Dealing with the Dilemmas: Integrity, Knowledge and Research*

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I acknowledge and pay respect to the Elders and other members
of the Bundjalung Nation, traditional owners/ custodians
of the land where I live and work.

Introduction

> The Aborigines, of which race I am fiercely proud to be a member, have been the subject of many reports, dating back to the days of George III, shortly after colonization of Australia. Right from the moment Captain Cook landed in Australia, you will notice that I avoid the word 'discovered', as we, the Aborigines, never thought of it as being lost, countless millions of words have been written about us.
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> My race has been legislated for, legislated against, and in so doing, have been placed under the microscope of public scrutiny and opinion to no avail. I say to no avail as a generalization, for in too many instances, those who have researched and prepared these reports, have been white pseudo experts, who have set themselves up as authorities, and attempted to judge us with European values.[1]

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1 "Commentary on the 1981 John Barry Memorial Lecture" (1982) 15 ANZL Crim 22, 22. I have not provided the author's name, who has passed away, to avoid offence to family, relatives or to that person's community.

In 1996, I commenced postgraduate studies in law and chose the experience of workplace discrimination against Indigenous Australians as my topic. Unwittingly, but perhaps subconsciously, I had launched myself on a rough road of learning both about legal research methodology and theory, but more importantly about the nature of the legal academy itself. By engaging with research related to Indigenous peoples, I immediately positioned myself – though it wasn't my intention – as one of the "white pseudo experts" that cause Indigenous Australians so much grief.

A significant proportion of my learning within this postgraduate process has been focused upon becoming more aware of this position and of its implications, and the ways in which it contradicts what I assert are my moral and political values. It has more recently been focused upon repositioning: finding *my* appropriate space and place within the question I had posed. Though this learning continues, this article represents a discussion of some of the issues with which I have engaged so far.

The purpose of this article is to stimulate debate amongst legal academics on the critique raised by Indigenous Australians of "pseudo white experts", of western-oriented research methods, and of research done "about them". The title is adapted from an article entitled "Dilemmas of Integrity and Knowledge: Protocols in Aboriginal Research", by Eleanour Bourke,[2] one of the many Indigenous Australian academics who has written on the specific concerns of and objections by Indigenous Australians to research undertaken by the non-Indigenous academy. Obviously, this includes the legal academy.

There is of course, an ironic - if not impossible - basis to this article in that I am (re)presenting a critique of myself, a critique which has already been articulated cogently and at some length by a wide range of Indigenous Australians.[3] Even so, there are three reasons why I felt my preparing this article still retained value.

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[2] Bourke E A, "Dilemmas of integrity and knowledge: protocols in Aboriginal research" in *1995 National Aboriginal Higher Education Conference report,* University of South Australia, Underdale, SA, 1996.

[3] For instance, see Bourke, note 2; Behrendt P, "Balancing the Books: the other side of the story" (1993) 45 Autumn *Education Links* 9; Aboriginal Research Institute (University of South Australia), *Ethics in Aboriginal Research*, University of South Australia, South Underdale, SA, 1993, Anderson I, "Black suffering, white wash" (1993) June-July *Arena* 23; and Anderson I, "Reclaiming Tru-ger-nan-ner: De-

First, although perhaps now more often subject to ethics procedures, there has been little questioning or discussion within the literature by Australian legal academics of the ethics process in research, let alone specific examinations of the ethics of research on Indigenous issues.[4]

Secondly, in the new millennium attention has focused upon the past century's academic and legal developments in the form and practice of law. It is equally important that we take time to review its failures, and one of the academy's most significant failings has been the 'objectification' of Indigenous peoples in its scholarship. The Indigenous Peoples of Australia[5] have formed a significant focus of legal scholarship, especially in a wide range of government reports,[6] and in the staggering number of articles and papers generated by Australian legal academics, lawyers and students each year. The Native Title 'industry', alone, sees Australian lawyers researching Indigenous peoples in droves. Yet, only a small - albeit rapidly increasing - number of those undertaking this research are themselves Indigenous Australians.

Colonising the Symbol", in Van Toom P and English D, *Speaking positions: aboriginality, gender and ethnicity in Australian cultural studies* (1995).

4 Terry Hutchinson's new text, *Researching and Writing in Law* is one of the few legal research texts that discuss ethics requirements (pp 15-17). However, there is no reference to the specific ethical protocols related to research involving Indigenous Australians: Hutchinson T, *Researching and Writing in Law*, Lawbook Co, Sydney, 2001. The Theory Research Action Workshop conducted by the Legal Intersections Research Centre, University of Wollongong, 16 July 2002, signals an opening in which to discuss these issues.

5 The indigenous peoples of many other countries are equally 'over-researched'. I will concentrate on the position in Australia, though there seem to be strong parallels in critiques by Maori academics to those of Indigenous Australians. For instance: Milroy S, "Maori Women and domestic violence: The methodology of research and the Maori perspective" (1996) 4 *Waikato Law Review* 58, Jackson M, *The Maori and the Criminal Justice System - He Whaipaanga Hou: A new perspective*, Report prepared for the Justice Department, Justice Department, New Zealand, 1988, Bishop R, "Initiating empowering research" (1994) 29(1) *New Zealand Journal of Educational Studies* 175, Tuhiwai-Smith L, *Decolonizing methodologies,* Zed Books, London & New York; University of Otago Press, Dunedin, 1999, and Tunks A, "He Wero ki te Ture: Maori Legal Research Methodology", Paper presented to the ALTA Conference, University of the South Pacific, Vanuatu, July 2001. Thanks to Nan Seuffert for bringing Stephanie Milroy's article to my attention.

6 Eg, RCADIC, *National Report of the Royal Commission into Aboriginal Deaths in Custody*, AGPS, Canberra, 1991; Human Rights and Equal Opportunity Commission, *Bringing Them Home*, HREOC, Sydney, 1997; and Australian Law Reform Commission, *The Recognition of Aboriginal Customary Law*, AGPS, Canberra, 1986.

Thirdly, and perhaps as a result of these factors, the Indigenous critique remains in my view misunderstood by or unknown to many members of the legal academy. This is despite the fact that legal academics regularly transgress the boundaries of 'traditional' legal scholarship and import from a range of disciplines new ways of exploring law and peoples' experiences of it.[7] This may be explained by the fact that most legal academics - just like the general population of Australia - tend to have little direct experience with Indigenous Australians. But, as lawyers, we should well know that our ignorance is no excuse. Our position as 'producers' and 'conveyors' of knowledge affects Indigenous Australians and creates an obligation to tackle our ignorance. It is *our* responsibility to ensure that we are properly informed.

In relation to these three matters, perhaps the irony I create is mitigated by my desire to stimulate discussion rather than to present answers. At best this article represents *my* understanding of the Indigenous critique and the issues it raises, and cannot and should not replace consultation with Indigenous Australians. Indeed, that's where the answers are - with the communities alongside whom we live, our colleagues and our students, and greater consultation is what I hope this article will encourage.

In contrast, at points my discussion will appear to be oblivious to the growing presence of Indigenous members of the academy, and I apologise in advance for that. But at these points, my purpose is to direct my comments to the site of the problem, that is, the non-Indigenous academy.

In the first section of this paper, I will discuss the criticisms made by Indigenous Australians in relation to western-informed knowledges and approaches to research. In the second, I will briefly outline the broad principles that are reflected in the guidelines on ethics in research involving Indigenous Australians, and discuss some examples of "good" and "bad" research.

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7 For example see: Davies M, *Asking the law question*, 2nd ed, LawBook Co, Sydney, 2002; Hunter R, Ingleby R and Johnstone R (eds), *Thinking about law: perspectives on the history, philosophy and sociology of law*, Allen & Unwin, St Leonards, NSW, 1995.

"White Psuedo Experts"

Knowledge = Power

Research = Knowledge

Research = Power[8]

The quote at the beginning of this paper captures the essence of the criticism repeatedly voiced by Indigenous Australian peoples - Elders, activists, academics and other community members - of research done "about them": "white pseudo experts" have consistently and relentlessly researched them since colonisation began.[9] In so doing, the academy has tended to study and thereby objectify them, and to colonise their property, culture, and their being. The anger behind this is criticism is compounded as Bourke and Behrendt point out, "because research related to us over the years has failed to produce [for us] any perceived return or advantage"[10] and indeed has tended to lead to "restrictive regulations and control"'.[11]

The development of the legal academy within Australia as an adjunct to the profession has left us a legacy that, along with inadequate resources, "still severely restrains the development of legal scholarship and pedagogy in this country".[12] Much of the work produced by legal academics still displays a tendency towards a "direct relationship" with the "needs of the profession".[13]

Such work is underscored by the scientific paradigm of research[14] - the endeavor to discover 'facts' and thereby generate knowledge, and

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8 Eckermann AK, Roberts D & Kaplan G, "The role of participatory action research in Aboriginal education" (1994) 22(4) *Aboriginal Child at School* 10, p 13.

9 See Bourke, note 2; Behrendt, note 3, Aboriginal Research Institute, note 3, p 1.

10 Bourke, note 2, p 47; see also Margaret Hampton, Chairperson of the Aboriginal Health Research Ethics Committee of South Australia, cited by Johnstone M, "Improving the ethics and cultural suitability of Aboriginal health research" (1991) 15(2) *Aboriginal and Islander health worker journal* 10, p 10.

11 Behrendt, note 3, p 11.

12 Weisbrot W, "Competition, cooperation and legal change" (1993) 4(1) *Legal Education Review* 1, p 15.

13 Gava J, "Scholarship and Community" (1994) 16 *Sydney Law Review* 443, p 443.

14 This paradigm was endorsed as appropriate for legal research by the Pearce Committee: Pearce D and others, *Australian Law Schools: A Discipline Assessment*

then to catalogue and to systematise it[15] - “modest, incremental refinements of a shared, cumulative enterprise: ‘the common law’ “.[16] The traditional values of this paradigm – the hierarchy of knowledge contained in judicial and legislative texts, the primacy of positivist and liberal values, notions of rationalism,[17] and the insistence on its objectivity[18] - enable law to define and control identities and behaviour.

Although clearly this paradigm is being challenged by legal and other scholarship and new ways of knowing and research methodologies are being developed, the production of knowledge by *any* means retains great significance “in non-Indigenous terms, as … [knowledge] represents degrees of power, profit and, to a significant degree, privilege and socio-economic advantage”.[19] So as Eckermann, Roberts and Kaplan[20] invite us to conclude, through producing knowledge, research also produces power, power that has been used to

> maintain and justify the disempowerment and subordinate status of Aborigines in Australian society …. Historically research in Australia has exemplified this power structure wherein Aboriginal interests and priorities have been subordinated, if indeed even recognised, to those of non-Aborigines.[21]

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for the Commonwealth Tertiary Education Commission, AGPS, Canberra, 1987, as cited by Hutchinson T, note 4, p 35.

15 Gava, note 13, p 445.

16 Collier C, “Interdisciplinary Legal Scholarship in Search of a Paradigm” (1993) 42 Duke LJ 840, p 843, as cited by Gava, note 13, p 444. Ziegler’s call for a unitary legal research paradigm represents a clear stance endorsing legal research as a ‘science’, and regards the incremental ‘building’ of knowledge as a measure of its progress: Ziegler P, “A paradigm for legal research” (1988) 51 *Modern Law Review* 569. See Daintith’s response to Ziegler: Daintith D, “Legal research and legal values” (1989) 52 *Modern Law Review* 352, pp 356-360.

17 See the discussions in Davies, note 7; Hunter, Ingleby & Johnstone, note 7; and Hutchinson, note 4, p 8. See also, Gava, note 13, p 455.

18 See Simpson GJ & Charlesworth H, “Objecting to Objectivity: the radical challenge to legal liberalism”, in Hunter, Ingleby, & Johnstone, note 7, p 86.

19 Smith A, “Indigenous Research Ethics: Policy, Protocol and Practice” (1997) 25(1) *The Australian Journal of Indigenous Education* 23, p 24.

20 Eckermann, Roberts, & Kaplan, note 8, p 13.

21 Roberts D, “Changing the hierarchy of power in Aboriginal research: towards a more collaborative approach” (1994) 5 *Kaurna Higher Education Journal* 36, cited

Indigenous Australian Elders, writers, activists, academics and individuals recognise the unrecognisable in this power, and know the unknowable. They call this force by different names – "colonialism",[22] the "continuing oppression by Munanga",[23] *duggaibah*, the "place of whiteness",[24] and the *muldarbi*/ demon spirit[25] - it continues taking "different forms of dominance and power".[26]

The exercise of power within the research process is an expression of this continued colonialism as its prevailing paradigm remains largely informed by non-Indigenous pedagogies that continue to judge Indigenous Australians by "European standards" and to subordinate Indigenous interests and priorities. The effect is the potential of research - in many ways realised - to colonise Indigenous culture, beliefs, property, minds, bodies, and as Irene Watson describes it, even a person's very being:

> [I feel pressured] to locate myself within a space where the muldarbi has been working for centuries in dismantling my Nunga being. The risk of this space is to become assimilated by the muldarbi, the challenge is to survive and remain a

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by Bourke, note 2, p 47. Eckermann, Roberts and Kaplan make a similar point: 'it is timely to ask whether research has asked the right questions, or whether by amassing "facts" rather than understanding, it has maintained the status quo': Eckermann, Roberts and Kaplan, note 8, p 10.

22 Watson I, "Indigenous Peoples' Law-Ways: Survival Against the Colonial State" (1997) 8 *Feminist Australian Law Journal* 39; Gary 'Mick' Martin, Lecturer, College of Indigenous Australian Peoples; Kelly L, "Reconciliation and the implications for a sovereign Aboriginal nation" (1993) 3 (61) *ALB* 10; Anderson, note 3; Behrendt L, "In your dreams: cultural appropriation, popular culture and colonialism – critique of Marlo Morgan's New Age fantasy Mutant Message Down Under" (1998) 4 (1) *Law/ Text/ Culture* 256; Mansell M, "Towards Aboriginal Sovereignty: Aboriginal Provisional Government" (1994) 13 (1) *Social Alternatives* 16; McGlade H, "The repatriation of Yagan: a story of manufacturing dissent" (1998) 4 (1) *Law Text Culture* 245.

23 Bindarriy, Yangarriny, Mingalpa, and Warlkunji, "Obstacles to Aboriginal Pedagogy", in *Aboriginal Pedagogy: Aboriginal teachers speak out*, Deakin University Press, Geelong, Victoria, 1991, p 164 (The authors of this article changed their names to protect their identity.)

24 Moreton-Robinson A, "Duggaibah, or 'place of whiteness': Australian feminists and race" in Docker J and Fischer G (eds), *Race, Colour and Identity in Australia and New Zealand*, UNSW Press, Sydney, 2000, p 240.

25 The muldarbi is the demon spirit - 'a killer of law, land and people': Watson I, "Power of the Muldarbi, the road to its demise" (1998) 11 *Australian Feminist Law Journal* 28.

26 Watson, note 25.

> Nunga … We struggle for the place that is free from [the muldarbi's] … 'right way of knowing' to be free to know in the way of the grandmothers. And as a process of healing and creating that space, bel hooks suggests we dissolve white thinking. To dissolve the muldarbi is to think outside its perceived and imposed regimes of thought. For me that is a process of decolonising the mind, and dissolving dominant colonial thought patterns. So that I can see the horizon from an indigenous place and space, and know the mother beneath my feet.[27]

So it cannot be surprising that many Indigenous Australians believe non-Indigenous researchers should just stay away completely, and at least demand significant changes to the research process. As Smith points out, "[a]gainst an historical background of culturally devastating colonial invasion and its aftermath, it is not surprising that the context for research is sociologically and psychologically complicated … [Indigenous Australians] have good cause to be angry and disappointed".[28]

Curiously, the call to change or "stay away" tends to make many non-Indigenous researchers angry and disappointed. This brings into question the purpose of the research process and who it is that gains the benefits. As Behrendt points out, many non-Indigenous researchers may well have the "misguided assumption that they are really working for the benefit of Aboriginal people … [but a] not insignificant number were [and are], of course, doing it for their own academic advancement".[29]

That there is something wrong with this is explained by Russell Bishop, speaking in Aotearoa. He illustrates the contrast between the western and the Indigenous research ethos:

> In cultures where a collectivist ethos is paramount, specialists are constantly reminded of their fealty to and interdependence with the collective whole. On the other hand, the specialist in the individualist culture, over time not only loses the

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[27] Watson, note 25, p 28, and see also Watson, note 21.

[28] Smith, note 19, pp 25 & 27.

[29] Behrendt, note 3, p 11.

> interdependence of the researcher with the researched, but justifies this distancing from the group in elitist terms such as the need for freedom of expression, for academic freedom, individual initiative and for unfettered intellectual leadership. This latter stance has flourished within the positivist paradigm, by taking the position that the expert, the intellectual or the academic is the most suitable person to generate research questions, to select or construct methodologies and to construct meaning from the data that is gathered. [30]

Thus an immediate problem raised by the involvement of non-Indigenous researchers in research related to Indigenous peoples, is our distance from Indigenous peoples (and indeed our distance from *our*selves). Ian Anderson puts it this way:

> In relation to Aboriginal people, a key problem is non-Aboriginal Australians' widespread lack of direct experience with Aboriginal Australia[, relying instead] … on the accounts of expert commentators. These commentators … mediate Aboriginal experience for non-Aboriginal Australians [perhaps] … actually create Aboriginal Australia for the majority of non-Aboriginal Australians. In this context, the quality of the interaction between the commentator and Aboriginal people is an important factor. *It matters whether these experts know Aborigines from picture books or if they have spent time working with Aboriginal communities in an attempt to build constructive relationships with those communities. Attending to the quality of this relationship is crucial* to the critical analysis of commentators' interpretations of Aboriginal experience.[31]

The following exchange, an extract from the evidence presented by a Nunga man, George Trevorrow, to the Royal Commission into the Hindmarsh Island Bridge, illustrates the importance of "constructive relationships" as compared to knowledge drawn from "picture books":

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[30] Bishop, note 5, p 181.

[31] Anderson, note 3, p 24 (emphasis added).

Q Let me put a suggestion to you: what you are talking about is a disturbance to the environment. Is that right.

A No more than that. To what those Ngaitji are to the people. They are not just animals and fish and snakes and things to us. They are real. They are more like people. Spiritual.

Q So it is really nothing to do with women's business, is it.

A It is combined with those things.

Q … You were saying that the island is significant because it is a place of women's business, and that a bridge linking the mainland to this place of women's business would be a desecration. That's what you're saying is it.

A Yes there is no way -

Q And you don't know, do you, by necessity, about what the women's business is, do you.

A (Witness shakes his head.)

Q So you cannot tell us, can you, in what way the bridge would affect the spirituality of the island, which is women's business, can you.

A No I have no way in the world of explaining that to you. I never come here to talk about the women's business on that site.

Q You are not in a position to talk about it, are you.

A Because I can't, I'm a man.

Q That's right. So your objection to the bridge really comes down to an environmental objection, isn't it.[32]

In this exchange the examiner, the Commission's assisting Counsel cannot grasp the concept that the details of Nunga women's business may not be known to a Nunga man but remain the source of his objection to the building of the bridge. In response, Watson observes, "what a total waste of time it is to even attempt to explain these ideas

[32] The extract is taken from Watson, note 21, pp 51-52.

in a forum that is disrespectful and ignorant of Indigenous Peoples' laws and culture".[33]

As a result we continue to misinterpret and misrepresent, exacerbating this by our attempts to essentialise the voices of those who participate (willingly or not) in the research project. Lillian Holt makes this clear in saying:

> No, I am not speaking on behalf of all Aboriginal people, nor all Aboriginal women. We are not an homogenous group. This needs to be said because often Aboriginal people are burdened by the expectation that any one of us can be a 'spokesperson' for our whole race …as if there is one monolithic and abiding culture by which ALL Aborigines are blessed bound or bonded. Yet white Australians are seldom asked about 'white culture'. I am not going to speak about Aboriginal culture; I am going to speak about one Aboriginal experience - my own.[34]

Equally, we continue to use language or descriptions that present Indigenous peoples, their laws or beliefs, as 'exotic' and 'romanticise' them.[35]

So how can we be angry to learn that Indigenous Australians will not tolerate being treated merely as the researcher's "subject", or to tolerate the dehumanising process that goes with "being researched"? Can we honestly deny that

> there continues to be those who maintain an attitude that they have the God-given right to almost demand that people reveal details of their lives and thoughts to them … Aboriginal people are expected to acquiesce to the wishes of non-Aboriginal researchers.[36]

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[33] Watson, note 21, p 51.

[34] Holt L, "One Aboriginal Woman's Identity: Walking in Both Worlds" (1993) 18 *Australian Feminist Studies* 175, p 175.

[35] See: Smith RG, "Towards a composite educational research methodology: balancing the authority equation in Aboriginal education" (1996) 24(2) *Australian Journal of Indigenous Education* 33, p 38.

[36] Behrendt, note 3, p 11.

While such "behaviour had to be tolerated in the past because of the way society was structured[, things have shifted so that] … such behaviour is less tolerated now".[37] Consequently, Indigenous Australians are very clear that they must "have a say in what needs to be studied",[38] and that issues of "consultation, ownership, control and community involvement are of fundamental importance".[39] As Smith points out, "the ethics and value/relevance of research takes on special significance in respect of Indigenous cultural survival and empowerment".[40]

Clearly lawyers and legal academics play a significant role in Anderson's mediating process, and rightly or wrongly will continue to for some time, given the plethora of legal activity around native title, protection of cultural heritage, conflicts of land usage such as at Jabiluka, compensation claims by the Stolen Generations, continued over-representation within the criminal justice system, common law developments such as *Mabo v The State of Queensland [No 2]*,[41] and so on.

If only for this reason, I would suggest that as teachers and researchers in law, we have an obligation to promote respect for and to dispel ignorance about Indigenous law and culture.[42] Indeed, on our own terms, there are plenty of laws that oblige us to do so.[43] The question then becomes how do we do it?

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37 Behrendt, note 3, p 11.

38 Gale F, "Community involvement and academic response: the University of Adelaide Aboriginal Research Centre" (1982) 6 (June) *Aboriginal History* 130, p 130.

39 Aboriginal Research Institute, note 3, p 1. See also, Gale, note 38.

40 Smith, note 19, p 24.

41 (1992) 175 CLR 1, and its development in *Wik Peoples v Queensland* (1996) 187 CLR 1, *Yarmirr v Northern Territory* [1998] 771 FCA (6 July 1998), and so on.

42 A previous draft of this article was rejected for publication on the basis, in part, that this assertion was a 'questionable assumption (in scholarly circles)': Personal communication.

43 Eg, UNESCO Convention on Cultural Property; Draft Declaration on the Rights of Indigenous Peoples, <http://www.halcyon.com/FWDP/un.html/>, and the Julayinbul Statement on Indigenous Intellectual Property Rights, <http://www.cscanada.org/~scs/text/Julayinbul.htm/>, discussed in Janke T, *Our Culture, Our Future* (1997) and Nielsen J and Martin G, "Indigenous Australian Peoples and Human Rights", in Kinley D (ed), *Human Rights in Australian Law*, The Federation Press, Sydney, 1998, pp 97-98 and 103-108. Smith asks 'is it purely coincidental that just at a point when Indigenous people seek to claim back

To meet the dilemmas of research exposed by the Indigenous critique, the definition of *our* specific role in this process warrants detailed examination and considered reflection. It also requires reflection upon the meaning and purpose of research and the unraveling of its culture and practice. For instance, what questions can or should be asked and by whom? What are the 'real' or appropriate sources of knowledge? Who defines the question to be researched and the way to uncover knowledge to answer that question? Who defines the outcomes to be achieved? Who is the owner of the final product and the knowledge produced? In conventional approaches, the researcher takes the lead in determining the answer to each of these questions, and generally, in the context of legal research, does so within the hierarchy of legal sources of information.

Feminist, postmodern, and other critical studies already challenge doctrinal legal and other paradigms of 'knowing' and finding 'truth'. In some respects the Indigenous critique expands these challenges, but requires greater reflective ability as within this challenge, we find the possibility of research that may promote empowerment and enhance Indigenous self-determination.[44] Indeed, as I've argued elsewhere,[45] it also offers us the possibility of empowering ourselves, and regaining our collective whole, reducing our distance from *our* spirits and *our* communities. Such research also contains the possibility of breaking the 'monopoly of knowledge', ironically of course, the possibility of breaking *our own* monopoly. Perhaps that's why it makes us angry and disappointed.

Integrity in Research

Through choosing a research methodology that involved interviews with Indigenous Australians about their experiences, I became subject to a set of supervisory procedures that were very new to me – research ethics. This reflects sadly on my own law schooling, which trained me specifically in the method of doctrinal legal research. I was

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ownership and control of intellectual, spiritual, physical, and other cultural property, legislation is enacted to "protect and control" access to and ownership of knowledge?': Smith, note 19, p 26.

44 Howitt R, Crough G and Pritchard B, "Participation, power and social research in Central Australia" (1990) 1 *Australian Aboriginal Studies* 2, p 2.

45 Nielsen J, "Legal Scholar or gatekeeper?", Paper presented to the 19th Australian Law and Society Conference, Victoria University, Melbourne, December, 2001.

ill-prepared to devise a social science oriented research protocol, let alone one that did not position me as a "white psuedo expert". I am concerned that these deficits remain within contemporary Australian legal education.[46]

The latter deficit is also a feature of the academy more generally, though most Universities have adopted or are in the process of developing guidelines specific to research involving Indigenous Australians.[47] It is significant that these must be observed only when the research protocol involves contact with Indigenous Australian peoples as "human subjects"; unless a funding body, such as Australian Institute of Aboriginal and Torres Islander Studies (AIATSIS) or the Australian Research Council (ARC), is involved, no protocols or obligations appear to apply to projects related to Indigenous issues where no "human subjects" are engaged directly by the process.

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46 Despite the evolution of a range of cross-disciplinary research methods by legal academics as illustrated in the *Australian Feminist Law Journal*, for instance, and the Theory Research Action Workshop: note 4. Hutchinson's text makes a significant formal contribution to the discussion of the range of methodologies used within Australian legal research. However, as already indicated, it makes no specific reference to methodologies and ethics in terms of their application specifically to Indigenous legal issues: Hutchinson, note 4.

47 Such as, National Health and Medical Research Council, *Guidelines on Ethical Matters in Aboriginal and Torres Strait Islander Health Research* (1991); Aboriginal Research Institute, note 3; Australian Institute of Aboriginal and Torres Strait Islander Studies, "Ethical Research", Research grants, information for Applicants and ethical guidelines, AIATSIS, Canberra, undated; and Centre for Indigenous Natural and Cultural Resource Management, Northern Territory University, Research Ethics, NTU, NT, 23 October 1997. Most of these guidelines are discussed in Bourke, note 2. See also Ken Wyatt, "The Rights of Aboriginal Communities and the Obligations of Health researchers" (1991) 15(2) *Aboriginal and Islander Health Worker Journal* 7. The National Health and Medical Research Council has recently published a Consultation paper on its *Guidelines on Ethical Matters in Aboriginal and Torres Strait Islander Health Research,* entitled *Draft Values and Ethics in Aboriginal and Torres Strait Islander Health Research*, NMHRC, 13 November 2002, www.nhmrc.gov.au/issues/index.htm. For some time, the Australian Research Council has been investigating the development of ethical guidelines for research related to Indigenous Australians: Communication with AIRC 2001. However, a recent visit to their website indicates no formal guidelines have been adopted: 26 November 2002.

The policies in place within the academy provide a fairly comprehensive picture of what can constitute a more ethical research process. They emphasise and promote research in which there is:[48]

- Indigenous control over the definition of research projects, the manner of the research process and research outcomes
- Indigenous ownership of cultural knowledge and information
- Research which is beneficial to the community, consistent with its needs and aspirations, and which enables the community to define outcomes of benefit to it
- Appropriate procedures to obtain informed consent
- Collaborative research processes which facilitate the recognition and acknowledgment of Indigenous expertise and participation within the research process,[49] and promotion of Indigenous employment within the research process, including the development of research experience and skills
- The right to access research results in an accessible and acceptable manner, and
- Respect for and acknowledgment of Indigenous cultural and personal sensitivities and values, including the right to refuse to participate in the project or to refuse the participation of non-Indigenous researchers.

In addition, the AIATSIS guidelines specifically recognise that:

- [No researcher] has an undeniable right to be given access to information about Aboriginal or Torres Strait Island life or culture …; [and]

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[48] This information draws on the guidelines in note 47. In the remainder of this section, further references are provided only where there are differences between the guidelines used.

[49] Behrendt comments that 'an Aboriginal person's expertise is not given any recognition. We are expected to do it for nothing': Behrendt, note 3, p 10.

- Failure to respect Aboriginal or Torres Strait Islander custom can disrupt the life of the communities[.][50]

In addition, 'legal' consents, such as permits to enter Indigenous Australian lands, may also be required.

As indicated in the Introduction, the purpose of this paper is to promote discussion of the Indigenous critique, rather than to provide answers to it. Therefore, the remainder of this section will draw on the information provided in these guidelines and on literature from a range of disciplines to explore in more detail the issues these guidelines raise.

Consultation and community participation

The first step involved in the guidelines is consultation, but this involves much more than merely getting *someone* to say 'yes'. Consultation with the community involves:

- informing its members about the nature of the proposed research project and what it could involve,
- confirming the research is consistent with their needs and priorities,
- enabling them to have input into the definition of the project and its method,
- identifying appropriate individuals and organisations to be involved,
- determining appropriate outcomes of benefit to the community,
- defining any particular requirements related to ownership of research results and the potential use of the research results and information gained through the project, and
- ensuring that information about the project (including its outcomes) is communicated effectively.

[50] AIATSIS Guidelines, note 47, p 8.

Who constitutes the 'community' to be consulted is a critical point, and the guidelines make various suggestions about who could be consulted, for instance 'governing' councils or land councils.[51] However, no generic point of contact is defined and Juanita Sherwood has noted that the term 'community' is one that non-Indigenous people tend to misapprehend. She points out that it is not a term with a definitive meaning, but one that is informed by "notions of identity, connection, respect and family",[52] and by Elders who are the "link to our cultural knowledge".[53] This reinforces Anderson's point on the significance of understandings gained through establishing 'constructive relationships' rather than 'picture books'.

Crucial to an effective consultation process is recognition of the right of the community - and the individuals within in it - to refuse to be involved. This may mean the project cannot begin until the community's concerns are resolved or that it cannot occur at all. For instance, Fay Gale records an example of a project suggested to the Aboriginal Research Centre (University of Adelaide), which did not go ahead as the community concerned rejected it. On this Gale comments, "[t]he Centre felt that this experience was valuable because it showed that the University would accept a community's refusal even though the group had no land rights or power in legal terms".[54]

Consultation with the community surely will not be a one-off event leading to automatic approval. It is essential that the community representatives be given time to consider the proposal and to make informed decisions. This time will also ensure that the community can confirm the research is consistent with their needs and priorities, have real input into the definition of the project and research methods, to identify individuals and organisations willing to be involved, to determine the outcomes desired by the community, and to ensure that information about the project filters into the community. These consultations can also be used to negotiate ownership of the results of the project - including authorship, copyright and other intellectual property rights - and the means by which dissemination of the result will be controlled by the community.

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[51] For instance, see AIATSIS Guidelines, note 47, p 10.

[52] Sherwood J, "Community: what is it?" (1999) 4 (19) *Indigenous Law Bulletin* 4, p 6.

[53] Sherwood, note 52, p 6.

[54] Gale, note 38, p 133

Once the community gives consent to being involved in the project, those who will participate in the project individually must be advised on their rights as participants in the project to ensure they give informed consent *or* exercise the right to say no.[55] Johnstone points out that the ability of participants to exercise their right to consent as currently framed, is contingent on the researcher's goodwill and interpretation.[56] Thus the researcher may need to educate participants about the right to consent,[57] specifically that it includes the right to refuse - whether at the beginning, middle or end of the project. Participants must also be given an appropriate and effective way of exercising the right to refuse.

Definition and methodology

Clearly, a community will understand its problems and its priorities far better than an outsider (if the researcher is an outsider). Not surprisingly then, Indigenous commentators have criticised non-participatory research methodologies for their "inadequate scope and quality",[58] and for having been defined according to non-Indigenous perspectives. This has diminished the quality of these projects by ignoring issues of significance to Indigenous peoples, by negating or trivialising their perspectives and experiences, and ignoring completely the significance of Indigenous spirituality.[59]

Stephanie Milroy is one of these critics and in her view such research is lacking because the methodology has often been determined "by an agenda which lacked [an Indigenous] perspective".[60] This is significant as the nature and range of information that might be collected is reduced. For example, she states that the particular issues of colonisation and racism are of great significance to the experience by Maori of the Pakeha legal system. Consequently, defining a research methodology that does not explore these influences can only

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[55] The importance of informed consent is also discussed in Johnstone, note 10.

[56] Johnstone, note 10.

[57] Johnstone, note 10, p 12.

[58] Watts B H, *Aboriginal Futures, A review of Research developments and Related Policies in the Education of Aborigines*, ERDC Report No 33, (1982), cited by Bourke, note 2, p 47.

[59] Milroy, note 5, p 69.

[60] Milroy, note 5.

produce a less than complete understanding of the Maori experience.[61]

The difference in result is clearly illustrated in the Aboriginal Pedagogy project undertaken by students and teachers of the Deakin-Batchelor Teacher Education Program to explore the pedagogy of Aboriginal teaching and learning.[62] The project's aim was to

> support Aboriginal teachers who were working to create distinctive forms of pedagogy which were not merely acceptable to Aboriginal people but which made an explicit effort to test pedagogies which realised Aboriginal people's aim for self-determination.[63]

This project makes clear its purpose to achieve Indigenous self-determination in education, and its recognition of the significance and impact of colonisation on the issues to be analysed. Had self-determination and colonialism not been explicitly acknowledged - a clear possibility had the project's agenda been defined solely from a non-Indigenous perspective - the project's goal, to "effect [a] decolonisation pedagogy", could never have been imagined, let alone been possible.

On the other hand, collaborative research processes - such as Participatory Action Research[64] and Action Research[65] - *may* offer non-Indigenous researchers a useful starting point to develop research that aligns with the needs and priorities of Indigenous peoples, and thus better adhere to the guidelines. Unlike doctrinal legal research, these processes make more possible the questioning of truisms such

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61 Milroy, note 5, pp 69-75.

62 Aboriginal Pedagogy, note 23, p 7.

63 Aboriginal Pedagogy, note 23, p 15.

64 Eckermann, Roberts & Kaplan make the point about PAR that 'dilemmas may become more soluble if the emphasis changes from involvement to participation and empowerment': Eckermann, Roberts, and Kaplan, note 8, p 13. See also, Whyte W F (ed), *Participatory Action Research*, Sage, Newbury Park, California, 1991; Hecker R, "Participatory action research as a strategy for empowering Aboriginal health workers" (1997) 21(7) *Australian and New Zealand Journal of Public Health* 784.

65 Sands G, "Action research" (1988) 16(5) *Aboriginal Child at School* 35; Alison Searle, "Action research: a valuable teaching learning strategy" (1988) 16(2) *Aboriginal Child at School* 44.

as ‘certainty’, ‘truth’ and the locations of ‘knowledge’.[66] They also provide the potential to develop a two-way learning process between the ‘researcher’ and the project’s participants.

Such research challenges the power structure inherent within the prevailing research paradigm, and may empower rather than disempower individuals and communities.[67] However, this is only achievable if the research process operates within the correct cultural practices and mores.[68] Obviously, then, the method described by these approaches would need to be adapted by each community involved to reflect more adequately it’s own priorities, cultural needs, practices, and ways of knowing.[69]

Clearly this is not the same as implementing an Indigenist research methodology,[70] as would an Indigenous researcher. However, PAR

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[66] Eckermann, Roberts and Kaplan, note 8, p 12. And indeed, as Hutchinson points out, a range of methodologies with this intent and effect are now employed by Australian legal researchers: Hutchinson, note 4.

[67] I am not suggesting that these are the best or only means of developing a research process. See also, Purdy J, *Common Law and Colonised Peoples*, Ashgate, Dartmouth, England, 1997; Douglas G and Bohill R, “Community Consultation In An Anti-Social Environment: Part One” (2000) 5 (2) *ILB* 7 & Douglas G and Bohill R, “Community Consultation In An Anti-Social Environment: Part Two” (2000) 5 (3) *ILB* 8; Howitt, and others, note 44; Ross H, “Progress and prospects in Aboriginal social impact assessment” (1990) 1 *Australian Aboriginal Studies* 11; Craig D, *The Development of Social Impact Assessment in Australia and Overseas and the role of Indigenous Peoples* (1989); Smith RG, note 35; Hayley Katzen and Loretta Kelly (Southern Cross University) explored a similar process in Australia: Katzen H and Kelly L, *How do I prove I saw his shadow?*, Northern Rivers Community Legal Centre, Lismore, NSW, 2000. In Aotearoa, see note 5; Seuffert and Milroy have used a bicultural research process: Milroy, note 5, and Seuffert N, “Lawyering and Domestic Violence: A Feminist integration of experiences, theories and practices”, in Stubbs J (ed), *Women, male violence and the law*, The Federation Press, Sydney, 1994.

[68] Milroy, note 5, pp 66-67.

[69] For instance, see the discussion of Action Research in Aboriginal Pedagogy, note 23, pp 7-16.

[70] See, for instance, Japanangka errol West, *An alternative, Australian Indigenous Research and teaching Model – The Japanagka Teaching and Research Paradigm,* Doctoral Thesis, 2000; Rigney L, “Tools for an Indigenist Research Methodology: A Narungga Perspective”, Paper delivered to the World Indigenous Peoples Conference: Education, Albuquerque, New Mexico, June 15-21 1996; Atkinson J, “Dadirri: listening to one another”, *Trauma Trails, Recreating Songlines*, Spinifex Press, Melbourne, 2002; Nicholson B, “Indigenous Theory”, Paper presented to the Theory Research Action Workshop, Legal Intersections Research Centre, University of Wollongong, 16 July 2002; Bishop, note 5; Tuhiwai-Smith, note 5; and Tunks, note 5.

and Action Research methods may have something to offer; more particularly, by drawing on and learning from the decolonising methodologies being articulated by Indigenous academics and researchers, opens the *possibility* of developing concordant decolonising methodologies by which non-Indigenous researchers can engage appropriately with issues concerning Indigenous communities and peoples, *by engaging* with issues concerning *ourselves*.

Dr Irene Watson has commented that decolonisation is a “white” issue too,[71] in that the preservation by non-Indigenous peoples of “dominant colonial thought patterns” maintains the borders of the “right way of knowing” and sustains the academic endeavour to colonise Indigenous philosophy and being.

Ownership and control

As noted in Bishop’s comments above, the prevailing individual culture in the academy is quite inconsistent with the notion of responsibility to those participating in research. However, the guidelines emphasise the right of Indigenous communities to retain control and ownership of cultural knowledge and information, and of the outcomes of the research project. The two examples described below help to illustrate why.

The first example, relates to legal proceedings brought by the Pitjantjatjara Council to protect cultural knowledge and information. In *Foster v Mountford and Rigby Ltd*,[72] the Pitjantjatjara people successfully obtained an injunction against Mountford and a publishing company to prevent the publication of Mountford’s book, *Nomads of the Australian Desert.* Mountford, an anthropologist, had visited the Pitjantjatjara community in the 1940s and had been given access to sites and information of deep cultural and religious significance. He included this information in his book. The injunction was granted by the Northern Territory Supreme Court to prevent any further distribution of the book in the Northern Territory,[73] as it

[71] Dr Irene Watson, personal communication, 5 December 1999.

[72] (1976) 14 ALR 71.

[73] It is not clear from the judgment if the book was being offered for sale outside of the Northern Territory - presumably it was. This is significant given that the Pitjantjatjara's territory includes 'the south-west corner of [the Northern Territory], a large area of the north-west of South Australia, and a portion of the central portion of West Australia': *Foster v Mountford & Rigby* (1976) 14 ALR 71, at 72.

might cause disruption to Pitjantjatjara culture and society should the book come into the hands of the uninitiated.

About six years later, the Pitjantjatjara were forced back into the courts to prevent the distribution of slides that Mountford had taken of secret/ sacred material. The slides were being put up for auction, following Mountford's death. The Victorian Supreme Court made interlocutory orders that the slides be delivered to the Pitjantjatjara Council, who then inspected the slides, removed those that would be offensive if distributed, returning the balance to the auctioneers. The Court made final orders declaring those slides removed the property of the Pitjantjatjara Council for and on behalf of the Pitjantjatjara, Yankuntjatjara and Ngaanyatjara peoples.[74]

This example illustrates why it is important that information published as a result of the research must accord with Indigenous custom, sensitivities, beliefs and laws, including the different role and laws related to men and women, and taking particular care with restricted materials and the publication of photos and other materials that may cause offence.

The next example illustrates why the researcher must also be willing to abide by the community's right to control the outcomes of the project, even thought it may lead to outcomes different to those the researcher desires. In this instance, an Indigenous Australian community participated in a health study that identified a particular illness as prevalent within its population. The community requested that the information not be published, and this request was honoured. However, one of the researchers involved in the project was "distressed" and objected "to information being swept under the carpet because of its potential to offend or embarrass".[75] In the researcher's view, if the information remained unpublished this health problem would not be addressed, as public pressure would not be brought to bear to provide more adequate public funding.

[74] "Casenote - Pitjantjatjara Council Inc and Peter Nganingu v John Lowe and Lyn Bender Supreme Court of Victoria (Crockett J) 25-26 March 1982" (1982) No 4 *Aboriginal Law Bulletin* 11.

[75] Ragg M, "Publish and be doomed", *The Bulletin*, August 27 1996, p 24.

The community, on the other hand, formed the view that

> the particular health problem is well known, and that publishing more research about the same problem reinforces stereotypes but does nothing to alleviate the problem … the solution is known - what is needed is the political will to tackle the problem.[76]

It would seem that the community's decision to prevent publication was based on years of experience with prejudice and racism built on racial stereotyping, and that clearly they had no wish to exacerbate this. Apparently the researcher failed to appreciate or to understand the significance of the community's perspective on the outcome *they* could expect from publication: they foresaw public outrage but not directed at the lack of health funding, instead they foresaw increased public outrage directed *at them*.

It is important also to be conscious of the specific needs of the community to ensure that their privacy and confidentiality is protected.[77] Particularly those in remote and regional communities[78] may remain identifiable despite the removal of obviously 'identifying' facts in published documents. A few details - however benign they may seem to those outside the community - are usually sufficient within a small community to enable a person to be identified.

Feedback

Research projects that do not involve effective feedback have little hope of achieving any real or direct benefit to the community concerned.

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[76] Ragg, note 75, p 24.

[77] See Human Rights and Equal Opportunity Commission, *It's like delving into your soul: Aboriginal and Torres Strait Islander Privacy Awareness consultation and research*, Final Report, HREOC, Sydney, September 1995.

[78] Though not only, given the efficacy of the Koori/ Goori/ Murri/ Nunga … grapevine.

Feedback is essential to a collaborative research process rather than being a separate endeavour,[79] and feedback processes must be culturally appropriate to be effective. It is an ongoing process, requiring feedback during *and* after the research process. Feedback during the project will ensure participants can check the accuracy of the researcher's recording of the information they have provided, and that they remain confident in their decision to contribute the information. As Hecker points out, this process of confirming results with the participants also benefits the researcher by strengthening the validity of the data/ information obtained.[80]

Equally, it is essential to provide the results to the community to ensure it can act on research findings.[81] This requires effective communication skills that are cognisant of language used in the community and cross-cultural communication processes, and must be done in an atmosphere that is not threatening to Indigenous people.[82] A study of a feedback process used in a health study in the Kimberley, suggested that the most effective means of communication was feedback provided to the individual participants by the researchers themselves, and that feedback should be provided as close as possible in time to the research interviews.[83]

Clearly, research results should be disseminated only with approval by the community (as discussed above), and in ways approved by them. This will necessarily involve further consultations with the community *after* the project is finished, and could involve removal of some information particularly if the researcher proposes other sources in which to publish the information.

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[79] Hunter E, "Feedback: towards the effective and responsible dissemination of Aboriginal health research findings" (1992) 17(May) *Aboriginal Health Information Bulletin* 17, p 18.

[80] Hecker, note 64, p 785.

[81] Collins L and Poulson L, "Aboriginal Research: an Aboriginal perspective" (1991) 15(2) *Aboriginal and Islander Health Worker Journal* 6, p 6.

[82] Collins and Poulson, note 81, p 6. For instance, see the analysis of the feedback process used in a health study conducted in the Kimberley cited next.

[83] Kimberley Aboriginal Health Workers, "The importance of Aboriginal research feedback: why and how should it be given back" (1992) 16(2) *Aboriginal and Islander Health Worker Journal* 4, p 6. See also Hunter, note 79.

Conclusion

Ethical research is "constructed and enacted within specific cultural contexts",[84] and to date, our examination of the legal academy's "cultural context" has been mediocre at best. I suggest it matters how we as lawyers undertake research in all of its forms, how we find information and how we produce knowledge, as we play - and seem likely to continue to play – a significant role in mediating the experience of Indigenous Australians and the rest of Australia.

I hope this paper encourages us to ponder and to debate the cultural context within which we operate and often take for granted. Despite the previous millennium's refinements to legal pedagogy, the legal academy urgently needs to engage fully with the Indigenous critique, and to better understand and meet Indigenous Australians' concerns about research. Our capacity to engage in research with integrity is of the essence.

Maintaining a stance based on unfettered academic leadership risks continuing to

> stifle the originality, integrity and creativity of [Indigenous] legal writers … [suffocating the Indigenous voice] … through the reliance on Eurocentric legal fictions and scientific assumptions; through the belief in the superiority of western thought; and through the misuse of academic autonomy[85]

precluding the formation of any space within which non-Indigenous and Indigenous academics and communities can dialogue.

The quality of ethical guidelines and procedures depend on "what, if any, mechanisms are in place to ensure that researchers will comply with the guidelines once established".[86] Thus there must be an institutional response to ensure that researchers develop ethical frameworks to work with Indigenous communities, which includes accountability procedures to ensure that the guidelines are followed, and followed to the satisfaction of the relevant community, and not merely to that of a Committee.

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[84] Smith, note 19, p 25.

[85] Paraphrasing a comment on non-Maori legal research by Tunks: Tunks, note 5, p 1.

[86] Johnstone, note 10, p 11.

Similarly, ethics committees are "only as good as the people who serve on them",[87] and so there is a need for Indigenous people to participate in these committees (with appropriate remuneration), and for appropriate training for non-Indigenous committee members.

These questions about research risk being lost in the prevailing economic climate and the consequent pressures being applied to higher education institutions. Indeed, the imperatives of economic rationalisation make asking these questions very unattractive.[88] However, if we are honest about our mediating role in the production and dissemination of knowledge, these questions cannot be avoided. Finding the answers to them requires more inquiry, learning and reflection on our part, and in a particular, a conscious effort to lose the "picture books".

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87 Johnstone, note 10, p 12.
88 Smith, note 19, p 26.