Race, Place and the Santa Teresa Case: Legal Service Provision Challenges in Remote Northern Territory Communities

Dylan Trainor, email: <Dylan.Trainor@anu.edu.au>
ANU Law Internship Paper completed May 2022
Undertaken with Darwin Community Legal Service, contact: Judy@dcls.org.au

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Introduction

Residential tenancies make up more than 50% of occupied private dwellings in the Northern Territory.[1] Residential tenancy issues in the Northern Territory (NT) are distinct from other Australian jurisdictions due to a number of factors: the highest percentage of Indigenous Australians[2] by population,[3] a high proportion of remote tenancies,[4] a high proportion of public housing,[5] and complex and fluctuating social housing management structures.[6] In addition to these general issues, chronic overcrowding, geographical distance, and cultural and language barriers add further complexity to tenancy issues, particularly in remote NT communities.[7] Remote tenants are currently underserved and communities struggle with housing issues. Service provision is currently based on outreach models which are limited in effectiveness. Part I will identify the issues surrounding remote Aboriginal tenancies in the Northern Territory. Part II will explore these issues through the recent Santa Teresa case. Part III will attempt to elucidate the underlying features of remote tenancies using theoretical approaches, and Part IV will explore alternative tools to improve outcomes for legal tenants.

I Background

A Contemporary History of Social Housing in Remote NT Tenancies

All most all rentals in remote NT are provided by public housing.[8] Prior to the Northern Territory Emergency Response ('NTER'), public housing in the NT was managed by Indigenous Community Housing Organisations ('ICHOs') – organisations who operated either closely with or as part of

1 Australian Bureau of Statistics, *Northern Territory: 2016 Census All persons QuickStats* (Web Page, 7 April 2022) <https://www.abs.gov.au/census/find-census-data/quickstats/2016/7>.

2 Note: following the practice of the Northern Territory Government Office of Aboriginal Affairs, the term 'Aboriginal' will be used to describe Indigenous Australians within the Northern Territory. When describing Indigenous people from all areas of Australia, the term Indigenous Australian's will be used.

3 Australian Bureau of Statistics, 'Estimated resident population, Indigenous status, 30 June 2016' *Estimates of Aboriginal and Torres Strait Islander Australians* (Web Page, 7 April 2022) <https://www.abs.gov.au/statistics/people/aboriginal-and-torres-strait-islander-peoples/estimates-aboriginal-and-torres-strait-islander-australians/jun-2016>; The Northern Territory Indigenous population is 30.3% of the total, the next highest state being Tasmania with 5.5%, compare to 3.3% of the total population of Australia.

4 Department of Local Government, Housing and Community Development, Northern Territory Government, *A Home for all Territorians: Northern Territory Housing Strategy 2020-2025*, (2019) 9.

5 Ibid.

6 Nadia Rosenmen and Alex Clunies-Ross, 'The New Tenancy Framework for Remote Aboriginal Communities in the Northern Territory' (2011) 7(24) *Indigenous Law Bulletin* 11, 11 ('*Rosenmen*').

7 Ibid.

8 Department of Local Government, Housing and Community Development, Northern Territory Government, *A Home for all Territorians: Northern Territory Housing Strategy 2020-2025*, (2019) 9.

local Aboriginal community councils.[9] The ICHOs did not have title to the land, which had been granted to Aboriginal people under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), but were responsible for collecting payment for housing, providing repairs and maintenance, and where possible erecting new housing; the ICHOs did not have ownership rights to the dwellings and few tenants signed leases under these arrangements, thus their rights were not defined under the *Residential Tenancies Act 1999* (NT) ('RTA").[10] Though this management model provided cheap, flexible, community oriented tenancies, the ICHOs collected little rent and were limited to the modicum of funding the government offered in order to address repairs and housing stock issues.[11] In addition, the complex relationship under this model between Aboriginal land trusts who held ownership rights and the ICHOs meant that tenants' rights were ill-defined.[12]

As part of the NTER, the Commonwealth and NT governments entered in to a Memorandum of Understanding in September 2007 that recognised the "need to improve housing standards and close the gap on Indigenous disadvantage in the Northern Territory", committing $793 million of existing funding to achieve this goal.[13] Under the principles agreed to under the Memorandum, the Commonwealth and NT governments established the Strategic Indigenous Housing and Infrastructure Program ('SIHIP') to deliver repairs, renovations and new housing units to alleviate issues with overcrowding and poor housing stock.[14] However, funding was contingent upon the Commonwealth government negotiating long term leases with the Aboriginal land trusts who had ownership of the land.[15] The government subsequently acquired 40-year leases over housing lots in 73 remote communities.[16] The upshot of this process was that the relationship between the government and the tenants was now subject to the RTA though conditions in remote tenancies have shown little improvement, with housing stock continuing to decay, extensive wait times for repairs due to policy practices and overcrowding.[17] More recent policy initiatives have so far failed to repair and upgrade housing and provide new housing in a timely manner.[18] Despite acquiring

9 Elly Patira, 'Cuts Both Ways: Tenants' Rights And The Double-Sided Consequences Of 'Secure Tenure' In Remote Aboriginal Communities' (2016) 8(23) 4 ('*Patira*'); *Rosenmen* (n 5) 11.
10 *Patira* (n 8) 5; Rosenmen (n 6) 11
11 *Patira* (n 8) 4-5.
12 *Rosenmen* (n 5) 11.
13 Department of Families, Housing, Community Services and Indigenous Affairs, *Strategic Indigenous Housing and Infrastructure Program – Review of Program Performance* (Review, 28 August 2009) 13.
14 Ibid.
15 Department of Families, Housing, Community Services and Indigenous Affairs, *Strategic Indigenous Housing and Infrastructure Program – Review of Program Performance* (Review, 28 August 2009) 14.
16 *Patira* (n 8) 5.
17 Ibid 6-7; Department of Families, Housing, Community Services and Indigenous Affairs, *Strategic Indigenous Housing and Infrastructure Program – Review of Program Performance* (Review, 28 August 2009) 14.
18 Ibid 10.

legally cognizable status as tenants post-NTER, remote tenants continue to struggle with tenancy issues.[19]

B Cultural and Language Barriers to Service Provision

The ability of remote Aboriginal tenants to enter into residential tenancy contracts understanding their rights and obligations is greatly reduced by a lack of language support. A majority of remote tenants speaking English as a second, third or even fourth language.[20] This affects both tenants' ability to understand and navigate tenancy law, and also any legal service provision. Furthermore, both government and service providers must also be able to navigate Aboriginal social and cultural practices to effectively understand and assist remote Aboriginal tenants.[21]

C Remoteness as a Barrier to Services

For tenants in remote areas who have housing issues, location proves to be a substantial impediment to obtaining services to address these issues.[22] As the Top End Women's Legal Service submitted to the Legal and Constitutional References Committee report *Legal aid and access to justice*, "The access to justice in remote areas is so inadequate that remote indigenous people cannot be said to have full civil rights."[23] Recent reports have framed the issue of remoteness as a lack of 'access to justice' but the experiences of tenants in obtaining repairs from the government indicates that even where there is a relatively straight-forward tenant-initiated process for requesting repairs, remoteness serves as a means through which to devalue the claims of tenants.[24] Remoteness is also often framed in terms of the cost of delivery of services in comparison to urban areas, making service provision economically unpalatable for governments.[25]

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19 Fiona Allison and Chris Cunneen, *Access to Justice in the Barkly: A review of the Justice Too Far Away Report on Tenant Creek and Barkly Region's Access to Legal Services and Information* (February 2020) 12.

20 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of the Commonwealth of Australia, *Our Land, Our Languages: Language Learning in Indigenous Communities* (Report, September 2012) 91.

21 Mark Moran, Paul Memmott, Daphne Nash, Chris Birdsall-Jones, Shaneen Fantin, Rhonda Phillips and Daphne Habibis, 'Indigenous lifeworlds, conditionality and housing outcomes' (AHURI Final Report No 260, Australian Housing and Urban Research Institute, March 2016) 13 [1.2.3].

22 Productivity Commission for the Steering Committee for the Review of Government Service Provision, Commonwealth Government of Australia, *Overcoming Indigenous Disadvantage: Key Indicators 2020* (Report, 2020) 5.22.

23 Legal and Constitutional References Committee, The Senate, *Legal aid and access to justice* (Report, 2004) 107 [5.120].

24 *Patira* (n 4) 7.

25 Mark Moran, Paul Memmott, Daphne Nash, Chris Birdsall-Jones, Shaneen Fantin, Rhonda Phillips and Daphne Habibis, 'Indigenous lifeworlds, conditionality and housing outcomes' (AHURI Final Report No 260, Australian Housing and Urban Research Institute, March 2016) 27-9.

II The Santa Teresa Case

A Background

Santa Teresa (Ltyentye Apurte) is a small community 85km south east of Alice Springs with a population of 580, with 86.6% identify as Aboriginal or Torres Strait Islander.[26] 11.5% of residents speak only English at home, and at least five Indigenous languages are spoken.[27] Of the 119 total residencies in the community, 1,111 are rental properties, and of these, 80 are social housing, controlled by the NT government.[28] In 2015 a 40-year lease was finalised between Santa Teresa Aboriginal Land Trust and the Commonwealth Government, though tenants had from 2010 entered into residential tenancy agreements with the Commonwealth government.[29]In 2015, Australian Lawyers for Remote Aboriginal Rights ('ALRAR') spent time in Santa Teresa (Ltyentye Apurte) talking with residents about issues of concern, with residents identifying that housing conditions were the most pressing issue.[30] With assistance from Aboriginal Housing NT and volunteers, ALRAR surveyed the 70 houses in the community and identified over 600 repair and maintenance issues, and subsequently submitted 70 letters to the NT Department of Housing regarding these issues.[31] After receiving no response ALRAR filed 70 claims in the Northern Territory Civil and Administrative Tribunal ('NTCAT') seeking repairs under s 63 of the *Residential Tenancies Act 1999* (NT) ('RTA').[32]

B NTCAT Decisions

The initial NTCAT proceedings were undertaken with the court selecting four applicants whose issues were representative of the total pool of applicants.[33] In addition to the initial pleading, the applicants sought compensation under s 122[34] of the RTA on the basis of the government's failure to

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26 Australian Bureau of Statistics, *Santa Teresa (Ltyentye Purte): 2016 Census All persons QuickStats* (Web Page, 9 May 2022) <https://abs.gov.au/census/find-census-data/quickstats/2016/ILOC70200102>.

27 Ibid.

28 Australian Bureau of Statistics, *Santa Teresa (Ltyentye Purte): 2016 Census Community Profile* (Web Page, 9 May 2022) <*https://abs.gov.au/census/find-census-data/community-profiles/2016/UCL721014*>.

29 *Patira* (n 4) 6; *Various Applicants from Santa Teresa v Chief Executive Officer (Housing)* [2019] NTCAT 7.

30 Australian Lawyers for Remote Aboriginal Rights, *Santa Teresa Community Housing Claim* (Web Page, 9 May 2022) <https://alrar.org.au/santa-theresa-community-housing-claim/>.

31 Ibid.

32 Ibid; *Various Applicants from Santa Teresa v Chief Executive Officer (Housing)* [2019] NTCAT 7 ('*Santa Teresa NTCAT*'); In brief section 63 states that a tribunal may order repairs to be completed in specified period if the repairs are emergency repairs, the repairs do not arise a result of the tenant contravening the tenancy agreement, and that the tenant has notified the landlord as specified by s 58. Section 63(2) provides definitions of emergency repairs.

33 *Santa Teresa NTCAT* (n 38).

34 In brief s 122 allows that a tribunal may order compensation for loss or damaged suffered by either party in a tenancy agreement.

uphold their obligations under either s 57(2)(a)[35] or s 48(1)[36]. It should be noted here that the repairs raised by the tenants were indicative of an egregious failure by the NT government, including a five-year wait after notification to have dripping taps which flooded the bathroom repaired, an almost six month wait for a stove to be replaced, a six-week delay for the replacement of a back door, and an 18-month delay to replace a broken toilet.[37] The NT government made a counter claim against the applicants for unpaid rent.[38] The applicants claimed in response that the agreements were invalid due to uncertainty or alternatively that they were invalid on the basis of *Amadio*[39] and that they should be compensated for overpayment of rent.[40]

The tribunal ruled that the agreements entered into were invalid on the basis that they were inconsistent with the RTA, as such the terms should be those specified in Schedule 2 of the Act, but these agreements were not void for uncertainty.[41] The tribunal ultimately ruled that the government had failed in its duty as landlord to maintain the dwellings in a habitable condition for all four applicants and ordered compensation to be paid.[42] The counter claim by the respondents was withdrawn for one applicant and dismissed for the remaining three.[43]

Following this decision, the applicants sought costs on an indemnity basis against the NT government.[44] The costs requested by the applicants were a total of $408,341.71, based on the fees charged by their counsel.[45] The tribunal ruled that costs were owed by the respondents but that these should not be awarded on an indemnity basis.[46] The court did award what they considered significant costs, justifying the sum based on their concern for the respondents "unmeritous conduct"[47], being failure to act as a model litigant, persistence in a hopeless case, failure to comply with tribunal and court orders.[48]

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35 In brief section 57(2)(a) stipulates that a landlord is not in breach of their obligation to repair unless they have had notice of the required repair.
36 Section 48 states that the landlord must ensure that the premises are habitable, meet health and safety requirements under the Act, and are reasonably clean, unless caused by the tenant or the tenant has failed to notify the landlord of such.
37 *Santa Teresa NTCAT* (n 38)
38 Ibid.
39 *Commonwealth Bank of Australia Ltd v Amadio* HCA 14; (1983) 151 CLR 407, 461.
40 Ibid.
41 *Commonwealth Bank of Australia Ltd v Amadio* HCA 14; (1983) 151 CLR 407, 461.
42 Ibid.
43 Ibid.
44 *Various Applicants from Santa Teresa v Chief Executive Officer (Housing)* [2019] NTCAT 12.
45 Ibid.
46 Ibid.
47 Ibid [52].
48 Ibid [26]-[46].

C Appeal to the NT Supreme Court

Two of the applicants, Young and Conway, then applied to the NT Supreme Court to determine the following issues: 1) Whether NT Housing had engaged in unconscionable conduct when entering the tenancy agreements with residents and whether NTCAT had erred by not determining whether the contracts were unconscionable according to *Amadio*; 2) Whether the tenancy contracts were void under the RTA for uncertainty; 3) Whether the definition of "improvised dwelling" used by the respondent (NT Housing) was properly construed; 4) Whether the term habitable is properly construed to be limited to health and safety, and of relevance only to Young; 5) Whether a door is a security device or element of reasonable security as under s 49(1).[49] The *Amadio* issue was remitted back to the tribunal, the appeals on issues 2) and 3) were dismissed.

The most impactful ruling was on the definition of the term, 'habitability', where Justice Blokland defined habitability as, "humaneness, suitability and reasonable comfort of the premises…judged against contemporary standards."[50] This definition of habitability went beyond mere concerns of health and safety and introduced a conception of habitability that recognised the dignity of tenants and a positive right to comfort as opposed to a negative right to be free from danger. The significance of this decision is immense, and would foreseeably require the NT government to invest enormously in improving housing stock not just in Santa Teresa but in all NT government run housing.

The final issue on appeal was significant as the appellants contended that a ruling that a lack of a door constituted a security device, which the court upheld, meaning that a breach of the RTA on the landlord's part would not be dependent on whether notification was made to them.[51] The applicant also contended that this opened up the possibility of a claim for damages based upon *Baltic Shipping* in which damages can be awarded for a breach where a contract promises of peacefulness and comfort, and failure provide such is the basis for the breach.[52] Interestingly, the extended definition of habitability formulated would tend to support to a degree the contention that a rental contract is one that promises peacefulness and comfort.

49 *Young & Conway v Chief Executive Officer, Housing* [2020] NTSC 59.
50 Ibid [80].
51 Ibid [88].
52 *Baltic Shipping Co v Dillon* [1993] HCA 4; 176 CLR 344; *Young & Conway v Chief Executive Officer, Housing* [2020] NTSC 59, [90].

D Appeal to the NT Court of Appeals

The NT government unsurprisingly appealed the decision of the Supreme Court, on the following grounds: 1) that the court had erred in remitting the decision as to the validity of the contracts back to the tribunal as this was outside the tribunal's jurisdiction; 2) that the court had erred in construing habitability in the way that they did; and 3) whether compensation under s 122 is subject to the same constraints as contract law and if so, if the tribunal has powers to award compensation based on the principles in *Baltic Shipping.*[53]

The court upheld the appeal on points 1) and 3), finding that the tribunal does not have jurisdiction to declare a contract void on equitable ground nor the power to order compensation in the event that a contract is invalid[54], and that compensation under s 122 is subject to the same constraints as contract law and that this being so, damages were not available as the central object of a tenancy agreement is the right over property not the provision of comfort or peacefulness.[55]

In regard to the definition of habitability, the court allowed that the definition of habitability extended beyond mere concerns of safety but should not be as open as the one arrived at by the Supreme Court.[56] The court stated that "[q]uestions of fitness for habitation are to be judged against a standard of reasonableness having regard to the age, character and locality of the residential premises and to the effect of the defect on the state or condition of the premises as a whole."[57] This reformulation is much more constrictive, arguably providing little guidance, if any.

E Santa Teresa – Implications

The Santa Teresa case highlights a number of issues in regard to the problems faced by remote tenants. First, ALRAR's approach centred on the issues as identified by the community itself, providing agency for the tenants. Second, the fact that such a high proportion of tenants were experiencing tenancy issues highlights that these are not individual problems but are of a systemic nature. It is instructive to note that the counter claims of unpaid rent and that the damage was caused by the tenants themselves raised by the NT government failed by reason that the government had been unable to provide any admissible evidence to support these claims, and in a sense were relying on the tribunal to infer from the nature of the damage that it was caused by the tenants

53 *Chief Executive Officer (Housing) v Young & Anor* [2022] NTCA 1.
54 Ibid [20].
55 Ibid [54]-[58].
56 *Young & Conway v Chief Executive Officer, Housing* [2020] NTSC 59 [48].
57 Ibid [50].

themselves.[58] Finally, the issues raised regarding unconscionable conduct indicate the NT government's unwillingness to adapt to and engage with Aboriginal tenants.

III A Deeper Look at Race and Place in Remote Aboriginal Communities

Though in some regards the Santa Teresa case can be seen as the successful enforcement of remote Indigenous tenants' rights, it is also illustrative of how remoteness and Indigeneity operate to curtail tenants' ability to have these rights recognised. This section of the paper will attempt to utilise theories of legal geography and critical race theory to explore how remoteness and Indigeneity contribute to remote Indigenous tenants' outcomes in obtaining justice. It is my contention that these two factors effectively work together to reinforce colonialist discourses that delegitimise the legal needs of remote Indigenous tenants.

A Empty Legal Space

As Lisa R. Pruitt notes, rural (and remote) areas have largely escaped the attention of legal geography scholars.[59] The majority of legal geographic work is concentrated on the urban and merely employs rural areas as a means of identifying the urban by what it is not.[60] In Australia there has been some work that shifts the focus away from the urban, however, this work has been predominantly occupied with environmental law.[61] As a result, remote legal landscapes are under theorised. This is reflected in the law's own conception of rural spaces as lawless.[62] Without the ordering effects of state law, with formal state legal actors physically restricted, these places are treated by those actors as lawless.[63]

However, to cast these spaces as lawless is to privilege the state as the only legal institution in these areas, which is simply not the case. As Irene Watson asserts, Aboriginal laws continue to play an

58 *Santa Teresa NTCAT* (n 38) [53].
59 Lisa R Pruitt, 'The Rural Lawscape: Space Tames Law Tames Space' in Irus Braverman, Nicholas Blomley, David Delaney, and Alexandre Kedar (eds) *The Expanding Spaces of Law: A Timely Legal Geography* (Stanford University Press, 2014) 190, 191 ('*Pruitt*').
60 Ibid.
61 Tayanah O'Donnell, Daniel F Robinson and Josephine Gillespie, 'An Australian and Asia-Pacific Approach to Legal Geography' in Tayanah O'Donnell, Daniel F Robinson and Josephine Gillespie (eds) *Legal Geography: Perspectives and Methods* (Routledge, 2019) 3, 5.
62 *Pruitt* (n 70) 190.
63 Ibid.

instrumental role in the lives of Aboriginal peoples, despite the government's best efforts.[64] Though not monolithic, all Australian Aboriginal legal systems constitute relationships between people, law and land in a distinctly different way to the legal system of the Australian state.[65] The current model of departmental governance of remote Aboriginal tenancies fails to engage with, or even acknowledge the plurality of legal systems present in these remote communities. By bringing the government to the centre of the legal relationships between remote Aboriginal tenants and the land they live on, friction between Aboriginal law-ways and state law is intensified.

B The Tyranny of Distance

NTER fundamentally changed rental property governance structures in remote Aboriginal communities. By shifting the oversight of public housing from ICHOs to the NT Department of Housing, the locus of legal power shifted away from remote tenants and toward the urban, the government. This movement serves to alter the legal relationships between tenants and their landlords by changing the spatial relationships between tenants and their landlords. Through this the government is able to deploy strategies that highlight the spatial challenges of fulfilling any of their legal obligations as a means to deprive tenants of their legal rights. Informal policies like the 'saving up' of repairs is a concrete example of the way in which spatial relationships, enforced by the change in tenancy management, transform the legal relationships of tenants in remote areas. The legal space has been recoded by a shift in governance structures that produce negative material outcomes for tenants. The negative material conditions engendered by the legal relationships between tenants and the government – lack of amenities, dilapidated housing, and overcrowding – reinforce these spaces as 'lawless'.

C The Legal Wilderness

Legal service provision in remote spaces is no less a constitutive element in the remote legal landscape. Current service provision revolves around outreach models, entailing travel from metropolitan or regional areas. Travel times are long and often require four-wheel drives, or in some instances air travel. These service delivery models fortify the constitution of remote spaces as marginal spaces, removed as they are from the metropole, both in a physical sense and legal sense. The metropole is where legal services are concentrated, and from where legal services venture forth

64 Irene Watson, 'Indigenous Peoples Law-ways: Survival Guide Against the Colonial State' (1997) 8 *Australian Feminist Law Journal* 39, 45.

65 Irene Watson, 'Indigenous Peoples Law-ways: Survival Guide Against the Colonial State' (1997) 8 *Australian Feminist Law Journal* 39, 45.

into a 'legal' wilderness. Pruitt notes the long travel times and limited contact prevent legal outreach workers from doing much legal work in remote areas.[66] Legal work that is done is often done back in offices, at tribunals and courts in urban areas. This model concentrates state law within these urban areas, reinforcing the remote areas as legal landscapes with less 'law.' Though outreach work is necessary, the use of outreach models as the only form of legal service provision, it has been shown to be ineffective, reinforcing racially-patterned inequalities.[67] This is not to say that remote Aboriginal tenants are incapable of understanding and using state legal mechanisms to enforce their rights, but as the Santa Teresa case demonstrates, even when tenants do follow the prescribed procedures they are often ignored. Outreach reinforces the notion that effective law must emanate from the metropole.

D Bureaucratic Impositions of Time

Not only are tenants subject to delays in addressing their needs due to physical constraints, but also due to the bureaucratic structures established after NTER. In some cases, repairs are undertaken by contractors who are in closer physical proximity to the public housing communities they serve. However, though tenants notify contractors of the repairs required, repairs can only be undertaken when the government issues work orders to the contractor.[68] This imposed inefficiency leaves remote public housing in a continual state of disrepair.[69] Through the state enforcing its power as an ordering force in remote communities, the material conditions of remote tenancies are negatively affected. Tenants are subject to bureaucratic processes that draw out the time between contracts and actual rights over spaces, repairs, and fixes, contributing to overcrowding and leaving dwellings in a constant state of disassembly.[70] Again, the concentration of state law in urban areas contributes to material disadvantage in remote communities.

E Historical Discourses of Race Informing the Present-Day

The historical relationship between the current state and Commonwealth governments and Aboriginal people has been a relationship of dispossession, disempowerment and attempted erasure.[71] The historical categorisation of Indigenous Australian people as savages and natives

66 *Pruitt* (n 70) 206.
67 Francis Markham and Bruce Doran, 'Equity, discrimination and remote policy: Investigating the centralization of remote service delivery in the Northern Territory' (2015) 58 *Applied Geography* 105.
68 Liam Grealy, 'Governing disassembly in Indigenous Housing' (2021) *Housing Studies* 1.
69 Ibid.
70 Ibid.
71 Patrick Wolfe, 'Settler colonialism and the elimination of the native' (2006) 8(4) *Journal of Genocide Research* 387, 388.

functioned to separate them from the colonisers and deny them rights under settler/colonial law.[72] In tandem with the non-recognition of Indigenous people as not deserving of the same rights as the colonisers, was the non-recognition of the already existing Indigenous legal systems in place.[73] The categorisation of Indigenous people as less than the white settlers was reflected in and reaffirmed by paternalistic government policies that continue to this day.[74]

The relationship between race and paternalistic policies that seek to disempower Aboriginal people in the Northern Territory is no more apparent than in the legislation that accompanied NTER. The suspension of the *Racial Discrimination Act 1975* (Cth) effectively negated the rights of Aboriginal people to challenge government decisions.[75] Coupled with the forced leasing of Aboriginal land to the Commonwealth government, overseen by the Northern Territory Department of Housing, the NTER and subsequent legislation has substantially reduced the ability of remote Aboriginal tenants to manage their own affairs.

F 'They Don't Know How to Live in these Houses'

In addition to the disempowerment of remote Aboriginal tenants through NTER associated legislation, NT administrative responses to remote tenancy issues indicate that racist discourses of 'the savage' continue. Damage to remote public housing is often attributed to Aboriginal tenants who don't know how to live in houses properly.[76] This is despite multiple government reports identifying that damage from tenants accounts for less than ten percent of required repairs.[77] The majority of issues that face remote tenants stem not from their inability to 'live properly' in houses, but rather the chronic overcrowding and poor construction of public housing in the first place.[78] The expectation of the NT government that NTCAT would take their claims that damage was caused by tenants and that tenants owed them significant amounts of rent at face value without

72 Edward Synot and Dylan Lino, 'The Recognition and Protection of Indigenous Rights' in Matthew Groves, Janina Boughley and Dan Meagher (eds) *The Legal Protection of Rights in Australia* (Hart Publishing, 2019) 247, 256.
73 Irene Watson, 'Introduction' in Irene Watson (ed) *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Taylor and Francis, 2014), 1, 1.
74 Shelley Bielefeld and Fleur Beaupertt, 'Income Management and Intersectionality: Analysing Compulsory Income Management through the Lenses of Critical Race Theory and Disability Studies ('DisCrit') (2019) 41(3) *The Sydney Law Review* 327, 338-9.
75 Ibid 330.
76 Tess Lea, 'This Is Not a Pipe: The Treacheries of Indigenous Housing, (2010) 22(1) *Public Culture* 187, 189 ('*Lea'*).
77 Remote Housing Review: A review of the National Partnership Agreement on Remote Indigenous Housing and the Remote Housing Strategy (2008-2018)' (Report, 2017) 2; Department of Families, Community Services and Indigenous Affairs, 'Indigenous Housing: Findings of the Review of the Community Housing and Infrastructure Program' (Final Report, February 2007) 41.
78 *Lea* (n 87) 189-190.

providing any admissible evidence is indicative of a continuing influence of racist discourse within the NT government.[79]

G Emptiness as a Tool of Colonisation

The conception of the remote as an empty space energises colonial discourses that form the foundation of the settler project in Australia, the myth of *Terra Nullius*.[80] These discourses asserted the superiority of the European settlers over Aboriginal and Torres Strait Islander people, that there were no laws, no society prior to the arrival of white settlers. Just as the state legal system constitutes a space free of its agents as lawless, the non-recognition of Aboriginal and Torres Strait Islander people erases these people as agents of their own law, erases the legal systems that have and continue to exist in Australia. The continued treatment of remote areas as (nearly) empty, distanced, and difficult, geographically and legally serves to energise these foundational settler-colonial discourses. Discourses of remote areas as empty, both materially and legally do double duty in erasing Aboriginal law-ways and ontologies while invigorating conceptions of remote areas as lawless, reinforcing its material difference to the 'ordered' urban environment.

IV Alternative Methods

Outreach models have limited effectiveness, energising conceptions of the remote as lawless. Additionally, they reduce the remote Aboriginal tenants' capacity for self-determination which has been shown to reduce positive outcomes. The Santa Teresa case has shown that the issues faced by remote tenants are not cases of individual issues, but rather systemic issues created by policy decisions. The ability of remote Aboriginal tenants to effect change is substantially curtailed by outreach models which tend to deal with tenants on an individual basis and in a piece-meal fashion. This begs the question as to whether there are alternative methods that may be implemented to improve outcomes and services to those in remote public housing. The following section will consider the use of human rights law, strength-based discourses and Participatory Action Research ('PAR') as alternatives to the current use of outreach services.

79 *Santa Teresa NTCAT* (n 38).

80 Irene Watson, 'Indigenous Peoples Law-ways: Survival Guide Against the Colonial State' (1997) 8 *Australian Feminist Law Journal* 39, 46-7; Richard Howitt, 'Sustainable indigenous futures in remote Indigenous areas: relationships, processes and failed state approaches' (2012) 77(6) *GeoJournal* 817, 818.

A Using International Law

On the face of it, International Law obligations appear to be a useful resource for remote Aboriginal tenants and the legal service providers who currently work with them. However, two issues arise: Australia's inconsistent compliance with International Law,[81] and the strident criticism of Indigenous and non-Indigenous scholars of international human rights as a continuation of Western European colonial domination.[82]

1 Inconsistent Rights

Despite Australia's support of the Human Rights Council, Australia has consistently failed to act on the majority of deficiencies identified in UN reviews of Australia's compliance with human rights law.[83] As a dualist country, international law must be incorporated through legislation, and Australia has shown little appetite to extensively incorporate international laws, arguing that the protections and rights granted are already in effect through combinations of legislation, statutory interpretation, common law protections, and parliamentary processes.[84] However, Australia has been consistently criticised by the UN Human Rights committee for violations with little effect. Thus the protections afforded by instruments such as the United Nations Declaration on the Rights of Indigenous People ('UNDRIP') and the International Covenant on Economic, Social and Cultural Rights ('ICESCR'), which both call for Indigenous peoples' self-determination, and for ICESCR, the right to adequate housing lack impact in Australia despite being signed and ratified.[85] Even so, the suspension of the *Racial Discrimination Act 1975* (Cth) as part of NTER indicates that even where appropriate legislation exists to uphold international law obligations, the

81 Madelaine Chiam, 'International Human Rights Treaties and Institutions in the Protection of Human Rights in Australia' in Matthew Groves, Janina Boughey and Dan Meagher (eds), *The Legal Protection of Rights in Australia* (Hart Publishing, 2019) 229, 232.

82 See for example: Steven Newcomb, 'Domination' in relation to Indigenous ('dominated') Peoples in international law' in Irene Watson (ed), *Indigenous Peoples As Subjects of International Law* (Taylor and Francis Group, 2017) 18; Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Taylor and Francis Group, 2014); Colin Samson, *The Colonialism of Human Rights: Ongoing Hypocrisies of Western Liberalism* (Polity Press 2020).

83 Madelaine Chiam, 'International Human Rights Treaties and Institutions in the Protection of Human Rights in Australia' in Matthew Groves, Janina Boughey and Dan Meagher (eds), *The Legal Protection of Rights in Australia* (Hart Publishing, 2019) 229, 234-5.

84 Madelaine Chiam, 'International Human Rights Treaties and Institutions in the Protection of Human Rights in Australia' in Matthew Groves, Janina Boughey and Dan Meagher (eds), *The Legal Protection of Rights in Australia* (Hart Publishing, 2019) 229, 232.

85 *United Nations Declaration on the Rights of Indigenous Peoples,* GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007); I*nternational Covenant on Economic, Social and Cultural Rights,* opened for signature 16 December 1966, 993 UNTS 171 (entered into force 3 January 1976), Article 11(1).

Commonwealth government is willing forgo its obligations in pursuit of purported policy objectives.[86]

2 Human Rights as Colonial Law

Academics, both Indigenous and non-Indigenous, have criticised human rights law instruments as a continuation of colonial dominance of Western European powers. Irene Watson argues that current international law reinforces Western ontologies that have consistently enforced hierarchies of power that privilege colonising nations and centre on Western political theory.[87] Further, the body tasked with implementing UNDRIP, the UN Permanent Forum on Indigenous Issues, has little power to resolve disputes between Indigenous people and states, leaving states to continue to govern Indigenous peoples as they see fit.[88] Similarly, Ambellin Kwaymullina argues that the individual-centred approach of human rights law is at odds with Indigenous Australian conceptions of law and legal systems, again representing an imposition of colonial legal orders upon Indigenous peoples.[89] Despite an expressed desire to work with Indigenous people to make good the violence of colonialism and implement the (belated) recognition of the rights of Indigenous peoples, human rights law frameworks continue to do the same work that earlier conceptual frameworks did to justify the colonial project. The rejection of international law frameworks is by no means a consistently held position amongst Indigenous peoples. Both the former and current Aboriginal and Torres Strait Islander Social Justice Commissioners have described UNDRIP as, "the most comprehensive tool we have available to advance and protect the rights of Aboriginal and Torres Strait Islander peoples."[90] However, the issues identified above with the actual implementation and respect of rights highlights the challenges of using international law frameworks.

86 Australian Human Rights Commission, *The Suspension and Reinstatement of the RDA and Special Measures in the NTER* (2 November 2011); it should be noted that subsequent legislation to reinstate the RDA is conditional in nature and exceptions to full RDA coverage still exist.

87 Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Taylor and Francis Group, 2014), 148.

88 Ibid.

89 Ambellin Kwaymullina, 'Aboriginal Nations, the Australian nation-state and Indigenous international legal traditions' in Irene Watson (ed) *Indigenous Peoples As Subjects of International Law* (Taylor and Francis Group, 2017) 15-6.

90 Australian Human Rights Commission, *The Community Guide to the UN Declaration on the Rights of Indigenous People* (2010) 4; *United Nations Declaration on the Rights of Indigenous Peoples* (Web Page, 27 April 2022) <https://declaration.humanrights.gov.au/>.

B Re-framing the 'Issue': Strength-Based Discourses

As explored above, racist discourse continues to influence policy decisions and legal outcomes for remote Aboriginal tenants. Policy addressed to Indigenous issues has consistently framed issues as problems, creating narratives of deficiency and negativity; a deficit discourse.[91] Not only do discourses of deficit effect interactions between governments, service providers and tenants, but they also contribute to lateral violence between individuals in marginalised groups.[92] There is a surfeit of negative discourses surrounding remote Aboriginal tenancies. The very concept of remoteness is one of marginalisation, a linguistic device of othering that privileges particular spatial relationships. As discussed earlier, remote areas are seen as lacking in law; remote tenants lack service, lack access, lack rights. Policy decisions are centred around addressing deficits in remote Aboriginal housing through actions of the government, a top-down approach that encourages a view that remote Aboriginal tenants must be taken care 'of'; at their most extreme, policies advocate for the removal the 'problem', that is, of remote Aboriginal communities entirely. [93]In addition, racist discourses continue to inflect how government administration responds to the concerns of remote Aboriginal tenants.

Strength-based approaches are varied.[94] Many strength-based approaches attempt to identify and utilize assets and resources, individual, social, spiritual or cultural, to increase the agency available to communities.[95] Others seek to engage with Indigenous ways of being and knowing, and to effect a form of decolonisation to address the systemic violence that Indigenous people have been subject to. The benefits of strengths-based approaches are that they may engage with the systemic underpinnings of disadvantage that affect remote Aboriginal tenancies, while increasing the scope for tenants to exercise self-determination. By recognising the strengths that remote communities do have, the power hierarchy inherent in the urban-rural/remote can be challenged, and alternative and perhaps more imaginative solutions can be sought for remote tenancy issues.

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91 William Fogarty, Melissa Lovell, Juleigh Langenberg and Mary-Jane Heron, National Centre for Indigenous Studies, 'Deficit Discourse and Strengths-based Approaches: Changing the narrative of Aboriginal and Torres Strait Islander health and wellbeing' (May 2018), 2 ('*Fogarty et al*').

92 Scott Gorringe, Joe Ross and Cressida Fforde, ''Will the Real Aborigine Please Stand Up': Strategies for breaking the stereotypes and changing the conversation' (AIATSIS Research Discussion Paper No 28, Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), January 2011) 3.

93 Richard Howitt and Jessica McLean, 'Towards Closure? Coexistence, remoteness and righteousness in Indigenous policy in Australia' (2015) 46(2) *Australian Geographer* 137.

94 *Fogarty et al* (n 93) 9.

95 *Fogarty et al* (n 93) 15.

Indigenous health initiatives using strengths-based approaches can provide guidance, as can efforts to articulate outcomes and impacts[96] and supporting literature and research.[97]

C Re-centring Tenants through Participatory Action Research

Action Research is a research methodology that reconceptualises the subjects of research as active participants in the research project.[98] A collaborative approach to identifying and solving issues faced by communities, it encourages self-reflection to challenge the assumptions of researchers, and stresses an iterative process of planning, action, observation and reflection, where reflection informs the next cycle of the research process.[99] Central to the process is that outcomes are not predetermined but arrived at by collaboration and constantly redefined through observation and reflection.[100] Participatory Action Research has been successfully utilised in a range of different initiatives involving Aboriginal participants.[101] The North Australian Aboriginal Justice Agency ('NAAJA') established a PAR project in remote communities to improve legal education initiatives, stressing the equal participation of all participants.[102] The strength of the PAR approach is that it draws on the knowledge and capabilities of remote Aboriginal communities, providing agency and self-determination. By encouraging a collaborative approach, external researchers are able to learn the cultural, social and legal systems that constitute the community to be able to work with and for communities. The success of Santa Teresa can be seen to draw on some of the same principles as those demonstrated by NAAJA's use of PAR. ALRAR approached the community with the aim of identifying which issues were of most concern to the community themselves and involved local organisations in the practical processes of legal work.

96 *Fogarty et al* (n 93) 29.

97 Mark Moran, Paul Memmott, Daphne Nash, Chris Birdsall-Jones, Shaneen Fantin, Rhonda Phillips and Daphne Habibis, 'Indigenous lifeworlds, conditionality and housing outcomes' (AHURI Final Report No 260, Australian Housing and Urban Research Institute, March 2016) 103 [7.3.2].

98 Herbert Altricher, Stephen Kemmis, Robin McTaggart and Otrun Zuber-Skerritt, 'The concept of action research' (2002) 9(3) *The Learning Organisation* 125, 130.

99 Ibid.

100 Ben Grimes and Will Crawford, 'Strong foundations for community based legal education in remote Aboriginal communities' (North Australian Aboriginal Justice Agency, October 2011).

101 See for example: Komla Tsey, David Patterson, Mary Whiteside, Leslie Baird and Bradley Baird, 'Indigenous Men Taking Their Rightful Place In Society? A Preliminary Analysis Of A Participatory Action Research Process With Yarrabah Men's Health Group' (2002) 10 *Australian Journal of Rural Health* 278; and particularly: Janet McIntyre, 'Yeperenye Dreaming in Conceptual, Geographical, and Cyberspace: A Participatory Action Research Approach to Address Local Governance Within an Australian Indigenous Housing Association' (2003) 16(5) *Systemic Practice and Action Research* 309, for a strong argument for utilising PAR methods in remote Aboriginal housing.

102 Ibid.

Despite these apparent positives, PAR methods have been subject to critique from practitioners, participants, and those outside the research community.[103] Bill Cooke and Uma Kothari have identified three overarching issues with participatory methods: the over-riding of existing decision-making processes; the risk that group decision making will reinforce the interests of already dominant group members; and, that the focus on participatory methods blinds researchers to other methods that may have advantages not provided by PAR.[104] They argue that these issues are, or at least can be present, in PAR projects.[105] Another criticism of PAR is that it forces individuals and communities to provide resources and labour in aid of the project thus the participants bear the costs of their own success.[106]

V Conclusion

In conclusion, current service provision models are limited by their reduced engagement with the underlying issues that define the legal and material conditions of remote Aboriginal tenancies. Current policy approaches are imbued with racist discourses and privilege white, Western, metropolitan based understandings of law. The success of the Santa Teresa case demonstrates the enormous unmet legal needs of remote Aboriginal communities and highlights the success of approaches that break with current models of service provision and centre remote tenants. Alternative service provision models such as strengths-based approaches and PAR show promise as they work to address the systemic issues that structure the legal need of Aboriginal tenants in remote areas of the NT.

103 Bill Cooke and Uma Kothari, 'The Case for Participation as Tyranny' in Bill Cooke and Uma Kothari (eds) *Participation: The New Tyranny?* (Zed Books, 2001) 1 ('*Cooke and Kothari')*.
104 *Cooke and Kothari* (n 105) 7-9.
105 Ibid 8.
106 Ibid 6.

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