

AAL Essay Award Speech - 13 Dec 2021

Giulia

We would like to start by acknowledging the Traditional Owners of the land on which we meet today: the Turrbal and Yuggera People and pay our respects to Elders past and present. We acknowledge this vast and ancient continent holds sacred stories that symbolise the ongoing connection of over 250 First Nations to this time and place, since time immemorial. We honour First Nations Elders past, present and future who continue to share how this land, its waters and sky, hold significant spiritual meaning and moral force.

Chief Justice, the Honourable Alan Robertson SC, Judges, Associates, friends and family. Before we begin, Suvradip, Lillian and I would like to thank you all for your attendance here today and for taking the time out of your busy afternoons to celebrate this occasion with us.

About seven months ago, we came across this year's topic for the Academy of Law's Essay competition and upon reading the question immediately thought to ourselves, how can one neatly capture and articulate in only 10,000 words the contribution lawyers can make to the resolution of outstanding fundamental issues for First Nations Peoples in Australia. At first glance, the task appeared as an almost impossible feat; and that's precisely why we decided to enter this year's competition.

Cognisant that the rights of First Nations Peoples have long been the subject of considerable debate for which many aspirational proposals have been made, we set about researching and writing this essay with one key theme in mind: pragmatism.

By combining each of our own particular interests in native title, traditional knowledge and intellectual property and the criminal justice system, our aim was to address the topic by discussing well-established issues known to most but analysing them from a new vantage point; namely by finding commonalities between the three so as to unearth the key systemic flaws and offer solutions that may reap real and tangible reform.

Through the course of doing so, we found ourselves engaging in a constant process of self-reflection, continually asking ourselves: how as lawyers, and more pertinently, as non-Indigenous lawyers, can we use the legal skills with which we have been equipped, to make the greatest impact? This forced us to challenge our own preconceived ideas of lawyering and think beyond the strict confines of the traditional lawyer-client relationship.

More personally, it made us reflect on our own positions not just as lawyers but also as individuals, and find a balance between our abilities to influence from the position of privilege we find ourselves in and our limitations as non-Indigenous peoples, and nor being on the ground with Indigenous communities.

After several months of research and speaking to different interviewees, both Indigenous and non-Indigenous, who generously shared with us their own opinions and lived experiences, we soon came to realise that these issues cannot be tackled by a single lawyer, organisation or group. Nor can they be fixed by simply changing or creating new laws. Rather, to see meaningful change, lawyers need to work

collaboratively with each other and involve broader society in a concerted effort to change the status quo. This is what led us to the theory of movement lawyering.

Suvradip

Movement lawyering is about reimagining the traditional understanding of the lawyer-client relationship whereby lawyers can begin to use their transferable legal skills to further the goals of a wider movement.

The lawyer is no longer the protagonist; the lawyer must practice humility above all else.

A fundamental shift is necessitated, towards learning from the client as the leader and expert in a pre-existing social movement, and keeping an open mind to how the lawyer can best contribute to the movement that is ultimately owned by the client.

The idea of movement lawyering turns away from the traditional understanding of the litigation focussed public interest lawyering developed in the USA - which often excludes advocacy beyond litigation and can indirectly discriminate against clients whose interests do not suit a litigation strategy, often re-entrenching structures of social power.

The most salient and well known example of what movement lawyering has meant to the First Nations Peoples in Australia has been the 1970 establishment of the Aboriginal Legal Service in Redfern, New South Wales; a movement that brought together lawyers, social workers and activists, amongst others.

At a high level, the essence of movement lawyering is adopting the goals of a movement, developing a strategy in conjunction with movement leaders for achieving that goal and creating specific tactics based on transferable legal skills to enact that strategy.

The theory of movement lawyering has recently gained traction in Australia, as evidenced by the recent Reb Law conference which brought together over 500 lawyers to discuss the principles of movement lawyering in the Australian context.

Turning to our essay, we have sought to identify in our work a common goal that exists amongst some First Nations activists, that is the acquisition of *pragmatic* sovereignty for First Nations Peoples, supplemented by a strategy of creating space for First Nations Peoples to engage in civil society, and begin to illustrate how specific tactics can be developed by lawyers in alliance with movement leaders within existing First Nations movements.

We see this theory being applied in practice as lawyers begin to apply their pre-existing skill sets to help movements further their cause, whether that is by helping draft submissions to parliament, making offices available for meetings, coaching movements leaders on making public appearances or more traditionally advising on legal issues; skills that are much needed in the movement for the acquisition of *pragmatic* sovereignty for First Nations Peoples in Australia.

We hope that our analysis for this bottom-up approach to lawyering can be a pragmatic complement to the more idealistic calls for constitutional recognition, treaty and a voice to Parliament - made in the Uluru Statement from the Heart - calls that are already being considered by various stakeholders.

Lillian

We sought to apply this theory which Suvradip has just explained, to better understand the context and power structures which exist within our three areas of interest. For me, that was native title.

Mabo and the recognition of native title were welcomed as a much needed step towards reconciliation in the 1990s. Since then, the development of the law has watered down what was, for many First Nations Peoples, an unique opportunity for change.

What has emerged is an “imperfect intersection” between two different legal systems. In essence, native title is the legal equivalent of trying to fit a square peg into a round hole.

We suggest that native title lawyers should use their skills to act as *translators* between these two systems. To do this, lawyers must practise in a manner which moves away from a paradigm of the ‘lawyer as expert’. Lawyers need to develop strong relationships with their clients, and, as much as possible, a nuanced awareness of their unique way of life. Where there is an opportunity for a free-exchange of ideas, lawyers can create the space for innovative solutions. We suggest that there is an example for this with the recent *Noongar Nation* settlement in Western Australia. The settlement took the form of an ILUA but has been called by some academics Australia’s first treaty.

Giulia

Unlike native title, traditional knowledge protection is still very much in its period of infancy. There is presently no legislative scheme or *sui generis* law which specifically enshrines the rights of traditional knowledge holders outside the international instruments to which Australia is a signatory.

Whilst there are negative repercussions which inevitably flow from the lack of any proper, legal recognition, traditional knowledge is a great opportunity to see how movement lawyering can be applied to a particular socio-legal issue.

For example, instead of seeing the problem as one that can be solved or at least assisted by the introduction of legislation – which reflects the conventional top-down approach – movement lawyering suggests that law-making is not the immediate goal. Instead, the role of lawyers in this context is to act as intermediaries and educators with a view to fostering best practice among the profession and industry bodies alike through codes and soft-law counterparts.

Learning from native title wherein practice was treated as antecedent to legislative intervention, lawyers now have scope to define the trajectory of policy making around traditional knowledge in a way that does not further impinge upon indigenous decision-making.

Suvradip

The history of surveillance and control of First Nations populations through whimsical legislation and coercive policies is well catalogued.

This history pervades our present through increasing trends of technological surveillance, such as the *Youth Justice Amendment Act 2021* (Qld) which legalises the uses of ankle tracking devices for youth on bail, implemented in post codes where the demographic is dominated by First Nations Peoples.

It is well recognised that the solution is community based interventions and justice reinvestment projects - not further incarceration.

To develop tactics on how to best create space within the criminal justice dialogue for these solutions to be heard, we analysed the *process* of law-making around the *Youth Justice Amendment Act*, rather than the substantive impact of the laws.

What was revealed was a silencing of First Nations Voices through a facade of consultation without meaningful engagement. The research revealed tokenistic government consultation, and fear based rhetoric which led to rash and incarceration based solutions which will further worsen the deficit discourse around offending of First Nations Peoples.

Lawyers must help the pre-existing movements foreground their voices in the political dialogue and ensure that impulsive legislation does not further impact First Nations Peoples, especially youth, in their interactions with the criminal justice system.

Lillian

From the outset, Giulia, Suvradi and I always wanted, above all else, to write something *useful*. Our essay needed to provide a pragmatic answer to the question “what can lawyers do”.

Broadly, across three domains, we suggest that lawyers can:

- Educate ourselves - on Australia’s history of systemic racism and subjugation of First Nations Peoples; and on the incredibly rich and diverse indigenous cultures we have in Australia.
- Listen - listen to the voices of first nations peoples and allow time and space for truth-telling
- Practise mindfully - ensuring that we are not only cognisant of what the law *is*, but we are also open to the opportunities and innovative solutions it could provide

Yet, there are still left with many pragmatic questions left to answer:

- How does the theory of movement lawyering align with the ethical duties of a lawyer to their client?
- How can this theory translate to a culture of movement layering where Australia does not necessarily have the cultural foundations which exist in America from public interest lawyering?
- What are examples of people doing this work already in Australia and how can we bring these to the forefront?

More broadly we hope that our essay will do three things.

1. Offer a fresh perspective

As young, mostly soon-to-be lawyers, we are acutely aware that we have limited experience in practice. However, we hope that our ideas can be used to challenge the present mindset of legal practitioners and the legal system which, can be, slow to change.

2. To promote humility

By emphasizing self-reflection we encourage lawyers to be humble and cognisant of what a great privilege it is to be a lawyer and have the skills we possess. Humility as a lawyer includes being careful not to perpetuate engrained systemic power-imbalances and to approach our role from a basis of mutual respect.

3. To nurture the seeds of hope

While issues faced by First Nations peoples are significant and long-standing, we hope to show how lawyers can take small steps to create real change. We have unique skills, which can be harnessed to empower others. By writing the essay together we also hope to demonstrate the power of collaboration and how individuals working together can create something greater than the sum of its parts

We hope this will foster a culture of action - where we seek to ask: “***what and how*** to do, rather than why not to do”

Thank you

1. AAL for recognition and opportunity
2. The judges of the competition - The Honourable William Gummow, Tony McAvoy SC and Gabrielle Appleby
3. Alan Robertson and the Chief Justice for their kind words
4. Janine for organising this event
5. Our family and friends for their support