

# AUSTRALIAN INDIGENOUS LAW REVIEW

2008 • Volume 12, Special Edition 2



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# AUSTRALIAN INDIGENOUS LAW REVIEW

2008 • Volume 12, Special Edition 2

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# INDIGENOUS LAW BULLETIN

*Since 1981 the Indigenous Law Bulletin has led the way with accessible, accurate and timely information about Australia's Indigenous peoples and the law. We write for legal practitioners, advocates, policy makers, researchers and students. We cover legislation and government policy, case law, parliamentary proceedings, international developments, local activism and the work of Indigenous communities and organisations.*

*We report on crime, family law, native title, custody issues, legal services, international and comparative law, land and water rights, intellectual property and copyright law.*

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## EDITORIAL NOTE

The *Australian Indigenous Law Review* ('AILR') is a DEST-approved publication unique for its currency, wide range of material, expert commentary and international perspectives. It draws together legal materials from all areas affecting Indigenous peoples in Australia and around the world.

The AILR publishes detailed, peer-reviewed commentary from leading Australian and international experts. It also includes recent and relevant case law, publishing the most prominent cases alongside those which would otherwise go unreported. In furthering the transition from its previous incarnation as a reporter-style journal to a review, and in recognition of the increased availability of primary source materials online, the AILR has in 2008 strengthened its focus on commentary, and also removed the Digest section.

Information is presented in an accessible, easy-to-read format. The AILR includes a cumulative index in the last volume of each edition.

Previous volumes of the AILR are available online at AustLII. The AILR is designed to complement the Indigenous Law Centre's long established publication, the *Indigenous Law Bulletin*.

*Previous editions of the AILR are available online at <<http://www.austlii.edu.au/au/journals/AILR/>>.*

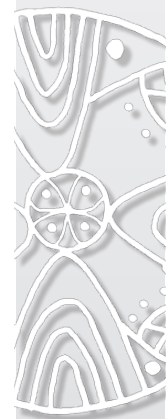
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The editors wish to extend their thanks to the various Australian Aboriginal and Torres Strait Islander legal services, whose contributions to and cooperation in the production of this edition have been invaluable. The editors would also like to thank the Editorial Panel, Prue Vines, Janette Murdoch, Dani Johnson, Talia Epstein, the Indigenous Policy and Service Delivery Branch and the Indigenous Law and Justice Branch of the Commonwealth Attorney-General's Department, John Hewitt, Zrinka Lemezina, Sonia Cooper and Michelle Bradley for their contributions to the creation and production of this edition of the AILR.

## **Artist's Note**

The cover artwork is entitled *Country* and is by Hazel Morton Kngwarrey. Hazel hails from the Ngkwarlerlanem and Arnkawenyerr areas of country, which are parts of the Utopia region in the Northern Territory. Stories told in the work are of Hazel's country, including of *boor-la-da* (rainbow), *tharrkarr* (sweet honey grevillea) and *yerramp* (honey ant). Prior to beginning painting in 1991, Hazel worked in the batik medium, though she has since become established in a variety of media. She is one of many artists in a large family, and her work has been exhibited widely in Australia and internationally.



# EDITORS' INTRODUCTION

Welcome to the second AILR Special Edition for Volume 12, which takes as its theme 'Coronial Reform and Preventing Indigenous Death'. We are nearing two decades on after the conclusion of the Royal Commission into Aboriginal Death in Custody ('RCIADIC'), the inquiry established to investigate the high rates at which Aboriginal and Torres Strait Islander people were dying in prisons, police cells and juvenile detention centres around Australia. Among the many issues brought to light by the RCIADIC's extensive five-volume *National Report* were substantial deficiencies in the coronial systems in operation throughout Australia's States and Territories. Many of the RCIADIC recommendations for the improvement of coronial law remain unimplemented.

One of the key messages to emerge from the RCIADIC on the issue of coronial reform was the need to enhance the increasingly recognised preventive function coronial inquests can have – a function chiefly resident in the coronial recommendation-making power. Following the conduct of a thorough investigation into a death, a coroner, having ascertained the circumstances and causes of the death, has the power to make recommendations to government and other agencies in order to prevent the occurrence of further deaths in similar circumstances. Despite this recommendation-making capacity possessed by coroners, in most Australian jurisdictions there is no obligation on government and other agencies to respond to or even consider the potentially life-saving recommendations that come out of coronial inquests.

Making the need for a robust and effective coronial system all the more urgent are the tragically high rates of mortality and lower life expectancies that are a statistical reality for Aboriginal and Torres Strait Islander peoples. Clearly, it is crucial that the preventive potential of coronial inquests is fully realised so as to avert the occurrence of further Indigenous deaths and to, in whatever way possible, help reverse such alarming statistics. Yet it is also plain, as many pieces in this edition show, that effective and culturally sensitive coronial processes are required to show respect for the deceased and their families.

The original impetus for this Special Edition came from a study conducted by Professor Ray Watterson, Penny Brown and John McKenzie, which investigated the implementation of coronial recommendations throughout Australia. While this national study uncovered some successes in coronial process, the key findings of the study reveal the repeated neglect of coronial recommendations in the absence of a consistent legislative framework. The report of that study forms the centrepiece of this Special Edition.

The other pieces published in this edition were primarily sourced from people working in Aboriginal and Torres Strait Islander legal services across Australia. These pieces provide important insights into the different coronial systems operating throughout Australia, and voice the concerns of the Aboriginal and Torres Strait Islander families, and their representatives, who have involvement with the coroner. To preserve the essence of these pieces, they have not, unless otherwise indicated, been peer-reviewed.

Aboriginal and Torres Strait Islander people should be aware that some of the articles reproduced in this edition contain the names of deceased persons.

NB. As this edition was going to print, a number of amendments were made to the Victorian Coroners Bill 2008. The amended Bill was subsequently passed, and received Royal Assent on 11 December 2008. Of the greatest relevance to this Special Edition was the amendment requiring that public statutory authorities in receipt of coronial recommendations must respond to those recommendations within three months, advising of any action taken in relation to the recommendations.

# CONTENTS

Volume 12, Special Edition 2

Foreword 1  
*The Hon Bob Debus*

## Report

---

Coronial Recommendations and the Prevention of Indigenous Death 4  
*Ray Watterson, Penny Brown and John McKenzie*

## Commentary

---

'Why This Law?': Vagaries of Jurisdiction in Coronial Reform and Indigenous Death Prevention 27  
*Rebecca Scott Bray*

Respecting the Dead, Protecting the Living 45  
*Raymond Brazil*

The Centrality of the Royal Commission into Aboriginal Deaths in Custody When Discussing  
Potential Reform to the Victorian Coronial System 55  
*Victorian Aboriginal Legal Service Co-Operative Ltd*

Human Rights in Coronial Inquests 64  
*Jonathon Hunyor*

The *Coroners Act 2003* (SA) and the Partial Implementation of RCIADIC: Consequences for  
Prison Reform 75  
*Christopher J Charles*

Coronial Reform in Western Australia 90  
*Kate Allingham and Peter Collins*

When Will People Read the Recommendations? 95  
*Rory Downey*

The Coroner's Exercise of Discretion: Are Guidelines Needed? 103  
*Shannon Chapman*





# FOREWORD

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The Hon Bob Debus MP  
Minister for Home Affairs

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It gives me great pleasure to introduce this Special Edition of the *Australian Indigenous Law Review*. The articles in this important collection examine a range of options for coronial reform against the background of recommendations made by the Royal Commission into Aboriginal Deaths in Custody ('RCIADIC'), a survey of current coronial procedure and significant proposals for reforms.

Almost two decades after the RCIADIC delivered its final report, the plight of Indigenous people who come into contact with the criminal justice system remains urgent. Indigenous Australians continue to be grossly over-represented in prison populations, incarcerated at 13 times the rate of non-Indigenous persons. Added to this, the Australian Institute of Criminology's National Deaths in Custody Program reports that the relative proportion of Indigenous to non-Indigenous deaths in police custody and custody-related operations has been increasing since 2002.

The calls for coronial reform within this Special Edition pay attention to, but extend well beyond, investigations into Indigenous deaths in custody. Indeed, the issues considered here go straight to the heart of the challenge confronting all Australians today: the urgent need to redress the particular disadvantage of Indigenous people in the criminal justice system. More explicitly, the authors underline the important role that coronial investigations and subsequent recommendations can play in addressing this disadvantage for Indigenous and non-Indigenous people.

An obvious response to this challenge is for governments and other parties to prevent Indigenous deaths wherever there is the knowledge and capacity to do so. Coronial recommendations following the investigation of a particular death have the capacity to set new standards in areas such

as policing, corrective services and public health. And yet, as the authors in this volume emphasise, coronial processes can only fulfil this preventive role if recommendations are implemented by governments and other responsible parties.

Several articles highlight the lack of means currently available in Australia to monitor the implementation of coronial recommendations. While some jurisdictions have enacted legislative requirements to formally respond to coronial recommendations, the authors suggest there is a lack of scrutiny of whether they have been implemented. Arguably, this makes it difficult to evaluate just how effective coronial inquests are in delivering public health outcomes that reach beyond the particular case in question.

The RCIADIC highlighted the importance of coronial processes as critical, independent points of review. States and Territories each have their own legislation which provides for the conduct of coronial investigations, including any requirements for the government to respond formally to recommendations. For its part, the Australian Government is facilitating greater cooperation between all jurisdictions in areas impacting Indigenous law and justice outcomes such as policing, corrections, juvenile justice and family violence prevention. The development through the Standing Committee of Attorneys-General ('SCAG') of a National Indigenous Law and Justice Framework is one example of how the Government is forging a nationally consistent approach across a broad range of issues. The development of a national approach to coronial recommendations could be a component of that Framework.

I commend the editorial team at the *Australian Indigenous Law Review* and the authors for their thought-provoking work in this complex area of law and policy. While the

views expressed in this journal are not necessarily those of the Australian Government, I welcome ongoing and open dialogue about how governments at all levels might work together so that they can be more responsive and accountable in coronial processes and, most importantly, prevent further unnecessary deaths of Indigenous peoples in this country.