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Speech delivered by Fiona McLeod SC, Council Member CLA and President of the Law Council of Australia at the Commonwealth Law Conference 2017, Melbourne.

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Introduction

Thank you Chief Justice for your very kind introduction.

Chief Justice, my Lords, your Honours, distinguished guests, ladies and gentlemen.

It is a great pleasure to welcome you all to Melbourne, my home and to welcome those of you especially who have travelled so far to be here with us today. Some of you have travelled from as far away as New Zealand!

It is a particular pleasure to welcome you all alongside my good friend the President Alex Ward because it was at his urging, four years ago, that I attended my first Commonwealth Law Conference in South Africa and had the opportunity to travel to South Africa, to Botswana and to Zambia with my family.

And my time in Africa, although brief, and my sense of my place in the world changed – because Africa and its people and its beauty and its struggle as a continent touched me forever.

Travel – and immersion in each other's culture – is so terribly important – if we are to learn to see the world through each other's eyes.

In welcoming you here today I acknowledge that we are meeting on the traditional lands of the Wirundjeri people of the Kulin nation and I pay my respects to their Elders.

These are the local people, Indigenous to the area, who lived in peace and prosperity for tens of thousands of years in this area long before my ancestors arrived here from the United Kingdom in the last century or so.

Ours is a young nation, but the history of our Aboriginal people is recalled in a rich tradition of story and song that has been passed down by the Elders over generations.

Our Aboriginal and Torres Strait Islander peoples have lived on the Australian continent for more than 60,000 years.

Their languages and traditions represent the world's oldest continuous cultural heritage.

Theirs is a history that remembers the changing of seasons and teaches the great stories and the cycle of life, when to harvest, when to hold back the harvest.

It is a history of stewardship of the land for current and future generations. It is a history steeped in a sense of common good – or common wealth.

The Commonwealth

Why do we meet as a Commonwealth association? Plainly a commonwealth refers to a group of nations with common interest, reflecting our common heritage of connection to the British Empire.

But we are more than that. We meet here for this Conference in the common good, exploring over the next few days those things that challenge us and sharing our solutions so that we might inspire each other with new thinking.

It is our diversity of experience, of culture, of thinking and approach that permit us to test old assumptions – for the common good.

Common Heritage

The concept of common heritage was well understood to Roman and English law. Originally conceived as a concept of the global commons designed to protect the seabed and ocean floor[1], later the Moon and Antarctic region,[2] the notion can trace its origins to roman law concepts of *res communis* and *res nullius*.[3] Founded upon a notion of public trust, the concept recognised that certain lands including rivers, seabeds, lakes, forests, tidal zones and submerged lands, could not be "owned" by individuals and were held by the Crown as a trustee for the benefit of all citizens to freely use and navigate.

Misuse of the commonly held property by commercial exploitation or adverse possession was, according to the doctrine, a misuse against the community and protections were enforceable by any member of that community.[4]

In Australia the concept of *res nullius* – or ownership by none, was used to create enormous injustice for our Indigenous peoples. Their land management practices and cultural traditions were, in the eyes of the colonial new arrivals, unsophisticated and unrelated to notions of ownership. Stewardship – or custodianship – was expressly rejected as prior possession and so the land, it was determined, was available to be acquired by possession.

This meant, in Australia, the dispossession and state sanctioned or condoned murder of our first peoples, with a brutality with which we are still struggling to come to terms.

Until relatively recent times, it also meant that we pursued government policies that encouraged the removal of Aboriginal and Torres Strait Islander children from their families, their communities and their country, considering that it was better for those children to be raised away from their communities.

In many cases, to live in homes where they were abused.

In many cases, where the pain of removal was so profound that the effects are seen across the generations.

The recognition of the strong bonds between our first peoples and their traditional lands has also been a long time coming, with recognition of common or native title to land only upheld in our highest court, the High Court of Australia, in 1992.

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1. UN GA Adoption of the Declaration of Principles governing the Sea-Bed and Ocean Floor and subsoil thereof, beyond the limits of national jurisdiction leading to the UN Convention on the Law of the Sea 21 ILM (1982) 1261 (UNCOLS).
2. Moon Treaty 1967: Treaty of Principles governing the Activity of States and the Exploration and use of Outer space including the Moon and other Celestial Bodies 6 ILM 1967 386 (Moon Treaty); 1979 Agreement governing the activities of States on the Moon and other Celestial Bodies 18 ILM (1979) 1431 Art 7.
3. Translated as 'communal things' and 'no-one's thing' respectively.
4. For example, see M.C. Mehta v. Kamal Nath India Sup Crt (1997) ISCC 388.

The reality is that we must learn from our Indigenous peoples and confront the notion of common wealth once again, because the issues that confront humanity - corruption, climate change, environmental degradation, slavery and exploitation, global poverty and inequity - require us to work, not for the benefit of a few enabled sovereign states or a handle of individuals wealthy beyond imagining, but for the common good of all.

All of us would be acutely aware of the extraordinary recent global events unfolding our region here - in the South China Sea, further away in the European Union, in the USA and unfolding online.

We watch with fascination, and some degree of horror, as our once sacred conventions and institutions are trashed before our eyes, sometimes in social media in tweets of 140 characters or less.

But pick any decade of the last century and you will find, in many places in the world including those observing, in theory, parliamentary democracy and the separation of powers:

- oligarchs asserting wide discretionary executive powers protected by laws, with powerful military and intelligence assets at their command;
- the vast profits of illegal conduct pouring through the accounts of subterranean operatives, often working in the shadows on behalf of individuals or organisations through obscure networks of influence;
- politicians influenced by those who have purchased access, by corruption and graft;
- public servants and authorities spending public funds without compliance with due process or in response to nepotism;
- growing economic and social inequality and gross violation of human rights;
- environmental catastrophes where few are held to account and future generations bear the cost;
- a captive or disorganised press unable to protect whistleblowers effectively, to pierce through propaganda and influence just outcomes;
- courts and law enforcement agencies, jurisdictionally and morally confined in their capacity to confronting issues of inequity beyond the case before them; and
- a vast network of so-called 'economic hitmen', murky intelligence activity, jackals and assassins operating brazenly and with impunity.

Today we observe outrageous and offensive attacks on our judiciary, and a daily barrage of outright lies from elected officials, but history teaches us that in fact democracy and the rule of law have always been fragile.

That law enforcement have always struggled to keep pace with the ingenuity of crooks.

And that for the most part the bad guys get away with it.

Most people instinctively understand these facts, if they do not understand the causes, and they also understand the fact they are powerless to effect change in their own lives – and will only put up with so much before the erosion of trust turns to anger, boiling over all areas of life from the protest at the ballot box to outbursts of violence.

In this context, our efforts to build integrity and accountability in support of the observance of human rights and the rule of law throughout the world, are crucial - both in maintaining trust in the system and social cohesion, and in addressing the causes of inequality and instability.

There is always something human beings want or are afraid of sufficiently to make us corruptible.

It is therefore vital that our institutions are continually strengthened and improved to protect as we can against human need, greed or protection of those we hold dear.

But that strengthening must be balanced so that the grant of powers does not, of itself create the very environment for misuse of power.

This Conference will examine many areas in need of attention.

In the context of these global forces, the issues of self-determination and empowerment of the Indigenous peoples of the world are both instructive and especially challenging.

Indigenous imprisonment

In Australia we are facing a crisis in the way our Indigenous people are affected by the justice system.

Although just 2.5 per cent of the Australian population identify as Indigenous, they make up 27 per cent of the prison population.

And Indigenous youth comprise over 50 per cent of juveniles in detention.

Australia's overall imprisonment rate stands at 203 per 100,000 people.

This is a little above average internationally, but about average.

New Zealand shares the rate of 203, for example, England is a bit lower with 147, while the US sits at 693.

Where Australia does stand out globally is the rate at which Indigenous people are imprisoned.

Aboriginal and Torres Strait Islanders are imprisoned at a rate of more than 2100 per 100,000.

This means they are being imprisoned at a higher rate than any cultural group in the Western World.

Even more troubling is that this is a problem that has been trending up and not down.

A Royal Commission into Aboriginal Deaths in Custody shocked the nation in 1991, when it revealed that Indigenous peoples were being imprisoned at seven times the rate of the broader population.

But today in 2017 the rate has exploded to 14 times.

Aboriginal and Torres Strait Islander women, meanwhile, are the fastest growing cohort of people who are both victims of violence and imprisoned for violent offences.

Indigenous women make up around 2.2 per cent of the Australian female population, but around 34 per cent of those imprisoned.

The rate of imprisonment of Indigenous women has increased by 74 per cent since 2000.

These substantial increases in the rate of Indigenous imprisonment are occurring at a time when Australia's overall crime rate is falling.

In short, there is something very wrong happening here that demands urgent attention.

When it comes to identifying causal factors, the answer, of course, is not straightforward.

The drivers of Indigenous imprisonment are complex and intertwined: high rates of cognitive impairment in the prison population and foetal alcohol syndrome is rife; hearing and other health challenges mean young people disengage from schooling early; socioeconomic disadvantage, high rates of depression, alcohol and drug abuse, family violence, homelessness, unemployment, and poor health – all play roles.

As undoubtedly does the history of dispossession and removal that I have described.

These factors are self-perpetuating – they form a cycle of disadvantage which is intergenerational and virtually impossible for many, who are caught within it, to escape.

Perhaps the most toxic of these factors is family violence.

Nationally, Indigenous women are 34 times more likely to be hospitalised because of family violence than other Australian women.

And they are ten times more likely to be killed as a result of violent assault.

Australia's governments also contribute to the imprisonment crisis through a negatively self-reinforcing criminal justice response.

State and Territory governments in recent decades have introduced various populist 'tough-on-crime' policies that cause more Indigenous Australians to be caught up in the justice system.

The Federal Government then claims justification for withholding adequate funding for Aboriginal legal services, arguing responsibility should now lie with the states who have effectively driven up demand.

States then fail to make that investment and social problems deepen, creating the impetus for more 'tough on crime' measures.

The irony of course is that the highest proportion of people held in custody or corrections is comprised of those returning to prison, while virtually every person imprisoned has themselves been a victim of crime.

When it is considered that the fastest growing cohort in Australian prisons is Indigenous women, it becomes reasonably apparent that there is a clear disconnect between criminal justice policy objectives and outcomes.

Additionally, however, we must also recognise that many of the drivers of Indigenous imprisonment stem directly from the Australian legal system itself.

Mandatory sentencing, punitive bail and parole conditions, falling funding for justice services – all play a major role in exacerbating the problem.

This is Australia's most pressing national social justice concern.

Year after year, successful government-funded reports reveal a disproportionate impact of corrections policies on our Indigenous population.

Yet today in Australia, on International Day for the Elimination of Racial Discrimination, despite our acknowledged history of abuse towards our Indigenous peoples, despite knowing the causes of their struggle with the criminal justice system in the harsh context of this reality, a debate rages over whether to wind back the protections of the Racial Discrimination Act so that offensive statements directed at our Indigenous people and others of other races may be more easily be made.

We, as lawyers, and as lawyers' associations have a responsibility to be proactive and to resist these unnecessary changes, to drive a unified approach to this national problem.

While the problems are complex, there are a number of immediate measures which could yield significant change in the nature of Indigenous peoples' interactions with the justice system.

Changes to laws and practices will immediate yield outcomes and can reduce recidivism, save money, and prevent crime.

Justice reinvestment trials and specialist courts in consultation with Indigenous leaders are also having positive impacts on community empowerment and ownership of justice solutions.

Adequate funding for legal aid and legal assistance support is critical.

In Australia, Aboriginal and Torres Strait Islander Legal Services were established in every State and Territory some 40 years ago to provide culturally competent legal assistance services to Indigenous peoples.

Unfortunately, while the legal needs of Indigenous people have grown substantially, Indigenous legal services have been stretched to breaking point.

The challenges these services face are immense and the pressures imposed on their hard-working staff are enormous.

Unfortunately after decades of inadequate and declining funding from the Commonwealth Government, these services are increasingly unavailable or inaccessible to many who need them most.

For example, in Western Australia, the Aboriginal Legal Service has just three family lawyers to service an Aboriginal population of roughly 94,000, dispersed over a land-area roughly equivalent in size to the United Kingdom, South Africa and India – combined. This is despite acute legal problems affecting so many Indigenous families.

Successive federal governments have seen fit to wind back funding and states and territories have failed to fill the gap.

We need to take an honest critical look at the things that work and the things that do not.

This year the Law Council of Australia announced a new national initiative with a strong relevance to Indigenous Australia: the Justice Project – a national blueprint for justice for all.

The Justice Project is a comprehensive national review into the impediments to justice in Australia, focusing on those facing significant social and economic disadvantage in our community.

We are talking here about all vulnerable groups – the elderly, the young, those living in remote areas, the homeless, and those affected by discrimination.

The project will look to build the case for new justice strategies and law reform secured by appropriate funding.

It will focus in particular on identifying 'what works' and why, based on existing evidence, highlighting the data gaps and providing constructive, informed recommendations for future action. It will make the economic case for investment in justice infrastructure and for consideration of Justice Impact Statements for Federal laws – to always assess the impact on the justice system of government initiatives and consider where additional resources will be required.

The Final Report will also guide our future advocacy about improving access to justice.

Our role

It is important that lawyers provide leadership on these matters, in consultation with civil society and with government.

At the other end of the spectrum lies the push for the constitutional recognition of Aboriginal and Torres Strait Islander peoples in the Australian Constitution. This is a slow process engaging many voices and considering many models. It must be respectful and encourage rather than stifle meaningful participation of our first peoples in our precious democratic processes.

The exclusion of Indigenous Australians as citizens, as people of the commonwealth until 1967, has compounded their sense of isolation within their own lands.

We have an historic opportunity to right the historic wrongs of this country, an opportunity which concerns all Australians.

If I may return to where I started this morning, to South Africa.

Nelson Mandela said, upon the adoption of the new Constitution for South Africa more than 20 years ago.

"*This is our national soul, our compact with one another as citizens, underpinned by our highest aspirations and our deepest apprehensions.*"

Our own Australian Constitution is a working document. As fascinating as it may be to those who love to pore over the meaning of sections and chapters, if it reflects our national soul, at least in respect of our first peoples, it is empty and in need of nurturing.

And it is pertinent to make these remarks this morning at this Conference. It was through colonisation, federation and establishing Australia as a constitutional democracy within the Commonwealth of Nations, that Australia grew as a nation.

It is by honest exposure and reflection, by the sharing or our problems and our solutions that we can work together for the common good.

No one of us is perfect, some of us face a greater burden than others and can seek to share in our common wisdom.

Our common wealth is the future of our peoples and the health of our planet.

Individually and collectively, we are some of the most powerful and most privileged human beings on the planet – now and at any time in our history.

These are undertakings that we, as problem solvers, should embrace together – this week and into the future.

It is a worthy undertaking, much greater than the accumulation of material wealth, the building of personal glory and impressive sounding titles.

Each of us is much more than that.

And that would be a life wasted.

So once again welcome. I look forward to meeting you throughout this Conference to my home and sharing this important work together.

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