

## EDITORIAL: LAW, RACE AND WHITENESS

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We acknowledge the sovereignty of the many Indigenous Nations of Australia, and pay our respects to their ancestors, Elders and peoples—of the past, present and future.

The contributions to this special issue of the *ACRAWSA e-journal* critically interrogate the interface of Anglo-Australian law and legal systems, race and whiteness. They seek to expose the racialisation of legal discourse and call into question the normative white subject of Anglo-Australian law. Anglo-Australian law obscures the hegemonic function of whiteness through its liberal claims to neutrality, objectivity and rationality, and the promotion of formal, rather than substantive, equality. As in other discursive domains, whiteness operates within law as the invisible norm by which an originary and unquestioned legitimacy is claimed.

Groundbreaking work drawing on critical whiteness studies has highlighted law's agency in establishing and maintaining racialised power, premised on the 'normality' of whiteness and the legitimacy of its claim to privilege. In the United States, legal theorists such as Cheryl A Harris, Kimberlé Crenshaw, Richard Delgado, Mari Matsuda and others have developed the insights of critical race theory to articulate a critique of whiteness and to deconstruct the liberal notions of race and equality underpinning civil rights discourse (Crenshaw et al, 1995: xiv; and see Delgado & Stefancic (eds) 1997: Part IV). However, this work largely fails to acknowledge or address the concerns of Indigenous peoples within 'Western' societies or the complexity of 'minority'

peoples' position in relation to their society's colonial past (see Moreton-Robinson 2004a: viii).

By contrast, in Australia, Irene Watson and Aileen Moreton-Robinson have led the field in interrogating and deconstructing the function of whiteness in Anglo-Australian law and its disavowal of Indigenous sovereignty. Their scholarship is positioned within Indigenous epistemology and ontology, and draws on critical whiteness theory to expose the hegemony of whiteness within Anglo-Australian legal discursive and institutional practices. Watson has engaged in a sustained critique of the contemporary colonialism of white sovereignty, a 'sovereignty of violence, not of law that is always known' (2002: 257), which has introduced Australian legal scholarship to new conversations involving decolonisation, a process of dissolving and thinking outside law's imposed regimes of white colonial thought (Watson 1998: 31). Moreton-Robinson's work also offers a compelling paradigm for analyses of legal discourse, in that it deconstructs the 'possessive logic of patriarchal white sovereignty', which she has, for instance, deployed in relation to the reception of claims for native title recognition (2004b).

Despite these significant foundations for bringing critical whiteness theory to the important site of law, there has been only limited attention in Australia to the field. Indeed, this is the first issue of an Australian journal devoted to the theme. Moreton-Robinson has indentified the lack of attention given by Australian

legal scholars to issues related to race as indicative of our 'agency' in the 'reproduction and maintenance of racial hierarchies' (Moreton-Robinson 2007: 85). That is, our lack of engagement with the concerns and epistemologies of the raced 'other' is not merely a silence, but is also silencing, oppressive and self-serving. In editing this special issue of the *ACRAWSA e-journal*, we hope to have interrupted this silence and encouraged further scholarship in the field of critical whiteness theory and law.

Naomi Fisher opens the issue with a piece entitled 'Out of Context: The Liberalisation and Appropriation of "Customary" Law as Assimilatory Practice'. Writing up 'strong' from her position as an 'Aboriginal woman learning and journeying back to her culture, place and identity' (p 1), Fisher argues that common law's claim to have 'recognised' Aboriginal Law is erroneous because the 'dialogue' between Aboriginal Law and common law is one-sided. She points out that any claim by common law to 'recognise' Aboriginal Law is false because the common law refuses to engage in a dialogue *with* the knowledges and Law founded in Aboriginal context and ontology. The effect of the common law's liberal discourse (monologue) is to grant legitimacy and power only to itself, and thus reiterate white hegemony through the assimilation and appropriation of Aboriginal peoples and Law, enmeshing them at sites of bureaucratic and legislative intervention and control.

The hegemony of liberalism in legal discourse is further deconstructed in the contributions that follow. In 'Witnessing Whiteness: Law and Narrative Knowledge', Trish Luker critiques the privileging within legal positivism of an epistemological framework grounded in

'scientific knowledge' as the basis for demonstrable proof. Using a site of testimonial evidence from the landmark action taken by members of the Stolen Generations, Luker argues that despite evidence presented by Lorna Cubillo which revealed the systematic practice of Indigenous child removal, this was rejected by the court because it did not meet the legal standard for proof. At the same time, evidence founded in narrative forms of knowledge, which revealed the function of whiteness in supporting dominant paradigms of historical truth, were discredited.

In 'Pinned like a Butterfly: Whiteness and Racial Hatred Laws', Karen O'Connell analyses the Federal Magistrates Court's decision in *McLeod v Power* (2003), a case involving a white prison officer's complaint of racial vilification against an Aboriginal woman. Despite a finding that vindicates the Aboriginal woman, O'Connell exposes the hypervisibility accorded to 'blackness' in the decision, which sits in stark contrast to the failure to reveal the significance of whiteness. She argues that an approach to law which foregrounds embodiment in racial hatred cases can render whiteness visible and that by exposing whiteness to examination, a more coherent racial identity for whites and a richer and fairer system of law may emerge.

Greta Bird reverses the conventional focus of legal analysis in her contribution 'The White Subject as the Liberal Subject' by engaging—through personal storytelling—in an analysis of her own position as the full citizen, the 'white liberal subject'. Bird identifies a significant moment in her understanding of whiteness that enabled her to reflect on her own subjectivity as a white legal academic and to identify her experience of white race privilege. In the desire to develop an ethics of alterity, Bird explores and acknowledges

the construction of her white subjectivity living in a raced nation, to set her own ethical goals towards resisting and challenging her own whiteness.

Finex Ndhlovu's contribution, 'A Critical Discourse Analysis of the Language Question in Australia's Immigration Policies: 1901–1957', draws insights from the conceptual framework of critical discourse analysis to interrogate the use and abuse of language testing as a tool for racial and political exclusion in Australia from 1901 to 1957. Marking an important period in the development of racialisation in Australian legal discourse, the construction of 'undesirable' immigrant subjects reminds us of the unstable nature of racialised categories of otherness. This remains an abiding issue as the language question continues to feature prominently in public debates on Australia's citizenship and immigration laws.

Jennifer Nielsen's contribution, 'Whiteness and Anti-Discrimination Law—It's in the Design', analyses the racialised effect of law's liberal notion of formal equality. Using the *Anti-Discrimination Act 1977* (NSW) as a case study, she argues that despite the assertion of 'race-neutrality' promoted by formal equality, the Act operates to produce a selective colour-blindness that stabilises and reproduces the dominance of white privilege. Nielsen then extends her analysis to the contemporary discourse of substantive equality, to argue that it may remain selectively colour-blind to racial difference and thereby reiterate whiteness. She questions mainstream legal scholars' support of the 'invisibility' of law's whiteness, and calls on them to interrogate the implications of whiteness, in order to expose and challenge law's reproduction and maintenance of racial marginalisation and privilege.

In addition to these formal scholarly works, we are very pleased to be able to include creative works which speak to the theme of this issue (a rare event in legal scholarship). The first, by Edwina Howell, offers three short pieces of creative writing under the title, 'It's Captain Cook all Over Again ...'. Howell's work is followed by two poems by Benna Coyne. Taking advantage of the ACRAWSA e-journal's digital environment, Benna performs both poems. The first, 'Suffering from Sovereignty' is performed as a voice piece, while in the second, Benna collaborates with composer Giordano to present 'The Sound of Whiteness'.

The issue also includes a rejoinder from Denise Cuthbert to the piece by Damien Riggs published in the last issue of the journal in which Riggs criticised Cuthbert's foregrounding of the experience of white adoptive mothers in a research project examining the adoption/fostering of Indigenous children. Cuthbert responds to Riggs by providing an account of the development of her ethical research parameters in which she considered her own subjective position as a white researcher and the politics of representation. Cuthbert affirms the importance in politically-engaged research of reporting and analysing all voices, Indigenous and non-Indigenous.

Finally, there are two book reviews: Damien Riggs reviews Derek Hook's text entitled *Foucault, Psychology and the Analytics of Power*, which he finds to be an exciting extension of the work of Foucault of direct relevance to critical race theory. Kathleen Conellan reviews a collection edited by Basia Spalek and Alia Imtoual, *Religion, Spirituality and the Social Sciences*, which she describes as a 'sparkling mosaic' of significant contributions to interrogations of spirituality and faith which reveal the

hegemonic status of established religions, disguised as secularism.

To conclude, we wish to offer our gratitude to the many people who made this issue of the ACRAWSA e-journal possible. Our deep thanks to all of the contributors and to the anonymous referees who gave generously of their time and expertise. We would also like to thank Damien Riggs for his support with editorial matters, and Alan Han, who made this issue magically appear.

It is our fervent hope that this issue contributes to and encourages a greater body of scholarship which engages an interdisciplinary approach to critique and deconstruct the function of hegemonic whiteness in Anglo-Australian law.

#### Editors

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