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RESEARCH NOTE

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The Definition of Aboriginality

In his analysis of over 700 pieces of legislation, the legal historian John McCorquodale found no less than 67 different definitions of Aboriginal people.[1] Though colonial legislation initially grouped Aboriginal people by reference to their place of habitation (e.g. aboriginal natives of New South Wales and New Holland), 'blood' quantum classifications entered the legislation of New South Wales in 1839, South Australia in 1844, Victoria in 1864, Queensland in 1865, Western Australia in 1874 and Tasmania in 1912. Thereafter till the late 1950s States regularly legislated all forms of inclusion and exclusion (to and from benefits, rights, places etc.) by reference to degrees of Aboriginal blood. Such legislation produced capricious and inconsistent results based, in practice, on nothing more than an observation of skin colour. To illustrate the inconsistencies the historian Peter Read, drawing on documented sources, has offered the following conflation:

> In 1935 a fair-skinned Australian of part-indigenous descent was ejected from a hotel for being an Aboriginal. He returned to his home on the mission station to find himself refused entry because he was not an Aboriginal. He tried to remove his children but was told he could not because they were Aboriginal. He walked to the next town where he was arrested for being an Aboriginal vagrant and placed on the local reserve. During the Second World War he tried to enlist but was told he could not because he was Aboriginal. He went interstate and joined up as a non-Aboriginal. After the war he could not acquire a passport without permission because he was Aboriginal. He received exemption from the Aborigines Protection Act—and was told that he could no longer visit his relations on the reserve because he was not an Aboriginal. He was denied permission to enter the Returned Servicemen's Club because he was.[2]

There were surprisingly few challenges to the appropriateness of these definitions (those there were came mostly from Europeans charged with supplying liquor to Aborigines) and few judicial pronouncements on their appropriateness (and those there were seemed to support the classifications).[3]

Federal legislation was quick to endorse State discrimination (thus the *Commonwealth Franchise Act 1902* disqualified 'aboriginal natives' who were not entitled to vote under State law) and the Federal Government quick to accept the administrative usefulness of the preponderance of 'blood' criteria (e.g. for deciding if an individual was Aboriginal for the purposes of being counted under section 127 of the Constitution or 'white only' labour laws as in the *Excise Tariff Act 1902*).[4] The Federal Government's constitutional preclusion from legislating with respect to Aboriginal people prior to 1967 did, however, prevent it from creating a raft of restrictive definitions similar to that which existed in the States.[5] When policy entered a more progressive period in the late 1960s and 1970s the blood-quantum definitions, which had never been accepted as meaningful by Aboriginal communities themselves, were relatively easy to abandon.

Throughout the 1970s a lot of Commonwealth legislation defined an 'Aboriginal' as 'a person who is a member of the Aboriginal race of Australia.'[6] Though possibly an improvement on 'blood' quantum definitions, the utility of this definition can still be questioned, not least of all on the grounds that there is no such thing as an Aboriginal race. Most scientists long ago stopped using the word 'race'.[7] Darwin wanted to replace typological thinking with the concept of populations and in the *Descent of Man* (1874) devoted several chapters to refuting the notion that races were separate species. For the modern anthropologist a 'human tree' can do no more than show the frequency (not exclusiveness) of genetic traits in sample populations and more meaningful divisions of humankind are suggested by region, culture, religion and kinship.[8]

In the 1980s a new definition was proposed in the Constitutional Section of the Department of Aboriginal Affairs' *Report on a review of the administration of the working definition of Aboriginal and Torres Strait Islanders* (Canberra, 1981). The section offered the following definition:

> An Aboriginal or Torres Strait Islander is a person of Aboriginal or Torres Strait Islander descent who identifies as an Aboriginal or Torres Strait Islander and is accepted as such by the community in which he (she) lives.

This three-part definition (descent, self-identification and community recognition) was soon adopted by Federal Government departments as their 'working definition' for determining eligibility to some services and benefits. The definition also found its way into State legislation (e.g. in the NSW *Aboriginal Land Rights Act 1983:* where 'Aboriginal means a person who: (a) is a member of the Aboriginal race of Australia, (b) identifies as an Aboriginal, and (c) is accepted by the Aboriginal community as an Aboriginal') and was accepted by the High Court as giving meaning to the expression 'Aboriginal race' within s. 51 (xxvi) of the Constitution (Justice Deane in *Commonwealth v. Tasmania* 1983). It was also used by the Federal Court when, in a first instance decision, it found that the Royal Commission into Aboriginal Deaths in Custody had no jurisdiction to inquire into the death of Darren Wouters as the community did not identify him as Aboriginal nor did he identify himself as Aboriginal (although the Full Federal Court subsequently found in *Attorney-General (Cwlth) v State of Queensland*, July 1990, that the Royal Commission's letter patents were framed in such a way as to make Aboriginal descent a sufficient criterion).

The advantages of this three part definition were not, however, apparent to all. In 1988 the Victorian State president of the RSL, Mr Bruce

Ruxton, called on the Federal Government:

> to amend the definition of Aborigine to eliminate the part-whites who are making a racket out of being so-called Aborigines at enormous cost to the taxpayers'.[9]

When asked to explain the Ruxton resolution, the national RSL president, Brigadier Alf Garland, spoke of genealogical examination to determine whether the applicant for benefits was 'a full-blood or a half-caste or a quarter-caste or whatever'.[10] Public reaction to the suggestion of a blood test included the observation that there is no blood test that establishes Aboriginality and that:

> When any of their numerous and varied kind put a foot wrong—and often even when they don't—white Australians will have no difficulty at all in identifying them as Aborigines and ascribing their shortcomings to their Aboriginality. But when there is some benefit flowing the Aborigines' way, such whites will raise silly questions. As Mr Ruxton did.[11]

In this same year and despite the protests of the Shadow Minister for Aboriginal Affairs Mr Chris Miles,[12] the Government included in its Aboriginal and Torres Strait Islander Commission Bill, Section 4(1) the 1970s style:

> 'Aboriginal person' means a person of the Aboriginal race of Australia.

Senator Coulter, the Democrat spokesperson on Aboriginal Affairs, argued this definition was tautological and wanted it amended[13] but Minister Gerry Hand claimed in a press release on 30 September 1988 that:

> The definition of an Aboriginal person in the Government Legislation establishing the Aboriginal and Torres Strait Islander Commission is the same definition used by all political parties over many years. Anyone who queries this should have a look at the *Aboriginal Land Rights (Northern Territory) Act 1976*, the *Aboriginal Development Commission Act 1980*, the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* and the *Aboriginal Land Grant (Jervis Bay Territory) Territory Act 1986.*

The three part administrative definition, though failing to plant itself in Federal legislation continued to give meaning to 'person of the Aboriginal race' and a version of it was included in Justice Brennan's Mabo (No. 2) judgement:

> Membership of the indigenous people depends on biological descent from the indigenous people and on mutual recognition of a particular person's membership by that person and by the elders or other persons enjoying traditional authority among those people.[14]

Just as the first of Justice Brennan's criterion, 'biological descent', was found in *WA v Ward* (2000) to not imply strict patrilineal descent, so the first pillar of the three-part administrative definition, 'Aboriginal descent', was found by Justice Merkel in *Shaw v Wolf* (1998) to not need to be proved 'according to any strict legal standard', it being:

> a technical rather than a real criterion for identity, which after all in this day and age, is accepted as a social, rather than a genetic, construct.

Although there have been community disputes over identification in Tasmania, the three part definition has generally been found to help protect individuals from the tendency among 'mainstream Australians' to consider 'real' indigenous people as people living somewhere else and others as manipulating the system.[15] It also sits well with the definition used by the UN Working Group on Indigenous Populations in 1986:

> Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies …, consider themselves distinct from other sectors of the societies now prevailing in those territories … They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.[16]

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1. John McCorquodale, 'The Legal Classification of Race in Australia', *Aboriginal History*, vol. 10, no. 1, 1986, pp. 7–24.
2. Unpublished paper, Aboriginal Citizenship conference at the ANU in February 1996.
3. McCorquodale, ibid., pp. 16–18.
4. For more on such legislation see John Summers, 'The Parliament of the Commonwealth of Australia and Indigenous Peoples 1901–1967', *Research Paper* no. 10, 2000–01, Department of the Parliamentary Library, Canberra.
5. Bradford W. Morse, *Aboriginal Self-Government in Australia and Canada*, Aboriginal Peoples and Constitutional Reform Background Paper no. 4, Kingston, Ontario, 1984, p. 15.
6. *Aboriginal Land Rights (Northern Territory) Act 1976* s. 3 (1), *Aboriginal and Torres Strait (Queensland Discriminatory Laws) Act 1975*, s. 3 and *Aboriginal and Torres Strait Islanders (Queensland Reserves and Communities Self-Management) Act 1978*, s.3.
7. Gordon Bowles, *The Peoples of Asia*, 1977, pp. 2–3.
8. ibid., p. 369.
9. John Slee, 'Definitions of an Aboriginal', *The Sydney Morning Herald*, 16 September 1988.
10. *The Australian*, 9 September 1988.
11. Slee, op. cit.
12. Chris Miles, *Press Release*, 10 September 1988.
13. *The Age*, 1 October 1988.
14. *Mabo v Qld* (No. 2) (1992) 175 CLR 1 at p. 70.
15. Report by Sweeney and Associates for the Aboriginal Reconciliation Branch of the Department of the Prime Minister and Cabinet, *A New Beginning: Community Attitudes towards Aboriginal Reconciliation*, January 1995, p. i.
16. Chris Cunneen, and Terry Libesman, *Indigenous People and the Law in Australia*, Butterworths' Legal Studies Series, Sydney, 1995, p. 238.