

# Speaking of Us, About Us and For Us: Telling Stories About Aboriginal Peoples From the Archives

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*This article reflects on three failed efforts to assist Aboriginal people to disrupt the stories that the state and non-Indigenous people had fabricated about their lives. It encompasses discussion of the Royal Commission into Aboriginal Deaths in Custody, the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families (the Stolen Generations) and an attempt to reclaim a personal diary and sketchbooks toured as part of a retrospective exhibition about Aboriginal artist Trevor Nickolls. The article shows how institutional politics, curatorial practices and intellectual property concepts combine to free up information flows and authorise others to speak of, about and for Aboriginal peoples. At a time when our public institutions are seeking greater participation by Aboriginal people in curating collections, and historians and academics are very interested in using archival material, there needs to be a wider discussion about the potential harms that can arise from opening up archival access.*

This article reflects upon the contemporary resonance of stories which are informed by the records and artefacts documenting Aboriginal and Torres Strait Islander lives and held in public collections. It is motivated by concern that institutional frameworks, curatorial practices and intellectual property laws interact in ways that will perpetuate historical injustice. Histories and biographical stories matter for many reasons, but especially because they are an important source of knowledge that continues to be accessed by Indigenous and non-Indigenous Australians interested in better understanding Aboriginal identity. Holding new

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public inquiries, opening up archival records, writing and creating new academic and creative works about the events disclosed, and adopting open access licensing to facilitate public use of collections are all often motivated by good intentions. These actions are intended as a gesture of respect towards the human rights and dignity of Indigenous people, and motivated by a desire to create a public space for the expression of self-determined identities. This creation of knowledge, however, has many dangers that need to be better understood. Exploring three failed efforts to assist Aboriginal people to disrupt the stories that the state and non-Indigenous people had fabricated about their lives illustrates why.

Most Australian public archives now have institutional protocols about consultation and consent to try to redress injustices arising from their past gatekeeping practices. The bureaucratic, disciplinary and legal structures that are in place nevertheless combine to create an information culture that arguably reduces Aboriginal people to information providers or memory machines, while non-Indigenous people continue to speak of, about and for Aboriginal people.

The following examples come from my experience over a long time, from working in a clerical capacity for the Royal Commission into Aboriginal Deaths in Custody (1987); to providing legal advice to a member of the Stolen Generations who had provided evidence to the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families (1995); to more recent efforts to reclaim the personal diary and sketchbooks of a highly acclaimed Australian Aboriginal artist, Trevor Nickolls. In reflecting upon these personal experiences and the knowledge gained from them, I have chosen to draw on broader conversations with Indigenous people about these issues and to prioritise works written by Indigenous scholars, rather than situate the analysis within a much larger body of academic literature about the archives and colonial history.<sup>1</sup> Notwithstanding significant changes to Australian institutional practices, Aboriginal and Torres Strait Islander people remain exposed to the risk of

<sup>1</sup> Numerous works have influenced this article, including: Tony Bennett, *Pasts Beyond Memory: Evolution, Museums, Colonialism* (London: Routledge, 2004); *Australian History Now*, ed. Anna Clark and Paul Ashton (Sydney: NewSouth Publishing, 2013); *Refiguring the Archive*, ed. Carolyn Hamilton, Verne Harris, Michèle Pickover, Graeme Reid, Razia Saleh, Jane Taylor (Cape Town, David Philip Publishers, 2002); Eric Michaels, *Bad Aboriginal Art: Tradition, Media and Technological Horizons* (Sydney: Allen & Unwin, 1994); Ann Laura Stoler, *Along the Archival Grain: Epistemic Anxieties and Colonial Common Sense* (Princeton, Princeton University Press, 2009).

significant new harms. The legal foundation that exposes Indigenous peoples to these harms is not well analysed, outside of intellectual property law.<sup>2</sup> At a time when our public institutions are seeking greater participation by Indigenous people in curating collections, and historians and academics are very interested in using archival material, there needs to be a wider discussion about the potential harms that can arise from opening up archival access.

### **An official record of ‘bad race relations’: stories about Eddie Murray**

Ambelin Kwaymullina reminds us that:

Aboriginal people need our stories, for they are our lifeblood. It was stories that carried us through the long violence of colonisation, and it is stories that will help us overcome the cycles of despair and disadvantage that are colonialism’s legacy.

[...]

What is to happen to us now, if we cannot find ourselves in stories?<sup>3</sup>

The need to include Aboriginal knowledge and experience of survival in the face of colonial violence entails more than the creation of new stories from Indigenous perspectives about the events of the past. There is also a need to interrogate the stories circulating about Aboriginal lives that have emanated from reviews of the records of the state, such as the reports of the Royal Commission into Aboriginal Deaths in Custody. In this section, I trace the production of an official report into the life and death of Eddie Murray, reflecting upon the difficulties that his family faced in contesting the official narrative. It explores the institutional politics that led to the ongoing marginalisation of Aboriginal voices, notwithstanding a genuine effort by the state to explore an alleged injustice.

<sup>2</sup> Even within intellectual property scholarship, there is little that explicitly addresses the politics of archival practice. See Terri Janke, *Indigenous Cultural Protocols and the Arts* (Rosebery: Terri Janke and Company, 2016); Kathy Bowrey and Jane Anderson, ‘The Politics of Global Information Sharing,’ *Social and Legal Studies* 18 (2009): 479-504.

<sup>3</sup> Ambelin Kwaymullina, ‘Let the Stories In: on power, privilege and being an Indigenous writer’, 12 June 2015, The Wheeler Centre Blog, <http://www.wheelercentre.com/notes/let-the-stories-in-on-power-privilege-and-being-an-indigenous-writer> (last accessed 15 August 2016).

Royal Commissioner Justice Muirhead's official report into the death of Eddie Murray opens with a mix of personal details and facts:

Edward James Murray was born on 6 December 1959 in Coonamble and spent most of his youth in Wee Waa, a small town in the north of New South Wales situated on the Namoi River. He was the second oldest son of Arthur and Leila Murray who had twelve children in all, nine girls and three boys.

On 12 June 1981 Eddie was found dead, hung by a strip of blanket made into a noose, in a police cell in the Wee Waa Police Station. He was then twenty-one years old.<sup>4</sup>

The inquest into Eddie Murray's death found an open verdict, there being insufficient evidence to ascertain whether his death was caused by an unknown person or persons or by suicide. Eddie Murray was only one of ninety-nine Aboriginal people to die in custody in Australia between 1 January 1980 and 31 May 1989. In 1987, a Royal Commission was established to address 'growing public concern that deaths in custody of Aboriginal people were too common and public explanations were too evasive to discount the possibility that foul play was a factor in many of them'.<sup>5</sup> Eddie Murray's death was the first investigated by the Royal Commission.

The letters patent of the Royal Commission required consideration of the underlying social, cultural and legal issues behind the deaths in custody. In fulfilling this objective, a first task was to locate any public record relating to the deceased person. All documentation was to be reviewed, indexed and copied to ensure the full and complete public record was available to the commission and the numerous parties that were legally represented. The material commonly copied, and thus widely distributed, included school records containing comments by teachers and school principals about students' attitudes and behavioural problems; numerous records of hospital attendances for scrapes, accidents and drug- and

<sup>4</sup> Royal Commission into Aboriginal Deaths in Custody, *Report of the Inquiry into the Death of Edward James Murray* (Canberra, 1989) (hereafter *Inquiry into the Death of Edward James Murray*), ch. 1.

<sup>5</sup> Elliott Johnston, *Royal Commission into Aboriginal Deaths in Custody: National Report* (hereafter *Royal Commission into Aboriginal Deaths in Custody National Report*) (Canberra, 1991), vol. 1, 1.1.2.

alcohol-related harms; reports from welfare officers about the family circumstances; miscellaneous police files noting past contact, which were often a record of drug- and alcohol-related incidents and public order offences; police prosecution files and court records of any proceedings; correctional services and probation files; and, finally, records from the coroner's court — photographs of injuries taken in the morgue; scientific reports on bruises, wounds, blood and organ analysis; and, occasionally, a brown paper bag containing an item of clothing. This primary evidence was further supplemented by a rehearing of evidence from persons involved in the events immediately leading up to the death. New expert evidence was also sought to elaborate on various matters, to assist in contextualising community relations and to canvass broader policy considerations about reform to the criminal justice system. There was a significant disparity between the large amount of information compiled by the state about the deceased person's life and the paucity of information collected upon their death. This 'background' led to the creation of a new permanent archive about Eddie Murray in the form of an official report into his suspicious death. For most members of the public, this report would form the entire basis of their knowledge of the deceased.

The median age of death of those being investigated was twenty-nine, but, in the official files, rarely was there evidence of more than the most rudimentary school achievement or any employment. Forms showed that many struggled to fill out very basic documentation unaided. Some, including Eddie Murray, were talented sportsmen, and this was a main cause for optimism about their future prospects, with training offering a break from the cycle of drinking and idleness. Most had only ever had short-term seasonal employment.<sup>6</sup> Eddie Murray was described by the commissioner as coming from a family that worked hard to improve housing, wages and conditions for Aboriginal people working in the local cotton industry. This led to the family being labelled 'activists' by white society, and from this it was concluded that 'Eddie grew up *with the notion* that he and his family were picked upon, particularly by the authorities'.<sup>7</sup> Eddie Murray had been detained for public drunkenness at least ten times in the four years prior to his final arrest. Under the *Intoxicated Persons Act* 1979 (NSW), detention was not supposed to be punitive; rather, it was for

<sup>6</sup> Inquiry into the Death of Edward James Murray, Ch 2.

<sup>7</sup> Inquiry into the Death of Edward James Murray, Ch 1.

the protection of both the community and the intoxicated person, who was to be taken to a prescribed place to dry out.<sup>8</sup> Eddie Murray was also banned from the local pub by the publican. It was the local publican who had called police when Murray sought to use the facilities, leading to his last detention and the discovery of his body at the Wee Waa watch house.

This became the story of Eddie Murray's life. In the inquiry into his death, considerable evidence was produced about the effects of alcohol consumption. Detailed, yet inconclusive, expert testimony was given as to whether or not Murray was an alcoholic and inured to the effects of intoxication. This was relevant because there was a question as to whether he had the motor skills required to hang himself in the cells, given his small stature and the extremely high blood alcohol reading taken after his death. The commission, while finding numerous inconsistencies and problems with evidence surrounding the account of Murray's arrest, the cause of death, what happened in the station in the immediate period thereafter and the relevance of his state of intoxication to his hanging, did not conclude his death was suspicious. The Royal Commission found that the death was a result of Murray's own actions. It was also more confidently concluded that 'bad race relations in the town figured as crucial background to the death'.<sup>9</sup>

Eddie Murray's parents attended most days of the hearing, which ran for several weeks. They appeared relentlessly patient at the course of events, which was uncomfortable to watch. There was a huge bar table, endless questioning and re-examination of testimony led by barristers representing the various interested parties, repeatedly going over what had previously been disclosed at the inquest held many years previously. The commissioner, Justice James Muirhead, often listened with his chin on his chest and his eyes shut, especially after lunch. It was apparent to the family from the volume of material on the trolleys near the bar table, and occasionally referred to in testimony, that the state had compiled excessive documentation of their son's rather unremarkable public life. It was also clear from the proceedings that there was scant and only very unreliable information concerning his shocking death.

The official revelations in the eventual report open with a description of the problems facing Aboriginal people living in a small Australian country

<sup>8</sup> *Intoxicated Persons Act 1979 (NSW)*, s. 5.

<sup>9</sup> *Royal Commission into Aboriginal Deaths in Custody National Report*, vol. 2, 12.1.6.

town — a finding of a history of difficult race relations, poor housing, little employment opportunity, poor wages, idle young men who drink to alleviate boredom, conflict centred on access to the public drinking houses owned and frequented by white people and from which Aboriginal people were frequently banned, and tensions often leading to police interventions. This would not have surprised any Indigenous person and perhaps none of the non-Indigenous people interested in the inquiry. Yet this was the primary initial discovery made by the Royal Commission into this death, based on an extensive review of the state's documentary archive and aided by soliciting further expert evidence to help bring meaning to these records.

Following their disquiet about the commission's finding of suicide, in 1997 the family commissioned a subsequent report to review the failings of the coronial inquest and the Royal Commission.<sup>10</sup> In response to this report, the NSW Government, through the coroner, ordered the exhumation of Eddie Murray's remains. The second forensic examination determined that he had suffered a fracture to his sternum, which had most likely occurred immediately before his death. This injury had not been recorded at either previous legal inquiry. It was consequently argued that there were now clear grounds to reopen the investigation: new evidence suggestive of violence before the hanging and a new injury relevant to assessing his capacity to hang himself. Further, in the interim, there had been a finding of corruption, including falsifying evidence, against one of the officers working at the Wee Waa watch house at the relevant time.<sup>11</sup> The new evidence was referred to the Police Integrity Commission in 2000. However, the report, issued three years later, was never publicly released. The matter was raised in the NSW Parliament in 2004, to no avail.<sup>12</sup> Murray's family are still publicly calling for a reopening of the case, thirty-four years after his death, seeking justice in his name.<sup>13</sup>

<sup>10</sup> Robert Cavanagh and Roderic Pitty, *Too much wrong: report on the death of Edward James Murray* (NSW: Many Rivers Aboriginal Legal Service, 1997).

<sup>11</sup> Cavanagh and Pitty, *Too much wrong* (2nd edition, 1999).

<sup>12</sup> NSW Parliamentary Debates, Legislative Council, 22 June 2004, 9783 (Lee Rhiannon).

<sup>13</sup> Australian Broadcasting Commission, 'Calls for Eddie Murray's death in custody case to be re-opened', *AM: News*, 12 June 2014, <http://abc.net.au/am/content/2014/s4023638.htm> (last accessed 1 June 2016).

In the literature on 'archive fever',<sup>14</sup> museology, colonial history, librarianship, cultural collections, intellectual property and cultural heritage law, there is an abundance of references to the need for a political and legal response to the colonial legacy.<sup>15</sup> The material falls crudely into two camps — one body of work is primarily oriented toward analysing colonial governance and the state; the other addresses Indigenous peoples, the colonial legacy and 'cultural collections'. Human rights dialogues straddle both domains, but in settler states like Australia, reform agendas with the capacity to directly affect Aboriginal and Torres Strait Islander lives orient towards the institutional practices of the state.

Colonial governance relies on the machinery of state to survey, assess, police and dictate life opportunities of First Nations peoples. Colonial administration produces an enormous array of documentation that generates mainstream knowledge of First Nations peoples. In Australia, the largest array of documentation of Aboriginal and Torres Strait Islander lives is the kind of material copied for the Royal Commission — the ubiquitous and mundane records related to policing, incarceration and welfare interventions into Indigenous lives, often poorly kept<sup>16</sup> and only reviewed in exceptional circumstances. The colonial archive, especially related to the administrations of the nineteenth century, has been much commented on by post-colonial scholars, in particular from Foucauldian perspectives.<sup>17</sup> My interest here, however, is not in reflecting upon the degree of surveillance and governance and the distorted knowledge produced about Indigenous lives through contact with colonial

<sup>14</sup> Jacques Derrida, *Archive Fever: A Freudian Impression* (Chicago: University of Chicago Press, 1996).

<sup>15</sup> See, for example, Paul Ashton and Anna Clark, 'Introduction: Rethinking Australian History', in *Australian History Now*, 13-23; Rosemary J. Coombe, 'The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy,' *Canadian Journal of Law and Jurisprudence* 6 (1993): 249-85; Heather Goodall, 'Aboriginal History and the Politics of Information Control,' in *Memories and Dreams: Reflections on Twentieth Century Australia*, ed. Richard White and Penny A. Russell (Sydney: Allen & Unwin, 1997): 77-96.

<sup>16</sup> See, for example, Tim Rowse, 'The politics of enumerating the Stolen Generations,' in *Rethinking social justice*, ed. Timothy Rowse (Canberra: Aboriginal Studies Press, 2013), 82.

<sup>17</sup> For a thoughtful commentary on the contribution and legacy of Gayatri Chakravorty Spivak's 'Can the subaltern speak?' and Jacques Derrida's 'Archive Fever', see Sandhya Shetty and Elizabeth Jane Bellamy, 'Postcolonialism's Archive Fever,' *Diacritics* 30 (2000): 1.

administrations, but to explore the significance of the records of the modern state, held and still being compiled today, for contemporary understandings of Aboriginal identity.

### **Confronting 'learned ignorance'**

Pierre Bourdieu coined the term 'learned ignorance' to refer to 'a mode of practical knowledge not comprising knowledge of its own principles'.<sup>18</sup> The practice of the Royal Commission into Aboriginal Deaths in Custody and subsequent investigations was to call up, review and copy official records. This was supposed to advance justice today by revealing the truth of the past. The state sought to learn more about its treatment of Aboriginal and Torres Strait Islander people, with a view to implementing recommendations to redress past injustice and racism. In asking the state to respond to new evidence ascertained through the efforts of Eddie Murray's family and their sympathisers, there is no contesting the right of the state to exercise power over Aboriginal and Torres Strait Islander peoples. Rather, in seeking to reopen the investigation, the family can be interpreted as asking the state to live up to its own institutional commitment to the rule of law, with the surrounding activism speaking to the asymmetrical nature of the power relationship. The rule of law has numerous formulations.<sup>19</sup> Descriptions share a commitment to curbing arbitrary and partial exercises of power by the state. The rule of law encompasses a commitment to record legal processes faithfully, with the documentation embodying the proof of legality. To call out the state on an institutional failure to account for a civilian's death and to call for officials to be held to account for unlawful actions affecting citizens is a very conventional rule-of-law argument. However, we need to look beyond the conventional reading of these politics.

Murray's family is doing more than drawing attention to the 'learned ignorance' of the state. They are also contesting the official narrative of Eddie Murray's life as a sad, depressed drinker with few prospects — a man who, influenced by the 'notion' of being picked upon by the state, took his own life. All Aboriginal witnesses interviewed told the commission

<sup>18</sup> The term is taken from Bourdieu's *Outline of a Theory of Practice*, cited in Stoler, *Along the Archival Grain*, 24.

<sup>19</sup> See Martin Krygier, 'Rule of Law,' in *International Encyclopedia of the Social and Behavioral Sciences*, ed. N. Smelser and P.B. Bates (Burlington: Elsevier Science, 2001), 13403-8.

that he was a happy person, many noting that he mixed well, had many friends, enjoyed life and in particular football, and was looking forward to a forthcoming tour.<sup>20</sup> Alice Nikki, a family member of another man who died in custody, spoke at an event designed to provide support to families involved in Royal Commission proceedings. She wanted it to be recognised that ‘the Royal Commission didn’t give us a chance to talk. They brought up all our memories for nothing’.<sup>21</sup>

The mystery of Eddie Murray’s death raises important political questions about the direct culpability and complicity of police, investigators, judges and other bureaucrats in state-sponsored violence and genocide. More broadly, it also leads us to ask who the state archive is for — what kind of knowledge is produced, what information is suppressed and with what implications, and how these acts are justified in legal inquiries ostensibly designed to throw light on what happened. Critical scholars working in criminology, sociology, political and legal theory and human rights literature are familiar with the limitations of this line of questioning.<sup>22</sup> In political philosophy, it leads to deeper concerns about the loss of our ethical capacity in the modern state.<sup>23</sup>

While these are important and relevant questions about our legal and political institutions, disciplinary intuitions divert thinking about archives into public law and private law camps. Legal scholars tend to dichotomise the colonial record in a problematic way. We have one set of political questions that relate to the records that the state keeps about itself and its governance of subjects, such as those that were the focus of the numerous inquiries into the death of Eddie Murray. Then we have the ‘other’ archives

<sup>20</sup> Evidence was taken from his mother Leila Murray, father Arthur Murray, uncle Allan Murray, and friends Lyall Combo, Cheryl Gordon, William Toomey, Stan Winters, Alfred Cochrane, Marge Toomey and Cecil Patten: *Inquiry into the Death of Edward James Murray*, 3.1.

<sup>21</sup> *Aboriginal and Torres Strait Islander Families in Australia Speak Out: Report to the Royal Commission into Aboriginal Deaths in Custody* (Sydney: National Committee to Defend Black Rights, 1990), 26.

<sup>22</sup> See, for example, *The Critical Criminology Companion*, ed. Thalia Anthony and Chris Cunneen (Leichhardt: Federation Press, 2013); Mitchell Dean, *Governmentality: Power and Rule in Modern Society* (London: Sage, 2009); Martti Koskeniemi, ‘Human Rights Mainstreaming as a Strategy for Institutional Power,’ *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 1 (2010): 47-58.

<sup>23</sup> Aimé Césaire and Robin D.G. Kelley, *Discourse on colonialism* (New York: Monthly Review Press, 2000); Hannah Arendt, *Eichmann in Jerusalem* (New York: Viking Press, 1963).

that the state keeps, presumed to revolve around a different set of issues relating to ‘cultural’ questions — the objects and histories of Indigenous peoples ‘looked after’ by public cultural institutions. We often neglect consideration of the broader cultural life of the records produced by the state. What gets lost along the way is a detailed consideration of the way the public circulation of official records continues to feed into the popular imagination and, although not intended, enlivens existing racial stereotypes.

For those interested in the work of the Royal Commission, it is presumed that deaths such as those of Eddie Murray tell a ‘political’ story. This includes modest statements about his social life that were perceived as relevant to understanding his death, but there was no real accounting of, or interest in, his cultural life. The account of his Aboriginality was reduced by the commissioner to a generic whitewashed tale of ‘bad race relations’, a rudimentary account of adolescent resistance to the overt signifiers of white power in Wee Waa. His experience as an Aboriginal man was left unexplored, unknown, marginalised in the records created for and used by the commission — his knowledge and culture today remain suspended outside of recorded history. Further, in the process of conducting the Royal Commission and its aftermath, there was an expansion of the archive about Eddie Murray. Within these new records was more reproduction and transmission of ignorance about his life, his Aboriginal identity, his culture and character. What is the resonance of this new colonising archive?

Blaze Kwaymullina notes that archives present stories in ways that manipulate time and space:

It is a weapon that says:

*I am distant from you.*

*I am disconnected and far away.*

*You can see me but you cannot touch me,*

*I exist elsewhere.<sup>24</sup>*

This new archive ‘updates’ the official story of Eddie Murray, while continuing to keep at a distance what he and his family might want heard.

<sup>24</sup> Blaze Kwaymullina, ‘Frozen Colonial Soldiers: Aboriginal Research and the Archives,’ *Westerly* 57(2) (2012): 37-38.

There is currently a new social justice campaign protesting the continuing over-representation of Aboriginal and Torres Strait Islander people in custody.<sup>25</sup> The recent media exposure on *Four Corners* of appalling treatment of Aboriginal children in custody in the Northern Territory has also highlighted the failure to implement the Royal Commission's recommendations. This will only fuel further discussion of the previous inquiries into the failings of the state.<sup>26</sup> The difficulties Aboriginal people face in contesting the ongoing generation of the state's narratives about themselves affect both the administration of the criminal justice system and public opinion. Limited racialised representations contribute to ongoing community tensions, racist policing and the ongoing over-representation of Aboriginal and Torres Strait Islander people in custody. Yet the cultural dimensions of the justice story, including challenges to the state's construction of Aboriginal identity, are continually marginalised in the official inquiries into the causes of injustice.

A few years later, the Stolen Generations inquiry determined to tread more carefully in recording and circulating stories about Aboriginal encounters with the state. However, these efforts also proved insufficient to prevent serious harm.

### **'Our history should not be hidden': M's story**

Historian Peter Read has estimated that the Stolen Generations include somewhere between ten and thirty-three per cent of Aboriginal children who were removed from their families in the period from 1910 to 1970.<sup>27</sup> Many children ended up in state institutions where family groupings were deliberately broken up and where many of the children suffered serious physical and sexual abuse. There was often no information provided to the

<sup>25</sup> There has been an eighty-eight per cent increase in incarceration over the past ten years. See 'Change the Record', <http://www.changetherecord.org.au> (last accessed 1 June 2016).

<sup>26</sup> Caro Meldrum-Hanna, Mary Fallon, Elise Worthington, 'Australia's Shame,' *Four Corners*, Australian Broadcasting Corporation, 26 July 2016.

<sup>27</sup> Peter Read, *The Stolen Generations: The Removal of Aboriginal People in New South Wales 1883-1969* (Sydney: NSW Department of Aboriginal Affairs, 1981); Peter Read, 'The return of the stolen generation,' *Journal of Australian Studies* 22 (1998): 8; Human Rights and Equal Opportunity Commission, *Bringing Them Home: A Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Sydney, 1997) (hereafter *Bringing Them Home*), ch. 2: Estimating the Numbers Removed.

children about their parentage. It was also common for them to be deliberately misled about their background and the circumstances that led to them being in care. Most were denied access to real educational opportunities. Some were adopted out to white families, unaware of their Aboriginal heritage.<sup>28</sup>

In 1994, a meeting in Darwin, the Going Home Conference, brought together more than 600 Aboriginal people who had been removed as children, with the intention to discuss their experiences and the case for reparations. One of the issues raised from the conference floor was the problem of getting access to archival information:<sup>29</sup>

The documentation kept by authorities on Aboriginal people is not easily accessible. Records of removals are lodged in police journals, mission records, and files created under the Commonwealth administration of Aboriginal Affairs.

For many Stolen Generations peoples wishing to collect information on their personal and families histories there is difficulty in locating and identifying information.

Many of the entries in police journals provide little detailed information, in many cases only the first name of the child is entered without reference to parents or other family members.

Upon reaching the institution after removal limited information was documented unless the child came to the attention of authorities, usually through misbehaviour. Little of this information has been made available to ex-residents of institutions.

Many children removed had their names changed and birth dates were estimated. For members of the Stolen Generations, piecing their history together with information from files and information from natural family members the journey takes on tremendous significance.<sup>30</sup>

<sup>28</sup> *Bringing Them Home*, Ch. 2: Self-Management and Self-Determination.

<sup>29</sup> Some historical dimensions to access problems are discussed by Henriette Fourmille, 'Who Owns the Past: Aborigines as Captives of the Archives,' *Aboriginal History* 13 (1989): 1.

<sup>30</sup> Going Home Conference, *The long road home ...: the Going Home Conference, 3-6 October*

Final recommendations from the conference spoke to the importance of addressing the politics of archival practice. Creating access to official documentation at no cost to the applicant, including having birth certificates corrected, changing institutional policy, having Aboriginal officers to advise on archival policy, and creating Link-Up, an agency to assist people reclaiming their personal history, were considered matters of urgency.<sup>31</sup> Another recommendation addressed restitution in the form of non-repetition — not creating another welfare archive that objectifies Aboriginal and Torres Strait Islander peoples.

Test cases were also brought by members of the Stolen Generations using a mix of civil law and administrative law arguments to test the culpability of the state.<sup>32</sup> It was always apparent, however, that there were inadequate resources to fund widespread legal action to address this historic injustice. Furthermore, as noted above, it was difficult to access the documentation required for individuals to find out more about their identity, let alone to prove wrongdoing by the state.<sup>33</sup> Freedom of information requests were sometimes useful to uncover personal histories and family connections, although it was also often distressing to members of the Stolen Generations to learn that they had not been voluntarily given up and that numerous efforts to locate and try to reclaim them and their siblings had been thwarted by authorities. Whereas the Royal Commission into Aboriginal Deaths in Custody could be described as an attempt to use the documentation of the state to address the learned ignorance of the state and to hold agents of the state accountable for past wrongdoing, those pushing for an inquiry into the Stolen Generations

1994 (Darwin: Karu Aboriginal Child Care Agency, 1996) (hereafter *Going Home Conference*), 22.

<sup>31</sup> See further, Sonia Smallacombe, 'Accessing Personal and Family Records: Contesting the Gatekeepers,' *Indigenous Law Bulletin* 4 (1998): 4.

<sup>32</sup> For example, *Williams v Minister, Aboriginal Land Rights Act 1983* [No 1] (1994) 35 NSWLR 497; *Williams v Minister, Aboriginal Land Rights Act 1983* [No 2] (1999) 25 FamLR 86; *Williams v Minister Aboriginal Land Rights Act and State of NSW* [No 3] (2000) ATortsRep 81-578; *Kruger v Commonwealth* [1997] HCA 27; *Cubillo and Another v Commonwealth* [No 1] (1999) 89 FCR 528; *Cubillo and Another v Commonwealth* [No 2] (2000) 103 FCR 1; *Cubillo and Another v Commonwealth* [No 3] (2001) 112 FCR 455; *Bruce Trevorrow v State of SA* [2007] SASC 2.

<sup>33</sup> See, generally, Chris Cunneen and Julia Grix, *The Limitations of Litigation in Stolen Generations Cases* (Canberra: Australian Institute of Aboriginal and Torres Strait Islander Studies, 2004).

wanted it acknowledged that the documentation of the state was a deeply inadequate and misleading source of information about the history of colonial relations. The ambition was to compile information from survivors about what happened to them and what they were told — the accounts routinely left out, not heard, not sought or ignored in official records.

Indigenous advocacy included the demand that: “Our history should not be hidden. It should be expressed all the time in music, song, whatever, and be written so our future children can understand it through our eyes, not through non-Aboriginal eyes”.<sup>34</sup>

It was thus understood by those who sought to participate that this new record was not strictly for the state’s own benefit. The ambition was to create an archive for the benefit of future generations, so that Indigenous and non-Indigenous Australians would more fully appreciate the history of colonialism and its impact on the people of the land.

Political action culminated in the establishment by the Keating government of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families (1995), to be conducted by the Human Rights and Equal Opportunity Commission (HREOC). Informed by Aboriginal advocacy, HREOC staff determined that it was especially important for personal stories to be heard and recorded. The Governor-General, Sir William Deane, explained that this was especially important because “true reconciliation between the Australian nation and its indigenous peoples is not achievable in the absence of acknowledgment by the nation of the wrongfulness of the past dispossession, oppression and degradation of the Aboriginal peoples”.<sup>35</sup>

The argument was that without acknowledging the past pain and suffering, reconciliation was impossible. One outcome of this process was Prime Minister Kevin Rudd’s *Apology to Australia’s Indigenous peoples* in 2008.<sup>36</sup>

<sup>34</sup> *Going Home Conference*, 26.

<sup>35</sup> *Bringing Them Home*, 4.

<sup>36</sup> *Apology to Australia’s Indigenous peoples*, House of Representatives, 13 February 2008, <http://australia.gov.au/about-australia/our-country/our-people/apology-to-australias-indigenous-peoples> (last accessed 24 August 2016). Other related federal government inquiries that followed the Stolen Generations report resulting in public apologies include the Senate Standing Committees on Community Affairs *Inquiry into Children in Institutional Care* (2005) and *Inquiry into Former Forced Adoption Policies and Practices* (2012).

Another was the creation of a new public record, the inquiry's evidence, about Australia's appalling history of human rights abuses.

The design of the inquiry sought to effect a much higher degree of Aboriginal ownership over the process of being heard and over the recordings of personal stories than had occurred with the Royal Commission into Aboriginal Deaths in Custody. The personnel conducting the inquiry were not only focused on reviewing the available documentary accounts of contact with the state, they also sought to create an environment that was responsive to the people whose personal stories were to be told. There was some degree of awareness that speaking of the violence would be distressing and could retraumatise Aboriginal informants.<sup>37</sup>

Nonetheless, the climate generated at the time of the inquiry and in the immediate aftermath was one in which there was active encouragement for people to share their personal stories, so that both Indigenous and non-Indigenous Australia could better understand the nation's history.<sup>38</sup> This created considerable pressure on the Stolen Generations to seize their moment in history. The inquiry took evidence from 535 Indigenous people throughout Australia concerning their experiences of the removal policies. Anonymised testimony was widely cited in the inquiry report, *Bringing Them Home*. Seventeen personal stories were also published, with the identities of the authors protected by the use of pseudonyms. Nevertheless, as might be expected given that the stories were always intended to be shared with the community, accounts travelled beyond official publications where identities were protected or information was only disclosed on the terms that the confider felt were appropriate. There was also 'sharing' through personal networks at community level. For at least one member of the Stolen Generations, this proved catastrophic.

M had given evidence to the Stolen Generations inquiry. He wanted the extensive and horrific abuse he had suffered to be on the public record.

<sup>37</sup> With so many subsequent inquires, there is now a concern that participation is only retraumatising victims, leading some to question whether Indigenous people should become involved.

<sup>38</sup> There is a website devoted to archiving and filming personal stories, 'The Stolen Generations' Testimonies', <http://stolengenerationstestimonies.com> (last accessed 1 June 2016). See also Bronwyn Fredericks, 'Reflections on the Challenges with the Bringing Them Home Oral History Project,' *Oral History Association of Australia Journal* 28 (2006): 17.

However, he had travelled interstate to give evidence because he did not want to expose his young family to knowledge of his suffering of sexual and physical abuse while he was institutionalised. M also used freedom of information laws to obtain information from the Department of Children's Services and child care officers about how he came to be in care, which led to him learning more about his mother, siblings and birth name, as well as giving him access to other official reports into his conduct and negative views of his personality and prospects. He collated this with other information from the mission where he had ended up, trying to piece together all he could to help make sense of his life. M shared this information with a non-Indigenous person who had befriended him and with whom he had been discussing Aboriginal politics and spirituality, in the context of considering collaborating in a commercial venture. This person then self-published a book which quoted from M's evidence to the inquiry and other personal documentation, revealing many of the private details M had been able to discover about his earlier life and circumstances. This information was incorporated into the author's narrative about a universal Aboriginal spirituality and criticism of the politics of self-determination and rights claims by Aboriginal peoples. Although the book had limited distribution, the community where M and his family lived were aware of the publication. M's friends sought legal advice about how to restrain the circulation of the book.

Australia has very weak privacy laws. There is no federal charter of human rights, although a recent Australian Law Reform Commission inquiry has recommended the Commonwealth introduce a tort action for serious invasion of privacy that would include redress for the misuse of personal information.<sup>39</sup> It is not clear, however, that even a reformed law would catch this kind of conduct, due to the circumstances. M's identity and previously undisclosed details obtained under freedom of information laws would be able to be protected under confidential information law or a new federal privacy law. However, in this case, in the spirit of reconciliation, M had agreed to at least some of this information being disclosed, not anticipating how that information would travel, nor the consequences, which muddied the water. The best that could be hoped for would be that his name could be legally suppressed, but taking action would likely only draw attention to the text and deliver much desired

<sup>39</sup> Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era: Final Report* (ALRC Report 123) (Sydney, 2014).

publicity to an otherwise undistinguished author who was keen to nurture a profile to advocate her 'New Age' beliefs.

Copyright recognises identities in romantic terms, where the author's personality clothes 'unoccupied' ideas.<sup>40</sup> This body of law prioritises the principle of the free circulation of ideas and protection of authorial expression over the importance of protecting the integrity of situated and embodied knowledge.<sup>41</sup> In M's case, the thief compiled the facts and incorporated them, small details and other small quotations into a new narrative. Copyright, in providing a private incentive to the author to publish an 'original literary work', only encouraged M's ongoing dehumanisation and degradation. Copyright mobilised the thief to speak *of him, about him, for him*. This new narrative clothed M's 'Aboriginal' identity in a costume of the author's choosing. Copyright law's investment in securing the conditions for the free circulation of ideas diminished M to a marginal role. He was reduced to a mere authentication device, providing cultural distinction and emotional valence. He served to credential a highly dubious literary text. With an already difficult life marked by a profound sense of loss, the theft further complicated M's identity among those he cared most about and in the community around him. It had a terrible personal and emotional impact.

M had wanted the wrong of the acts of violence against him, including the theft of his identity that came from his removal from family, made visible to the state. He wanted the state to accept full responsibility for the acts done to him and his kin by various officials. But M was not looking for his life story to be made public. He was not offering up his life story as public property, for his identity to be appropriated for others and the basic facts and circumstances of his life and bureaucratic opinion of his personality

<sup>40</sup> For historical accounts, see Mark Rose, *Authors and Owners: The Invention of Copyright* (Cambridge, Mass: Harvard University Press, 1993); Martha Woodmansee, *The Author, Art and the Market: Rereading the History of Aesthetics* (New York: Columbia University Press, 1994); Kathy Bowrey, 'Law, Aesthetics and Copyright Historiography: A Critical Reading of the Genealogies of Martha Woodmansee and Mark Rose', in *Research Handbook on the History of Copyright Law*, ed. Isabella Alexander and Tomás Gómez-Arostegui (Cheltenham: Edward Elgar, 2016): 27-52.

<sup>41</sup> Haraway notes, 'Situated knowledges are about communities, not about isolated individuals. The only way to find a larger vision is to be somewhere in particular ... Situated knowledges require that the object of knowledge be pictured as an actor and agent': Donna Haraway, 'Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective,' *Feminist Studies* 14 (1988): 3.

and capacities revealed to all. Yet in advising what could be legally done to prevent this publication, it was apparent that Australian law had no capacity to stop this type of exposure. Once the words fly out in a public venue and through private discourse, such is the hegemony of binary intellectual property constructs — categories and principles of privacy, confidential information, copyright — that M stepped into view only to find himself disarmed and exposed to further violation.

M's exploitation is not the kind of example that is usually related to problems of archives and cultural collection. It is an ill fit with the types of problems that seem to preoccupy the critical academic literature about archives, as literature inevitably orients discussion around the historic conduct of public institutions and improving institutional relations with Aboriginal and Torres Strait Islander peoples. The way 'reformed' practices will intersect with the other laws that govern access to information held, and what individuals might do with this new knowledge, is left out of consideration. The 'wrong' here was not performed by agents associated with the national inquiry. There was no wrong in the way they produced a new archive or with the terms on which they made these stories available to the public.

Yet, there was a deep sense of shame that came from having to tell M that our laws could offer little help. It is simply not on point to note that the Stolen Generations inquiry personnel were not the ones who harmed M or that his problem fell outside of the relevant intellectual property and privacy protections, nor to shift attention and blame to his unethical acquaintance. M grew up in a legal system that did not regard him as a full human being, with equal rights and legal entitlements. However, he was encouraged to believe that, in the spirit of reconciliation, in standing up to tell his personal story, there would be recognition of the importance of *his identity, his place, his situation* in the nation's history. The head of state and all those involved held out that there was interest in recognising his situated and embodied knowledge. What his encounter in 'truth-telling' demonstrated was not only the law's incapacity to live up to its promise, but also a deep-seated irresponsibility in not being able to call the legal order to account for engaging M in such a horrible and painful deception.

To understand how such a problem can arise, we need to revisit the larger politics of information flows.

### **The circulation of knowledge in a culture of copying**

There is extensive literature that addresses knowledge politics, seeking to reform public institutions in tune with a 'post-colonial' sensibility.<sup>42</sup> This literature often speaks to the need for libraries, museums and universities to repatriate, where possible, stolen cultural heritage and human remains; for a deeper ethnographic sensitivity in methods of cataloguing and display; for outreach to and inclusion of Indigenous communities; and for respect for cultural rights in traditional knowledge and traditional cultural expressions, although generally without much disruption to the existing edifice of intellectual property law.<sup>43</sup> A common ambition of scholars and those working in institutions responsible for these collections is to reform the architecture that informs the 'order of things', responding to Indigenous agency, addressing history by improving institutional practice. These reforms are also seen as in tune with new human rights instruments, such as the 'right to dignity' and 'right to maintain, control, protect and develop ... intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions' under the United Nations Declaration on the Rights of Indigenous Peoples.<sup>44</sup>

Political events, such as the Royal Commission into Aboriginal Deaths in Custody and Stolen Generations inquiries, also function to educate the public, and the horrors revealed prick the public conscience. This also affects to some extent how public galleries, libraries and museums come

<sup>42</sup> The term post-colonial is highly contested, yet there are recurrent political and legal overtures that seek to empower Aboriginal and Torres Strait Islander peoples and redress systemic racism. As Irene Watson (quoting Spivak) notes, the word 'post-colonialism' itself 'is like throwing words around and is as meaningless as the idea of decolonization — that is, the idea is thrown around without being based in any truth of decolonization or moving beyond the event of colonialism': Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Oxford: Routledge, 2015), 25.

<sup>43</sup> This is, of course, why treaty negotiations of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), World Intellectual Property Organisation, have continued since 2001 without any resolution or prospects for real advance of First Nations' rights in settler states.

<sup>44</sup> Article 15 provides that indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information. Article 31 relates to the right to maintain, control and protect cultural heritage, traditional knowledge and traditional cultural expressions. United Nations Declaration on the Rights of Indigenous Peoples, opened for signature 13 September 2007, A/RES/61/295 (entered into force 2 October 2007).

to understand their publics. It becomes more necessary for the institutions to formally acknowledge the other histories and ownership claims associated with cultural artefacts they 'own' and curate. Change becomes necessary so that both non-Indigenous and Indigenous people can interact with cultural collections and displays without feeling the compulsion to avert their eyes in shame. These developments have led to much scholarly discussion about preservation, copying, access to the archive and 'best practice' protocols for accessing and using resources and materials attributed to Aboriginal and Torres Strait Islander owners. Aboriginal and Torres Strait Islander communities are called upon because gatekeepers need to do something more with the material they hold. Today the request often includes permission to digitise, which is also promoted as a tool that, if sensitively handled, facilitates a democratisation of access, allowing for 'grassroots' engagement, aiding the rediscovery of fragile Indigenous identities and assisting with broader community education of non-Indigenous peoples.

The political ambition of the institutions that adopt consultation protocols is teleological. Ethical practice is presumed to be a consequence of reforms being actualised and perfected in the future through implementing the reform agenda.<sup>45</sup> What is being 'made safe' through changed practice is the ongoing circulation and digital distribution of knowledge, securing archival material so it remains potentially available and reproducible in accordance with agreed terms negotiated between the institution and designated Aboriginal owners. The political orientation is thus directed towards securing the future public circulation of cultural property, even though in some cases material can be removed from public access and, on occasion, may be destroyed.

What is often overlooked in the process is that, regardless of the system of classification attached to the archival material and the access restrictions attached to certain material, our information culture remains draped in a conventional understanding of freedom of expression. This is supported by familiar Western laws attached to the ownership of documents and sound and audiovisual recordings, primarily dictated by contract and copyright law. Furthermore, an ethical reinvention of archival practice is occurring at a time of significant challenge facing our public cultural institutions. The contemporary museum is described by Andrea Witcomb

<sup>45</sup> Alasdair C. MacIntyre, *After virtue* (Notre Dame, Ind: University of Notre Dame Press, 1984), 215.

as being in need of forging a new relationship with its audiences.<sup>46</sup> The curatorial space is being conceived of by artists as a hub that enables creative assemblages and performance of fluid identities.<sup>47</sup> Correspondingly, public museums and libraries are striving to reinvent their purpose and relevance, experimenting with new modes of curation, circulation and scholarly communication to facilitate new data flows, alongside older ones. This itself impacts expectations about how the public should be able to interact with material held in collections — encouraging more research, publications, quotation, remixes, appropriations and creative ‘play’.

While maximum attention and scrutiny are directed towards the responsibility of the public institution for the past, there is little interest in curtailing the right of private actors to access digital copies of artefacts in the future. There is little thinking about the personal and community impacts that follow from authorising researchers (including myself), members of the public and non-Indigenous artists to use and recontextualise material ‘freed up’. There is a collective forgetfulness that what is being mined is living history, and that researchers and artists are rewarded by copyright and other academic systems of credit (research grants, reputation, promotions, salary) for doing so.

Post-colonial aspirations make Indigenous testimony and personal stories, particularly the personal stories revealed to the state, especially vulnerable to exploitation by others in two ways. Firstly, there is a climate in which pressure is brought to bear on Aboriginal and Torres Strait Islander peoples to share their personal experiences with the public. Secondly, where the public and academic interest has been primed to want to know more about the colonial past from the ‘other’ point of view, there is a cultural premium for ‘authenticated’ stories. Yet copyright law has no interest in protecting the identities and relationships that ‘inspired’ the ‘original’ story, nor in the accuracy of accounts. The priority in protection and the reward of property rights is only afforded to the new

<sup>46</sup> Andrea Witcomb, *Re-Imagining the Museum: Beyond the Mausoleum* (London and New York: Routledge, 2003), 166.

<sup>47</sup> Jane Birkin, ‘Art, Work, and Archives: Performativity and the Techniques of Production,’ *Archive Journal* Issue 5, Fall 2015, <http://www.archivejournal.net/issue/5/archives-remixed/art-work-and-archives> (last accessed 9 August 2016); Maryanne Dever and Linda Morra, ‘Literary Archives, Materiality and the Digital,’ *Archives and Manuscripts* 42 (2014): 223-6.

author. This reduces the Aboriginal informant to a memory machine, fed into the existing legal architecture.

Given this contemporary challenge, it is often hard to distinguish what is distinctly post-colonial about the logic of the 'new' ethical institutional practices being advocated with regard to Indigenous collections. Despite an avowed commitment to redress the problem of institutional domination over Indigenous lives, it is easy to replicate existing power relations through the ethical practices that seek to redress historic injustice. Indeed, it is easy to effect an ongoing colonialism under the guise of ethical practice, when the rights of the public to use the collection on whatever terms suit them generally remain intact.

In the final example described below, it was the gallery's avowedly post-colonial sensibility that directly fuelled the perceived injustice.

### **Other side art: telling Trevor Nickolls' story**

In 2009 and 2010, an art exhibition focusing on the artist Trevor Nickolls (1949–2012) toured Australia. This is how it was described:

*Other side art* is the first museum survey of the work of senior South Australian artist, Trevor Nickolls who has been described as 'the father of urban Aboriginal art'. He stands as a seminal figure whose career has spanned an unprecedented era of Aboriginal cultural expression. This major survey exhibition will chart in detail Nickolls's themes, symbols and techniques to establish a powerful comprehension of his inspiration and direction.<sup>48</sup>

Trevor had little involvement in the curatorial process. Most of the works on display came from major public and private collections. He hoped that the profile would help raise interest in the purchase of new work, in particular new paintings about *Storm Boy*, the title being a pun on a classic Australian children's story and film about a boy's friendship with a pelican. The inspiration for the painting came from childhood memories of visiting Pitjantjatjara communities and talking about the nuclear clouds and fall-out from British tests conducted on Aboriginal land at Maralinga in the 1950s and 1960s. As a politically inspired artist, Trevor wanted his

<sup>48</sup> *Other Side Art. Trevor Nickolls, A Survey of Paintings and Drawings 1972–2007*, A NETS Victoria touring exhibition developed by the Ian Potter Museum of Art, The University of Melbourne. Curator: Michael O'Ferrall.

works to be held in public collections and to be seen by the Australian public, rather than sold as investments to wealthy private and corporate collectors. He hoped this retrospective would open up new opportunities.

When Trevor attended the exhibition, he was shocked to see on display some early sketches and diaries he had long forgotten about. Some of this was subject matter he would never have agreed to be on public display, particularly images of deceased Aboriginal people. He was embarrassed and upset that Aboriginal people would think he had agreed to these images being exhibited. At the time, he had no idea how anyone could have gotten access to them. He found the mystery very disconcerting. Trevor asked for help in finding out how this had happened, so that he could get the images back.

It is worth considering why this material was sought to be included in the exhibition in the first place. Trevor had not especially turned his mind to saving these works for himself, let alone for posterity. He had long discounted them as not being of much artistic relevance, thus had never considered the need to attach access restrictions. To do that, he would need to have remembered them more carefully and imagined the potential uses that could be made of them in the future, in order to understand whatever it was that he was consenting to. The current dialogues within museums and galleries on access, permission and digitisation oversimplify the fluidity of memory and forgetting, reducing the relationship to an arrow, forgetting how we assign and reassign importance to various markers throughout our lives.<sup>49</sup>

Artist biographical information is commonplace in exhibition spaces, especially in retrospectives, where the life story of the individual creator is presented in a manner that suggests coherence to the assembly. But, historically, Aboriginal artists have not fitted comfortably within these romantic exhibition norms. Cultural signifiers interfere with a narrow biographical focus. With the emergence of the 'urban' Aboriginal artists, there is a more complicated story that connects the artist, the work and the state. A conventional biographical account seems incomplete and depoliticised when the work is the expression of, as Trevor Nickolls put it, 'a marriage of Aboriginal culture and Western culture to form a style

<sup>49</sup> The complexity of concepts of time and Indigenous knowledge systems is explored in Ambelin Kwaymullina and Blaze Kwaymullina, 'Learning to read the signs: law in an Indigenous reality,' *Journal of Australian Studies* 34 (2010): 2.

called Traditional Contemporary — From Dreamtime to Machinetime'.<sup>50</sup> The work of the urban Aboriginal artist is situated within a narrative of race relations and the state, so that the work might make sense to contemporary audiences.

In the Nickolls retrospective, the gallery space included information about the artist and the works in a room brochure, on the gallery wall texts and on a related website.<sup>51</sup> Educational resources were developed to encourage visiting school children to explore a variety of topics: studies in Aboriginal art and culture; the diversity of Indigenous styles and artistic practices; symbolism and iconography; figuration and abstraction; techniques and production; social and political issues; cross-cultural interactions; spirituality; social justice; and cultural heritage. Trevor's painting style, his postmodern sensibilities and his art world status as an urban Aboriginal were closely associated in available packaging of his artistic subjectivity. Tensions surrounding his identity and categorisation as an artist, however, only highlighted the significance of the inclusion of sketches and portraits from early in his career. In being 'candid' unpublished portraits of Aboriginal people, these images spoke to a very personal exploration of his Aboriginal identity. While the retrospective sought to provoke a critical public awareness of issues of race and Australian history, Trevor did not welcome feeding the gaze onto his coming into being as an Aboriginal man and his cultural credentials.

Trevor Nickolls suffered from serious bouts of illness throughout his life, which, on occasion, included extended hospitalisations. He believed that the drawings and diaries came to be in possession of Gisella Scheinberg, the owner of Holdsworth Gallery from 1969 to 1997, as a consequence of her assisting him during one of these periods. Gisella Scheinberg later donated the works to the New England Regional Art Museum as part of the government's Cultural Gifts Program. Perhaps she did not attach any particular significance to the works, yet did not want to take responsibility for destroying them. The Cultural Gifts Program encourages Australians to donate items of cultural significance from private collections to public art galleries, museums, libraries and archives, for which donors accrue

<sup>50</sup> Quoted in Margo Neale, 'Renegotiating Tradition: Urban Aboriginal Art,' in Margo Neale and Sylvia Kleinert, *The Oxford Companion to Aboriginal Art and Culture* (Melbourne: Oxford University Press, 2000), 27.

<sup>51</sup> 'Other side art: Trevor Nickolls, a survey of paintings and drawings 1972 - 2007,' NETS Victoria (2016), <http://netsvictoria.org.au/other-side-art> (last accessed 1 June 2016).

income tax benefits.<sup>52</sup> In response to my enquiries, staff at the New England Regional Art Museum were as helpful as they could be in the circumstances. They advised that the bequest form said that Trevor was paid \$200 apiece for the works in 1984. Trevor, however, had no recollection of this transaction and strongly doubted he would ever have sold these particular images.

The National Library in Canberra holds all the business records for Holdsworth Gallery, including a box concerning Trevor Nickolls.<sup>53</sup> These business records were also donated as part of the Cultural Gifts Program in 1997. However, as is not unusual for business records, Gisella Scheinberg created a right to control who can access these records for the first thirty years. Permission to access the files about Trevor, made on his behalf, to discover any evidence of past exchanges with him was denied by Gisella Scheinberg. The National Library felt bound to comply with the conditions of the bequest.

Legally, there were several potential avenues that could have been further explored. Firstly, we could have raised questions about the conditions of the original bequest under the Cultural Gifts Program, challenging Gisella Scheinberg's right to gift the works to the state and the entitlement of the regional museum to continue to hold them under property and contract law. This could at least force release of the business records alleged to contain details of the relevant sales income to Trevor. Secondly, under copyright and confidential information law, Trevor could seek to restrain the unauthorised public exhibition of his unpublished artworks. While he remained living, his privacy may have been able to be protected. Thirdly, the Australia Council has produced best-practice cultural protocols relating to the production and exhibition of Indigenous art. This includes the requirement 'to consult effectively and gain consent for use of Indigenous cultural material'.<sup>54</sup> Galleries seek to comply with the protocols, although establishing who should be consulted can be difficult. But that would not be a challenge in this case. A beginning point in any discussion about the appropriateness of displaying these images would

<sup>52</sup> 'Cultural Gifts Program - Ministry for the Arts', (2016), <http://arts.gov.au/cgp> (last accessed 1 June 2016).

<sup>53</sup> Records of Holdsworth Galleries, National Library of Australia, MS 9153, Box 113.

<sup>54</sup> Terri Janke, *Visual cultures* (Strawberry Hills, NSW: Aboriginal and Torres Strait Islander Arts Board, Australia Council, 2002); Terri Janke, *Protocols for Producing Indigenous Australian Visual Arts* (Strawberry Hills: Australia Council for the Arts, 2012).

have been to talk further to Trevor, which could have led to the removal of the works from display.

Trevor's decision, however, was that taking action would only make his current life harder. It was too risky. It was evident that the custodians of the public galleries were reluctant to look further into his claims because they were confined by various contractual and property rights in place, as well as their own institutional protocols concerning bequests. As employees, they could not act off their own bat and they felt they could not enter into conversation about the provenance of the works (and whether or not they should be returned to Trevor) when the person who made the bequest to their institution, Gisella Scheinberg, did not want to enter into such a discussion. To take things further required moving beyond the gallery space, more loudly raising Trevor's concerns in the broader public sphere or embarking on legal action. However, this would have complicated any relationships Trevor and his current art dealer had or were trying to forge with staff and curators of major galleries. He did not want to offend the curatorial staff, whom he respected and whose hard work had made the retrospective possible. He was mindful of protecting his reputation. He was keen not to be branded in stereotypical racist terms as the difficult, problematic, unpredictable, unprofessional Aborigine. He was already fighting against a feeling that he was very much slighted by the art world, especially in his home town, competing for profile within a crowded market of Aboriginal art.

### **Responsibility/irresponsibility?**

Arguably, some fuller representation of Aboriginality is made recoverable to us, in a more generic sense, through our interactions with the 'other cultural collections'. Trevor clearly had more control over the representation of his identity than had occurred with the distorted exposure of the life and death of Eddie Murray, or with the awful appropriation of M's life story. Here, there was also a genuine scholarly logic that supported the inclusion of the sketches and diaries in the Nickolls retrospective and, as far as I am aware, Trevor never confronted any of those directly involved in the exhibition. Resigning himself to doing nothing about the problem made him angry and depressed. *He was denied the right to access his own archival record.* He had to tolerate a public exploration of his Aboriginality on terms with which he felt very uncomfortable. He feared reproaches and loss of face among other Aboriginal people.

Trevor wanted his drawing and paintings to speak to the Australian and Aboriginal peoples and beyond these shores, so that we might all better understand Aboriginal life, spirituality and history, while being entertained, amused and provoked to thought. He ended up troubled and frustrated because, despite some of his art making a significant public impact, he failed to redress an injustice. It meant that (at least part of) his legacy, represented by an Australia-wide retrospective tour of his works, was constructed by and for non-Indigenous eyes.

Although we had discussed the possibility of my writing a scholarly article about these problems at the time, it is only due to Trevor's passing in 2012 that I am doing so now. My account suffers for lack of Trevor's participation and approval of the text, but hiding the problem away for longer also presses on my conscience. I know from our small conversations that he was alive to the need for such a discussion to be aired.

**'They only come talking, when *they* want to do something with it'**

In reflecting on the ethics of conducting archival work, Irene Watson shared with me a conversation she had observed during a visit to the old ladies of the desert region. The old ladies were discussing a recent consultation with an important person from a public museum. The purpose of the visit was to reveal that some material had been found in the collection which appeared to have originally been taken from that location. In accordance with public museum protocols, the archivist had come to discuss the curatorial terms on which the museum might continue to hold this material and make it more broadly available without causing cultural offence. The women laughed and said, 'They have all our stuff and they only ever want to talk to us, they only come talking, when *they* want to do something with it'.

The epistemic space in which we usually interrogate our colonial past remains that which was created when the records, including those attached to artefacts, were brought into being. These origins usually generate various lines of authority, determining who can speak of what and for whom, with public policy and disciplinary priorities dictating ethics and the role of applicable laws in the jurisdiction. The limitations of these starting points are all too evident from my examples.

The knowledge that circulated from the Royal Commission constructed Eddie Murray as an Aboriginal man we only know about in terms of the

matters deemed relevant to an inquiry into his death. His story, as retold in the reports, speaks to the degradation of Aboriginal life in a rural country town, without giving his family any chance to talk about his identity freed from, or at least resisting, institutional fetters. To date, it has proven impossible to challenge the closing of the inquiry into his death and, with that failure, to challenge pessimistic assumptions about the significance of his having an Aboriginal identity. We also only know of M's identity through the injustices he suffered and revealed to the state. However, M was then subject to a lawful appropriation of his identity, unable to prevent it. In both cases, the state set out with the intention of redressing colonial violence. That journey began with revisiting the archival records. However, the path taken only fragmented and dissipated ethical and legal responsibility for the violence committed and inflicted new waves of pain and suffering, leading to the further circulation of whitewashed accounts.

The point here is not that we need Indigenous people to reveal more of themselves to us. But when we require Aboriginal and Torres Strait Islander people to reveal their experiences of violence — with a view to making institutional actors publicly accountable for any wrongs and so that non-Indigenous people may better understand injustices that were inflicted upon Aboriginal and Torres Strait Islander peoples in their name — we recycle Aboriginal identity through a Western political and legal frame. Things do not necessarily fare much better within a cultural space. The public circulation of Trevor Nickolls' 'lost property' was in a cultural space where we were explicitly invited to 'discover' Aboriginality. Trevor was happy for the public to take up that invitation to some extent, but he was concerned about the archival resources chosen that framed his subjectivity in a particular way. He was also mindful of the lasting power of racist stories that help perpetuate stereotypes about hopeless Aboriginal lives, and he sought to distance his legacy from that record. Whichever way he turned, he found himself in a hostile space.

Academics, historians and users of archives valorise official records, even though we also often seek to interrogate the veracity of the record and provide glimpses of stories not yet told. Our information culture is based on the power of freedom of communication, including the right to document, to copy, to quote, to remix. Combined, my three examples show how our information culture can generate a teleology that leads to further rounds of cultural appropriation and distortions of identity, even when the avowed institutional intention and political commitment is post-

colonial. Our processes are often dehumanising and, in the words of Indigenous participants, circulate stories told ‘through non-Aboriginal eyes’ — ‘They brought up all our memories for nothing’; ‘we cannot find ourselves in stories’.

As digitisation of our national collections continues apace,<sup>55</sup> we need to create a different way of engaging. I want other lawyers, academics and Indigenous peoples to think about why the people I was trying to help, despite mainly good intentions from all concerned, were left completely exposed to new layers of abuse. In these examples, even a thoughtful engagement asked the Indigenous person to navigate a hostile space. Beyond the original points of contact, courtesy of Australian information laws, Indigenous peoples can still very easily be transformed by users of the collections into memory machines in service of a colonial past. As a starting point, there is a need for more sensitivity to the dangers that can arise when Aboriginal and Torres Strait Islander people are encouraged to share personal histories in public.

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<sup>55</sup> See, for example, Jenny Wood, ‘AIATSIS On Trove’, Trove Blog, January 22, 2016 <https://www.nla.gov.au/blogs/trove/2016/01/19/aiatsis-on-trove> (last accessed 1 June 2016).