

# NON-INDIGENOUS LAWYERS WRITING ABOUT INDIGENOUS PEOPLE

## Colonisation in practice

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Lawyers are trained to be advocates, to speak for and represent others in the interests of justice. Against this, it is well known that there are serious problems when non-Indigenous people write about Indigenous people.<sup>1</sup> While it can depend on the subject matter, non-Indigenous people have no licence to write about Indigenous culture.<sup>2</sup> When writing about Indigenous issues other than tradition and culture, there are still many hazards for the non-Indigenous author to reflect on. These include potential breaches of Indigenous protocols,<sup>3</sup> undermining self-determination and Indigenous sovereignties, homogenising Indigenous people, and misrepresenting as well as patronising Indigenous people. Historically, writing by non-Indigenous people has played a central role in the dispossession, denial of legal sovereignty, and oppression of Indigenous Australians.

Realising that not all lawyers have the time to acquaint themselves with interdisciplinary scholarship, in particular extra-legal literature written by Indigenous Australians, I have decided to share what I have gleaned as a legal academic. As such this is not a guide for non-Indigenous lawyers, rather a case for critical self-reflection. For some, what I'm about to say might be patronising or condescending, but for many more, it might be good advice.

In this article I draw on Indigenous scholarship and standpoint theory to show that legal research tends to inadvertently participate in colonial conflict and demonstrate the need to change the way non-Indigenous people write about Indigenous Australians. This isn't simply an academic or scholarly concern. It goes to the heart of how law and policy are conceived and delivered on the ground impacting on the daily lives of Indigenous people. To make this argument the article begins with an explanation of the basis for self-reflection and critique when speaking for others. This is followed by an outline of the problem of representation, how this is exacerbated by the commodification of research, before providing two examples of non-Indigenous legal literature impacting negatively on Indigenous people; namely, legal rights and sovereignty.

### Standpoint theory

Before I justify these arguments it is both appropriate and necessary that I declare who I am, who I claim to speak for, and why I am writing on this topic in accord with Indigenous research protocol.<sup>4</sup> As a third generation descendant of European migrants to Australia, I do not, and cannot, speak for Indigenous people.<sup>5</sup> My intention is to speak as a non-Indigenous man to address non-Indigenous lawyers who claim to act for and write for the benefit of Indigenous people.

My motivation as a non-Indigenous person writing on this topic is two-fold. The first concerns my motivation for becoming an academic lawyer. I have a deep-seated desire to question, make more accountable, challenge and remove hierarchy, in all its human manifestations. This stems from evidence that there is no basis, whether in nature or law, for some person(s) to have more than others, or for some to dominate or control others:<sup>6</sup> human hierarchies are unjustifiable.<sup>7</sup>

My second reason for writing in this area is related to the first, and that is a professional interest in more accountable ways of doing either law or research so that they do not participate in the construction or perpetuation of hierarchy. In addition to the Indigenous critics of outsider scholarship are many feminist post-positivist writers, who draw upon their Indigenous colleagues to demand greater accountability of those who claim to speak for others.<sup>8</sup> This fits with a body of scholarship known as feminist standpoint theory, and I write here as a standpoint theorist.<sup>9</sup> This means that I not only recognise my privileged place within the colonising polity, but also means that I am accountable to the Indigenous people I am writing about.

It must also be said that Indigenous Australians are not in need of my 'help' despite the terror inflicted upon them by colonial rule.<sup>10</sup> Instead, I see Indigenous people as resilient and perhaps the greatest survivors that history has known. This does not exculpate me or other non-Indigenous Australians who facilitate colonial rule through the many ways life is depicted, constructed and ultimately experienced. As Falk and Martin point out, there is a dire need for non-Indigenous Australians to question their privilege which is based on the lie of Crown sovereignty. They say (paraphrasing Watson)<sup>11</sup>:

[T]hat movement away from colonialism can only occur where the state and non-Indigenous participants in the debate are prepared to question their own institutions and ways of thinking in order to listen to Indigenous peoples' claims.<sup>12</sup>

Therefore, it is not for non-Indigenous Australians to speak of an Indigenous 'problem'. Rather the problem remains colonisation and for present purposes the failure of lawyers to self-critique and recognise their privileged position within a colonial relation.<sup>13</sup>

### Representation

Words matter. They shape colonial relations and participate in a cultural interface.<sup>14</sup> As a legal academic performing an editorial role with two Australian law journals (including this one), I see plenty of legal research written by non-Indigenous people about Indigenous people. I often observe manuscripts written by non-Indigenous lawyers using the pronouns 'we' and 'us'. When a non-Indigenous lawyer writes about Indigenous issues and uses these words they are excluding the very people they claim to be writing about and are presuming their audience is like them — non-Indigenous.<sup>15</sup> It is well-known in disciplines other than law that

Indigenous people are the best placed to write about themselves, and non-Indigenous authors should only do so after deep critical reflection, and on the proviso that they identify themselves and declare their intentions.<sup>16</sup> For many Indigenous people, failure to observe this principle is more than just academic. It is the misappropriation of Indigenous voices and amounts to yet more colonial oppression.<sup>17</sup>

Whether non-Indigenous people should speak for Indigenous people is controversial at best and, at its worst, is more colonial oppression. It is controversial to the extent it is at the least paternalistic or patronising. For some Indigenous people it is not so much paternalistic but more disrespectful because it ignores Indigenous culture and protocols.<sup>18</sup> For other Indigenous people it is often, but not always, seen as unhelpful and can contribute to the maintenance of colonial power.<sup>19</sup> While for others it depends on the subject matter.<sup>20</sup> It may be oppressive to the extent the non-Indigenous author is silent on, or dismissive of, Indigenous sovereignties.<sup>21</sup> For many more, if the writer does not declare their identity and reason for writing, does not embrace Indigenous ontology and Indigenous sovereignties, and does not seek to critique colonial history to transform the existing power relation, they have no business speaking.<sup>22</sup> As such, legal scholarship written about Indigenous people can for the most part be called *outsider scholarship*. It could be handled a lot better in almost all cases.

## Commodification of knowledge

The problem of representation is exacerbated by the commodification of knowledge and its impact on publishing.<sup>23</sup> In a climate of Excellence in Research Australia ('ERA'), a 'publish or perish' audit culture means the flow of research in general is rapidly increasing. It is turning the free-thinking and critique that once created space for Indigenous activism to be heard<sup>24</sup> into the production of non-Indigenous knowledge for the sake of appearing to be productive.<sup>25</sup> It is a system where quantity and its measurement are more important than quality reminiscent of Taylor's infamous scientific management.<sup>26</sup> Scientific management benchmarked individual tasks within the assembly lines of inter-War industrial production by timing each task in an attempt to lift productivity. There was indeed a short-term lift in productivity but ultimately the dehumanising effects of Taylorism saw productivity suffer through absenteeism and sabotage, amongst other perils. The human relations approach succeeded Taylorism, adopting a more holistic view of human resources. The significance of this anecdote for present purposes is that as non-Indigenous scholarship written about Indigenous people increases in quantity it has the effect of dwarfing the output of Indigenous scholars, thereby exacerbating colonialism through the thwarting of Indigenous intellectual self-determination and sovereignty.<sup>27</sup>

Also, where non-Indigenous scholars appear to be motivated more by advancing Indigenous causes, as opposed to merely lifting their output to satisfy performance management objectives, they as outsiders are defining Indigenous causes instead of Indigenous people themselves.<sup>28</sup> As Rigney points out, 'hegemonic versions of Indigenous *reality* are distressingly biased in contemporary social science'.<sup>29</sup> The same can be said of legal literature which is confined to equal rights (as opposed to reparation), and the belief that welfare reform or constitutional amendments can address the structural inequality caused by dispossession and the denial of sovereignties.<sup>30</sup> These legal fetishes become a substitute for genuine change premised on Indigenous sovereignties and self-determination. This criticism also applies to legal research written under the banner of post-colonial studies which explores the nuances of discourse without mention of the denial of Indigenous sovereignties. In the main, the ERA climate has coincided with the Northern Territory Intervention to produce a body of non-Indigenous legal literature debating rights and welfare, while ignoring the direction and leadership of the vast literature written by Indigenous people about sovereignty, self-determination, language and intellectual integrity.

## Rights and welfare

So much has been written of late by non-Indigenous lawyers about the Northern Territory Intervention and welfare reform. Much of this focuses on rights or the absence of rights. A key Indigenous figure quoted by non-Indigenous writers in these debates has been Noel Pearson. Pearson has the capacity to speak on welfare reform for his people of Cape York but as an outsider to the Territory no more authority than non-Indigenous people to speak generally about the NT intervention and welfare reform there.<sup>31</sup> That is, whether the lawyer or researcher is Indigenous or non-Indigenous, 'both can be designated as outsiders to the Indigenous community being researched'.<sup>32</sup> To assume otherwise is to make the historical colonial error of treating all Indigenous people as one homogenous people rather than as diverse sovereign people.<sup>33</sup> What is important about the role played by non-Indigenous lawyers in this debate is that they have by and large misappropriated Pearson's work to make arguments which resonate with their particular political belief system.<sup>34</sup> In other words, it is commonplace to selectively use Pearson's work. Pearson is not claiming that removing 'sit-down money' is the sole answer for his people. He also points to the absence of self-determination and the historical under-spending by governments on infrastructure for his people.<sup>35</sup> Predictably many on the political right have ignored all but his message about individual Indigenous responsibility because it resonates with their 'blame the victim' conservatism.<sup>36</sup> Equally concerning is that so many on the so-called liberal left have embraced Pearson's individual responsibility aspects and ignored calls for reparation and self-determination. I agree with Birch's argument that well-meaning liberals are part of a colonial problem to the extent they are self-appointed experts making careers out of a power structure that privileges them:

Those opposing the conservatives may well believe that they have acted with the interests of Indigenous people in mind. But, importantly, too many liberal historians are as equally concerned with their self-appointed role as the gatekeepers to Australia's past. In this sense — not unlike the conservatives — the interests of liberals are in the protection of versions of white nationalism in Australia which have historically trod too softly over the landscapes of the past, ensuring that white Australia's 'blemishes' do not outweigh its 'triumphs' (historians refer to this approach as 'balance').<sup>37</sup>

It is one thing for Pearson to argue that his people must take more responsibility for their lives, and it is quite another for a privileged outsider to make the same argument. Noel Pearson has the authority to speak for his people, outsiders do not. By doing this an outsider participates in and continues a tradition of *Whites* know best how to deal with an *Aboriginal problem* of the former's making. Whether it is through assimilation, protection, the removal of children, or mutual obligation, the policy prescription is a colonial one and not one nuanced from self-determination.

## Sovereignities

Many lawyers do indeed embrace self-determination, but they then turn their back on Indigenous sovereignities, or worse still concede that the issue has somehow vanished since the High Court's decision in *Mabo*.<sup>38</sup> Yet self-determination by definition must assume Indigenous sovereignities. It surprises me how many non-Indigenous Australians go through the motion of acknowledging traditional owners of country, and yet fail to acknowledge Indigenous sovereignities more generally. Indigenous people consistently maintain their sovereignities have never been relinquished.<sup>39</sup> Michael Mansell is not the only Indigenous Australian asserting Indigenous sovereignities.<sup>40</sup> It would be surprising if any Indigenous Australian considered Indigenous sovereignities to have ended. The reason for this is relatively straightforward. Indigenous sovereignty is inextricably linked to Indigenous identity and culture, and sovereignty tethers identity and culture to country.<sup>41</sup> It cannot be broken by a legal fiction, the planting of a flag, or executive action for just 200 years. Indigenous sovereignities have existed for time immemorial and continue to exist so long as Indigenous culture exists.

Non-Indigenous lawyers in Australia are not authorised to declare or concede an end to Indigenous sovereignities. Yet so many non-Indigenous lawyers do just that, whether by referring to High Court judgments, speculation that parliaments will never return it, according to international law, or on some other colonial/legal basis. Just as culpable here are the lawyers who are completely silent on Indigenous sovereignities because ultimately there are no legal panaceas in the absence of proper respect for Indigenous sovereignities.

## Conclusion

The idea that privileged outsiders can speak for 'Others' has been questioned extensively by post-positivist feminists and Indigenous scholars alike. It is an idea that offends basic principles of law,<sup>42</sup> research ethics,<sup>43</sup> and accountability to Indigenous people; the very people for whom they claim to write. Often, this non-Indigenous research simply recycles tired approaches to policy failing to respect the growing voices within Indigenous scholarship, which have since at least the 1990s moved away from the idea that non-Indigenous scholars can describe Indigenous problems and solve them. In short, non-Indigenous people writing about Indigenous issues tend to inadvertently contribute to the status quo of existing power relations rather than listening to, and opening up space for, Indigenous scholars to speak for themselves.

Before attempting to 'help' Indigenous people, non-Indigenous authors should reflect on whether their work creates space for Indigenous people to speak for themselves or whether it might hinder this. It is also appropriate that non-Indigenous research about Indigenous people should fit with an Indigenous ontology. Equally important, non-Indigenous lawyers seeking justice should critique colonial rule over Indigenous people. This can be achieved through research that assists the struggle for Indigenous self-determination and, most importantly, facilitates recognition of Indigenous sovereignities. Alternatively justice might be pursued through writing that exposes Australia's continuing colonial history with an aim to educate and or seek reparation.

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