# FOREWORD

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It is a privilege to introduce the thematic for this issue, 'Dynamics of Power within Criminal Law'. The criminal legal system – expansively defined to include the surveillance and policing of some communities – is so often the site of both the most insidious forms of disempowerment, and, as the activists who established the Aboriginal Legal Service ('ALS') showed, the greatest opportunities for communities to exercise power and self-determination to make change.

At a moment when political forces across all Australian jurisdictions are setting justice policy on a dangerous and regressive trajectory which adopts mass imprisonment and hyper-criminalisation as inevitable, if not desirable, features of our society, it is timely to reflect on the role that we should play as lawyers in advancing justice of a substantive kind.

While the tools used by organisers, activists and lawyers to advance systemic change are not new, it is only relatively recently that theories of movement lawyering have been developed.[1] For present purposes, I will define movement lawyering as lawyering that supports and advances social movements (defined as the building and exercise of collective power), led by those most directly impacted, to achieve systemic institutional and cultural change.

Aboriginal and Torres Strait Islander Legal Services ('ATSILSs') were established in a critical act of self-determination more than 50 years ago arising out of the Black Rights protest movement of the 1960s and 1970s, and might be seen as one of the most significant examples of 'movement lawyering' in post-settlement Australia's short history.

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1 See, eg, William P Quigley, 'Ten Ways of Looking at Movement Lawyering' (2020) 5(1) *Howard Human and Civil Rights Law Review* 23; Eduardo RC Capulong, 'Client Activism in Progressive Lawyering Theory' (2009) 16 (Fall) *Clinical Law Review* 109; Lilian Burgess, Giulia Marrama and Suvradip Maitra, 'Movement Lawyering: An Old Ethos and New Theory for First Nations' Sovereignty' (2022) 96(7) *Australian Law Journal* 510; Scott L Cummings, 'Movement Lawyering' (2020) 27(1) *Indiana Journal of Global Legal Studies* 87 <https://doi.org/10.2979/indjglolegstu.27.1.0087>; Anna-Maria Marshall and Daniel Crocker Hale, 'Cause Lawyering' (2014) 10 *Annual Review of Law and Social Science* 301 <https://doi.org/10.1146/annurev-lawsocsci-102612-133932>; Christos Boukalas, 'Politics as Legal Action/Lawyers as Political Actors: Towards a Reconceptualisation of Cause Lawyering' (2013) 22(3) *Social and Legal Studies* 395 <https://doi.org/10.1177/0964663912471552>; Veryl Pow, 'Rebellious Social Movement Lawyering against Traffic Court Debt' (2017) 64(6) *UCLA Law Review* 1770.

## I THE ABORIGINAL LEGAL SERVICE: A PROUD HISTORY WITH PROFOUND EFFECTS ON ACCESS TO JUSTICE FOR ALL

The ALS has proudly served Aboriginal and Torres Strait Islander communities for more than 50 years.

The establishment of the ALS is one chapter in a long history of resistance. Its story is both a tangible manifestation of self-determination and a living example of how all Australians have benefited from the activism, advocacy and innovation of Aboriginal and Torres Strait Islander people. The ALS was, after all, the first free legal service in Australia, and one of the first Aboriginal community-controlled organisations, paving the way for ATSILSs, Aboriginal Medical Services, legal aid commissions and community legal centres ('CLCs') to be established across the continent.

Like so much of Australia, Redfern in the 1960s was stained with police discrimination and brutality against Aboriginal and Torres Strait Islander people. Police were enforcing nightly curfews that targeted Aboriginal people, subjecting them to arbitrary, violent arrests and detention.

On the occasion of the 50-year anniversary of the ALS, Gary Foley, one of its founders, penned the essay 'White Police and Black Power: The Origins of the Aboriginal Legal Service'.[2] Foley describes how, in 1969, young Aboriginal activists, including Paul Coe, Gary Williams, Billy and Lyn Craigie, Bob and Kaye Bellear, along with Foley, began monitoring police harassment of the community in Redfern, including raids against the Empress Hotel, a Koori pub. Their efforts were met with increased surveillance: as described by Roberta (Bobbi) Sykes, the 'group of community activists who were in the process of setting up a range of services to the Black community ... attracted the attention of ASIO and the police'.[3]

The history of the ALS matters for many reasons, some of which I will address here. Firstly, its establishment as a community-controlled organisation is a critical manifestation of self-determination in action. Foley describes the ALS as 'a revolutionary body in the sense that it was a completely new concept of Aboriginal organisation. Previously virtually all organisations and agencies that purported to exist for the "benefit" of Aboriginal peoples had been (and were still then) dominated and controlled by white administrators and white staff.'[4] The ALS was borne of the Australian Black Power movement, described by Sykes as the 'power generated by people who seek to identify their own problems and those of the community as a whole, and who strive to take action in all possible forms to solve those problems'.[5]

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2 'White Police and Black Power: Part 1', *Aboriginal Legal Service* (Web Page, 9 July 2021) <https://www.alsnswact.org.au/white_police_black_power_1> ('Foley Essay Part 1').

3 'White Police and Black Power: Part 5', *Aboriginal Legal Service* (Web Page, 10 September 2021) <https://www.alsnswact.org.au/white_police_black_power_5> ('Foley Essay Part 5').

4 'Foley Essay Part 1' (n 2).

5 'White Police and Black Power: Part 2', *Aboriginal Legal Service* (Web Page, 16 July 2021) <https://www.alsnswact.org.au/white_police_black_power_2>.

There has been significant progress made – at least on a formal level, despite persistent challenges in implementation in practice to date[6] – in recognising that Aboriginal communities and organisations are best placed to lead solutions and improve outcomes for their own communities. This is not least of all through the historic signing of the 2020 National Agreement on Closing the Gap ('National Agreement').[7] The National Agreement recognises, among other things, that:

- Better life outcomes are achieved when Aboriginal and Torres Strait Islander people have a genuine say in the design and delivery of services that affect them;[8] and
- Structural change in the way governments work with Aboriginal and Torres Strait Islander people is needed to overcome the entrenched inequality faced by too many Aboriginal and Torres Strait Islander people so that their life outcomes are equal to all Australians.[9]

By signing the National Agreement, all Australian governments have committed to sharing decision-making with Aboriginal and Torres Strait Islander people represented by their community-controlled organisations. Sharing decision-making, by definition, requires a sharing – and a transfer – of power. As the National Agreement explicitly recognises, this would previously have been considered a radical proposition, and represents 'an unprecedented shift in the way governments work, by encompassing shared decision-making on the design, implementation, monitoring and evaluation of policies and programs to improve life outcomes for Aboriginal and Torres Strait Islander people'.[10]

The National Agreement also introduced targets to reduce the over-representation of Aboriginal and Torres Strait Islander adults and children in contact with the criminal legal system, and to reduce the disproportionate rates of domestic and family violence that impact Aboriginal communities.[11] As noted above, however, we have not yet seen sustained progress towards these modest targets due to the failure of governments to 'fully grasp the nature and scale of change required to meet the obligations they signed up to under the agreement',[12] with the Productivity Commission finding 'evidence of a failure [by governments] to relinquish power and the persistence of "government knows best" thinking'.[13]

Despite establishing a framework for implementing the fundamental structural changes required to bring socio-economic outcomes for Aboriginal and Torres Strait Islander people into line with those of the general population, as long as

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6 See, eg, Productivity Commission (Cth), *Review of the National Agreement on Closing the Gap* (Study Report, January 2024) vol 1 <https://www.pc.gov.au/inquiries/completed/closing-the-gap-review/report>.

7 Closing the Gap, *National Agreement on Closing the Gap* (July 2020) <https://www.closingthegap.gov.au/sites/default/files/files/national-agreement-ctg.pdf> ('*National Agreement*').

8 Ibid 2 [6].

9 Ibid 2 [6], 3 [15].

10 Ibid 2 [7].

11 *National Agreement* (n 7).

12 See 'The National Agreement on Closing the Gap Is an Opportunity Governments Cannot Continue to Waste' (Media Release, Productivity Commission (Cth), 7 February 2024) <https://www.pc.gov.au/inquiries/completed/closing-the-gap-review/report>.

13 Ibid.

criminal legal systems remain a tool leveraged by political actors to maintain the current social and political status quo, it is incumbent on lawyers to continuously reflect on the institutions and processes of the legal system and their role in it. This kind of reflexive practice, accompanied by remedial action, is crucial to addressing the systemic racism and paternalism that deprives Aboriginal and Torres Strait Islander peoples of the ability to practice self-determination, and share power, in developing and implementing their own solutions.

To this end, Foley's essay also provides an example of how non-Aboriginal people can wield their power and privilege to stand in solidarity with Aboriginal communities. The Redfern activists quickly enlisted Professor Hal Wootten, Dean of the University of New South Wales Faculty of Law, and subsequently appointed as a Supreme Court Judge in 1971, to their cause. As an eminent member of the legal profession, Professor Wootten 'provided a thin veneer of protection from the police harassment so prevalent at the time' and supported establishing a shopfront legal assistance service for the Aboriginal community in Redfern.[14]

In turn, Professor Wootten brought on a number of other prominent lawyers. The Redfern activists were supported by several white volunteers, largely young law students, including Alan Cameron, Eddy Neumann, Peter Stapleton and more. At night, they attended local hotels to confirm the claims made by Aboriginal people and see whether their presence would deter police from unfairly arresting large numbers of Aboriginal people. The claims of abuse and intimidation by police were easily confirmed. The Redfern activists and their allies helped arrange bail applications, interview Aboriginal people in lock-up, and prepare defence strategies for Aboriginal people who had been arrested.

Foley's essay highlights the fact that everyone, including non-Aboriginal people, has benefited from the activism and advocacy of Aboriginal communities. As Foley writes, the 'repercussions of what this small group of Redfern activists achieved were felt nationwide as Aboriginal Legal Services based on the original Redfern model sprang up all over Australia during the subsequent decade'.[15] The ALS opened its doors to a single shopfront office in Redfern in 1970 and spread throughout the rest of the state. By 1974 there was an ATSILS in every state and territory throughout Australia. This had flow-on effects for other, generalist legal services which make up a significant part of today's legal assistance sector landscape, currently comprised of seven ATSILSs, eight legal aid commissions, 16 family violence prevention legal services and approximately 179 CLCs.[16]

Yet, as they so often are, the risks and the consequences of getting these reforms and advances across the line were borne by Aboriginal people. Recognising this is the first step but this proud history of changing unjust systems through strength, protest and resistance should also galvanise non-Aboriginal people and organisations to work in solidarity with Aboriginal and Torres Strait Islander

14 'Foley Essay Part 5' (n 3).

15 'White Police and Black Power: Part 6', *Aboriginal Legal Service* (Web Page, 21 September 2021) <https://www.alsnswact.org.au/white_police_black_power_6>.

16 *Independent Review of the National Legal Assistance Partnership* (Final Report, 28 May 2024) 20–6 [3.4] ('*NLAP Review*').

communities and Aboriginal and Torres Strait Islander Community-Controlled Organisations ('ACCOs'), including ATSILSs.

## II WHY ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLE NEED TO BE LEADING THE MOVEMENT

There are many reasons why it is important that those directly impacted need to be leading the movement for Aboriginal and Torres Strait Islander justice. Being a movement lawyer requires taking direction from directly impacted communities and from organisers, as opposed to imposing an agenda or prioritising technical expertise as a legal advocate or practitioner.

Poet Audre Lorde reminds us, 'there are no new ideas. There are only new ways of making them felt'.[17] One way to make things felt is to ensure that those impacted are the storytellers. We know that the stories we tell show what we value: the deepest personal narratives we carry in our hearts and memories remind us of who we are and where we come from. With these stories we can build relationships, unite constituencies, name problems, and mobilise people to together bring about the change we want to see. The story of the origins of the ALS shows us that pursuing justice by enabling and uplifting those most affected by injustice will always produce greater fairness and equity for everyone.

This requires taking active steps to build the power of those directly impacted by injustice, and the steps to be taken must be considered in the context of structures of power, influence and decision-making which currently organise our society. Building the power of those directly impacted also requires an active transition of resources and authority to those directly impacted – a reality that at times sits uncomfortably even with the most noble and well-meaning of government, mainstream and civil society stakeholders.

## III BECOMING A MOVEMENT LAWYER IN THE FIGHT FOR FIRST NATIONS JUSTICE

There are numerous principles and theories of movement lawyering summarised in international literature. The organisers of the inaugural Rebellious Lawyering Conference Australia in 2021 synthesised this non-exhaustive list of principles 'taken from our learnings from movement lawyers in the United States who we have spoken to, worked with, and learned from':[18]

- Working with communities and movements in a way that builds their long-term power.
- Lawyer-client relationships as participatory, power-sharing processes (this doesn't mean simply deferring to clients or not being critical).

17 Audre Geraldine Lorde, *Sister Outsider: Essays and Speeches* (Crossing Press Feminist Series, 1984) 34.

18 'What is Movement Lawyering', *Reb Law Conference Australia* (Web Page) <https://reblaw.com.au/what-is-movement-lawyering/>.

- Communities and movements providing the direction and setting the agenda (just like paying corporate clients).
- The law, and the work lawyers do within it, is already a site of political struggle that reinforces current power structures and is used to enforce the status quo. Movement lawyers (like their corporate counterparts) engage with the law as a tool of defensive and offensive power.
- Accountability to movements and communities, and systems to ensure accountability.
- Self-reflection / critical analysis and continued learning; being prepared to be regularly uncomfortable.
- Building the leadership and amplifying the voices of those most affected by political and social injustice. Assisting our clients to get seats at tables of privilege – seats that we are often invited to occupy instead of our clients.
- Supporting visionary and offensive work.

While First Nations lawyers and academics will undoubtedly go on to define principles and theories specific to Aboriginal and Torres Strait Islander movement lawyering in the coming years, the following are suggested steps for movement lawyers who hope to support Aboriginal and Torres Strait Islander people and communities in the fight for self-determination and justice.

1. **Understand the history of Australia's treatment of Aboriginal and Torres Strait Islander peoples.** In particular, understand the role of assimilation and protectionism in law and policy, both historically and in the present day. Appreciate that the law is a reflection of the distribution of power and privilege in society, and by its very nature it is designed to protect the status quo. Do not assume an inherent benevolence, and do not conflate law with justice.
2. **Appreciate that the settler-colonial legal system has never worked for Aboriginal and Torres Strait Islander communities, and, in fact, rarely works for others.** As highlighted above, when systemic change is achieved that improves outcomes for Aboriginal and Torres Strait Islander people, everybody benefits.
3. **Recognise the limits of the law, and especially the limits of law reform.** As Eduardo Capulong writes, movement lawyers, or progressive lawyering approaches, 'do not measure professional success primarily or exclusively in terms of creating favorable law or serving more clients – practices we have come to know as impact litigation/law reform or "access to justice." Rather, they measure success by how practice raises political consciousness, motivates and strengthens client activity and supports effective grassroots activism generally.'[19]
4. **Use the full range of tools available to movement lawyers.** These include litigation, legal services, legal policy, grassroots outreach, education and

19 Capulong (n 1) 119.

organising.[20] Where litigation is used as a tool, consider the potential outcomes of litigation within an expansive frame that includes generating public awareness or discussion, influencing opinion and building alliances and coalitions.[21]

5. **Actively work to transfer power and resources to Aboriginal and Torres Strait Islander people and organisations.** The National Agreement not only provides a practical blueprint for implementing this in practice (for example, through the guidance set out in the Strong Partnership Elements about the minimum requirements for shared decision-making), it also provides a mandate to build the community-controlled sector.[22] On an individual level, this can include simple steps, such as ensuring that Aboriginal and Torres Strait Islander people and ACCOs always have a seat at the table in legal and policy reform spaces – especially where decisions are being made that will impact Aboriginal and Torres Strait Islander people.

20 Ibid 125.

21 Ibid 125–7.

22 See 'Priority Reform Two' in *National Agreement* (n 7) 8–10 [42]–[57]. The Independent Review of the National Legal Assistance Partnership also made recommendations in relation to self-determination in service delivery – specifically, Recommendation 11 notes the need for consideration of 'reallocation of resources between existing service providers (including the transfer of funding, staff and premises and transitional costs where relevant), and any additional funding reasonably necessary for the ACCO to provide the relevant services': see *NLAP Review* (n 16) xv.

# THEMATIC
# DYNAMICS OF POWER WITHIN CRIMINAL LAW

*Artwork by Alaina Fang*