WESTERN AUSTRALIAN COURTS ON NATIVE AFFAIRS 1936-1954 – ONE OF 'OUR' LITTLE SECRETS IN THE ADMINISTRATION OF 'JUSTICE' FOR ABORIGINAL PEOPLE

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There has recently been some discussion of the need for a system of justice in Australia which recognises the precepts of Aboriginal customary law. This recent discussion within, at least, the ranks of the Standing Committee of Attorneys' General builds upon the earlier work of the Australian Law Reform Commission (1986). I suggest that this debate should be informed by earlier attempts to give expression to these concerns. The only Australian jurisdiction which has historically established such a system in respect of serious indictable offences is Western Australia. There, Courts of Native Affairs ("CNAs") were established by the *Native Administration Act* 1936 (WA) ("*NA Act* 1936"),[1] and operated from 1936-54. During that period, they tried every case of *inter se* wilful murder and murder concerning Aborigines in Western Australia. It is impossible to exactly quantify the number of hearings conducted in this jurisdiction because of the relative difficulty in obtaining all records, but it would seem from research that I have recently undertaken that approximately 100 Aboriginal people were processed to varying degrees. These hearings, conducted in public, seem to have suffered from the great Australian silence on Aboriginal issues.[2] In what follows I raise some of the concerns and criticisms which can be raised about the operations of this system, with a view to breaching this conventional oppressive silence which, I suggest has left us with what Smith describes as a "queer set of shapes".[3] It is important to breach this silence in our jurisprudence to set right some of the errors which have been made in the all too brief examinations of how this system operated.

Historian and former Western Australian Aboriginal affairs administrator Biskup, has described the establishment of these courts as the 'least'

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1 Western Australian Act No 43 of 1936; note that with progressive amendments to the Act the section numbers changed. I have continued to use the section numbers from the 1936 printing.

2 WEH Stanner, *The 1968 Boyer Lectures. After the Dreaming*, ABC Press (1969).

3 B Smith, *The Spectre of Truganini*, ABC Press (1980).

controversial of the innovations of the *NA Act* 1936.[4] This view has subsequently been adopted by commentators who regard the courts as ameliorative in their incorporation of customary law.[5]

I. THE *NATIVE ADMINISTRATION ACT* (WA) 1936

Often described as 'special', the Western Australian CNAs were established in 1936 pursuant to ss 60 and 63[6] of the *NA Act* 1936, a legislative regime which has been described as reducing Aboriginal people to the status of "born idiots".[7] The statute presented a bundle of contradictory impulses. It 'protected' the Aborigines and it pilloried them; it ousted the rule of law and the common law and increased the power of administrators to an extraordinary degree, as well as promoting a 'protection racket' which can be more readily described as 'persecution'.[8] The legislation was arguably draconian, in the fashion of the *Mutiny Act,*[9] the *Fugitive Slave Act*[10] and the anti-Semitic laws of Vichy France.[11] The provisions which established the CNAs represented the continued imposition of a Western Australian legal tradition of 'accused speaks' Marian courts for Aboriginal people, a fifteenth and sixteenth century legal process which had long since been abolished in other common law jurisdictions.[12]

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4 P Biskup, *Native Administration and Welfare in Western Australia*, unpublished Masters thesis, University of Western Australia (1965) p 284.

5 See J Toohey, "The Impact of Anglo-Australian Law on Aborigines" in *Law under Stress, Future Challenges for the Legal* System, University of Western Australia Press (1979) p 32; Western Australian Parliamentary Votes and Proceedings, 9 December 1953, p 2481; M Daunton-Fear, *Sentencing in Western Australia*, University of Queensland Press (1975) pp 201-3; R Johnstone, "Aboriginal Issues in Australian Legal Scholarship: The Australian Law Reform Commission's Report on the Recognition of Aboriginal Customary Law" in MP Ellinghause, AJ Bradbrook and AJ Duggan (eds), *The Emergence of Australian Law*, Butterworths (1989).

6 Note that ancillary ss 61 and 62 are not examined in any great detail here. Section 61 provided for arrest without warrant and banishment and detention of Aboriginal people convicted under the *Criminal Code* (WA), ss 382 and 452. Section 62 provided for summary trial for *any* person charged with assaulting a 'native'. Only magistrates, not justices of the peace, were allowed to exercise powers under this section, because it involved the prosecution of non-Aboriginal people. This section was only ever criticised for imposing delays and pre-hearing detention on non-Aboriginal people (Western Australian Public Records Office ("WAPRO") file no 993 593/1938) and this criticism was only voiced in 1952-3.

7 P Hasluck, *Black Australians, A Survey of Native Policy in Western Australia 1829-1897*, University of Melbourne Press (2nd ed, 1970) pp 160-1.

8 J Huggins and T Blake, "Protection or Persecution" in K Saunders (ed), *Gender Relations in Australia: Domination and Negotiation*, Harcourt Brace Jovanovitch (1992); D McLeod, *How the West was Lost, The Native Question in the Development of Western Australia*, self published (1984) p 2.

9 Which operated throughout the seventeenth and eighteenth centuries; R Weisberg, *The Failure of the Word, The Protagonist as Lawyer in Modern Fiction*, Yale University Press (1984).

10 Which operated ante-bellum America; R Cover, *Justice Accused, Anti-Slavery and the Judicial Process*, Yale University Press (1975).

11 Which governed occupied France during World War II; R Weisberg, *Vichy Law and the Holocaust in France*, New York University Press (1990).

12 JH Langbein, "The Privilege and Common Law Civil Procedure: The Sixteenth to Eighteenth Centuries" in RH Helmholz et al (eds), *The Privilege against Self Incrinimation, Its Origins and Development*, University of Chicago Press (1997).

II. PROMOTION OF COURTS OF NATIVE AFFAIRS – 1920-30

Proposals for these CNAs emerged in the 1920s and 30s as a result of persistent lobbying by 'concerned citizens' troubled by the position of Aboriginal people in the ordinary legal process in Australia. In the late 1920s, two massacres and their subsequent inquiries, the first one in the Kimberley,[13] and the second at Coniston in the Northern Territory,[14] increased concern about the failure of the legal system to address the 'clash' of cultures,[15] and culminated in a call for an Aboriginal Model State with its own tribunal.[16] Lobbyists included many vocal church functionaries;[17] anti-slavery advocates such as Bennett,[18] Rischbieth, Cooke[19] and Baillie;[20] and anthropologists Piddington,[21] Elkin[22] and Stanner.[23]

Administrators and law officers seeking to expand their quasi-judicial and 'protective' empires, notably Neville, Chief Protector of Aborigines Western Australia,[24] and the Northern Territory Crown Law Officer Asche, were vocal in their promotion of CNAs. Given Neville's connection with the Western Australian Agent General's Office in Britain,[25] it would seem unlikely that he

13 GA Wood, *Royal Commission of Inquiry into Alleged Killing and Burning of Bodies of Aborigines in East Kimberley*, 1927, Western Australian Parliamentary Votes and Proceedings, vol 1, no 3; N Green, *The Forest River Massacres*, Freemantle Arts Press (1995).

14 H Reynolds, *The Whispering in our Hearts*, Penguin (1998) p 191.

15 AP Elkin, "Aboriginal Evidence and Justice in North Australia" (1947) 5 *Oceania* 173.

16 M Roe, "A Model Aboriginal State" (1986) 10 *Aboriginal History* 1.

17 B Attwood and A Markus, *The 1967 Referendum, or, When Aborigines didn't get the Vote*, Aboriginal and Torres Straits Islander Studies (1997); ERB Gribble, *The Problem of the Australian Aboriginal*, Angus and Robertson (1932) p 93.

18 See for example MM Bennett, *The Australian Aboriginal as Human Being*, Ashton Rivers (1930).

19 F Paisley, "No Back Streets in the Bush 1920's and 1930's Pro-Aboriginal White Women's Activism and the Trans Australian Railway" (1997) 25 *Australian Feminist Studies* 12.

20 ERB Gribble, *Papers – Manuscript Collection*, held at the Australian Institute of Aboriginal Studies in Canberra, 1515/18 item 193.

21 See, for example, R Piddington (1929) *Contemporary Review* 221.

22 See, for example, AP Elkin, "Anthropology and the Future of the Australian Aborigines" (1934) 5 *Oceania* 2; and see T Rowse, *White Flower, White Power*, Cambridge University Press (1998).

23 WEH Stanner, "The Australian Aboriginal" in J Kevin (ed), *Some Australians Take Stock* (1939) 1.

24 A Haebich, "The Formative Years: Paul Hasluck and Aboriginal Issues during the 1930's" in T Stannage et alia (eds), *Paul Hasluck in Australian History, Civic Personality and Public Life* (1999) 93 at 96.

25 Neville's brother was employed in the office of the Agent General in London and Neville visited him in late 1919-20 (P Jacobs, *Mister Neville, A Biography*, Freemantle Arts Press (1990) pp 45, 48 and 95), a year when lethal tribal conflict was conspicuous in both Western Australia and the Northern Territory (D Rose, *Indigenous Customary Law and the Courts, Post-Modern Ethics and Legal Pluralism*, Australian National University Discussion Paper Number 2/1991 at 97-8). Crown Law Department (CLD) files created in 1919 referring to the establishment of CNAs: WAPRO file no 1042 508/1919, "Establishment of a Court in the North West to deal with Native Cases".

was unaware both of the Colonial Office's praise[26] and criticisms of native courts in other jurisdictions.[27] In his evidence to the Wood Royal Commission, Neville spoke of CNAs in the South African and Kenyan colonial court system as a potential model,[28] citing with approval the use of headmen to "bring in the offender".[29] Remarkably, criticisms of native courts in other jurisdictions were conspicuously absent in the Western Australian 'debate', although similar Northern Territory proposals were routinely criticised in similar terms.[30]

Neville made submissions to both the 1927 Royal Commission[31] and the 1929 Royal Commission into the Australian Constitution[32] in support of the CNA proposal, stating that "native trials" were "farcical in the extreme" and that "local juries" refused to convict whites.[33] He dismissed suggestions that the law was applied equally, a position from which he later resiled.[34] At all times Neville and others collapsed concerns about non-Aboriginal defendants being acquitted of crimes against Aboriginal people with the issue of *inter se* violence, failing to recognise the complexity of the situation. The West Australian Moseley Royal Commission in 1934 accepted Neville's submissions as to the necessity of establishing CNAs,[35] even as Bushe[36] was rejecting less powerful CNAs in Africa. In support of his arguments Neville disingenuously exploited the "great success" of the less invasive Queensland native courts which were confined to dealing

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26 Ormsby-Gore reported that Native Courts in Nigeria were "closely supervised" and that they demonstrated a "much deeper knowledge of local law and custom than that possessed by British officials... [and a] clearer insight into reliability of witnesses... [resulting in] more substantial justice [being] meted out than is possible for any foreign court": H Ormsby-Gore, *Report by the Honourable Ormsby-Gore MP (Parliamentary Under Secretary of State for the Colonies) on his visit to West Africa during the Year 1926*, Command Paper 2744, House of Commons Parliamentary Papers 1926, vol 9, p 211. These courts could be differentiated from the Western Australia experiment as in Africa native courts were an element of the policy of indirect rule. This was never a consideration in Western Australia: L Marchant, *Aboriginal Administration in Western Australia 1886-1905*, Australian Institute of Aboriginal Studies (1981) pp 15-30.

27 See, for example, HG Bushe, *Report by HG Bush on his Visit to Nigeria*, House of Commons 1934, Parliamentary Debates, Official Report (5th series), Colonial Office 583/183.

28 Western Australia was not alone in setting up this alternative stream of 'justice'; other colonial outposts from Tanganyika to Guadal Canal experimented with similar proposals: I Hogbin, "Native Councils – Native Courts in Solomon Islands" (1944) 14 *Oceania* 257 at 274. The *NA Act* 1936 carries the same title as the 1927 South African legislation (M Chanock, "The South African Native Administration Act of 1927: Reflections on a Pathological Case of Legal Pluralism" in O Mendelsohn and U Baxi (eds), *The Rights of Subordinated Peoples*, Oxford University Press (1994)), and additionally, the Western Australian proposal should not be isolated from developments in other colonial jurisdictions, given the time frame in which it arose: see *ibid*. In some jurisdictions the courts were established to promote the policy of 'indirect rule', a modernist, colonial enterprise of the British Empire, part of the civilising mission to save the brown man from himself: GC Spivak, *In Other Worlds, Essays in Cultural Politics*, Routledge (1988) p 296.

29 GA Wood, note 13 *supra* at 72.

30 Commonwealth Public Records Office file no F1 1938/636

31 GA Wood, note 13 *supra*.

32 *Royal Commission into the Commonwealth*, 1929, memoranda located in WAPRO file no 993/412/1927.

33 *Ibid*, dated 19 January 1927.

34 He wrote, in response to Mary Bennett in 1933: "[O]ur courts of law give to natives the same trial as in the case of others, and proper court records are kept of all trials". WAPRO file no 993/166/1932, memorandums of 19 June 1933 and 20 August 1935.

35 WAPRO file no 993/333/1933.

36 Note 27 *supra*.

with summary matters, and which have themselves been recently criticised.[37] Welcoming Moseley's recommendations, Neville pressed for ill defined 'native representation' at the hearings.

Some of Moseley's recommendations for the blanket rejection of Aboriginal people's 'confessions' (to reduce police abuses)[38] and the non-compellability of Aboriginal wives, had considerable merit. However, the promotion of 'headmen' as a means to "obtain information and bring witnesses forward"[39] was accepted as unproblematic. Further, the contradictions inherent in viewing the CNAs as "a line of defence" for Aboriginal people,[40] and the potential for conflicts of interest were absent from the discussion in spite of controversial earlier criticisms of Western Australian Aboriginal jurisprudence.[41] The issue of Neville's 'expertise' in Aboriginal affairs, itself a matter of controversy,[42] was also ignored.

III. THE 'BENEFITS' OF COURTS OF NATIVE AFFAIRS

The benefits of the CNAs as advocated by Neville,[43] were the expedition of prosecutions and economy, with costs saved in transporting and accommodating Aboriginal witnesses. 'Finality' would be assured by the abolition of both juries and appeals, although it seems appeals were most infrequent if not actually non-existent. Although the abolition of juries and the lessening of emphasis on legally qualified and skilled personnel would also save costs, this was never articulated in so many words. In spite of some obvious shortcomings, the new system was welcomed as placating critics such as Bennett.[44] Inherent in the advocacy of the new system was a paradoxical desire on the part of the benevolent to undermine

37 In 1939, Stanner asserted that while Queensland was doing reasonably well in Aboriginal policy in 1938, the state of Western Australia was intent upon "doing better": see, for example, C Tatz, "Queensland's Aborigines, Natural Justice and the Rule of Law" (1963) *Australian Quarterly* 33 and G Nettheim, *Out Lawed: Queensland's Aborigines and Islanders and the Rule of Law*, Australian and New Zealand Book Co (1973).

38 Police conduct of interviews was already governed by the adoption of the 1918 Judges Rules (England) – *Police Act 1892* (WA), s 9.

39 WAPRO file no 993/333/1933, undated memo from AO Neville, Chief Protector of Aborigines.

40 *Ibid.*

41 CW Slaughter, "The Aboriginal Native of North-West Western Australia and the Administration of Justice" (1901) 9 *Westminster Review* 411. Interestingly, problems of conflicts of interest were still not recognised in 1953 by Professor Cleland of the University of South Australia: JB Cleland "Correspondence, Notes and News. The Aborigine and British Justice" (1953) 4 *Mankind* 477.

42 Western Australian Parliamentary Votes and Proceedings, 1936.

43 WAPRO file no 993/333/1933.

44 MM Bennett's comments in the press and in her publications such as *The Australian Aboriginal as a Human Being*, Ashton Rivers (1930), gave Eleanor Dark and Charles Flinders the impetus to deny her assertions of slavery and iniquity: see articles in the *West Australian* on 19 May 1932, p 3; 26 May 1932, p 4; 6 June 1932, p 4; and 10 June 1932, p 4; and in the *Daily News* on 17 June 1933, p 5.

or eliminate certain Aboriginal customary law practices.[45] Bennett's position, like that of Neville, was rife with contradictions.[46] She promoted the active interference with cultural law and rites, while at the same time criticising the *Aborigines Act* 1905 (WA) for countenancing administrative interference with the liberty of the subject "[contrary] to the law of the land".[47] Ironically, when passed, the *NA Act* 1936 in its totality ensured virtually unfettered administrative control of Aboriginal people's lives.[48] Even the squattocracy, more concerned about proposals for licensing Aboriginal labour than equality before the law, asserted that the Act produced an 'autocrat' in the person of the Commissioner.[49]

IV. THE ACT – 'SPECIAL' OR SHAMBLES?

Two sections and some brief, but far-reaching regulations[50] establish this alternative and discriminatory legal system. Sections 60 and 63 and regulation five (1936)[51] are the most significant. The regulations were proclaimed twice (1936 and 1938), as on the first occasion they were unlawfully gazetted without parliamentary approval as required by s 69 of the *NA Act* 1936. Assent was finally being obtained in a climate of almost total silence about their strictures. This debate, like all of those involving this new system of 'justice' for Aboriginal people, was perfunctory.

45 Ultimately, regulation 129 of the *NA Act* 1936 empowered the Minister, on the advice of the Commissioner for Native Affairs, to instruct that "injurious tribal practices shall be discontinued". "Whenever it is deemed expedient by the Minister upon the recommendations of the Commissioner to instruct that any tribal practice considered injurious to the natives shall be discontinued in any district, he shall cause notices to be posted throughout the district accordingly and it shall be the duty of protectors for such district to instruct natives accordingly, and take action against any native persistently disobeying such instructions". The ludicrousness of posting notices to instruct a largely illiterate Aboriginal population seems lost on the Parliament as no one refers to this provision in the debate: Western Australian Parliamentary Votes and Proceedings, 1938.

46 The contradictory impulses informing opinion about the 'needs' of Aboriginal people at that time is evident when one considers Daisy Bates' 1926 call for the execution of an Aboriginal man for the murders of white gold inspectors, offences which non-Aboriginal people were later convicted of. She argued that the death penalty provided the "only real deterrent" for what she saw as the "suppressed sort of defiance" of Aboriginal people: see E Clegg, *Return Your Verdict, Some Studies in Australian Murder Cases*, Angus & Robertson (1965), citing Bates' letter to the Governor.

47 M Morgan, *Mount Margaret: A Drop in the Bucket*, Mission Publications of Australia (1986) pp 157-9.

48 Aboriginal Legal Service of Western Australia, *Telling Our Story, A Report by the Aboriginal Legal Service of Western Australia (Inc) on the Removal of Aboriginal Children from their Families in Western Australia*, ALSWA (1995) p 15; A Haebich, *For Their Own Good, Aborigines and Government in the South West of Western Australia*, University of Western Australia Press (1988).

49 Western AustralianParliamentary Votes and Proceedings, 1938, pp 2241-60.

50 Section 63(5) authorised the Governor to make regulations prescribing the procedure to be followed in the CNAs.

51 Western Australia Government Gazette, 29 April 1938, regulation 125.

V. SECTION 60(1) – THE 'RIGHT TO SILENCE'

Section 60(1) was directory and authoritative, providing for the outright rejection of admissions or confessions obtained from an Aboriginal person either charged with or suspected of any offence punishable by death or imprisonment. The Bench retained no discretion in respect of the protection of this 'right to silence', although from a study of the extant records of the actual cases, this provision was honoured more in the breach than in the observance, with the *Coroner's Act* 1920 (WA), s 42(2) mechanisms to shield witnesses from self-incrimination also proving ineffectual.[52] 'Confessions' were admitted as 'exhibits' at inquests and remained on the Police-Crown law file which was provided to the CNA Bench. Ironically, in the 'ordinary' Supreme Court jurisdiction, s 60 protections were upheld in the widest possible terms.[53]

Throughout the parliamentary 'debate'[54] it is apparent that Aboriginal people's confessions were perceived as *rehabilitative.*[55] Neville made it plain in explanatory circulars numbers 155 and 186 that inculpatory statements were admissible and to be solicited in the hearings, as s 60 was enacted to "ensure that the full facts... shall be brought out at the trial", and that there "shall be no possibility of a native prejudicing himself" *before* the protector (often a police officer) had the opportunity of entering a plea for the defendant.

VI. SECTION 60 (2), (3) AND (4) – THE PLEA OF GUILTY

Section 60(2) stated that no plea of guilty 'shall' be accepted by any court unless a protector 'satisfied' the court that the defendant understood the accusation, was aware of the right to trial, and desired to plead guilty without

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52 This issue is discussed in *Royal Commission into Aboriginal Deaths in Custody, Reports on the Deaths of John Pat and Robert Joseph Walker*, 1990, where police and prison officers took advantage of such protections. Properly advised defendants retained the privilege of non-incrimination throughout the period in which the CNAs operated. See T Walker, *Murder on the Rabbit Proof Fence, The Strange Case of Arthur Upfield and Snowy Rowles*, Hesperian Press (1993) p 83.

53 In appeals in the ordinary court system, s 60(1) was invoked for the protection of a defendant processed in an attachment of earnings application (*Thompson v Brockman* (1939) 42 WALR 36) and others charged with theft of a £7 battery (*Bolton v Neilsen* (1951) 53 WALR 48), and rape (*Louis v R* (1952) 53 WALR 81), a case cited as good law by JV Barry, GW Paton and G Sawer, *An Introduction to the Criminal Law in Australia*, MacMillan and Co Ltd (1948) p 15. The Supreme Court consistently ruled in favour of the widest possible construction in favour of the accused in accordance with both the terms of the statute and legal doctrine. *Louis* was later cited with approval in Queensland: *R v Lindsay* (1963) Qd R 386, *R v Kina* (1962) Qd R 139, where a similar section was understood to place the judge "entirely in the hands of the accused". Some years later, Eggleston suggested that police could have been prosecuted for breaching this section: E Eggleston, *Fear Favour or Affection: Aborigines and the Criminal Law in Victoria, South Australia and Western Australia*, Australian National University Press (1976) p 43. She also suggested that attempts to alter the trial record in one case indicated an awareness of the illegal reception of confessional evidence.

54 Western Australian Parliamentary Votes and Proceedings, 1936.

55 This view was reiterated years later: "Surely if [an Aboriginal person] knows that he is breaking the law and the consequences of doing so, no injustice will be inflicted if [his confession is admitted and] he is punished in the same way as the ordinary citizen." Western Australian Parliamentary Votes and Proceedings, 7 December 1954, p 3620.

duress (s 60(3)). 'Police-officer-protectors' were disqualified from entering pleas when 'connected' with the case (s 60(4)). However, 'connection' was not defined, and any protector, including police, could otherwise 'represent' the interests of the accused (s 60(5)). These subsections repeated a 1911 amendment to s 59A of the *Aborigines Act* 1905 (WA),[56] which applied to the ordinary legal system. Documents located actually provide examples of cases where potentially 'interested' police were invited to sit as the Chief Protector of Aborigines' *nominee* on the CNA Bench, as well as examples where police from small regional stations were asked to act as defence counsel. Police acting as clerks of court (*Justices Act* 1902 (WA), s 34)[57] further reduced the appearance of impartiality.[58] For Aboriginal people the situation arguably encouraged the view that police, Department of Native Affairs ("DNA") officers and station managers cooperated to their legal disadvantage.[59]

VII. SECTION 63 (1), (2), (3), (4) – THE COURTS, 'SPECIAL' MAGISTRATE, HEADMAN[60]

Section 63(1) established CNAs to try "any offence" committed by "a native against another native". The Governor had the power of proclamation (s 63(2)(a)), but in practice this became an administrative not an executive function. A number of CNAs were inexplicably proclaimed in a 'job lot' as late as 1947.[61]

Section 63(2)(b) provided for a two man Bench comprised of a 'special magistrate',[62] commissioned by the Governor to act as chairman of the court, and the Commissioner of Native Affairs or his nominee. The term 'special magistrate' was not defined (see also *Justices Act* 1902 (WA), *Public Service Act* 1904 (WA), *Stipendiary Magistrates Act* 1930 (WA), and *Interpretation Act*

56 *Aborigines Act Amendment Act* 1911 (WA).

57 For a later examination of the complicitous role of clerks of court in advancing discriminatory police practices see G Bird, *The 'Civilising Mission': Race and the Construction of Crime*, Monash University Publishing (1987) p 20.

58 *Royal Commission into Aboriginal Deaths in Custody*, 1991, at 115.

59 P Marshall, *Raparapa Kularr Martuwarra. All Right, Now We Go 'Side The River, Along That Sundown Way. Stories From The Fitzroy River Drovers*, Magabala Books (1988) p 100; E Eggleston note 53 *supra*, p 44.

60 Contemporary commentaries show how useful 'headmen' were to colonial powers, and how they were used for the management of relationships between the two cultures: see O Adoweye, *The Judicial System in Southern Nigeria, 1854-1954*, Humanities Press (1977); note 28 *supra*; SE Merry, "Law and Colonialism" (1991) 25 *Law & Society Review* 889.

61 Western Australia Government Gazette, 26 September 1947.

62 The notion of 'special magistrate' in this context is first noted in Strehlow's "Notes of evidence" to the *1935 Northern Territory Board of Inquiry into ill-treatment and shooting of Aborigines by Constable W. Mckinnon and ors*, 1935, Commonwealth Public Records Office file no F1: 1938/636.

1918 (WA)),[63] but legal qualifications were not necessary (the *Justices Act* 1902, s 11, and the *Public Services Act* 1904, s 30). Contemporary criticism of such informality was never aired in this debate.[64]

The nominee position was rarely assumed by the Commissioner of Native Affairs, with protectors, including police-protectors, being routinely appointed to the position.

Section 63(2)(c), which provided for the involvement of the 'headman' (ostensibly to provide for the importation of customary law into the CNAs), was a tortured piece of drafting. It stated that the CNAs "shall if practicable" call to *its* assistance a "headman" of the accused's tribe. The draft Bill providing for a *power* to call a headman was amended in parliamentary committee to provide for a *duty* to do so,[65] which in turn was supplanted with the expression that the court "shall if practicable" call to its assistance a headman "of the tribe to which the accused person belongs".[66] The Act was silent as to when a headman's expertise was relevant to the process,[67] whether he was assessor or witness, and if so whose, and whether he was to make a pronouncement on the law in open or closed court (if at all).[68] Some case files show that police organised the headman as witness in some cases even though the wording of the section suggests that the

63 There had been considerable debate about the legitimacy of the appointment of 'special magistrates' in the context of the *Child Welfare Act* 1922 (WA) and the *Married Women's Protection Act* 1922 (WA), and special legislation was mooted to deal with the issue in those jurisdictions. No such debate or legislation was discussed in relation to the CNAs, where magistrates were often Resident Medical Officers who had been appointed to the Bench without examination: *Public Service Act* 1904 (WA), s 30, and the *Stipendiary Magistrates Act* 1930 (WA). Indicative of the level of expertise necessary, a District Medical Officer appointed Resident Magistrate in 1933 was said to "know nothing about magisterial matters". This appointee was, however, regarded as being in no worse position than a "number of other doctors who proceed to the north west" : WAPRO file no 1042 4052/1938, dated 3 November 1933.

64 That same year, jurist HV Evatt remarked on the potential for injustice when a Bench lacked qualifications, as untrained magistrates were both "unlikely to give as much effect to the presumption of innocence as a jury [properly instructed by a judge]" and less cautious about police evidence, being in close association with the police and conducting their hearings in the 'Police Courts': HV Evatt, "The Jury System in Australia" (1936) 10 *ALJ Supplement* 49 at 57) The hurry and bustle of the summary jurisdiction was in his view conducive to the imposition of conviction: *ibid*; and see *Mraz v R* (1955) 93 CLR 493 at 514, per Fullagher J:

> [there is a]... long tradition of the English criminal law that every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. If there is any failure in any of these respects, and the appellant may therefore have lost a chance which is fairly open to him of being acquitted, there is, in the eyes of the law, a miscarriage of justice.

65 Western Australian Parliamentary Votes and Proceedings, 1936, p 2623.

66 *Ibid*, p 2653.

67 Note 53 *supra*.

68 This issue will only be found litigated in an African case *Dhalamini et al v R* [1942] AC 583 (cited in B Hollander, *Colonial Justice, The Unique Achievement of the Privy Council's Committee of Judges*, Bowes and Bowes (1961)) heard by the Privy Council. It was held that the views of the headman ought to be sought in open court, to provide a safeguard and guarantee that customs were not misunderstood and were publicly manifest, and the finding of the lower court that it was only in a closed session that an 'independent opinion' would be forthcoming was overturned. Interestingly, the Privy Council referred to a number of codes where the procedure is spelled out: *India (Code of Criminal Procedure)* 1898, s 309; *Gold Coast (Criminal Procedure) Code* 1936 *Revision*, s 280; and *Nigeria (Criminal Procedure) Ordinance* 1914, s 142.

witness be called by the court. In some cases a headman became a court functionary when he should more appropriately have been a defendant.

The jurisdiction of the courts was *exclusive*, providing for the power, but not the duty, to take tribal custom into account in mitigation if it was "set up and proved" as the reason for the offence (s 63(3)). Tribal custom was not and arguably could not be defined. The words "native culture" presented similar difficulties.[69] Case law provided no assistance.[70] The incorporation of "contingent, negotiated and disorderly" customary law[71] into the body of the general law was clearly never going to be some simple, orderly and linear, modernist, enlightened enterprise fulfilling the "Faustian-Cartesian dream of order in the law".[72] However, any recognition of this difficulty is absent from the discussion. It was apparently assumed that the CNAs, aided by headmen, would simply provide for the exposition of the relevant customary law.

While mitigation of penalty and the incorporation of some amorphous form of customary law was the object of s 63(3),[73] it proved impossible to effectively 'interpret', resulting in uncertainty, inequitable verdicts, and the elevation of poorly informed local European opinion and comforting "folktales"[74] into ethnographic and legal postulates.

The difficulties of interpretation were compounded in s 63(4), which provided for a discretionary penalty of less than ten years gaol in capital cases which ordinarily carried the death penalty. The discretion could only be invoked if it was proved that the offence had been committed in "pursuance of tribal custom".

As afterthoughts, tacked onto this sentencing section, were provisions which abolished appeals and provided non-compellable witness status for Aboriginal wives. Only in parliamentary committee was this last issue raised,[75] even though it, like the issue of facilitating the successful prosecution of non-Aboriginal defendants, had underpinned much of the advocacy for change. Without recourse to appeal processes, remedies for 'judicial' error, oppressive sentencing or bias were only available to Aboriginal people through the *largesse* of the Executive Council at the behest of the DNA, which in a number of instances actually pressured the Crown Law Department to prosecute.

Although the right to a jury trial is a fundamental common law right,[76] the abolition of juries in this jurisdiction passed without comment in these debates, even though it is arguable that the Western Australian Legislature acted ultra vires and unconstitutionally in passing the Regulation which effected this

69 WAPRO file no 1042/4211/1937, memo dated 3 December 1937.

70 See *Hodge v Needle* (1947) 20 ALJ 499 at 500, per Dixon J.

71 RM Berndt and C Berndt, *The World of the First Australians*, Aboriginal Studies Press (1992); DB Rose, note 25 *supra*; T Rowse, *Remote Possibilities: the Aboriginal Domain and the Administrative Imagination*, Australian National University (1992) p 94; J Toohey, note 5 *supra*; M Chanock, note 28 *supra*.

72 S Benhabib, "Critical Theory and Postmodernism: On the Interplay of Ethics, Aesthetics and Utopia in Critical Theory" (1990) 11 *Cardozo Law Review* 1435 at 1437.

73 P Biskup, note 4 *supra*, p 284.

74 *Royal Commission into Aboriginal Deaths in Custody*, 1991.

75 Western Australia n Parliamentary Votes and Proceedings, 1936; WAPRO file no 1042/1749/1941.

76 J Jackson and S Doran, *Judge Without Jury, Diplock Trials in the Adversary System*, Clarendon Press (1995).

abolition.[77] The regulation which abolished the jury simply stated that CNA hearings should "as nearly as practicable" mirror proceedings for "a simple offence".

VIII. CONFUSION AMONGST THE LEGISLATORS

The debate about the *NA Act* 1936 illustrated the aphorism that there are a "bewildering and dangerous proliferation of meanings"[78] about any piece of legislation, in this case even before it left the Houses of Parliament.

The parliamentary debate is negligible and ill-informed,[79] with conventional silences promoting this situation. Kitson, the Chief Secretary, spoke in generalities about CNAs and repeated Neville's assertions that the Northern Territory and Queensland were already considering or implementing similar 'native courts'. He lauded the benefits of prompt establishment, mobility and economy, and described the courts as providing "as nearly as possible" a "semblance" of justice.[80] He assured the Parliament that the Crown would still be required to "prove" its case.[81]

In parliamentary committee the sections which established the courts were dealt with in passing, and attempts to extend the jurisdiction to non-Aboriginal people were rejected out of hand in spite of early discussion about this possibility.[82] White men were not to be subjected to this "demeaning system".[83]

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77 Western Australia Government Gazette, 19 March 1937; Western Australia Government Gazette, 14 May 1937, regulation 5; Western Australia Government Gazette, 29 April 1938, regulation 125. Section 58 of *The Constitution Act* 1889 (WA) provided for the abolition, alteration and variation of "existing courts". The Governor was only authorised to make regulations pertinent to "procedural" matters (*NA Act* 1936). Arguably the abolition of the right to trial by jury was rather more significant than "procedural": see *Shanahan v Scott* (1957) 96 CLR 245, where the Court held that the regulations went beyond the scope of the Act and were not necessary or expedient; *Utah Construction and Engineering Pty Ltd v Pataky* [1966] AC 62; *Morton v Union Steamship Co of NZ* (1951) 83 CLR 402; *Spence v Teece* (1982) 41 ALR 648, and *Anthony Lagoon Station P/L v Maurice* (1987) 74 ALR 77. Even though Australian states retained power to legislate for Aboriginal people, the *Commonwealth Powers Act* 1943 (Cth) referred matters pertinent to Aboriginal people "in co-operation with the state" to the Commonwealth for a period limited to five years after World War II, in the light of which the CNA legislation was arguably unconstitutional, at least for the period 1945-1950. However, this issue was never litigated. The issue of the constitutional 'right' to trial by jury (*Commonwealth Constitution*, s 80) was the subject of argument before the High Court on one occasion prior to the establishment of the Western Australian CNAs in the case of *R v Bernasconi* (1915) 19 CLR 629. The High Court held that s 80 was not a guarantee of such a 'right'. This position was subsequently upheld in *Kingswell v R* (1985) 159 CLR 264 and *Brown v R* (1986) 60 ALJR 257 at 267. However, in 1936 Evatt continued to argue that the right to a jury trial was guaranteed by the *Constitution*: HV Evatt, note 64 *supra*.

78 CR Douzinas, R Warrington, and S McViegh, *Postmodern Jurisprudence, The Law of Text and the Texts of Law*, Routledge (1991) p 51.

79 Western Australian Parliamentary Votes and Proceedings, 1936.

80 *Ibid.*

81 *Ibid.*

82 Western Australian Parliamentary Votes and Proceedings, 1936, pp 2621-2. Ultimately, the only impact this Act had upon non-Aboriginal defendants was to provide for them to be prosecuted summarily for assaults, before a magistrate but not justices. This distinction is parenthesised by Neville when he italicised references to non-Aboriginal people in the regulations.

83 Western Australian Parliamentary Votes and Proceedings, 1936, p 2388.

Members were confused. Some understood the courts to be a "transportable" Supreme Court[84] conducted before "native juries".[85] They decried CNAs as a "sop",[86] and questioned the need for, or the value of, prosecutions for compliance with customary obligations,[87] regarding the problem as "insoluble".[88] They both supported the proposed courts as economically rational,[89] and dismissed them as throwing costs "away".[90] The amalgamation of the roles of the judiciary and administrators in the form of nominees was welcomed as an "added safeguard", as the nominee would "know all there is to be known" about the administration of Aboriginal affairs.[91] Any criticisms of the 'special magistrate' were dismissed out of hand as, it was asserted, the selection criteria for this position would be "knowledge" not "incompetence".[92] The general tone of the debate about CNAs is hurried, superficial and disinterested, in marked contrast to later debates about licensing missions and contracting out Aboriginal labour.[93]

While 'wives as witnesses' was discussed in passing, no comment of any kind was made about the abolition of the jury or of appeals. One might wonder whether the Government concealed this innovation even from other parliamentarians when it is remembered that jury trials were ousted by regulations whose passage into law was illegal, until this situation was corrected in 1938.[94] In the operations of the CNAs this innovation went unchallenged until the case of *Albert Dinah*,[95] where objection is only recorded in the press.

IX. LAYERS OF HISTORICAL CONVENTIONAL SILENCES

Discussing Aboriginal policy in the years in question, both Foxcroft,[96] and Hasluck[97] fail to mention the CNAs. In 1948, Neville overlooked the CNAs when

84 *Ibid*, p 2621.
85 *Ibid*, p 2378.
86 *Ibid*, p 2394.
87 A position which reflects the history of ignoring *inter se* violence in Western Australia: L Marchant, note 26 *supra*; P Biskup, *Not Slaves, Not Citizens: The Aboriginal Problem in Western Australia 1898-1954*, University of Queensland Press (1973) pp 303-5.
88 At the federal level, Robert Garran (Commonwealth Attorney General's Department) at the First Australian Legal Convention thought the problem "insoluble", the only solution being to provide the judge with a discretion as to the imposition of the death penalty. RR Garran, "The Law of the Territories of the Commonwealth" (1935) 9 *ALJ Supplement* 28 at 36.
89 Western Australian Parliamentary Votes and Proceedings, 1936, p 2384.
90 *Ibid*, p 2378.
91 *Ibid*, p 2623.
92 *Ibid.* Anthropologist Frederick Rose ("Native Murder Case", *West Australian*, 23 April 1941, p 10) was particularly scathing of the Bench in a matter in 1941. In that case, evidence was rejected even though plainly 'relevant' and prosecution submissions were adopted uncritically as a result of the unsympathetic intervention of the nominee whose actions plainly assisted the prosecution.
93 Western Australian Parliamentary Votes and Proceedings, 1936-8.
94 Western Australian Parliamentary Votes and Proceedings, 1938.
95 *Kalgoorlie Miner*, 19 December 1941. The Bench comprised justice of the peace McBeath and Resident Magistrate Wallwork.
96 EJB Foxcroft, *Australian Native Policy, its History, especially in Victoria*, Melbourne University Press (1941).
97 P Hasluck, *Black Australians: A Survey of Native Policy in Western Australia 1829-1897*, Melbourne University Press (2nd ed, 1988).

discussing Aboriginal people's continuing recourse to traditional law enforcement which he said was rooted in "evil, revenge, fancied wrongs, cruel blood lusts, [and] decadence", while at the same time criticising Aboriginal people's opacity and resilience to the scrutiny of non-Aboriginal law enforcement agencies.[98] Elkin, one of the exponents of the system in Australia, omitted any reference to the CNAs in two papers,[99] although earlier he had congratulated and contemporaneously criticised the Western Australian Government for establishing the CNAs and for extensively expanding the jurisdiction of local magistrates and abolishing appeals, the latter innovation going well beyond the powers he knew to have been granted to similar courts in Papua New Guinea.[100] In an essay of appreciation of Elkin, anthropologist Berndt,[101] who himself gave evidence of Aboriginal customary law in at least two cases in the 'ordinary' jurisdiction,[102] made no mention of Elkin's role in sponsoring CNAs in Australia.

Only Bateman, as Royal Commissioner into 'Native Affairs', reported that the law which established the CNAs was poorly drafted and conceived in respects to its jurisdiction and the penalties available to it.[103] He had presided over some CNAs by this time, and was possibly drawing on this experience. It was his view that it was 'absurd' that *all* native trials were heard by these courts, although he saw nothing untoward about their powers *per se*. His is a rare commentary in which it is understood that the CNAs retained the power to sentence the defendant to death. It was his belief that this could not have been the Parliament's intention.[104] Although Bateman's was an official report, no action was taken to address this apparent anomaly.

X. LAYERS OF LEGAL SILENCES

Just as the introduction of these courts seems to have slipped virtually unremarked through the parliamentary process, and been lost in historical analysis, it seems to have been subjected to an inadvertent conventional silence in the legal process.

Contemporaneous with the passage of the *NA Act* 1936, Western Australian lawyers who had papers read at the Second Australian Legal Convention,[105] and

98 AO Neville, "Native Policy", presented at Australian and New Zealand Association for the Advancement of Science, 1948 at 10.

99 AP Elkin, "Anthropology in Australia: one chapter" (1958) *Mankind* 5 at 6; AO Elkin, "Aboriginal-European Relations in Western Australia: and Historical and Personal Records" in RM Berndt and C Berndt, *Aborigines of the West* (1980) 285.

100 EP Elkin, note 15 *supra*, pp 205-10.

101 RM Berndt, note 71 *supra*.

102 The case of *R v Jimmy Njanji*, his opinion being cited in full in the *Royal Commission into Aboriginal Deaths in Custody*, note 74 *supra* at 193-198; and *R v Ferguson* referred to by D Parker, "Social Agents as Generators of Crime", in RM Berndt, *Aborigines and Change, Australia in the '70s* (1977) 332.

103 *Report of Survey of Native Affairs Western Australia*, 1948.

104 *Ibid* at 37.

105 See (1936) *ALJ Supplement reporting the Second Australian Legal Convention (Adelaide)*. Western Australian papers delivered at this 1936 conference, read by others in their absence, included one by KC

others who established the Western Australian Council for Civil Liberties in 1936, failed to remark upon the CNAs. At the 1936 convention, a discussion about the merits of jury trial which involved Menzies, Evatt and Villeneuve-Smith drew no Western Australian response at all. A subsequent journal article on the subject of the jury by former Western Australian Supreme Court Puisne Judge John Hale omitted any mention of the abolition of the jury in the CNAs,[106] even though an example of a merciful jury verdict in a case involving an Aboriginal defendant in the 'ordinary' courts was cited in the text.

Not surprisingly, these early silences have been imported unchanged into more recent legal practice. Western Australian legal practitioners with a history of appearing for Aboriginal people know little about the CNAs. Lawyer, Western Australian Senator, and member of the National Native Title Tribunal, Fred Chaney, was unaware of the CNA's existence.[107] John Huelin, a lawyer involved in the Western Australian Aboriginal Legal Service, provided only sketchy details,[108] and Lloyd Davies, who had practised as a lawyer for Aboriginal people in Western Australia since 1945, advised that he had never heard of the jurisdiction.[109] John Hedges, who undertook the report on community justice systems and alcohol controls in Aboriginal communities in Western Australia,[110] was also unfamiliar with the CNAs.[111] The Hon Justice Kirby,[112] discussing the Australian Law Reform Commission Aboriginal Customary Law Reference (1986), observed that "only lately" had the recognition of customary law

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Wolff, "Crime and Insanity" 76, in which it was asserted that Western Australia was taking steps to ameliorate the impact of the M'Naughten rules. JE Virtue's paper entitled "Directing the Jury as to the Presumption and Burden of Proof" 86, in which *Woolmington v DPP* [1935] AC 462 was discussed in the light of the *Criminal Code* (WA), s 266, which placed the burden on the accused in cases where he or she asserted death occurred due to negligence. The law on this issue was not as straightforward as this paper would suggest: see *Mullen* (1938) 59 CLR 124; or *Timbu Kolian v R* (1968) 119 CLR 47.

106 J Hale, "Juries: the Western Australian Experience" (1973) 11 *University of Western Australia Law Review* 99 at 104.

> The details are unimportant... [the charge was wilful murder]. The jury drawn from the locality in which natives were by no means favourite citizens, acquitted outright, to the satisfaction of everyone including the police who had gone to considerable pains to put up the prisoner looking clean and tidy and probably for the first and last time in his life.

The tone of the commentary is critical and compares unfavourably with the view held by Lord John Russell in his publication, *English Government*, when he suggests that "defiance of the law by juries represents the protest of the people against the undue severity of the law": cited in HV Evatt, note 64 *supra* at 66.

107 National Native Title Tribunal Member Fred Chane, personal communication, 26 March 1997 and 7 April 1997 (copies on file with author).

108 J Huelin, *On the Road to Equality, Post war politics and law relating to the Aboriginal people of Western Australia*, United Nations Association of Western Australia (1980). Huelin later acted for Aboriginal people in respect of the *Skull Creek (Laverton) Royal Commission*: Western Australian Parliamentary Votes and Proceedings, 1976, vol 8, in which region some seven of the CNA were convened – the cases of *Nangoo, Waeow, Mundyat, Lilburra, Yeendeen, Brucey* and *Poobang*.

109 L Davies, personal communication, 28 August 1996 (copy on file with author).

110 J Hedges, *A Report Prepared for the Minister with Special Responsibility for Aboriginal Affairs, Community Justice Systems and Alcohol Control, Recommendations Relating to the Aboriginal Communities Act and Dry Area Legislation in Western Australia*, 1984.

111 J Hedges, personal communication, 26 March 1997 (copy on file with author).

112 M Kirby, "TGH Strehlow and Aboriginal Customary Law" (1980) 7 *Adelaide University Law Review* 172 at 175.

captured the attention of judges and lawmakers. To the extent that the CNAs did not incorporate much less celebrate Aboriginal customary law, Kirby is fortuitously correct. The silence on this issue amongst these pre-eminent practitioners reflects the 'loss' of these courts from the record most evocatively.

No records exist of these courts in the Western Australian Supreme Court Library, even though the charges were invariably capital offences. No superior court reports exist because there were no rights of appeal, and no constitutional challenge was ever made of their authority.[113] The Western Australian Supreme Court Librarian was wholly unaware of the CNAs and referred me back to the Department of Native Affairs Annual Reports ("DNAAR") for the only extant record of the cases.

XI. SILENCE BREEDS ERROR – CONVENTIONAL SILENCE AS OPPRESSIVE SILENCE

These silences have allowed for the proliferation of erroneous and illfounded assertions as to the 'benefits' conferred upon Aboriginal people by these courts. Bolton[114] and Foley[115] assert, with little factual basis, that the CNAs "improved" the position of Aboriginal people, by providing "special measures". Reynolds[116] simply repeats the general description of the courts as "special", using Elkin's 1947 essay as his source. Elkin,[117] Rowley[118] and Biskup[119] advise that the CNAs were constrained by a ten year maximum gaol term which, on Eggleston's examination of the Broome Native Court Book, was palpably erroneous.[120] She found that in a total of eight transcribed cases, five defendants were sentenced to death in the West Kimberley.[121] Three of these men appeared as joint defendants in one case.[122] Although tried in a smaller 'job lot' than was often historically the case in Western Australia,[123] this hearing alone provokes a number of serious questions about the stated 'improvement'. There is no reference to the trials or sentences of these three men in the DNAAR. All three of the defendants were charged with wilful murder, and all were represented by the one hospital orderly

113 Compare this with the situation in Papua New Guinea where cases are reported in the Papua and New Guinea Law Reports, for example *R v Tsagagoan-Kagobo* [1965-66] PNGLR 122, *R v Kalit* [1971-2] PNGLR 124, and litigated in the High Court, for example *Timbu Kolian v R* (1968) 119 CLR 47, *Mamote-Kulang v R* (1964) 111 CLR 62.

114 G Bolton, "Black and White after 1897" in T Stannage (ed), *A New History of Western Australia* (1981) 124

115 M Foley, "Aborigines and the Law" in P Hanks and B Keon-Cohen (eds), *Aborigines and the Law* (1984) 160.

116 H Reynolds, *Aboriginal Sovereignty: Reflections on Race, State and Nation*, Allen and Unwin (1996) p 82.

117 AP Elkin, note 15 *supra*.

118 CD Rowley, *The Destruction of Aboriginal Society*, Penguin Books (1970) p 303.

119 P Biskup, note 87 *supra*, p 183.

120 E Eggleston, note 53 *supra*.

121 *Ibid*, pp 284-5.

122 *Wherra et al* (1948).

123 L Marchant, note 26 *supra*, p 37.

acting as counsel. One of his major submissions during the running of the cases was that his client, Wherra, had made the other two defendants join the murderous enterprise. The submission had no effect upon the hearing, the matter proceeding to conclusion with all three men sentenced to death.

Although Elkin noted the imposition of the death penalty when reporting on two 1942-3 CNA hearings in his 1947 publication, he dismissed these sentences as errors.[124] The two 1943 cases cited by Elkin are described only by reference to their locality. After examining the relevant extant files, however, it is apparent that the cases are *Yampbin* (Fitzroy Crossing) and *Coodji* (Wiluna). These cases were both representative and unrepresentative, there being at least four other CNAs trials that year.[125] In the cases of *Yampbin* and *Coodji*, the nominee for the Commissioner for Native Affairs was the local justice of the peace, the powers of which office Elkin had condemned in the preceding pages of his essay. The special magistrate appointed to hear the *Coodji* case was Dr Oldmeadow, who almost certainly had no legal qualifications. The case was heard 200 miles from the scene of the offence and the death penalty was imposed. In this "most puzzling" case,[126] the circumstances of the fatality were trivialised by the exclusion of extremely complex issues of continuing 'pay back' in the region at that time.[127] Coodji was prosecuted by the police officer who 'defended' Dungle Dungle, one of the Aboriginal men involved in this complex web of continuing customary law. There were real problems of proof in this case, not the least of which was the inconclusiveness of the post mortem. Elkin's commentary is silent on these issues.

Yampbin was represented by the local hospital orderly. His case involved a 13 month delay in bringing the case to a hearing, the extensive admission of hearsay evidence, the reduction of complex customary law precepts to the trope of "noisy Aborigine" engaged in "fights over women", and the privileging as the main issue the continued and deleterious missionary interference in marriage practices. Elkin's use of this latter case as exemplar is all the more surprising when the records are thoroughly searched and it is discovered that Yampbin died in gaol within a year of being sentenced.[128] It is surprising that matters of 'pay back' which taint these cases and the "making good of an essential loss",[129] are not alluded to at all by Elkin, who was an anthropologist.

Elkin's inaccurate comment that the establishment of the CNAs was "occasional"[130] has been repeated by Daunton-Fear and Freiberg,[131] and his claims that the Bench was well informed and sympathetic are contrary to the assertions of his Cambridge colleague, anthropologist Rose.[132] Rose was apparently actively

124 AP Elkin, note 15 *supra* at 206.

125 FEA Bateman presided over two of these other cases on the one day.

126 K Maddock, *The Australian Aborigines: A Portrait of Their Society*, Penguin (2nd ed,1986).

127 E Venbrux, *A Death in the Tiwi Islands, Conflict, Ritual and Social Life*, Cambridge University Press (1995).

128 Aboriginal deaths in official custody in Western Australia were not unusual and are alluded to as early as 1883: Western Australian Parliamentary Votes and Proceedings, 1883, p 213.

129 M Jackson, *At Home in the World*, Duke University Press (1995).

130 AP Elkin, note 15 *supra* at 205-210.

131 MW Dauton-Fear and A Freiburg, "'Gum Tree Justice': Aborigines and the Courts" in D Chappel and P Wilson (eds), *The Australian Criminal Justice System*, Butterworths (1977).

132 F Rose, "Native Murder Case", *Western Australian*, 23 April 1941, p 10.

involved in discussions about this case with the hospital orderly cum defence counsel.[133]

Early inaccuracies which flourished in the resulting vacuum or in the positively oppressive place provided by conventional silences were also voiced in later texts.[134] Crawford, Hennessy and Fisher[135] compound errors and omissions when they assert that the 1920s saw 'substantial' efforts made to afford recognition to customary law, later advanced in the 'special courts' of Western Australia where they contend the death penalty was abolished.[136] The CNA cases demonstrate the inaccuracy of the first assertion and erode the claim that these courts were in any way 'special', except negatively so. Further, they demonstrate that it is factually incorrect to suggest that the *NA Act* 1936 abolished the death penalty.[137]

Misinterpretation of the text of the *NA Act* 1936 is graphically illustrated when Daunton-Fear contends that 'poor drafting' "created doubts concerning rights to appeal".[138] The statute could not be plainer in abolishing rights to appeal even if the relevant provision was cynically grafted onto the penalty provision.

XII. SILENCES IN THE OFFICIAL DISCOURSE THE DEPARTMENT OF NATIVE AFFAIRS ANNUAL REPORTS

The official documentation which I have located advances this notion of conventional oppressive silences. The DNAAR are terse, and omissions are notable. Some defendants, such as Wherra, never made it into this public record even though the death penalty was imposed; others were 'inadvertently' omitted from the DNAAR in the year of their appearance.[139]

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133 Rose continued as a controversial figure in Australian anthropology, being officially refused access to one Northern Territory Aboriginal community on the basis of his membership of the Communist party: JA Barnes, "Politics, Permits, and Professional Interests: The Rose Case" (1969) 3 *The Australian Quarterly* 17.

134 J Crawford, "Legal Pluralism and the Indigenous Peoples of Australia" in O Mendelsohn and U Baxi (eds), *The Rights of Subordinated Peoples* (1994) 178; Australian Law Reform Commission Report 31, *The Recognition of Aboriginal Customary Law*, 1986.

135 J Crawford, P Hennessy and M Fisher, "Aboriginal Customary Law: Proposals for Recognition" in K Hazelhurst (ed), *Ivory Scales, Black Australia and the Law*, University of New South Wales Press (1987).

136 *Ibid.*

137 It was not until 1952 that the death penalty provision which allowed for the continuing public execution of Aboriginal people, was repealed, and then on a private member's bill. Confusion may have occurred when comparing Western Australia and the Northern Territory, as in the Northern Territory the death penalty became a discretionary sentencing option in 1934 as a result of the furore surrounding the *Tuckiar* case: T Egan, *Justice all their Own, The Caledon Bay and Woodah Island Killings 1932-1933*, Melbourne University Press (1996).

138 MW Dauton-Fear, note 5 *supra*, p 202.

139 For example, *Mundayat @ Reggie*.

The range of penalties were not contexualised, so that apparently 'light' penalties were quietly celebrated, omitting all mention of sentencing practices which appear to have established these bench marks in the past.[140]

These records are themselves an exercise in non-say. The 'hearing day' for many of the Aboriginal defendants could well be represented by a *Shandy*-like blank page.[141] Banishment as a punishment was iterated as if it were not a highly significant attempt at fundamental dislocation, nor unsettling and harsh.[142] Penalties less than death were reported without reference to the means by which they were imposed, either through executive clemency or otherwise, so the reader does not know whether the bench was exercising its sentencing discretion or not. Significant cultural histories embedded in places where events occurred were silenced so that such places were rendered free of virtually all Aboriginal context.[143] For example, the death of a nameless woman at Violet Valley 'feeding' station[144] in 1939 is examined outside the context of events taking place there. Violet Valley was known to be a hard place[145] where the manager whipped Aboriginal people,[146] and where Alf George, previously an employee of the DNA and later an official participant in some CNAs, exploited Aboriginal women,[147] chained people up,[148] and reportedly gave people electric shocks.[149] George features often in the CNAs in various capacities before he was sacked for dishonestly branding stock, yet none of (t)his history is publicised in the official discourse of the CNAs. Significantly, however, there was a 'walk-off' Violet Valley in 1940 and Aboriginal people were returned under police 'escort'.[150] Congruent with this narrative runs another. Violet Valley was an important cultural site for Aboriginal people, a place where people met in their numbers and where peace-making ceremonies were conducted.[151] The report of this case

140 WAPRO file no 752: 751: 1934

Year	*Name*	*Offence*	*Sentence*
1912	*Ned* tried at Kalgoorlie	Manslaughter	12 months
1916	*Ranjal* tried at Perth	Manslaughter	2 months
1920	*Judabury* tried at Broome *Bibiac*	Manslaughter	12 months
1927	*Bindami* tried at Derby	Manslaughter	9 months
1929	*Damason* tried at Broome	Manslaughter	2 years
1930	5 defendants tried at Derby	Manslaughter	2 years
1934	*Hymibung* tried at Perth	Manslaughter	3 months

141 L Sterne, *The Life and Opinions of Tristram Shandy, Gentleman*, Signet Classics (1962).

142 E Said, *Representations of the Intellectual, the 1993 Reith Lectures*, Vintage (1994) pp 35-47.

143 See R Layton, "Relating to the country in the Western Desert" in E Hirsch and M O'Hanlon (eds), *The Anthropology of Landscape. Perspectives on Place and Space* (1995) 210.

144 The name given to 'ration stations'.

145 Kimberley Language Resource Centre, *Moola Bulla*, Magabala Press (1997) p 143; B Shaw, *When the Dust Come in Between*, Aboriginal Studies Press (1992) p 16.

146 H Ross, *Impact Stories of the East Kimberley*, Australia National University (1989) p 51.

147 *Ibid.*

148 Kimberley Language Resource Centre, note 145 *supra*, oral history of *Reggie Kingala*, pp 135-6.

149 *Ibid*, pp 150-1.

150 *Ibid*, pp 64-6.

151 *Ibid.*

was silent on all these matters. Other places where violent deaths occurred such as Cosmo Newbery 'feeding station' and Roelands Mission also escape examination in these records. The latter was a place notorious for its promotion of an extreme religious position and "lack of warmth";[152] the former had been criticised over many years.[153]

Lack of legal training of medical personnel appointed to the bench is not adverted to in the official discourse, and neither is the potentially discreditable involvement of Resident Magistrates and District Medical Officers in punitive police "leper-patrols".[154] However, one of the more critical elements of the "hidden transcripts"[155] in the DNAAR is the silence which pervades the qualifications of those involved as defence and prosecution personnel. Two cases may be cited here which detract from the view that the CNAs were an 'improvement', and it should be noted that the following commentaries are wholly omitted from the official discourse. *Mundayat @ Reggie* was tried in 1944-5 with Donegan, then in charge of Cosmo Newbery 'feeding station', acting as defence counsel.[156] Donegan, previously a police constable in the Kimberley, had been criticised for his inertia and ineptitude in the investigation into the killing and burning of numbers of Aboriginal people in the Forrest River area by a police and civilian punitive expedition in 1926.[157] He was one of two police removed from the investigation for unreliability,[158] and he was also reprimanded by the Commissioner for failing to volunteer evidence about locating a bullet fragment in the trunk of a tree at Dala, one of the massacre sites. Directed to find and produce the bullet, his evidence to the Royal Commission was observed to be "scarcely more satisfactory" than the "unreliable" evidence of his Sergeant.[159] In another case, one remaining court record, the Carnarvon Court charge sheet, apprises the reader of the personnel in *Henry Milburn's* case in 1952. A Sergeant St Jack prosecuted, information which does not appear in the DNAAR. St Jack was one of the police charged with the murder of four Aboriginal people at Dala in the 1926 killings mentioned above, and he was further implicated in the killing and burning of another 26 Aboriginal people at the same time.[160] At the committal on these four charges of murder,[161] St Jack was discharged after Aboriginal evidence failed to sustain a prima facie case.[162]

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152 AL West, *Adjustment of Part Aborigines Trained on a Rural South West Mission, Report on Roelands Mission*, unpublished report, Department of Aboriginal Affairs (1955); *Royal Commission into Aboriginal Deaths in Custody. Regional Report of Inquiry into Underlying Issues in Western Australia*,, 1991.

153 W Grayden, *Adam and Atoms*, Frank Daniels Pty Ltd (1957) p 84; M Morgan, note 47 *supra*; *Royal Commission into Aboriginal Deaths in Custody. Regional Report*, *ibid* at 68.

154 MA Jebb and M Munro, *Ememera. A Man of Merarra*, Magabala Books (1996) pp 77-8; B Shaw, note 145 *supra*, p 19.

155 J Scott, *Domination and the Arts of Resistance, Hidden Transcripts*, Yale University Press (1990).

156 WAPRO file no 993/256/1930. Note that the name Mundayat @ Reggie incorporates both the Aboriginal name and the anglicised name of Reggie. The use of @ replicates its use in the original DNA files.

157 GA Wood, note 13 *supra*.

158 *Ibid*.

159 *Ibid*.

160 *Ibid*.

161 Committal hearing held in Perth, 1927; N Green, note 13 *supra*.

162 N Green, note 13 *supra*.

One might observe that his function as prosecutor was not out of character, except that these were putatively 'special' courts with a special function, staffed by special officers. In other records of cases, we find Reverend McCaskill appointed as the nominee, neatly collapsing without further comment the functions of church, state, and judiciary (in the case of *Yalalnanna* at Fitzroy Crossing). Although McCaskill's biography contains a whole chapter on his involvement with Aboriginal people, his legal representation of Aboriginal defendants is not mentioned.[163]

Additionally, some inquest documents show that hearings were convened before AL Millard whose brother, T Millard, was implicated in the execution of an Aboriginal man called Splinter in the Kimberley at about this time.[164] Splinter's bones can still be seen at the number two bore at Go Go Station near a "big outcrop of limestone on your left as you're going to Christmas Creek from here".[165]

In one instance, the conventional silences in the DNAAR are confidentially ruptured by the text of a police participant. Police Constable Anderson brought his police patrol in the Warburton ranges into public odium[166] by publishing an article in *Walkabout Magazine* where he described footwalking prisoners 480 miles and firing over the head of an escaping felon called Waeow to effect his arrest.[167] None of this narrative appears in the DNAAR. The DNAAR also omits the fact that the nominee in this case and the separate capital charge heard that same day at Laverton was the Roads Board Secretary Heddick, who may or may not have been active in discriminating against Aboriginal people in the region as was the case with other Roads Board personnel in Western Australia.[168]

These are just some of the powerfully oppressive silences in the official discourse, silences which provide for or allow the social and cultural construction of this jurisdiction as a benevolent one.

XIII. SILENCES OF THE CROWN LAW DEPARTMENT – FILES, COURTS, INQUESTS, AND REPORTS

The most complete conventional oppressive silence in the official discourse is found in the interest and responses of the Western Australian Crown Law Department ("CLD") to enquiries about this jurisdiction. This department failed

163 M Capper, *All Things to all People, The Life Story of the Reverend Donald Longman McCaskill 1917-1989*, self published (1994).

164 P Marshall, note 59 *supra*, pp 66-70.

165 *Ibid*, p 69.

166 As Sergeant Anderson he was later rehabilitated by the Grayden inquiry where he was described as a "recognised authority" on the Laverton-Warburton 'area', having a reputation for firmness: W Grayden, note 153 *supra*, p 12.

167 A Anderson, "Police Patrol in the 'Never Never'", *Walkabout*, 1 September 1948, p 13; and see Police File 1559/47, the case of *Weaow* wounding *Warby Weaow* subsequently acted as Anderson's tracker: W Grayden, note 153 *supra*, p 84.

168 A Haebich, note 48 *supra*; WAPRO file no 993 593/1938 regarding Gnowangerup Roads Board.

to provide even a single file requested[169] and lists of file numbers extracted from other files (DNA, Crown Solicitor's Office and police files) and submitted to the CLD have prompted the verbal advice that the files were destroyed or impossible to find.[170]

A paucity of information is available as to the views of the CLD or any of its functionaries on the operations of the CNAs, the constitutional position, or the summary and regulatory abolition of the right to appeal or to a jury trial. One file, however, simply entitled *Native Administration Act Regulations,* disclosed CLD objections to ultra vires regulations relating to Aboriginal people which provided for forced medical examinations, employment permit restrictions, and continued "forced" labour, as well as the removal of wards and people from "prohibited areas". Destruction of "native dwellings" was described as "questionable".[171] However, this file is significantly silent about the equally questionable CNA regulations.

Where CLD files have been obtained it has been through the general files index in the WAPRO and these files are not directly relevant to the CNAs. Remarkably, the search for these records took me from the Director of Public Prosecutions to the Ministry of Justice and the Crown Solicitor's Office, via the Minister for the Environment (co-ordinating justice, environment and the arts), and thence back to the WAPRO, all to no avail.

Secrecy and silence on the part of the CLD, and other government bureaucracies, is not a novel observation.[172] What is additionally concerning, however, is that it was from the CLD that the DNA sought authoritative pronouncements as to constructions of the law, and it was those opinions which swayed administrators. Former DNA employee, Biskup, refers to the CLD as providing *rulings* on issues,[173] as does Neville when he speaks of the CLD "upholding" the decision of a magistrate, thereby determining the matter.[174] Once such a *ruling* had been obtained, no other opinion was sought regardless of the quality of the response, as is evidenced in some of the available files.[175] The CLD acted as prosecutor, yet was also the DNA's lawyer and by proxy, the only lawyer available to Aboriginal defendants, notwithstanding the conflict involved.

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169 But see R Kidd, *The Way We Civilise, Aboriginal Affair – The Untold Story*, University of Queensland Press (1997), regarding her extensive access to Queensland files.

170 A list of files provided to me by a person working in the area, and which were reportedly known to exist, was simply ignored when submitted to that Department. Correspondence was also undertaken to attempt to obtain any extant files, to no avail: 7 October 1996, 18 June 1996, 23 October 1996, 10 December 1996, 4 November 1998, and 10 November 1998 (copies on file with author).

171 WAPRO file no 1042 4211/37: Memorandum of 3 December 1937.

172 S Amin, "Remembering Chauri Chaura: Notes from Historical Fieldwork" in R Guha (ed*), Subaltern Studies Reader – 1986-1995*, University of Minnesota Press (1997); D Chakrabarty, *Rethinking Working Class History, Bengal 1890-1940*, Princeton University Press (1989). My difficulties mirror those of the Royal Commission into Aboriginal Deaths in Custody in obtaining records from the Crown Law Department (*Royal Commission into Aboriginal Deaths in Custody. Regional Report*, note 152 *supra* at 38-9) and reflect concerns expressed about 'information paternalism' and unnecessary discretionary secrecy provisions in the legislative programmes of successive Western Australian Governments: *Royal Commission into Commercial Activities of Government and other activities*, 1992 at II: 2: 3: 2.

173 P Biskup, note 87 *supra*, pp 111, 145 and 158.

174 DNAAR, 1940 at 14.

175 WAPRO file no 993/203/1932.

Collapsing the interests of Aboriginal people with, and into, those of the State which prosecuted them, and failing to comprehend the difference between an administrative and a judicial ruling, is a constant theme of this process, and the practice goes well beyond an acceptance of what some commentators see as the necessary 'hybridity' of crown law departments.[176]

Even though records of the court and legal process are generally difficult to locate and access in Western Australia,[177] here, the almost total erasure of the CLD records of the CNAs seems remarkable. This "failure of the word" would surprise many Western Australian historians, given the invasive surveillance of Aboriginal people undertaken by administrators generally .[178]

A search of local courts' records produced a few brief sheets from registers, but mostly resulted in advices that no records existed.[179] Responses from Wiluna, Cue,[180] Laverton and Onslow Courts were under the hand of the local police station supervisor. Files from inquests are routinely destroyed after eleven years in Western Australia,[181] thereby silencing other official versions of events. Where I have accessed such files it has been through the records selectively retained on the DNA or police files. The *Reports of CNA Hearings*, which were to be directed to the Governor, form no separate archive, and the Governor's office knew nothing of their existence.[182]

XIV. SILENCES OF PROFESSIONAL PARTICIPANTS

Although medical practitioners regularly presided over these hearings, no records could be located through either the Health Department of Western Australia,[183] the Western Australian branch of the Australian Medical Association, or medical historians.[184] The personal recollections of a medical

176 JTL Edwards, *Law Officers of the Crown*, Sweet and Maxwell (1963).

177 A Gill, "Aborigines, settlers and police in the Kimberleys 1887-1905" (1977) *Studies in Western Australian History* 1.

178 A Haebich, note 48 *supra*; P Jacobs, "Science and Veiled Assumptions: Miscegenation in Western Australia, 1930-1937" (1990) *Australian Aboriginal Studies* 10; and R Kidd, note 167 *supra*, have commented upon similar problems in obtaining bureaucratic records of Queensland government control of Aboriginal people, and much earlier and in a politically charged context, J Spigelman, *Secrecy, Political Censorship in Australia,* Angus and Robertson (1972) pp 98-110, has commented upon secrecy in respect of Aboriginal records generally.

179 These courts included Meekatharra, Port Hedland, Cue, Moora, Southern Cross, Wagin, Kalgoorlie, Northam, Bunbury, Quaraiding, Broome, Geraldton, Derby, Onslow, Carnarvon, Marble Bar, Halls Creek, Wiluna, Wyndham, Fitzroy Crossing, Laverton and Kattanning.

180 Cue retained the record of one case.

181 WAPRO librarian, personal discussion, 17 October 1996 (note on file with author).

182 Western Australian Governor's Office, personal discussion, 17 October 1996 (note on file with author).

183 Administrative Officer Hooper, personal communication, 2 June 1995 (copy on file with author).

184 P Winterton, personal communication, 3 April 1997 (copy on file with author).

practitioner who sat on the bench in the Northern Territory at about this period present an alarming picture of how such courts might have operated.[185]

No published biographies exist of parties involved in CNAs, although some brief journal articles address earlier court processes[186] and the role of protectors in other states.[187] A request for information from the MacDonald family of Fossil Downs Station in the Kimberley for records of the MacDonalds who sat on CNAs was also unproductive.[188]

Although the legal profession was not excluded by law,[189] and members sometimes, but very rarely, appeared in CNA hearings,[190] no commentary from any defence counsel has been located and none of the solicitors who appeared in the hearings have been traced.[191]

XV. 'OPENNESS' AND SILENCES OF OTHER DEPARTMENTAL RECORDS AND POLICE AND DNA DOSSIERS

Files which have been more readily accessed include those which contain the official discourse of the police and the DNA, which incorporate their own forms of conventional silencing.

Police files remained 'closed' if the accused was acquitted or if a *nolle prosequi* was entered. Evidence of discriminatory or selective policing, unavailing administrative pressure to prosecute, and corrective supervision

185 McCann's is the only doctor's commentary I have located which deals with the role of the medical practitioner in judicial and legal functions. His book is interesting for the manner in which it documents, but fails to critically examine, the multiple functions of the medical practitioner. He acknowledges that his profession had little formal legal knowledge, that the system was rough and ready, that the line between Bench and pathologist was fine if not non-existent, and that post mortems were conducted in a fairly approximate fashion. Nevertheless, he wondered whether the "rough and ready" justice that he dispensed without knowledge of the "finer technicalities of the law" was not "fairer" than the processes conducted by the lawyers. He congratulated himself on one occasion on saving trouble and expense for the state. He cavilled with the pomposity of advocates who introduced concepts such a *habeas corpus,* and was prepared to manipulate the list to ensure that the advocate left town before the conclusion of cases. He regarded "native" cases as a "hit-and-miss" affair in which interpreters "manufactured" answers, and he openly commented that the use of "approver" or King's evidence from co-accused was the "only way to get result". The use of European names such as "Hairy Arse" and "Bill arse over head" did not trouble McCann, nor did the policeman's dog stealing the Aboriginal skull which was an exhibit. FB McCann, *Medicine Man*, Angus and Robertson (1959).

186 CW Slaughter, note 41 *supra*.

187 JB Cleland, note 41 *supra*, regarding South Australia.

188 Henwood, personal communication, 9 February 1998 (copy on file with author). The Henwood family are related to the MacDonalds.

189 By implication lawyers were unnecessary as the Government of WA asserted that the cases before the CNAs were purely "tribal" matters involving only conflicts of fact and not law, and therefore counsel would be of "little assistance in reaching equitable verdicts": WAPRO file no 993/546/1942 Premier's office memo to Anti-Slavery Society, 8 May 1943.

190 Lawyers were, by regulation 103, expressly excluded from appearing in citizenship applications as the Chief Secretary asserted that these were matters in which no law was involved, merely matters of fact and it was therefore "desirable to keep the legal profession out of the discussions".

191 Western Australia Law Society, personal communication, 4 May 1995 (copy on file with author).

regimes of the CLD or the Bench was therefore not forthcoming. Such unexaminable interruptions and discontinuities might have provided some intriguing insights into the CNAs process. In one instance, where such a file was erroneously included with another,[192] the picture is instructive.

The DNA files demonstrate the significance of management and control, and the overarching power of the Chief Protector-Commissioner for Native Affairs in respect of whether prosecutions would be launched. However, they do not deal with matters of legal principle. Nor do they explore Aboriginal people's cultural responses to the process or develop any understanding of the complexity and subtlety of customary law *morés*, a more challenging task than simply rendering 'facts' and conclusions,[193] even though these courts were specially designed to deal with customary lethal conflict.

Additional silences have been imposed by the number of gaps as a result of missing records, as some files have simply not been located. Naming and titling idiosyncrasies imposed a further subtle silence, half ruptured, but still controlling[194] in locating files, so that triggers for tracking files included pursuing references to the *NA Act* 1936, phrases such as 'the alleged killing of a native', 'the death of a native at Forrest River Mission', or simply an Aboriginal name or word.[195] On occasion a file otherwise untraceable was located by simply calling up files from the relevant year, but for no single year have I gained access to the 'whole' archive.

XVI. 'NATIVE COURT BOOKS' – TRANSLATING THE SILENCES OF OTHERS

The only *Native Court Books* which appear to have survived are those of Wyndham and Broome (this ledger was viewed by Elizabeth Eggleston) and these are cursory narratives of events in the court room, illustrating the problems in 'reclaiming' trial records[196] and in translating the silences of others.[197] The position of Aboriginal people who came before CNAs is recorded with as little care as were the records on slave 'crimes' in the United States of America.[198] Perhaps that is not the only parallel.

192 The case of *Ratler*.

193 D Bird Rose, note 25 *supra*.

194 R Phillips, "How Museums Marginalise: Naming Domains of Inclusion and Exclusion" (1993) 2 *The Cambridge Review* 195.

195 As to the slippage of names, note EM Curr's reference to a man called *Plato* whose title 'slipped' to *Billy O'Toole*: EM Curr, *Recollections of Squatting*, Melbourne University Press (1965) p 127.

196 TA Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury, 1200-1800*, University of Chicago Press (1985); JM Beattie, *Crime and the Courts in England, 1600-1800*, Princeton University Press (1986); and JH Langbein, "Shaping the Eighteenth Century Criminal Trial: A View from the Ryder Sources" (1983) 136 *University Chicago Law Review* 1.

197 G Dening, *...Readings/Writings*, Melbourne University Press (1998) pp 111-84.

198 E Genovese, *Roll Jordan Roll: The World the Slaves Made*, Pantheon (1974) p 33.

XVII. SUMMARY

As Inglis has observed in another neo-colonial legal context, the records in the public domain are inaccurate, partial, forgetful, and based upon a "conspiracy of silence". Perversions of the facts pass for "authentic narratives".[199] It is such conventional silences, the silences imposed by the dominant, the 'voiced', which have promoted a climate where it can be said that the CNAs were a 'beneficial' jurisdiction. Before we move on to the consideration of an alternative system of justice for Aboriginal people, perhaps we should examine the past.

199 A Inglis, *The White Women's Protection Ordinance: Sexual Anxiety and Politics in Papua*, St Martins Press (1974) p 142. On Inglis' examination, the trial record of a Papua New Guniean man charged with an offence against the *White Women's Protection Ordinance (PNG)* is inaccurate, erasing from the country's memory the one legal execution pursuant to this legislation. The trial proceeded in the absence of appointed defence counsel.