perception, thought and critical thinking in order to choose. Thus the capabilities approach is aimed at a 'nation of free choosers': citizens must have the opportunity to have education and learn about the many options that are available to them in life. Finally, Nussbaum says that there is a need for imagination, because no decision-maker has first-hand experience of the lives of all the many diverse groups that constitute society.

6 Criticisms of the Capabilities Approach

Criticisms of Nussbaum's capabilities approach are mostly aimed at the content of her list of central human capabilities. There are two major strands to this criticism. First the argument that Nussbaum's list lacks democratic legitimacy and, second, that the universal and individual nature of the list is Western and paternalistic.

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78 Ibid.  
79 Ibid.  
80 Ibid.  
81 Ibid.  
82 Ibid 15.  
(a) Democratic Legitimacy

Some scholars argue that the list of central human capabilities lacks democratic legitimacy. Whereas Sen leaves the choice or deliberation of a list of relevant capabilities to the public sphere, Nussbaum’s general, open-ended and universal list is viewed as problematic because she does not allow for engagement by the democratic process in selecting what capabilities are valuable to a community. Nussbaum’s approach is said to limit the role of ‘agency’ in democracy.

However, Nussbaum emphasises that the list is not definitive and needs to be tailored to the material and social circumstances of a community. Nussbaum recognises that there are many different conceptions of the good and suggests that a community may only want to choose one or two capabilities on the list that are important to them. Nussbaum refers to this as plural specification or local specification. Capabilities scholar Ingrid Robeyns makes the point that the list attracts too much attention and that, in fact, more work needs be done on the kind of democratic institutions that the capabilities approach in practice would require.

I argue that the list of capabilities is one of the most powerful aspects of Nussbaum’s version of the capabilities approach. The list is a detailed attempt to formulate a universal framework by which women’s lives and women’s rights are taken as seriously as those of men. For Aboriginal women in Australia, this is important because of the sensitivity displayed by men to any scrutiny of the way Aboriginal women are treated by men in communities, and the level of violence. A list such as this can bypass the diversionary and obfuscating conversations about colonisation that situate self-determination between the state and the Aboriginal political domain. It avoids the uncomfortable situation where women have to minimise the wrongs committed against them in order to avoid the wrath or insecurity of men. On a practical level, the list permits a conversation to be had about how

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85 Robeyns, ‘Sen’s Capabilities Approach and Gender Inequality’, above n 6, 74.
86 Nussbaum, Sex and Social Justice, above n 3, 45.
87 Ibid 42.
Aboriginal women are living today, and how the state and their own culture respond to those challenges.

Adopting partially or in whole Nussbaum’s list of capabilities is not about imposing upon any one Aboriginal individual or Aboriginal community a set of Western ideas about the good life or how people should live their lives. Rather, the list is an attempt to name the preconditions of a dignified human life. Indeed the list echoes much of the language used by Aboriginal women in Women’s Business, as described in Chapter 2. Nussbaum is not imposing restrictions upon cultural traditions and practices or on women’s autonomy in regard to their right to choose to engage in those practices. Nussbaum has always maintained that what people choose to do with their lives once they have reached the threshold of functioning is not the concern of the capabilities approach. Rather the capabilities list can be viewed as a baseline of what constitutes a dignified life. Thus the emphasis is upon acknowledging that men and women in an Aboriginal community have potential and they are entitled to the capabilities required in order to reach that potential. This means Aboriginal women can make a free choice about their role in an Aboriginal community, in the family or in the state.

(b) Universalist Approach vs Cultural Relativism

While the international human rights framework is primarily underpinned by universal individual rights, there remains a constant challenge to the universality of these rights, on the basis that their meaning derives from the Western liberal tradition. The question often asked is ‘who decides what is culture?’ Cultural relativists assert that the content of ‘rights’ should be determined on the basis of a group’s core values and standards. For

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example, during the UN Commission on Human Rights drafting sessions for the *Declaration on the Rights of Indigenous Peoples* (‘UNDRIP’), some Indigenous participants did not believe that the practice of Aboriginal custom, protected under Article 33, should be subject to international human rights law:

The phrase ‘in accordance with internationally recognised human rights standards’ must be deleted. This article [Article 33] allows us the right to have our own structures, customs, traditions as is inherent within our right of self-determination and the phrase added on to it, seeks to limit the full exercise of our right.  

Inevitably Nussbaum’s list of capabilities has been questioned on the grounds that it purports to be universal, is individualistic, and therefore does not adequately take into account group rights.  

The list is said to be ‘sophisticated’, even ‘fanciful’, and draws from the life of an ‘artistically inclined, self-consciously and voluntarily religious’ Western woman rather than the lives of women in India.  

As a highly educated, middle-class, Western woman, Nussbaum is accused of being paternalistic or elitist and unable to truly understand the lives of women in poverty.  

The content of the list, it is suggested, does not reflect what poor women are concerned with in their daily lives, such as safety, nutrition and shelter.  

According to Elizabeth Zechenter:

Although the capabilities approach represents a thoughtful attempt at justifying universal human rights, its primary weakness lies in its failure to adequately account for the fact that certain significant differences among cultures cannot be reconciled by looking for commonalities or points of agreements among these cultures.

However, Nussbaum emphasises that the international human rights law system is not derived solely from a Western perspective, but encompasses many non-Western

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93 Okin, ‘Poverty, Well-Being and Gender’, above n 6, 296.


95 Okin, ‘Poverty, Well-Being and Gender’, above n 6, 296.

philosophical traditions. Nussbaum says that capabilities are not an ‘alien importation’ but rather a framework that ‘squares pretty well with demands women are already making in many global and national political contexts’. While Nussbaum argues that not all cultural traditions are bad norms, she suggests that, in order to freely choose to live a traditional life, one must first have certain economic and political opportunities in place.

Nussbaum is critical of the relativist stance in development studies that takes up ‘positions of reaction, oppression and sexism’. I argued in Chapter 3 that there is a lack of clarity to the claim by some Aboriginal women that feminists essentialise Aboriginal women. Similarly Nussbaum argues that the relativist challenge is not always accompanied by ‘clear and explicit philosophical arguments’. Nussbaum argues that relativists frequently overlook harmful traditions or indeed ignore counter-traditions of female defiance in order to defend cultural norms. The activity of criticism, stresses Nussbaum, is inherent to all cultures as they are dynamic and full of contestation. By ignoring such dynamism, relativists also take an essentialised approach to culture.

The relativist objection to Nussbaum overlooks the porous nature of contemporary cultures into which the discourse on international human rights has permeated. Nussbaum argues that the ideas of feminism, of democracy, of egalitarianism are now ‘inside’ every known society. This is why this thesis maintains that the capabilities approach is complementary to Aboriginal Australia’s right to self-determination. Since the land rights movement, international human rights law has played a significant role in Indigenous rights advocacy and the substantive development of Indigenous peoples’ rights. Indigenous communities are enthusiastic about and open to international human rights law as informing their relationship with the state. Indigenous peoples are active in the international human rights system, often to the point of adopting an uncritical, dogmatic stance in relation to

97 Nussbaum, ‘Women’s Capabilities and Social Justice’, above n 3, 239.
98 Ibid 241.
100 Ibid.
101 Ibid.
102 Ibid 59.
103 Nussbaum, Women and Human Development, above n 7, 51.
104 Ibid 49.
international human rights law. This is because international human rights law is deployed as a tool in the historical and ongoing adversarial relationship between the coloniser and colonised — even though the state often fails to adequately incorporate international law into the domestic legal system, and even though scholars such as James Tully, argue that it is just another colonial exercise that divides Aboriginal communities.

I would argue that binding and non-binding international human rights standards have been more important to Australian Aboriginal advocacy than to Indigenous advocacy in those jurisdictions that have a treaty agreement or constitutional recognition. For example, many of the laws in Australia recognising Aboriginal rights such as heritage and land are influenced or directly legislated by the state under international human rights conventions. These include the Racial Discrimination Act 1975 (Cth) (‘RDA’) and the Aboriginal Law Rights Act Northern Territory (Northern Territory) 1975 (Cth) (‘ALRA’). The Aboriginal opposition to the Northern Territory Emergency Response (‘NTER’) was primarily focused on state-recognised rights including those under the RDA and the ALRA. Similarly, much of the Aboriginal support in favour of the NTER has been on the grounds of Australia’s obligations under the Convention on the Elimination of All Forms of Discrimination Against Women (‘CEDAW’) and the Convention on the Rights of the Child (‘CROC’).

In Australia the majority of the discourse on the rights of Indigenous peoples has played inside and around the international human rights framework.

Added to this, it is frequently claimed by Aboriginal women in the course of public contestation about Aboriginal customary law that harmful Aboriginal law practices should evolve to be consistent with international human rights law, and particularly the rights of


106 James Tully, ‘The Struggles of Indigenous Peoples for and of Freedom’ in Ardith Walkern and Halie Bruce (eds), Box of Treasures or Empty Box?: Twenty Years of Section 35 (2003) 272. See also Taiaike Alfred, Peace, Power and Righteousness: An Indigenous Manifesto (1999) 140.


women. For example, Alison Anderson, former Aboriginal and Torres Strait Islander Commission (‘ATSIC’) Commissioner and current member of the Northern Territory Legislative Assembly, publicly supported the Law Reform (Gender, Sexuality and Defacto Relationships) Bill 2003. The reform Bill removed the defence of customary marriage to certain sexual offences involving children under the age of 16 years. Anderson stated that, as a Luritja woman, she is proud of and continues to practice her law and culture, and is supportive of customary law marriages, but she is not supportive of ‘sexual activity with under-age brides’. In publicly supporting the law reform, Anderson appealed to CROC, arguing that Indigenous children should be entitled to the same human rights protections as non-Indigenous children. Similarly Wiradjuri scholar Larissa Behrendt has argued that Aboriginal cultural practices

very much respect contemporary notions of human rights ... [A]ll my life I’ve been hearing ... language about our rights. Our rights to sovereignty, our right to land, our right to culture. It seems to me that we’re very much a culture now that is interested in the notion of rights. And I don’t see how we can as a culture say that we value fundamental human rights like our right to sovereignty, the right to our native title, the right to our culture and language, but we don’t value the rights of our most vulnerable members, our children and women.

C Conclusion

Part II has explained Martha Nussbaum’s capabilities approach. I have argued that the capabilities approach is congruent with Indigenous peoples’ right to self-determination. I do not believe the usefulness of the capabilities approach can be negated solely on the grounds of cultural difference because of the critical importance of international human rights law to Aboriginal culture in Australia since the beginning of the self-determination era. Next, Part III details the capabilities approach in its application to Aboriginal Australia and explains how the capabilities approach can enhance and particularise contemporary Indigenous rights claims. Part III then discusses how the capabilities approach has been applied in Australia.

110 See now Law Reform (Gender, Sexuality and De Facto Relationships) Act 2003 (NT).
111 Anderson, above n 109.
112 Larissa Behrendt, cited in ABC Television, above n 109.
III RECONCILING THE CAPABILITIES APPROACH WITH ABORIGINAL RIGHTS: A NEW APPROACH TO SELF-DETERMINATION AND ABORIGINAL WOMEN

A The Relationship Between Capabilities and Self-Determination

Using the capabilities approach as a lens through which to view self-determination does not mean supplanting self-determination as the fundamental aspiration of Aboriginal women. The right to self-determination is an explicit goal of Aboriginal people and Aboriginal women within Western liberal democracies. It is also a fundamental human right for members of a cultural group, such as Indigenous peoples, to be able to enjoy and exercise their individual human rights collectively.\(^{113}\) This requires the capability to have control over one’s environment. In the political domain the capability to have control over one’s environment includes being able to participate effectively in political choices that govern one’s life, which can be achieved through guarantees of rights of political participation, free speech and freedom of association. The capability of control over one’s material environment means being able to hold property, including land, and having the right to seek employment on an equal basis with others. Yet it is has been shown in Chapters 1 and 3 that the right to self-determination has shown a limited understanding of how Aboriginal women truly live. For example, in Women’s Business, Aboriginal women reported that the Commonwealth Development Employment Projects scheme\(^ {114}\) was gendered because: ‘men [received] a different rate of pay and women [were] not allowed to do the same jobs .... Women just don’t have to be in sewing and cooking’.\(^ {115}\) Women felt that they should be able to choose from a variety of jobs and not ‘just’ caring and cleaning.\(^ {116}\)

I have argued that in Australia the right to self-determination lacks specificity, and is predominantly aligned with aspirations for land rights and procedural rights pertaining to decision-making by the state. Moreover, as the few reports I have surveyed demonstrates, Aboriginal women are rarely asked what they think in relation to what self-determination means to them. Rather Aboriginal women’s thoughts are often conveyed through male-


\(^{114}\) This scheme is an Aboriginal-specific ‘work for the dole’ program.


\(^{116}\) Ibid 102.
produced texts. These include the texts produced by the office of the Aboriginal and Torres Strait Islander Social Justice Commissioner, a position which in the 18 years since its creation in 1992 — interestingly, as an outcome of the Royal Commission into Aboriginal Deaths in Custody (‘RCIADIC’) — has only ever been held by an Aboriginal man. Such texts bring us no closer to understanding the lives of Aboriginal women.

Nussbaum’s capabilities approach may allow a new conversation about the right to self-determination, inclusive of women. It is a universal framework that is consistent with Indigenous advocacy because the list embodies much of what self-determination is about: for example, control over one’s environment, affiliation and especially being able to form a conception of the good and engage in critical reflection about the planning of one’s life.

The most recent incarnation of the right to self-determination is contained in the UNDRIP. Since being endorsed by the Australian Government in April 2009 the UNDRIP has enlivened Aboriginal peoples’ claim to self-determination. However, the UNDRIP explicitly provides that states shall take measures, in conjunction with Indigenous peoples, to ensure that Indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination. Thus the UNDRIP concedes that the daily reality of life for Aboriginal women in communities is unsafe. If anything, the presence of Article 22 — which calls upon states to take measures to ensure that Indigenous women and children enjoy full protection against all forms of violence and discrimination — is important because it counters potential arguments of cultural relativism or narratives that seek to deny the endemic violence that is committed against Aboriginal women globally.

The benefit of Nussbaum’s capabilities approach, is that it has the practical value of translating capabilities into the vernacular of ‘ordinary daily life’, which Aboriginal women can use to capture and name what is happening to them on a daily basis. If we return to the perspectives of Aboriginal women elicited in *Women’s Business* in Chapter 2, the

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117 The four Social Justice Commissioners appointed since 1992 are, in order, Mick Dodson, William Jonas, Tom Calma and Mick Gooda.
Capabilities approach would have provided an important benchmark from which to measure how the state and Aboriginal communities provide the political and material support for Aboriginal women's capabilities. This process is crucial if human rights are to have any meaning and if people are going to benefit from their recognition. Otherwise, how do we know if self-determination has been achieved?

By focusing from the start on what people are actually able to do and to be, [the capabilities approach] is well placed to foreground and address inequalities that women suffer inside the family: inequalities in resources and opportunities, educational deprivations, the failure of work to be recognised as work, insults to bodily integrity. Traditional rights talk has neglected these issues, and this is no accident, I would argue: for rights language is strongly linked with the traditional distinction between a public sphere, which the state regulates, and a private sphere, which it must leave alone.119

Nussbaum's concern about the way 'traditional rights talk' fails to capture the actual, everyday ways in which Aboriginal women's opportunities are limited, explains why the right to self-determination as defined in international law and the UNDRIP cannot alone be the mechanism by which self-determination can be achieved. Capabilities are aspirational standards that must be implemented to have any meaningful impact upon Indigenous peoples' lives, similar to international human rights standards, whether binding or non-binding. The language of rights needs to be translated in a way that individuals can readily understand what it is that human rights are trying to achieve. The capabilities approach provides that translation and has the advantage of being closely related to the Indigenous right to self-determination.

The next section unpacks further the concern about the failure of 'traditional rights talk'. This is done in two ways: first it is shown how the right to self-determination lacks specificity and nuance on a local level; and second it is argued that international law and its legal instruments rest on a private/public dichotomy. These factors work together to marginalise Aboriginal women.

119 Nussbaum, 'Poverty and Human Functionings', above n 54, 55.
B Improving the Conversation About Self-Determination for Aboriginal Women

The following sections explain how the language of capabilities and functioning can improve the way we speak and think about the right to self-determination and thus transform the way self-determination is constructed and implemented.

The following section illustrates two major ways in which the language of self-determination is limited for Aboriginal women in its current configuration. First, self-determination is characterised by a lack of nuance. This necessitates that traditional rights language be translated into a language that Aboriginal women can understand and use on a day to day basis. The capabilities approach provides a practical language that can be used by Aboriginal women to transpose what those rights mean in practice. The second way the conceptualisation of self-determination is limited is explained with reference to the public/private dichotomy.

1 The Language of Human Rights

When ATSIC audited its own programs and policies in 1995 to examine how it responded to the needs of Aboriginal women, the resulting report revealed the unique and specialised way in which Aboriginal women express their rights.\textsuperscript{120} Aboriginal women from urban, regional and remote areas identified very geographic- and socio-economic-specific needs for their communities, including: coin-operated washing machines in women’s centres; recreation activities for the elderly in city gymnasiums; fencing to keep young children in their own surroundings; traditional birthing centres; sober centres; drunkenness to be banned from all living areas in communities to make them safe places for women and children; vacation programs for communities so children can experience a holiday atmosphere; women assisting in the design of community houses; increase of women’s health programs such as pap smears, breast cancer awareness, and pre- and post-natal education.\textsuperscript{121}

This is the kind of detail that is not permitted by the current paradigm of self-determination because the right to self-determination is filtered through the lens of Aboriginal politics. It

\textsuperscript{120} ATSIC Office of Evaluation and Audit, \textit{Evaluation of the Effectiveness of ATSIC Programs in Meeting the Needs of Aboriginal Women and Torres Strait Islander Women: Final Report} (1995).

\textsuperscript{121} Ibid 36.
is a political right masquerading as a legal right. Though self-determination is viewed as the right of Indigenous peoples to pursue their economic, cultural and social development collectively, frequently the minutiae of individual interests are subsumed by the collective. The problem that emerges, then, is not simply that there is a failure to ask, ‘are women asked what they want to do and be?’ — although this is certainly part of the problem. The main issue here rather is that there is no systematic way of measuring self-determination on a community-by-community basis.

An example can be seen in the context of women’s political participation: while women do have the nominal right to participation, this will be restricted in cases where women are threatened with violence. This is relevant to the situation of Aboriginal women because of what is known as ‘lateral violence’ in communities. According to Marcia Langton, ‘[l]ateral violence is the expression of anomie and rage ... and entrenched and unequal power relations [against] the most vulnerable members of the family: old people, women and children’. It is a term used to explain the way in which Aboriginal women are ‘humbugged’ and bullied when they speak out on issues of violence or sexual assault. The capabilities approach provides a new blueprint for Aboriginal communities to frame how to think and discuss what it really is for an individual to secure a right like political participation. It is not limited, as it is in current discourse, to a national representative body or even a land council.

By defining the securing of rights in terms of capabilities, we make it clear that a people in country C do not really have an effective right to political participation, for example, a right in the sense that matters for judging that the society is a just one, simply because this language exists on paper: they really have been given the right only if there are effective measures to make people truly capable of political exercise.

Nussbaum argues that in order to provide an actual right to political participation, it requires affirmative material and institutional support, not just a nominal right guaranteeing

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122 Nussbaum, ‘Poverty and Human Functionings’, above n 54, 54.
125 Nussbaum, ‘Poverty and Human Functionings’, above n 54, 53.
an absence of impediment to participation. As Erica-Irene Daes, Special Rapporteur of the UN Working Group on Indigenous Populations, posited:

It is important that we must try to guard against a kind of false consciousness with respect to achieving the true spirit of Indigenous self-determination ... The true test of self-determination is not whether Indigenous peoples have their own institutions, legislative authorities, laws, police and judges. The true test of self-determination ... is whether Indigenous peoples themselves actually feel that they have choices about their way of life.

Daes agrees that the emphasis on regulatory instruments, such as land laws and corporate laws, masks the ways in which these instruments may in fact operate against the achievement of true self-determination.

An analogy here can be drawn to the way in which state parties report to UN supervisory treaty bodies on domestic laws and policies pertaining to the implementation of international human rights obligations. Australia, for example, reports on law and policy about Indigenous self-determination but fails to explain how effective these measures are in the daily lives of Aboriginal people. In its 2006 report on its implementation of the International Covenant on Civil and Political Rights ('ICCPR') and the International Covenant on Economic and Social, Cultural Rights ('ICESCR'), the Australian Government made the following statement about the right to self-determination:

The Australian Government recognises the cultural distinctiveness and diversity of Indigenous peoples and acknowledges the importance of Indigenous peoples being closely involved in the development and implementation of policies and programs that impact on them.

The Government’s substantive contribution on implementation of the right to self-determination was described in the following way:

126 Ibid 54.
Indigenous Australians have decision-making roles within Indigenous specific organisations (such as Aboriginal housing authorities in the States and Territories) and within mainstream agencies, and advise governments through a range of formal bodies. Most discrete Indigenous communities live on Indigenous owned land and many manage their own local government functions. A large number of Indigenous-controlled organisations are involved in the planning and delivery of government-funded services in areas such as health, housing and employment.\textsuperscript{12}

These two quotes were the full extent of Australia’s reporting on self-determination. This reveals the poverty of the information reported and the limitations of human rights treaty monitoring. No detailed information is provided about how Aboriginal people actually live their lives. The capabilities approach works to arrest the recondite nature of self-determination because it reconfigures data-mining to a more sophisticated picture than simply a focus on funding and expenditure in Indigenous affairs.

2 \textit{Making the ‘Private’ Public}

The second problem with the right to self-determination as currently configured is that the international human rights law system is influenced by the traditional notion of the liberal state. This means that it is more likely that the state will regulate activities that occur in the public sphere but not those activities that occur in the private sphere. Feminists refer to this as the ‘public–private dichotomy’ and it is applied domestically and internationally.\textsuperscript{13} Although this dichotomy is contested among feminists, it is a useful tool to consider when thinking about the right to self-determination and Aboriginal women.\textsuperscript{14}

The public–private dichotomy operates to categorise issues that affect the entire community in a binary way: sites such as the workplace, public institutions and the economy are

\textsuperscript{12} Ibid 49.

\textsuperscript{14} It is contested by Aboriginal women because of the way the state has historically and contemporarily imposed itself in the Aboriginal ‘private’ sphere. In Australia, for example, this is illustrated by reference to the Stolen Generations or even welfare management in the NTER. See generally Jennifer Koshan, ‘Sounds of Silence: The Public/Private Dichotomy, Violence and Aboriginal Women’ in Susan Boyd (ed) \textit{Challenging the Public/Private Divide: Feminism, Law and Public Policy} (1997) 87.
situated in the public sphere and thus heavily regulated in policy and law. The private sphere on the other hand remains relatively unregulated: looking after the family and private interests such as childcare or women’s health issues as well as violence against women, are not subject to the same level of regulation and protection. The effect of this dichotomy is to relegate the role of women and women’s issues as secondary and of lesser value to the public sphere. The vast proportion of issues and challenges that women experience on a daily basis, with regard to their roles as mothers and carers of families, are situated in the private sphere.

This dichotomy is very powerful and entrenches gender inequality by influencing public attitudes to women’s issues. Indeed Aboriginal women are often described by themselves and by Aboriginal men using the language of ‘family’, ‘nurturing’, ‘caregivers’, etc, to describe their role and status in communities. In previous chapters, I have explained the consequences of the liberal state’s configuration of the right to self-determination, in that the ‘self’ is assumed to be male. The public–private dichotomy is another version of how self-determination, a state-centric right, is played out in the public sphere on all issues pertaining to self-determination (land, governance, representative political structure, education) yet traditionally excludes issues within the private sphere (Aboriginal women, Aboriginal children, violence, sexual assault and abuse in communities).

C Selecting Capabilities

Having discussed the way in which the capabilities approach traverses the problems of traditional rights talk, I turn now to the question of developing a ‘list’ of capabilities in Aboriginal Australia. The selection of capabilities is critical in Aboriginal communities given that consultation and participation is paramount in their engagement with the state, particularly since the NTER. Considering the list of needs identified by Aboriginal women in the 1995 audit report of ATSIC referred to earlier — childcare, employment, holiday programs — we know that these are not simply ‘women’s issues’ — these are community issues. And Aboriginal women have frequently expressed a desire to work through their issues with the community. This is why Nussbaum’s approach is compelling because it enables us to construct a new way of thinking about the content of self-determination that is inclusive of the whole community.
A universal and open-ended list of central human capabilities means that they are not specific to Aboriginal women *per se*, but can also be used by everybody: they are fundamental civil and political and social and economic rights that the community is already arguing for. It transforms rights discourse into a more detailed and fully-fleshed design that is able to capture the details of the life of an Aboriginal person. Self-determination can only be achieved if both men and women secure the fundamental rights and freedoms necessary to live a fully human life and freely make choices.

For example, the capability for life, to live to the end of a human life of normal length and not die prematurely, is intrinsic to the aspirations of both Aboriginal men and women. The Close the Gap campaign endorsed by Commonwealth and state governments is aimed at closing the 12-year gap in life expectancy between Indigenous and non-Indigenous Australians. Yet an Aboriginal man and woman considering the capability for life in the context of ‘closing the gap’ will view their lives differently. Like the RCIADIC, Close the Gap makes no allowance for the possibility that service provision and health outcomes may be gendered. It is popularly accepted that an Aboriginal male dies earlier than an Aboriginal female. In this context it is worth considering whether Close the Gap would have been such a successful mobilising campaign, unifying the NGO sector and compelling the Council of Australian Governments to commit resources and funding, if the narrative of the sick Aboriginal person was female. The same point can be made about the RCIADIC, whose enormously influential work was based on a vision of the imprisoned and over-represented Aboriginal person as male. I argue that the capabilities approach allows us to traverse this problem and the patriarchal way in which Indigenous and non-Indigenous politics are conducted.

An Aboriginal Australian version of the capabilities approach does not have to involve all of the capabilities Nussbaum has identified on her list. It can be ‘cherry-picked’ by

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individual communities to best suit the local circumstances. Because it is an individualistic list, it provides a space in which Aboriginal women can ask themselves questions about their own lives. Do Aboriginal women have the freedom to speak out on issues of importance to them? Do they have adequate housing? Are Aboriginal women free from violence? On this approach, the goal of self-determination is no longer what is best for the community but rather it becomes more individualised based on capability and functioning: what is she actually able to do and to be? This is a more inclusive way of viewing self-determination and a more accurate way of addressing disadvantage.

**The Capabilities Approach in Australia: Cape York**

While there is no scholarship in Australia applying Nussbaum’s capabilities approach to the situation of Aboriginal women in Australia, the capabilities approach has attracted some interest in Australia in relation to Indigenous disadvantage. Cape York leader Noel Pearson especially has been a prominent advocate of Sen’s capabilities approach in Cape York, which is the only Aboriginal community where the capabilities approach has been comprehensively applied. In particular, Sen’s capabilities approach has been used by

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Pearson to facilitate the welfare reform measures being devised by the Cape York Institute. Pearson is an Aboriginal leader and public intellectual. To an extent he has been dismissive of the rights approach adopting Sen's capabilities approach as an alternative. The main thrust of Pearson's criticism of the Indigenous rights agenda is that it is meaningless without economic development. While Pearson draws predominantly on Sen's work, he adopted Nussbaum's approach to capabilities in devising a list of capabilities:

- **Employment**: The number and type of employment opportunities for members of the community.
- **Income**: The level of income, which indicates the consumption possibilities.
- **Wealth**: The net worth of a household or individual, which gives the capacity to sustain consumption possibilities.
- **Income passivity (negative capability)**: The degree of the dependence on unearned income, which depletes all other capabilities over time.
- **Health**: The ability to access quality health services and maintain a healthy state (both physical and mental).
- **Safety**: The ability to live free from crime.
- **Housing**: The ability to live in adequate housing.
- **Basic Infrastructure**: The ability to access basic services, such as roads, water, sewerage, power and communications.
- **Education**: The ability to access a quality education.
- **Social capital**: The ability to trust and connect with other members of the community.
- **Governance**: The ability to depend on sound government institutions.

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### Comparison of Pearson and Nussbaum lists of central human capabilities:

<table>
<thead>
<tr>
<th>Pearson</th>
<th>Nussbaum</th>
</tr>
</thead>
<tbody>
<tr>
<td>Employment</td>
<td>Control over one’s environment</td>
</tr>
<tr>
<td>Income</td>
<td>Control over one’s environment</td>
</tr>
<tr>
<td>Wealth</td>
<td></td>
</tr>
<tr>
<td>Income passivity (negative capability)</td>
<td></td>
</tr>
<tr>
<td>Health</td>
<td>Life; bodily health and integrity; emotions; affiliation; other species; play</td>
</tr>
<tr>
<td>Safety</td>
<td>Bodily integrity</td>
</tr>
<tr>
<td>Housing</td>
<td>Control over one’s environment</td>
</tr>
<tr>
<td>Basic Infrastructure</td>
<td>Control over one’s environment</td>
</tr>
<tr>
<td>Education</td>
<td>Senses, imagination, and thought; practical reason</td>
</tr>
<tr>
<td>Social capital</td>
<td>Control over one’s environment</td>
</tr>
<tr>
<td>Governance</td>
<td>Control over one’s environment</td>
</tr>
</tbody>
</table>

In the above table I have attempted to match up Nussbaum’s list of capabilities with Pearson’s. Pearson never discloses how the list was determined even though that process is crucial to the capabilities approach. Sen argues that a list must be the subject of public discernment and contestation and Nussbaum maintains that her list is open-ended and flexible and should be subject to discussion by communities affected.

Pearson’s capabilities approach does not shift far from welfare economics as the primary driver of economic development. His approach is informationally limited in some respects — for example, the ability to access basic services may not tell us about the quality of those basic services. Pearson’s approach is also open to confusion because of its emphasis on the personal responsibility of individuals. Pearson argues that individual behaviour in and of itself has become a causal factor in limiting other individuals’ capabilities, hence further entrenching disadvantage.\(^{141}\) In doing so, however, Pearson overlooks how behaviours that limit capabilities of neighbours, family members, etc, are committed by individuals who themselves do not meet the capabilities threshold required of a dignified human life.

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\(^{141}\) Noel Pearson, ‘Freedom, Capabilities and the Cape York Reform Agenda’, above n 137, 6.
Pearson also claims that the difference between opportunity and capabilities is responsibility: 'Individual citizens may indeed have a right to opportunity, but such opportunity will not become capability without the individual and her family (and community) taking responsibility to convert opportunity into capability'. This is problematic because it ignores the responsibility of the state. While Pearson acknowledges that Cape York does not have adequate state infrastructure for quality education, for example, his capabilities approach is constructed on the basis that those opportunities are in fact available. Thus, on Pearson's account, the only reason that the individual is capability-deprived is because of their own inadequacies. Pearson's approach diminishes the culpability of the state in failing to provide resources for capabilities. Ultimately, people cannot convert what they do not have into opportunity, and it is ill-conceived to blame that on the individual and his or her family.

Pearson views the main problem in securing capabilities as tackling disadvantage and what he calls the 'perverse incentive' of the welfare system. The Pearson paradigm equates to: poverty + welfare dependency + no individual responsibility = no capabilities. Pearson's formulation is informed by his emphasis on responsibility in Aboriginal rights. He argues that human rights fail because they do not encourage individuals to take responsibility for their own lives. The Western welfare state, says Pearson, is predicated on the basis that the state is responsible for the social provision of opportunity. He says that Sen overlooks 'responsibility failure': whereas in developing countries the problem is a real shortage of opportunity, in places like Australia there is too much state-funded opportunity and not enough responsibility. The problem with this approach is that it projects an image of the Australian state as a successful provider of opportunity and rights, even though Pearson himself acknowledges that this is not the case:

to say that an indigenous child in a remote community, with a history of poor health and possessing minimal education, has the right to choose her life path is nonsense. Her choices have already been made for her: she is predestined to a life removed from participation in the economy and will live in that remote world all of her days.

142 Pearson, 'Choice is Not Enough', above n 138.
143 Ibid.
144 Ibid.
145 Ibid.
Yet Pearson argues that an Indigenous child will only develop capabilities if her parents and her community fulfil their responsibilities to ensure that she attends school every day, after a good night's sleep, having eaten breakfast and been given lunch.

In following Nussbaum by selecting a list of capabilities, while at the same time focusing on Sen's economic reasoning, Pearson fails to move beyond the level of rhetoric. Roebyns argues that it is conceptually flawed to apply both Nussbaum and Sen's capabilities theories because of the fundamental differences in the role of democratic deliberation and public choice in their approaches. Ultimately Pearson's approach is that capabilities are dependent on the market economy. He says, 'to get at issues of agency, self-esteem and identity, full engagement in the real economy is a necessity'.

His application of the capabilities approach does not explicitly engage in human rights nor in how the state should secure fundamental economic and social rights beyond providing Aboriginal people with an entry to the market-based economy. Questions about how constitutional guarantees could force the state to resource certain rights to a level of capability are not explored.

Finally, Pearson's capabilities approach lacks an engagement with intersectionality. It does not question the differentials that may exist between Aboriginal men and Aboriginal women in Cape York communities. This is curious given the breadth of evidence about the level of violence that Aboriginal women in Cape York experience in their daily lives.

Nevertheless, Pearson does question whether Indigenous culture in Australia — in its conservatism and its power of conformity — is antithetical to reform and development, and says that these are inescapable issues for the Indigenous community.

IV CONCLUSION

The nominal recognition of rights does not encourage capability to function at a threshold level required to live a dignified human life. As explored in this chapter, this is because of the false dichotomy between civil and political rights and economic, social and cultural

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146 Ibid.
rights and the lack of government action taken to resource rights. For Aboriginal people it is also because of the complex interplay of poverty, disadvantage, geography, culture and institutional racism; and this is more acute for Aboriginal women. This chapter presented Martha Nussbaum’s capabilities approach as an alternative theoretical lens through which to address this challenge.

This thesis argues that resolving Aboriginal disadvantage and delivering social justice for Aboriginal people cannot be achieved if Aboriginal women are excluded. The fundamental flaw in the way the right to self-determination is understood domestically is that the political right is conflated with the legal right. This skewed theory of self-determination is reductionist and the singular identity it fosters marginalises Aboriginal women. This is why I claim that the capabilities approach is a persuasive tool. Adopting the capabilities approach as a theoretical foundation for understanding the right to self-determination does not undo decades of Aboriginal advocacy for the recognition of distinct Indigenous rights and for the provision of basic citizenship rights and social infrastructure. When adapted by Aboriginal communities to the social and material context of their locality it can be used by Aboriginal men and Aboriginal women to reframe the conversation about self-determination. In this way human rights become more tactile and comprehensible to the daily experiences of Aboriginal women and men’s lives; and so too does constitutional reform which becomes more immediate and relevant than the discursive project of the Aboriginal political domain. In this way the capabilities approach redirects the conversation about the right to self-determination away from an exclusively political inquiry about what Aboriginal women ought to be able to do (when measured against the UNDRIP, for instance) to a question about what Aboriginal women are actually able to do and be.
CHAPTER FIVE: AN INSTITUTIONAL APPROACH TO SELF-DETERMINATION: ATSIC AND INDIGENOUS WOMEN

I INTRODUCTION

In earlier chapters I have mapped the shifting form of the right to self-determination in international law; how the state promotes a restrained yet patriarchal concept of self-determination and how the Aboriginal political domain has supported a state-centric narrative of self-determination that excludes or marginalises Aboriginal women. I have argued that the capabilities approach to human functioning provides an alternative framework for the articulation of a right to self-determination that is inclusive of Aboriginal women.

This chapter reviews the state-centric, institutional approach to the right to self-determination. The United Nations Declaration on the Rights of Indigenous Peoples ('UNDRIP') privileges an institutional approach to the realisation of self-determination as it expressly excludes secession and commits Indigenous peoples to maintaining and developing their own representative institutions. This chapter focuses on the Aboriginal and Torres Strait Islander Commission ('ATSIC'), which was created in 1989 as an expression of the Commonwealth Government's formal policy of self-determination for Indigenous peoples. It was set up as an independent statutory body and operated from 1990 to 2005.

In this chapter a capabilities framework is adopted as the means of evaluating Aboriginal women's experiences of ATSIC. This evaluation will measure Aboriginal women's capability to freely determine their political status and freely pursue their economic, social and cultural development under ATSIC. Part II of this chapter provides a brief historical background to Indigenous representative bodies in Australia culminating in ATSIC. Part III analyses ATSIC's funding for programs and services for Aboriginal women. Part IV concludes the chapter by applying the capabilities framework as an alternative way of understanding Aboriginal women’s experiences of ATSIC and evaluating the institutional approach to self-determination.

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2 See Aboriginal and Torres Strait Islander Commission Act 1989 (Cth) ('ATSIC Act').
II NATIONAL INDIGENOUS REPRESENTATIVE BODIES

While Indigenous activism and protest began as early as the 1840s it was mainly 'sporadic activism, local dissent and personal resistance'. The loose alliances that existed failed to make an impact on a national level and therefore momentum developed toward establishing a national Aboriginal and Torres Strait Islander presence. It was during the late 1950s that national Indigenous representative bodies emerged to provide an organised Indigenous political voice nationally. This section describes in order the various attempts at representative bodies in Australia and then concludes by considering the extent of Aboriginal women's participation in these institutions.

A The Federal Council for the Advancement of Aborigines and Torres Strait Islanders

The Federal Council for the Advancement of Aborigines and Torres Strait Islanders ('FCAATSI') was established in 1957 to facilitate interstate co-operation for the advancement of the rights of Indigenous peoples, and included Indigenous and non-Indigenous members. FCAATSI's primary role was to advocate for fundamental citizenship rights for Indigenous peoples, including civil and political rights and equality of pay.

From the time of its establishment and throughout the 1960s, FCAATSI also undertook a successful campaign for federal constitutional reform, which culminated in the 1967 referendum. The referendum resulted in the highest 'Yes' vote for any referendum in Australian history. The 1967 referendum resulted in two amendments to the Constitution of Australia: the words 'other than the aboriginal people in any State' were deleted from s 51 (xxvi) enabling the Commonwealth to make 'special laws' that were 'deemed necessary' in relation to Aboriginal and Torres Strait Islander people; s 127 was deleted in whole as it excluded Indigenous peoples in reckoning the numbers of the people of the Commonwealth or of a State.

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3 Jennifer Clark, Aborigines and Activism: Race, Aborigines and the Coming of the Sixties to Australia (2008) 5.
4 Ibid.
6 Ibid 170.
7 Ibid.
8 89.34 per cent voted in favour of the changes: see George Williams, Human Rights Under the Australian Constitution (1999) 252; Tony Blackshield and George Williams, Australian Constitutional Law and Theory: Commentary and Materials (5th ed, 2010) 1340.
Despite the success of the 1967 referendum, FCAATSI became embroiled in controversy. It was criticised for being a ‘white-run’ body and lacking ‘grass roots support’.9 It was accused of myth-making in relation to the referendum, which is popularly and erroneously regarded in Aboriginal communities as when Indigenous people gained citizenship and the vote.10 Eventually FCAATSI was disbanded in 1970 because of tension over non-Aboriginal control of the organisation and the participation of non-Indigenous people in its activities.11 Ultimately much of its work was superseded by the next national representative body, the National Aboriginal Consultative Committee (‘NACC’).

B The National Aboriginal Consultative Committee

With the election of the Whitlam Government in 1972, the Commonwealth Government adopted a policy of self-determination, which resulted in a number of initiatives being established to improve the situation of Aboriginal and Torres Strait Islander people.12 This included the granting of land rights (for example, through the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)) and the establishment of Aboriginal medical services and Aboriginal legal services.

Prime Minister Whitlam also established the first Department of Aboriginal Affairs (‘DAA’) and appointed a Minister to head the department. One of the most significant initiatives of this department was the establishment of the NACC, which was a ministerial advisory body that included an elected body of 41 Aboriginal and Torres Strait Islander people, and over 800 representatives from 41 electorates.13

The NACC was also the beginning of the development and training of Aboriginal bureaucrats in the Australian public service. Because of this, Aboriginal protest became ‘severely blunted’, as many of the objectives Aboriginal activists had fought for had

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been achieved by the Whitlam Government and many Aboriginal leaders and activists became public servants implementing the new policies of service delivery.¹⁴

Elections were crucial to the success of the NACC and widespread consultations took place in Aboriginal and Torres Strait Islander communities in order to convince communities to vote in the elections. Despite this, the voter turnout was low.¹⁵ With the election of the Fraser Government in 1975, NACC was reviewed by Ian Viner, the new Minister for Aboriginal Affairs. Viner's 1976 report found that NACC did not consult adequately with Aboriginal and Torres Strait Islander peoples, lacked legitimacy in communities and did not effectively advise the Minister.¹⁶ The report also found that NACC was lacking in direction and cohesion and its members disagreed on daily business.¹⁷ Furthermore there was a clear tension between urban Aboriginal people and rural Aboriginal people living traditional lifestyles.¹⁸ As a result of the report, in 1976 the NACC was abolished.

C The National Aboriginal Conference

The National Aboriginal Conference ('NAC') succeeded the NACC and was established in 1977 until it was abolished in 1985.¹⁹ It had a different structure to NACC, electing representatives to state branches from which ten national executive members were elected.²⁰ NAC elections were conducted by the Australian Electoral Office and the Department of Aboriginal Affairs.²¹ The NAC was the first Aboriginal organisation to be incorporated under the Aboriginal Councils and Associations Act 1976 (Cth).²² The NAC advocated for Aboriginal people on social security, land rights, health, the right to self-determination, institutional racism and racial discrimination.²³ Notably, the NAC advocated for a treaty between Aboriginal people and the state to resolve the unsettled

¹⁵ Attwood and Markus, The Struggle for Aboriginal Rights, above n 5, 277.
¹⁷ Rowse, above n 14, 127.
¹⁹ NAC, Establishment, Roles and Functions (1983).
²⁰ Ibid.
²¹ NAC, above n 19.
²² Ibid.
²³ Attwood and Markus, The Struggle for Aboriginal Rights, above n 5, 278.
issue of Aboriginal sovereignty. NAC was also mandated to liaise with government departments and agencies.

However, NAC’s work was hampered by a lack of government funding. It was also challenged by the corporate form, which was alien to Aboriginal culture. In 1983, the Hawke Labor Government responded to widespread criticism that NAC had failed to adequately consult with Indigenous communities, lacked professional expertise, was unwilling to co-operate with government departments and Aboriginal organisations and was ‘biased towards men’s participation and views’. An audit of NAC found serious problems with its financial administration. Thus in 1985 the Federal Government abolished the NAC and announced that it would again consult the Indigenous community with a view to establishing a new extra-parliamentary body to represent Indigenous peoples.

D The Aboriginal and Torres Strait Islander Commission

Following the abolition of NAC, two reports were commissioned to explore what went wrong with NAC and to help establish a replacement national representative body: the O’Donoghue report and the Coombs report. The Minister for Aboriginal Affairs, Gerry Hand, foreshadowed the establishment of a new replacement representative body in December 1987 in a parliamentary speech, ‘Foundations for the Future’.

Following a consultation period with Aboriginal and Torres Strait Islander communities that involved over 500 meetings with 14 500 people (including 6000 personal discussions between Gerry Hand and Aboriginal and Torres Strait Islander people), draft legislation was introduced into Federal Parliament. Debate and discussion over issues such as public accountability meant that it took two years before the Bill was passed giving effect to the Aboriginal and Torres Strait Islander Commission Act 1989 (Cth) (‘ATSIC Act’), which empowered ATSIC as an independent statutory body.

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24 Rowse, above n 14, 179.
25 Ibid.
26 Ibid 189.
31 ATSIC Act.
ATSIC's representative function was eventually based on a structure of 35 electoral regions across Australia (originally ATSIC was to consist of 60 Regional Council which were reduced to 35 in 1993). Each of these ATSIC regions had a Regional Council. In ATSIC elections, which were non-compulsory, representatives would first be elected to positions on the Regional Council. The Regional Council numbered eight to 12 representatives depending on the population of the particular region. Following the election of the Regional Council, a Chairperson and Deputy Chairperson from that region would be elected. All elected councillors then participated in a zone vote to choose a Commissioner to sit on the ATSIC Board. Along with a Torres Strait Islander Commissioner, 17 Commissioners sat on the ATSIC board. From this elected group of Commissioners, a Chairperson was elected to lead the ATSIC national Board.

ATSIC’s functions were to advise governments at all levels on Indigenous issues, to advocate for the recognition of Indigenous rights on behalf of Indigenous peoples regionally, nationally and internationally, and to deliver and monitor some of the Commonwealth Government’s Indigenous programs and services. The objects of the ATSIC Act were to ensure maximum participation of Aboriginal and Torres Strait Islander people in government policy formulation and implementation; to promote Indigenous self-management and self-sufficiency; to further Indigenous economic, social and cultural development; and to ensure co-ordination of Commonwealth, state, territory and local government policy affecting Indigenous people.

ATSIC was lauded as ‘innovative’ and an ‘amalgam’ because it had dual roles as a representative body accountable to Indigenous peoples and as an administrative body accountable to government. The administrative function of ATSIC was overseen by a Chief Executive Officer who was appointed by the Minister for Aboriginal Affairs. The administrative arm oversaw program and service delivery, which involved implementing ATSIC Board decisions and administering grants and funding to service providers. It also provided administrative support to the elected representatives.

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32 ATSIC Act s 3.
33 ATSIC Act s 3.
In 2003 the Government sought to review ATSIC, and despite the ATSIC Review being seen as an opportunity to reform ATSIC’s structure and service delivery, the Government moved to separate the administrative function of ATSIC from its representative function in 2003 in order to insert a separation of powers between the elected body and the public service. The Government split ATSIC into two arms, establishing the Aboriginal and Torres Strait Islander Services (‘ATSIS’) to administer ATSIC programs, separate from the representative arm. Amidst the ATSIC Review, the Federal Government, with bipartisan support from the Australian Labor Party, moved to have ATSIC abolished in 2004. The Bill amending the ATSIC Act to abolish ATSIC initially lapsed. However, in 2005 the Act abolishing ATSIC was given effect.

E  Aboriginal Women’s Participation in Representative Bodies

Aboriginal women’s participation in the different representative bodies has fluctuated. FCAATSI had a significant number of Aboriginal women involved in its campaign for constitutional reform. For example, Faith Bandler was a prominent campaigner for the ‘Yes’ vote in 1967. However, the prominent role of women in the organisation was a source of tension which contributed to FCAATSI’s demise, as a young generation of black power-inspired Aboriginal men questioned their engagement with the white members of FCAATSI. In the first membership of the NAC only two of the 10 members were women.

There is more data available on women’s participation in ATSIC. The representation of women in ATSIC mirrored the trend in Australian representative democracy generally with women’s participation being significantly lower than that of men. Another clear trend in Indigenous women’s representation in ATSIC was its gradual decline from ATSIC’s beginning in 1990. Although the original proposal for ATSIC included equal representation of women and men this was not realised in the final ATSIC structure. When ATSIC commenced, the Minister for Indigenous Affairs retained a power to

37 Aboriginal and Torres Strait Islander Commission Amendment Bill 2005 (Cth).
38 Aboriginal and Torres Strait Islander Commission Amendment Act 2005 (Cth).
appoint members to the Board of Commissioners. At ATSIC’s inception two positions out of 19 positions available at the time were held by women on the ATSIC Board of Commissioners. Both of these women were appointed by the Minister, including the Chair, Lowitja O’Donoghue. From 1991–93, four women were on the Board, two of which were appointed by the Minister. From 1994–96, there were six women (two appointed by the Minister) and from 1996–99 there were two women (both appointed). On the penultimate Board, out of 18 Commissioners five were women (all elected) and on the final Board of Commissioners there was one woman (elected). At the Regional Council level women’s representation fared better, in 1999 there were approximately 390 members on the 35 Regional Councils, of which 81 were women. Of the 35 Regional Councils elected in 1993, four had no women members; in 1996 seven had no women; and in 1999 one had no women members.

A Centre for Aboriginal Economic Policy Research (‘CAEPR’) analysis of the 2000 ATSIC elections noted that while, ‘women constituted somewhat less than half of nominees for the first elections in 1990 and have constituted around one-third of nominees in subsequent elections’, ‘women do not seem to be successful in being elected … nor in attaining higher elected ATSIC office’. The lack of representation of women was dismissed on the grounds that, although ‘women’s representation within ATSIC elected office leaves something to be desired, it is probably at least as good as the recent record of women’s representation in Australian parliaments’. Part III examines further the role of ATSIC in the lives of Aboriginal women and how Aboriginal women felt about ATSIC.

III ABORIGINAL WOMEN AND ATSIC

Part III provides a more detailed analysis of how women’s issues were dealt with by ATSIC. Part A focuses on specific funding and programs for women, Part B is an analysis of ATSIC’s own audit report into the effectiveness of its programs in meeting the needs of Aboriginal and Torres Strait Islander women. Finally, Part C

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42 It is important to note that up until 1999 s 26 of the ATSIC Act provided for the election of 17 Commissioners and two appointments by the Minister. Each of the ministerial appointments were women. Ministerial appointments were halted with the 1999 amendments to the ATSIC Act.


45 Ibid.
examines the ATSIC Review, which raised concerns about the marginalisation of women by ATSIC.

A Funding for Women’s Programs and Services

From ATSIC’s inception, all of its programs and services were intended to have relevance and application to all Aboriginal and Torres Strait Islander women. Women-specific programs and services were mostly administered under the policy area of Social Justice. This was partially in response to the recommendations of the Royal Commission into Aboriginal Deaths in Custody (‘RCIADIC’), which recommended additional funding for women and that Indigenous women be included in the implementation of its recommendations.46

During its early years, ATSIC established an Office of Indigenous Women (‘OIW’), which specifically focused on Indigenous women.47 ATSIC’s decision to establish the OIW was meant to improve the status of Aboriginal and Torres Strait Islander women in Indigenous affairs and to ensure that the views and needs of Aboriginal and Torres Strait Islander women (especially in remote areas) were taken into account in Aboriginal and Torres Strait Islander programs. The OIW was a resource unit that provided gender-specific perspectives to policy and program design throughout ATSIC’s work. The OIW operated through a network of Regional Women’s Advisers who worked in regions around Australia, especially with the 60 Regional Councils (although that number was eventually reduced to 35 Regional Councils), and community-based women’s groups.

The objectives of the OIW were to help redress the disadvantages that Aboriginal and Torres Strait Islander women suffer; to provide Aboriginal and Torres Strait Islander women with access to a wide range of choices, services and opportunities available to non-Aboriginal and Torres Strait Islander women; to ensure equal access and opportunity for Aboriginal and Torres Strait Islander women to all government programs including those aimed at Aboriginal and Torres Strait Islander people; and to

promote opportunities for women to undertake innovative and/or traditional cultural roles.48

From the outset the OIW was also charged with developing a strategy to encourage greater participation by Aboriginal and Torres Strait Islander women as candidates and voters in the Regional Council elections due by the end of 1993. The OIW expended its budget over four years on funding conferences for Indigenous women’s networking49 and on public education campaigns aimed at women.50 It also funded women’s projects ranging from arts and craft51 to health to childcare strategies.52 In ATSIC’s first two years a Family Violence Intervention Program was also established in conjunction with the National Committee on Violence Against Women. As part of this program, a draft report on family violence in Aboriginal and Torres Strait Islander communities was developed in order to investigate the incidence of family violence and the collecting of available data.

During 1993–94, ATSIC also established a Women’s Issues Advisory Committee (‘WIAC’) under s 13 of the **ATSIC Act**.53 The role of the group was to provide advice to ATSIC on the impact of policies and programs affecting the interests of women, consult with Aboriginal and Torres Strait Islander women on the issues that affect them and represent Aboriginal women and Torres Strait Islander women at high-level meetings

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48 It would further its objectives by informing the Board of Commissioners, Minister, Government and ATSIC Program Managers on programs related to Aboriginal and Torres Strait Islander women; developing special initiatives for Aboriginal and Torres Strait Islander women; encourage and liaise with relevant Commonwealth, State and Territory agencies to assist in the development of culturally appropriate programs to ensure the needs of Aboriginal and Torres Strait Islander families were addressed; and encourage those agencies to be positively involved with Aboriginal and Torres Strait islander people in the delivery of services, and in the management and planning of programs: see ‘Women’s Programs’, above n 47.

49 For example, for the year 1991–92, the OIW funded the first National Women’s Conference held in Canberra in April 1992 (the theme for which was ‘Aboriginal and Torres Strait Islander Women: Part of the Solution’) and the Economic Development Conference ‘Koori Women Mean Business’. This consisted of a two-day workshop and one-day expo, in Geelong, Victoria. See ATSIC, **Annual Report 1991–92**, above n 47.

50 For example, in 1991–92 the OIW provided $15 000 to a Darwin-based project to contribute to the costs of a 10–15 minute video for Aboriginal and Torres Strait Islander women about pap smears and their importance for good health. The Secretariat of National Aboriginal and Islander Child Care was funded ($39 970) to reprint the handbook *Through Black Eyes*: ATSIC, **Annual Report 1991–92**, above n 47.

51 For example, in 1991–92, Mudth-Niylete Aboriginal and Torres Strait Islander Corporation received $3110 to develop women’s ceramics: ATSIC, **Annual Report 1991–92**, above n 47.

52 For example, for the year 1991–92, Bourke Aboriginal Health Service was allocated $5500 for childcare services: ATSIC, **Annual Report 1991–92**, above n 47.

53 Section 13 of the **ATSIC Act** empowered ATSIC to establish committees to give ATSIC advice in relation to the performance of its functions.
on behalf of the ATSIC Board.\textsuperscript{54} WIAC’s membership included ATSIC-elected representatives and other women drawn from across states and territories. The activity of the WIAC fluctuated and in 2003 ATSIC’s Social and Physical Wellbeing Board Committee established another women’s committee: \textit{Kungkala Wakai — Our Women’s Voice}, also under s 13 of the \textit{ATSIC Act}.

The OIW was abolished in 1994 and there was no mention of Indigenous women-specific issues in ATSIC’s 1994–95 Annual Report.\textsuperscript{55} The ATSIC annual reports reveal that after the OIW was disbanded there were fewer Indigenous women’s programs, with specific funding phased out and women’s programs coming instead under more generic programs of ATSIC. For example, during 1995–96, Indigenous women’s funding came under ATSIC’s Community and Youth Support program. The Community and Youth Support program was established to assist Indigenous people to benefit from existing services and to develop additional services where necessary. According to the 1995–96 Annual Report the particular emphasis of the Community and Youth Support program was ‘on the needs of the aged, women, youth, children and the disabled’.\textsuperscript{56} This shift reflected ATSIC’s newly adopted position that those issues that affect Indigenous women were also the responsibility of Commonwealth and state/territory governments. It also reflected ATSIC’s own utilitarian ethic manifest in the treatment of Aboriginal women as a minority interest.

ATSIC began to attract criticism for the dramatic reduction in funding for Indigenous women’s programs over the course of four years.\textsuperscript{57} The Commonwealth Government had cut ATSIC’s budget by $470 million and many of the cost savings were found in programs for women’s issues: ‘A lot of programs were cut, women’s centres were closed’.\textsuperscript{58} Even so, ATSIC noted in its 2001–02 Annual Report that ‘all ATSIC programs benefit women and that certain outputs have a particular focus on the needs of women’.\textsuperscript{59}

\begin{itemize}
\item \textsuperscript{54} \textit{ATSIC, Our Women Our Future Women’s Advisory Committee Report, 1998–1999} (1999).
\item \textsuperscript{56} Examples of Community and Youth Services projects for women in 1995–96 include a women’s crisis centre serving 20 communities in New South Wales and women’s and community centres in the Northern Territory for family support and cultural maintenance: \textit{ATSIC, Annual Report 1995–96} (1996).
\item \textsuperscript{58} Windsor, above n 57.
\item \textsuperscript{59} Review of the Aboriginal and Torres Strait Islander Commission, \textit{In the Hands of the Regions}, above n 36, 102.
\end{itemize}
The rationale developing in ATSIC saw the gradual positioning of Indigenous women according to mainstream patriarchal notions of vulnerability within a society. This was not the case at ATSIC’s inception, when a woman was appointed as Chair, and when the idea that women should have 50 per cent mandated representation had been considered. Yet as ATSIC evolved, Indigenous women who constituted over 50 per cent of the Indigenous population, gradually became a ‘special interest’. When the specialist OIW was disbanded in 1994, eventually women’s issues were absorbed by more generic and gender-neutral programs. It is difficult to understand how much of the funding in these generic programs improved the lives of Indigenous women because the funding data was not disaggregated. For example, there was a significant amount of money funded for sporting activities in communities. However, there was no analysis of whether that money had a gendered impact, even though evidence suggested that women were less likely to take advantage of these sports programs than men as they entered puberty. For example, of the women consulted by ATSIC, only 7.2 per cent participated in community and youth support programs, which included sport and recreation development.60 Indeed, as the next section illustrates, Aboriginal women themselves identified ATSIC’s failure to adequately fund Aboriginal women’s programs as contributing to the ineffectiveness of ATSIC in meeting their needs.

B The Effectiveness of ATSIC in Meeting the Needs of Aboriginal and Torres Strait Islander Women

One of the most comprehensive documents containing the views of Aboriginal and Torres Strait Islander women about the effectiveness of ATSIC is the final report of the ATSIC Office of Evaluation and Audit’s Evaluation of the Effectiveness of ATSIC Programs in Meeting the Needs of Aboriginal Women and Torres Strait Islander Women (‘ATSIC OEA Report’).61 The 1995 report was commissioned by ATSIC in response to a growing awareness of the marginalisation of Aboriginal women in mainstream society and within Indigenous communities.62

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61 Ibid 3.
The *ATSIC OEA Report* consulted 1553 women across Australia. Of those, 1325 were Aboriginal women and 228 were Torres Strait Islander women. The women interviewed were evenly divided between urban, rural/provincial and remote areas. Of those 1553 Aboriginal and Torres Strait Islander women consulted, 555 Aboriginal and Torres Strait Islander women were interviewed by the audit team across Australia. Nine ATSIC programs were sampled in order to develop an impact analysis of programs upon women’s lives: health; native title; substance abuse; law and justice; community housing; community and youth support; land acquisition; Community Development Employment Projects (‘CDEP’); and Community Employment Initiatives Scheme.

In relation to specific ATSIC programs, the 555 Indigenous women were asked the question: ‘Do you think that ATSIC programs are meeting your needs and those of other Indigenous women whom you know?’ Only five per cent of the respondents answered yes. According to the *ATSIC OEA Report*, the main reason for this low result was women’s concern about their lack of input on housing, education, violence prevention and health. Indeed health was the women’s major concern, especially in relation to alcohol and substance abuse by young people. The women interviewed said that alcohol was the greatest enemy, because it physically, mentally and spiritually breaks down the family and disrupts the community.

The key indicators assessed in the audit were: the involvement of women in ATSIC decision- and policy-making and how this affects program design and access; the level of access by Aboriginal and Torres Strait Islander women to the initiatives taken by the RCIADIC; the involvement of Aboriginal and Torres Strait Islander women in program and service delivery; the cultural barriers that may inhibit or prevent Aboriginal and Torres Strait Islander women from accessing ATSIC’s programs and services; the socio-economic structural features beyond ATSIC which may inhibit access to the mainstream opportunities; and the number of applications from Aboriginal and Torres Strait Islander women for funding under ATSIC programs and their degree of success.

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63 ATSIC Office of Evaluation and Audit, above n 60, 19.  
64 Ibid.  
65 Ibid.  
66 Ibid 1.  
67 Ibid 39.  
68 Ibid 2.  
69 Ibid 2 (report finding 2).  
70 Ibid.
the relativity between economic and social programs, and reasons for not achieving funding.\footnote{Ibid 13.}

It was concluded in the \textit{ATSIC OEA Report} that ATSIC programs and services had limited effectiveness in meeting the needs of Indigenous women. This, the evidence suggested, was because Indigenous women had little involvement in formal ATSIC decision-making processes and few women were familiar with or had access to ATSIC’s programs and services. The report concluded that, ‘[a]ll in all, what lay at the heart of their concerns was that decisions that affected them, their communities and families were invariably made with limited input from the women these decisions would most affect’.\footnote{Ibid 81.}

This report is a powerful reminder from the self-determination era of how Aboriginal women were excluded from bodies designed to achieve self-determination. It reveals the limitations of an institutional approach for Aboriginal women if effective measures are not taken to ensure women are included. The matters raised by women during the course of the review are strikingly similar to those that emerged in the \textit{Women’s Business} report examined in Chapter 2. The inability of the state and the Aboriginal political domain to recognise and address the way in which they each exclude Aboriginal women from their processes means that self-determination is not well understood or developed by either group. It is apparent that during the ATSIC era there was no clear policy direction for achieving self-determination for Aboriginal and Torres Strait Islander communities. There were also divergent views in the community as to how self-determination ought to be achieved and, as the ATSIC case study demonstrates, the institutional approach was unable to harness them. Next, the ATSIC Review, an external independent review, is analysed in order to further understand the ways in which ATSIC marginalised Aboriginal women,

\textbf{C The ATSIC Review and Aboriginal and Torres Strait Islander Women}

ATSIC operated in a complex political environment that was complicated further when self-determination ceased to have bipartisan support.\footnote{See generally Will Sanders, ‘Reconciling Public Accountability and Aboriginal Self-Determination/Self-Management: Is ATSIC Succeeding?’ (1994) 53 \textit{Australian Journal of Public Administration} 475, 487.} Because ATSIC had to be accountable both to Indigenous peoples and the Commonwealth Government, it was
subject to extensive criticism — from Indigenous communities, state and federal
governments and the media.\textsuperscript{74} In the late 1980s the Federal Opposition, led by John
Howard, fervently opposed ATSIC’s establishment because it violated the principle of
equality and ‘divided’ Australia.\textsuperscript{75} Over time a public perception developed, fuelled by
state and federal governments, that ATSIC had responsibility for all government-funded
Indigenous programs and service delivery.\textsuperscript{76} As a consequence, state and federal
governments were able to blame ATSIC for policy failures in areas of Indigenous
affairs that were not even the province of ATSIC. One example frequently employed
by critics of ATSIC to support their claims, was that Aboriginal and Torres Strait
Islander health had not improved during ATSIC’s existence, even though health was not
a responsibility administered by ATSIC.\textsuperscript{77}

In 2003, the Howard Coalition Government, which had been vigorously opposed to
ATSIC in Opposition, announced a review of ATSIC. It appointed a review panel
constituted by former Labor Senator and Minister Bob Collins, former New South
Wales Liberal Attorney-General John Hannaford and an Aboriginal woman, Jackie
Huggins, to ‘examine and make recommendations to government on how Aboriginal
and Torres Strait Islander people can in the future be best represented in the process of
the development of Commonwealth policies and programs to assist them’.\textsuperscript{78}

\begin{footnotesize}
\begin{enumerate}


\item Larissa Behrendt, Chris Cunneen and Terri Libesman, \textit{Indigenous Legal Relations in Australia} (2009) 281.

\item Philip Ruddock, Minister for Immigration and Multicultural and Indigenous Affairs, ‘ATSIC Review Panel Announced’ (Press Release, 12 November 2002).
\end{enumerate}
\end{footnotesize}
In the Hands of the Regions (‘ATSIC Review Report’), the 2003 report of the ATSIC Review, was the first comprehensive external review of ATSIC.\(^7\) \(^9\) It found that ATSIC required urgent structural reform, in particular a greater devolution of power to the regions. One of its recommendations was the decentralisation of the ATSIC Board to give more power to the Regional Councils. This recommendation was important because of the evidence that there was a higher rate of political participation by women in regional and remote areas and because regional decision-making had greater consequences in regards to the creation of jobs and other funding.

The ATSIC Review expressed concerns about how Indigenous women had fared under ATSIC. This was raised in the discussion paper as an issue germane to the future of ATSIC because women constituted half of the community yet were absent from its political and policy structure. According to the ATSIC Review discussion paper, the lack of women’s participation affected ATSIC’s capacity to govern for all:

> Indigenous women have an irreplaceable perspective to contribute and if that perspective is missing or seriously diminished in the leadership levels of ATSIC for whatever reason, then the cause of the advancement of Indigenous Australians through ATSIC is poorer as a consequence.\(^8\)\(^0\)

The ATSIC Review discussion paper asked the following questions:

> Should there be a mandated level of representation for women — for example, through creation of designated female positions on the Regional Councils/Authorities and the Board? If so, what should be the level of representation — 50–50, designated positions or a minimum proportion? Or should there be some other arrangement, like Ministerial appointments or the section 13 Women’s Advisory Committee established by the current ATSIC Board? Should some other forum, such as a women’s council, be legislatively established? If so, what should be its role?\(^8\)\(^1\)

In submissions to the ATSIC Review and in response to the discussion paper, the ATSIC Board of Commissioners submitted that, while it was keen to see women play a greater role in Regional Councils, there was no place for designated positions or 50 per cent mandated levels of representation for women.\(^8\)\(^2\) Contrary to the position of the national Board, the ATSIC women’s committee, \textit{Kungkala Wakai — Our Women’s Voice}, was concerned about the impact of under-representation on Indigenous women. It submitted that the result of under-representation was:

\(^7\) Review of the Aboriginal and Torres Strait Islander Commission, \textit{In the Hands of the Regions}, above n 36, 5.

\(^8\) Review of the Aboriginal and Torres Strait Islander Commission, \textit{Discussion Paper}, above n 41, [4.26].

\(^9\) Ibid [8.19].

\(^10\) Ibid 41, 38.
that less attention has been given to issues related to families and women, including the needs of youth, the homeless and itinerants, substance misuse and family violence. In our view, a key objective of any new arrangements should be equal representation of women in terms of membership of regional councils, the proportion of regional council chairs, and in the proportion of commissions on the ATSIC board. That is, 50 per cent of these officials should be women. Putting in place a mechanism to achieve this may or may not have broad community acceptance, but it is nevertheless one way of addressing the marginalisation of women in Indigenous affairs.83

The National Network of Indigenous Women’s Legal Services (‘NNIWLS’) concurred that Indigenous women had historically received less benefit overall from the funding provided by ATSIC for legal services, which was the reason why the Family Violence Prevention Legal Services had to be established.84 In relation to the gender imbalance in ATSIC, NNIWLS argued that it was a significant problem and that there was a need for balanced representation and representation of the interests of women.85 NNIWLS contended that there should be a policy which requires program outputs to be assessed in terms of gender. They also raised the behavioural issues of the ATSIC Board of Commissioners, arguing that the Board needed strong and effective leadership capable of inspiring the confidence of all people, which would inevitably require the presence of Aboriginal and Torres Strait Islander women.86

The ATSIC Review discussion paper suggested that there was a correlation between the lack of women’s representation and ATSIC’s failure to deal with Indigenous women’s issues: ‘This failure to recognise the role played by Indigenous women is accompanied by inadequate leadership development and insufficient recognition of, and a reluctance to talk about, issues related to families and women’.87 There are a number of examples of this. First is ATSIC’s poor handling of the issue of violence against Aboriginal women in communities, which in some ways was a catalyst to national political and media sentiment turning against ATSIC. Reacting to growing criticism of its ability to represent women’s issues and its reduction in funding for Indigenous women, ATSIC was forced in 2001–02 to elevate family violence as one of its main policy priorities.88

As previously discussed in Chapter 3, ATSIC’s family violence strategy illustrated the

83 See ibid.
85 Ibid 6.
87 Review of the Aboriginal and Torres Strait Islander Commission, Discussion Paper, above n 41, [4.23], 26.
88 Ibid.
way in which ATSIC attempted, after national media scrutiny, to neutralise an issue that it had been reluctant to be involved with in the first place. The policy was titled ‘Our Family: ATSIC Board of Commissioners Family Violence Policy Statement’ and was coupled with a Family Violence Action Plan. There was no specific mention of the preponderance of male violence against women in Aboriginal communities.

Second, the media scrutiny on ATSIC regarding its failure to deal with domestic violence was compounded by the sexual assault allegations against the final Chair of the ATSIC Board of Commissioners, Geoff Clark. Under Clark’s leadership in 2002, the only female Commissioner represented on the ATSIC Board, Alison Anderson, resigned from her position on the Women’s Issues Advisory Committee because of a culture of ‘bullying’ within ATSIC. Anderson reported she had been intimidated for her stance opposing domestic violence against women. The ATSIC Townsville Chairperson Terry O’Shane had emailed Anderson demanding she not attend a meeting of a Cairns women’s group on domestic violence because she was ‘mischief making’. Anderson decided not to resign after the threats were made public but nevertheless the threats were symbolic of a culture of decision-making that was not inclusive of women and that tried to impose upon women distorted cultural restrictions. Anderson stated at the time, ‘We can’t even begin to talk about violence outside in communities amongst Aboriginal people if it’s happening with ATSIC–ATSIS … It’s happening within ATSIS itself. That little boy’s club — it’s entrenched culture.

Yet the dearth of women’s participation in Aboriginal politics was celebrated as ‘traditional’ by Geoff Clark on his re-election as Chairman of ATSIC in 2002. Clark declared that the new ATSIC Board, with only one woman elected, was ‘a victory for the Aboriginal community’. He thanked Aboriginal women who had voted in the election, saying, ‘You’ve given us a mandate, you’ve returned the traditional role to


Aboriginal men'.94 This declaration was reinforced by the Indigenous Affairs Minister Philip Ruddock, who observed that ‘Indigenous people [were] given the opportunity to choose whom they wanted to represent them in a free ballot. [They] chose to elect 16 men and one woman’.95

Despite clear examples given in the *ATSIC Review Report* of the importance of Aboriginal women’s sustained relationship in the organisation, and the correlation between lack of leadership and insufficient policy development on women’s issues, the ATSIC Review Panel decided against a 50 per cent mandated representation of women. Jackie Huggins, the only Aboriginal woman on the review panel, was outnumbered by her male colleagues. Huggins stated that:

> I made a recommendation which was not supported by my colleagues ... the recommendation reflected a belief I hold very strongly that Indigenous women must be represented at all levels of leadership and that this imperative must be enabled with the creation of designated positions throughout any future representative structure. Men and women have always shared responsibility in Aboriginal society, and if women are not supported in leadership roles today and in the future, our communities have no chance of becoming viable.96

Despite the position of Huggins and other Indigenous women who in submissions to the review sought equal mandated representation, Huggins’s fellow panel members, John Hannaford and Bob Collins, two non-Indigenous former politicians, sought a preference for minimum mandated positions. According to Hannaford, there was an issue ‘of [women] being available to participate’ that worked against equal mandated representation. He stated that:

> It is the women in the community who are expected to look after the extended family, therefore, their ability to make themselves available for the national move to Canberra or the move to a region is very difficult. That is why we said that ATSIC needs to address these issues of how you provide support for those women who are prepared to make themselves available to participate at a regional or state or national level.97

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94 Debra Jopson, ‘No Change at Top as Clark Lays on the Charm’, *The Sydney Morning Herald* (Sydney), 20 December 2002.


97 Evidence to Senate Select Committee on the Administration of Indigenous Affairs, Parliament of Australia, Canberra, 18 February 2005, 29 (John Hannaford).
This suggestion, that women's familial and communal obligations supersede the requirement for political representation, is consistent with an observation made in the *ATSIC OEA Report*, which remarked that the majority of the women interviewed were not high profile or politically active women. Their answers suggested that factionalism and poor self-esteem contributed to their difficulties in participating. There were also structural barriers such as: lack of transport; child care and training and support for leadership.98

Part III has highlighted the failure, as exhibited in the *ATSIC OEA Report*, the ATSIC Review and by ATSIC in general, to conceive of substantive measures to address the barriers to women's participation, such as childcare and training, highlights the limitations of how self-determination was understood. A fully fleshed and inclusive concept of self-determination would demand that women, comprising over 50 per cent of the community, are wholly involved in decision-making.

**IV ATSIC, ABORIGINAL WOMEN AND CAPABILITIES**

Part IV develops an alternative way of understanding Aboriginal women's experiences of ATSIC. I now analyse the 23 findings in the *ATSIC OEA Report* that gave rise to the conclusion that women's knowledge about the operations of ATSIC were 'extremely limited' and that ATSIC never cut through to grass-roots women.99 This analysis adopts the capabilities approach.

The 23 evaluation findings can be grouped into three general themes: self-determination — consultation and aspirations/ideas; skills, knowledge, and confidence; and leadership. How can these findings be interpreted using Nussbaum's capabilities framework as an alternative to the institutional approach to achieving self-determination for Aboriginal women?

The language used by the Aboriginal and Torres Strait Islander women interviewed forms the basis of the three themes. It is the women's own descriptions of the right to self-determination and their own aspirations and ideas. For example, the following quotes from Aboriginal and Torres Strait Islander women mirror Nussbaum's capabilities list regarding practical reason, affiliation and control over one's environment: 'the isolation that women have to deal with can make or create extra

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98 ATSIC Office of Evaluation and Audit, above n 60, 82.
99 Ibid 2.
problems and most of the time we feel we are a forgotten race';\textsuperscript{100} 'these people think that us old women are stupid';\textsuperscript{101} 'we need to say what we want to say';\textsuperscript{102} 'when are they going to let us look after ourselves?';\textsuperscript{103} 'there is a difference between talking on our behalf and talking with us';\textsuperscript{104} 'Aboriginal women are ... tied up with day to day pressures of family life, are kept “in their place” by Aboriginal men'.\textsuperscript{105}

If we take Nussbaum’s capabilities list and compare it with the findings of the \textit{ATSIC OEA Report}, some capabilities clearly emerge above others. Indeed most of the \textit{ATSIC OEA Report} findings can be characterised as reflecting the capabilities for practical reason, affiliation and control over one’s environment. Practical reason means being able to form a conception of the good and to engage in critical reflection about the planning of one’s own life.\textsuperscript{106} Affiliation means being able to live for and in relation to others and to engage in various forms of social interaction.\textsuperscript{107} Control over one’s environment means being able to participate effectively in political choices that govern one’s life and having the rights of political participation and freedom of association.\textsuperscript{108} According to the capabilities approach, a life lacking any one of the list of central human functional capabilities means that it will fall short of being a good human life.\textsuperscript{109}

In adopting a capabilities approach as an alternative approach to understanding ATSIC, Part A considers theme 1, self-determination, Part B examines theme 2, skills, knowledge and confidence and Part C discusses the third theme, leadership. Fourth, I draw upon the \textit{ATSIC OEA Report} to examine the way Aboriginal women responded to and understood ATSIC’s ‘rights’ approach.

\textbf{A Theme 1: Self-Determination: Consultation and Aspirations/Ideas}

The right to self-determination is the most fundamental right underpinning the Indigenous normative framework.\textsuperscript{110} Almost all of the Aboriginal and Torres Strait Islander women interviewed had concrete ideas about how they wanted to achieve

\begin{itemize}
\item \textsuperscript{100} Ibid 22.
\item \textsuperscript{101} Ibid 24.
\item \textsuperscript{102} Ibid 23.
\item \textsuperscript{103} Ibid 25.
\item \textsuperscript{104} Ibid.
\item \textsuperscript{105} Ibid 70.
\item \textsuperscript{106} Martha Nussbaum, \textit{Sex and Social Justice} (1991) 41.
\item \textsuperscript{107} ATSIC Office of Evaluation and Audit, above n 60, 70.
\item \textsuperscript{108} Ibid 42.
\item \textsuperscript{109} Ibid.
\item \textsuperscript{110} See \textit{UNDRIP} art 3.
\end{itemize}
control over their lives, including through parenting classes, home repairs, car repairs, after-school care, family workers' groups, safe houses for women and children, women's resource centres, holiday programs for kids, programs for stress and relaxation, and education through violence prevention programs.\(^{111}\)

ATSIC to one side, women also had their own substantive ideas for the achievement of self-determination which were provided in the *ATSIC OEA Report*’s strategies for consideration by ATSIC and the Regional Councils. For example, women felt they should: be ‘informed of Native Title implications to women’s law and spirituality’;\(^ {112}\) be ‘involved in Native Title issues through consultation and negotiation’;\(^ {113}\) be ‘involved in purchase of land or businesses to address their participation in ATSIC and other programs’;\(^ {114}\) be able to ‘acquire land for Women’s Business (that is Law and Culture)’; be ‘supplied [training] … to become more business orientated with marketing skills included’;\(^ {115}\) have a women’s legal service set up ‘to address the injustice and improved access difficulties for indigenous women to these services’;\(^ {116}\) be assisted to ‘set up their own businesses with training available for 2 years’;\(^ {117}\) ‘have full control of [their] own enterprises’; and ‘be allowed to choose a variety of jobs, not just caring, cleaning etc’.\(^ {118}\)

Women also developed ideas about how to address the problems in communities, especially the priority issues of housing, education, violence prevention and health. For example, almost all of the women interviewed desired a women’s centre or family centre for those communities where there was an Aboriginal and Torres Strait Islander population.\(^ {119}\) These centres could assist in the dissemination of ATSIC information and educate women on their rights, relevant policies and programs, and how to apply for grants from ATSIC. Women said that one of the core issues was actually being consulted:

> We need to have our say in things that concern us — our men, boys, elders and girls.\(^ {120}\)

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\(^{111}\) ATSIC Office of Evaluation and Audit, above n 60, 38.

\(^{112}\) Ibid 101.

\(^{113}\) Ibid.

\(^{114}\) Ibid.

\(^{115}\) Ibid.

\(^{116}\) Ibid.

\(^{117}\) Ibid.

\(^{118}\) Ibid 102.

\(^{119}\) Ibid (report finding 18).

\(^{120}\) Ibid 28.
Aboriginal health and education don’t need more money — it needs action. We have to put the money we get from ATSIC to work. Instead of paying big salaries, we have to help black fellas get back on their own two feet, where they were before white fellas came along and knocked them off.\textsuperscript{121}

The diverse ideas of Aboriginal and Torres Strait Islander women identified in the report included: coin-operated washing machines in women’s centres; recreation activities for the elderly in city gymnasiums; fencing to keep young children in their own surroundings; traditional birthing centres; sober centres; banning of drunkenness from all living areas in communities to make them safe places for women and children; vacation programs for communities so children could experience a holiday atmosphere; women assisting in the design of community houses; an increase of women’s health programs such as pap smears, breast cancer awareness and pre- and post-natal education; parenting classes; life-skills classes; transport for the elderly; housing for homeless youth; single mothers’ groups; advice on how to do job interviews and CVs and how to enter the workforce; market gardening; and adult education including numeracy and literacy.\textsuperscript{122}

If self-determination worked, then these ideas would cut through to decision-making. Yet a frequently raised inhibitor of self-determination was what the women labelled as nepotism and corruption and an inability to speak freely. Often, if they made suggestions for improvement, they were labelled ‘troublemakers’ and if they spoke up their funding would come under threat: ‘we are troublemakers ’cause we speak up about problems, so if we did our families will get into trouble’.\textsuperscript{123} Also a widespread perception was that in order to be successful in funding applications or have your voice heard you had to have friends, family or relatives in positions of power: ‘I haven’t got relations that high up”; ‘if they don’t like us, they won’t help us”;\textsuperscript{124} ‘ATSIC ... only looks after itself and its own people ... only after its “favourites” or “families”’.\textsuperscript{125}

Women need women’s help to overcome the inequality of this world. We feel for each other in pain and in happiness. We know what it’s like to get bashed, to watch our young people fall down drunk, family and friends being killed in drunken arguments etc, etc. Still we keep working and caring. No talking anymore. Now it’s action.\textsuperscript{126}

\textsuperscript{121} Ibid.
\textsuperscript{122} Ibid 36.
\textsuperscript{123} Ibid 44.
\textsuperscript{124} Ibid.
\textsuperscript{125} Ibid 23.
\textsuperscript{126} Ibid 27.
Money won’t solve our problems unless we have some say in what the money does in our grassroots communities.127

Women need to be consulted more about community issues. Just because men are in management roles does not mean they have all the answers.128

1 **Theme 1: Self-Determination: ATSIC Policy and Program Design**

Next, in adopting a capabilities approach to the *ATSIC OEA* findings in relation to the first theme, self-determination, I consider ATSIC policy and program design. The *ATSIC OEA Report* revealed a widely shared perception among Aboriginal and Torres Strait Islander women across Australia that ATSIC failed to consult with women on the policies and programs that affected them. The report emphasised that women had limited opportunities to be consulted on the design of programs and services. In terms of policy design, of the 555 women interviewed, 10.6 per cent had been consulted in the design of a project, 5.8 per cent were consulted in the running of a project and 4.7 per cent were consulted on the end results of a project.129 Those interviewed made the following comments: ‘Programs are planned by men for men’;130 ‘women need to be involved in policy development’;131 ‘They don’t talk to us’; ‘ATSIC don’t talk with us women’;132 ‘Our voices don’t seem to make any difference’.133 The lack of women’s consultation on the development and implementation of policies and programs is salient because it limits women’s opportunities to make decisions and participate in policy-making activities and directly impacts upon their communities.134

2 **Theme 1: Self-Determination: Opportunities for Employment**

Concerns were also raised about access, decision-making, participation and policy involvement particularly in respect of training and CDEP.135 CDEP is an Indigenous ‘work for the dole’ scheme which until 2009 operated in remote, regional and urban areas (it now only operates in remote areas without an established economy). For many women CDEP represents an opportunity for economic development no matter how limited it may be. In the *ATSIC OEA Report*, Aboriginal and Torres Strait Islander women said that CDEP was male-dominated and male-controlled and focused on male-

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127 Ibid 24.
128 Ibid 22.
129 Ibid 44.
130 Ibid 40.
131 Ibid.
132 Ibid.
133 Ibid 28.
134 Ibid 55.
135 Ibid (report finding 11).
oriented work. The women said that decisions about CDEP placements were made by men and women were offered ‘women’s jobs’ like cleaning and cooking. One woman recalled that ‘[w]omen don’t get asked to do CDEP. If we do, it’s only house work things’.

The report contained an example of women who were in a CDEP sewing group. The women really wanted to try hydroponic gardening to grow nutritious vegetables, which would help to keep their children healthy and help them save money since fresh vegetables had to be brought in from the nearest town. Yet the women felt they had no involvement in the planning process and saw CDEP only as a men’s project.

3 Theme 1: Self-determination: Combined Capabilities

According to the capabilities approach, the goal of public policy is the development of the capabilities of citizens to perform those functions central to a good human life. It is useful here to reflect back on what ATSIC’s statutory objectives were: to ensure maximum participation of Aboriginal and Torres Strait Islander people in government policy formulation and implementation; to promote Indigenous self-management and self-sufficiency; to further Indigenous economic, social and cultural development; and to ensure co-ordination of Commonwealth, state, territory and local government policy affecting Indigenous people. Although ATSIC was established to enhance the democratic participation of Indigenous peoples at a state and federal level, it is evident from the findings of the ATSIC OEA Report that, in the case of Aboriginal and Torres Strait Islander women, ATSIC failed to involve women in its political arrangements and operations, which were considered at the time to be the best vehicle for delivering the right to self-determination to Indigenous communities.

Indeed, while ATSIC had a role in improving the lives of Aboriginal and Torres Strait Islander people, this was limited because ATSIC was not responsible for health service delivery. The state and Commonwealth governments were, and remain, primarily responsible for service delivery and policy development in the field of Indigenous health. Nonetheless when applying a capabilities framework to how Aboriginal women

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136 Ibid 62.
137 Ibid.
138 Ibid 57.
139 Ibid.
140 Ibid 61.
141 ATSIC Act s 3.
fared under ATSIC we are speaking about *combined capabilities*. While basic capabilities (innate, natural capabilities) and internal capabilities (developed capabilities) are crucial to the building blocks of a functioning human life, it is the combined capabilities that enable functioning when internal and external environments combine. National representative bodies, like government, make up significant parts of the external material and political environment that should combine to provide capability for Aboriginal and Torres Strait Islander women. Representative bodies should be viewed as an additional external influence that should provide opportunities alongside that of the mainstream political system.

Self-determination in its institutional form of ATSIC did not recognise how the difference between being a man or a woman affects one’s life. Biological sex makes a difference in terms of the prospects and opportunities for individuals. It is clear from many of the women’s answers, ideas and expressions on self-determination in the *ATSIC OEA Report* that to a significant extent there exists internal capability amongst Aboriginal women for participation in politics, freedom of speech and association, practical reason, etc. The flaw in the institutional form of self-determination as realised under ATSIC is its inability to recognise how gender and cultural constraints limit Aboriginal women’s capabilities and adapt the institution to take into account those barriers.

As an Indigenous institution, ATSIC’s underlying philosophy — and indeed the underlying philosophy of self-determination — was that Indigenous people are better equipped to deliver economic, social and cultural development for ourselves than non-Indigenous institutions. This was based on the argument that Indigenous institutions know their communities and can provide more culturally appropriate services in a more culturally appropriate environment. However, this was not borne out in the case of ATSIC’s treatment of women. Self-determination cannot be achieved when women are excluded from leadership and policy design. The experience of ATSIC raises important questions about the practical operation of the right to self-determination and the ability of Indigenous-specific representative bodies to provide combined capabilities without a sustained and legitimate constitutional presence.
B Theme 2: Skills, Knowledge and Confidence

Following on from the concerns raised about the right to self-determination, Aboriginal and Torres Strait Islander women said this exclusion was exacerbated by their low skill-base and low level of knowledge about ATSIC as an organisation representing their interests. The language used by Aboriginal and Torres Strait Islander women reflects a number of concerns, which can be categorised according to Nussbaum’s schema as involving capabilities of senses, imagination and thought, practical reason and control over one’s environment: ‘too scared’; ‘too shy’; ‘never been allowed to speak’; ‘too many barriers’; ‘no baby sitter’; ‘lack of confidence’; ‘insufficient education/knowledge/training/support’. 149

1 Theme 2: Skills

The ATSIC OEA Report confirmed that Indigenous women did not experience equitable access to ATSIC’s programs and services, ‘because of their lack of knowledge and training about ATSIC’s operations’. Also the report found that ATSIC’s programs, and the language used in the program guidelines and other documentation, were incomprehensible to Indigenous women. Women said they lacked the necessary writing skills required to voice their concerns and the skills to apply for grants. They wanted advice and assistance to apply for funding because applications for funding were too complicated. Responses by Aboriginal and Torres Strait Islander women to the audit included, ‘We don’t like the application process. It’s too hard and uses words we don’t know; we know what we want but don’t know what ATSIC wants’.

Many women consulted said they had lost confidence in submitting funding applications to ATSIC because of the low rate of successful outcomes, the common

142 ATSIC Office of Evaluation and Audit, above n 60, 40.
143 Ibid 43.
144 Ibid.
145 Ibid.
146 Ibid 56.
147 Ibid 80.
148 Ibid.
149 Ibid.
150 Ibid 2.
151 Ibid (report finding 10).
152 Ibid.
153 Ibid 27.
perception being ‘why should they apply when they only get knocked back’. One interviewee’s response was:

We try hard each year to get funding and we get told there is no money — not fitting the guidelines etc, etc. So we try to work with what we’ve got! When we do get funding, someone else decides what we have to spend it on and when we are supposed to spend it. When are they going to let us look after ourselves? What is self-determination — nothing without self-sufficiency.155

Aboriginal and Torres Strait Islander women told the consultation that they wanted to advise ATSIC of their needs but perceived that they lacked the skills and opportunities to make their concerns known.156 Women said that because of these ostensibly insurmountable obstacles they were resigned to ‘quietly go on about their own business, looking after their families and their communities’.157

2 Theme 2: Skills: Knowledge and Confidence

Education and literacy were raised by women as the most critical factors limiting their participation in ATSIC. According to Nussbaum, human beings ‘can become fully capable of the major human functions’ only when they are ‘provided with the right educational and material support’.158 In the context of the thematic grouping of skills, knowledge and confidence, we can see that women were excluded from the reach of ATSIC because they lacked the basic capabilities to enable them to take advantage of the programs established for the economic development of communities. This is especially problematic when it comes to lost opportunities to create businesses in communities. As Nussbaum argues, the absence of freedom to choose employment outside the home is linked to other capability failures in the areas of health, nutrition, mobility, education and political voice.159

In the absence of an adequate education about ATSIC’s policies and programs, women expressed a resignation at the impenetrable nature of ATSIC and found it was easier to concentrate on their homes, families and communities.160 This reinforces the cultural narrative that Indigenous women prefer the domestic sphere and running their communities and that the role of Indigenous women in keeping communities going is of

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154 Ibid (report finding 4).
155 Ibid 25.
156 Ibid (report finding 9).
157 Ibid.
158 Nussbaum, Sex and Social Justice, above n 106, 43.
159 ATSIC Office of Evaluation and Audit, above n 60, 46.
160 Ibid.
great import. While this narrative represents women’s domestic and community role as a choice, the *ATSIC OEA Report* reveals that this is not a choice. The report shows that women do want to have jobs and establish businesses in order to improve the economic and social situation of their families and homes. However, in ignoring the gender barriers that work against Aboriginal and Torres Strait Islander women’s take-up of policies and programs, skewed gender narratives are reinforced, reflecting a cultural preference giving priority to men and boys. According to the capabilities approach, a woman’s affiliation with a certain group or culture should not be taken as normative for her unless, on due consideration, with all the capabilities at her disposal, she makes that norm her own. Thus it is critical in to keep in mind those obstacles to self-realisation that are imposed by cultural norms.

**C Theme 3: Leadership**

The third theme that can be elicited from the *ATSIC OEA Report* concerns women’s leadership and exclusion from governance structures. Leadership is present in Nussbaum’s list of central human functional capabilities of affiliation, practical reason and control over one’s environment. While all capabilities are central and cannot be traded off against one another, practical reason and affiliation stand out for special significance. According to Nussbaum, both organise and suffuse the others making their pursuit truly human.

The Aboriginal and Torres Strait Islander women interviewed raised strong views about the political leadership of ATSIC. They were especially critical of the chasm between the male-dominated leadership and Indigenous women’s needs:

All men are involved in decisions and we are a low priority. We are not consulted about women’s things.

[ATSIC] is mostly dominated by male persons. No feedback from male ATSIC representatives. Nepotism is rife. No information is given or participation by community members is encouraged in making decisions.

ATSIC is still a place in (a nearby city) and we have a male representative.

Women’s issues MUST become a priority! Women are 51% of the Aboriginal and Torres Strait Islander population, it is time we got a fair deal.

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161 Ibid.
162 Ibid.
164 ATSIC Office of Evaluation and Audit, above n 60, 42.
165 Ibid 41.
166 Ibid 35.
Training for men to sensitise them to access women as equals is a MUST. Men must realise and accept the valuable knowledge and skills that women can and do contribute.\textsuperscript{168}

The \textit{ATSIC OEA Report} revealed degrees of intimidation that prevented women’s participation: ‘some community government councils did not acknowledge women’s needs — most are male dominated. When women complained about injustices, they were intimidated and could lose their homes, etc’.\textsuperscript{169} Again, ‘we are troublemakers ‘cause we speak up about problems, so if we did our families will get into trouble’.\textsuperscript{170}

Of the 555 Aboriginal and Torres Strait Islander women interviewed, 66.7 per cent knew how to get elected to a Regional Council and 44.6 per cent said they would consider nominating for a position on a Regional Council. However, there were some considerable barriers to Indigenous women seeking office and the following statements are examples of women’s responses: ‘too scared to sit with a table of men, to speak out and lack of English’; ‘I don’t feel as though I am educated enough’; ‘We have tried to nominate but I feel people are not resourced enough and given enough back up and support’.\textsuperscript{171} It is clear that lack of education, confidence, family connection and institutional support were some of the reasons women did not seek to run for office. The problems of excessive travel and time away from family and community were also primary considerations: ‘too much to do already’; ‘my children are too small, perhaps later’; ‘Too much (time) away from home’.\textsuperscript{172}

In almost 50 years of experiments in national representative structures, the one consistent factor in their design is the sustained marginalisation of women in leadership. Over time this can entrench low self-confidence and affect women’s ability and will to take formal leadership roles. Nussbaum has found that hierarchies of gender can ‘undermine’ self-respect and the emotional development of women.\textsuperscript{173} Salient to this are the stories of intimidation told by those women who participated in ATSIC politics.\textsuperscript{174} Intimidation works to limit freedom of association and freedom of speech.

\textsuperscript{167} Ibid 26.
\textsuperscript{168} Ibid 22.
\textsuperscript{169} Ibid 4.
\textsuperscript{170} Ibid 44.
\textsuperscript{171} Ibid.
\textsuperscript{172} Ibid.
\textsuperscript{173} Nussbaum, \textit{Women and Human Development}, above n 163, 43.
\textsuperscript{174} See, eg, ATSIC Office of Evaluation and Audit, above n 60, 44 (one woman was quoted as saying, ‘I have been there and it is a mad chopping block with dog eat dog and every man for
For institutions established to deliver self-determination, the aim should be to provide a supportive environment, in which Aboriginal women can run for office with ease if they so choose. The audit clearly revealed an express desire of many women to hold formal positions with support. It is flawed to suggest that the ballot box or mandated gender equality in governance structures are sufficient guarantees of women’s participation, because to be effective each requires substantial support in other capabilities (education, confidence, non-humiliation). The evidence suggests that in ATSIC there was no such support.

D Women’s Views on Human Rights and Indigenous Rights

Advocacy for human rights and Indigenous rights was one of the most successful roles that ATSIC played in the Australian polity and was at the forefront of ATSIC’s work domestically and internationally. ATSIC was one of the central players in the development of the movement towards addressing the ‘unfinished business’ between the state and Indigenous peoples, particularly with its role in the negotiation of the Social Justice Package in 1995 as a part of the settlement following the Mabo decision. This settlement included the Native Title Act 1993 (Cth), the Indigenous Land Fund and the Social Justice Package. The Prime Minister Paul Keating requested that ATSIC and the Council for Aboriginal Reconciliation consult and prepare submissions on the Social Justice Package. ATSIC established a committee and sought to consult constituents on the substance of the Social Justice Package. It is worth noting here that the Social Justice Package was never implemented.

The audit asked Aboriginal and Torres Strait Islander women about ATSIC’s work on rights and more specifically human rights. The women consulted said they wanted to ‘live like other Australians’ and have access to the ‘rights’ and ‘privileges’ of mainstream Australia. They were especially ‘vocal about their need for access and equity and strongly supported human rights’.

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177 ATSIC Office of Evaluation and Audit, above n 60, 65.

Ibid.
However, the *Mabo* decision attracted a different response and was viewed by Aboriginal and Torres Strait Islander women at the time as ‘men’s business’.\(^{178}\) The evaluation team noted that they tried to explain to the women that *Mabo* was not just ‘men’s business’ but it was also ‘women’s business’. While women’s views are likely to have changed since the *ATSIC OEA Report*, chiefly because over time community knowledge about native title has deepened, the audit was conducted three years after the *Mabo* decision and it illustrates that ATSIC had not done a successful job in disseminating information about its rights agenda to communities. Moreover the information that was available to communities appears to have given women the impression that native title rights were gendered (‘men’s business’).

When questioned on the Social Justice Package, the women consulted said that if they knew and understood what this meant, and how it would affect their lives they would want to participate and become involved.\(^{179}\) The women said they were ‘concerned and frustrated’ about their lack of knowledge about *Mabo* and the Social Justice Package. Women also reported that they were not invited to the consultations on the Social Justice Package.

Many women consulted, but particularly urban women, believed that the Mabo decision was irrelevant to them. They thought that remote indigenous people, who still had a connection with their lands, might benefit, but noted that only a limited number of women were invited to attend the Social Justice Package consultations.\(^{180}\)

The *ATSIC OEA Report* found the lack of knowledge about the Social Justice Package was significant given ATSIC’s elevation of rights as a priority in its agenda and the ostensibly important impact of these two developments, *Mabo* and the subsequent Social Justice Package, upon the lives of Aboriginal and Torres Strait Islander women. The report suggested that future work around rights and social justice needed to involve Indigenous women ‘possibly independent of men’ to ensure their full participation. The fact that Aboriginal women did not understand *Mabo* or the Social Justice Package reinforces the narrow, male-dominated conception of self-determination during the self-determination era.

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\(^{178}\) *Mabo v Queensland (No 2)* (1992) 175 CLR 1; ibid 64.

\(^{179}\) *ATSIC Office of Evaluation and Audit*, above n 60, 65.

\(^{180}\) Ibid.
E  Final Recommendations

The final recommendations of the report were for the establishment of a taskforce to address gender disadvantage, possible amendments to the *ATSIC Act*, a strategy with the Australian Electoral Commission to increase representation of Aboriginal and Torres Strait Islander women on Regional Councils and Commonwealth electoral rolls, and a high priority given to measures to address family violence.\(^{181}\) None of these initiatives were achieved during ATSIC’s time.

F  Conclusion

In seeking to resolve the conundrum of accommodating women’s perspectives in a male-dominated organisation, it is problematic to establish a special women’s office or committee, or to have a grants program with a special women’s budget, and then expect women to be able to achieve their aspirations for self-determination such as those summarised above. Creating ‘special’ programs, for example, will not adequately tackle the underlying community problems such as alcoholism of which women bear the brunt of. Given the complaints summarised in the *ATSIC OEA Report* about procedural obstacles experienced by women, such as lack of skill in filling out grant applications, difficulty in understanding the ATSIC forms, culturally inappropriate behaviour of non-Indigenous staff, and poor English skills, such programs will be ineffective and if these obstacles go unaddressed, women’s capabilities will remain incompletely realised.

The recommendations suggested initiatives that demand constant attention and resources in order to become effective. When electoral cycles are involved, such initiatives are likely to be forgotten as new issues are raised with greater urgency. The problem with ad hoc, band-aid approaches such as policy on the run, is that they are not sustained or long term. The audit raised questions about the institutional self-determination model which has been historically and uniquely employed in Australia — a model based on statutory and incorporated bodies. As Tim Rowse has suggested: ‘Self-determination begs the question: what self or selves? To encourage corporations, associations and councils was to attempt a practical answer to that questions’.\(^{182}\) Yet the question remains whether any public institution established to protect and channel affiliation will ever be well equipped for introspection about those obstacles to women’s

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\(^{181}\) Ibid 5.

\(^{182}\) Rowse, above n 14, 132.
participation created by traditional cultural norms. This is particularly salient in light of the fact that cultures can be conservative and resistant to internal criticism. If the right to self-determination continues to be configured institutionally through the establishment of bodies such as ATSIC, equality of opportunity will be difficult to achieve for women.

It may be that Aboriginal and Torres Strait Islander women’s interests are best served in a non-cultural form. That does not necessarily mean that Indigenous peoples should not arrange their political affairs through representative bodies or incorporated bodies. But women’s lives and capabilities would be enhanced if their status was accompanied by parallel protections such a constitutional entrenchment of equality between the sexes. This would provide a guaranteed and sustained legal obligation for the institutions of self-determination to listen to women and include women in governance and the development and administration of Indigenous policies and programs.

V \hspace{1cm} CONCLUSION

This chapter has examined the limitations of a non-constitutional, institutional approach to self-determination. Nussbaum’s capabilities framework is a useful tool by which to examine the most recently completed exercise in institutional self-determination, ATSIC. This framework helps to explain how Aboriginal women’s capability to freely determine their political status and freely pursue their economic, social and cultural development under ATSIC was constrained by the male-dominated culture of state institutions. National representative institutions like ATSIC will always struggle to be capability-enabling. In order to effectively operationalise the right to self-determination in an institutional form, greater thought must be given to understanding how the gender make-up of an organisation contributes to or impedes the development of capabilities. ATSIC’s distance from grass-roots communities and its male-dominated bureaucracy and leadership excluded Aboriginal women and thereby impeded their capabilities. Measured against the capabilities framework, ATSIC failed to satisfy the core areas of functioning that would enable a dignified human life. ATSIC failed to marshal the combined capabilities of Aboriginal women through its organisation because it failed to comprehend the importance of women’s contribution.

Greater protections are required to protect Aboriginal women, who are the most vulnerable group in Indigenous communities. What must be pursued is the most
effective mechanism to ensure that Aboriginal women reach the fundamental threshold of capabilities required for them to function as human beings and achieve self-determination as Aboriginal people. An institutional form of self-determination, statutory or otherwise, is not enough — the collective nature of Indigenous politics means that, more often than not, women's issues will be eschewed in favour of the interests of the collective, which are synonymous with the interests of men.

The institutional form of self-determination is now entrenched in the UNDRIP, which expressly precludes secession and commits Indigenous peoples to maintaining and developing their own representative institutions. As a consequence, institutional mechanisms are likely to remain the primary way in which Indigenous self-determination is delivered. However, the capabilities approach leads one to the conclusion that any institutional vehicle for self-determination will struggle to deliver self-determination for Aboriginal women in the absence of a legal, enforceable framework entrenching the right to gender equality.

What is required is a more powerful guarantee that Aboriginal women's interests will be addressed. Special policies or offices or mandated positions will not mean that Aboriginal women’s interests are taken into account on each and every decision that is made on Indigenous issues. One of the most effective ways of enabling this is constitutional guarantee. The next chapter explores the situation in Canada where a constitutional guarantee to equality has provided Aboriginal women with real power to challenge patriarchal legislation, policies and decisions of the state and Indigenous organisations.

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183 UNDRIP arts 18, 20, 33.
CHAPTER SIX: A CONSTITUTIONAL GUARANTEE OF EQUALITY: CANADIAN ABORIGINAL WOMEN AND SELF-DETERMINATION

I  INTRODUCTION

This chapter aims to examine a constitutional approach to self-determination. It discusses the empowerment of Aboriginal women in Canada since the constitutional entrenchment of the *Canadian Charter of Rights and Freedoms* ('Charter').\(^1\) Canada is a useful comparator because there is a commonality of experience with Australia, including a lack of Aboriginal women in leadership roles, the state's privileging of Aboriginal men over women and the 'hyper-masculinist'\(^2\) prescription of Aboriginal sovereignty and self-determination.\(^3\) However, Aboriginal women in Canada have come to exert a more defined political presence in the state and a more pronounced status within contemporary Aboriginal politics than Aboriginal women in Australia. This chapter will argue that Aboriginal women's empowerment in Canada has been influenced by the constitutional entrenchment of sex equality.

Part II of this chapter begins by describing how Indigenous rights and the right to self-determination have been recognised in Canada via treaty, legislation and the *Canadian Constitution*.\(^4\) It then explores how women have been excluded or marginalised by these processes, especially as a direct result of legislative discrimination of the *Indian Act*.\(^5\) Part III explains how the *Charter* environment has empowered Aboriginal women to challenge the discriminatory effect of the *Indian Act* and the sexist policies of the state and First Nations. In Part IV, the chapter concludes by analysing the positive impact of constitutional recognition of equality on Aboriginal women.

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5. *Indian Act*, RSC 1985, c I-5 ('*Indian Act*').
II  

ABORIGINAL WOMEN PRE-CHARTER

A  Aboriginal Women and Self-Determination

1  Treaties and Self-Government

The primary way the state has engaged with Indigenous peoples in Canada has been through treaty agreements. The Crown signed many of the treaties that exist today before confederacy in 1867, although many of these agreements have been dishonoured to varying degrees.6 Most of the treaties were signed between 1871 and 1921 over the provinces of Northern Ontario, Manitoba, Saskatchewan, Alberta and parts of Yukon, Northwest Territories and British Columbia.7 These treaties provide varying degrees of self-government. Since the early treaty-making period, Canada has continued negotiating and entering into treaty agreements with those Aboriginal groups who did not enter into agreements during the early colonisation period. Significantly self-determination became the formal policy of the Canadian Government following the Royal Commission on Aboriginal Peoples ("RCAP") in 1993, whose final report recommended that the state adopt the right to self-determination as the basis of the state’s engagement with Indigenous peoples. The RCAP conceived of self-determination in the following way:

[self-determination entitles Aboriginal peoples to negotiate the terms of their relationship with Canada and to establish governmental structures that they consider appropriate for their needs ... in practice there is a need for the federal and provincial governments actively to ... implement right to self-determination.8

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7  Treaties 1 and 2 Between Her Majesty The Queen and the Chippewa and Cree Indians of Manitoba and Country Adjacent with Adhesions (1875); Treaty 3 Between Her Majesty The Queen and the Saulteaux Tribe of the Ojibbeway Indians at the Northwest Angle on the Lake of the Woods with Adhesions (1971); Treaty 4 Between Her Majesty The Queen and the Cree and Saulteaux Tribes of Indians at the Qu'appelle and Fort Elice (1874); Treaty 5 Between Her Majesty The Queen and the Saulteaux and Swampy Cree Tribes of Indians at Beren's River and Norway House with Adhesions (1875); Copy of Treaty No 6 Between Her Majesty The Queen and the Plain and Wood Cree Indians and Other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River with Adhesions (1876); Copy of Treaty and Supplementary Treaty No 7 Between Her Majesty The Queen and the Blackfeet and Other Indian Tribes, at the Blackfoot Crossing of Bow River and Fort Macleod (1877); Treaty No 8 Made June 21, 1899 and Adhesions, Reports, Etc (1899); The James Bay Treaty — Treaty No 9 (Made in 1905 and 1906) and Adhesions Made in 1929 and 1930 (1905–06); Treaty No 10 and Reports of Commissioners (1906); Treaty No 11 (June 27, 1921) and Adhesion (July 17, 1922) with Reports, etc (1921).

One of the most important outcomes of the RCAP was the establishment of the federal comprehensive claims policy, Canada’s Inherent Right of Self-Government Policy in 1995. The comprehensive claims policy sought to process claims to self-government and Aboriginal rights through a formal agreement that would define precisely what Aboriginal rights and benefits were. This policy formally recognised self-government as treaty rights under s 35 of the Constitution subject to the Charter. This policy was first implemented during the process for the Nisga’a Final Agreement (2000) which was the first modern treaty negotiated in British Columbia. Negotiations continue in British Columbia under the British Columbia Treaty Commission Process. Other modern-day agreements negotiated both prior to and under the negotiated agreements include the James Bay and Northern Quebec Agreement (1975) and the Northeastern Quebec Agreement (1978), the Sechelt Indian Band Self-Government Act (1986), the Yukon First Nations Umbrella Final Agreement (1993) and the Nunavut Land Claims Agreement which led to the proclaiming of a new territory in 1999, with the establishment of Nunavut, which is 85 per cent Inuit. Thus the treaty agreement and negotiated agreements to implement self-government has become the dominant framework by which Indigenous peoples and the state have come to view the right to self-determination in Canada.

2 What About Indian Women?

The modern treaties and self-government agreements negotiated by the Canadian Government tend not to have gender-specific equality provisions. This has been problematic for Aboriginal women because the consequences of the ‘gender-invisible land claims policy are far-reaching’, preventing women from exercising greater

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13 Sechelt Indian Band Self-Government Act, SC 1986, c 27.


15 Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty The Queen in Right of Canada (1990).

16 Ruth L Gana, ‘Which “Self”? Race and Gender in the Right to Self-Determination as a Prerequisite to the Rights to Development’ (1995) 14 Wisconsin International Law Journal 133. See also Linda Archibald and Mary Crnkovich, If Gender Mattered: A Case Study of Inuit Women, Land Claims and the Voisey’s Bay Nickel Project, Status of Women Canada (1999); Val
control over their lives. The contemporary literature on self-government reveals there is a lack of gender perspectives in treaty-making. According to First Nations woman Wendy Lockhart Lundberg (Sqamish):

> It is ironic that self-government initiatives are often referred to as ‘modern day treaties’. I find that these initiatives do not advance native women on the path towards equality but rather they are draconian in their present form, relegating native women to the Dark Ages.

For example, the *Nisga’a Final Agreement* is considered a best-practice template for other agreements, yet it does not have a specific gender equality provision (although it and other agreements are expressly subject to the *Charter*). Joyce Green has observed:

> Contemporary treaties and the sets of inter-governmental agreements called ‘self-government’ do not take a gendered view of decolonization. Without suggesting that Aboriginal regimes are any more likely than colonial ones to violate women’s rights, it is arguably a ‘best-practices’ matter to explicitly name protection of women’s rights in these agreements.

Nunavut is another example of the way in which gender has been excluded as a consideration in the development of a governance structure. The Nunavut Implementation Commission (‘NIC’) saw the establishment of Nunavut as an opportunity to address the gender disparity in political representation in Indigenous politics. The NIC therefore proposed a dual-member electoral system with gender equality: ‘[t]he call for balanced representation in politics is ... more than a call for recognition of shared interests, it is a call for recognition for equality for a historically mistreated group in society’. According to the NIC:

> as groups, men and women have had different relationships with the laws and institutions created through public policy, and have had different life experiences. As a result, there are differences in the ways in which men and women approach politics. ... One can ... acknowledge that women’s underrepresentation in politics helps explain why they are more likely to be poorer (especially if they’re single parents) than men are, earn lower wages for work of equal value, face other forms of discrimination in the

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Archibald and Crnkovich, above n 16, 15.


Ibid.


workplace, are discriminated against by pension systems, and have limited access to affordable child day-care ...23

The NIC argued that the legislature should reflect the gender make-up of most Nunavut homes. On the other hand, those opposed to the dual-member proposal argued that all ‘Canadians’ should have the same rights before the law and therefore no special requirement should be provided for women’s representation.24 A plebiscite taken on the proposal was rejected, with 57 per cent of Nunavut voting against equal representation, although only 39 per cent of people eligible to vote actually attended the plebiscite. After the plebiscite, a Nunavut newspaper editorial criticised the outcome:

Compared to most of Nunavut’s men, Nunavut’s women are more literate, more level­headed and more skilled. Self-governing Nunavut will need leaders who know how to read, write, count and compute in both our major languages and leaders who know how to show up for work without a hangover. But take a look at who shows up the next time your regional Inuit association or community council holds a meeting. Then, count the number of men around the table who possess those qualities. Next, count the number of women who possess those qualities. Observe who’s doing the typing, the interpreting, the translating, the minute taking, the bookkeeping and the telephone answering. Observe who’s doing the work that actually takes brains to do. If you do that, you’ll understand what the people of Nunavut really lost on Monday’s vote. You’ll understand that the gender parity proposal was not created for the benefit of women[,] it was created for the benefit of all.25

In the debate surrounding the plebiscite, Aboriginal women’s rights were constructed as ‘individual’ and Western and were pitted against the rights of the collective.26 This dichotomy dominates the literature on Aboriginal women’s rights, self-government and treaties.27 Val Napoleon describes this dichotomy as erroneous because the individual is constitutive of the collectivity; they should not threatened by it.28 Furthermore Emma LaRocque argues that while Aboriginal culture was built on egalitarian ideals it does not follow that individual rights should be disregarded.29 Yet, because of the gender bias

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23 Ibid.
way in which self-determination has been recognised by the state and come to be understood in Indigenous politics, the idea that an individual is free to be self-determining is dwarfed by the demands of the collective. And this, as Napoleon says, is almost always 'to the detriment of Aboriginal women'.

B Legislative Framework

1 Gradual Enfranchisement Act

Aside from concluding treaties with First Nations, the Canadian Government has regulated Aboriginal affairs through legislation. Originally, in 1867, Confederation conferred upon the federal government the power to make laws for Indians. The first legislative arrangement controlling the lives of Indians was the Gradual Enfranchisement of Indians Act (‘Gradual Enfranchisement Act’) in 1876. The Gradual Enfranchisement Act prescribed criteria by which Aboriginal people were identified and divided into two categories: treaty-status and non-treaty-status Indians. As the terminology suggests, treaty-status Indians belonged to groups who had a treaty agreement with the state whereas non-treaty Indians were part of groups who did not have a treaty. The Gradual Enfranchisement Act divided treaty-status Indians into statutory ‘bands’ and conferred limited powers of self-management upon these bands. Status as a ‘treaty Indian’ meant an annuity, access to reserve Indian land, recognition as having Aboriginal status in dealings with the Crown, and access to medical services and health resources.

2 Discriminatory Impact

The Gradual Enfranchisement Act defined an Indian man as ‘any male person of Indian blood reputed to belong to a particular band’. An Indian woman had to marry an Indian or non-treaty Indian to retain her status under the Act. If a treaty-status woman married a non-Indian man, then she would automatically lose her Indian status. Yet if

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30 Napoleon, above n 16, 36.
31 See generally Paul McHugh, Aboriginal Societies and the Common Law (2005) 2, on the way in which common law countries use public law or legalism as a means of controlling Indigenous populations.
32 An Act for the Gradual Enfranchisement of Indians, the Better Management of Indian affairs, and to Extend the Provisions of the Act 31st Victoria, Chapter 42, SC 1869, c 6 (‘Gradual Enfranchisement Act’).
33 Gradual Enfranchisement Act s 4.
34 Gradual Enfranchisement Act s 4.
35 Gradual Enfranchisement Act s 4(c).
a treaty-status man married a non-Indian woman, then that woman could gain Indian status upon marriage.\(^{36}\)

Treaty-status women who were consequently excluded from their band as a result of marriage were entitled to a lump sum payout of their treaty money or an annuity from their treaty money.\(^{37}\) When women took the first option of a lump sum payout these arrangements were referred to as ‘red ticket’.\(^{38}\) If a woman who had lost her Indian status divorced from her non-Indian husband, then she could not regain her Indian status.\(^{39}\) Band elections were also introduced into Aboriginal governance structure. All women were disenfranchised from those band elections even though, ‘prior to European contact, many Aboriginal women possessed that which can be compared to the right to vote’.\(^{40}\) Eventually the discriminatory provisions of the *Gradual Enfranchisement Act* were consolidated into a new *Indian Act*.

In 1951, the *Indian Act* introduced a new system by which Indians were registered on a roll to be maintained by the Department of Indian Affairs.\(^{41}\) The Indian Act has been amended eighteen times since its enactment as the *Gradual Enfranchisement Act*. The *Indian Act* prescribes the definition for eligibility for registration of Indians and determines the rules for deregistration from the roll.\(^{42}\) Section 11 deems who is entitled to be registered as an Indian. Section 12 provided for those who were not entitled to be registered under Indian status. The most controversial provision has been s 12(1)(b), which deemed that an Aboriginal woman who married a non-Indian man was compulsorily deprived of her right to reside on a reserve as well as any title to land on a reserve.\(^{43}\) In effect, this rendered obsolete the legal status of a ‘red ticket’ woman, who under the *Gradual Enfranchisement Act* had remained entitled to an annuity. These women were wholly ‘disenfranchised’, the term used to describe voluntary or compulsory loss of Indian status.

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\(^{36}\) *Gradual Enfranchisement Act* s 4(c).


\(^{38}\) Ibid. ‘Red ticket’ is discussed extensively in *Sawridge Band v Canada* [1995] 4 CNLR 121.

\(^{39}\) *Gradual Enfranchisement Act* s 26(1).


\(^{41}\) For in-depth discussion of the amendments see ibid.

\(^{42}\) *Indian Act* s 11.

\(^{43}\) *Indian Act* s 12(1)(b).
Aboriginal women have contended that the *Gradual Enfranchisement Act* /the *Indian Act* have imposed European ideas of gender and tradition upon Aboriginal culture.\(^4^4\) They have argued that their ‘experiences, perspectives, and political agendas for reform were perceived as not only irrelevant but dangerous to Indian sovereignty movements’.\(^4^5\) Many Aboriginal women maintain that they have been subjugated because of the institutionalisation of European patriarchy in Aboriginal culture.\(^4^6\) This is reflected in the patrilineal bias of the state’s formal determining of Indian identity and the way in which Indian bands exclude or marginalise Aboriginal women.

For Judith Sayers and Kelly MacDonald, the institutionalisation of membership conflict initiated a shift in the allegiances and political alliances of Indian bands, at the national level through to the local level. The statutory framework of the *Indian Act* became ‘ingrained into their identity-practices and politics even as they negotiated movement into new political structures at the end of the twentieth century’.\(^4^7\) This is despite historical and anthropological evidence to support the matrilineal system of many of the tribes (for example, the Iroquois, whose identity was passed through the female line).\(^4^8\) The consequence of this bias has been that rules for Indian status directly discriminated against Indigenous women. Sayers et al argue, as does this thesis, that, in the absence of recognising the distinct role and circumstances of women, self-determination can never be meaningful or truly achieved.\(^4^9\)

3 Indian Act Litigation

In response to the historical inequality experienced by Aboriginal women as a result of the *Indian Act*, two Aboriginal women’s organisations emerged — Indian Rights for Indian Women and the Native Women’s Association of Canada (‘NWAC’). These organisations aimed for law reform and to establish a voice for Aboriginal women who felt Indian men were internalising the discriminatory laws that had been imposed upon Aboriginal people. At the time, Aboriginal women recognised that to have any chance

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\(^4^4\) Isaac and Maloughney, above n 40, 453. See also Joyce Green, ‘Canaries in the Mines of Citizenship: Indian Women in Canada’ (2001) 34 *Canadian Journal of Political Science* 715, 724; Sayers and MacDonald, above n 18, 10.

\(^4^5\) Barker, above n 2, 137.

\(^4^6\) Sayers and MacDonald, above n 18, 10.

\(^4^7\) See McHugh, above n 31, 185.


\(^4^9\) Sayers and MacDonald, above n 18, 13.
of a voice in any future constitutional discussions with the state, they needed to work
together to advocate for law and policy reform. One particularly important lawsuit and
legal proceedings in the international arena created momentum for Aboriginal women’s
campaign to challenge the discriminatory elements of the *Indian Act* and seek a voice in
mainstream political debate.\(^{50}\)

(a) **Jeanette Lavell and Yvonne Bedard**

*Lavell v Canada* concerned the marriage of Jeanette Lavell (nee Corbiere, a
Wikwemikong Indian) to David Lavell, a non-Indian man. In December 1970, Ms
Lavell received notice of the revocation of her enfranchisement by the Indian Registrar,
in accordance with s 12(1)(b) of the *Indian Act*.\(^{51}\) As explained above, this type of
discrimination meant that women would lose their Indian status if they married out,
whereas men did not. Lavell initiated proceedings, arguing that the *Indian Act* violated
her right to equality before the law, as guaranteed in s 1(b) of the 1960 *Canadian Bill of
Rights*. The York County Court at first instance held that the *Canadian Bill of Rights* could not
render the *Indian Act* inoperative.\(^{52}\) According to the Court, equality before the law
meant ‘equality of treatment in the enforcement and application of the laws of Canada
before the law enforcement authorities and the ordinary courts of the land’.\(^{53}\) As a
result, s 12(1)(b) was held to be valid as it applied to all Aboriginal women equally.
Moreover, Grossberg J found that, while Mrs Lavell had lost her Indian status, she had
gained the full benefit of the rights and freedoms of all Canadian women and
accordingly she was in a better situation than women under the *Indian Act*. Lavell
appealed Grossberg J’s decision to the Federal Court of Appeal. In a unanimous
decision, the Court of Appeal set aside Grossberg J’s decision and declared that
s 12(1)(b) was discriminatory, rejecting the argument that because both Indian and non-
Indian women were treated the same then there was no discrimination.\(^{54}\)

Similarly, in 1964, Yvonne Bedard, an Iroquois woman, lost her Indian status of the Six
Nations Reserve after marrying a non-Indian.\(^{55}\) In 1970, she returned to the reserve to

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50 Barker, above n 2, 135.
52 Ibid 1376.
53 Ibid 1350.
live in a property that she inherited from her mother. However, because of the amendments to the Indian Act, she was denied the right to live on the reserve and inherit property. The Six Nations Band Council passed a resolution demanding that Bedard dispose of the property. Eventually Bedard transferred the property to her brother who was a registered member of the band and remained living in the property with her brother and children. The Six Nations Band Council then passed a resolution calling upon the District Supervisor to serve Bedard notice to quit the reserve. Bedard brought proceedings in 1971, challenging the Band Council resolutions and her de-registration as an Indian as discrimination on the basis of sex. She argued that s 12(1)(b) of the Indian Act was inoperative by virtue of s 1(a) of the Canadian Bill of Rights, which guarantees the right to enjoyment of property and the right not to be deprived thereof except by due process of law. The Ontario Supreme Court found that s 12(1)(b) of the Indian Act was inoperative by virtue of the Canadian Bill of Rights.

The Lavelle and Bedard cases were appealed and heard together in the Supreme Court of Canada. The National Indigenous Brotherhood (predecessor to the Assembly of First Nations) intervened in the case against Lavell and Bedard because it was concerned about the implications of the decision for the Indian Act and Indian bands’ ability to self-govern. The Supreme Court allowed the appeals, ruling that s 12(1)(b) was consistent with the Canadian Bill of Rights, and set aside the judgments of the Federal Court of Appeal and the Ontario Supreme Court respectively. In effect the Court held that, while s 12(1)(b) may have discriminated against women, as long as it applied equally to all women it did not violate equality before the law.

The women involved in this litigation were vilified as contributing to the colonisation of Indians in Canada. They were attacked by Indian leaders as undermining Indian heritage and as being ‘white-washed women’s libbers’. According to one First Nations scholar:

> It is clear that the male leadership of the First Nations organizations do not consider women’s rights as a human rights issue. The male dominated discourse on self-

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57 Bedard v Isaac (1971) 25 DLR (3d) 551, 554.
58 Ibid 557.
government suppresses and denies how much we as First Nations have integrated patriarchy in ourselves, our families, communities and nationalists movements. The situation ignores the reality of gender politics and sustains sexist oppression. Sexist oppression has regulated the lives of First Nations women in two ways, by not recognizing women's rights within collective rights and by violence. Women's rights are defined within a sexist context of being individual rights and therefore seen as not fitting into traditional collective rights ideology.62

These early pre-Charter constitutional challenges initiated by Aboriginal women activists brought to the surface the tension between self-government (a tenet of the right to self-determination) and Western individual rights (the right to equality before the law).63 According to First Nations scholar John Borrows, although many Indian organisations did consider sexual discrimination to be wrong, they wanted Indian women to subordinate their objectives to the organisations' own political purposes.64

(b) Sandra Lovelace

Following these decisions, Sandra Lovelace, a Maliseet Indian who had lost her Indian status when she married a non-Indian on 23 May 1970, made a complaint about s 12(1)(b) of the Indian Act to the United Nations Human Rights Committee ('UNHRC'), the supervisory body of the International Covenant on Civil and Political Rights ('ICCPR').65 The UNHRC found that Lovelace had been denied the right of access to her Indigenous culture and language with other members of her group.66

According to the UNHRC, the Indian Act violated the ICCPR because it excluded a certain class of Indian women from government-controlled recognition of Indian bands. The decision in Lovelace affirmed the right of an individual within a group to have access 'to her native culture and language in community with the other members of her group'.67 The UNHRC found that no legal impediments should prevent a member of a minority from associating with any other group and that any legal impediment must have a 'reasonable and objective justification'.68

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62 E I Herbert cited in Sayers and MacDonald, above n 18, 12.
63 See generally Deveaux, 'Conflicting Equalities?', above n 28, 522.
64 Borrows, above n 27, 27.
67 Ibid [40].
68 Ibid [16].
The public outrage that followed the decision of the UNHRC in *Lovelace* forced the Canadian Government to amend the *Indian Act* in 1985. The 1985 amendments were intended to eliminate the discriminatory treatment of women and the control by the state of the membership rules in Indian communities. These amendments are commonly referred to as ‘Bill C-31’.

On June 28, 1985, Bill C-31 was passed by Parliament. The 1985 amendments repealed the legal construct of enfranchisement and enabled the return of Indian status to those women and children who had lost it under s 12. New rules of Indian registration were introduced under s 6(1) for children born after 16 April 1985 that allowed First Nations to develop and apply their own rules governing membership, to be approved by the Minister of Indian Affairs.

Bill C-31 created new divisions in the Indian community because it did not end statutory discrimination against Indian women but rather maintained ‘residual discrimination’. From 1985 de-registered and non-registered Indians were granted s 6(1) status under the *Indian Act*. Those who were granted status under s 6(1) included those who had 50 per cent Indian blood, as well as those who were not Indian but had married Indian men. Conversely, those women who lost their status for marrying a non-Indian man regained their status, although their non-Indian husbands were not entitled to be registered. This resulted in a situation where the children of Indian women who had lost status from marrying out prior to 1985 were only given s 6(2) status (the significance of which is explained below). Meanwhile those children of Indian men who married non-Indigenous women prior to 1985 received s 6(1) status.

The residual discrimination emerged where second-generation children married non-Indigenous partners. For those second-generation children with s 6(2) status, when they married and had their own children with non-Indians, those children would not be granted Indian status; whereas the children of people with s 6(1) status would be granted Indian status. Thus the ‘second generation rule’ operated earlier for those

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72 *Indian Act* s 6(1)(a)–(e).

grandchildren whose s 6(2) Indian grandparent was a woman. This created a distinction between children of ‘reinstatees’ and other children of registered Indians under the Indian Act.

The 1985 changes also gave status to Indians who lost status under the ‘double mother rule’. The double mother rule applied when a legitimate child of a status Indian father, whose mother and grandmother only had status because of their marriage to status men, would lose their status at 21. This was the only rule that existed when an Indian man claiming status could lose status at 21. Another criticism of Bill C-31 was that Aboriginal women had to declare who the father of their child was when registering their children. This rule was difficult for those women who did not wish to reveal the paternity of their children. Still, if such information was not provided to the Department of Indian Affairs, it classified the children as non-status Indians.

Complicating matters further was the fact that, despite government funding often being linked to the membership numbers of Indian bands government, funding did not increase with the growing number of registered Indians.74 This put a particular strain on social programs and reserve resources, such as health services and post-secondary education, which impacted upon Indian women.75 As such, Indian bands and organisations were more likely to support the pre-1985 Indian Act because the discriminatory provisions reduced the number of Indians entitled to registration, and reduced the pressure on economic resources. Of this, Aboriginal philosopher Menno Boldt has explained that Indian bands are conservative in their membership in order to protect their per capita share of royalties and other financial benefits from treaty agreements, and this has manifested in their support of exclusionary rules against Aboriginal women.76

The discriminatory effect of Bill C-31 generated a substantial amount of academic literature because of its continued detrimental impact upon women.77 Aboriginal

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76 Boldt, above n 74.
women argued that 'residual sex discrimination in the Indian Act violated the Charter and international human rights standards, and that the principle of sexual equality cannot be validly compromised in the name of self-government'.\textsuperscript{78} The discriminatory aspects of Bill C-31 were viewed by many Aboriginal women through the prism of the ongoing tension between collective rights and individual human rights, which was heightened by treaty agreements and the constitutional reforms that had been introduced in 1982.\textsuperscript{79} Yet the impact of Bill C-31 upon Aboriginal women’s lives was greater than just the infringement of a legal or political right.\textsuperscript{80} The laws were depriving Aboriginal women of access to the opportunities, resources and services that they should have been entitled to — for example, the ability to access employment programs identified for Indian status persons.

III ABORIGINAL WOMEN AND CHARTER ADVOCACY

A Indigenous Recognition in the Constitution

Meanwhile, around the time of the Lovelace complaint, constitutional reform was on the political agenda, following the election of Pierre Trudeau as Canada’s Prime Minister. Constitutional reform was afoot for a number of reasons including the movement for Quebecois separatism and the ineffectualness of the Canadian Bill of Rights. The Bill of Rights was limited in its scope because it was a statutory instrument that could be suspended or overridden by Parliament and it only applied to federal jurisdiction.\textsuperscript{81} From 1960 to 1982, only five of 35 claimants under the Bill of Rights won their cases before the Supreme Court of Canada.\textsuperscript{82} The jurisprudence was ambiguous as to whether


\textsuperscript{79}Moss, ‘The Canadian State and Indian Women’, above n 77, 287; Provart, above n 69, 117.


the *Bill of Rights* empowered the courts to override inconsistent legislation or whether it was merely a statutory interpretation guide.\(^8^3\)

Prior to patriation, the National Indian Brotherhood (predecessor to the Assembly of First Nations, ‘AFN’), actively opposed patriation without the constitutional entrenchment of Aboriginal treaty rights. The Government of Canada eventually agreed to the recognition of Aboriginal rights in a revised version of the proposed *Constitution*; however, this was withdrawn at the First Ministers’ Conference in 1981. Following intense protest from Aboriginal groups, including NWAC, the Government agreed to include Aboriginal rights.

In 1982, the *Canadian Constitution* was ‘patriated’ from the United Kingdom, following passage of the *Constitution Act 1982* by the UK and Canadian parliaments. This constitutionally entrenched the *Charter*. The *Canadian Constitution* now included a constitutional provision recognising and affirming ‘existing’ Aboriginal and treaty rights in Canada in s 35.\(^8^4\) These rights were recognised for three distinct Aboriginal groups: the Indians, the Metis and the Inuit. Section 35, at this point, provided:

> 35(1) The existing Aboriginal and treaty rights of Aboriginal people of Canada are hereby recognised and affirmed.
> (2) In this Act, ‘aboriginal peoples of Canada’ includes the Indian, Inuit and Metis peoples of Canada.

Furthermore Aboriginal resistance to the articulation of individual rights in the *Charter* resulted in the inclusion of s 25, which was to operate as a shield for pre-existing Aboriginal rights:

> The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including:
> (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
> (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

During the patriation period Aboriginal women’s groups were concerned about the implications of the recognition of self-government for women. NWAC worked closely with the women’s movement, including the National Action Committee on the Status of Women, lobbying for the inclusion of equality rights in the *Constitution* and

\(^8^3\) Dickson, above n 81; cf *R v Drybones* [1970] SCR 282.
\(^8^4\) *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) c 11.
participation rights in constitutional negotiations. An equality guarantee was recognised in s 15:

(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Section 15 is not limited to the grounds of gender but contains a non-exhaustive list of grounds upon which an equality right can be based. In addition s 28 guarantees the equality of men and women under the Charter. Section 28 is more of an interpretative tool than a substantive right:

Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

While s 35 was a significant constitutional development for Indigenous rights in Canada, what is of interest here is the transformative nature of the constitutional entrenchment of an equality guarantee given the historical discrimination against Aboriginal women. Aboriginal women’s advocacy, including the work of NWAC, led to tension between anti-Charter and pro-Charter Aboriginal groups over whether or not the Charter should apply at all to self-government. The tension was also manifest between those Indian-status women who maintained that the Charter was inconsistent with cultural values and the right to self-determination and those non-status Indian women who argued that the Charter should apply to Indian bands. According to Wendy Moss, the common refrain at the time was that First Nations’ rights (such as self-government) should be protected against the Charter and this meant that sex discrimination had become the symbol of conflict between collective Aboriginal rights and individual human rights in Canada. The antagonism between women’s rights — as individual rights — and Indigenous rights had developed over a long period of time

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88 Ibid 19.
in Canada since the state developed a legislative framework to regulate the identity of Indians. This tension can be partially explained as a consequence of the economic and social rewards that result from being designated as a treaty-based Indian; however, to limit it to this is to deny the insidious and subtle way that sex discrimination operates. This tension continued after patriation as the question of whether Charter rights should apply to Aboriginal self-government was debated.90

B Aboriginal Women and Constitutional Reform

Provision was made in the Constitution for the issue of Aboriginal constitutional rights, specifically self-government, to be revisited at a later date. Thus s 37 mandated the convening of constitutional conferences to discuss constitutional matters that directly affect Aboriginal people.91 The mandated constitutional conferences were held in 1983, 1984, 1985 and 1987.92 Further negotiations on self-government would be problematic for Aboriginal women if a proposed right to self-government was exempted from the operation of the Charter and thus women’s participation at these conferences was critical.

During the first constitutional conference in 1983, NWAC, who had also worked with non-Indian women’s groups during patriation, successfully argued for the insertion of a gender equity clause within s 35 of the Constitution, providing that existing Aboriginal and treaty rights would be interpreted to apply equally to Aboriginal women and men.93

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.


91 Section 37 states: '(1) A constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada within one year after this Part comes into force. (2) The conference convened under subsection (1) shall have included in its agenda an item respecting constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those peoples to be included in the Constitution of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on that item. (3) The Prime Minister of Canada shall invite elected representatives of the governments of the Yukon Territory and the Northwest Territories to participate in discussions on any item on the agenda of the conference convened under subsection (1) that, in the opinion of the Prime Minister, directly affects the Yukon Territory and the Northwest Territories.'

92 Borrows, above n 27, 29.

93 Barker, above n 2, 142.
This was an important development in sex equality. Section 25 had been considered by many to shield Aboriginal rights from the *Charter*. The language of s 35(4) reflects the language of s 15 of the *Charter*, and the effects of s 28 and s 35(4) combined together to limit the Aboriginal right to self-government.94

In 1987 at Meech Lake, a mandated conference was held for further discussions on constitutional matters. The conference also aimed to seek Quebec’s agreement to the *Constitution* and to recognise Quebec’s distinct cultural status (because patriation had been done without Quebec’s consent). During these discussions the possible clarification of Aboriginal rights in the *Constitution* was also flagged, although Aboriginal leaders protested they were not adequately consulted.95 The conference resulted in the Meech Lake Accord of 1987, which proposed recognition of Quebec as a distinct society as well as increasing the powers of provinces in the federal compact.96 Some of these changes included greater power for the provinces in relation to provision of social and economic programs and Indian groups were concerned with the implications of this for service delivery to Indians. In order to be successful, the Accord required all the provincial parliaments to ratify it within three years. The Accord was rejected by most provinces, overwhelmingly by Quebec, and this set the scene for the next round of negotiations at Charlottetown in 1991 and 1992 where Indigenous peoples would have a seat at the negotiating table to debate further entrenchment of Indigenous rights in the *Constitution*.97

During the Charlottetown round, Aboriginal conferences were held to negotiate further possible amendments to s 35(1), which already provided that ‘the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognised and affirmed’.98 The major consideration for Aboriginal groups to be negotiated at Charlottetown was the recognition of an inherent right to self-government in the *Constitution*. These negotiations were particularly important for Aboriginal women because they involved consideration of whether or not the *Charter* should apply to

96 Ibid 125.
97 Ibid 161.
98 Ibid 170.
s 35(1). It was argued that the Charter was antithetical to Aboriginal sovereignty and culture and represented the continuing colonisation process. The AFN, representing reserve-based Indian men, assumed a prominent voice in the negotiations, just as they had in discussions leading to the patriation of the Canadian Constitution.

The Charlottetown Accord would have recognised the inherent right of self-government for Aboriginal peoples within Canada and importantly it would have made the right of self-government subject to the Charter. However, the Charlottetown Accord was defeated by referendum on 26 October 1992. At that point it remained uncertain and contested how the Charter would apply to Aboriginal governments. Central to this inquiry, however, is the exclusion of many Aboriginal women’s voices from negotiations during the Charlottetown conference. The following is a discussion of the struggle of NWAC to be able to participate in the negotiations.

1 The Right to Participate

In 1991, the Canadian Government announced that it would provide funding of $10 million for four Aboriginal organisations to attend and participate: the AFN, the Native Council of Canada, the Metis National Council and the Inuit Tapirisat of Canada. NWAC did not receive any funding because women’s issues were included in the consultation with the AFN. In fact, ‘all Aboriginal women’s groups were excluded’ including the National Action Committee on the Status of Women and the National Metis Women of Canada.

the [AFN] and majority of band government leaders agreed with Parliament’s exclusion of Native women’s groups from the conferences. Women and ‘women’s issues’ were negated as irrelevant to the serious political matters of ‘aboriginal and treaty rights’ that the conferences were intended to address.

NWAC protested against the lack of women’s participation and violation of equality rights because of their exclusion from direct funding for constitutional matters, especially given that serious consideration was being devoted to whether s 35 should

100 Green, ‘Balancing Strategies’, above n 20, 151; Monique Deveaux, Gender and Justice in Multicultural Liberal States (2006) 130.
101 McNeil, above n 94, 62.
102 Barker, above n 2, 141.
103 Ibid.
remain exempt from the reach of the *Charter*.\textsuperscript{104} According to NWAC, this was unacceptable because the Indigenous debate would be male-dominated.

While NWAC supported Aboriginal self-government, it protested the Government’s decision on the basis of three arguments: NWAC wanted to be a full participant at the constitutional table, with equal status to the other Aboriginal organisations; NWAC wanted equal funding to advance its position; and NWAC wanted the *Charter* to apply to Aboriginal governments, at least until Aboriginal governments passed their own *Charter* which protected women’s equality rights.\textsuperscript{105}

On 12 March 1992, the Federal Government wrote to NWAC rejecting its complaint and its request for funding on the grounds that the national associations that were selected to attend represented both men and women. NWAC, by contrast, was regarded as a ‘special interest’ group, not truly representative of Aboriginal people, and only concerned about women’s issues.\textsuperscript{106} Also it was suggested that women would be taken care of by the new amendment (Bill C-31) to the *Indian Act*.\textsuperscript{107}

As a consequence of the Government’s denial of NWAC’s right to attend the conference, NWAC initiated proceedings in the Federal Court. In *Native Women’s Association of Canada v Canada*, NWAC argued that Aboriginal women were entitled to equality of participation and equal funding.\textsuperscript{108} They sought

> an order of prohibition to prevent any further disbursements of funds to the four Aboriginal organizations until NWAC was provided with equal funding as well as the right to participate in the constitutional review process on the same terms as the four recipient groups.\textsuperscript{109}

NWAC argued that the Government, in ‘funding male-dominated groups and failing to provide equal funding to NWAC, violated their freedom of expression and right to equality’.\textsuperscript{110} The Federal Court rejected NWAC’s argument.

\textsuperscript{104} Green, ‘Constitutionalising Patriarchy’, above n 77, 110. See also Deveaux, *Gender and Justice in Multicultural Liberal States*, above n 100, 127.


\textsuperscript{106} Barker, above n 2, 141.

\textsuperscript{107} Ibid.

\textsuperscript{108} *Native Women’s Association of Canada v Canada* [1994] 3 SCR 627, [6].

\textsuperscript{109} Ibid [9].

\textsuperscript{110} Ibid [10].
NWAC appealed to the Federal Court of Appeal, which ruled that the Canadian Government had indeed privileged Aboriginal men in constitutional negotiations, contrary to the right to freedom of expression.111 However, NWAC’s remedy was limited to a declaration that the right to freedom of expression had been violated. The case was appealed to the Supreme Court but only after the constitutional negotiations that were germane to the action had concluded. The majority of the Supreme Court found that there was not enough evidence to support the argument that the right to freedom of expression had been violated on the basis of discrimination:

The federal government’s decision not to provide equal funding and participation in the constitutional discussions to NWAC did not violate their rights under ss 2(b) and 28 of the Charter, since s 2(b) does not generally guarantee any particular means of expression or place a positive obligation upon the government to fund or consult anyone.112

The Supreme Court also found there was no evidentiary basis for the submission that women’s perspectives would not be represented by the Aboriginal organisations selected for funding. The Court stated that:

The threat of losing equality rights if Aboriginal self-governments are created without being subject to the Charter was not a present denial of a s 15 right. The outcome of the constitutional discussions could not be predicted and a ‘merely hypothetical consequence’ was no basis for judicial intervention in the constitutional reform process.113

Aboriginal scholar John Borrows observed of the proceedings:

These women put greater trust in the Charter and common law courts to protect them in their rights than they did in their own people. This demonstrates that some First Nations women were very concerned that their rights to self-government were not being protected by the process and substance of the Charlottetown Accord.114

Even though NWAC lost this case, its advocacy and lobbying raised the profile of Aboriginal women’s issues nationally. Public sentiment was turning against the AFN, who the media had painted as ‘advancing sexist attitudes and discriminatory practices against women’.115

Despite its exclusion from the Charlottetown round, NWAC participated in the constitutional discussions through the provinces of Manitoba, Ontario, New Brunswick,

112 Ibid.
113 Ibid 18 (Sopinka J).
114 Borrows, above 27, 45.
115 Barker, above n 2, 142.
Saskatchewan and Quebec. NWAC maintained the position throughout that ‘gender equality was a self-government issue and that any true Indian self-government would not have a problem with the traditional principle of equality between men and women’. According to Mclvor,

without doubt, the challenge of the NWAC, while unsuccessful in court, was nonetheless instrumental in ensuring that Aboriginal communities are not excluded from the protection that Charter rights are supposed to offer to all women in their interaction with all levels of government.

The success of the NWAC’s media and legal advocacy strategy did attract criticism from Aboriginal communities, especially the male political leadership, whose ‘first line of offence’ was that NWAC were ‘destroying our traditions’ and therefore could not claim to be ‘Aboriginal’. NWAC’s position was that it did not define women’s equality to the ‘exclusion or negation’ of the collective right to self-government, treaty rights or the rights of men; but rather that women’s issues and gender were fundamental to the character of their Indian bands because ‘the collective is only as sound as the status and rights of the individuals that comprise it’.

The band councils and Chiefs who preside over our lives are not our traditional forms of government. The Chiefs have taken it upon themselves to decide that they will be the final rectifiers of the Aboriginal package of rights. We are telling you, we have a right, as women, to be part of that decision. Recognizing the inherent right to self-government does not mean recognizing or blessing the patriarchy created by a foreign government.

Following on from this advocacy NWAC was included in and funded to attend subsequent constitutional negotiations, including the Kelowna Accord held on 24–25 November 2005 and the preparatory meetings prior. NWAC stated:

Beginning in early 2004 NWAC participated in the Canada-Aboriginal Peoples Roundtable discussions. Our unprecedented role at this and subsequent Sectoral Follow-Up Sessions were ‘history in the making’. Our presence at these preparatory meetings represented a pivotal first step in achieving a level of recognition that Aboriginal women have been struggling for years to attain. Our main objective is to ensure Aboriginal women and their representative organisations continue to be valued contributors in the joint development of balanced, holistic solutions to the severe

116 Ibid.
118 Green, ‘Taking Account of Aboriginal Feminism’, above n 61, 27.
120 NWAC cited in Borrows, above n 27, 41.
discrepancies in standards of living between Aboriginal and non-Aboriginal people in Canada.\textsuperscript{121}

\section*{C Aboriginal Women’s Charter Litigation}

\subsection*{1 Sections 15 and 28 of the Constitution and the Indian Act}

Although the NWAC litigation was not successful in a legal sense, there have been other examples of how Aboriginal women have been empowered by the \textit{Constitution} to pursue their rights through litigation. Although the litigation strategy has not always been successful and is often costly, the following cases illustrate the way constitutional guarantees such as those contained in ss 15, 28 and 35(4) of the \textit{Constitution} can have an impact upon Aboriginal women’s lives.

In the 1996 decision in \textit{Sawridge Band v Canada}\textsuperscript{122} a challenge was mounted against Bill C-31 amendments on the basis that they abrogated s 35 of the \textit{Constitution}.\textsuperscript{123} The specific issue was the threat to the autonomy of the Sawridge, Ermineskin and Sarcee Bands to develop their Indian band membership rules under Treaty No 8. They argued that the 1985 amendments removed this freedom as well as the freedom of association because of the impact of other reinstates upon the Bands.\textsuperscript{124}

The Ottawa Court of Appeal ruled that, in Aboriginal times and up to the making of the treaties, all of the plaintiffs’ predecessors had no custom of controlling their groups’ membership.\textsuperscript{125} Therefore, the Court held, the status pertaining to an Indian and the determination of who and who is not a member of an Indian band is the purview of Parliament and not a band council.\textsuperscript{126} The Court found that no Aboriginal right had triggered s 35, but in the event that such a right did, it would be deemed ineffective by virtue of s 35(4) of the \textit{Constitution}, which states that men and women are guaranteed Aboriginal and treaty rights equally.\textsuperscript{127}

\begin{enumerate}
\item \textit{Bay v Registrar of Indians} (Unreported, Federal Court of Canada, Trial Division, Mahoney J, 10 March 1976), cited in ibid.
\end{enumerate}
Sawridge demonstrates a number of important things. First, it shows how Aboriginal women can use a constitutional right to equality to challenge the assertion that the right to discriminate against Aboriginal women is a part of Aboriginal peoples’ custom and traditions. According to Green, Sawridge is an example of ‘the tactical and demonstrably illegitimate use of “tradition”, as an instrument of domination’. These arguments undermined Aboriginal women’s cultural identity and their right to equal political treatment. Aboriginal women were able to draw attention to the tension between the state’s obligation to provide equality before the law for men and women under s 35(4) of the Constitution and its failure to extend full citizenship rights to Aboriginal women manifest in its confected framework of Indian identity.

The 2000 decision in Scrimbitt v Sakimay Indian Band Council is significant because it illustrates how s 15 of the Charter operated to prevent Indian bands from introducing discriminatory policies that attempted to circumvent Bill C-31. In this case, the applicant, who was born into the Sakimay Indian Band and was a registered Indian, lost her status after marrying a non-Indian and was denied a vote at Band Council elections. Following the 1985 amendments to the Indian Act, the applicant applied for and obtained reinstatement of her Indian registration. However, the Band Council deleted the applicant’s name from the Band List when it assumed control over membership rules. The Band Council argued that it did not have to re-register the applicant because it had developed its own policies and procedures based on traditional practices, and these included not permitting Bill C-31 Indians to vote.

The Federal Court ruled that the Band’s membership policy violated s 15 of the Charter which guarantees equality before and under the law and the right to equal protection and benefit of the law. The Court found that the Indian Band’s policy reinstated the discrimination that the Parliament had rectified in Bill C-31. Furthermore it was deemed that equality rights are not ‘subject to any conflicting Aboriginal rights under subsection 35(1) of the Constitution Act 1982’. Finally the Band’s conduct was in violation of s 1 of the Charter because it was not consistent with the ‘reasonable limits
prescribed by law as can be demonstrably justified in a free and democratic society'.

Scrimbitt reinforced the position that bands could not design different membership rules based on Bill C-31. Sawridge and Scrimbitt are two examples of how constitutional litigation has worked to prevent Indian bands from operating in a way that excludes an already marginalised group within the collective from being marginalised further and having their cultural identity undermined.

2 Funding and Resources

Aboriginal women have also used s 15 and s 28 rights to challenge government funding decisions that exclude Aboriginal women’s voices from consultation and engagement with government. British Columbia Native Women’s Society v Canada in 2001 involved a challenge to the Federal Government’s exclusion of Aboriginal women’s organisations from funding in relation to a job training program. Furthermore the plaintiffs were not consulted on the Aboriginal Human Resources Development Strategy. The British Columbia Native Women’s Society claimed that the failure to allow sex equality in funding breached ss 6, 7, 15 and 28 of the Charter.

Hargrave P held that there is no requirement for government action in the form of funding. His Honour found that ‘all of the case law and judicial discussions stop short of any concept which might be extended to provide a guarantee of funding, or even a guarantee, specific to or inherent in section 6 of the Charter, that there must be equal funding’. Indeed he suggested that there might be more ‘available and practical political remedies than legal ones’.

However, in Metis National Council of Women v Canada (Attorney General), the Metis National Council of Women (‘MNCW’) initiated legal action after Aboriginal women had been excluded from an Aboriginal job creation program implemented by the Federal Government to address high levels of unemployment. The application claimed MNCW was excluded from all aspects of the program including consultation,

134 Ibid 69.
136 Ibid.
137 Ibid 10.
138 Ibid 65.
139 Ibid 87.
140 [2005] 2 CNLR 192.
141 Ibid [1].
agreement, administration and funding, which it was argued constituted differential
treatment between Metis men and women and violated, inter alia, s 15 of the Charter.142

In Canadian constitutional jurisprudence, the standard for an application based on a
violation of subsection 15(1) was set out by the Supreme Court of Canada in Law v
Canada (Minister of Employment and Immigration) (‘Law’).143 According to the
Supreme Court there are three inquiries that must guide the court:

1. Does the impugned law draw a distinction between the claimant and others on the
basis of one or more personal characteristics or fail to take into account the
claimant’s already disadvantaged position within Canada society resulting in
substantively differential treatment between the claimant or others on the basis of
one or more personal characteristics?
2. Was the claimant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds?
3. Does the differential treatment discriminate in a substantive sense, bringing into
play the purpose of s 15 of the Charter in remedying such ills as prejudice,
stereotyping and historical disadvantage?144

In Metis National Council of Women v Canada (Attorney General), the Federal Court
found that the MNWC had failed to prove that it represented the interests of Metis
women. Moreover, the MNWC had failed to prove to the Court that the Metis National
Council, which won the contract for bilateral agreements, only represented men and a
male standpoint or that it gave preference to male Metis with respect to negotiation,
administration and disbursal of funds.145 According to the Court, the MNWC’s s 15
application failed because the exclusion of MNWC did not have ‘the effect of treating
Metis women different from Metis men’.146

Although these two examples were not successful, the purpose of describing them is to
demonstrate the recourse that is available to Aboriginal women in order to challenge
decisions that are taken to the detriment of women. Inevitably this action compels the
state to change the way it conducts business with Aboriginal women. As Sharon
McIvor contends, the media attention and the mobilisation of women are equally
important as constitutional litigation: ‘winning or losing has not been the yardstick for

142 Ibid.
144 Metis National Council v Canada (Attorney General) [2005] 2 CNLR 192, [37].
145 Ibid [70].
146 Ibid [69].
success. Rather it is our willingness to take action, to protest, to use courts, to use media, and to take advantage of various fora'.

3 Sharon McIvor — Residual Discrimination in the Indian Act

The most recent example of Aboriginal women’s use of constitutional litigation was in 2007, when Aboriginal scholar Sharon McIvor succeeded in having the most discriminatory aspect of Bill C-31 struck down by the Supreme Court of British Columbia. McIvor and her children challenged ss 6(1) and 6(2) of the Indian Act in relation to registration. They argued that the remedial efforts introduced with Bill C-31 continued to discriminate contrary to ss 15 and 28 of the Charter. According to the plaintiffs, the registration regime under the Indian Act continued to discriminate between descendants who trace their ancestry along the paternal line and those who trace their ancestry along the maternal line. Therefore the Indian Act maintained a preference for male Indians who married non-Indians and their descendants over female Indians who married non-Indians and their descendants.

The Court found that s 6 of the Indian Act violated ss 15 and 28 of the Charter. The provision discriminated on the grounds of sex and marital status, against matrilineal descendents born prior to 17 April 1985, and Indian women born prior to 17 April 1985, who married non-Indian men. The Court held that s 6 was of no force and effect in so far as it provided for the preferential treatment of Indian men over Indian women born prior to 17 April 1985, and the preferential treatment of patrilineal descendents over matrilineal descendents born prior to 17 April 1985.

It was found by the Court that the eligibility of a child to register as an Indian, based on their parent’s background, is a benefit of the law in which both the parent and the child have a legitimate interest. The Court held that the plaintiffs’ evidence showed that the inability to be registered with full s 6(1)(a) status because of the sex of one’s parents or grandparents was ‘insulting and hurtful and implies that one’s female ancestors are deficient or less Indian than their male contemporaries’.


McIvor v Canada (Registrar of Indian and Northern Affairs), 2007 BCSC 827.

Ibid [4].

Ibid.

Ibid [7].

Ibid.

Ibid [192].

Ibid [286].
In determining discrimination, the *Law* test was applied, according to which a comparator group is identified in order to compare and determine the extent of discrimination and disadvantage. The comparator group used by the plaintiffs comprised descendants along patrilineal lines, and the Court found they were clearly granted a benefit under s 6 of the *Indian Act* that was denied to the descendants along matrilineal lines.

As a consequence, the Court concluded the registration provisions in s 6 continued to discriminate against Indian women, and were contrary to ss 15 and 18 of the *Charter*. The Court further concluded that the discrimination was significant and not justified under s 1 of the *Charter*.

The Canadian Government appealed to the British Columbia Court of Appeal. On the issue of s 28 of the *Charter*, the Court said that s 28 is an interpretive provision, and ‘does not, by itself, purport to confer any rights, and therefore cannot be contravened’. On the s 15 issue, the Court of Appeal applied the three-prong test established in *Law* to determine whether there had been a breach of s 15 of the *Charter*. As already noted, this test includes identifying the benefit of the law that is at issue and an appropriate comparator group. The Court said that the discrimination was based on sex not marriage, and for the purposes of the case, it was sufficient to consider whether Ms McIvor was discriminated against on the basis of sex. The defendants put forward the argument that there was no discrimination in the sense that the legislation treats everyone the same — *any* person with one Indian grandparent would not be entitled to registration. However, if there was discrimination, it was justified, argued the defendants, ‘by reference to the need to respect vested rights and to effect a smooth transition from a discriminatory pre-Charter regime’. Moreover, if the equal treatment was discriminatory, it was limited by s 1 of the *Charter*, to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

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155 Ibid [160].
156 Ibid [220].
157 Ibid [7(d)].
158 *McIvor v Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153, [64].
159 Ibid [68].
160 Ibid [114].
161 The four-part test in *R v Oakes* [1986] 1 SCR 103 must be applied: (1) is the objective of the legislation pressing and substantial?; (2) is there a rational connection between the government’s
The Court of Appeal considered the defendants’ claim that the legislation was a compromise with several goals, including preserving pre-existing rights. The preserving of pre-existing rights was considered pressing and substantial and the government objective was to create a non-discriminatory regime that also preserved the rights of those given status prior to 1985. The Court said there was a rational connection because the legislation clearly sought to protect these rights. However, the legislation did not satisfy the minimal impairment test, as the legislation widened the existing inequality between those descendants of an Indian mother and those descendants of an Indian father. The legislation did not just preserve the right to Indian status until the age of 21 for the comparator group, as in the 1985 legislation (which would have amounted to minimal impairment), but further advantaged an already advantaged group.

The Court said the legislation did pass the final proportionality test in that it did not amount to an extraordinary prejudice, just that it gave an extraordinary exception for the comparator group: ‘While the 1985 legislation, for reasons of preserving existing rights, postpones the second generation cut-off by one generation for those who had Indian status at the date of its enactment, it does not have permanently discriminatory effects’.

The British Columbia Court of Appeal decided that, because the legislation did not pass the minimal impairment test, it must be found invalid: ‘Sections 6(1)(a) and 6(1)(c) of the Indian Act violate the Charter to the extent that they grant individuals to whom the Double Mother Rule applied greater rights than they would have had under ... the former legislation’. The Court declared that ss 6(1)(a) and 6(1)(c) were, therefore, of no force or effect, pursuant to s 52 of the Canadian Constitution. The order was suspended for one year, until 6 April 2010, to allow Parliament to amend the legislation to make it constitutional. McLvor sought leave to appeal in the Supreme Court of Canada. This was based on the Court’s finding the inequality arose from the fact that

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162 McLvor v Canada (Registrar of Indian and Northern Affairs), 2009 BCCA 153, [121].
163 Ibid [140].
164 Ibid [149].
165 Ibid [161].
grandchildren of Indian males, who married before 1985, were given ‘enhanced status’ over women in the same circumstances and not the discriminatory status rules based on generational lines. On 5 November 2009, the Supreme Court of Canada refused McIvor leave to appeal.166

The McIvor decision was celebrated in Canada as the end of a long battle against discrimination in the Indian Act. It is significant because of the protection s 15 provided to the rights of Aboriginal women. Yet it is a Pyrrhic victory in a way, because it pushes the discrimination back another generation as did the Bill C-31 amendments.167 The frustration of Aboriginal women activists is that Canada is not resolving the problem in terms of the discrimination but rather delaying it for future generations. Thus, from 6 April 2010, the children of the children of Bill C-31 will be denied status and therefore the situation of discrimination is not fully resolved. Also, McIvor’s Supreme Court appeal was dismissed with costs, which can be seen as punishing the litigant. This strategy therefore raises questions about the financial limitations of a constitutional approach to improving the lives of Aboriginal women. It is expensive and there can be extensive time delays. In regard to s 15 challenges, NWAC has recommended that, with the complexity of s 15 litigation plus the long delays and costs, the NWAC Board and the Provincial and Territorial members should assess which issues should be challenged in the future.168 It raises questions about the incompleteness of an entrenchment model. Nevertheless I will argue that constitutional constraints should remain a critical feature of a capabilities approach concerning Aboriginal women in Australia.

IV CONSTITUTIONAL REFORM AND THE RIGHT TO SELF-DETERMINATION

Embedding the capabilities approach within a constitutional framework means that people’s power of choice is central to their lives.169 The power of constitutional entrenchment is that basic capabilities can be afforded a structural and material aspect. In that way, capabilities are converted into legal rights that require government attention and, ideally, funding and resources. Still, this theory of the aim of securing

166 McIvor v Canada (Registrar of Indian and Northern Affairs) (Unreported, Supreme Court of Canada, McLachlin CJ, Abella and Rothstein JJ, 5 November 2009).
constitutional guarantee is complex, as in the example of the *NWAC* decision, where the Supreme Court found that freedom of expression did not require the state to fund NWAC. Conversely, Supreme Court of Canada decisions such as that in *Haida* have found that s 35 does impose on the state a duty to consult with Indigenous peoples in regard to natural resource development affecting Aboriginal land.¹⁷⁰

In a general sense, the 25-year scholarly evaluations of the impact of the *Charter* upon Aboriginal people agree that the *Charter* has given First Nations people leverage to challenge the status quo.¹⁷¹ The primary purpose of most litigation has been to challenge the state based on s 35, with most s 35-rights litigation funded through First Nations organisations. Yet a developing trend has seen *Charter* challenges increasingly conducted by individual status Indians, Metis and non-status Indians and Aboriginal women’s groups, who have very limited funding.

Indeed the *Charter* has resulted in a significant shift in Canadian political culture, especially in regard to women’s organisations, both Aboriginal-specific and general. As Green has argued, the adoption of the *Charter* has changed the way in which federal and constitutional politics are contested by citizens, especially social movements.¹⁷² The mobilisation of the women’s movement during this time has meant that women have been able to consolidate and argue their own values and ideas about how their political communities should be reconfigured.¹⁷³ More importantly, Aboriginal women and women’s groups have been able to collaborate on advocacy for equality rights.¹⁷⁴ Together Aboriginal women’s groups and the women’s movement were able to...

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¹⁷² Green, ‘Balancing Strategies, above n 20, 140.

¹⁷³ Sawer and Vickers, above n 87, 4.

¹⁷⁴ Dobrowolsky, above n 86, 720.
successfully argue for the inclusion of s 15 equality rights and the s 28 equality clause.\textsuperscript{175}

The question of whether the \textit{Charter} has empowered women is one that divides Aboriginal women.\textsuperscript{176} For example, the resistance of male-dominated Aboriginal groups to the \textit{Charter} created a tension with the pro-\textit{Charter} Aboriginal women’s groups. Also, an internal divide emerged within pro-\textit{Charter} Aboriginal women concerning whether the \textit{Charter} should apply not only to federal and provincial governments but also to First Nations governments.\textsuperscript{177} According to Sawer and Vickers, ‘most non-status women supported having the \textit{Charter} apply to First Nations governments at least until they could develop their own parallel laws’; while ‘many status Aboriginal women, by contrast, argued that the \textit{Charter} with its emphasis on individual rights was inconsistent with Aboriginal cultures and would be imposed in a neo-colonial way by white governments’.\textsuperscript{178}

While there have been limited wins and often limited remedies, as in \textit{McIvor}, and the Supreme Court of Canada has often ruled against Aboriginal women, most Canadian Aboriginal women have generally come to view \textit{Charter}-based litigation as a successful strategy.\textsuperscript{179} This is because, even where litigation has failed, it has raised the profile of Aboriginal women’s issues and often thereby precipitated political action to remedy the injustice in question.

The tensions that have arisen as a consequence of the \textit{Indian Act} and constitutional reform have been construed as a dichotomy between individual rights of women and collective Indigenous rights.\textsuperscript{180} Indeed it has been argued that the litigation has impinged upon Indian self-government and threatened the assimilation of Indian people.\textsuperscript{181} Many Aboriginal women challenge this dichotomy as false.\textsuperscript{182} The next

\begin{thebibliography}{99}
\bibitem{175} Green, ‘Balancing Strategies’, above n 20, 146.
\bibitem{176} Green, ‘Taking Account of Aboriginal Feminism’, above n 61.
\bibitem{177} Sawer and Vickers, above n 87, 20
\bibitem{178} Ibid 19.
\bibitem{179} McIvor, ‘Woman of Action’, above n 60.
\bibitem{182} Napoleon, above n 16.
\end{thebibliography}
section discusses in more detail how Aboriginal women in Canada are challenging the right to self-determination in its limited conformation as recognised by communities and the state.

A What ‘Self’ in Self-Determination?

The experience of Aboriginal women in Canada, as in Australia, raises the question of what constitutes ‘self’ in the right to self-determination. Many Canadian Aboriginal women scholars have criticised the rigid configuration of the right to self-determination as being exclusively ‘self-government’, thus inviting such polemic debate as occurred during the constitutional conventions and during Indian Act litigation.183

Aboriginal scholar Professor Val Napoleon has criticised the way the individual/collective dichotomy ‘has been used in Native communities to override the rights of Native women’.184 Napoleon argues that the Aboriginal political discourse of self-determination would be more useful if it ‘were to incorporate a practical and developed understanding of individual self-determination’.185 According to Napoleon, ‘an individual perspective on self-determination could perhaps shift collective self-determination between rhetoric to a meaningful and effective political project that engages Aboriginal peoples and is truly inclusive of Aboriginal women’.186

Similarly at a national level, self-determination could be engaged as a process by which Canadian democratic governance is ‘decolonised’, but inclusive of Aboriginal women. Currently in Canada, self-determination is, in the vein of nation-building, viewed as self-government.187 As Green argues of the Indigenous constitutional rights project in Canada:

These constitutional initiatives do not ... reveal or remedy Canada’s own colonial relationship to Aboriginal peoples. They do not in any practical fashion democratise political power nor do they reveal or remedy the practices that exclude the vast majority of women and of racialised others from meaningful participation in political and economic life. Canada’s question, yet to be answered definitively, is: ‘what ought to be the basis of unity around which a sovereign political entity can be built?’188

183 Sayers and MacDonald, above n 18; Green, ‘Balancing Strategies’, above n 20.
184 Napoleon, above n 16, 31.
185 Ibid.
186 Ibid.
188 Ibid.
Napoleon believes that ‘individual self-determination’ means the freedom and autonomy of individuals to be ‘self-making’ and suggests that a manifestation of a person’s ‘self-determining autonomy is through relationships with others’. Similarly, Green makes the point that what is needed in configuring the right to self-determination is a ‘greater appreciation’ of the importance and ‘centrality’ of the individual to the collective. Green argues that, because the individual and the collective constitute each other, we must argue for a definition of ‘collective self-determination’ that affirms the inclusion of all individuals and the rights to self-determination. These positions have synergy with the capabilities approach as a tool that reconciles this idea of the individual’s ‘self-making’ and collective ‘self-determining’.

In Canada, such an appreciation of the nuances of self-determination has arguably come through the contesting space of constitutionalism. It is more difficult, as is the case in Australia, to develop that appreciation in a legal and political paradigm that is subject to unchecked democratic revision. This is because, in the absence of constitutional guarantees, the locus of Indigenous politics is played out in the legislature. Internal questioning such as, *is this idea of self-determination too gendered or exclusionary?*, is eschewed for a more polemic discourse of the state and the collective.

Of course, the example of Canada reveals that the reality of constitutional entrenchment requires judicial review and consequently may require successful litigation to secure rights implementation. In this vein, it is evident that law and political culture are reshaped by constitutional changes, mostly driven by litigation. In the case of marginalised women such as Indian women, they are the least likely groups to have the confidence or money to consider legal action. For this reason, the Charter is seen by some as an inadequate tool for obtaining social and economic relief from poverty:

The Charter’s focus on rights and freedoms is not matched by attention to equality of opportunities, nor to social and economic minimums for basic human needs ... The guarantees in the Covenant on Economic, Social and Cultural Rights have been largely neglected ... [F]ollowing the liberal ideological adherence to formal but not to actual equality, the prince and the pauper are still equally entitled to sleep under the bridge.
On this view, Aboriginal women have only obtained a ‘theoretical benefit’, which ‘has not translated into equitable treatment or representation as Aboriginal women in either Aboriginal or settler political institutions or policies’.

The lack of intellectual and political space for the vigorous and free exchange of ideas, including critical and oppositional ideas such as feminism, suggests that Aboriginal feminists do not enjoy enough security to participate routinely in the freedoms of speech, thought and association that are considered minimums for expression of citizenship in contemporary Canada.

This criticism about the limitations on Aboriginal women’s freedom of speech, thought and association is also central to Aboriginal women’s experience in Australia.

While the Charter has provided support for equality and anti-discrimination claims, ‘it has been an inadequate tool for obtaining social and economic relief from poverty’. The focus on rights and freedoms is not ‘matched’ by a state focus on equality of opportunity or on ‘social and economic minimums for basic human needs’. This is important to keep in mind, as the capabilities approach is aimed at what people are actually able to do and be after reaching the minimum threshold of capabilities required of a functioning human being.

Here it is useful to look to the situation in South Africa. The South African Constitution, and in particular the Bill of Rights, recognises civil and political and economic, social and cultural rights. In this case the Constitution is regarded as having great transformative potential for women, especially Indigenous women: ‘the Constitution’s incorporation of a host of socio-economic rights, and particularly its transformative potential ... is an important antidote to the axis of gender subordination: namely, poverty, violence and custom’.

Despite tremendous advances, the South African Constitution ‘cannot comprehensively overturn the deep structural inequalities that face women in South Africa today’, although according to Penelope Andrews, it may force those in power ‘not to ignore

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196 Green, ‘Balancing Strategies’, above n 20, 152.
197 Ibid.
these inequalities'. 199 This echoes Aboriginal women's concerns in Canada about the limitations of the transformative power of the Canadian Constitution in the absence of a commitment by the state to implement economic, social and cultural rights in order to address poverty. Moreover, according to Andrews, the 'seductive' possibilities of litigation under the South African Constitution may disproportionately influence women 'to redirect their attention from non-legal transformative strategies that may produce a deeper and more enduring economic, political and social justice'. 200 Thus the legalist approach that seeks accountability of the state through the constitutional project may divert women's attention from those non-legal measures such as political advocacy, partnerships or other community educative strategies that may be more effective, less costly and more immediate in their impact. Of course in pursuing litigation, one of the less examined, unforeseen consequences of constitutional enactment can be a court's approach to interpretation of rights and the challenges that arise when a court is hostile to rights or imports outdated notions of race or sex. 201

It is clear that, without the buttressing of constitutional rights by other educational, legal, cultural or political institutions, the transformative potential of constitutional enactment is limited. This is because a whole raft of resources are required in order to change community and cultural attitudes including patriarchal or traditionalist attitudes within Indigenous communities. Certainly it is the case that it is difficult to achieve equality if fundamental economic, social and cultural rights are not being adequately implemented. These are some of the important limitations that must be kept in mind in terms of advocating a constitutional approach to capabilities.

However, in reflecting on the limitations of a dependence on constitutional enactment, as in a guarantee to women's equality and more broadly, the right to self-determination, it may be that the capabilities approach will moderate some of these limitations. This is because the capabilities approach provides a more holistic approach to how rights are given expression. One of the reasons Nussbaum's capabilities approach is attractive is because it has the practical value of translating capabilities into the vernacular of the ordinary day to day experiences of Aboriginal women not limited to constitutional

200 Andrews, 'Imagine All the Women', above n 198, 4.
rights. It enables women to capture and name what they experience on a daily basis. For this reason, even with the limitations of a constitutional guarantee to equality, the capabilities approach provides an important benchmark from which the to measure how the state provides the political and material support for Aboriginal women's capabilities. This exercise in giving full shape and meaning to rights through capabilities means that we can better judge whether self-determination is being or has been achieved for Aboriginal women; constitutional rights alone cannot provide that. Thus, the capabilities approach can give practical expression to the right to self-determination through an equality guarantee in the Constitution and, meanwhile, fill the gap in Indigenous discourse on women and the right to self-determination in a way that delivers specificity on a local level, enhancing the state and the Indigenous communities knowledge of what women need and aspire to.

B Conclusion

The Canadian experience illustrates how the right to self-determination, given shape by constitutional guarantees, can affect Aboriginal women's lives. Throughout the process of colonisation, the right to self-determination was configured by the state and Indigenous groups through legislation and treaties in a gender-biased way that excluded women. Constitutional reform has been transformative.202 While group-dependent and gendered constraints continue to impact upon the way in which Aboriginal women in Canada view the Canadian Constitution and the opportunities that are afforded to them, those constraints have not prevented Aboriginal women from making choices about and changing their lives. The litigation strategy adopted by Canadian Aboriginal women can be said to have converted opportunity into capability in a way that cannot be experienced by Aboriginal women in Australia. In particular protest and mobilisation has enabled Aboriginal women in Canada to form an identity in the polity as a social movement in a way that has not occurred in Australia. For these reasons, constitutional reform offers a valuable comparison with the Aboriginal and Torres Strait Islander Commission ('ATSIC'), which embodied the right to self-determination in an institutional form. On the Charter experience for Indians, and in particular Aboriginal women's litigation, Borrows has concluded that it has 'helped achieve partial success in our quest for self-determination'.203

202 Green, 'Balancing Strategies', above n 20, 153; McLvor, 'Aboriginal Women Unmasked', above n 117, 112; Borrows, above n 27, 24.
203 Ibid 23.
The lesson from Canada is that entrenching the right to self-determination in its manifestations of self-government and treaty agreements under s 35 has been at times a marginalising experience for Aboriginal women. The patriarchal early treaty agreements were recognised as containing ‘pre-existing rights’ under s 35 and potentially limiting the application the Charter and of ss 15 and 28 to the operations of Indian bands. While international human rights law such as the United Nations Declaration on the Rights of Indigenous Peoples204 has provided an external blueprint for Indigenous peoples’ right to self-determination, the understanding and practice of the right has been more of an internal, indigenous development to Canada. In Australia, by contrast, the development of the right to self-determination has been in a sense more acultural and heavily dependent on international human rights law.

The examples of the Canadian Constitution and ATSIC provide us with deeper insight into two methods of operationalising self-determination: constitutionally or institutionally. Both provide examples of what contributes to or impedes the development of Aboriginal women’s capabilities. ATSIC was unable to satisfy the core areas of functioning for Aboriginal women that would enable a dignified human life. ATSIC failed to marshal the combined capabilities of Aboriginal women through its organisation because it excluded women and marginalised women’s issues. Ultimately ATSIC’s demise was fashioned easily because its existence as a statutory institution was subject to the changeableness of democracy, dependent on political will.

By contrast, in Canada, we have the example of a legal framework that ultimately means that women are required to be included. Constitutional guarantees remain, as Nussbaum argues, the most practical and effective way of implementing the capabilities approach, especially in Australia. The Constitution is the only bulwark against the inconstancy of democratic deliberation. Entrenchment of fundamental rights is critical to the capabilities approach because constitutional reform can secure the minimum standards that are necessary for democratic decision-making in modern liberal democracies. Those standards are basic capabilities that enable human beings to be and do and live a dignified human life.

The example of Canada has raised questions about the lack of economic, social and cultural rights in the *Canadian Constitution*. In the absence of a state commitment to economic and social rights, how can the capabilities of Aboriginal women improve? The example of Canada, where civil and political rights are protected in the *Constitution*, reveals that those rights alone cannot be fully capability-enabling. What may be required are additional economic and social rights that practically improve the lives of Aboriginal women by marshalling state resources to actually address the combined capabilities failure that exists in liberal democracies. Civil and political rights need to be accompanied by the right to good health, adequate shelter (bodily health); being able to laugh, play and enjoy recreational activities (play) as well as participating effectively in political choices that govern one’s life, rights to political participation, free speech and freedom of association (control over one’s environment). The question that guides the conclusion of this thesis is: what type of constitutional reform in Australia is most likely to improve the lives of Aboriginal women? Is constitutional entrenchment alone sufficient to deliver combined capabilities that enable Aboriginal women to live a dignified human life?

V Conclusion

This chapter has described the way in which Aboriginal women in Canada have been able to challenge discriminatory policies using constitutional rights guarantees. The strategy has raised the profile of discrimination against women by the state and Aboriginal communities. The example of Canada also illustrates how representative bodies structurally fail to incorporate Aboriginal women’s interests. This is the fundamental difference between a statutory locus for Indigenous rights advocacy and an entrenchment model.

Although different circumstances exist in Australia and Canada, there are very clear similarities in the way in which Aboriginal women are marginalised on the basis of culture. The constitutional guarantee to equality coupled with the equality provision in s 35(4) of the *Canadian Constitution* have worked together to ensure that Aboriginal women can challenge both discriminatory legislation and policy that excludes them from participation, state consultation and access to monetary benefits as a result of the inherent right self-determination. This provides a wall of protection that Indigenous women in Australia do not have.
However, as Green and others have argued, constitutional recognition is not enough to ensure that the state will address the social and economic inequalities that would make the Charter more meaningful for Aboriginal women. This is where the capabilities approach can provide a supplementary benchmark from which to judge the effectiveness of rights. The capabilities approach gives greater precision to the language of rights. It means that all rights are viewed as capabilities to material and social preconditions that require government action. In Canada the capabilities approach would transform the focus on legal entitlement to an approach which influences and changes the way public policy applies and interprets human rights. The capabilities approach is a more nuanced and precise guide for public policy than utility, as a measurement, in understanding what constitutes a good human life. It can also be used both as a statutory interpretation instrument and a guide for the judiciary in constitutional interpretation.

The question that is raised by the Canadian example and Australia is what self or selves constitutes self-determination? Cultural affiliation may be too conservative to ever ensure that Aboriginal women’s interests are accounted for in a way that enables them to realise self-determination. Of course, Aboriginal women will continue to choose to be affiliated with Aboriginal organisations. Yet Aboriginal women require greater protections to ameliorate the marginalising effect of institutions such as representative bodies. However, an alternative framework of understanding the right to self-determination, such as the capabilities approach, provides a universal lens through which to view rights and policies aimed at addressing disadvantage and a minimum threshold of what capabilities may be required to achieve self-determination.

The question remains: are capabilities protected in the Canadian Constitution? The answer is: partially in the Charter. The Charter does provide a list of entitlements and protections, which are placed ‘beyond majority whim’. This means that Canada has committed to a politics of non-utilitarianism in a way that Australia has not. However, the experience of Aboriginal women in Canada is that, despite the self-determination infrastructure that exists, the state has not committed adequately to

208 Ibid 59.
209 Ibid.
addressing the gaps in health and welfare in Aboriginal communities because it is not compelled to. It is important to consider the need for a constitutional guarantee to equality in Australia with the limitations of constitutional reform in the absence of further economic, social and cultural rights.
CONCLUSION

This thesis has explored the topic of Aboriginal women and the right to self-determination. The right to self-determination is the cornerstone of the normative framework of Indigenous rights. The question asked by this inquiry is whether the right to self-determination, in its current form, is able to facilitate Aboriginal women's capability to freely determine their political status and freely pursue their economic, social and cultural development. It is a question that is rarely asked even though it is critical to the development of Aboriginal women. This thesis has argued that very little attention has been paid to Aboriginal women and the right to self-determination in Australia. This has been to the detriment of their development and their lives as human beings. As a response, this thesis has fashioned an alternative way of understanding the right to self-determination that is more inclusive of Aboriginal women.

I. THE LIMITATIONS OF THE RIGHT TO SELF-DETERMINATION

The first part of this thesis identified that the normative framework of Indigenous peoples’ right to self-determination pays little attention to women. This inquiry has focused on the discourse of three domains that have been critical to the enumeration of Indigenous peoples’ right to self-determination over time: international law, the state and the Aboriginal political domain. Each of these levels has failed to take into account the challenges, hopes, aspirations and needs of Aboriginal women. The favoured language of self-determination has had limited effect on Aboriginal women’s lives. This study has shown that, at the levels of international law, the state and Aboriginal politics, self-determination is read as: self = Aboriginal collective.

The body of literature on the right to self-determination at each of these levels also illustrates a failure to differentiate between the life experiences of Aboriginal men and Aboriginal women. This reflects the patriarchal nature of the three domains. Consequently the ‘self’ in self-determination is also constructed as the Aboriginal male: self = male. The reductionist way the Indigenous right to self-determination has been articulated at each level has manifested in Aboriginal women’s status today as the most vulnerable and marginalised group in Australian society.
The flaw in this traditional approach to Indigenous self-determination is not that Aboriginal people pursue their fundamental human rights and freedoms collectively, a legal understanding that the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP") now animates in international and domestic law.\(^1\) Rather the problem stems from the fact that self-determination is state-centric — it is located primarily between Indigenous peoples and the state.

In regard to international law, the statist nature of the right reflects its historical development, as mapped in Chapter One. It also reflects the important role that international human rights law has played in the political and legal advocacy of Indigenous peoples globally. Despite the space that Indigenous peoples have created for themselves within the UN system, self-determination at international law remains state-based. The state-centric form embedded in the UNDRIP restricts the right to self-determination to an internal norm practised within a country’s borders. It precludes secession and promotes the creation of Indigenous institutions within the state, respecting the territorial integrity of the state, democracy and the rule of law (although UNDRIP does permit maintenance of traditional cross-border relationships between Indigenous groups). As Chapter One demonstrated, because these structural questions have dominated international law’s consideration of Indigenous rights, no thought has been given to Aboriginal women as individuals constitutive of the collective. Rather they have been drawn as vulnerable and requiring state protection.

Domestically, the state-centric nature of the right reflects the adversarial nature of Indigenous politics in colonial and post-colonial eras. The state-centric focus of the right to self-determination has meant that the language and the concept in practice have been skewed. The patriarchal nature of Western public institutions (both internationally and domestically) has inculcated Aboriginal political culture and institutions to the detriment of Aboriginal women’s rights and status in Aboriginal communities. As Chapter Two described, Aboriginal women were excluded from the development of land rights legislation and land councils. Similarly in Chapter Six, Aboriginal women in Canada have

been neglected by the state and marginalised by the operation of the *Indian Act*; in practice, the ‘self’ is equal to male.

The third level explored the Aboriginal domain and revealed that the political strategy of self-determination adopts a universal approach undifferentiated by sex. In approaching this analysis, there was no literature in Australia that questioned the current form of self-determination as it relates to Aboriginal women in Australia. For example, as Chapter Five highlighted, there is no gender analysis of the Aboriginal and Torres Straits Islander Commission’s (‘ATSIC’) period of existence, the most recent historical exercise in self-determination in Australia. Similarly in Chapter Three, the limited literature about Aboriginal women and self-determination was based on an assumption that Aboriginal women are aligned with Aboriginal men and the Aboriginal rights movement. In Aboriginal political statements on self-determination there is no mention of women or differentiation between Aboriginal men’s and Aboriginal women’s aspirations or goals. ‘Indigenous peoples’ is taken as a universal and singular standpoint for the purposes of political strategy. This assumption means that there has been no need to interrogate self-determination in terms of what it means to women and what impact it has upon their lives. According to this approach, it is more effective to engage with the state if Aboriginal men and women are united.

However, to suggest that the construction of Indigenous peoples as a ‘collective’ is only for political strategy fails to appreciate the subtle and insidious way in which sex discrimination operates to marginalise and exclude women. While the primacy of race loyalty and communal responsibility is justifiable and understandable, less scrutinised is the way in which women often sacrifice their own well-being and safety for the greater good, particularly because of the power of the harrowing narratives about the emasculation of Aboriginal men and their displacement as a result of colonisation. Deploying narratives that insist Aboriginal women adopt an allegiance to their race over their gender — narratives which influence the decisions women take in response to instances of violence and sexual abuse — calibrates ‘self’-determination in favour of the perpetrator of violence, who is almost always a man.
II Capabilities

Having identified some of the problems with how the right to self-determination is currently understood, the second part of the thesis turned to the question of an alternative framework to counter the marginalisation or exclusion of Aboriginal women. Thus the next section of the thesis set about fashioning a new approach, explaining how it could be implemented and why it was complementary to Aboriginal culture and Aboriginal ideas of self-determination. In selecting an appropriate model to refashion self-determination, I was motivated by the need to render self-determination more inclusive of Aboriginal people in a way that Aboriginal people are more likely to achieve self-determination than maintaining the current impersonal, standardised normative framework.

Given the exigencies of gender I have raised in this thesis, I identified the capabilities approach as the most useful framework in which to reconfigure the right to self-determination. The capabilities approach as articulated by Martha Nussbaum is a novel way to understand the right to self-determination. The capabilities approach has only been considered a few times in the context of Aboriginal Australia but never in the context of gender and Aboriginal women’s issues.

There are two ways that the capabilities approach is useful. First, it is a valuable way to (re)learn the language of the right to self-determination. The second way that it indicates the significance of is a constitutional guarantee to sex equality. This is most likely to enhance Aboriginal women’s ability to achieve a threshold of capabilities necessary to function as a dignified human being and therefore more likely to realise self-determination.

As a first step the capabilities approach would involve presenting Nussbaum’s capabilities list to individual Aboriginal women and men in communities to elicit a new conversation about what self-determination means. This would enable us to imagine what it is for Aboriginal women to achieve self-determination without marginalising Aboriginal men. As explained in Chapter Four, the capabilities approach can be tailored to the specific, geographical needs of communities across Australia, reflecting in a more nuanced and tactile way what it means to live as an Aboriginal person in an Aboriginal community. The language of capabilities gives texture to the discourse of international human rights law.
And while I have used the term ‘Aboriginal political domain’ as a helpful description in my argument, there is a tension between those who drive the agenda and those in communities who believe the discourse of the political domain is detached from the daily realities of life across Australia.

To give an example of how the capabilities approach can be useful in understanding how to achieve self-determination, let me return to the situation of Aboriginal women in Australia under the Northern Territory Emergency Response, or the ‘Intervention’, referred to in Chapter Three. The Intervention was the Commonwealth Government’s response to the findings in the report ‘Little Children Are Sacred’ published in 2007. The report found evidence of widespread violence and abuse of Aboriginal children and women in remote Northern Territory Aboriginal communities. The Commonwealth Government took a number of measures to address the situation. The Intervention was controversial because some of the measures were perceived to be aimed at the diminution of Aboriginal land rights and control over Aboriginal land and not aimed at child protection. Also, the failure to consult Aboriginal communities was understood as a breach of self-determination. In summary the Aboriginal domain heavily focused its objections on the changes to land laws. Those in favour of the Intervention emphasised children’s rights and women’s safety.

The capabilities approach provides a middle ground in this contentious debate. It is able to traverse the polemic to provide a more textured and nuanced response to the Intervention. The evidence of high levels of violence in Aboriginal communities and the way in which the lives of most, if not all, Aboriginal women in these communities are affected by violence, mean that Aboriginal women do not reach the threshold of a life worthy of a human being. This has not only been the result of the state’s failure to provide law and order and basic social and economic needs of people in these Aboriginal communities, but it has also occurred in a geographical territory that has the largest Aboriginal land ownership in Australia. In other words, it has occurred in the Northern Territory, an area

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with more Aboriginal controlled land and autonomy or ‘self-determination’ than any other place in Australia.

The dominant Aboriginal response to the Intervention has been to argue that the way to arrest the problems of social and economic disadvantage is to provide more infrastructure and social and cultural support; and to permit this to be controlled and delivered by Aboriginal people. The assumption is that more resources alone will not deliver improved outcomes — there must be Aboriginal control. Yet this traditional approach to self-determination obscures the fact that the individual person, the Aboriginal woman or Aboriginal man, is constitutive of the Aboriginal collective. Control and autonomy may be one factor in improved socio-economic outcomes but it cannot come at the expense of a more holistic and nuanced way of measuring what benefit is. Is benefit measured by the number of Aboriginal-controlled organisations? Or is it measured by an understanding of what any Aboriginal person in any Aboriginal community is able to be and do as a functioning human being?

The capabilities list provides guidance as to what a dignified humane life may look like. As illustrated in Chapter 4, this could be as diverse as: coin-operated washing machines in women's centres; recreation activities for the elderly in city gymnasiums; traditional birthing centres; sober centres; banning of drunkenness from all living areas in communities to make them safe places for women and children; vacation programs for communities so children could experience a holiday atmosphere; women assisting in the design of community houses; an increase of women's health programs such as pap smears, breast cancer awareness and pre- and post-natal education; parenting classes; advice on how to do job interviews and CVs and how to enter the workforce; market gardening; and adult education, including numeracy and literacy.3

So long as routine interpersonal violence continues in the daily life experience of Aboriginal women, they can never reach the threshold of what is required to live a dignified human life. Self-determination can never be achieved if half the population is left behind. Dealing with violence cannot wait until the state has decided to deliver on the fundamental

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political aspirations of the Aboriginal domain: a treaty agreement, return of traditional lands and resources, compensation.

Aside from violence, the capabilities approach also provides a new lens through which to understand the traditional institutional approach to self-determination in Australia. The institutional approach to self-determination dominates the way Aboriginal groups organise themselves, with over 6000 Indigenous corporations currently in Australia. In Chapter Five, the institutional approach was revealed as limited in its ability to facilitate self-determination for Aboriginal women. This is because it is state-centric and, in its adversarial positioning with the state, often ill-suited to conversations about expansive notions of self-determination. Of all the voluminous analysis examining the abolition of ATSIC, no sustained attention has been paid to the challenges women faced in dealing with ATSIC, despite the fact that this raised serious questions about how to develop a future representative body.

ATSIC’s failure to give due account to gender representation resulted in policy design, policy decisions and political representation that were detrimental to Indigenous women and arguably contributed to ATSIC’s decline. A national representative body like ATSIC will struggle to be capability-enabling in the absence of constitutional guarantees. This is because gender and gender considerations play a critical role in whether an organisation contributes to or impedes the development of capabilities. This thesis has therefore argued that Aboriginal women’s interest is not best served in the institutional form without parallel protections such as constitutional rights.

Stronger protections such as a constitutionally entrenched equality right are needed in order to require organisations and the state to take into account Aboriginal women’s interests and voices when it comes to the decisions that affect their lives. This is consistent with the capabilities approach, which acknowledges that some fundamental capabilities must be entrenched in order for the state to provide the political and material support to deliver citizens the minimum threshold required for a dignified human life.

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As I conclude this thesis the new national Indigenous representative body in Australia has been unveiled, called the National Congress of Australia’s First Peoples. It is formed as a company limited by guarantee. In its initial consultations to determine the Indigenous community’s ideas for a new national representative body, a model that had equal gender representation received widespread community support. The final version of the national representative body, as a corporate structure, was modelled on the Canadian Assembly of First Nations. It has three chambers: service delivery organisations and peak bodies; sectoral organisations such as land councils; and individuals including academics. The role of the company is not to provide services to Aboriginal communities, but to be a ‘leader and advocate for recognising our status and rights as Aboriginal and Torres Strait Islander peoples’. The Congress is to consult with state and federal governments on policy development.

In the dissemination of information leading up to the Congress’s incorporation and the report of the Aboriginal and Torres Strait Islander Social Justice Commissioner on the Congress, it was stated that there would be equal numbers of men and women in the structure. However, the Constitution of the incorporated Congress reveals that the ‘mandated’ gender equality is only aspirational. Gender equality was regarded to be a ‘risk’ to the company model. The first national Congress has not yet been convened, but it appears that the new model does not respond to the concerns I have raised about Aboriginal women and ATSIC.

The failure to secure clear rules and a proper selection process pertaining to gender equality is problematic. If the National Congress fails to deliver equality in its leadership this will inevitably skew the way in which decisions are made and policy is formed. Moreover it will maintain the dominance of the narrative in the Australian polity that Aboriginal leadership is male. This will alienate Aboriginal women from the structure — which is

7 Ibid 26.
8 National Congress of Australia’s First Peoples, above n 4.
9 Copy on file with author.
designed to represent them — and deter them from pursuing leadership opportunities in the Congress. As yet undeveloped is a policy to promote and support Aboriginal women joining the Congress; as the *ATSIC Review* revealed, basic information such as how to fill out the membership application form, is critical to participation and critical to Aboriginal women’s rights to participate effectively in political choices that govern their daily life, free speech and freedom of association.

### III  **Constitutional Reform**

The capabilities approach only gets us to a certain point in terms of improving the lives of Aboriginal women. It can provide a new language in which to understand self-determination, but can it compel states to pay attention to Aboriginal women? The experience of Aboriginal women in Canada with constitutional guarantees is constructive because it appears that they have fared better than Australian Aboriginal women in terms of control over their environment, affiliation and practical reason. The strengthening of these capabilities can be linked to the process of constitutional patriation and the consequent environment of constitutional contestation, as discussed in Chapter Six.

In Australia, the main thrust of the Aboriginal constitutional rights campaign is recognition of an Indigenous rights provision in the *Australian Constitution*. In Canada, s 35 of the *Canadian Constitution* recognises Indigenous rights, and Aboriginal women including the Native Women’s Association of Canada (‘NWAC’) have been supportive and argued for those rights. The constitutional guarantee to equality in the *Canadian Charter of Rights and Freedoms* coupled with the equality provision in the *Canadian Constitution* have combined to provide Aboriginal women with a platform from which to challenge discriminatory legislation and policies that exclude them from participation, consultation and access to opportunities as Indian women. I was interested in how constitutional protection has given Aboriginal women in Canada a form of protection that Aboriginal women in Australia do not have. The differences in political capabilities are stark.

Constitutional reform is vital for the future of Indigenous Australia. The utilitarian ethic of liberal democracies like Australia means that Aboriginal peoples’ political and legal concerns are dwarfed. Two per cent of the Australian population are tasked with the epic
struggle of convincing Australian parliaments of the utility of passing legislative measures or adopting policies that benefit Aboriginal people alone. When such measures and policies have been taken, it has often been through the use of special measures under the Racial Discrimination Act 1975 (Cth), which permit the state to effectively discriminate in favour of Aboriginal people in order to achieve equality. However, special measures are only for a temporary period, and are supposed to cease once their objectives have been fulfilled. Even where more permanent measures are put in place — the Native Title Act 1993 (Cth) or the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth), for instance — history demonstrates how easily these rights can be abrogated or repealed. For these reasons, constitutional reform remains the central pursuit of what Aboriginal people call ‘unfinished business’. In order to have sustained attention on the chronic disadvantage that is suffered in Aboriginal communities across Australia, Aboriginal issues need to be taken out of the political arena. Parliamentary sovereignty means that the legislative agenda of one political party can be easily amended or abolished by the next and, with three-year political terms in Australia, Aboriginal rights are insecure and uncertain.

Despite Aboriginal peoples’ preference for constitutional reform, the current temperature in Australia, in terms of human rights protection, is for statutory recognition in a Charter of Human Rights or Human Rights Act. The preference for statutory recognition over constitutional recognition of rights reflects a number of characteristics of the Australian polity.

First it is a conservative polity, demonstrated by the few times in Australian history that the Australian Constitution has successfully been amended. Eight out of 44 referendums have succeeded since 1901 and the successful amendment proposals were those that attracted support from both political parties. Therefore it is accepted political wisdom that in order to change the Constitution, amendments require bipartisan support. Thus the preference for a statutory model reflects the resignation of many rights advocates that a constitutional charter is virtually impossible to achieve. One of the preferred approaches is to adopt the

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Canadian method of maintaining a statutory Bill of Rights for two decades and eventually, once the population is comfortable with rights discourse, entrench fundamental rights and freedoms in the *Constitution*.\(^\text{12}\)

Secondly, Australian interest in a statutory model of rights reflects the dominance of Westminster parliamentary sovereignty and the prevailing sentiment in Australian parliaments that their power should not be impinged upon by constraints like a Charter of Rights.\(^\text{13}\) In fact the tenor of the Charter of Rights movement in Australia is to insist that having a statutory Charter will have very little impact upon parliaments’ capacity to make laws. For example, parliaments would still be empowered to pass discriminatory laws against Aboriginal people, so long as they acknowledged what they are doing.

Despite the contemporary fashion for statutory rights protection, there is a developing consensus in Australia that the current *Constitution* is ill-suited to Australia’s modern democracy.\(^\text{14}\) This was most recently discussed in the Governance stream of the Federal Government’s 2020 Summit and by the Local Government Association of Australia.\(^\text{15}\) Indeed the most recent political bipartisan agreement with respect to Aboriginal recognition in the *Constitution* is for the preamble to the *Constitution* to be amended to recognise Aboriginal and Torres Strait Islander peoples.\(^\text{16}\)

### IV EQUALITY

Supporting a guarantee to equality in the *Constitution* over recognition of Indigenous peoples is controversial. The primary object of this inquiry in advocating constitutional reform is to alter Aboriginal women’s status as the most marginalised and vulnerable group

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living in Australia today. I argue that this is more likely to be achieved through a constitutional guarantee of equality than by an Indigenous right.

Constitutional recognition is about putting the capabilities framework into practice. While the capabilities approach, especially a list of capabilities, demonstrates which capabilities should be delivered to people, most versions fail to explain through which institutions these should be delivered. Nussbaum’s capabilities approach is that constitutional protection of fundamental rights is central to securing capabilities because entrenchment is required in order for the state to provide the material support necessary for the realisation of rights.

There has been some discussion by the judiciary in the United States of how a capabilities framework would work in the context of the US Constitution. It is suggested that the capabilities approach could provide not only a canon for statutory interpretation but also an interpretative guide for the judiciary in its constitutional work. This would mean the efficacy of the capabilities approach as a constitutional interpretative framework would often depend on the interpretation method of the judge.

A useful model of equality entrenchment in the Australian context would be one based on the Canadian Charter’s model of equality:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
   (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The Canadian guarantee was adopted as the model for a constitutional guarantee by the Australian Law Reform Commission (‘ALRC’) in its 1994 inquiry Equality Before the

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18 Wood, above n 20, 423.
The ALRC inquiry argued that a constitutional guarantee would signify the importance of equality to the Australian polity. This is because the guarantee would not be easily amended or repealed unlike an ordinary Act of Parliament. The ALRC acknowledged that there are limits to the judiciary’s ability to protect individual rights in the face of express legislation to the contrary or in the absence of a constitutional basis for doing so. The ALRC argued that, based on the Canadian model, an Australian guarantee should include: equality before the law, equality under the law, equal protection of the law, equal benefit of the law and the full and equal enjoyment of human rights and fundamental freedoms. This would apply to all aspects of public action and to all matters (public and private) regulated by law. It would render inoperative laws, policies and programs inconsistent with equality: any law, policy, program, practice or decision which was inconsistent with equality on the ground of gender would be inoperative to the extent of the inconsistency.

There are limitations to the constitutional approach. Contestation requires judicial review and litigation. This has proved a difficult pathway for Aboriginal women in Canada because, even though it has provided Aboriginal women with capacity to challenge patriarchal legislation and policies, it is costly. As noted in Chapter Six, given the complexity of litigation based on s 15 of the Canadian Charter, coupled with the cost and time delays, future litigation will require careful planning and decision-making. In addition, the stress of litigation and the experience of some Aboriginal women who have been marginalised and intimidated as a result is a deterrent.

The other significant limitation raised by Aboriginal women scholars is the absence of entrenched economic, social and cultural rights in the Canadian Constitution. As discussed in Chapter Six, in the absence of a state commitment to economic and social rights it is difficult to understand how the Constitution alone can improve Aboriginal women’s capabilities. As in Canada, basic civil and political rights alone are not wholly capability-enabling. Civil and political rights need to be accompanied by the right to health, adequate

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20 Ibid pt II, [4.16].
21 Ibid [4.3].
22 Ibid [4.4].

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shelter (bodily health); being able to laugh, to play and enjoy recreational activities (play) as well as participating effectively in political choices that govern one’s life, rights to political participation, free speech and freedom of association (control over one’s environment). It is important to keep in mind though the discussion in Chapter Six that South Africa’s constitutionalising of socio-economic rights has had limited effect, so far, in reducing social, cultural and economic structural inequality.23

Does the Canadian Constitution adequately promote and protect capabilities? The answer is that they are partially protected; despite the limitations, entrenchment is more capability-enabling than the institutional, non-constitutional approach in Australia. Aboriginal women in Canada have demonstrated how constitutional rights have permitted them to challenge the dominant, male-dominated, reductionist configuration of the right to self-determination. As Chapter Six has identified, the constitutional protection of rights has empowered Aboriginal women to re-shape the way self-determination is framed and alter the conversation about self-determination. The right to self-determination cannot be exercised wholly in isolation of shared, common community values to equality between the sexes and equality before the law. It compels an intra-cultural conversation to be had, individual to individual as well as individual to the collective.

Although this thesis has problematised the statist nature of the right to self-determination as promoting a patriarchal form of self-determination, the benefit for Aboriginal women in Canada has been legal and non-legal transformative power of constitutionalism. This was discussed in Chapter Six in regard to the experience of Aboriginal women after the patriation of the Canadian Constitution. While constitutionalism can be a constraint, as the path that is available is limited by the constitutional text and judicial interpretation, it can also be a galvanising and channelling force for the community. Sharon McIvor alluded to this positive aspect of constitutionalism in noting that the measurement of the success of

NWAC’s litigation in Canada included the extra-legal benefits of protest, media coverage, access and identity.24

This thesis can be considered as a contribution to critical debates over the applicability of the capabilities approach to Indigenous peoples and groups. While this thesis has addressed the criticism that the capabilities approach is ill-suited to groups and collective rights, it argues that this critique is not fatal to the utility of the capabilities approach. Although Nussbaum’s capabilities approach is not the only answer to the problems faced by Aboriginal women, it is a practical tool that can be adapted without compromising the integrity of communal rights or the collective. It remains difficult in Aboriginal and Torres Strait Islander communities for women to write and speak on gender issues, given the strong conditioning forces of culture. This thesis aims to fill part of the substantial gap in the literature in Australia on Aboriginal women and the right to self-determination.

24 See Chapter Six at n 147.
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