

# *Pandora's Box*

LAW IN FIRST PERSON: INDIGENEITY & THE LAW 2018

The Annual Academic Journal from the Justice of the Law Society  
THE UNIVERSITY OF QUEENSLAND

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# *Pandora's Box*

2018 *Law in First Person*



**Editors**

Julius Moller & Molly Thomas

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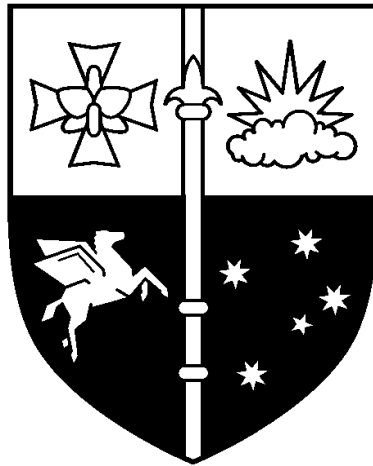
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*We are all visitors to this time, this place. We are just passing through.  
Our purpose here is to observe, to learn, to grow, to love ... and then we  
return home.*

Australian Aboriginal Proverb

## FOREWORD

*on*

## Law in First Person

## His Honour Judge Nathan Jarro

Last year marked both the 25<sup>th</sup> anniversary of the landmark decision of the High Court in *Mabo v Queensland (No 2)*<sup>1</sup> and the 30<sup>th</sup> anniversary of appointment of the Royal Commission into Aboriginal Deaths in Custody by letters patent in 1987.

These events were, and continue to be, of great importance to all Australians who appreciate Indigenous issues. Undoubtedly, these events have had a profound impact on the way our legal system understands Indigenous identity.

As the former Chief Justice of Western Australia, the Honourable Wayne Martin AC QC, has acknowledged, many Australians are aware that Aboriginal and Torres Strait Islander peoples are much more likely to be questioned by police than non-Aboriginal people, and when questioned, they are more likely to be arrested. If they are arrested, Aboriginal people are much more likely to be remanded in custody than given bail. Aboriginal people are much more likely to plead guilty than go to trial, and if they go to trial, they are much more likely to be convicted. If Aboriginal people are convicted, they are much more likely to be imprisoned, and at the end of their term of imprisonment they are much less likely to be released on parole.

At every single step in the criminal justice process, Aboriginal people fare worse than non-Aboriginal people. Our nation's past history and mistreatment of Indigenous Australians has a deep connection with Indigenous identity, and this goes a long way to explaining Indigenous disadvantage and the legal solutions in response to such wide-ranging issues.

The theme that often goes unappreciated in the literature is looking beyond the surface of the Australian legal construction of Indigenous identity and exploring the deeper question of,

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<sup>1</sup> (1992) 175 CLR 1.

to what extent Australian law responds, recognises and makes reparation, to Indigenous Australians *with meaningful engagement from the perspectives of Indigenous Australians*. That is, for me at least, truly understanding the *Law in First Person*.

The importance of this theme is not limited to criminal justice, but extends to the commercialisation of Indigenous knowledge, the relationship between Indigenous people and traditional lands, and Indigenous customary law.

As the Honourable Sir Gerard Brennan AC KBE QC observed, 'the imposition of a legal solution to a problem that has its origin deep in the traditions of people is not necessarily just or even desirable.'<sup>2</sup> Though, as Sir Gerard goes on to say, 'there first must be an understanding and respect of those traditions. Only then is it possible to postulate laws that might operate with justice to all.'<sup>3</sup>

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<sup>2</sup> Sir Gerard Brennan AC KBE QC, 'Foreword' in Greta Bird, Gary Martin and Jennifer Nielsen (eds), *Majah: Indigenous Peoples and the Law* (The Federation Press, 1996) iii.

<sup>3</sup> Ibid.

## INTRODUCTION

*from the* QUEENSLAND LAW SOCIETY

Ken Taylor\*

Australia has a solid justice system and laws that are evolving as time moves on to be increasingly inclusive of all Australians. One aspect of these changes is the consideration of Aboriginal and Torres Strait Islander people going through our justice system. As part of this, we are also seeing more assistance offered to cater to cultural needs.

In 2015, Queensland Law Society was pleased to see the State Government commit to reinstating specialist courts, including the Murri Court. This was a positive step forward towards diverting Aboriginal and Torres Strait Islander (ATSI) people from the criminal justice system and providing them with a culturally appropriate avenue to resolve criminal offending. A commonly circulated figure from the *Overcoming Indigenous Disadvantage* Report in 2016 reveals that the number of Indigenous Australians imprisoned is 13 times higher than non-Indigenous people.<sup>1</sup>

Indigenous sentencing courts aim to reduce high rates of reoffending among Indigenous offenders and provide a culturally-appropriate criminal justice process, with a focus on involving the Indigenous community. The Society called for the reinstatement of specialist courts ahead of the 2015 Queensland State Election, resulting in 13 Murri Courts rolling out across Queensland. These types of courts allow justice to be individualised by not only catering to differing cultural needs, but also by involving communities. This assists judicial officers to find the best ways to work with Indigenous offenders and elders.

Just as the drug and alcohol courts assist in addressing the root cause of offending, the Murri Court allows the offender to have their culture, motivations, needs and offence looked at as a whole rather than just the offence itself. The offender has the possibility of

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\* President of the Queensland Law Society.

<sup>1</sup> Productivity Commission for the Steering Committee for the Review of Government Service Provision, Council of Australian Governments, *Overcoming Indigenous Disadvantage: Key Indicators 2016* (2016).



avoiding jail time as they have proven that they are willing to rehabilitate. This is where these courts differ from mainstream courts, which do not have the time to intervene pre-sentencing.

The Murri Court was initially established in 2002 in response to the alarming number of ATSI people incarcerated in Queensland jails, but were subsequently closed in 2012 after a change of government. Prior to these courts being reinstated, the 2016 Report shared that the national imprisonment rate for ATSI people had increased by 77 per cent over a 15-year period.<sup>2</sup>

In 2010, the Australian Institute of Criminology released a report evaluating the Queensland Murri Court, summarising that the court had been successful in many of its objectives. This included reducing the over-representation of Indigenous offenders in prison and juvenile detention, reducing reoffending, improving court appearance rates and strengthening the relationships between the court and Indigenous community. It was also reported that the courts had the support of the Indigenous community, including elders.<sup>3</sup>

To be eligible for the Murri Court, one must:

- identify as an Aboriginal or Torres Strait Islander person;
- be pleading guilty;
- be on bail;
- have a Murri Court where they need to go to court; and
- be willing to meet regularly with volunteer elders before sentencing.

This personal touch can see volunteer elders not only advocating for the offender in the courtroom, but also liaising with drug and alcohol services, writing advocacy letters, speaking to welfare groups and family counsellors. This format also makes the court more informal and less intimidating, while also focusing on rehabilitation where possible. Murri

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<sup>2</sup> Ibid 17.

<sup>3</sup> A Morgan and E Louis, *Evaluation of the Queensland Murri Court: Final Report* (Australian Institute of Criminology, 2010) 3.

Courts promote trust between the traditional court process and the Indigenous community, with the role of elder anecdotally often proving more effective than that of a judge. There have been stories of offenders apologising in court after being addressed by a respected elder, when they had previously not shown remorse.

This system sees culture as the primary tool for rehabilitation. Some rehabilitation options include bail programs in the form of yarning circles and other programs that build offenders' cultural responsibility.

The aim, as always, is to maximise the prospects of offenders becoming valuable, contributing members of their community, and not left to drown in a cycle of crime and incarceration.

## A NOTE FROM THE EDITORS

In 1967 we were counted, in 2017 we seek to be heard. We leave base camp and start our trek across this vast country. We invite you to walk with us in a movement of the Australian people for a better future.

– *Uluru Statement from the Heart* (2017)

This edition of *Pandora's Box* is named 'Law in First Person'. This title was chosen to acknowledge the status of Indigenous people as the first people of not only Australia, but of many different countries around the world. Contrary to the historical marginalisation of the perspectives, law and sovereignty of Indigenous people, this edition seeks to place their experiences at the centre of our examination of the law.

This edition focuses on the experiences of 'first people' under the law, exploring Indigeneity in contemporary and historical perspective and the ways in which the law has responded to, recognised and made remedy to Indigenous peoples in different cultures. We sought to focus on the issues raised in the *Uluru Statement from the Heart*, a document prepared by the Referendum Council as part of its final report released in 2017.

Discussion of the experiences of Indigenous people in Australia in our legal system touches on public law issues, like the growing calls for constitutional recognition following the *Uluru Statement*. These are important questions for who we are as Australians. As the *Uluru Statement* explains, Indigenous sovereignty is a spiritual notion. The preamble to the *United States Constitution* spoke of a desire to form 'a more perfect union'. The *Uluru Statement* speaks to the same idea, an acknowledgement of Indigenous sovereignty which should be allowed to shine through as a 'fuller expression of Australia's nationhood'. This edition is our attempt to provide a 'state of the union' on the relationship between Indigeneity and the law and to encapsulate efforts to better that union.

The *Uluru Statement* noted that Indigenous Australians are the most incarcerated people worldwide. Our interview with Associate Professor Hilde Tubex gives insight into the extent of Indigenous over-representation in our prison system and explains the work which

needs to be done with prison programs, throughcare, and community engagement and may even require a change in paradigms in our criminal justice system.

Samantha O'Donnell's article, 'Proceed with Caution: Restorative Justice and Domestic Violence', also examines the intersection between Indigeneity and our criminal justice system. Ms O'Donnell's article analyses two case studies from New Zealand which have shown the benefits of the restorative justice model in dealing with domestic violence, which may be a preferable approach in Indigenous communities, given the failings of the traditional criminal justice response.

Dr Anthony Hopkins' research examines the importance of individualised justice in sentencing for Indigenous offenders. Our interview with Dr Hopkins explores the influence of this new tool to achieve justice for Indigenous defendants drawn from experience in other jurisdictions. Touching on the debate prompted by the recent decision of the High Court in *Bugmy v The Queen* (2013) 249 CLR 571, Dr Hopkins explains how the principle of equality requires a consideration of Indigenous experience.

In the *Uluru Statement*, the incarceration and separation of children from their families were highlighted as issues plaguing our country. No place was this more horrifyingly demonstrated in recent years than in the footage of young people held in the Don Dale Juvenile Detention Centre shown on the ABC *Four Corners* program in 2016.

Alison Whittaker's article, 'The Unbearable Witness, Seeing: A Case for Indigenous Methodologies in Australian Soft Law', reflects on the *Royal Commission into the Protection and Detention of Children in the Northern Territory* which followed the public outcry at the footage. Her article makes the case for Indigenous methodologies to be included in the soft law recommendations which arise out of such inquiries and commissions, using as the centre of her article the child at the centre of the *Royal Commission* and examining the ways in which community responses to that child reflect broader societal issues of racism, bias and a lack of reciprocity.

Our interview with Associate Professor Thalia Anthony also explores the violence uncovered by the subsequent *Royal Commission*. Associate Professor Anthony explains the broader implications of the *Royal Commission* as it relates to the ways in which our systems

fail Indigenous children, whether in the criminal justice system or in the care system, where Indigenous children are routinely placed in non-Indigenous families. Associate Professor Anthony also spoke of the importance of Indigenous involvement in reforms to the criminal justice system, in order to avoid the racial bias and institutional deadlock currently facing these issues.

While the *Uluru Statement* looks forward, the article 'A Day in the Life of Indigenous Australia: From Flora and Fauna to Personhood' by Associate Professor Asmi Wood looks back at the evolution of the treatment of Indigenous people under Australian law from Federation to the present day, a period which constitutes 'a day in the life' of Indigenous Australians, who are thought to have lived in this country for 65,000 years. Professor Wood's article is a detailed, delicate account of the recognition of Indigenous Australians, which demonstrates how far there is left to go.

Our exploration of Indigenous issues is, however, not confined to Australia. Our interview with Jocelyn Bosse discusses the *Nagoya Protocol*, a supplementary agreement to the *United Nations Convention on Biological Diversity*, which has not yet been fully implemented in Australia. This protocol sought to expand the provisions of the treaty which related to access to biological materials and the sharing of benefits from the subsequent use of those materials to better enforce Indigenous rights, but as Ms Bosse notes, the *Nagoya Protocol* has provided little, if any, substantive change for Indigenous rights to traditional knowledge and associated biological materials.

Furthermore, our interview with Dr Claire Charters explores the *United Nations Declaration on the Rights of Indigenous People* and its impact in Australia and beyond. Dr Charters explains the importance of the principle of self-determination and the ways in which Indigenous self-determination has manifested itself, while also providing context on the roles of international treaty organisations in fostering Indigenous sovereignty and political power.

In Australia, Indigenous rights have long been connected with the land and other property. This edition explores two aspects of property law, employing both domestic and international perspectives. First, Dr Bryan Keon-Cohen AM QC's article, 'From "Land-Related Agreements" to "Comprehensive Settlements" to "Domestic Treaties": An Inevitable Progression?' explores two recent proposals to reform the native title regime:

Victoria's negotiation-focused scheme under the *Traditional Owner Settlement Act 2010* (Vic) and the 'comprehensive settlement' and 'treaty' concepts growing in popularity in Queensland and Western Australia. Dr Keon-Cohen's article explores the implications of these proposals not only for land justice, but for the broader political power of Indigenous peoples.

Second, this edition includes Benjamin Teng and Sophie Ryan's article, 'Returning the Past: The Repatriation of Cultural Property to Indigenous Peoples', which won the 2018 Justice & The Law Society's Essay Competition. This article explores the international law applicable to repatriation of Indigenous peoples' cultural property and Australia's implementation of these rules.

We have been grateful to receive such wonderful contributions for our edition this year, which hopefully shed a little light on the ways in which Indigeneity intersects with the legal system. In *Rom Watangu – The Law of the Land*, Galarrwuy Yunupingu wrote how, for the Yolngu people, '[a] song cycle tells a person's life: it relates to the past, to the present and to the future'. The stories gathered together in this journal tell a little of our past, a little of our present, and a little of our future. We hope that the future of the law begins a new cycle of recognition, reconciliation and reparation for Indigenous peoples all around the world.

The Justice & The Law Society acknowledges that this journal was published on Turrbal and Jagera land and pays respects to their elders past, present and emerging. We acknowledge that Indigenous sovereignty has never been ceded or extinguished and pay tribute to its laws which sustain and survive.

**Julius Moller & Molly Thomas**

2018 Editors, *Pandora's Box*

## ABOUT PANDORA'S BOX

*Pandora's Box* is the annual academic journal published by the Justice and the Law Society of the University of Queensland. It has been published since 1994 and aims to bring academic discussion of legal, social justice and political issues to a wider audience.

The journal is not so named because of the classical interpretation of the story: of a woman's weakness and disobedience unleashing evils on the world. Rather, we regard Pandora as the heroine of the story – the inquiring mind – as that is what the legal mind should be.

*Pandora's Box* is launched each year at the Justice and the Law Society's Annual Professional Breakfast.

*Pandora's Box* is registered with Ulrich's International Periodical Directory and can be accessed online through *Informit* and EBSCO.

Additional copies of the journal, including previous editions, are available. Please contact [pandorasbox@jatl.org](mailto:pandorasbox@jatl.org) for more information or go online at <http://www.jatl.org/> to find the digitised versions.

## ABOUT THE CONTRIBUTORS

*Associate Professor Thalia Anthony* works at the Faculty of Law at the University of Technology, Sydney. Associate Professor Anthony's expertise is in the areas of criminal law and procedure and Indigenous people and the law, with a particular specialisation in Indigenous criminalisation and Indigenous community justice mechanisms. Her research is grounded in legal history and understandings of the colonial legacy in legal institutions. She has developed new approaches to researching and understanding the role of the criminal law in governing Indigenous communities and how the state regulates Indigenous-based justice strategies. Her research is informed by fieldwork in Indigenous communities and partnerships with Indigenous legal organisations in Australia and overseas. Associate Professor Anthony's research informs her teaching in terms of advancing strategies for Indigenous cultural competencies in law curricula, which had its genesis in 2008 when she organised an Australian and New Zealand conference on this theme.

*Jocelyn Bosse* is a PhD student in the TC Beirne School of Law at The University of Queensland. Her research is part of the Australian Research Council Laureate Fellowship project 'Harnessing Intellectual Property to Build Food Security'. Her thesis explores the role of the law in shaping the circulation of the Kakadu plum (*Terminalia ferdinandiana*). She was also the President of the Justice & The Law Society in 2016.

*Associate Professor Claire Charters* is from Ngati Whakaue, Tuwharetoa, Nga Puhi and Tainui. Associate Professor Charters' primary area of research is in Indigenous peoples' rights in international and constitutional law, often with a comparative focus. She is working on articles on the UN Declaration on the Rights of Indigenous Peoples, the relationship between tikanga Māori and the state legal system, tensions between human rights and Indigenous peoples' rights and on the legitimacy of Indigenous peoples' rights under international law, which will be published as a book by Cambridge University Press. Associate Professor Charters is also working on a number of collaborative research projects including on Indigenous peoples' self-determination and the philosophical foundations of Indigenous law. Associate Professor Charters is a member of the International Law Association's Committee on Indigenous peoples' rights and a co-director of the Aotearoa



New Zealand Centre for Indigenous Peoples and the Law, and has previously worked for the UN's Office of the High Commissioner for Human Rights in the Indigenous Peoples and Minorities Section, focusing on the Expert Mechanism on the Rights of Indigenous Peoples.

*Dr Anthony Hopkins* is a Senior Lecturer and Director of Clinical and Internship Courses at the Australian National University's Law School. He is also a criminal defence barrister who began his career in Alice Springs, working for the Aboriginal Legal Service. In his practice there he discovered a passion for Indigenous justice, defending the rights of those facing criminal charges, and giving voice to the myriad reasons people become entangled in the criminal justice system. He continues to practice with a focus on sentencing and appellate cases. Dr Hopkins' research is focused on the question of inequality in the criminal justice system, and on the importance of understanding the experience of 'others'.

*His Honour Judge Nathan Jarro* is a graduate of Queensland University of Technology with a Bachelor of Laws and Bachelor of Business (Accountancy). His Honour practised as a solicitor and a barrister, mainly in the areas of criminal and family law, and later in administrative, commercial and personal injury law. Judge Jarro has served as a member of the Queensland Aboriginal and Torres Strait Islander Advisory Council and President of the Indigenous Lawyers Association of Queensland Inc. His Honour further served as editorial board member of the Indigenous Law Bulletin, and as the Bar Association of Queensland President's Nominee for the Australian Bar Association's Indigenous Issues Committee in 2016. Judge Jarro was appointed a judge of the District Court of Queensland on 26 March 2018.

*Dr Bryan Keon-Cohen AM QC* is a retired barrister, writer and activist. He was born and educated in Melbourne and earned the degrees of Bachelor of Arts, Bachelor of Laws and Master of Laws at Melbourne University. He thereafter lectured at Monash University law school, worked with the Honourable Michael Kirby AC CMG at the Australian Law Reform Commission in Sydney, and joined the Victorian Bar in 1981, taking silk in 1996. He was junior counsel for the plaintiffs throughout the *Mabo* litigation; has acted for claimants in many native title and immigration matters in the Federal Court; has appeared in the High Court in significant constitutional, native title and refugee matters; and has written and

lectured extensively on Indigenous rights. On 26 January 2012 he was made a Member of the Order of Australia (AM) for services to the law especially the development of Indigenous rights. In May 2012, Dr Keon-Cohen graduated with a PhD from Monash University following publication of his book, *Mabo in the Courts: Islander Tradition to Native Title: A Memoir*.

*Julius Moller* is studying a Bachelor of Commerce (Finance) and Bachelor of Laws (Hons) at The University of Queensland. He currently works as a paralegal at King & Wood Mallesons. Mr Moller was the co-editor of *Pandora's Box* for 2018.

*Samantha O'Donnell* graduated from the Australian National University in 2016 with a Bachelor of Laws (First Class Honours) and a Bachelor of International Relations. Prior to graduation she volunteered as a paralegal with the Aboriginal Legal Service, the ACT Human Rights Commission and the North Australian Aboriginal Justice Agency. Following graduation, she worked on a restorative justice jurisprudence project as a Research Assistant for Professor Tony Foley at the ANU College of Law. She then commenced work as a Graduate at the Australian Securities and Investments Commission and is currently working as a Solicitor at the Financial Rights Legal Centre, Sydney. She is Secretary of the NSW Young Lawyers' Human Rights Committee and is a Volunteer Solicitor at Salvos Legal, Sydney.

*Sophie Ryan* is studying a Bachelor of Arts and Bachelor of Laws at The University of Queensland. Ms Ryan was the co-winner of the 2018 Justice & The Law Society Essay Competition.

*Ken Taylor* is the President of Queensland Law Society. He is a director of Purcell Taylor Lawyers in Townsville, having been admitted in 1989. Ken is also a current member of the Townsville District Law Association and the Australian Lawyers Alliance, holds specialist accreditation in personal injuries law and is a member of the S.193A Workers Compensation Review Panel. He holds the position of a director on the Board of Mater Health Services North Queensland and has a life membership with the Townsville Community Legal Centre. In addition to becoming President of the QLS in 2018, Ken is also on various other

QLS sub-committees and has been a QLS Councillor since 2014. He also assists a number of local sporting organisations in Townsville.

*Benjamin Teng* is studying a Bachelor of Commerce and Bachelor of Laws at The University of Queensland. Mr Teng was the co-winner of the 2018 Justice & The Law Society Essay Competition.

*Molly Thomas* is a graduate of The University of Queensland with a Bachelor of Arts (French & Spanish) and a Bachelor of Laws (Hons I). She currently works as the Associate to the Honourable Justice Roslyn G Atkinson AO at the Supreme Court of Queensland. Ms Thomas was the co-editor of *Pandora's Box* for 2018.

*Associate Professor Hilde Tubex* is an Associate Professor and Deputy Head of School Research at the Law School of the University of Western Australia. Her areas of expertise are comparative criminology and penal policy, Indigenous Peoples and the criminal justice system. She has been involved in several research projects with a focus on Indigenous overrepresentation, including a Future Fellowship from the Australian Research Council investigating penal cultures in Australian jurisdictions, and ARC Linkage Project on risk assessment of Aboriginal Sex Offenders in Australia, and a project funded by the Criminology Research Council on building effective throughcare strategies for Indigenous offenders.

*Alison Whittaker* is a Gomeroi law scholar and poet. She was a 2017-2018 Fulbright recipient at Harvard Law School, where she was named Dean's Scholar in Race, Gender and Criminal Law. Her second book, *BLAKWORK*, is out in September 2018 with Magabala. Alison is a Research Fellow at the Jumbunna Institute.

*Associate Professor Asmi Wood* is the Interim Director of the National Centre for Indigenous Studies (NCIS) at the Australian National University and teaches at the Australian National University College of Law. He received the National Neville Bonner Award for teaching excellence in 2015 and the ANU Vice Chancellor's Teaching Excellence Award in 2010.

# A Day in the Life of Indigenous Australia: From Flora and Fauna to Personhood

Associate Professor Asmi Wood\*

## I INTRODUCTION

At a 2018 Reconciliation Week talk at the Australian National University ('ANU'), a student commented on how Australia has an enviable human rights record. He noted it was a favoured destination for immigrants from all parts of the world, was an affluent and successful multi-cultural, multi-religious society and enjoyed freedoms that were the envy of world. Most importantly, he also noted that First Nations peoples<sup>1</sup> were recognised at formal events through 'Welcome or Acknowledgement of Country' addresses (including an opening statement made at that particular Reconciliation week function) and seem to enjoy great respect. He rather quizzically asked 'what more' could First Nations people want? The underlying tone of the question was that Indigenous people were ingrate and that the insistence by Indigenous people for 'further' recognition was much more than was reasonably warranted or necessary.

The student admitted that he was in his first semester of first year at the ANU and was a foreign student with little knowledge or study of Australian history or legal history, as he was a Business student. So, while his comments were bold and perhaps akin to one 'out of the mouth of babes', those same thoughts have arguably crossed the minds of many who have arrived in Australia since the 1967 Referendum, and quite likely, among others as well. In his defence, the contemporary situation is not easy to understand in a nuanced and balanced way, without historical context or perspective.

For this reason, this paper examines the Aboriginal story from the period just before Federation to current day, while briefly highlighting some key milestones over the past 100

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\* Interim Director, National Centre for Indigenous Studies, Australian National University.

<sup>1</sup> The terms 'First Nations', 'Indigenous', 'aboriginal natives', 'Aboriginal', 'Torres Strait Islanders', and the various permutations of 'blood quantum' are used interchangeably through this paper. There has been a change in the use of terminology over the years. See also n 20 below.

years. Indigenous people are thought to be the longest living cultures on the planet and colonial history is but a blip in their time scale. To this end the paper takes the form of 'a day in the life', depicting the last century or so in this context, as a mere moment in Aboriginal history, juxtaposed with over 65,000 years of Aboriginal custodianship of the Continent. Yet as history taught in schools largely excludes this history of colonisation of the Continent, it is perhaps unsurprising that there is a significant level of ignorance on Indigenous history in the general community – misunderstandings which can arguably lead to racism.

Consequently, this paper, as with others in this edition, takes a 'first person's perspective' which, while subjective, serves as a counterpoint to an unjustified call for what, at its extreme, is essentially a call for 'gratitude' for English colonisation of the Continent. While the selective use of history below will have its detractors, it is noted that majoritarian views get significantly more airing, as is evident from the words of our new student above, describing his opinions of Australian society and history gleaned through osmosis, albeit over a very brief period.

The paper examines how law and society have viewed the role and the place of Indigenous people in Australia. It examines the evolution of the law, and the accompanying societal attitudes in this regard. The paper focuses primarily, but not exclusively on the Federal Constitution and jurisprudence in this respect.

## II IT IS DARKEST BEFORE THE DAWN: INDIGENOUS PEOPLE AND FEDERATION

The *Constitution*, as originally framed, entrenched the Founders' notion of White superiority over coloured races.<sup>2</sup> However, the Founders were mainly concerned with the place of coloured immigrants. On the other hand, the Constitutional Convention debates largely ignored the place of 'aboriginal natives'<sup>3</sup> in Australian society. Some individuals, such as

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<sup>2</sup> Geoffrey Sawer, *The Constitution of the Commonwealth of Australia* (Maxwell, 2<sup>nd</sup> ed, 1910) 464.

<sup>3</sup> Geoffrey Sawer, 'The Australian Constitution and the Australian Aborigine' (1966) 2 *Federal Law Review* 17, 17; John Williams and John Bradsen 'The Perils of Inclusion: The Constitution and the Race Power' (1997) 19 *Adelaide Law Review* 95, 100.

Senator Playford (South Australia), considered it wrong to disregard Indigenous interests.<sup>4</sup> However, they were largely in the minority and the drafters of the *Constitution* – whose views echoed those of the majority of the first Parliament – sought to exclude Indigenous people from the general community.<sup>5</sup> This is evident in the *Constitution* as it was at and shortly after Federation, as well as in the debates leading to the *Commonwealth Franchise Act 1902* (Cth), examined below.<sup>6</sup>

Before and at Federation, only male British subjects over 21 could vote in the Colonies (other than in South Australia).<sup>7</sup> In the early periods of Federation, the segregation of full-blood Aboriginal people was the norm.<sup>8</sup> Exclusionary laws applied to women and Indigenous ‘full-bloods’. Further, the racially discriminatory provisions of the *Constitution* were applied for the purposes of franchise.<sup>9</sup> During these debates Sir Edward Braddon (Tasmania) said, ‘I hope that we shall disfranchise the aboriginal wherever it is possible to be done’.<sup>10</sup>

For others it was not just a matter of excluding ‘full-bloods’: Mr Higgins (Northern Melbourne) said, ‘it is utterly inappropriate to grant the franchise to the aborigines, or ask them to exercise an intelligent vote’.<sup>11</sup> There were also the uninhibited White supremacists, whose views drew from the concepts of eugenics which were prevalent at the time, and that of later Nazi ideology.<sup>12</sup> Mr Isaacs (Indi) said:

The aboriginals have not the intelligence, interest, or capacity to enable them to stand on the same platform with the rest of the people of Australia and determine complex political questions.<sup>13</sup>

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<sup>4</sup> Commonwealth, *Parliamentary Debates*, Senate and House of Representatives, 10 April 1902, 1582.

<sup>5</sup> Commonwealth, *Parliamentary Debates*, Senate and House of Representatives, 10 April 1902, 1582.

<sup>6</sup> *Constitution* ss 51(xxvi) and 127.

<sup>7</sup> Australian Electoral Commission, *Events in Australian electoral history* (23 March 2016) AEC <[https://www.aec.gov.au/Elections/Australian\\_Electoral\\_History/reform.htm](https://www.aec.gov.au/Elections/Australian_Electoral_History/reform.htm)>.

<sup>8</sup> John Gardiner-Garden, *The 1967 Referendum: History and Myths* (Research Brief No. 11, Parliamentary Library, 2006-2007) 7 (‘Gardiner-Garden (2006-2007)’).

<sup>9</sup> John Summers, *The Parliament of the Commonwealth of Australia and Indigenous Peoples 1901 – 1967* (Research Paper No. 10, Parliamentary Library, 2000) I (‘Summers (2000)’).

<sup>10</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 24 April 1902, 11978.

<sup>11</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 24 April 1902, 11977.

<sup>12</sup> See also discussion below in **Error! Bookmark not defined..**

<sup>13</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 24 April 1902, 11980.

It was also said that Aboriginal franchise would be repugnant to the majority of White people. Indeed, A.P Mathieson (Western Australia) said:

It is repugnant to the greater majority of the people of the Commonwealth that an aboriginal man, or aboriginal lubra or gin – a horrible degraded, dirty creature – should have the same rights as ordinary Europeans ...<sup>14</sup>

Such views represented an assertion of racial superiority and a fear of invasion, to Indigenous and other foreigners alike.<sup>15</sup> For example, for Sir Isaac Isaacs or A P Mathieson and others, it was important that the *Constitution* should not prevent a white man from 'cutting off the pig-tail of a Chinaman'.<sup>16</sup> Although concerns about the fear of invasion or economic competition between new immigrants and Australian nationals still remain, these have not been and are *not* issues to do with Indigenous people.

Some minority voices, however, opposed this naked hatred. Senator Playford (South Australia), also mentioned above, said, 'I contend that it would be a heartless thing to disenfranchise aborigines'.<sup>17</sup> Senator O'Connor (New South Wales) said that it would be:

a monstrous thing, an unheard piece of savagery on our part, to treat the aboriginals, whose land we were occupying [sic] to deprive them of any right to vote in their own country.<sup>18</sup>

Despite this, racially discriminatory policies continued unabated throughout the segregationist period (the period approximately between Federation and the 1950s).<sup>19</sup> During this time, racial categorisation of Aboriginal people was based on relative skin colour and blood quantum. Gardiner-Garden notes that:

When the Commonwealth bureau of Statistics was created in 1905 they took the view that although they should not tabulate the number of full-blood Aboriginals, they

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<sup>14</sup> Commonwealth, *Parliamentary Debates*, Senate and House of Representatives, 10 April 1902, 11,580.

<sup>15</sup> John Williams and John Bradsen 'The Perils of Inclusion: The Constitution and the Race Power' (1997) 19 *Adelaide Law Review* 95, 112.

<sup>16</sup> *Yick Wo v Hopkins* (1886) 188 US 356.

<sup>17</sup> Commonwealth, *Parliamentary Debates*, Senate and House of Representatives, 10 April 1902, 1582.

<sup>18</sup> Commonwealth, *Parliamentary Debates*, Senate and House of Representatives, 10 April 1902, 1584.

<sup>19</sup> Dean Ashenden, '1790 – 1928: The Forgotten War: Best We Forget?', *The Canberra Times* (online), 23 April 2013 < <https://www.smh.com.au/opinion/best-we-forget-20130422-2iaii.html>>.

were allowed to enumerate them and did so in the 1911 to 1966 census. *Those deemed to have less than half aboriginal blood were classified as Europeans*<sup>20</sup> and included in the statistics for the general population. Those deemed to be ‘half-castes’ were fully tabulated as a category in the ‘race’ analysis.<sup>21</sup> (emphasis added)

That is, while section 127 of the original *Constitution* excluded ‘aboriginal natives’ from the national population, the Commonwealth still *enumerated* full-bloods, half-casts and mixed-bloods,<sup>22</sup> which allowed the Commonwealth to track the success or otherwise of the programme of breeding out Indigenous peoples. There is no evidence that the majority of the European population disagreed with these views or the racial policies of their parliamentarians.

There was, however, a stirring of the conscience on the issue of Indigenous people among an increasing number of Parliamentarians. Pritchard notes that the majority of the Royal Commission on the Constitution (1927-29) recognised the need ‘to give more attention to Aboriginal people’ but was a concern focused only on Australia’s international reputation.<sup>23</sup> However, the issue of the usurpation of Aboriginal lands, their continuing dispossession or the removal of their children did not appear to have been considered relevant by the Royal Commission.

Towards the end of this segregationist period, while strictly enforcing the White Australia policy, former Labour Party leader Arthur Caldwell nonetheless recognised that Australia’s past treatment of Aboriginal people was an ‘eternal shame’ and ‘admitting [to] *some* of our obligations’.<sup>24</sup> Contemporaneously, former Prime Minister Harold Holt publicly acknowledged Indigenous peoples as the ‘true natives’ of Australia.<sup>25</sup> However, history

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<sup>20</sup> Such people were classified as quarter cast (quadroon or by decreasing fractions such as octroon) but this terminology is quite offensive in Australia and is not generally used in contemporary writing, unless it is with reference to historical material. The different use in this context of blood quanta in the USA is noted but is not considered here.

<sup>21</sup> Gardiner-Garden (2006-2007) 7.

<sup>22</sup> Ibid.

<sup>23</sup> Sarah Pritchard, ‘The “Race” Power in Section 51(xxvi) of the Constitution’ (2011) 15 *Australian Indigenous Law Review* 44, 47.

<sup>24</sup> Commonwealth, *Parliamentary Debates*, Senate and House of Representatives, 3 March 1949, 1449, 1456 (Arthur Caldwell).

<sup>25</sup> Commonwealth, *Parliamentary Debates*, Senate and House of Representatives, 3 March 1949, 1449 (Harold Holt).



shows that, at the time, little, if any, real reform followed these speeches and that the general neglect was not rectified. There continued to be a perception in the eyes of the majority that Aboriginal natives were a dying race<sup>26</sup> for whom the kindest act that society could muster was to 'smooth out the dying pillow'.<sup>27</sup>

The segregationist period gradually morphed into an assimilationist phase in the 1950s. Henceforth, the idea of so-called 'benign neglect' was abandoned and Parliament moved into an aggressive assimilationist phase of 'breeding out the colour'.<sup>28</sup>

The horrors of this policy were particularly evident in the aftermath of World War II. Although the international community adopted notions such as universal human rights inherent to the human person, independently of 'race', Australia resisted the call for the recognition of racial equality and the strong sentiments against apartheid.<sup>29</sup> Chesterman describes the prevailing Australian laws of the time as 'undignified protectionist regimes'.<sup>30</sup> By the 1960s, however, there was a much broader mood for change, arguably prompted by Aboriginal activism<sup>31</sup> and reinforced by changes on race equality norms developing in the international plain.<sup>32</sup>

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<sup>26</sup> Royal Commission on the Constitution of the Commonwealth: Report of the Proceedings and Minutes of Evidence (Parliament of Australia, 19 September 1927) 488.

<sup>27</sup> John Williams-Mozley, 'The Stolen Generations: What Does This Mean for Aboriginal and Torres Strait Islander Children and Young People Today?' in Kaye Price, *Aboriginal and Torres Strait Islander Education: An Introduction for the Teaching Profession* (Cambridge University Press, 2013) 21, 24.

<sup>28</sup> See generally Russell McGregor, *'Breed out the Colour' or the Importance of Being White*, (Australian Historical Studies, Routledge, 2002) 286.

<sup>29</sup> According to Sarah Pritchard, 'The 'Race' Power in Section 51(xxvi) of the Constitution' (2011) 15 *Australian Indigenous Law Review* 44, 50: '[...] the dominant view among biological scientists, anthropologists and social theorists in that the concept of 'race' is socially constructed imprecise, arbitrary and incapable of definition or scientific demonstration' (footnote omitted).

<sup>30</sup> John Chesterman and Brian Galligan, *Citizens Without Rights* (Cambridge University Press, 1997) 122.

<sup>31</sup> For example the significant political impact of the famous 'Yirrkala bark petitions' in 1963: Lauren Day, '50 years on, Yirrkala Celebrates Bark Petitions That Sparked Indigenous Land Rights Movement', *ABC News* (online), 10 July 2013 <<http://www.abc.net.au/news/2013-07-10/50-years-on-yirrkala-celebrates-legacy-of-bark-petitions/4809808>>; and the famous, symbolic 2,000 mile 'freedom ride' in 1965 which highlighted the failure of assimilationist policies and called for an end to the remaining vestiges of segregation. For activism leading up to this point, see Sue Taffe, *Black and White Together* (University of Queensland Press, 2010) 16-22.

<sup>32</sup> Gardiner-Garden (2006-2007) 4; John Chesterman, *Civil Rights: How Indigenous Australians Won Formal Equality* (University of Queensland Press, 2005).

### III 1967: THE SUN RISES ...

During the 1960s, there were two relevant constitutional changes being contemplated: the rescission of section 127 and an amendment to section 51(xxvi).<sup>33</sup> In 1964, Parliament, with little Indigenous input into the parliamentary processes, thought that this legal reform could help to create a more equitable society.<sup>34</sup>

Prior to the 1967 amendments, section 51(xxvi) ('the race power' and post 1967 referred to as the 'amended race power') gave the Parliament the power to make laws for:

(xxvi.) The people of any race, *other than the aboriginal race in any State*, for whom it is deemed necessary to make *special laws*. (emphasis added).

The clause 'other than the aboriginal race in any State' (the 'exclusion clause') explicitly prevented the Commonwealth Parliament from making (*any*) laws with respect to the 'aboriginal race'.

The popular perception saw the 1967 changes to the *Constitution* as creating 'equality' between Europeans and Indigenous people. Against this, Harold Holt argued that removing the exclusion clause was unwise and discriminatory.<sup>35</sup> He noted however, that the government was so affected by the erroneous 'popular impressions' that the exclusion clause (*in itself*) was discriminatory and that these 'popular misconceptions' were too deeply rooted.<sup>36</sup> Don Chipp, the Minister for Tourism, rightly expressed concerns that removing the exclusion clause would allow a future government to discriminate *against* Aboriginal people.<sup>37</sup> Sir Robert Menzies also spoke against the removal of the exclusion clause,<sup>38</sup> which he too rightly noted served as 'a protection against discrimination by the Commonwealth

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<sup>33</sup> The referendum question in 1967 relating to s 24 is not discussed in this paper.

<sup>34</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 14 May 1964, 1902; Gardiner-Garden (2006-2007) 8.

<sup>35</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 21 February 1967 to 19 May 1967, 263.

<sup>36</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 21 February 1967 to 19 May 1967, 263.

<sup>37</sup> National Museum of Australia, *FCAATSI Legislative Reform Committee* (2014) National Museum of Australia: Collaborating for Indigenous Rights <[http://indigenoustrights.net.au/civil\\_rights/the\\_referendum,\\_1957-67/fcaatsi\\_legislative\\_reform\\_committee](http://indigenoustrights.net.au/civil_rights/the_referendum,_1957-67/fcaatsi_legislative_reform_committee)>.

<sup>38</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 11 November 1965, 2639.

Parliament in respect of Aboriginals'.<sup>39</sup> Notwithstanding his misgivings, Holt subsequently relented to the public pressure and supported the rescission of the exclusion clause. The 1967 Referendum passed with a (record) requisite double majority and is a testament to the goodwill of the majority of 'ordinary Europeans'.<sup>40</sup>

It is not suggested that Aboriginal activists had misplaced trust in the Commonwealth.<sup>41</sup> In response to the views of the parliamentarians cited above, Mrs Lorna Lippmann, the Convener of the Federal Council for the Advancement of Aborigines and Torres Strait Islanders, noted that the existence of the exclusion clause had not prevented the Commonwealth from discriminating against Aboriginal people in the past.<sup>42</sup> A lesson for the present is that, although popular misconceptions should not be ignored, the relevant legislation should ensure that the positive law *gives precise effect* to the aspirations of the broader population.

#### IV ... BUT CASTS A LONG SHADOW!

Contrary to the popular notion, formal equality between black and white was not achieved in 1967 and the legal fiction of *terra nullius*, the notion of a land that at the time of colonisation was empty of a civilised people was yet to be rescinded.<sup>43</sup>

The Australian Institute of Aboriginal and Torres Strait Islander Studies ('AIATSIS') notes, in a formal legal sense, that Indigenous people did not receive explicit 'rights' or other guarantees in 1967.<sup>44</sup> Blackshield and Williams also state that 'the open words of s 51(xxvi) and the racially discriminatory intentions behind it were extended to Aboriginal people

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<sup>39</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 11 November 1965, 2639. However, Sir Robert wanted to maintain s 51(xxvi) if there was a need in the future to make special laws for Nauruans: Summers (2000) 64.

<sup>40</sup> Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 5th ed, 2010) ('Blackshield and Williams (2010)').

<sup>41</sup> National Museum of Australia, *FCAATSI Legislative Reform Committee* (2014) National Museum of Australia: Collaborating for Indigenous Rights <[http://indigenousrights.net.au/civil\\_rights/the\\_referendum,\\_1957-67/fcaatsi\\_legislative\\_reform\\_committee](http://indigenousrights.net.au/civil_rights/the_referendum,_1957-67/fcaatsi_legislative_reform_committee)>

<sup>42</sup> Ibid.

<sup>43</sup> *Koonwarta v Bjelke-Petersen* (1982) 153 CLR 168, 242 (Murphy J); Gardiner-Garden (2006-2007) 4.

<sup>44</sup> Australian Institute of Aboriginal and Torres Strait Islander Studies, *The Referendum Australia Had to Have* (2018) AIATSIS <<http://www.aiatsis.gov.au/collections/exhibitions/yes/campaign.html>> (emphasis added).

without any indication that the power can be applied only to their benefit<sup>45</sup> and, as discussed below, reflects the High Court's interpretation of the amended race power.<sup>46</sup>

Justice Gaudron confirmed the misgivings of Menzies, Holt and Chipp, when she characterised section 127 (rescinded in 1967) as a discriminatory provision,<sup>47</sup> but nonetheless, that as a whole, the 1967 amendments to the *Constitution* were 'minimalist'.<sup>48</sup> In this context, Justice French highlights 'the tension between the *values that gave birth to the power and those which amended it*'.<sup>49</sup>

Former Prime Minister Julia Gillard referred to the 1967 constitutional reforms as 'incomplete'.<sup>50</sup> Further, post-1967 statutes such as the Hindmarsh Island Bridge legislation<sup>51</sup> and the Northern Territory Intervention legislation ('NTI')<sup>52</sup> are examples of the phenomenon of apparently 'neutrally framed laws', purportedly for the benefit of Indigenous Australians but which work to their detriment. The *Hindmarsh Bridge Case* caused a loss to the *Ngarrindjeri*.<sup>53</sup> The NTI has been widely criticised by Australian and international bodies as a gross breach of international and domestic obligations assumed under the *Racial Discrimination Act* 1975 (Cth).<sup>54</sup> These laws are highly discriminatory. Nonetheless, Parliament clearly has the lawful authority to do so under the amended *Constitution*.

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<sup>45</sup> Blackshield and Williams (2010).

<sup>46</sup> *Koonwarta v Bjelke-Petersen* (1982) 153 CLR 168 ('*Koonwarta Case*').

<sup>47</sup> *Kruger v Commonwealth* (1997) 190 CLR 1, 70 ('*The Stolen Generation Case*').

<sup>48</sup> *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 361 (Gaudron J).

<sup>49</sup> Robert French, 'The Race Power: A Constitutional Chimera' in H P Lee and George Winterton (eds), *Australian Constitutional Perspectives* (Lawbook Co, 1992) 180, 185 ('French (1992)') (emphasis added).

<sup>50</sup> Commonwealth, *Parliamentary Debates*, 13 February 2013, 1120 (Julia Gillard).

<sup>51</sup> *Kartinyeri v Commonwealth* (1998) 195 CLR 337.

<sup>52</sup> *Wurridjal v Commonwealth* (2009) 237 CLR 309 ('*Wurridjal Case*').

<sup>53</sup> *Kartinyeri v Commonwealth* (1998) 195 CLR 337 ('*Hindmarsh Island Bridge Case*').

<sup>54</sup> *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969); implemented in Australia by the *Racial Discrimination Act* 1975 (Cth).

## V HIGH NOON: THE RECOGNITION OF INDIGENOUS PEOPLE AS CIVILISED IN *FACT*

The *Gove Land Rights Case*, heard in the Supreme Court of the Northern Territory, involved a decision by an Australian Court that deals directly with the merits of an Aboriginal claim to particular traditional tribal or communal lands.<sup>55</sup> In his decision, Justice Blackburn described the rules governing Aboriginal society in the following terms:

The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called 'a government of laws and not of men,' it is that shown in the evidence before me.

Notwithstanding this finding of *fact* that Indigenous people were a civilised community, as a matter of law his Honour said that he was bound by the Privy Council precedent set in *Cooper v Stuart*. Decided in 1899, this case had solidified the legal fiction of *terra nullius* and was still good law, even after the 1967 Referendum.<sup>56</sup> However, Professor Coper argues persuasively that the seminal *Murray Island Case*<sup>57</sup> (discussed below) was the culmination of a series of cases, noting rightly that 'much of the groundwork was done' in *this* landmark case [*Gove Land Rights Case*].<sup>58</sup>

Any doubt as to the *scope* of the amended race power to continue to create Nazi like laws was dispelled in 1998.<sup>59</sup> Yet in 2018 the amended race power is still part of the *Constitution*,

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<sup>55</sup> Michael Coper, 'Concern About Judicial Method' (2006) 30 *Melbourne University Law Review* 554, 557 ('Coper (2006)').

<sup>56</sup> (1899) 14 App Cas 286.

<sup>57</sup> *Mabo v State of Queensland (No 2)* (1992) 175 CLR 1 ('*The Murray Island Case*').

<sup>58</sup> Coper (2006) 557.

<sup>59</sup> A question posed by Kirby J, on whether the scope of the 'race power' could include 'a law such as the Nazi race law', was affirmed/confirmed by Griffith Q: Transcript of argument in the High Court of Australia, 5 February 1998, *Kartinyeri v Commonwealth* (1998) 195 CLR 337 (the *Hindmarsh Island Bridge Case*) cited in Anthony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 3<sup>rd</sup> ed, 2002) 194.

and still – as extensively discussed in literature such as the *Kartinyeri Case* – continues to permit the lawful, detrimental treatment, of Indigenous people.<sup>60</sup>

Small sections of the community continue to hold such views. This was reinforced in 2007, when serving members of the Australian Special Services serving in Afghanistan flew the Nazi flag.<sup>61</sup> And again, in 2016, when a young Indigenous woman in Western Australia being held in custody for over allegations of a mere fine default was seen on CCTV footage being thrown around ‘like a ragdoll’ even while visibly very unwell.<sup>62</sup> She later died while still in police custody,<sup>63</sup> and as at June 2018, no charges have been laid. These are not isolated incidents.

## VI THE LONG DAY DRAWS TO AN END ...

In 1992, in a seminal case,<sup>64</sup> a courageous Court<sup>65</sup> formally and finally recognised *terra nullius* as an empty ‘legal fiction’,<sup>66</sup> and dispelled the notion in the common law<sup>67</sup> – a decision reflected in statute by the Parliament.<sup>68</sup> A practical effect of this decision is that the law, (arguably excluding the *Constitution*), can now admit that the Continent was inhabited by people worthy of ‘recognition’ at common law and Statute.<sup>69</sup>

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<sup>60</sup> *Constitution* s 51(xxvi); *Kartinyeri v Commonwealth* (1998) 195 CLR 337; French (1992) 185.

<sup>61</sup> Naaman Zhou, ‘Nazi Flag on Australian Army Vehicle “Utterly Unacceptable”, Turnbull Says’, *The Guardian* (online), 14 June 2018 <<https://www.theguardian.com/australia-news/2018/jun/14/nazi-flag-on-army-vehicle-utterly-unacceptable-turnbull-says>>.

<sup>62</sup> Andrew Burrell, ‘Cops Doubted Miss Dhu, Even at Death's Door’, *The Australian* (online), 19 May 2016 <<https://www.theaustralian.com.au/...miss-dhu.../737514cf6121d6eaf97a0c7da0725a29>>

<sup>63</sup> Nicolas Perpetch, ‘Ms Dhu Inquest: Coroner Criticises “Inhumane” WA Police Treatment Before Death in Custody’, *ABC News* (online), 16 December 2016 <<http://www.abc.net.au/news/2016-12-16/ms-dhu-inquest-coroner-slams-police-over-death-in-custody/8122898>>.

<sup>64</sup> *Mabo v State of Queensland (No 2)* (1992) 175 CLR 1.

<sup>65</sup> ‘This too is not an uncontested view: Garth Nettheim ‘*Mabo*: Judicial Revolution or Cautious Correction? *Mabo v Queensland*’ (1993) 16 *UNSW Law Journal* 1; Michael Mansell, ‘The Court Gives an Inch But Takes Another Mile’ (1992) 57 *Aboriginal Law Bulletin* 4; Michael Mansell, ‘Indigenous Rights in the Constitution’ (Paper presented at the National Indigenous Legal Conference, Sydney, 13 August 2011).

<sup>66</sup> *Mabo v State of Queensland (No 2)* (1992) 175 CLR 1, 42.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Native Title Act 1993* (Cth).

<sup>69</sup> A discussion of the significant consequences at international law of the denial of a *terra nullius* Australia particularly on the issues of discovery and the acquisition of territory are outside the scope of this paper and are not considered, however for a discussion about the international

Despite this, the High Court has continued to deny Indigenous Australians' evolving culture,<sup>70</sup> and have claimed that, in some cases, their traditional culture had entirely been 'washed away by the tides of history'.<sup>71</sup> This circumscribed legal view has been generalised by the public into a mainstream view that believes that 'true' Indigenous culture has disappeared from most parts of the Continent.<sup>72</sup> However, this view is itself, yet another 'legal fiction' that should be negated by what every right-thinking person knows to be true. As a nation however, Australia is struggling to do this.

Legal change on race-relations is occurring, but at a very slow pace. In 1999, the Howard government attempted a form of Indigenous recognition in a new preamble to the *Constitution* but this did not succeed.<sup>73</sup> In 2010, a minority Labor government needed the support of the Australian Greens party to form government.<sup>74</sup> As part of their agreement to support Labor, the Greens extracted a commitment that the Government would conduct a referendum on the recognition of Indigenous people in the *Constitution*,<sup>75</sup> and an Expert Panel was set up to do this.<sup>76</sup> But while the majority make up their minds Indigenous people continue to pay the price in social, economic, spiritual and other terms. On the other hand, Indigenous peoples' resilience has shown that their ability to recover has not been diminished by or because of the abrogation of duty by mainstream leaders.

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dimensions see Gerry Simpson, 'Mabo, International Law, Terra Nullius, and the Stories of Settlement: An Unresolved Jurisprudence' (1993) 19 *Melbourne University Law Review* 195.

<sup>70</sup> The *Yorta Yorta* people live along the banks of the intersection of the Goulburn and Murray Rivers in North-Eastern Victoria, Australia.

<sup>71</sup> *Members of the Yorta Yorta Aboriginal Community v Victoria & Ors* [1998] FCA 1606 (18 December 1998) ('*Yorta Yorta Case*').

<sup>72</sup> Aileen Moreton-Robinson, 'The Possessive Logic of Patriarchal White Sovereignty: The High Court and the Yorta Yorta Decision' (2004) 3 *Borderlands e-journal* 2, [22].

<sup>73</sup> Blackshield and Williams, above n 60, 1308.

<sup>74</sup> J Gillard, B Brown & others, 'Agreement to Form Government', the Australian Greens and the Australian Labor Party' ('the Parties') – agreement signed on 1 September 2010, 2. <[http://greens.org.au/sites/greens.org.au/files/Final%20Agreement%20ALP\\_GRNS.pdf](http://greens.org.au/sites/greens.org.au/files/Final%20Agreement%20ALP_GRNS.pdf)>.

<sup>75</sup> *Ibid.*

<sup>76</sup> Report of the Expert Panel, 'Recognising Aboriginal and Torres Strait Islander People in the Constitution' (Commonwealth of Australia, January 2012) 1, 2 ('Report of the Expert Panel').

## VII WHEN WILL THE SUN SET ON TERRA NULLIUS IN THE CONSTITUTION?

As noted above, the *Constitution*, which entrenched the Founders' notions of *terra nullius* and their view of 'aboriginal natives' as an invisible non-people, still persists today, and creates a disjuncture between the law and the *Constitution*. These embedded notions, unless expressly negated, in clear words to this effect in the *Constitution must* continue to inform the law. The High Court is not free to discount the words of the Framers of the *Constitution* and are bound by 'fidelity to the framers'. Indeed, one of the framers of the *Constitution*, Barton J, held that the '[Court is to arrive at the proper meaning of the *Constitution*] by reference to the words and the history of the law'.<sup>77</sup> That is, the High Court is not free to ignore history and has not done so on this issue.

The need for formal constitutional recognition of Indigenous people is therefore overdue. This was confirmed in the Expert Panel's report.<sup>78</sup> However, this need for Constitutional change is clearly but unfortunately not a self-evident proposition to a public who largely appear to erroneously believe that racial equality was achieved in 1967. On the other hand, an important finding of the Expert Panel was that 'many people were surprised or embarrassed to learn that the Constitution [still] provides a head of power that permits the Commonwealth Parliament to make laws that discriminate on the basis of "race"'.<sup>79</sup> An important lesson is that civic education has a long way to go on this question.

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<sup>77</sup> *Tasmania v Commonwealth* (1904) 1 CLR 329, 358.

<sup>78</sup> Report of the Expert Panel, 122; *Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples* (JCSATSI, July 2014); *Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples* (JCSATSI, June 2015); Marcia Langton and Megan Davis (eds), *It's Our Country: Indigenous Arguments for Meaningful Constitutional Recognition and Reform* (Melbourne University Press, 2016); Jennifer Nielsen, Simon Young and Jeremy Patrick (eds), *Constitutional Recognition of First Peoples in Australia: Theories and Comparative Perspectives* (Federation Press, 2016).

<sup>79</sup> Report of the Expert Panel, [1.14], 42.



## VIII CONCLUSION

Even in the 1890s there were,<sup>80</sup> as there are increasingly today,<sup>81</sup> voices calling for the equal protection of the law for people of all races. Contemporary society's views on race, as related to discrimination, have also changed quite significantly from the past. For example, the notion of racial superiority has evolved and is now mainly a minority view in Australia. This is a significant change from the years leading up to Federation. However, racism however is far from absent in contemporary Australian society, even though the anti-discrimination laws have had a chilling effect on its public expression by those from the political extremes who call for almost absolute freedom to offend.

Achieving constitutional recognition and/or racial equality is not a panacea for the social ills in this area. It is well known in the law that equality before the law can involve the equal treatment of unequals or the unequal treatment of equals. It remains a substantial issue for public policy. It is however, not an unreasonable starting point if we seek to create a society where every person is presumed to be of 'equal value', irrespective of their creed or colour.

In the 1970s Windeyer J observed 'Law, marching with medicine but in the rear and limping a little'.<sup>82</sup> Although the broader public expect the law to reflect societal values, Windeyer J's statement is arguably still true of the law's reflection of societal values on race more broadly. On the notion of racial equality however, under the *Constitution*, this gap is more a chasm than a limp. It is surely time for Australia to amend the anachronistic parts of its nineteenth century constitution!

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<sup>80</sup> Quick and Garran, *The Annotated Constitution of the Commonwealth of Australia* (Legal Books, 1976) 623.

<sup>81</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562, 627 (Kirby J); Alice Rolls, 'Avoiding Tragedy: Would the Decision of the High Court in *Al-Kateb* Have Been Any Different if Australia Had a Bill of Rights Like Victoria?' (2007) 18 *Public Law Review* 119.

<sup>82</sup> *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383, 395 (Windeyer J).

## An Interview with Associate Professor Claire Charters<sup>\*</sup>

### Editors

*Associate Professor Charters, thank you so much for agreeing to be interviewed by Pandora's Box for our 2018 edition: Law in First Person. To start things off, it's been more than ten years now since the United Nations Declaration on the Rights of Indigenous Peoples<sup>1</sup> was adopted by the General Assembly and despite its non-legal nature, it's been a pretty significant step towards eliminating human rights violations across the globe for the world's 370 million Indigenous people. Do you think it has been successful in achieving those aims?*

I think to the extent that it has been applied in most legal and political settings, it has had influence in some places. So, for example, in New Zealand, our highest court is the Supreme Court of New Zealand and we have now [seen] four references to the *Declaration* in the Supreme Court in cases involving minority rights. It is not decisive, but it certainly has been influential. And in the most recent case, for the justices who used it, it was again maybe not the decisive factor, but it was highly influential in deciding the case in a way which was more beneficial for Indigenous peoples.

As I understand it, you see less of that in Australia and in Canada, you don't see as much incorporation of the *Declaration* into cases by the judiciary. But you have in Canada, for example, legislation going through to implement the *Declaration* domestically so there is a lot of political activity there, and it looks like that legislation will go through in Canada to implement the *Declaration* and that will be significant and will be world-leading in that respect. There are certainly other places around the world where the *Declaration* has been influential. For example, in Bolivia, it has legislative force and while I am not a Spanish-speaker, I understand that it has been

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<sup>\*</sup> Associate Professor Claire Charters is an Associate Professor at The University of Auckland. This is a revised version of an interview conducted by Julius Moller on 31 August 2018 and transcribed by Molly Thomas.

<sup>1</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61<sup>st</sup> sess, 107<sup>th</sup> plen mtg, Agenda Item 68, UN Doc A/RES/61/295 (13 September 2007).

used in jurisprudence in Ecuador and possibly Colombia as well. Certainly, in Belize, it has been influential in court cases.

In the international human rights monitoring mode, a lot of the United Nations treaty bodies have used the *Declaration* to interpret rights favourably for Indigenous peoples, which I think is really positive, as well as in the United Nations Human Rights Council's Universal Periodic Review and in regional human rights courts in the Americas and Africa. That's just a snapshot of some examples of where the declaration has been used by courts in their jurisprudence and incorporated into legislation. I think that shows a good deal of significance for the *Declaration* legally, but I actually think its power comes as much from its moral authority as from its influence legally. And that's because it's a benchmark by which States are assessed, both obviously in a formal process by human rights treaty bodies, but also more generally in public debates. I was just in Sydney last week and was at a small workshop with [Professor] Megan Davis who was talking about the influence of the *Declaration* particularly in the constitutional recognition dialogue happening in Australia. From her perspective, it seemed to influence the view taken of the *Uluru Statement [from the Heart]*.<sup>2</sup> That, in the future, could potentially have some legal force, and hopefully it will. But still, the fact that it has been used as benchmarks for constitutional reform or other ways in which the government is thinking about how things should be done in a moral sense, the *Declaration* is still a standard by which States are being assessed. Of course, the world is a big place and the *Declaration* has influence in different ways in different places. It varies in influence based on a lot of different factors, but especially based on political will, but even when there is not significant political will for the *Declaration*, States can't avoid it through international processes.

So overall, I think the *Declaration* to some extent has legal force in some places and political force in some places, but I think its moral and social force is generally quite strong. Does that mean that the *Declaration* has been complied with? Probably not.

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<sup>2</sup> Australian Referendum Council, 'Uluru Statement from the Heart' (Indigenous National Constitutional Convention, 2017).

Does it mean that it assists in moving towards better compliance with Indigenous peoples' rights? Probably yes.

*Just off the back of that, in terms of it having legal force in some places but not others, it was worrying seeing the initial opposition by Australia, Canada, New Zealand and the United States to the Declaration but then we have seen the tone soften somewhat.*

Well, yes, when it was adopted, Australia, Canada, New Zealand and the United States initially voted against it. Those four states were the only states to oppose it and have all since moved to support it.

*As you mentioned, there is a battle going on in various countries, including Australia, regarding constitutional recognition of Indigenous peoples. Do you think there is any way to reinvigorate that debate? It seems to come in waves and in Australia, it seems like it's coming to a bit of a peak now where it's becoming a significant issue again. Do you think there's anything that could give it that final push to get it over the line?*

It would be difficult to talk about Australia just because I'm not familiar enough with the context. I certainly think that international pressure is part of the equation for that final push. But with any formal recognition of Indigenous people's rights, whether it be constitutional or otherwise, you need to have a certain constellation of political, legal and social factors all aligning in the right way. You can try to manipulate those by, for example, increasing international pressure for Australia to take seriously the *Uluru Statement* but there are always going to be counter-factors including, for example, having a more conservative government in power at this time. The final push might come from a change in government; that's often a time where you get that final push to change a policy.

*It certainly seems that, in terms of the factors which can be influenced outside government, those have developed well so it seems it may just be a need for the political willpower to be there to get it across the line. Moving then, from the domestic sphere to the international sphere, why do you think international law is such an important medium through which we can protect Indigenous groups?*

International law and international politics is a really important tool for Indigenous groups for a number of reasons, including particularly that self-determination is

available. That is one of the questions which international law considers and that claim to self-determination that Indigenous peoples have made can be received in an international legal and international political context which can't be received in a domestic context. For example, in a common law system, the principle of parliamentary sovereignty does not tolerate the existence of a different sovereign. So international law is very enticing in that respect. I think another one of the key advantages is that when you are coming up to roadblocks at the domestic level, you might have more success at the international level. That's a way to shine a light on a particular issue, get attention on a particular issue, get justice for a particular issue, which you wouldn't be able to achieve domestically or for which the dialogue may be difficult domestically. It's a way to create pressure to seek change at a domestic level, but going outside the state to get it. It's also true that states, particularly western liberal democracies, are sensitive to international pressure so if you capture that, it can be a way to force action.

*Going back to your point regarding self-determination, that is obviously a large part of the Declaration. What do you see as being the fundamental parts of self-determination and do you think that states are allowing Indigenous peoples within their jurisdictions to have that right?*

I'm going to answer that second question first. So, yes, there are lots of instances where I think we see more examples of Indigenous self-determination. For example, in the United States, there are approximately 600 federally-recognised tribes, many of which have their own jurisdiction, their own courts, their own legal systems and their own law reports, and function as independent states internally. You have places like Greenland which, for all intents and purposes, is independent from Denmark even though Denmark is nominally still the governing state. You have examples in Mexico where there are autonomous regions. In New Zealand, you have fewer examples of Maori acting autonomously as their own government but you have co-management of important resources like major rivers which are essentially co-governed between Maori and the state. Canada is negotiating treaties which are about shared jurisdiction for particular First Nations and the state, including, for example, the Nisga'a in British Columbia. Also, a lot of the very far north of Canada is

governed by Indigenous peoples and to some extent, I think that some of those developments are really influenced by acceptance that Indigenous people have the right of self-determination as a matter of international law, but not all of them. The United States' approach is a bit more complicated, for example, but Greenland is very much driven by that discussion. Similarly, the Sami in the north of Norway, Finland and Sweden have their own Sami parliament and the *Declaration* is very much a part of that process. So yes, I think we see examples of self-determination being exercised. In New Zealand, for example, as you might know, we have seven seats in our 120 seat Parliament which are designated for Maori.

So, the first part of your question was more-or-less related to the content of the right of self-determination. Well, there are multiple articles in the *Declaration* in addition to article 3 which is the article which gives the right to self-determination which address what you might call Indigenous people's political rights. For example, article 4 talks about ideas of self-government and autonomy. That idea is very clearly expressed in the *Declaration*. But there are also elements of an understanding of self-determination which looks at ensuring that there is adequate participation of Indigenous peoples in state governance. And that's kind of conflicting, that Indigenous people have both autonomy and participation in state government. I think that you can have mixtures of the both. I think in New Zealand, we have a mixture of the both. With the Maori seats and local government initiatives, we have the participation in state government but then also we have some autonomy and self-governance, even if it's not formally recognised.

And I think the *Declaration* had to have those different options to reflect different understandings of self-determination and the different claims which different Indigenous peoples were bringing. For example, some Indigenous peoples were seeking to participate in government, some were seeking autonomy, and then there were many groups seeking options in between those two aims. So I think the content of self-determination is not one particular way of expressing self-determination but I think as it is set out in the *Declaration*, it accommodates many, which includes some form of autonomy and may even go as high as its fullest understanding as sovereignty.

*So really, autonomy has become a very fundamental aspect of self-determination. Turning then to the broader context of the Declaration, how do you see the role of the United Nations High Commissioner for Human Rights in assisting with the exercise of self-determination or the recognition of other rights?*

I think the role of the office of the High Commissioner is tricky. I worked for the office of the High Commissioner for a while and it is tricky partly because it is part of the apparatus of the United Nations and it doesn't have much autonomy because its funding comes from states. The office of the High Commissioner does quite a bit of work at the technical level with providing states and Indigenous peoples with information about how to achieve the rights through, for example, national human rights commissions. It will also do work with other United Nations agencies and the World Bank to ensure that they are complying with the *Declaration*. It is hard for the office of the High Commissioner though because it is quite a small organisation and its focus is really on the developing world. This means that its presence in places like Australia and New Zealand is very limited. For those countries, we are looked after by the office in Suva, Fiji which has about two or three people working at it. They might do some training for Indigenous peoples on self-determination or human rights but I'm not sure this kind of work falls within the ambit of the office of the High Commissioner.

However, there are bodies like the United Nations Expert Mechanism on the Rights of Indigenous People and that body has the potential to be powerful in advising states how to realise Indigenous peoples' rights and the right to self-determination. Up until this point, they've pretty much done that through reports and studies but their mandate has just been extended so they can be invited into states to advise states if there is legislative or constitutional reform or a particular issue which has some momentum behind it. In the mining sector, for example, there are often conflicts between Indigenous peoples and private companies as well as governments. The fact that the Expert Mechanism now has the mandate to go in, in addition to also people like the Special Rapporteur is very significant, but I'm not sure that the office of the High Commissioner is that powerful but these other bodies have the potential to be.

The Special Rapporteur's mandate can be exceptional in some instances with helping states and Indigenous peoples implement these rights in practice.

*From your work with the Office and other organs, and seeing the work the Special Rapporteur has done, what would be your advice for any law students, and in particular Indigenous law students, who might have a similarly global outlook or passion to work on these issues on the international stage?*

Well, I would say that there is no obvious career path, which makes it tricky. I would say that people should take any opportunity they can get to involve themselves in international affairs involving Indigenous peoples. That might entail, in the Australian context, getting yourself involved with the national congress or trying to work with academics like Professor Megan Davis who are quite active. At the University of New South Wales, there is an Indigenous centre at the law school. I would try to look for funding to get to some of these meetings and I know that the Australian government does have some funding which is available for youth. People might disagree with me on this but I would also suggest postgraduate study on these issues because I also think it's important to understand what's going on.

If I were a law student in Australia, I would be trying to get involved in activism around the *Uluru Statement*, looking to work with Indigenous academics and advocates who are active on these issues, including Professor Megan Davis in Sydney and Les Malezer in Brisbane, applying to intern at the United Nations if that was at all possible, and thinking about postgraduate work.

You would want to be working closely with Indigenous communities and Indigenous organisations which were active on the international stage. But there's no obvious career path in the sense that there is not a job to apply for. It's interesting because I have noticed that of the people from my generation who got involved around 1990 to 2000, the ones who have stayed active have tended to be academics, I guess because it's academically interesting but also because it provides us a place and space to be active in these politics.

If you want a job with the United Nations, it's demanding in the sense that they may require a master's and various other things but on the other hand, it's not a



meritocracy at all. It's so random whether you get a job there or not. I've had friends who have wanted to go the United Nations route and they've done the United Nations exams and gone that route. I've also had friends who have worked for the volunteer service of the United Nations where you get a small stipend to go and work in the field, which they've used as their launchpad to a career in the United Nations.

*That certainly seems to be a growing trend in this area; it's a matter of just taking opportunities as they come.*

I think for Indigenous students, if you're really passionate about it, you'd want to get active at the domestic sphere, with FARA, for example, which is based in Brisbane. When I started out in this area, I spent a lot of time photocopying for people and I interned at the United Nations when I was 23. But what that meant was that I met people who are not only now close friends but are also quite powerful and influential. It's about making networks but also building trust and confidence in the work that you're doing.

*Well, thank you so much, Associate Professor Charters. Our readers will certainly aspire to have your level of knowledge on these issues and it's been great to have an international perspective which focuses on the area of Indigenous peoples.*

## The Unbearable Witness, Seeing: A Case for Indigenous Methodologies in Australian Soft Law

Alison Whittaker\*

There is a young Aboriginal boy<sup>1</sup> in a suit before the *Royal Commission into the Protection and Detention of Children in the Northern Territory*.<sup>2</sup> I know his name, but we will call him Mr V. I can watch Mr V. It is livestreamed into my office — my colleagues and I are tweeting about him. He is 18. He is Ngarrindjeri. By this point, he has been before the courts since he was eleven years old. He was subject to reports by major newspapers and the Children's Commissioner,<sup>3</sup> even before he was thrust into the limelight in July 2016. The Australian Broadcasting Corporation broadcast video taken of him when he was thirteen, fourteen, sixteen, seventeen.<sup>4</sup> In some of the footage, he sits upright in a chair. The chair is in a locked room with a sole fluorescent light. He is shirtless and trapped, strapped in and motionless. His head is covered in a hood. The unthinkable image went everywhere — a kind of visual shorthand for the horrors Indigenous youth experience in Australian prisons. The boy is now outside, now a man. He is described in popular discourse as 'the boy in the hood'.<sup>5</sup> A tattoo of 'a goanna guiding other baby goannas' winds over his right arm. He said:

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<sup>1</sup> In light of the pressure of public attention on this young man, I have elected not to use his name for this paper.

<sup>2</sup> Northern Territory, Royal Commission into the Protection and Detention of Children in the Northern Territory, *Final Report* (2017) ('RCNT').

<sup>3</sup> Office Children's Commissioner, Northern Territory Government, *Own Initiative Investigation Final Report — Services Provided by the Northern Territory Department of Correctional Services to Don Dale Youth Detention Centre and Alice Springs Youth Detention Centre* (August 2016); Maria Billias, 'Report Revealed Don Dale Abuse Eleven Months before Footage Was Released', *Northern Territory News* (Darwin), 28 July 2016 ('Billias (2016)').

<sup>4</sup> Staff Writer, 'Timeline of Dylan Voller's Mistreatment in Youth Detention', *ABC News* (Darwin), 26 July 2016.

<sup>5</sup> Kirsty Needham, 'Don Dale Detention "Boy in the Hood" Dylan Voller's Phone Calls Cut before Royal Commission Evidence', *The Sydney Morning Herald* (Sydney), 10 December 2016.

I'd rather have a picture of my face instead of me in a restraint chair. It's a really bad memory. I kind of want to forget ... But, I get it. It's a proclamation, which sticks in everyone's head. It gets used a lot.<sup>6</sup>

He is not the only Aboriginal victim of violence whose visage is stuck in the Australian consciousness of Indigenous suffering. Nor is Mr V the only such person to stick in Australia's institutional memory. Aboriginal and Torres Strait Islander peoples are among the 'most researched people'<sup>7</sup> the world — driven first by the curious scrutiny of anthropological Darwinism on a 'dying race',<sup>8</sup> then as deficient policy subjects, increasingly refined by government and non-government actors in Indigenous affairs.<sup>9</sup> More recently, Indigenous cultural knowledges and practices are under the microscope of cultural appropriation and knowledge theft.<sup>10</sup> Under both gazes, scorn, pity and horror are heaped on Indigenous persons through the production of knowledge in which we are assumed to be beneficiaries but of which we are rarely experts.<sup>11</sup> Critical Indigenous epistemologies,

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<sup>6</sup> Enoch Mailangi and Jonno Revanche, 'Dylan Voller Is the Prison Reform Activist Australia Needs', *Vice* (Sydney), 10 August 2017.

<sup>7</sup> Robyn Penman, 'Occasional Paper 16 — Aboriginal and Torres Strait Islander Views on Research in Their Communities' (Footprints in Time: The Longitudinal Study of Indigenous Children, Parliament of Australia, 2006); Bronwyn Fredericks, 'So, You Want to Do Oral History with Aboriginal Australians? Old Stories, New Ways' (2008) 2 *Oral History Association of Australia Journal* 22; Bronwyn Fredericks, 'Making an Impact Researching with Australian Aboriginal and Torres Strait Islander Peoples' (2008) 5(1) *Innovation and Development* 24.

<sup>8</sup> Daisy Bates, *The Passing of the Aborigines: A Lifetime Spent among the Natives of Australia* (Benediction, 1938) 5; Elizabeth Elbourne, 'The Sin of the Settler: The 1835-36 Select Committee on Aborigines and Debates over Virtue and Conquest in the Early Nineteenth-Century British White Settler Empire' (2003) 4(3) *Journal of Colonialism and Colonial History*; Lisa Waller, 'Singular Influence: Mapping the Ascent of Daisy M. Bates in Popular Understanding and Indigenous Policy' (2010) 37(2) *Australian Journal of Communication* 1.

<sup>9</sup> See, eg, Maggie M Walter, 'The Politics of the Data: How the Australian Statistical Indigene Is Constructed' (2010) 3(2) *International Journal of Critical Indigenous Studies* 45; Alison Vivian, 'Evidence? What Evidence? Government Policy Development and the Northern Territory Intervention' (2012) 3 *Ngija: Talk the Law* 13.

<sup>10</sup> See generally, Terri Janke and Livia Iacovino, 'Keeping Cultures Alive: Archives and Indigenous Cultural and Intellectual Property Rights' (2012) 12(2) *Archival Science* 151; Jane Anderson, 'Duke University Center for the Study of the Public Domain Issues Paper: Indigenous Traditional Knowledge and Intellectual Property' (Issues Paper, Duke University, 2010); Lorie Graham and Stephen McJohn, 'Indigenous Peoples and Intellectual Property' (2005) 19 *Washington University Journal of Law and Policy* 313; World Intellectual Property Organisation, 'WIPO and Indigenous Peoples' (WIPO, 2012).

<sup>11</sup> See, e.g., Aileen Moreton-Robinson, 'Towards an Australian Indigenous Women's Standpoint Theory' (2013) 28(78) *Australian Feminist Studies* 331 ('Moreton-Robinson (2013)'); Aileen Moreton-Robinson, 'When the Object Speaks, A Postcolonial Encounter: Anthropological

which scrutinise institutions that extract and produce knowledge from Indigenous peoples in the academe, suggest that scorn, pity and horror produce ill-aligned knowledges — or at least knowledges that can only fit colonial purposes. The gaze cast on Mr V is the same gaze of extractive knowledge production. No fewer than three public government reports<sup>12</sup> and at least three hundred news reports<sup>13</sup> were built on his body. So far, they have gone unheard — the publicity resulting only in the production of further knowledge without the promise of policy reform without young peoples' voices.<sup>14</sup> The subject of juvenile justice for Indigenous young people itself, under which these inquiries fell, has produced a seemingly endless stream of recommendations that go ignored<sup>15</sup> — long before Mr V was born. Such inquiries position Indigenous people, rather than colonial legal structures, as deficit subjects<sup>16</sup> — disadvantaged, but not oppressed.<sup>17</sup>

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Representations and Aboriginal Women's Self-presentations' (1998) 19(3) *Discourse: Studies in the Cultural Politics of Education* 275 (Moreton-Robinson (1998)).

<sup>12</sup> An internal, confidential report by the NT Department of Corrections (inaccessible to the public at the time of writing); RCNT; Office Children's Commissioner, Northern Territory Government, *Own Initiative Investigation Final Report — Services Provided by the Northern Territory Department of Correctional Services to Don Dale Youth Detention Centre and Alice Springs Youth Detention Centre* (August 2016); Robyn Smith, 'Northern Territory January to June 2017' (2017) 63(4) *Australian Journal of Politics & History* 668.

<sup>13</sup> From an [online news search](#) on April 23 2018.

<sup>14</sup> Thalia Anthony, 'Young People's Voices Are All but Invisible in the Don Dale Royal Commission's Interim Report', *The Conversation* (Sydney), 5 April 2017; Chris Cunneen and Sophie Russell, 'Don Dale Royal Commission Demands Sweeping Change – Is There Political Will to Make It Happen?', *The Conversation* (Sydney), 17 November 2017.

<sup>15</sup> Chris Cunneen, 'Racism, Discrimination and the Over-Representation of Indigenous People in the Criminal Justice System: Some Conceptual and Explanatory Issues' (2005) 17 *Current Issues in Criminal Justice* 329; Leticia Funston and Sigrid Herring, 'When Will the Stolen Generations End? A Qualitative Critical Exploration of Contemporary "Child Protection" Practices in Aboriginal and Torres Strait Islander Communities' (2016) 7(1) *Sexual Abuse in Australia and New Zealand* 51; Rob White, 'Indigenous Young People and Hyperincarceration in Australia' (2015) 15(3) *Youth Justice* 256.

<sup>16</sup> Cressida Fforde et al, 'Discourse, Deficit and Identity: Aboriginality, the Race Paradigm and the Language of Representation in Contemporary Australia' (2013) 149(1) *Media International Australia* 162; Greg Vass, "'So, What Is Wrong with Indigenous Education?'" Perspective, Position and Power Beyond a Deficit Discourse' (2012) 41(2) *The Australian Journal of Indigenous Education* 85.

<sup>17</sup> Gabrielle Berman and Yin Paradies, 'Racism, Disadvantage and Multiculturalism: Towards Effective Anti-Racist Praxis' (2010) 33(2) *Ethnic and Racial Studies* 214.

Soft law incorporates Royal Commissions,<sup>18</sup> parliamentary inquiries, and coronial hearings<sup>19</sup> that have formal powers of compulsion and judicial-adjacent proceedings. Soft law is central in the contemporary experience of Australian Indigeneity, and Australian Indigeneity has done much to inform the shape of soft law.<sup>20</sup> We have been variously examined in executive inquiries from the *Aboriginal Land Rights Commission* of the 1970s,<sup>21</sup> the *Little Children are Sacred* inquiry,<sup>22</sup> to the *Royal Commission into Aboriginal Deaths in Custody* ('RCIADIC'),<sup>23</sup> to the *Bringing Them Home Report*<sup>24</sup> concerning generations of Indigenous children stolen from their culture and families. Standing bodies of soft law, like the use of Coroners Courts to mandatorily investigate deaths in custody<sup>25</sup> and the Law Reform Commissions of the Commonwealth, States and Territories,<sup>26</sup> also produce a steady stream of Indigenous deficit analysis. To what end has this knowledge been produced? The inquiry at which Mr V appeared produced 227 recommendations, which the Northern Territory government agreed to fulfil.<sup>27</sup> The Federal government, with ostensibly more control over

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<sup>18</sup> Most held at the Federal level under the *Royal Commissions Act 1902* (Cth) and *Royal Commissions Regulations 2001* (Cth).

<sup>19</sup> See Boronia Halstead, 'Implementing Coroner's Deaths in Custody Recommendations: A Victorian Case Study' (1995) 7 *Current Issues in Criminal Justice* 340; Raymond Brazil, 'Respecting the Dead, Protecting the Living' (2008) 12 *Australian Indigenous Law Review* 45 ('Brazil (2008)').

<sup>20</sup> See, eg, *Queensland v Wywill* (1989) 90 ALR 611 (defining Aboriginality at common law for the purpose of a Royal Commission, contesting especially controversially the role of historic concealment and 'dilution'). See also, Alison Whittaker, 'White Law, Black Arbiters, Grey Legal Subjects: Deep Colonisation's Role and Impact in Defining Aboriginality at Law' (2017) 20 *Australian Indigenous Law Review* 1.

<sup>21</sup> Northern Territory, Aboriginal Land Rights Commission, *Final Report* (1974).

<sup>22</sup> Into child welfare in the Northern Territory: Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, Rex Wild and Pat Anderson, *Ampe Akehyernemane Meke Mekarle: Little Children Are Sacred* (Dept. of the Chief Minister, Office of Indigenous Policy, 2007).

<sup>23</sup> Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *Final Report: National and Regional Reports* (1991).

<sup>24</sup> Australian Human Rights and Equal Opportunity Commission, Human Rights and Equal Opportunity Commission, Commonwealth of Australia, *Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997).

<sup>25</sup> Coroners have a statutory mandate to investigate any death in custody. See, e.g., *Coroners Act 2009* (NSW) s23; Olivia McFarlane and Prue Vines, 'Investigating to Save Lives: Coroners and Aboriginal Deaths in Custody' (2000) 4(27) *Indigenous Law Bulletin* 8.

<sup>26</sup> Of which, the Australian Law Reform Commission recently produced an inquiry into Federal laws' role in Indigenous incarceration: Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Report No 133 (2017).

<sup>27</sup> With the caveat of budgetary restrictions: Helen Davidson, 'NT Says It Cannot Afford All of Juvenile Detention Royal Commission's Reforms', *The Guardian* (Darwin), 20 April 2018..

implementation, supported only ‘in principle.’<sup>28</sup> Troublingly, even if those recommendations translate into reform, some were ‘likely to reproduce old ways of managing Indigenous families without a clear imperative’.<sup>29</sup>

RCIADIC produced 339 recommendations.<sup>30</sup> In the twenty-five years since, only a minority are implemented while the crisis of Indigenous deaths in custody continues to escalate<sup>31</sup> and the burden on Coroners to investigate them grows in volume each year.<sup>32</sup> Victoria’s *Royal Commission into Family Violence* developed 227 recommendations, but just nine on Indigenous family violence despite its heightened prevalence in our communities.<sup>33</sup> Those recommendations were for ‘cultural competence’ — a familiar refrain in Indigenous policy since the 1980s<sup>34</sup> — or to continue with existing solutions like those under Victoria’s Aboriginal Justice Agreement.<sup>35</sup> The *Bringing Them Home Report* in 1997 recommended reparations for the Stolen Generations.<sup>36</sup> In 2007, prominent impact litigation<sup>37</sup> to which many had attached their hopes of reparations, failed to create a replicable model. Recently, now that many of the claimant group have passed, some states and territories have set up

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<sup>28</sup> Jacqueline Breen and Georgina Hitch, ‘Federal Response to Youth Detention Royal Commission “a Cop out”, NT Children’s Commissioner Says’, *ABC News* (Darwin), 9 February 2018.

<sup>29</sup> Thalia Anthony, ‘There’s Still a Long Way to Go for the Don Dale Royal Commission to Achieve Justice’, *The Conversation* (Sydney), 20 March 2018.

<sup>30</sup> Above n 23.

<sup>31</sup> Brooke Boney, ‘It’s Worse 25 Years after Royal Commission into Aboriginal Deaths in Custody: Dodson’, *SBS News* (Sydney), 13 April 2016; Thalia Anthony, ‘Deaths in Custody: 25 Years after the Royal Commission, We’ve Gone Backwards’, *The Conversation* (Sydney), 13 April 2016; Laura Beacroft, Mathew Lynham and Matthew Willis, ‘Twenty Years of Monitoring since the Royal Commission into Aboriginal Deaths in Custody: An Overview by the Australian Institute of Criminology’ (2011) 15(1) *Australian Indigenous Law Review* 64; Australian Institute of Criminology, *Deaths in Custody in Australia: Monitoring and Reports* (2013) Australian Institute of Criminology: Criminal Justice System.

<sup>32</sup> Australian Institute of Criminology, ‘National Deaths in Custody Program 2011–12 and 2012–13’ (Monitoring Report 26, Australian Institute of Criminology, 2014) 23.

<sup>33</sup> Victoria, Royal Commission into Family Violence, *Victorian Royal Commission into Family Violence: Report and Recommendations* (2016) 84–86. See generally, Australia’s National Research Organisation for Women’s Safety, ‘Indigenous Family Violence’ (2015); Heather Nancarrow, ‘In Search of Justice for Domestic and Family Violence: Indigenous and Non-Indigenous Australian Women’s Perspectives’ (2006) 10(1) *Theoretical Criminology* 87.

<sup>34</sup> See, eg, Juanita Sherwood, ‘Colonisation – It’s Bad for Your Health: The Context of Aboriginal Health’ (2013) 46(1) *Contemporary Nurse* 28.

<sup>35</sup> See Department of Justice and Regulation, Victorian Government, *Victorian Aboriginal Justice Agreement — Phases 1, 2, and 3* (2018).

<sup>36</sup> Above n 24, 216.

<sup>37</sup> *Trevorrow v State of South Australia* (No 5) [2007] SASC 285.

statutory compensation bodies that offer survivors between \$20,000<sup>38</sup> and \$75,000.<sup>39</sup> When the Royal Commission set up in response to Mr V's torture was announced, some in the Indigenous community lamented the length at which we are examined, our trauma compounded, in the interests of knowing the problems which no one plans to do anything about. Pat Anderson, who co-commissioned recent inquiries and gave evidence at RTNC, called the slew of investigation 'an opiate'.<sup>40</sup> Mick Dodson, who was Counsel Assisting in RCIADIC, lamented that the responsible institutions 'have gone on their merry way ... As if there had been no recommendations ... the inevitable deaths, the hurt and the misery [continue]'.<sup>41</sup> Indigenous tragedy, triumph and suffering is taken before soft inquiries in the name of investigation.

Creating repetitive and increasingly particulate knowledge about Indigenous suffering using soft law not only derails reparative or substantive justice for Indigenous peoples, it creates new paths of suffering and new paths for governments to deny justice. In the coronial jurisdictions, this is already the subject of significant debate.<sup>42</sup> Putting aside the incapacity of Coroners to look backwards to evaluate liability and offer positive reparations,<sup>43</sup> Coroners' forward-looking recommendations power is not binding<sup>44</sup> and in some jurisdictions does not require the relevant agencies to read or respond.<sup>45</sup>

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<sup>38</sup> In South Australia, through a (highly-criticised and now closed) commission: South Australian Department of Aboriginal Affairs, 'Stolen Generations Reparations Scheme' (Press Release, March 2016); Tom Fedorowytch, 'Stolen Generations: South Australia's Compensation Scheme Attracts More Applications than Expected', *ABC News* (Adelaide), 31 March 2017.

<sup>39</sup> In NSW, under the *Guidelines for the Administration of the NSW Stolen Generations Reparations Scheme 2017* (NSW); see also, New South Wales Parliament Legislative Council General Purpose Standing Committee, 'Reparations for the Stolen Generations in New South Wales: Unfinished Business' (Legislative Council General Purpose Standing Committee No. 3, 2016) 3.

<sup>40</sup> Kate Wild, "Nothing Ever Happens": Why Indigenous Leaders Are Angry at Latest Round of Inquiries', *ABC News* (Darwin), 4 November 2016.

<sup>41</sup> Michael Dodson, 'Introduction to the 10th Anniversary of the Royal Commission into Aboriginal Deaths in Custody Special Issue' (2001) 5(8) *Indigenous Law Bulletin* 4, 4.

<sup>42</sup> See, eg, Rebecca Scott Bray, "Why This Law?": Vagaries of Jurisdiction in Coronial Reform and Indigenous Death Prevention' (2008) 12(2) *Australian Indigenous Law Review* 27; Brazil (2008).

<sup>43</sup> Coroners are explicitly precluded from making findings or remarks of criminal or civil liability: See, e.g., *Coroners Act 2009* (NSW) s 81(3).

<sup>44</sup> Halstead, above n 19; Raymond Brazil, 'The Coroner's Recommendation: Fulfilling Its Potential? A Perspective from the Aboriginal Legal Service' (2011) 15(1) 94.

<sup>45</sup> Victorian Aboriginal Legal Services Cooperative Ltd, 'The Centrality of the Royal Commission into Aboriginal Deaths in Custody When Discussing Potential Reform to the Victorian Coronial System' (2008) 12(2) *Australian Indigenous Law Review* 55; Brazil, above n 44.

Other, more ad hoc inquiries, are worse for their lack of established institutionalization and sporadic, politically-motivated, and intense involvement in their subject matter. The *Little Children are Sacred* inquiry, despite its significance and integrity as a review, is famous for one thing<sup>46</sup> — being used by the Federal government to send the military into Indigenous communities, suspend the *Racial Discrimination Act*, and institute a decades-long act of social engineering responsible for new colonial trauma.<sup>47</sup> In the more-recent RCNT, Mr V, compelled to speak about his suffering for a livestreamed inquiry, was criticised for his testimony by Australian media who thought of him as a deserving thug.<sup>48</sup> They used this gaze over Mr V to counter the horror of his hooded visage and of his testimony about the day to day human rights abuses in Australian juvenile prisons.<sup>49</sup> The gaze and rigour of settler law, absent even its diminished capacity to recognise and compensate Indigenous victimology, is a continuation of the same violence that put Mr V in that chair and recorded it, and that sent the army on communities like his. Australian soft law becomes an unbearable witness — at once relishing the voyeurism of seeing and the exhibitionism of being seen to see.

The knowledge-centricity and policy motivation of soft law provide parallels with the crisis of Indigenous knowledge extraction in the academy — offering as much equivalent condemnation as they do a path out of the entrenched cycle of examination and re-examination. Critical Indigenous research methodologies are as varied as the groups and the individuals using them, but emerge from the common premise that research methodologies should be informed by Indigenous ways of knowing, being and doing.<sup>50</sup> These priorities

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<sup>46</sup> Barry Hindess, 'Unintended Rhetoric: The "Little Children Are Sacred" Report' in John Uhr and Ryan Walter (eds), *Studies in Australian Political Rhetoric* (ANU Press, 2014) 85; John Howard, 'To Stabilise and Protect: Little Children Are Sacred' (2007) 19(3) *The Sydney Papers* 68.

<sup>47</sup> Alison Vivian and Ben Schokman, 'The Northern Territory Intervention and the Fabrication of Special Measures' (2009) 13 *Australian Indigenous Law Review* 78; Peter O'Mara, 'Health Impacts of the Northern Territory Intervention' (2010) 192(10) *Medical Journal of Australia* 546.

<sup>48</sup> See, eg, Miranda Devine, 'Sympathy for Teenage Delinquent Is Misplaced', *Daily Telegraph* (Sydney), 13 December 2016.

<sup>49</sup> See, eg, Amos Aikman, 'Dylan Voller Escapes Cross-Examination at Royal Commission', *The Australian* (Darwin), 9 December 2016.

<sup>50</sup> Lester-Irabinna Rigney, 'Internationalization of an Indigenous Anticolonial Cultural Critique of Research Methodologies: A Guide to Indigenous Research Methodology and Its Principles' (1999) 14(2) *Wicazo Sa Review* 109 ('Rigney (1999)').



emerge in response to both exploitation through the academy, and the relegation of Indigenous epistemologies to the 'primitive'.<sup>51</sup>

The criticism of settler scholarship as inherently extractive and exploitative has failed to infiltrate the conversation around government inquiries and soft law. Yet the similarities are compelling. Settler scholarship is criticised for building capital (social and fiscal) from communities without reciprocity and while replicating work they can do for themselves while retaining that wealth.<sup>52</sup> Soft law is comparatively lucrative, and similarly diverts Indigenous resources from their communities. RCIADIC was criticised for insufficient community governance in its architecture, and especially for marginalising the interests of Indigenous women as it designed its inquiry.<sup>53</sup> Even the recent RCNT, forged in an era where Indigenous methodologies and consultation are on the civic agenda, cost around \$70 million,<sup>54</sup> without implementation costs. Reforms recently announced (including a \$71 million budget to replace the detention centres the NTRC concluded people should be prevented from using and a new \$66.9 million police IT system) total \$229 million, but will likely go funded.<sup>55</sup> Just \$8.9 million is hypothetically allocated to 'empower community-led reform'.<sup>56</sup> Meanwhile, the Northern Territory government diverted some \$2 billion earmarked for Indigenous-specific programs into its own government funds.<sup>57</sup>

Just as settler scholarship often fails to translate itself into real-world or cognisable impacts for Indigenous communities, soft law is rarely followed up with monitoring budgets or mechanisms. RCIADIC monitoring, for instance, appears to be funded by Australian

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<sup>51</sup> Martin Nakata, *Disciplining the Savages, Savaging the Disciplines* (Aboriginal Studies Press, 2007) 182.

<sup>52</sup> See, Judy Putt, 'Conducting Research with Indigenous People and Communities' (2013) 15 *Indigenous Justice Clearinghouse Briefs* 1; Juanita Sherwood et al, 'Who Are the Experts Here?: Recognition of Aboriginal Women and Community Workers in Research and Beyond' (2015) 11(2) *AlterNative: An International Journal of Indigenous Peoples* 177 (Sherwood et al (2015)).

<sup>53</sup> Elena Marchetti, 'Critical Reflections upon Australia's Royal Commission into Aboriginal Deaths in Custody' (2005) 5 *Macquarie Law Journal* 103.

<sup>54</sup> Tom Maddocks, 'Royal Commission into Child Detention and Protection Costs NT Government More than \$40 Million', *ABC News* (Darwin), 28 November 2017.

<sup>55</sup> Nakari Thorpe, 'NT Government Pledges Historic \$229m to Overhaul Youth Justice System', *NITV News* (Darwin), 20 April 2018.

<sup>56</sup> *Ibid.*

<sup>57</sup> Helen Davidson, '\$500m Meant for Indigenous Services Was Spent Elsewhere by NT Government', *The Guardian* (Darwin), 11 January 2018; Stephen Fitzpatrick, 'Northern Territory Cash Shuffle Sees \$2bn Taken from Indigenous Aid', *The Australian* (Darwin), 28 February 2018.

human rights organisations for the decade after the Royal Commission,<sup>58</sup> but is now being taken up by meagrely-funded grassroots Indigenous activists and better-funded international NGOs<sup>59</sup> who already knew the perils RCIADIC uncovered. The knowledge and policy produced by soft law, then, inhabits a temporal space that seems to implicitly acknowledge that they are unenforceable and so go unenforced: building a grey market for literature explaining how.

Equally, some critical Indigenous scholars accuse the constructive benevolence of settler scholars and lawmakers of distracting from substantive reform or of conveying the appearance of a ‘virtuous racial state’.<sup>60</sup> RCNT was announced some hours after the footage of Mr V was broadcast across Australia.<sup>61</sup> The announcement almost soothed the moral crisis presented by the revelation that some eight boys were gassed in their cells. Indeed, the Northern Territory government had known of the incident since it had occurred, and the Northern Territory Children’s Commissioner issued a ninety-page report which was widely reported on months earlier.<sup>62</sup>

Perhaps most crucially, those Indigenous people before soft law commissions criticise their lack of reciprocity, even outside of the promised exchange of knowledge for reform. Stephanie Gilbert, a scholar on the embodiment of Indigeneity, was a participant in the *Bringing Them Home Report* as a member of the Stolen Generations.<sup>63</sup> Gilbert wanted to give an ‘unedited narrative’ as ‘a means of recording my previously unrecorded story.’<sup>64</sup> When

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<sup>58</sup> David McDonald, ‘The Monitoring of Australian Deaths in Custody: Some Contemporary Issues’ (1994) 6 *Current Issues Crim. Just.* 76.

<sup>59</sup> Melissa Sweet, ‘New Report Reveals Litany of Failures by Governments in Response to Royal Commission into Aboriginal Deaths in Custody’, *Croakey* (Sydney), 14 April 2016; Amnesty International and Clayton Utz, ‘Review of the Implementation of RCIADIC’ (May 2015).

<sup>60</sup> Aileen Moreton-Robinson, ‘Virtuous Racial States’ (2011) 20(3) *Griffith Law Review* 641; Megan Davis, ‘Chained to the Past: The Terra Nullius of Australia’s Public Institutions’ in Tom Campbell, Jeffrey Goldworthy and Adrienne Stone (eds), *Protecting Rights Without a Bill of Rights: Institutional Performance and Reform in Australia* (Routledge, 2017) (‘Campbell et al (2017)’) 185; Megan Davis, ‘A Culture of Disrespect: Indigenous Peoples and Australian Public Institutions’ [2006] 8 *UTS Law Review* 135.

<sup>61</sup> Northern Territory Government, ‘Royal Commission Established’ (Press Release, 28 July 2016).

<sup>62</sup> Billias (2016); Office Children’s Commissioner, Northern Territory Government, *Own Initiative Investigation Final Report — Services Provided by the Northern Territory Department of Correctional Services to Don Dale Youth Detention Centre and Alice Springs Youth Detention Centre* (August 2016).

<sup>63</sup> Stephanie Gilbert, ‘“Telling It How It Was”: For What?’ (2016) 5 *Ngija: Talk the Law* 100.

<sup>64</sup> Ibid 101, 110.

she returned to the archives of such narratives that were created by the *Bringing Them Home Report* as a doctoral scholar, she found stories like hers, and even records of her own story, inaccessible to her — gatekept by an archival body suddenly concerned with privacy, copyright, *sub judice* contempt, and defamation in the otherwise-public inquiry. Using her own experience as a case study, Gilbert remarked:

Indigenous methodologies [value] Indigenous people as knowledge holders and [as] self-determin[ing] ... not so much the other concerns that a dominant society wants prioritised ... people gave testimonials rather than legally testable 'evidence' ... We hope they will ... strengthen the families and the communities.<sup>65</sup>

What, then, can soft law do? The answer is, again, found in critical Indigenous research methodologies. These mandate cultural specificity in methodological approach;<sup>66</sup> ensuring communities set the agendas of the inquiry;<sup>67</sup> and the maintenance of relationships through and around research.<sup>68</sup> Those relationships require that Indigenous communities, far from transacting on our own tragedies, get *something* from the development of knowledge about us.<sup>69</sup> For a start, that something is data sovereignty, where Indigenous communities act through researchers with control over their own data, rather than acting as researched

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<sup>65</sup> Ibid 108.

<sup>66</sup> See Moreton-Robinson (1998) and Moreton-Robinson (2013); N Martin Nakata et al, 'Decolonial Goals and Pedagogies for Indigenous Studies' (2012) 1(1) *Decolonization: Indigeneity, Education and Society* 120; Ruth Panelli and Gail Tipa, 'Placing Well-Being: A Maori Case Study of Cultural and Environmental Specificity' (2007) 4(4) *EcoHealth* 445; Gawaian Bodkin-Andrews et al, 'Mudjil'dya'djurali Dabuwa'Wurrata (How the White Waratah Became Red): D'harawal Storytelling and Welcome to Country "controversies"' (2016) 12 *AlterNative: An International Journal of Indigenous Peoples* 480.

<sup>67</sup> Steve Hemming et al, 'Speaking as Country: A Ngarrindjeri Methodology of Transformative Engagement' (2016) 5 *Ngija: Talk the Law* 22 ('Hemming et al (2016)').

<sup>68</sup> Alison Vivian et al, 'Implementing a Project within the Indigenous Research Paradigm: The Example of Nation-Building Research' (2016) 5 *Ngija: Talk the Law* 47 ('Vivian et al (2016)'); Alison Vivian, Amanda Porter and Larissa Behrendt, 'Reflections on the Rates of Crime Project' (2016) 5 *Ngija: Talk the Law* 75 ('Vivian, Porter and Behrendt (2016)').

<sup>69</sup> Mike Evans et al, 'Common Insights, Differing Methodologies: Toward a Fusion of Indigenous Methodologies, Participatory Action Research, and White Studies in an Urban Aboriginal Research Agenda' (2009) 15(5) *Qualitative Inquiry* 893; Rhonda Koster, Kirstine Baccar and R Harvey Lemelin, 'Moving from Research ON, to Research WITH and FOR Indigenous Communities: A Critical Reflection on Community-Based Participatory Research' (2012) 56(2) *The Canadian Geographer / Le Géographe canadien* 195; Anne Markiewicz, 'Closing the Gap through Respect, Relevance, Reciprocity and Responsibility: Issues in the Evaluation of Programs for Indigenous Communities in Australia' (2012) 12(1) *Evaluation Journal of Australasia* 19; Vivian et al (2016).

subjects. Data sovereignty is a critical Indigenous response to the ethics of data collection as a way of refining the targets of law,<sup>70</sup> the perils of which preoccupied Indigenous peoples long before its mainstream digital watershed. Just Reinvest Bourke, for instance, has built a whole Indigenous governance architecture around its data collection in the criminal justice system, to directly shape to what questions and reform ends that the data is put.<sup>71</sup>

To this end, soft law might be better implemented as a standing Indigenous body of inquiry that can be proactive and set its own agenda, rather than reactive to crises. Models abroad, like the Truth and Reconciliation Commissions of both South Africa and Canada,<sup>72</sup> have demonstrated some (albeit imperfect) potential for generative knowledge as a legal tool by opening on the premise of Indigenous agenda-setting and resolution. Without Indigenous leadership and Indigenous epistemologies, including reconsidering or fusing Western standards of both good data and good law,<sup>73</sup> however, such inquiries are likely to fall into the same patterns of creating Indigenous subjects of ‘disadvantage’, rather than doing the crucial work of interrogating colonial relations. This latter transformative agenda is present in the minds of many as the *Uluru Statement from the Heart*<sup>74</sup> urges for a Makkarata

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<sup>70</sup> Jack Latimore, ‘Indigenous Data Sovereignty: More than Scholarship, It’s a Movement’, *Croakey* (Sydney), 29 October 2017.

<sup>71</sup> Michaela Whitbourn, ‘Just Reinvest NSW: Program to Tackle Indigenous over-Representation in Jail Could Be a “Game Changer”’, *The Sydney Morning Herald* (Sydney), 4 February 2015; Just Reinvest NSW Inc, ‘Maranguka: Justice Reinvestment for Aboriginal Young People’ (presented at the Race and Incarceration Conference, United States Studies Centre, March 2017) (‘Just Reinvest NSW Inc (2017)’).

<sup>72</sup> Jennifer J Llewellyn and Robert Howse, ‘Institutions for Restorative Justice: The South African Truth and Reconciliation Commission’ (1999) 49(3) *The University of Toronto Law Journal* 355; Jeff Corntassel and Cindy Holder, ‘Who’s Sorry Now? Government Apologies, Truth Commissions, and Indigenous Self-Determination in Australia, Canada, Guatemala, and Peru’ (2008) 9(4) *Human Rights Review* 465.

<sup>73</sup> Moreton-Robinson (1998) and Moreton-Robinson (2013); Rigney (1999); Alison Whittaker, ‘Observing Aboriginality, Aboriginality Observing: Epistemic and Methodological Paths to an Indigenous Student Jurisprudence from Within’ (2016) 5 *Ngŋya: Talk the Law* 1 (‘Whittaker (2016)’).

<sup>74</sup> Australian Referendum Council, ‘Uluru Statement from the Heart’ (Indigenous National Constitutional Convention, 2017).

Commission<sup>75</sup> alongside constitutional reforms affording Indigenous Australians a formal political voice.<sup>76</sup>

Conceding that such a Commission is likely far on our horizon, we are faced with the inevitability of more colonial crises that will produce more forums of Indigenous-focussed soft law. For those future, reactive inquiries, reciprocal gestures can include — embedding knowledge translation for the community into the inquiry;<sup>77</sup> allocating an implementation budget that works towards long-term and localized capacity-building;<sup>78</sup> adjusting research to meet the questions being asked on the ground by Indigenous communities;<sup>79</sup> and providing resources and social capital for existing measures as expertise and Indigenous knowledge-holders as experts.<sup>80</sup> Part of respecting Indigenous peoples as knowledge-holders, too, is shifting their empirical treatment from data to co-researcher, from reform object to change-maker.<sup>81</sup> Data-centricity treats Indigenous knowledge as raw experience, incapable of itself being subject to a system of internal logics and intelligence-development. It ‘alienates Indigenous expertise and devalues Indigenous intellectual authority’.<sup>82</sup>

Structural ways researchers have incorporated knowledge-based approaches into their process and final product include — reciprocating Indigenous knowledge-holders as co-researchers with actual funds or resources,<sup>83</sup> involving Indigenous participants in

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<sup>75</sup> *Makkarata* is a Yolngu word describing a conciliation or a peaceful resolution process; see also, Melissa Lucashenko, ‘Time to Mention the War’ (2018) 59 *Griffith Review* 13; Claudianna Blanco, ‘Uluru Forum to Pursue Makarrata Instead of Symbolic Recognition’, *NITV News* (Alice Springs), 26 May 2017.

<sup>76</sup> Megan Davis, ‘Indigenous Rights and the Constitution: Making the Case for Constitutional Reform’ (2008) 7 *Indigenous Law Bulletin* 6; Megan Davis, ‘Human Rights Strategies’ in Campbell et al (2017).

<sup>77</sup> See, eg, Janet Smylie, Nili Kaplan-Myrth and Kelly McShane, ‘Indigenous Knowledge Translation: Baseline Findings in a Qualitative Study of the Pathways of Health Knowledge in Three Indigenous Communities in Canada’ (2009) 10(3) *Health Promotion Practice* 436; Hemming et al, above n 67.

<sup>78</sup> Hemming et al (2016); Vivian et al (2016); Michelle Chino and Lemyra DeBruyn, ‘Building True Capacity: Indigenous Models for Indigenous Communities’ (2006) 96(4) *American Journal of Public Health* 596.

<sup>79</sup> See, eg, Vivian, Porter and Behrendt (2016); Just Reinvest NSW Inc (2017).

<sup>80</sup> Hemming et al (2016); Sherwood et al (2015).

<sup>81</sup> Eve Tuck, ‘Re-Visioning Action: Participatory Action Research and Indigenous Theories of Change’ (2009) 41(1) *The Urban Review* 47.

<sup>82</sup> Hemming et al (2016), 40.

<sup>83</sup> Sherwood et al (2015).

methodological development and data interpretation,<sup>84</sup> and leaving space to develop culturally-relevant independent theory by appointing Indigenous commissioners of inquiry.<sup>85</sup> This does not necessitate that all Indigenous-produced knowledge be thought of as inherently authentic or authoritative,<sup>86</sup> but instead that soft law institutions prioritise the enrichment of conceptual and scientific understanding for both Indigenous and non-Indigenous participants ... understanding of where cross-cultural philosophical synergies lie<sup>87</sup> and to translate that into governance and transformations of power.

Soft law, like the academy, so long as it views itself as empirically distinct from its Indigenous subject matter, can never be responsible for or reciprocal to it. As Indigenous peoples, we do not only make a decolonial or moral claim to these jurisdictions when they touch our lives, but a robust empirical one. If these inquiries, like so few spaces in Indigenous-focussed law, truly ‘do what they say’<sup>88</sup> when they say they seek justice for us — they will say nothing. Instead, soft law can transform its extractive witnessing, through deferring to critical Indigenous research methodologies, into a space of self-determination that was long-promised us and is just now burgeoning in the academy. Transforming data into knowledge into reform, all at the behest of Indigenous communities, is one tangible way the entire economy of knowing the Indigene can be radically transformed to fiscally, ideologically, epistemically and legally benefit us.

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<sup>84</sup> See, eg, developing arts-based methods of data analysis and theorizing: Jessa Rogers, ‘Photoyarn: Aboriginal and Maori Girls’ Researching Contemporary Boarding School Experiences’ [2017] (1) *Australian Aboriginal Studies* 3.

<sup>85</sup> Karen Martin and Booran Mirraboopa, ‘Ways of Knowing, Being and Doing: A Theoretical Framework and Methods for Indigenous and Indigenist Re-search’ (2003) 27(76) *Journal of Australian Studies* 203; Dawn Bessarab and Bridget Ng’andu, ‘Yarning About Yarning as a Legitimate Method in Indigenous Research’ (2010) 3(1) *International Journal of Critical Indigenous Studies* 37.

<sup>86</sup> I have previously argued that there are ‘two perceptions of Aboriginal scholarship—the “authentic” Aboriginal scholar, who is drawn from a set of colonially-perceived (and condescending) values of what Aboriginality is, does, and is capable of doing; and the authoritative Aboriginal scholar, who is drawn from the institutional authority of the academy and works strictly within its values’: Whittaker (2016) 6–7.

<sup>87</sup> Hemming et al (2016), 46.

<sup>88</sup> Sarah Keenan, ‘A Blue Wristband View of History: The Death of Mulrunji Doomadgee and the Illusion of Postcolonial Australia’ (2009) 34 *Alternative Law Journal* 248; Sarah Keenan, ‘Moments of Decolonization: Indigenous Australia in the Here and Now Special Issue: Law and Decolonization’ (2014) 29 *Canadian Journal of Law & Society* 163.



## An Interview with Dr Anthony Hopkins\*

### Editors

*Thank you for speaking with us today. In brief, what is individualised justice and why is it particularly important for Indigenous offenders?*

Individualised justice in sentencing involves taking account of all the circumstances of the offence and of the offender to ensure that a sentence is just and appropriate in the individual circumstances of the case. These individual circumstances must be related to the purposes of punishment, such as retribution, community protection, deterrence and rehabilitation.

Individualised justice is really an outworking of the principle of equality, requiring like cases be treated alike and unlike cases be treated differently. It recognises that the circumstances of offences and offenders can vary in infinite and material ways that will be relevant in sentencing. For instance, if two offenders commit virtually identical burglaries to support their drug addictions, but one has been accepted into a residential rehabilitation program and the other has not, the difference between their prospects of rehabilitation will need to be considered. Sadly, the offender without access to residential rehabilitation will have lower prospects of rehabilitation, and protection of the community by way of imprisonment may be required.

By its very nature, individualised justice is no more important for one offender than another. However, both historically and in the present, mainstream sentencing courts have generally not been very good at understanding and taking into account the experience of Indigenous offenders. We know the tragic statistics of custodial over-representation and significant disadvantage experienced by many within our Indigenous communities. We are beginning to understand the extent of intergenerational trauma that is a consequence of colonisation, dispossession, child

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\* Dr Anthony Hopkins is a Senior Lecturer at the Australian National University. This is a revised version of an interview conducted by Julius Moller on 29 August 2018.



removal and community fragmentation. And yet, the link between the experience of an offender and the experience of their people is rarely explored or considered in sentencing. Further, where it is, there is often a tendency to treat Indigeneity as synonymous with disadvantage and risk, thereby dismissing the potential to draw upon the strengths within the Indigenous community that may enable rehabilitation and reform. This goes with a relative absence of Indigenous-specific rehabilitation and healing programs. Moves to require sentencing courts pay particular attention to Indigenous experience must be understood as correcting a failure to pay sufficient attention to that experience, a failure that amounts to a denial of equality before the law.

*While Australian courts have discretion to consider Indigenous background factors in sentencing, this mostly turns on submissions and reports tendered in court. What can be done to provide a wider range of information relevant to Indigeneity throughout the court process?*

Australian sentencing courts have the discretion to consider material facts that exist by reason of an offender's experience as an Indigenous person, so long as they are put before the court in evidence and/or submissions. Mainstream sentencing courts do not typically have capacity to investigate the experience of offenders; that responsibility rests with increasingly under-resourced Legal Aid and Aboriginal and Torres Strait Islander Legal Services. These services are generally unable to fund the preparation of reports and to otherwise present significant evidence relating to an offender's experience as an Indigenous person. The result is often silence when it comes to background and systemic factors that may be crucial to understanding an Indigenous person's pathway to offending, and silence with respect to the potential Indigenous-specific pathways to desistance.

One potential solution is to provide a specific mechanism to facilitate the introduction of evidence concerning Indigenous experience into sentencing courts. Based upon experience in Canada, the Australian Law Reform Commission (ALRC) in its *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait*

*Islander Peoples Report*<sup>1</sup> has recommended the introduction of ‘Indigenous Experience Reports’ (Recommendation 6-2).<sup>2</sup> Care needs to be taken to ensure that these reports do not become glorified risk assessments or conform to a deficit model of Indigeneity. Central to avoiding this is insistence that such reports be written by, or in close collaboration with, Indigenous authors who are not employed by State and Territory correctional services. The Australian Capital Territory has committed itself to a trial of Indigenous Experience Pre-Sentence Reports, though final details of, and commencement date for, this trial are not known.<sup>3</sup>

Another critically important approach to increasing engagement with Indigenous experience in sentencing is to involve elders and respected Indigenous community members directly in the sentencing process through the establishment of Indigenous specific sentencing courts, or sentencing advisory groups (see *Pathways to Justice Report* Recommendation 6-3).<sup>4</sup> To date the vast majority of Indigenous offenders do not have access to these alternative sentencing processes.

*How successful has consideration of Indigeneity been in other jurisdictions, and what can we learn from the overseas experience?*

It is no simple matter to measure the success of efforts to ensure that Indigenous experience is considered in sentencing in other jurisdictions. It is notoriously difficult to establish a reduction in recidivism as a consequence of the introduction of an alternative sentencing process or evidence gathering tool. I will leave that discussion to the criminologists.

However, one thing is clear: it is impossible to seek solutions, and support offenders to desist from offending, if the causes of offending are not understood and taken into account. Understanding and giving voice to Indigenous experience in sentencing

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<sup>1</sup> Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Report No 133 (2017) (*‘Pathways to Justice Report’*).

<sup>2</sup> Ibid 14.

<sup>3</sup> See Recommendations 20 – 22 of the Legislative Assembly for the Australian Capital Territory, *Government Response to the Standing Committee on Justice and Community Safety’s Report on the Inquiry Into Sentencing* (2016) 13-4.

<sup>4</sup> *Pathways to Justice Report* 14.

is therefore a necessary but not sufficient condition for success. This understanding must go hand in hand with Indigenous specific programs for healing, rehabilitation and reform, run by or in close partnership with Indigenous communities.

With this caveat, perhaps the best measure of success is the extent to which sentencing remarks, where published, indicate a deeper and more nuanced understanding of Indigenous experience, including the extent to which they acknowledge the strengths inherent in Indigeneity. A reading of Canadian sentencing remarks suggests that where Indigenous Experience Reports (called 'Gladue Reports' in Canada after a seminal case of the same name) have been made available to sentencing judges, the silence is lifted and understanding is increased.

*In Bugmy v The Queen*,<sup>5</sup> the High Court of Australia refused to recognise the relevance of the broader Indigenous experience to sentencing. Should this reform of the sentencing process instead come from the legislature?

In *Bugmy* at [39] the High Court affirmed the principle stated by Brennan J in *Neal v The Queen*<sup>6</sup> that 'courts are bound to take into account ... all material facts including those facts which exist only by reason of the offender's membership of an ethnic or other group'.<sup>7</sup> This enables an offender's experience as an Indigenous person to be taken into account where there is an evidential foundation for this.<sup>8</sup> However, the Court refused to endorse a requirement that sentencing courts pay particular attention to Indigenous experience in sentencing,<sup>9</sup> raising the spectre that if such a provision was to be enacted, it might breach the *Racial Discrimination Act 1975* (Cth).<sup>10</sup>

Arguably, the decision fails to recognise that a requirement to pay particular attention rests upon the principle of equality. It recognises that to date, insufficient attention

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<sup>5</sup> (2013) 249 CLR 571 ('*Bugmy*').

<sup>6</sup> (1982) 149 CLR 305 ('*Neal*').

<sup>7</sup> *Neal* at 326.

<sup>8</sup> *Bugmy* at [41].

<sup>9</sup> *Bugmy* at [36].

<sup>10</sup> See *Bugmy*, footnote 55.

has been paid to Indigenous experience, which amounts to a denial of equality and a failure of individualised justice.<sup>11</sup>

As matters stand, establishing a sentencing principle that requires courts to pay particular attention to Indigenous experience will require legislative action, with a clear intention to rectify an existing failure to take proper account of that experience. Such a legislative provision has been recommended by the ALRC (see *Pathways to Justice Report* Recommendation 6-1).<sup>12</sup> Experience in Canada shows that such a provision would be insufficient without a mechanism to introduce evidence of an offender's experience as an Indigenous person into the sentencing proceeding. Such a mechanism could be introduced through legislation, but it could also be introduced by executive decision, backed by funding to enable, for example, the preparation of Indigenous experience pre-sentence reports.

However, to reiterate a point already made, bringing a deeper engagement and understanding of Indigenous experience into the sentencing process is just the foundation for enabling healing, rehabilitation and reform. It is essential that State and Territory governments enter true partnerships with their Indigenous communities to enable the promise of understanding to be realised through Indigenous specific programs.

*Dr Hopkins, thank you for providing us with an insight into Indigeneity and the sentencing process, and the important role that individualised justice can play in delivering better outcomes. I have no doubt that this will be food for thought for our readers.*

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<sup>11</sup> For an analysis of this point, and comparison with Canadian jurisprudence, see Thalia Anthony, Lorana Bartels and Anthony Hopkins, 'Lessons Lost in Sentencing: Welding Individualised Justice to Indigenous Justice' (2015) 39(1) Melbourne University Law Review 47.

<sup>12</sup> *Pathways to Justice Report* 14.



## From ‘Land-Related Agreements’ to ‘Comprehensive Settlements’ to ‘Domestic Treaties’: An Inevitable Progression?

Dr Bryan Keon-Cohen AM QC\*

### I INTRODUCTION

Since 1994, the native title regime has delivered significant land and associated outcomes to many Indigenous communities and severely frustrated many others. This experience has triggered a search for alternative ways of achieving land justice.<sup>1</sup> Amongst several recent initiatives I discuss below two only: first, a negotiation-focused scheme in Victoria pursuant to the *Traditional Owner Settlement Act 2010* (Vic) (*TOS Act*); and second, regional native title claims in Western Australia and Queensland where notions of ‘comprehensive settlements’ or ‘treaties’ are discussed.

Layered on top of this complex ‘land rights’ mix is continuing agitation – reaching back at least forty years<sup>2</sup> – for the execution of one national treaty or several state-based treaties, itself part of a national discussion about the Constitutional recognition of Indigenous peoples. These proposed treaties, in turn, provide both another avenue for traditional owners to secure access to and control of land, and are themselves also significantly advanced by the existence of the ‘Indigenous Estate’ located throughout Australia and extensive experience with negotiating land-related agreements.

These agreements – especially under the *Native Title Act 1993* (Cth) (*NT Act*) and the Victorian *TOS Act* – are, of their nature, concerned mainly with access to, use of, and making decisions about, land. They were not conceived as, and do not qualify as, ‘treaties’

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<sup>1</sup> For a recent review, see B A Keon-Cohen, ‘From Euphoria to Extinguishment to Co-existence?’ (2017) 23 *JCULR* 9 (‘Keon-Cohen (2017)’).

<sup>2</sup> See S. Harris, *It’s Coming Yet: An Aboriginal Treaty Within Australia Between Australians* (Aboriginal Treaty Committee, 1979); Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Two Hundred Years Later: Report on the feasibility of a compact or Makarrata between the Commonwealth and Aboriginal People* (1983).

as that concept is generally understood. However, the concept and reality of a 'treaty', like 'sovereignty', is fluid, especially in a federation such as Australia. Since 1901, our federation, like that in the USA and Canada, has divided powers of government between, on the one hand, the Commonwealth, States and Territories, and on the other, the legislature, judiciary and executive branches. But unlike those other former British colonies, 'domestic dependent nations' found in the USA<sup>3</sup> or territories in Canada where Indigenous groups enjoy delegated legislative powers<sup>4</sup> have not, so far, been accepted in Australia. However, I agree with constitutional writers that at least one 'domestic treaty' – the Noongar settlement in Western Australia, discussed below – is already in place.

This article seeks to explore how these three threads – the expanding Indigenous Estate, associated agreements or comprehensive settlements now in place or being pursued, and treaty talk associated with constitutional recognition – lead to the next step: entering into what I here designate 'domestic treaties' affording a degree of self-government or sovereignty to Indigenous polities. I suggest that, as evidenced by the recently executed Noongar settlement, the progression from statutory land regimes to land-focused agreements to comprehensive settlements or treaties incorporating powers of self-government and government-to-government relations are desirable, if not inevitable, steps likely to lead to better outcomes for all involved.

## II STATUTORY LAND TENURE REGIMES

In Australia since the 1960s, the States<sup>5</sup> (pioneered by the Dunstan Labor government in South Australia)<sup>6</sup> and the Commonwealth<sup>7</sup> have enacted statutory land tenure regimes

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<sup>3</sup> *Cherokee Nation v State of Georgia* (1831) 5 Pet 1; *Worcester v Georgia* (1832) 6 Pet 515.

<sup>4</sup> See *James Bay and Northern Quebec Agreement* (1975) s 9; *Cree-Naskapi (of Quebec) Act* (1984) establishing the Cree Regional Authority and the Inuit Makivik Corporation.

<sup>5</sup> See, for major schemes only: Victoria – *Aboriginal Land Rights Act 1970* (Vic) under which freehold title to the Framlingham and Lake Tyers reserves was transferred to Aboriginal Trusts; NSW – *Aboriginal Land Rights Act 1983* (NSW); *National Parks and Wildlife Amendment (Aboriginal Ownership) Act 1999* (NSW); Queensland – *Aboriginal Land Act 1991* (Qld); *Torres Strait Islander Land Act 1991* (Qld); *Aboriginal and Torres Strait Islander Land (Providing Freehold) Amendment Act 2014* (Qld); Tasmania and Western Australia have no such scheme, but see *Aboriginal Lands Act 1995* (Tas).

<sup>6</sup> See *Aboriginal Lands Trust Act 2013* (SA), first enacted in 1966.

<sup>7</sup> See especially for Northern Territory – *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth); ACT – *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth) which allows for the grant of inalienable freehold title in the Jervis Bay Territory to the Wreck Bay Aboriginal Community

vesting a variety of rights in Crown land (sometimes former ‘Reserves’)<sup>8</sup> for the benefit of Indigenous communities. In 1992, the High Court in *Mabo v Queensland (No 2)*<sup>9</sup> (‘*Mabo*’) added an entirely new principle to this statutory cocktail: that the Australian common law recognized, subject to proof, enforceable property rights based on Indigenous custom and tradition. This, in turn, led to two additional nation-wide statutory land tenure regimes enacted by the Commonwealth: the *Native Title Act 1993* (Cth) (discussed below), which commenced operation on 1 January 1994; and the Indigenous Land Corporation (‘ILC’), established in 1995 with the task of purchasing land for Indigenous groups on the open market.<sup>10</sup>

These initiatives have led to what might now be described as a steadily expanding ‘Indigenous Estate’ located across the continent and over adjacent seas. The pre-*Mabo* schemes delivered a wide variety of titles, rights and interests to traditional owners: for example, from inalienable fee simple title granted to Aboriginal Land Trusts (Northern Territory) to very little entitlements (eg Crown land declared a ‘reserve for the use and benefit of Islanders’).<sup>11</sup> Ignoring, for the moment, the native title contribution since 1994, this ‘estate’ is extensive. For example, as at December 2017 approximately 50% of the Northern Territory’s land, and 85% of the Territory’s coastline, has been granted as Aboriginal freehold to traditional owners.<sup>12</sup> Likewise, in South Australia, the *Anangu*

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Council; Queensland – *Aboriginal and Torres Strait Islanders (Queensland Reserves and Communities Self-Management) Act 1978* (Qld); Victoria – *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* (Vic).

<sup>8</sup> See, eg, Aboriginal or Islander reserves, pursuant to declarations made under the *Land Act 1910* (Qld). See also *Aboriginal Affairs Planning Authority Act 1972* (WA).

<sup>9</sup> (1992) 175 CLR 1. For a detailed account of the litigation, see B A Keon-Cohen, *A Mabo Memoir: Island Kustom to Native Title* (Zemvic Press, 2013).

<sup>10</sup> See also the Land Fund (now labelled the Land Account) established in 1994 to support the ILC. These entities now operate under the *Aboriginal and Torres Strait Islanders Act 2005* (Cth) s 191A(1), previously called the *Aboriginal and Torres Strait Islanders Commission Act 1989* (Cth). For a recent account of the ILC’s land purchases, see Keon-Cohen (2017) 17-9.

<sup>11</sup> See many reserves set aside since 1901 under various state Land Acts (eg *Land Act 1910* (Qld)), and amended versions, still in force.

<sup>12</sup> See Northern Land Council, Commonwealth of Australia, *Annual Report 2016-17* (2017). A large proportion of the remaining Territory land mass is subject to native title determinations, or is under claim. This statistic excludes other forms of Aboriginal land interests (eg special purpose leases, pastoral leases, crown lands, and community living areas excised from pastoral leases). See K Howey, “‘Normalising’ What? A Qualitative Analysis of Aboriginal Land Tenure Reform In The Northern Territory” (2015) 18(1) *AILR* 4.



*Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA) grants inalienable freehold title over 103,000 km<sup>2</sup> in the north-west corner of the state, as does the *Maralinga Tjarutja Land Rights Act 1984* (SA) to a similar-sized area in the west.

### III NATIVE TITLE 1994 – 2018

Much has been achieved – and much left undone – in the native title arena since the coming into force of the *NT Act* on 1 January 1994. The *NT Act*, following many rulings on precisely what critical provisions mean – especially the definition of native title found at s 223(1) – is now more accepted by governments, miners, and other land users as ‘part of the landscape’ than was the case during its first decade. Here, I focus only upon additions to the Indigenous Estate through successful determinations of native title and associated agreement-making.

#### A Determinations

As at 1 May 2018, 423 native title determinations have been made by the Federal Court. Of these, native title was found to exist in all or part of the determination area in 354 cases, with no native title found in 69 claims.<sup>13</sup> The increasing percentage of Australian land and islands involved is instructive when considering treaty prospects. As at 31 March 2018, 34%,<sup>14</sup> totaling 2,626,521 km<sup>2</sup> of Australia’s land mass, was subject to native title determinations, up from 8% as at 30 June 2005.<sup>15</sup> Almost half of the recognized native title land is located in Western Australia: 1,331,368 km<sup>2</sup>, or 51.6% of that state. Over 64% of that is exclusive possession land, by far the largest proportion of any jurisdiction.<sup>16</sup> In South

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<sup>13</sup> See National Native Title Register, *Statistics* (10 September 2018) National Native Title Tribunal <<http://www.nntt.gov.au/pages/statistics.aspx>> (*NNTT Statistics*).

<sup>14</sup> Ibid. The percentages of Australia’s land mass subject to native title determinations as at 30 June 2010 and 30 June 2015 were 12% and 30% respectively.

<sup>15</sup> Ibid and personal communication to the National Native Title Tribunal, dated 1 June 2018. This area exceeds the combined areas of the UK, Ireland, the Netherlands, Germany, Belgium, France, Spain, Portugal, Italy and Austria. An additional 76,693 km<sup>2</sup> of seas are also determined native title areas.

<sup>16</sup> *NNTT Statistics*.

Australia as at 31 December 2017, 56% of the state or 531,331 km<sup>2</sup> was subject to determined native title.<sup>17</sup>

Of the above determinations, 334 were reached by consent (usually after lengthy and often debilitating negotiations); 48 were litigated; and 41 were unopposed.<sup>18</sup> As of May 2018, 287 further applications for a determination of native title, plus six claiming compensation for loss of native title had been presented to the National Native Title Tribunal ('NNTT') with 198 accepted and registered.<sup>19</sup>

After 24 years, these achievements are to be welcomed. However, the various determinations deliver not one holistic concept of land with (perhaps) implied rights of management and control (aka self-government), but a 'bundle' of various land-related rights and interests<sup>20</sup> depending upon the evidence before, and rulings of, the Federal Court Judge involved. These limitations, built into the *NT Act* claims system, must be recalled when considering reaching agreements with governments and third parties concerning not only the land and/or seas in question, but also powers of self-government within our federal structure.

### B *Indigenous Land Use Agreements ('ILUAs')*

Of more importance, for treaty discussions, is the ILUA scheme, pursuant to the future act provisions of the *NT Act*.<sup>21</sup> These were introduced into the *NT Act* in 1998 as part of the Howard Government's 'Ten Point Plan', being a response to the High Court's decision in *Wik Peoples v Queensland*.<sup>22</sup> These ILUAs, unlike 's 31' agreements, will, in most cases, involve the relevant government party and thus open up opportunities for expanding negotiations

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<sup>17</sup> See National Native Title Tribunal, *25 years of Native Title recognition* (2017) National Native Title Tribunal <<http://www.nntt.gov.au/Documents/States%20and%20territories.pdf>>; see also *NNTT Statistics*.

<sup>18</sup> Several determinations, as of 14 May 2018, were described as 'not yet in effect': see *NNTT Statistics*.

<sup>19</sup> *Ibid*.

<sup>20</sup> See *Western Australia v Ward* (2002) 213 CLR 1. Here, the court rejected the view that communal native title could be equated with 'ownership' as known in western law.

<sup>21</sup> *NT Act* ss 24AA – 44G.

<sup>22</sup> (1996) 187 CLR 1.

into the self-government arena.<sup>23</sup> As at 31 March 2018 1,200 ILUAs had been negotiated and registered with the NNTT,<sup>24</sup> albeit often after a long struggle. These cover 2,321,741 km<sup>2</sup> or 30.2% of Australia's land mass.<sup>25</sup> As the name indicates, these agreements are mainly concerned with land use, not self-government. They regulate future activities on native title land and deliver a degree of management of those lands to those recognized by the Federal Court as traditional owners and, importantly, usually include financial and other benefits flowing to them. Many further 's 31' side agreements accompanying native title claims on particular issues, not necessarily involving the relevant government party, have also been concluded.<sup>26</sup>

These statistics concerned with achieving, and benefiting from, native title under the *NT Act* are impressive – though like all such figures, they hide a multitude of issues and problems. Of particular concern over many years are land management problems, especially the proper resourcing, up-skilling, role and functioning of Prescribed Bodies Corporate ('PBCs'), the entities that, as part of a determination, are required to hold (as trustee or agent) and manage land held under native title at the direction, and on behalf, of traditional owners.<sup>27</sup> By 31 March 2018 PBCs managed, on behalf of traditional owners, 2,539,414 km<sup>2</sup> of native title land across Australia – about 33% of the country – with a further 2,703,197 km<sup>2</sup> to be managed by PBCs yet to be established.<sup>28</sup> When issues of self-governance are added to the pile of issues on the negotiation table, being a crucial element in treaty discussions, these PBCs, their capacities and functions become even more important. They

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<sup>23</sup> When a 'Body Corporate' or 'Area' ILUA provides for extinguishment of native title, the relevant government must be a party; if extinguishment is not required, the relevant government 'may' be a party: see *NT Act* ss 24BD(2), 24CD(5) respectively. The relevant government must be a party in all 'Alternative Procedure' ILUAs: *NT Act* ss 24DE(1),(3).

<sup>24</sup> See *NNTT Statistics* and personal communication to the National Native Title Tribunal, dated 1 June 2018. A further 23 ILUAs were being processed for registration by the NNTT at that date.

<sup>25</sup> *NNTT Statistics*.

<sup>26</sup> They probably number many thousands and are usually commercial in confidence. See articles in M Langton et al (eds), *Honour Among Nations* (MUP, 2004) 173 – 250.

<sup>27</sup> *NT Act* ss 55 – 60AA. See also Deloitte Access Economics, *Review of the Roles and Functions of Native Title Organizations: Discussion Paper* (2013) and Deloitte Access Economics, *Final Review* (2014).

<sup>28</sup> See *NNTT Statistics* and personal communication to the National Native Title Tribunal, dated 1 June 2018.

are the obvious candidates to assume an ever-larger role with added attendant challenges, ie self-government functions.

### C Problems

Amongst many problems and frustrations in the native title scheme<sup>29</sup> is the often bitter experience of claimants unable to overcome the severe onus of proof concerning establishing ‘connection’ built into the definition of native title, exacerbated by High Court Decisions,<sup>30</sup> and the failure of governments to respond to many calls for substantial reform, including from the Australian Law Reform Commission (‘ALRC’).<sup>31</sup> The government’s neglect has caused many claimant groups to look elsewhere in search of some form of land justice – including treaty negotiation.

As at May 2018 discussions aimed at reforming the *NT Act* are proceeding – albeit at a snail’s pace – between the Attorney-General’s Department, Canberra, and the national peak body for Native Title Representative Bodies and Service Providers, and Territory Land Councils, the National Native Title Council.<sup>32</sup> None of this, to my knowledge, embraces notions of incorporating powers of self-government as such into agreement making under the *NT Act*.

## IV ALTERNATIVES TO NT ACT CLAIMS

Due to many factors – steep evidentiary hurdles, extensive extinguishment provisions, legal technicalities and dubious outcomes – many Indigenous communities that have been most impacted by European settlement (ie those located on the eastern seaboard) have little or no ability, and less inclination, to access the benefits of the native title regime. The claims

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<sup>29</sup> For example, the lack of resources for PBCs; on average, several years to resolve a claim; damaging intra and inter-community disputes; and above all, a complex, excessively legalistic regime designed more to constrain than recognize native title.

<sup>30</sup> *NT Act* s 223(1); see *Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 (‘*Yorta Yorta*’).

<sup>31</sup> See Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993*, Report No 126 (2015) (‘ALRC Report’).

<sup>32</sup> Matters under review during 2017 included the ALRC Report, an inquiry by COAG’s Senior Officers Working Group, *Investigation into Indigenous Land Administration and Use: Report to COAG* (December 2015), and the aborted *Native Title Amendment Bill 2012* (Cth). During 2018, this process seems to be making little progress.

process has also generated serious community disputes, and in-principle opposition from some traditional owner groups to the entire scheme, as yet another re-visiting of oppressive colonial requirements.<sup>33</sup> If the ALRC's current proposals for reform were implemented, all this may yet change.

Meanwhile, various alternative schemes are being pursued. Two only, relevant to the treaty question, are discussed here. I mention in passing, but do not discuss, two further alternatives arising from the torturous negotiations during 1993 leading to the enactment of the *NT Act*: the purchase of land for Indigenous communities on the open market by the Indigenous Land Corporation, which continues;<sup>34</sup> and the so-called 'Social Justice Package' which never eventuated.<sup>35</sup>

### *A Victoria: The TOS Act Scheme*

#### *1 Negotiation & Agreement Preferred*

In 2003, the then Victorian Labor Government determined to resolve about twenty outstanding native title claims by mediation and agreement in preference to litigation.<sup>36</sup> Thereafter, in 2004, the State and the Yorta Yorta people executed a joint management agreement concerning 50,000 hectares of Crown land in the state's north, including the Barmah State Forest and areas along the Murray and Goulburn Rivers.<sup>37</sup>

In December 2005 the Wotjobaluk claim in the Wimmera region was settled after a ten-year negotiation under the *NT Act*.<sup>38</sup> This settlement included a consent determination

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<sup>33</sup> See, eg, Eve Vincent, *Against Native Title: Conflict and Creativity in Outback Australia* (Aboriginal Studies Press, 2017).

<sup>34</sup> See discussion in Keon-Cohen (2017) 17-19.

<sup>35</sup> A package entitled *Recognition, Rights and Reform* 'was put together by ATSIC': see, for a brief account, P Turner and T Bauman, 'Interview with Pat Turner: Reflections on the 20<sup>th</sup> Anniversary of Mabo' in T Bauman and L Glick (eds), *The Limits of Change: Mabo and Native Title 20 Years On* (AIATSIS, 2012) 310, 316-18.

<sup>36</sup> M Scalzo, 'Native Title and its Implications' (Paper presented at VGSO Seminar Series, September 2007) 8.

<sup>37</sup> First Nations Legal & Research Services (formerly Native Title Services Victoria), *History of Native Title in Victoria* (2013) First Nations Legal & Research Services <<https://www.fnls.com.au/history-of-native-title-in-victoria/>>.

<sup>38</sup> *Clarke on Behalf of the Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagulk Peoples v Victoria* [2005] FCA 1795. Two further Wotjobaluk applications (No 2 and No 3) were also the subject of

recognizing non-exclusive native title rights and interests; funding for the traditional owners' PBC for five years; title to three culturally significant areas; and co-operative management involvement in several national parks and state forests in the region. Similarly in March 2007, after an eleven year struggle, the Gunditjmarra people in the state's south-west achieved a consent determination from the Federal Court over the larger part of their claim area.<sup>39</sup> The associated settlement agreement included co-operative management of an important national park; freehold title to culturally significant areas of land; a commitment from Government for continued consultation and support for several Gunditjmarra projects; and five-year funding for their PBC. This was followed in July 2011 with a consent determination in favor of the Gunditjmarra and Eastern Marr people recognizing non-exclusive native title rights to part of their claimed area, done solely under the *NT Act*.<sup>40</sup>

Thus, from 1994 – 2011, only three positive Federal Court determinations recognizing non-exclusive native title rights and interests were made in Victoria, plus three negative determinations that native title did not exist in the claimed areas.<sup>41</sup> In 2010, the then Attorney-General Rob Hulls suggested that based on this experience, a further 50 years would be required to resolve existing and future claims pursuant to *NT Act* procedures.<sup>42</sup>

## 2 *Time for a change: TOS Act*

Following a 2008 Report,<sup>43</sup> the *Traditional Owners Settlement Act 2010* (Vic) was enacted in September 2010, supported by additional policies, guidelines and programs. The *TOS Act* established a framework within which out-of-court native title settlements could be negotiated. This is a voluntary scheme: ie claimants may elect to file, as an additional or alternative process, a native title determination application pursuant to the *NT Act* in the Federal Court.

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consent determinations on the same date, ruling that native title did not exist over areas of Crown land claimed. See *Wotjobaluk (No 2)*, *Wotjobaluk (No 3)*, both at [2005] FCA 1795.

<sup>39</sup> *Lovett on behalf of the Gunditjmarra People v Victoria* [2007] FCA 474.

<sup>40</sup> *Lovett on behalf of the Gunditjmarra People v Victoria (No 5)* [2011] FCA 932.

<sup>41</sup> See *Yorta Yorta, Wotjobaluk (No 2)* and *Wotjobaluk (No 3)*.

<sup>42</sup> Premier of Victoria, 'New Framework a Just Approach to Native Title' (Media Release, 28 July 2010).

<sup>43</sup> Steering Committee for the Development of a Victorian Native Title Settlement Framework, Victorian Government, *Report of the Steering Committee* (2008).

### 3 *Settlement Components*

Under the *TOS Act*, key settlement components are contained in a Recognition and Settlement Agreement ('RSA') where the State formally recognizes the claimants as the traditional owners of the agreement area, with rights over Crown land similar to those commonly included in a non-exclusive native title determination.<sup>44</sup> A settlement package may include up to six further specified agreements, depending upon circumstances.<sup>45</sup> The *TOS Act* creates a new form of freehold title in Victoria – Aboriginal title<sup>46</sup> – which may be granted over Crown land such as national parks and reserves, and which does not extinguish native title. An alternative to the *NT Act's* future act regime, set out in a Land Use Activity Agreement ('LUAA'), is also provided for. In contrast to the *NT Act's* scheme,<sup>47</sup> a LUAA specifies five categories of land use activity on Crown land<sup>48</sup> and procedures for future use of public land that takes account of traditional owners' rights and interests.<sup>49</sup>

Pursuant to a Funding Agreement, community benefits are paid for negotiation and agreement activities as compensation for the impact on traditional rights. Lump-sum funding is deposited in a new Victorian Traditional Owner Trust. Capital and income may be drawn down to fund the core activities of a group's settlement corporation. Additional funding may be negotiated to support economic development opportunities for the group.

The native title aspects of a settlement are dealt with in an ILUA, executed and registered under the *NT Act*. Native title holders agree, *inter alia*, to withdraw all existing native title or compensation claims and not lodge any future claims. Traditional owners are not required to surrender native title rights and interests, except when required under the LUAA

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<sup>44</sup> *TOS Act* s 9.

<sup>45</sup> These deal with land transfers and/or grants, future use of land, natural resources, future funding, an ILUA, and joint management of parks and reserves. See AIATSIS, *Native Title Handbook: Victoria* (2016) 6 – 8; Native Title Services Victoria, *Annual Report 2016-17* (2017) 10 – 11 ('NTSV *Annual Report*').

<sup>46</sup> See *TOS Act* Part 3, Division 4.

<sup>47</sup> See *NT Act* Part 2, Division 3.

<sup>48</sup> ie Routine, Advisory, Negotiation Class A & B, and Agreement Activities: see *TOS Act* Part 4.

<sup>49</sup> These embrace the gamut from routine activities undertaken without notification (eg erection and maintenance of fences, signage and similar low impact works, per *TOS Act* s 33(1)) through to major impact activities (such as the grant of an estate in fee simple that can only proceed with the traditional owner group's agreement, per *TOS Act* s 40(4)).

processes (eg with an agreed sale of Crown land). These components may be compared to those embraced by the more wide-ranging Noongar settlement, discussed below.

#### 4 *Outcomes 2010 – 2018*

Since the *TOS Act* commenced operation in 2010<sup>50</sup> only two settlements have been negotiated and finalized involving *TOS Act* elements with an accompanying ILUA. On 22 October 2010 the Federal Court issued a consent determination to conclude the Gunaikurnai people's claim,<sup>51</sup> accompanied by the signing of the first settlement package<sup>52</sup> incorporating benefits under *TOS Act*.<sup>53</sup> During 2013, Dja Dja Wurrung native title settlement negotiations were concluded successfully – the first to include all the elements of a settlement package available under *TOS Act*.<sup>54</sup> The RSA commenced operation on 14 November 2013 with ceremonies held at Bendigo. The settlement was hailed as 'a giant leap in reconciliation' and as 'breaking free from the constraints of native title law'.<sup>55</sup>

However, after these successful outcomes during its first years of operation, *TOS Act* progress seems to have stalled since 2013. One reason for delay appears to be 'Threshold Guidelines' introduced by the State in 2013. These were 'not part of the *TOS Act* but rules imposed by the government that must be complied with' before the state will commence

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<sup>50</sup> The Act has been amended twice to clarify its operation: see *Traditional Owner Settlement Amendment Act 2013* (Vic) and *Traditional Owner Settlement Amendment Act 2016* (Vic). The 2016 amendments 'includ[ed] many provisions sought by traditional owners and [the amendments] have been developed in close consultation with the Federation of Victorian Traditional Owner Corporations and NTSV: Victoria, *Parliamentary Debates*, Legislative Assembly, 31 August 2016, 3236 (Martin Pakula).

<sup>51</sup> *Mullett on behalf of the Gunai/Kurnai People v Victoria* [2010] FCA 1144.

<sup>52</sup> Four agreements constituted the package: an RSA, Land Agreement, Funding Agreement and Traditional Owner Land Management Agreement.

<sup>53</sup> Non-exclusive native title rights and interests were recognized over some 22,000 km<sup>2</sup> of Crown land in East Gippsland. Under the RSA, additional benefits included the grant of Aboriginal title to ten national parks and reserves (now jointly managed with the State) plus the Commonwealth and State governments each contributing \$6 million. These monies were deposited in the Victorian Traditional Owner Trust to support the core activities of the Gunaikurnai Land & Waters Aboriginal Corporation over the ensuing twenty years.

<sup>54</sup> See Victorian Government, *Dja Dja Wurrung Settlement* (9 August 2018) Department of Justice and Regulation <<https://www.justice.vic.gov.au/your-rights/native-title/dja-dja-wurrung-settlement>>. The LUAA commenced operation on 25 October 2013.

<sup>55</sup> Mick Dodson, 'Victoria's giant leap in reconciliation', *The Age* (Melbourne), 14 November 2013.



negotiations.<sup>56</sup> These have caused long delays. For example, the Taungurung claimants, assisted by Native Title Services Victoria, have been in substantive negotiations under the *TOS Act* since 2015. In February 2017 they submitted an economic report detailing estimates of compensation payable under the *NT Act*.<sup>57</sup> As at June 2018, this issue remained unresolved, though negotiations were proceeding with a settlement anticipated by November 2018.<sup>58</sup>

Following the State's 'dilatoriness in dealing with' claims,<sup>59</sup> a review of the 'Threshold stage process' was triggered in August 2017.<sup>60</sup> A confidential report was provided to government in November 2017. It is said to have promoted greater clarity in, and streamlining of, the threshold stage process. As at June 2018, several further Victorian claims are being pursued, some solely under *TOS Act*, some also filed in the Federal Court under the *NT Act* and registered by the NNTT. These claims are at various stages and are proceeding.<sup>61</sup>

The scheme, with its supporting policies and programs,<sup>62</sup> undoubtedly provides a more efficient and comprehensive approach to resolving native title matters in Victoria. It emphasizes present-day relationships of traditional owners to country; places a well-defined range of potential outcomes on the negotiation table in each settlement; and clearly identifies in advance the negotiation pathway. In addition, capacity building processes that support settlement negotiations equip traditional owner groups with better governance and decision-making to implement what are intended to be long-term durable agreements.

The *TOS Act* scheme, like the ILUA experience over 25 years under the *NT Act*, also opens up wider scenarios of additional treaty discussions, now before the Victorian Parliament (discussed below). If 'self-government' issues were also laid squarely and genuinely on the

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<sup>56</sup> *NTSV Annual Report* 5.

<sup>57</sup> As to 'just terms' compensation required by the *NT Act*, see *Northern Territory v Griffiths* [2017] FCAFC 106, now on appeal to the High Court.

<sup>58</sup> Personal communication to Native Title Services Victoria, dated 23 May 2018.

<sup>59</sup> *NTSV Annual Report* 6.

<sup>60</sup> Commenced on 3 August 2017 by Indigenous barrister Tim Goodwin. See Martin Pakula, 'Review to assist Traditional Owner groups' (Media Release, 3 August 2017).

<sup>61</sup> See *NTSV Annual Report* 22 - 27, where eleven traditional owner groups, pursuing various claims at various stages, are recorded.

<sup>62</sup> For example, the 'right people for country' mediation and facilitation program, and a range of measures to more closely align the *NT Act*, *TOS Act* and Victorian Aboriginal Cultural Heritage legislation.

negotiation table, we are well on the way to producing a domestic ‘treaty’ as defined below. As Attorney-General Martin Pakula stated in Parliament in August 2016:

[The *TOS Act*] strongly aligns with this government’s commitment to support self-determination for Aboriginal Victorians, which is also being progressed through the work to develop a treaty ... any treaty process will need to take account of settlement agreements made under [the *TOS Act*] ... They are, in themselves, vehicles for self-determination for Victoria’s traditional owners.<sup>63</sup>

These settlements have now been taken a step further in Victoria, with the commencement on 1 August 2018 of the *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic), discussed below.

### B *Regional Claims: WA & Queensland*

Another approach to claiming native title utilized during the last decade is for neighboring communities to join together as one ‘society’ utilizing a common ‘normative system’ of custom and tradition and mount a single, consolidated claim to a combined area. This option is (relatively) resource efficient; increases the claimants’ bargaining power when negotiating a consent determination or an ILUA; is more likely to lead to consistent outcomes throughout the relevant region; allows for flexibility of outcomes transcending a limited declaration of native title rights; and can deliver more substantial resources tailored to the particular social and economic problems of the communities involved. Such a large regional claim also provides an obvious basis, following the execution of a land-focused ILUA (or ILUAs), for pursuing additional self-governance issues and ‘treaty talk’ with the relevant State party that will normally be represented ‘at the table’.<sup>64</sup> Two such recent regional claims are noted, the first finalized, the second underway.

#### 1 *Noongar Settlement*

In *Noongar*, six claimant groups combined to make a single claim to their country, utilizing the South West Aboriginal Land and Sea Council (‘SWALSC’). Following a trial, Wilcox J

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<sup>63</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 31 August 2016, 3236 (Martin Pakula).

<sup>64</sup> See n 24 above.

held in 2006 that, subject to extinguishment issues, native title existed over part of the Noongar claim, labeled Part A. This included Perth and surrounding nonurban areas, the first such finding in Australia.<sup>65</sup> However in 2008, this result was overturned on appeal,<sup>66</sup> while leaving open the question of the existence of native title over the remainder of the Noongar claim beyond the Perth area – Part B. In December 2009, the SWALSC and the State agreed to pursue resolution of all Noongar claims by negotiation outside of the *NT Act*.<sup>67</sup> Despite considerable concerns amongst some Noongar claimants regarding the State's demand that native title be extinguished, in October 2014 an agreement on the text of the settlement was reached in principle. That agreement, in substance, was contained in the *Noongar Recognition Bill*, tabled in the State Parliament in October 2014.<sup>68</sup>

The 'comprehensive settlement package',<sup>69</sup> intended to resolve all native title claims in the region, affects about 30,000 Noongar people, is valued at about \$1.3 billion and covers about 200,000 km<sup>2</sup>. In addition, about 320,000 hectares of crown land is to be transferred into the Noongar Boodja Trust over five years. These land aspects will establish a significant area upon which the Noongar can exercise some powers of self-government.<sup>70</sup> Controversially, the Noongar surrendered all native title rights to the agreement area, and consented to the validation of any past invalid acts over those areas.<sup>71</sup>

As to achieving treaty status, importantly the settlement establishes, and resources, governance institutions: six Noongar Regional Corporations and one Central Services Corporation. These will receive \$10 million funding annually for twelve years. After authorization meetings between January and March 2015, and despite some opposition, the

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<sup>65</sup> *Bennell v WA* [2006] FCA 1243.

<sup>66</sup> *Bodney v Bennell* [2008] FCAFC 63.

<sup>67</sup> See, amongst many commentaries, Michael McCagh, 'Native Title in the Southwest: The Noongar Recognition Bill' (2016) 8(11) *ILB* 26, 29.

<sup>68</sup> *Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Bill 2014* (WA). A land administration Bill was also introduced in November 2015.

<sup>69</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 14 October 2015, 7313 (Colin Barnett).

<sup>70</sup> See *Land Administration (South-West Native Title Settlement) Act 2016* (WA) s 10 ('*LAA*').

<sup>71</sup> *LAA* Preamble [2].

six Noongar groups approved the deal and the six required ILUAs were executed in June 2015. The settlement was finally enacted in two statutes, in June 2016.<sup>72</sup>

However, the settlement was unexpectedly caught up in the Federal Court's *McGlade* decision of February 2017 concerning who, of the claimant group, was required to sign an 'Area ILUA'.<sup>73</sup> Following resolution of this problem through amendments to the *NT Act* enacted in June 2017<sup>74</sup> the six Noongar ILUAs were accepted by the NNTT as lawfully executed. As of June 2018, they are currently being considered by the NNTT for registration. If and when approved, the native title aspects, at least, of the settlement will be completed.

## 2 *From Settlement to Treaty*

In my view, as indicated above, a 'treaty' (as evidenced many times in, for example, Canada<sup>75</sup>) is not limited to an international agreement concluded between nation States governed by International Law.<sup>76</sup> The notion includes a domestic, legally binding, negotiated agreement between Indigenous people and a government that, amongst many possible substantial outcomes, recognizes, and gives effect to, some level of self-government vested in an Indigenous polity.<sup>77</sup> On this basis, the Noongar settlement qualifies, in my view, as a 'domestic treaty'.

Constitutional lawyers Harry Hobbs and George Williams, after a thorough examination, have also opined that the Noongar Settlement 'is in fact a classic treaty' where 'two nations'

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<sup>72</sup> *Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Act 2016* (WA); *Land Administration (South West Native Title Settlement) Act 2016* (WA).

<sup>73</sup> *McGlade v NT Registrar* [2017] FCA 10. See *NT Act* s 24CD(1) referring to 'all persons' who must be parties to the ILUA.

<sup>74</sup> See *Native Title Amendment (Indigenous Land Use Agreements) Act 2017* (Cth).

<sup>75</sup> To name but one former British colony, along with USA and New Zealand. See, amongst many publications, J R Miller, *Compact, Contract, Covenant: Aboriginal Treaty Making in Canada* (University of Toronto Press, 2009) and M Asch, *On Being Here to Stay: Treaties and Aboriginal Rights in Canada* (University of Toronto Press, 2014).

<sup>76</sup> See *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 2(1)(a).

<sup>77</sup> Described as 'a distinct political community composed of individuals collectively united by identity': see H Hobbs & G Williams, 'The Noongar Settlement: Australia's First Treaty' (2018) 40 (1) *Sydney Law Review* 1, 7 (Hobbs & Williams (2018)).

come together, agree upon certain matters, find a way forward and 'recognize each other's sovereignty'.<sup>78</sup> They point to three criteria. First, the settlement 'recognizes the Noongar as both traditional owners of the land and as a distinct polity, differentiated from other Western Australians'.<sup>79</sup> Second, the settlement:

... was agreed to via a political negotiation respectful of each party's equality of standing, evincing a commitment to secure a just relationship between Indigenous peoples and the State.<sup>80</sup>

The authors acknowledge 'the overriding sovereignty of the Australian State' but suggest the settlement amounts to a treaty, since it 'redefines the political relationship between Noongar and the Western Australian State, and achieves a just, equitable and sustainable settlement'.<sup>81</sup> Third, the settlement:

... contains more than mere symbolic recognition. ... the package of benefits ... serve two goals key to any treaty: they acknowledge the injustices of the past, and serve the Noongar people's future by strengthening culture and enhancing economic opportunities.<sup>82</sup>

The authors then consider what, in my view, is the crucial element in elevating the settlement to treaty status: powers of self-government. They observe:

There is no scope (at present) for a Noongar government and the Noongar people are not entitled to pass legislation. However ... these elements are not necessary to constitute a treaty; what is required is the recognition or establishment, and resourcing, of institutions and structures of culturally appropriate governance and means of decision-making and control that amount to, at least, a limited form of self-government. ... In this regard the Central Services Corporation and the six Noongar

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<sup>78</sup> Ibid 35.

<sup>79</sup> During negotiations, 'the Noongar ... insisted on nation to nation dialogue', a status recognized by Premier Barnett in a Press Release and in debates on the Bill in the WA Parliament: see Hobbs & Williams (2018) 35.

<sup>80</sup> Hobbs & Williams (2018) 36.

<sup>81</sup> Ibid.

<sup>82</sup> Ibid.

Regional Corporations ... formalize self-governance arrangements, and may 'pave the way' for 'robust forms of indigenous jurisdiction'.<sup>83</sup>

Whether the Noongar Settlement achieves treaty status – 'domestic' or otherwise – is perhaps not critical. The crucial factor, in my view, whatever label is applied, is reaching agreement on self-governing powers concerning the Indigenous party's economic, social and cultural development; recognition of, and respect for them as a distinct polity; and the establishment and resourcing of 'culturally appropriate governance and decision-making'.<sup>84</sup>

This analysis could be applied to many of the 1,200 ILUAs (and counting) already operating around the country – provided the relevant government is a party, and where the settlement delivered real powers and resources to the traditional owners' decision-making bodies, typically, a PBC. However, being essentially land-focused, and given the constraints of the *NT Act* negotiation process few, if any ILUAs, are likely, of themselves, to qualify as comprehensive settlements, let alone domestic treaties. But they clearly provide a sound foundation, as part of the Indigenous Estate, for negotiating the next step.

### 3 *Cape York Regional Claim*

The Noongar 'domestic treaty', I suggest, raises challenging self-government issues for the Cape York claim, which is of similar dimensions. This is a single, combined claim by numerous traditional owner groups to 79,427.32 km<sup>2</sup> of land known as 'The Cape York United No 1 Claim'.<sup>85</sup> It covers a substantial majority of Cape York, being areas that fall within the Cape York Land Council's ('CYLC') jurisdiction. Areas already the subject of prior native title determinations, or of native title claims extant at the time of filing, and areas where native title has clearly been extinguished (eg freehold land) are all excluded. The claim was filed in the Federal Court on 12 December 2014, was accepted by the NNTT for Registration on 6 February 2015, and has attracted 78 respondents.<sup>86</sup> As at June 2018 the applicants have filed nine anthropological reports, each relating to a sizeable part of the

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<sup>83</sup> Ibid 36 – 37, citing Dylan Lino, 'Towards Indigenous-Settler Federalism' (2017) 28(2) *Public Law Review* 118, 131.

<sup>84</sup> Hobbs & Williams (2018) 36 – 37.

<sup>85</sup> *Cape York United No 1 Claim v Queensland* (Federal Court of Australia, QUD673/2014, 6 February 2015).

<sup>86</sup> Being the State of Queensland, Shire Councils, mining companies, pastoralists, and others.

claim area. Two further expert reports focusing on the 'one society' issue, and on apical ancestors, have also been filed.<sup>87</sup> As at May 2018 it is hoped that, save for some *NT Act* s 223(1) connection and/or extinguishment issues that may require a contested hearing, most of the claim should be resolved by agreement. Whether the pursuit of a Noongar-style comprehensive settlement, involving similar extensive content, is considered to be a desirable objective for these claimants, and if so, whether such a result is achievable in Queensland, remains to be seen.

## V TREATY TALK AND CONSTITUTIONAL REFORM

These developments concerning the Indigenous Estate – especially land-related agreements pursuant to statutory schemes morphing into comprehensive settlements that embrace, *inter alia*, political identity and powers of self-government – are now an essential part of 'treaty' discussions at Federal, State and Territory levels.

### A Federal

Treaty agitation, relatively dormant since the 1970s,<sup>88</sup> is now enmeshed, as an important element, in the current debate about the recognition of Indigenous peoples in the Commonwealth Constitution.<sup>89</sup> In 2012, a report by an expert Panel<sup>90</sup> recommended repealing ss 25 and 51(xvi) of the Constitution and inserting new sections, labeled 51A, 116A and 127A. Currently, these proposals have been deferred in favor of four reforms contained in a 'Statement from the Heart' devised at a National Constitutional Convention,

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<sup>87</sup> See, for details, Applicants, 'Statement of Issues, Facts and Contentions', Submission in *Cape York United No 1 Claim v Queensland*, QUD673/2014, 9 March 2018, 96.

<sup>88</sup> See n 2 above.

<sup>89</sup> See, amongst many publications, M Langton, M Teehan, L Palmer and K. Shain (eds), *Honour Among Nations?* (MUP, 2004); M Mansell, *Treaty and Statehood: Aboriginal Self-determination* (Federation Press, 2016) ('M Mansell (2016)'); S Morris (ed), *A Rightful Place* (Back Inc, 2017) ('S Morris (2017)'); M Davis and M Langton, *It's Our Country* (MUP, 2016); D Freeman and S Morris, *The Forgotten People* (MUP, 2016); and for a contrary view, K Windschuttle, *The Break-up of Australia* (Quadrant Books, 2016) ('Windschuttle (2016)').

<sup>90</sup> Expert Panel on Constitutional Recognition of Indigenous Australians, Commonwealth of Australia, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (January 2012).

comprising about 250 Indigenous delegates, held at Uluru in May 2017.<sup>91</sup> This proposes, in short, four reforms: first, a constitutionally entrenched ‘first nations voice’ or representative body (to be subsequently established by statute) to advise the federal Parliament on laws affecting Indigenous people; second, ‘an extra-Constitutional Declaration of Recognition’ of First Peoples to be passed by the Parliament to ‘articulate a symbolic statement of recognition to unify Australians’; and third, the establishment of a Makarrata Commission to pursue two tasks: to ‘facilitate a process of local and regional truth telling’ (ie about Indigenous history, especially since 1788); and ‘to supervise a process of agreement-making between governments and First Nations’ (ie treaty-talk.).<sup>92</sup> These proposals were considered and accepted by a Referendum Council, which provided its Report to the Prime Minister and Leader of the Opposition on 30 June 2017.<sup>93</sup>

The then Prime Minister’s derisory and dishonest rejection of these proposals, utilizing a brief media interview in October 2017, has been described by Labor Senator Pat Dodson as ‘a real kick in the guts’<sup>94</sup> and by Noel Pearson as a cynical ‘betrayal’ of thousands of Indigenous people who, encouraged by government, met to discuss and formulate these proposals in good faith during 2016-17. The Treaty debate, however, continues at the national level.<sup>95</sup> The Labor opposition has pledged, if elected, to implement the Uluru proposals,<sup>96</sup> and the question of constitutional recognition and treaties is being examined by a Federal Joint Parliamentary Committee of Inquiry.<sup>97</sup> This Committee issued its Interim Report to Parliament in late June 2018, raising numerous detailed issues and seeking further submissions. It is required to provide a final Report by the end of November 2018. Thereafter, no doubt the debate will continue, including on the utility of the proposed

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<sup>91</sup> *Uluru Statement from the Heart* (May 2017), cited in S Morris (2017), 1 – 3; see also Referendum Council, Commonwealth of Australia, *Final Report of the Referendum Council* (30 June 2017) i (‘*Referendum Council Final Report*’).

<sup>92</sup> *Referendum Council Final Report* i, iii, 2.

<sup>93</sup> *Ibid.*

<sup>94</sup> Stephen Fitzpatrick, ‘It’s all or nothing on Uluru statement’, *Weekend Australian* (online), 12 May 2018.

<sup>95</sup> See, eg, Stephen Fitzpatrick, ‘Regions key “to giving voice to recognition”’, *Weekend Australian* (Australia), 26-7 May 2017, 8.

<sup>96</sup> ‘Editorial’, *The Australian*, 11 June 2018, 15.

<sup>97</sup> See Joint Select Committee of Inquiry into Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, chaired by Labor Senator Pat Dodson and Liberal MP Julian Leeser.



Makarrata Commission and its agreement-making functions. In my view, the Uluru proposals are sensible, workable, provide a sound foundation to pursue such reforms, are entirely consistent without constitutional structures, do not in any way challenge Parliament's sovereign powers, and should be supported – including the agreement-making aspect.

## B *States and Territories*

Given lack of national leadership, treaty talk has broken out at state and territory levels, albeit subject to changing fortunes of the political cycle.

### 1 *Northern Territory*

In the Northern Territory, in September 2016, the newly elected Labor Chief Minister Michael Gunner, committed to establishing a subcommittee on Aboriginal affairs to 'drive public discussions on a treaty' between the Territory and Indigenous nations.<sup>98</sup> Pursuant to this policy, on 8 June 2018, the government and the Territory's four land councils signed a 'treaty memorandum of understanding, committing the government and councils to three years of consultation'. The 'form of treaty' under consideration 'are contracts ... enforceable by law'.<sup>99</sup>

### 2 *South Australia*

In South Australia, since 1999, native title claimants have pursued direct negotiations with the Government and peak industry bodies under the *NT Act's* ILUA process aimed at a 'statewide comprehensive settlement' of native title issues, with a view to 'administrative, constitutional and procedural reforms'.<sup>100</sup> Extensive treaty discussions began in December 2016 between the then Labor Government and three Indigenous nations: the Ngarrindjeri,

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<sup>98</sup> NT News, 'Indigenous Treaty Remains on NT Government's Agenda', *NT News* (online), 4 May 2017, cited in Hobbs & Williams (2018) 2; G Williams, 'We Need the Framework of Responsibility A Treaty Gives', *The Age* (online), 2 April 2018, 10.

<sup>99</sup> M Owen, 'States bicker over regional treaty plans', *The Australian* (online), 12 June 2018, 4, quoting Chief Minister Michael Gunner.

<sup>100</sup> See G Neate, 'Agreement Making and the Native Title Act' in M Langton et al (eds), *Honour Among Nations* (MUP, 2004) 176, 194-5 and P Agius et al, 'Comprehensive Native Title Negotiations in South Australia' in M Langton et al (eds), *Honour Among Nations* (MUP, 2004) 203, 219.

Narungga and Adnyamathanha peoples.<sup>101</sup> Following a report by the South Australian Treaty Commissioner in July 2017<sup>102</sup> the State commenced formal negotiations leading to the signing of the Buthera Agreement with the Narungga Nation Aboriginal Corporation concerning the York Peninsula in February 2018.<sup>103</sup> However, with a change of government in March 2018, the Premier-elect Steven Marshall, described treaties as ‘expensive gestures’ and ‘a cruel hoax’.<sup>104</sup> The Premier stated that his government ‘would honour what has ... been signed’ – ie the Buthera Agreement – and that he ‘did not believe treaties can or should exist at the state level’.<sup>105</sup> In June 2018, proposed treaty discussions with the Ngarrindjeri and Adnyamathanha peoples were thus abandoned.

### 3 *New South Wales, Tasmania, ACT*

No treaty discussions are being pursued by current governments in these jurisdictions. However, in NSW on 12 June 2018, the Labor leader Luke Foley stated that if elected, his government would establish a treaty process to ‘provide a truthful basis for reconciliation’.<sup>106</sup>

### 4 *Western Australia*

Following the Noongar settlement, the Labor government announced on 7 June 2018 that, subject to a two-year consultation process, a ‘voice’ to Parliament would be established in state legislation, being an ‘Independent Office for Aboriginal People’. According to Aboriginal Affairs Minister and Treasurer Ben Wyatt, this proposed body would:

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<sup>101</sup> Hobbs & Williams (2018) 2.

<sup>102</sup> Office of the Treaty Commissioner, Government of South Australia, *Talking Treaty: Summary of Engagements and Next Steps* (July 2017), cited in Hobbs & Williams (2018) 2.

<sup>103</sup> National Indigenous Times, ‘Narungga deal pave way for treaty’, *National Indigenous Times* (online), 21 February 2018. The Agreement ‘lays the foundation for Treaty’.

<sup>104</sup> M Perkins and A Carey, ‘First steps on a long road’, *The Age* (online), 24 March 2018, 24; M Owen, ‘States bicker over regional treaty plans’, *The Australian* (online), 12 June 2018, 4.

<sup>105</sup> M Owen, ‘APY as troubled as NT: Marshall’, *The Australian* (online), 4 June 2018, 6.

<sup>106</sup> M Owen, ‘States bicker over regional treaty plans’, *The Australian* (online), 12 June 2018, 4.

... advocate policy development and reform to government and provide a level of accountability about the relationship between the state government and the Aboriginal community of WA.<sup>107</sup>

This initiative is to be welcomed. Its announcement, especially emanating from a state historically hostile to Indigenous rights, emphasizes, however, how fragile Indigenous reform processes are when so frequently subject to ideological policy divisions between major political forces. As with the recent South Australian experience discussed above, such considerations support the significant protection afforded by constitutional entrenchment of such reforms.

## 5 *Victoria*

Meanwhile, following its *TOS Act* initiative, Victoria again seems to be leading the country in this arena. On 28 March 2018 the Minister for Aboriginal Affairs, Natalie Hutchins, introduced into Parliament the *Advancing the Treaty Process with Aboriginal Victorians Bill 2018* (*Treaty Bill*). According to the Minister, this is ‘the first piece of legislation in our nation’s history to address treaty making with Aboriginal people’.<sup>108</sup> The *Treaty Bill* resulted from ‘working in close partnership with ... the Aboriginal Treaty Working Group’ over four years. It proposes entities and processes to ‘advance the treaty process’ in Victoria.<sup>109</sup> The *Treaty Bill*’s lengthy preamble includes the following:

The contents of a future treaty or treaties are yet unknown. A future treaty or treaties can help heal the wounds of the past, provide recognition for historic wrongs, address ongoing injustices, support reconciliation and promote the fundamental human rights of Aboriginal peoples, *including the right to self-determination*. (emphasis added)

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<sup>107</sup> P Taylor, ‘Echoes of Uluru as nascent office hailed for voice to Parliament’, *The Australian* (online), 7 June 2018, 7.

<sup>108</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 28 March 2018, 870 (Natalie Hutchins) (*Second Reading Speech*).

<sup>109</sup> Ibid. The Working Group was ‘recognized by the Minister in July 2016’. See *Treaty Bill* Cl 3; Aboriginal Treaty Interim Working Group, *Aboriginal Community Consultations on the Design of a Representative Body* (December 2016); Aboriginal Treaty Interim Working Group, *Aboriginal Community Consultations on the Design of a Representative Body – Phase 2* (June 2017).

After various proposed amendments were accepted or rejected,<sup>110</sup> the *Treaty Bill* passed both houses, and commenced operation on 1 August 2018 as the *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic) (*'Treaty Act'*). In short, an Aboriginal Representative Body is to be the 'voice of' and to represent 'traditional owners and Aboriginal Victorians' in 'establishing the ... elements necessary to support future treaty negotiations'.<sup>111</sup> The Act sets out 'Guiding principles for the treaty process' being: 'self-determination and empowerment; fairness and equality; partnership and good faith; mutual benefit and sustainability; and transparency and accountability'.<sup>112</sup> Three further 'elements' to support treaty negotiations are proposed: first, a Treaty Authority, being an independent 'umpire' to oversee and facilitate treaty negotiations to ensure 'fair, effective and efficient dealings'.<sup>113</sup> Second, a Treaty Negotiation Framework will:

... set out the processes for negotiating, formalizing, enforcing and reporting on treaty or treaties, and for resolving any disputes along the way ... (to) specify the threshold requirements a party must meet in order to enter into treaty negotiations.<sup>114</sup>

Importantly, the framework is intended to specify matters that 'will be unable to be addressed by a treaty or treaties'<sup>115</sup> (ie define the scope or content of the treaty), including those 'outside the jurisdictional powers of ... Victoria' (eg international relations or sovereign status in any international sense). The process envisaged 'acknowledges the limitations of what the State is legally able to do'.<sup>116</sup> The Minister, however, points out that:

Treaties with First Peoples in New Zealand, Canada and the United States deal with matters including acknowledgement and apologies for past wrongs, recognition of sovereignty and self-government, rights of access and/or manage land and resources,

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<sup>110</sup> Government amendments, especially inserting 'traditional owners' as an additional group to be involved in treaty processes, along with 'Aboriginal Victorians' were adopted. Amendments to insert references to 'Clans and First Nations' and to locate clan elders 'at the centre of future treaty talks', proposed by the newly-formed Victorian Clan Elders Council and Victorian Greens MP Lydia Thorpe (the Parliament's only Aboriginal MP) were all rejected. See Adam Carey, 'Aboriginal elders criticize treaty talks', *The Age* (online), 15 May 2018, 8.

<sup>111</sup> *Second Reading Speech; Treaty Act*, ss 1(b), 9(1).

<sup>112</sup> *Treaty Act*, ss 22-26.

<sup>113</sup> *Second Reading Speech; Treaty Act*, ss 27-29.

<sup>114</sup> *Second Reading Speech; Treaty Act*, ss 30-34, especially s 30(a)-(i).

<sup>115</sup> *Second Reading Speech*.

<sup>116</sup> *Ibid.*

health, education and economic development, and rights to enjoy and protect language, culture and heritage.<sup>117</sup>

Finally, and crucially, a Self-Determination Fund is proposed to provide an independent resource base to equip Aboriginal Victorians to 'participate in the treaty process on an equal footing with the State', and thereby to 'realize self-determination'.<sup>118</sup> It seems that the right to self-determination – acknowledged in the *Treaty Act* s 22(1) – and some degree of self-government rights, both set out in Arts 3 and 4 of the UN's 2007 Declaration on the Rights of Indigenous Peoples ('UNDRIP')<sup>119</sup> are envisaged as proper matters for negotiation in Victoria. However, a Greens' amendment requiring the treaty process to 'proceed in accordance with ... UNDRIP ... principles' was rejected by the government.<sup>120</sup>

Like their South Australian and Commonwealth colleagues, the Liberal opposition in Victoria opposes a treaty process,<sup>121</sup> suggesting that this initiative may be significantly affected as a result of the upcoming Victorian elections, scheduled for November 2018. Meanwhile, the recently appointed Victorian Treaty Advancement Commissioner, Jill Gallagher AO, continues to conduct regional meetings to provide advice and consult with Aboriginal groups to guide the establishment of the proposed Victorian Representative Body.

## VI CONCLUSION

In 1981, when discussing the Aboriginal Treaty Committee's Makarrata proposal, being a year before proceedings were issued in *Mabo*, I wrote:

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<sup>117</sup> Ibid.

<sup>118</sup> *Second Reading Speech; Treaty Act*, ss 35-37.

<sup>119</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61<sup>st</sup> sess, 107<sup>th</sup> plen mtg, Agenda Item 68, UN Doc A/RES/61/295 (13 September 2007). Endorsed by Australia in 2009.

<sup>120</sup> See Lydia Thorpe, *Amendments etc to be moved by Ms Thorpe* (2018) State Government of Victoria <[http://www.legislation.vic.gov.au/domino/Web\\_Notes/LDMS/PubPDocs.nsf/ee665e366dc b6cb0ca256da400837f6b/944D98521A8E29BDCA2582490006991B/\\$FILE/Thorpe.pdf](http://www.legislation.vic.gov.au/domino/Web_Notes/LDMS/PubPDocs.nsf/ee665e366dc b6cb0ca256da400837f6b/944D98521A8E29BDCA2582490006991B/$FILE/Thorpe.pdf)>; however, the Preamble was amended to include '... the State recognizes the importance of ... proceeding ... consistent with' UNDRIP principles: *Treaty Act*, Preamble.

<sup>121</sup> See, eg, A Carey, 'Aboriginal elders criticize treaty talks', *The Age* (online), 15 May 2018, 8; A Carey, 'Aboriginal treaty must go further: Greens MP', *The Age* (online), 7 June 2018, 9.

From what political and/or legal basis ... do Aborigines negotiate? – a process which implies that Aborigines have something which governments need and which they cannot take except by agreement. The truth is ... under current law, Aborigines have no legal basis whatsoever to request that governments come to the table nor, if they do appear, to demand anything from them ... The only basis upon which Aborigines can negotiate is political clout.<sup>122</sup>

Almost forty years later, times have changed. Increasingly, governments and the community accept that treaty talk is but a logical development of the fundamental principles enunciated in *Mabo (No 2)*: the recognition, by Australian common law, of the continued vitality, and legal validity, of rights in interests in land operating in a system of law founded on custom and tradition. Further, this increased acceptance of treaty talk has now become, not merely a logical development but, under the *NT Act*, one supported by a legal obligation. As Lisa Strelein observed in 2004, and as indicated above regarding government being a party to ILUAs:

Native title provides [Indigenous] peoples with one of the only processes in which the State is required to engage. For [them] too, native title is not merely a form of title. It is a fundamental recognition by the colonizing state of the distinct identity and special place of [Indigenous] peoples as the first peoples.<sup>123</sup>

After sixty years of development, the Indigenous Estate – with 1200 ILUAs in operation – is there: significant areas of land and seas held, usually in trust, by Indigenous corporations in which traditional owners enjoy a variety of rights and interests. Unlike political support, this Estate will not evaporate overnight. Much of it is already transitioning from a focus on ‘recognition and protection of Indigenous rights in land to [using] those rights for economic development’<sup>124</sup> and pursuing self-determination, including rights of self-government. It provides a sound foundation for first peoples to assert their ‘special place’ and pursue renewed treaty discussions. The issue becomes: why should the recognition of a

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<sup>122</sup> B A Keon-Cohen, ‘The Makarrata: A Treaty Within Australia Between Australians – Some Legal Issues’ (1981) 57(9) *Current Affairs Bulletin* 1, 9.

<sup>123</sup> L Strelein, ‘Symbolism and Function: From Native Title to Aboriginal and Torres Strait Islander self-government’ in M Langton et al (eds), *Honour Among Nations?* (MUP, 2004) 189, 202.

<sup>124</sup> Indigenous Land Corporation, Commonwealth of Australia, *Annual Report 2015-16* (2016) 38.

community's traditional system of law include not just rights in land, but also, for that community, rights to self-determination and self-government?

Following Noongar, the trend in land-based comprehensive settlements or domestic treaties is clear: consolidation of traditional owner groups and claimed areas, increased devolution of powers to enable significant self-government,<sup>125</sup> shared jurisdiction in a federal compact, and an enhanced political relationship between the Indigenous polity and the settler state involved. With these developments, increased 'political clout' is emerging – at least at state and territory levels – despite entrenched, sometimes shrill, opposition from commentators, especially at the political, journalistic<sup>126</sup> and academic levels.<sup>127</sup> At least in Victoria, the *Treaty Act* provides a prominent platform for the all-important Indigenous voice. Watch this space.

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<sup>125</sup> Aboriginal Activist Michael Mansell, for example, proposes a new seventh 'First Peoples State' with a complete range of powers: M Mansell (2016), 133-4, 200.

<sup>126</sup> See, eg, Andrew Bolt, 'Our Apartheid in all but name', *Herald Sun* (online), 5 April 2018; Greg Craven, quoted in D Freeman and N Hunter, 'When Two Rivers Become One', in S Morris (2017), 173, 176-7.

<sup>127</sup> See, eg, K Windschuttle (2016).

## An Interview with Associate Professor Thalia Anthony\*

### Editors

*Associate Professor Thalia Anthony, thank you for agreeing to be interviewed for the 2018 edition of Pandora's Box. In 2016, the nation was horrified when footage showing youth in Don Dale Juvenile Detention Centre was released, and subsequently the Royal Commission into the Protection and Detention of Children in the Northern Territory was established to investigate failings in the child protection and youth detention systems of the Territory. Are Australia's human and Indigenous rights protections inadequate?*

The experiences in Don Dale Youth Detention Centre reveal that there are inadequate human rights safeguards for Aboriginal children in detention and a failure of the criminal justice system to hold to account corrections ministers, managers and officers who are responsible for these harms to Aboriginal children. However, the experiences of Aboriginal children in Don Dale are not exceptional. There are similar occurrences at least in Alice Springs, Western Australia and Queensland. Across Australia, Aboriginal children are entering punitive detention centres at younger ages, according to the Australian Institution for Health and Welfare.

The Royal Commission heard of routine violence administered by staff in detention. This included bashing Aboriginal children, smashing their heads into concrete walls and floors, violently strip-searching young girls and boys and leaving them naked, gassing children, shackling them (including on mechanical restraint chairs) and hooding them, refusing access to the toilet and to drinking water, and threatening sexual assault. Many of these acts can be likened to the acts of torture in the infamous detention centres of Abu Ghraib and Guantanamo Bay. In addition, children would be kept for up to 23 hours per day in dark, rancid isolation cells that were part of the Behavioural Management Unit. Aboriginal children would be called racist names and made to do things like eat bird poo. Evidence was submitted to the Royal

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Commission that children had made complaints to authorities but that they fell on deaf ears. All these incidents violate local and international rules on the administration of juvenile detention.

Notwithstanding the Royal Commission's finding of systematic violence in youth detention and recommendations of criminal investigations,<sup>1</sup> the Northern Territory Police announced that it would not lay charges and no prosecutions have ensued. In 2014, a prosecution brought against a detention officer and supervisor who, without provocation, attacked 13-year-old Dylan Voller – the young person at the centre of the footage aired on *Four Corners* – resulted in a finding of not guilty.<sup>2</sup> The defendant, Derek Tasker, entered Dylan's cell, grabbed him by the neck and hit him against a concrete wall and then pressed Dylan's face into a mattress, holding him down by pushing his hand into the back of his head and his knee into his lower body. Tasker's claim that the aggravated assault was 'reasonably necessary' to restrain Dylan was accepted by the magistrate. This indicates how the legal protections safeguard those running detention centres rather than Aboriginal children in detention.

In the child protection system, the Royal Commission heard that there are a lack of procedural protections for families whose children are forcibly removed. Despite the recommendations of the Bringing Them Home Inquiry into the Stolen Generations,<sup>3</sup> the Northern Territory (NT) Government fails to engage with Aboriginal families prior to removing children. When in state care, evidence demonstrated that Aboriginal children are overwhelmingly placed with non-Aboriginal families or in care facilities. This has caused significant injury to Aboriginal culture and wellbeing

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<sup>1</sup> Northern Territory, Royal Commission into the Protection and Detention of Children in the Northern Territory, *Final Report: Volume 1* (2017).

<sup>2</sup> *Police v Derek James Tasker* [2014] NTMC 02.

<sup>3</sup> Human Rights and Equal Opportunity Commission, Commonwealth of Australia, *Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997).

in many Aboriginal communities across the NT. It defies the UN Convention on the Rights of Children<sup>4</sup> and the UN Declaration on the Rights of Indigenous Peoples.<sup>5</sup>

*Do you think there is a need for Indigenous voices or consideration of Indigeneity in the criminal process?*

There is an urgent need for criminal law processes to undo many of the implicit, and sometimes explicit, biases against Indigenous people. Indicating such bias, last year a magistrate in Tennant Creek criticised a 13-year-old Aboriginal defendant for not understanding the value of money. He said, ‘you don’t know what a first-world economy is ... where money comes from, other than the Government gives it out’.<sup>6</sup> In legislation, there are discriminatory prohibitions on customary law and cultural considerations in sentencing and bail in the NT and for Federal offences, as prescribed by the *Crimes Act 1914* (Cth).<sup>7</sup> This demonstrates a need for protections and remedies against racial bias in the criminal justice system.

Indigenous input or safeguards against racism at each stage of the criminal justice process, including in policing, prosecutorial, judicial and parole decisions, could serve to provide a check on racial bias that structures criminal justice discretion. The Australian Law Reform Commission’s Inquiry into Indigenous Incarceration Rates in 2017<sup>8</sup> recommended amendments to bail and sentencing legislation to account for Indigenous circumstances. It proposed reports on the defendant’s Indigenous community and available non-custodial options to be produced by Indigenous services, which occurs in the Canadian Gladue Report model. It also recommended the provision of Aboriginal youth courts for bail and sentencing matters, including in the NT where they were abolished in 2012, to enable Elders to have input and for a holistic consideration of the defendant’s circumstances. There additionally needs to be measures implemented to increase the number of Indigenous people who sit on

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<sup>4</sup> Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

<sup>5</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61<sup>st</sup> sess, 107<sup>th</sup> plen mtg, Agenda Item 68, UN Doc A/RES/61/295 (13 September 2007).

<sup>6</sup> *R v [A Child]* (Unreported, Tennant Creek Youth Justice Court, Borchers J, 6 June 2017), Transcript of Proceedings.

<sup>7</sup> *Crimes Act 1914* (Cth) ss 15AB, 16A and 16AA.

<sup>8</sup> Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Report No 133 (2017).

juries. Despite the vast over-representation of Indigenous people charged with crimes, there is a significant under-representation of Indigenous jurors.

However, incorporating Indigenous voices is likely to only slightly alter the outcomes for Indigenous people in the criminal justice system. A greater paradigm shift is needed to move towards decarcerating children, including removing the sentence option of penal custody for young people, which has precedent internationally. The Royal Commission heard that detention is primarily used to remand children and is detrimental to their wellbeing. There need to be alternatives to detention, especially ones that are Indigenous designed and controlled. Such a shift requires recognition that in the NT and elsewhere there are juxtaposing Aboriginal legal systems that continue to practice their laws. There should be capacity for Aboriginal children to be brought up in accordance with their own laws.

*On 17 November 2017, the Royal Commission tabled a final report to the Australian Parliament. Do you think the recommendations go far enough or is more needed?*

The key recommendations include replacing the Don Dale and Alice Springs detention centres with new facilities; the provision of bail accommodation; increasing the age of criminal liability to 12-years-old; and a greater Aboriginal Community Controlled Sector involvement in family support. A strong message coming through the evidence of Indigenous people in remote communities is that they wanted more resources to care for their children. However, the recommendations did not promote a reallocation of resources and controls over Aboriginal children from the state's penal and protection sector to Aboriginal families and communities.

The NT Royal Commission did not recommend a repeal of the discriminatory legislation widely known as the 'NT Intervention', which was a significant concern raised by Aboriginal witnesses such as Olga Havnen, Pat Anderson, Muriel Bamblett and Larissa Behrendt. The NT Intervention was originally enacted in the *Northern Territory National Emergency Response Act 2007* (Cth), which required the suspension of the *Racial Discrimination Act 1975* (Cth), and was subsequently recast as the *Stronger Futures in the Northern Territory Act 2012* (Cth). It has contributed to increasing detention of Aboriginal children, removal of Aboriginal children from families, and

the deteriorating treatment and conditions in juvenile institutions. The increase in detention rates is attributed to, *inter alia*, legislative provisions under the NT Intervention that increase criminal law offences and police powers specifically for Aboriginal communities, and has resulted in an escalation of young people remanded and sentenced to detention for minor offences.

It is also concerning that the Royal Commission, while increasing the age of criminal responsibility to 12, set a low bar for the age of criminal responsibility that falls below human rights standards and would fail to materially decrease the number of Aboriginal children in detention. The Council for the Administration of Criminal Justice and Protection of Juveniles has recommended that the age of criminal responsibility be *at least* 14. There are a substantial number of countries that have set the age above 14, and some as high as 18 (such as Chile and Brazil).<sup>9</sup> The NT Royal Commission heard medical evidence that detention does not positively serve any child, and in fact contributes to the deterioration of their development.

Finally, the Royal Commission noted two officers displayed particularly egregious and violent conduct, but did not recommend charges be laid against them or that detention managers or ministers be held to account. This lack of accountability is a major impediment to safeguarding the human rights of young people in detention. The failure to make recommendations after reviewing thousands of items of evidence was a significant disappointment to the children abused, their families and, I think, the expectations of the Australian public. It has not given an assurance to the Aboriginal children currently in NT detention that their safety will be protected and their complaints taken seriously. The lack of accountability flowing from the Royal Commission means that the conditions in NT detention today continue to breach human rights standards.

*Have the events of the past few years indicated a need for a Royal Commission on Indigenous Justice?*

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<sup>9</sup> For a breakdown by country, see Child Rights International Network, *Minimum Ages of Criminal Responsibility Around the World* (2018) CRIN <<https://www.crin.org/en/home/ages>>.

Many of the colonial injustices against Indigenous people are interconnected: the stealing of Indigenous land and displacement of Indigenous people, violence and biological warfare inflicted on Indigenous communities, the forced removal of Indigenous children from their families and the segregation, detention and incarceration of Indigenous people. So, it makes sense that commissions of inquiry should look beyond the narrow issues before them.

The Royal Commission into the Protection and Detention of Children in the NT included in its terms of reference an inquiry into child protection and detention systems. However, while it recognised that these systems were intertwined, the terms did not specifically identify the need to investigate how these systems impact on *Aboriginal* children. Nonetheless, Aboriginal witnesses who appeared before the Royal Commission connected the dots in their evidence, including linking the torture of Aboriginal children in detention to the racism of the Northern Territory Intervention. The recent ALRC Inquiry recommended an inquiry into Aboriginal out-of-home care and received submissions calling for an inquiry into youth justice.

Having watched almost all of the formal proceedings of the NT Royal Commission, I am not convinced that this is the best forum for achieving Indigenous justice. We have learned from numerous Royal Commission processes involving Indigenous people that this forum reinforces Western laws and ways of knowing, doing and being. It can legitimise the state's role in relation to Aboriginal people whilst 'appearing to seek justice'. Many Aboriginal people, as articulated in an article by Eddie Cubillo (who worked as Director of Engagement for the NT Royal Commission),<sup>10</sup> felt let down by the commission. There was no feedback to Aboriginal people who participated. There is instead a widespread feeling that nothing has changed. The current human rights case brought by the NT Legal Aid Commission<sup>11</sup> on behalf of two children in detention against the NT Government

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<sup>10</sup> Eddie Cubillo, *On the personal toll for Indigenous advocates and people when Governments fail to act* (18 June 2018) Croakey <<https://croakey.org/on-the-personal-toll-for-indigenous-advocates-and-people-when-governments-fail-to-act/>>.

<sup>11</sup> Stephanie Zillman, *NT youth detention lawsuit alleges new raft of human rights abuses inside centres* (17 August 2018) Australian Broadcasting Corporation <<http://www.abc.net.au/news/2018-08-17/lawsuit-alleges-human-rights-abuses-nt-youth-detention/10131188>>.

indicates that failures in youth detention persist. This includes ongoing overcrowding in youth detention, an over reliance on segregating children and children's lack of access to education and mental health services.

For justice, there needs to be appropriate ways to record current and historical Indigenous experiences *and* a commitment to making amends (including compensation, prosecutions and the return of Country). Change in the practices of governments and the corporate sector (which is responsible for the provision of substantial child protection services, as well as the poor treatment of Indigenous workers and consumers) are necessary. Quasi-legal processes of Royal Commissions that are bound to statutory procedures and terms of reference are unable to come to terms with these challenges or provide an appropriate forum for them to be aired.

Above all, change needs to be led by Indigenous peoples, including children and young people. Rather than the State once again determining the terms of engagement, Indigenous people must be able to set the priorities, instigate change and identify healing strategies. A good place to start is really listening to (not cross-examining) people like Dylan Voller, and other children who have suffered state-sanctioned abuse. Therein lies the solution to a broken system that sanctions the abusive treatment of Aboriginal children. It goes hand in hand with reconsidered issues of sovereignty and the recognition of Indigenous laws, land and nationhood. These issues cannot be resolved through a Royal Commission, but requires, in the words of Wiradjuri Professor Juanita Sherwood, 'a decolonising disposition'.



# Returning the Past: The Reparation of Cultural Property to Indigenous Peoples

Benjamin Teng\* and Sophie Ryan\*\*

## I INTRODUCTION

*‘History teaches us that the way to genocide is to take a culture and destroy its credibility so it can no longer reflect itself’.*<sup>1</sup>

In Australia, European colonisation saw the systematic and violent theft and dispossession of the cultural property and identity of the First Nations people. The means of this dispossession were horrific. The practices of collectors included grave-robbing, body snatching and murder.<sup>2</sup> Human remains and other cultural items were sent overseas to parts of Europe,<sup>3</sup> with little prospect of return. This has desecrated Indigenous culture in a multitude of ways. How, for example, can peoples who believe that the spirits of their dead cannot rest until their bodies have been returned to their country,<sup>4</sup> find peace when those bodies are on display in a foreign museum? The depravity of such cultural dispossession, which is far from unique to Australia, cannot be undone. Nonetheless, the path forward

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<sup>1</sup> R Merritt, cited by H Fourmille, “Submission on behalf of Aboriginal and Torres Strait Islander Social Justice Commissioner” in *Culture and Heritage Inquiry: Submissions, Report of the Standing Committee on Aboriginal and Torres Strait Islander Affairs* (Canberra, 1997) S0929 quoted in Ana Fillipa Vrdoljak, *International Law, Museums and the Return of Cultural Objects* (CUP, 2006) 261.

<sup>2</sup> Memmott, Paul – ‘The Significance of Indigenous Place Knowledge to Australian Cultural Heritage’ (1998) 4(16) *Indigenous Law Bulletin* 9; Gemmia Burden, *The violent collectors who gathered Indigenous artefacts for the Queensland Museum* (Accessed 7 September 2018) The Conversation <<https://theconversation.com/the-violent-collectors-who-gathered-indigenous-artefacts-for-the-queensland-museum-96119>>.

<sup>3</sup> Marilyn Truscott, *Repatriation of Indigenous cultural property* (2006) (paper prepared for the 2006 Australian State of the Environment Committee, Department of the Environment and Heritage, Canberra), available at <<http://www.environment.gov.au/soe/2006/publications/emerging/repatriation/pubs/repatriation.pdf>>.

<sup>4</sup> Library of Congress, *Repatriation of Historic Human Remains: Australia* (6 September 2015) Library of Congress <[http://www.loc.gov/law/help/repatriation-human-remains/australia.php#\\_ftnref31](http://www.loc.gov/law/help/repatriation-human-remains/australia.php#_ftnref31)>.



requires finding a path back: reparation requires returning the culture that has been taken. A necessary part of this cultural reparation is the return of cultural property. The return of cultural property is more than restitution of an object – it is a step towards the restitution of a culture and an identity.

This Article has two Parts. First, it outlines and analyses the international regime for the return of cultural property to Indigenous persons. Second, it outlines and analyses the Australian domestic regime of return, using the Queensland and Commonwealth regimes as case studies. The purpose of this Article is limited to the regimes as they currently exist; detailed proposals for reform are left for exposition elsewhere.

## II INTERNATIONAL REGIME FOR RETURN

The international framework for the return of cultural property to Indigenous peoples is complex. Currently, there is no binding obligation under international law requiring states to repatriate cultural property to Indigenous peoples. This is unsurprising: the international system is one underpinned by state consent, making acceptance of an obligation to return property to *individuals* an unlikely prospect. Despite this inherent tension, the international system is gradually affording greater recognition to the rights of Indigenous peoples, including to cultural property.

The most comprehensive recognition of Indigenous rights to date is the 2007 *United Nations Declaration on the Rights of Indigenous Peoples* ('UNDRIP').<sup>5</sup> However, this non-binding statement of principles is far from the only vehicle through which cultural property can be returned. The principal *binding* international law instrument governing the return of cultural property is the 1970 *UNESCO Convention on the Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property* ('1970 UNESCO Convention').<sup>6</sup> This treaty has become so influential in facilitating the exchange of cultural property, including in some limited instances, Indigenous cultural property, that it arguably now contains norms of

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<sup>5</sup> UNGA Res 61/295, 61<sup>st</sup> sess, UN Doc A/RES/61/295 (2 October 2007) ('*United Nations Declaration on the Rights of Indigenous Peoples*').

<sup>6</sup> *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970*, opened for signature 14 November 1970, 823 UNTS 232 (entered into force 24 April 1972).

customary international law. Yet, it does not go far enough in protecting Indigenous interests *vis-à-vis* cultural property. *The 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects* ('UNIDROIT Convention') does more in this respect.<sup>7</sup>

In this section, each of these principal vehicles for facilitating restitution of Indigenous cultural property are addressed in turn. First, however, some important clarifications are made regarding key concepts in this field of international law, and their implications for cultural property repatriation.

### *A Preliminary Matters*

#### 1 'Culture' and 'cultural rights'

While an essential concept, 'culture' is a difficult term to define. As noted by one commentator, '[t]he concept of "cultural rights" is vague because interpretations of the word "culture" vary widely'.<sup>8</sup> The term 'cultural heritage' conjures additional nuances to this already highly contextual term.<sup>9</sup> Illuminating the different interpretations has become part of the institutional mandate of the United Nations Economic Social and Cultural Organization ('UNESCO'), one of the key organisations facilitating the international regime for the return of cultural property. According to UNESCO, 'cultural rights' are 'the rights of creators and transmitters of culture, the rights of people at large to contribute to and participate in cultural life, and the rights of peoples to cultural identity'.<sup>10</sup> While still ambiguous, this definition is adopted for discussions involving cultural rights throughout this Article.

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<sup>7</sup> *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*, opened for signature 24 June 1995, 34 ILM 1326 (1995) (entered into force 1 July 1998).

<sup>8</sup> Dominic McGoldrick, 'Culture, Cultures, and Cultural Rights' in Mashood Baderin and Robert McCorquodale (eds), *Economic, Social and Cultural Rights in Action* (Oxford University Press, 2007). See also Lyndel Prott, 'Cultural Rights as Peoples' Rights in International Law' in James Crawford (ed), *The Rights of People* (Clarendon Press, 1988).

<sup>9</sup> On the difficulties of defining 'cultural heritage' see Sarah Harding, 'Value, Obligation and Cultural Heritage' (1999) 31 *Arizona State Law Journal* 291, 297-304.

<sup>10</sup> Stephen Marks, 'UNESCO and Human Rights: The Implementation of Rights Relating to Education, Science, Culture and Communication' (1977) 13 *Texas International Law Journal* 35, 50.

## 2 'Cultural property' and 'ownership'

Already, this Article has invoked the term 'cultural property'. Some go further to pair this term with that of 'ownership' under international law, asserting a right under international law for Indigenous peoples to 'own' their cultural 'property'. The complexities of this claim are not axiomatic for most. Public international law contains no substantive rules of property law to grant ownership over specific physical objects.<sup>11</sup> 'Property' is a legal status created by the municipal law of states and invoked by international law.<sup>12</sup> Professors Prott and O'Keefe state that 'what is property is not fixed; it is property when it is regarded by a particular jurisdiction as property'.<sup>13</sup> The effect is that, on its own, a claim for 'ownership' of 'cultural property' under international law is difficult, if not impossible to sustain. Rather, claims for ownership under international law require the support of the relevant domestic law.<sup>14</sup>

A further dimension to this issue that complicates the problem at the core of international cultural heritage law is the effect of the principle of sovereign equality<sup>15</sup> – no state can claim jurisdiction over another sovereign state and therefore, no state is required to enforce another's public laws.<sup>16</sup> The effect of this for cultural property moved across international borders is that no state is required to enforce the origin state's laws that render the export

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<sup>11</sup> Christopher Staker, 'Public International Law and the Lex Situs Rule in Property Conflicts and Foreign Expropriations' (1988) 58 *British Yearbook of International Law* 151, 154; Lyndel V. Prott, 'Problems of Private International Law for the Protection of Cultural Heritage' (1989) 217 *Recueil des Cours* 215, 280-281.

<sup>12</sup> See *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (Preliminary Objections)* [1970] ICJ Rep 3, 233 (Separate Opinion of Judge Morelli); Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law* (9<sup>th</sup> ed, Oxford University Press: 1992) 918.

<sup>13</sup> Lyndel V. Prott and Patrick J. O'Keefe, 'Law and the Cultural Heritage: Movement' (Butterworths, 1989).

<sup>14</sup> Determining what is the 'relevant' domestic law, for the purposes of international law, can be a further rabbit hole: see, eg, Ernst Rabel, *The Conflict of Laws: A Comparative Study* (Vol IV, 1958) 30.

<sup>15</sup> *United Nations Charter* art 2(1).

<sup>16</sup> This is the principle of *par in parem non habet imperium*. Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law* (9<sup>th</sup> ed, Oxford University Press: 1992) 341-342.

illegal.<sup>17</sup> It thus becomes clear at the outset that, on the topic of returning cultural property to Indigenous peoples, international law and domestic law are intertwined.

Why use the term ‘cultural property’ if it is so problematic? The term ‘cultural property’, has over time become imbued with a specific meaning in the international regime of cultural heritage protection. As Francesco Francioni notes, this ‘synthetic’ expression of ‘cultural property’ was ‘used for the first time in the *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954*’ (*1954 Hague Convention*).<sup>18</sup> Before this, the concept invoked today by the terms ‘cultural property’ and ‘cultural heritage’ was ‘considered elusive and fragmented’, united only by ‘an empirical indication of objects of historical, monumental or humanitarian interest that should be spared from acts of war’.<sup>19</sup> In the *1954 Hague Convention*, the term ‘cultural property’ is defined, ‘irrespective of origin or ownership’ as covering, *inter alia*:

movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest [...];

This robust definition has since been picked up in substantially the same terms in other international agreements.<sup>20</sup> Its separation of immovable and movable cultural property has also precipitated the evolution of separate regimes addressing each. For example, at the 15<sup>th</sup> session of the UNESCO General Conference 1968, the *Recommendation Concerning the*

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<sup>17</sup> Craig Forrest, ‘Strengthening the International Regime for the Prevention of the Illicit Trade in Cultural Heritage’ (2003) 4 *Melbourne Journal of International Law* 1, 6. The effect of this problem is clear in the cases of *A-G (New Zealand) v Ortiz* [1982] 1 QB 349 (concerning the illegal export of Maori ceremonial doors from New Zealand and the subsequent rejection of the claim for repossession by the United Kingdom courts): see Prott, above n 10, 100.

<sup>18</sup> Francesco Francioni, ‘The Human Dimension of International Cultural Heritage Law: An Introduction’ (2011) 22(1) *The European Journal of International Law* 9, 10. [Emphasis added].

<sup>19</sup> Ibid. See also Annexed Regulation of the IV Hague Convention of 1907, Articles 27 and 56.

<sup>20</sup> See, e.g., 1970 *UNESCO Convention* art 1. See also Lyndel V. Prott and Patrick J. O’Keefe, “‘Cultural Heritage’ or ‘Cultural Property’?” (1992) 1 *International Journal of Cultural Property* 307, 313.

*Preservation of Cultural Property Endangered by Public or Private Works* was adopted.<sup>21</sup> This is one of the first of many instruments following the *1954 Hague Convention* differentiating between responsibilities towards movable and immovable cultural property.<sup>22</sup> Consistent with this development, this Article primarily focuses on one arm of the cultural property regime: that relating to movable cultural property.

## B *The 1970 UNESCO Convention*

The principal international convention addressing the illicit movement of cultural property is the *1970 UNESCO Convention*. Arising out of concerns regarding the increasing demand for cultural heritage and related rise in illicit transfer of such heritage globally,<sup>23</sup> the Convention is reminiscent of the *1954 Hague Convention*. A key difference is that the *1970 UNESCO Convention* extends protection of cultural property to *peacetime*. The product of more than ten years of drafting by a group of more than fifty nations,<sup>24</sup> the Convention endeavours to govern and coordinate the restriction by state parties of the importation and exportation of cultural property protected by the Convention.

Functionally, the Convention solves the problem of *par in parem non habet imperium* (no state can claim jurisdiction over another sovereign state), outlined above. It does so by coordinating states, through multilateral agreement, to recognise one another's public export laws and to declare as illegal the importation of exported cultural heritage contravening those public export laws.<sup>25</sup> Importantly, Article 7(b)(ii) lays down an obligation of return:

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<sup>21</sup> *Recommendation Concerning the Preservation of Cultural Property Endangered by Public or Private Works*, Resolutions, UNESCO General Conference, 15<sup>th</sup> sess, 41<sup>st</sup> plenary meeting, adopted 19 November 1968.

<sup>22</sup> See Yahaya Ahmad, 'The Scope and Definitions of Heritage: From Tangible to Intangible' (2006) 12(3) *International Journal of Heritage Studies* 292, 294. The principal instrument for the protection of immovable cultural property is the *1972 Convention Concerning the Protection of the World Cultural and Natural Heritage*, opened for signature 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975).

<sup>23</sup> Forrest, above n 19, 1-2.

<sup>24</sup> Patrick J. O'Keefe, *Commentary on the UNESCO 1970 Convention on Illicit Traffic* (Institute of Art and Law 2007) 8-14; Kevin F. Jowers, 'International and National Legal Efforts to Protect Cultural Property: The 1970 UNESCO Convention' (2003) 38 *Texas International Law Journal* 145, 148-149.

<sup>25</sup> See Forrest, above n 19, 7.

at the request of the State Party of origin, to take appropriate steps to recover and return any such cultural property [cultural property stolen from a museum or a religious or secular public monument or similar institution] imported after the entry into force of this Convention in both States concerned [...].<sup>26</sup>

While this provision is important in entrenching an obligation of repatriation of cultural property, several key features reveal its inability to adequately address the interests of Indigenous peoples. First, the Convention and Article 7(b)(ii) are non-retroactive and do not apply to instances of unlawful takings of cultural property before the Convention's entry into force.<sup>27</sup> The limitation of the Convention to unlawful takings post-1970 should not be a surprise – without such a limitation, it is unlikely that 'market' states (fearful of their museums being emptied) would join the Convention, condemning it to failure. However, it means that most takings of Indigenous cultural property fall outside the scope of the Convention. Second, the cultural property subject to this repatriation obligation is that 'stolen from a museum or a religious or secular public monument or similar institution'.<sup>28</sup> Again, this does not cover the circumstances in which cultural property has been taken from Indigenous peoples in processes of colonisation and conquest. Third, the obligation is a best-efforts clause. It mandates only that the state take 'appropriate steps to recover and return' the relevant cultural property.<sup>29</sup>

The Convention's operative value for the repatriation of cultural property to Indigenous peoples is therefore minimal. The Convention's primary concern is *vis-à-vis* the international

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<sup>26</sup> It is *arguable* that there is sufficient widespread state practice accompanied by the *opinio juris* of states to support this obligation's crystallisation as a norm of customary international law, or nascent customary international law. There exist statements by non-state parties to the Convention that they feel bound by its obligations, national court decisions capable of evidencing *opinio juris* and a multitude of instances of return satisfactory of the requirements of Article 7(b)(ii) by states not party to the Convention. The state practice and *opinio juris* does not support this rule being extended to cultural property taken before the Convention's entry into force. Substantiation of each of these claims is beyond the scope of this essay and therefore left for more thorough analysis to elsewhere.

<sup>27</sup> Article 7(b)(ii) of the 1970 UNESCO Convention expressly limits the temporal application of the obligation. In any case, Article 28 of the *Vienna Convention on the Law of Treaties* reflects the position in international law that treaties do not apply retrospectively unless a provision is contained in the treaty to the contrary.

<sup>28</sup> 1970 UNESCO Convention art 7(b)(i).

<sup>29</sup> Ibid art 7(b)(ii).

illicit trade in art and antiquities, not reparation for past wrongs. The contribution to reparation to Indigenous peoples is thus largely a symbolic one – the Convention helps entrench that it is wrong to displace cultural property from its place of origin and while, for practical reasons, it turns a blind eye to history, it does help to build a stronger path for the future.

### C *The 1995 UNIDROIT Convention*

The many issues that hinder the *1970 UNESCO Convention* (including private law issues such as ownership) precipitated the International Institute for the Unification of Private Law's ('UNIDROIT') drafting of another Convention intended to address these gap:<sup>30</sup> the *UNIDROIT Convention*.<sup>31</sup> Indigenous stakeholders were not directly involved in the drafting of this Convention, however distinct efforts were made by UNESCO and key state negotiating parties to prioritise Indigenous rights.<sup>32</sup> This influence is reflected in the Convention. For example, the third preambular paragraph notes the 'deep concern' of state parties regarding 'the irreparable damage [...] to the cultural heritage of national, tribal, indigenous or other communities'.<sup>33</sup> While the Convention ultimately is also non-retroactive in application,<sup>34</sup> it is more accommodating for Indigenous peoples. It allows both state parties and individuals to be potential claimants for the return of stolen cultural property in certain circumstances. Under it, objects do not have to be specified as cultural property by the state, unlike under the *1970 UNESCO Convention*. There also a more generous time limit for claims relating to objects stolen from public collections that are 'a sacred or communally important cultural object belonging to and used by a tribal or indigenous community'.<sup>35</sup> The latter, in particular, recognises Indigenous interests.

Perhaps the most significant obligation under the *UNIDROIT Convention* is the requirement under Article 5(3)(d) that "holding" states order the return of objects illicitly exported from

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<sup>30</sup> Notably, this was at the request of UNESCO: Forrest, above n 19, 10.

<sup>31</sup> As at 7 September 2018, there are 28 states party to the Convention. Australia is not one of them.

<sup>32</sup> Lyndel V. Prott, *Commentary on the UNIDROIT Convention* (Institute of Art and Law, Leicester, 1997) 17.

<sup>33</sup> *1995 UNIDROIT Convention*, preambular para 3.

<sup>34</sup> *Ibid* art 10.

<sup>35</sup> *Ibid* art 3(8).

a state if that state establishes that the object's removal impairs 'the traditional or ritual use of the object by a tribal or indigenous community'. Prott argues that this provision could potentially found a claim for objects removed from an indigenous community without consent *prior* to the operation of the Convention, and then kept in a private collection, to be returned.<sup>36</sup> This theory is yet to be tested but holds great promise as a means for reparation by cultural property restitution.

The primary issue with the *UNIDROIT Convention*, however, is its lack of uptake by states. A fundamental divide between market and source states as to the correct approach to promoting, versus preventing, free trade of cultural heritage has led to 'few states signing, and even fewer ratifying, the UNIDROIT Convention'.<sup>37</sup>

#### D *The 2007 UNDRIP*

On 13 September 2007, the rights of Indigenous Peoples and their interests in repatriation of their cultural property were at last recognised by the international community in the *UNDRIP*.<sup>38</sup> *UNDRIP* is recognised by the United Nations to be 'the most comprehensive international instrument on the rights of indigenous peoples'.<sup>39</sup> It is therefore a great shame that this Declaration is only soft-law and contains only non-binding principles.<sup>40</sup> However, the soft-law nature of the instrument does not render it futile. Indeed, to appreciate the mobilising power of soft-law instruments one need only look to the *Universal Declaration of Human Rights* ('UDHR') which was adopted with formally the same status as *UNDRIP*.<sup>41</sup>

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<sup>36</sup> Prott, above n 34, 58.

<sup>37</sup> Forrest, above n 19, 10.

<sup>38</sup> *UNDRIP* was voted for by a majority of 144 states, with 4 against (Australia, Canada, New Zealand and the United States), and 11 Abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa, and Ukraine). Since 2007, the 4 parties voting against have reversed their position and now support the Declaration.

<sup>39</sup> United Nations, 'United Nations Declaration on the Rights of Indigenous Peoples' (ND) available <<https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>>.

<sup>40</sup> Formally, a declaration of the United Nations General Assembly is not binding on Member States.

<sup>41</sup> The vote was 48 votes in favour, with 8 members abstaining (Byelorussia, Czechoslovakia, Poland, Saudi Arabia, South Africa, the Soviet Union, Ukraine, and Yugoslavia), and 2 member states absent (Honduras and Yemen): Hilary Charlesworth, 'Universal Declaration of Human Rights (1948)' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of International Law* (Oxford



Yet, the *UDHR* has become the cornerstone of international human rights law. The *UDHR* is noted in nearly all international and regional human rights treaties; it has been cited in numerous national court decisions and legal systems as evidence of customary international law and guidance for legislation; and it is accepted (in most part) as containing customary international law, or at least general principles of law, by numerous eminent publicists.<sup>42</sup>

*UNDRIP* Article 11 lays down an almost unqualified right of return of cultural heritage:

1. Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.
2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 11, arguably, complements the existing human rights framework. Article 27 of the *International Covenant on Civil and Political Rights* ('*ICCPR*') contains the right to enjoy culture of 'ethnic, religious or linguistic minorities'. However, Article 27 provides no reference to 'cultural property'. In General Comment 23, the Human Rights Committee ('*HRC*') state that:

culture manifests itself in many forms, including a particular way of life, associated with the use of land resources, especially in the case of indigenous peoples [...] The enjoyment of those rights may require positive legal measures of protection [...].<sup>43</sup>

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University Press: 2008) [13]-[16] available  
 <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e887>>.

<sup>42</sup> See Hilary Charlesworth, 'Universal Declaration of Human Rights (1948) in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of International Law* (Oxford University Press: 2008) [13]-[16] available  
 <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e887>>.

<sup>43</sup> The Office of the High Commissioner for Human Rights General Comment No. 23 (50) on Article 27, UN GAOR, 49th Sess., Supp. No. 40, UN Doc. A/49/40 (1994) (General Comment 23). Shea Esterling, 'One Step Forward, Two Steps Back: The Restitution of Cultural Property in the United Nations Declaration on the Rights of Indigenous Peoples' Ruth Redmond-Cooper and Norman Parker (eds), (Dec 2013) Vol XVIII, Issue 4 *Art, Antiquity and Law* 327.

Thus, while *ICCPR* Article 27 and General Comment 23 do not specify the implications of Article 27 for cultural property, the spirit of Article 27 is clearly embodied by *UNDRIP* Article 11. In this way, *UNDRIP* Article 11(2) and its specified obligation of redress, including through restitution, could be understood as an implementation of the positive measures required of States to realise Article 27.<sup>44</sup>

If a State is successful in effecting the repatriation of Indigenous cultural property at an international level, that property then becomes subject to the domestic law of that State, which will be the focus of the next Part of this Article.

### III AUSTRALIA'S DOMESTIC RETURN REGIME

In Australia, the domestic regime for the repatriation of cultural property to Indigenous peoples is a hybridisation of legislation and policy. Separate legislation has been passed by States, Territories and the Commonwealth. The domestic regime is therefore complex and, at once, overlapping and inconsistent across the States and the Commonwealth.<sup>45</sup> This Part will outline and analyse the legal regime for return of cultural property in Australia and its application in practice, focusing on the jurisdictions of Queensland and the Commonwealth. It will then consider the voluntary return policies administered by Australian governments, non-governmental organisations and museums.

#### *A Queensland Regime*

On 28 October 2003, Queensland passed, together, the *Aboriginal Cultural Heritage Act 2003* ('*ACHA*') and the *Torres Strait Islander Cultural Heritage Act 2003* ('*TSICHA*'). The Acts entered into force on 16 April 2004 and are largely identical substantively.<sup>46</sup>

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<sup>44</sup> See, e.g., Shea Esterling, 'One Step Forward, Two Steps Back: The Restitution of Cultural Property in the United Nations Declaration on the Rights of Indigenous Peoples' Ruth Redmond-Cooper and Norman Parker (eds), (Dec 2013) Vol XVIII, Issue 4 *Art, Antiquity and Law* 333.

<sup>45</sup> Michael J Rowland, Sean Ulm and Jill Reid, 'Compliance with Indigenous cultural heritage legislation in Queensland: Perceptions, realities and prospects' (2014) 31 *Environmental and Planning Law Journal* 329, 330.

<sup>46</sup> *Aboriginal Cultural Heritage Act 2003* (Qld); *Torres Strait Islander Cultural Heritage Act 2003* (Qld).

The Acts repealed and replaced the *Cultural Record (Landscapes Queensland and Queensland Estates) Act 1987* ('*CRA*'), which was widely considered to be ineffective for the purposes of protecting indigenous cultural sites and property.<sup>47</sup> For example, first, the *CRA* failed to address the question of the transfer of ownership or return of cultural property to Indigenous peoples specifically.<sup>48</sup> Second, the *CRA*, rather ethnocentrically, only recognised tangible property that could be *objectively* identified as culturally significant, and not non-archaeological sites or sites that could only be identified by Indigenous peoples.<sup>49</sup> This regime, Queensland's regime, as it then was, was described as 'one of the worst site protection regimes in Australia'.<sup>50</sup> This is perhaps explained by the fact that the *CRA* was envisaged to protect cultural heritage generally, not Indigenous cultural heritage specifically. Indeed, the *CRA*'s preamble did not make any reference to Indigenous cultural property.<sup>51</sup>

The new regime, introduced in 2003, and administered through the *ACHA* and *TSICHA*, is specific to Indigenous cultural property. In taking up cultural property specifically, it has greater potential to protect the concerns of Indigenous peoples specific to cultural property. For the purposes of this Article, the return regime under the *ACHA* only will be analysed.

### 1 *The Aboriginal Cultural Heritage Act 2003*'

The preamble to the *ACHA* provides that it is '[a]n Act to make provision for Aboriginal cultural heritage, and for other purposes'. Section 4 provides that '[t]he main purpose of this Act is to provide effective recognition, protection and conservation of Aboriginal

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<sup>47</sup> *Review of Queensland's Indigenous Cultural Heritage Legislation: Discussion Paper*, 1999; See explanation of regime in Margaret Stephens, 'Queensland's Indigenous Cultural Heritage Legislation: A Critique' (2006) 10(2) *Journal of South Pacific Law* available at <<http://www.paclii.org/journals/fjspl/vol10no2/4.shtml#fnB14>>.

<sup>48</sup> *Ibid.*

<sup>49</sup> Memmott P, 'The Significance of Indigenous Place Knowledge to Australian Cultural Heritage' (1998) 1 *Indigenous Law Bulletin* 26; *Cultural Record (Landscapes Queensland and Queensland Estates) Act 1987* (Qld) ss33 (1)(a); Rowland, M J, *Conservation Plan for Cultural Heritage Sites on the Keppel Island Group, Central Queensland, A Report to the Livingstone Shire Council* (1992) Queensland Department of Environment & Heritage, Brisbane, 1-2; Ellis B, 'The Aboriginal Heritage: Sacred and Significant Sites' in *Cultural Conservation: Towards a National Approach*. (1994) Australian Heritage Commission Special Australian Heritage Publication Series no. 9, Australian Government Publishing Service, Canberra, 342.

<sup>50</sup> Ritchie, D 1996, *Australian Heritage Protection Laws: An Overview*, paper presented by D. Ritchie at the AAS/AIATSIS Workshop on Heritage Issues, 14-15 February 1996 (unpublished) at 3.

<sup>51</sup> *Cultural Record (Landscapes Queensland and Queensland Estates) Act 1987* (Qld) Preamble.

cultural heritage'. Section 5 provides that the fundamental principles underlying the Act's main purpose are that, *inter alia*:

- (a) the recognition, protection and conservation of Aboriginal cultural heritage should be based on respect for Aboriginal knowledge, culture and traditional practices;
- (b) Aboriginal people should be recognised as the primary guardians, keepers and knowledge holders of Aboriginal cultural heritage;

As regards the operative provisions of the *ACHA*, the Act adopts a wide definition of 'Aboriginal cultural heritage', which encompasses both Aboriginal sites and artefacts, and evidence of archaeological or historic significance of Aboriginal occupation of an area of Queensland.<sup>52</sup>

The heart of the current regime is the introduction of a new statutory duty of care that exists over all Aboriginal cultural heritage, contained in pt 3 of the *ACHA*. Section 23 of the *ACHA* has wide application and provides that a person who carries out any activity 'must take all reasonable and practicable measures to ensure the activity does not harm Aboriginal cultural heritage'.<sup>53</sup> The penalty for an individual found guilty of this offence is 1000 penalty units.<sup>54</sup> This 'cultural heritage duty of care'<sup>55</sup> is innovative, flexible and has been heralded as one of the *ACHA*'s major strengths,<sup>56</sup> but it does not provide for the return of *anything*. Instead, it is solely focused on the physical protection of Aboriginal cultural heritage, wherever it is located and whomever may own or possess it. While the protection and preservation of Aboriginal cultural heritage is an antecedent prerequisite to its return, it is not the focus of this Article.

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<sup>52</sup> *Aboriginal Cultural Heritage Act 2003* (Qld) s 8.

<sup>53</sup> *Ibid* s 23(1).

<sup>54</sup> *Ibid* s 23(1)(a) and (b). The penalty for a corporation found guilty of the offence is 10,000 penalty units.

<sup>55</sup> *Ibid* s 23(1).

<sup>56</sup> Rowland et al, above n 45, 338.

This Article is primarily concerned with pt 2 of the *ACHA*, which addresses the ownership, custodianship and possession of Aboriginal cultural heritage, and contains provisions that effect the *return* of Aboriginal cultural heritage.

(a) *The Return of Aboriginal Human Remains*

Part 2, div 2, ss 15 and 16 make provision for the return of Aboriginal human remains. Section 15 is an ownership creating provision, which provides that, if prior to the commencement of the section, Aboriginal people have a 'traditional or familial link with Aboriginal human remains immediately before the commencement' shall become the owners of those remains if they were not the owners already, irrespective of who may have owned the Aboriginal human remains before the commencement of the section.<sup>57</sup> Section 16 then establishes that, if those remains are in the custody of the State, the owners of those Aboriginal human remains may, at any time, request their return.<sup>58</sup> Alternatively, the owner can request that the entity continues to be the custodian of the human remains.<sup>59</sup>

Unfortunately, the 'traditional or familial link' requirement to establish ownership has lacked judicial consideration since the *ACHA* came into force. However, s 13 does provide that provisions of the Act must not be interpreted in a way that would allow the provision to prejudice an existing right of ownership,<sup>60</sup> a person's enjoyment or use or free access to Aboriginal cultural heritage,<sup>61</sup> or native title rights and interests.<sup>62</sup> The Explanatory Notes to the *Aboriginal Cultural Heritage Bill 2003* explain that the intent in including s 13 was to maintain the protection of customary rights that was provided under the *CR4*.<sup>63</sup>

Sections 17 and 18 ensure the practical efficacy of these provisions. They ensure that the State or one of its representative entities has custody of Aboriginal human remains such that owners can request their return. Section 17 makes it an offence for persons in possession of Aboriginal human remains, who do not have the necessary traditional and

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<sup>57</sup> *Aboriginal Cultural Heritage Act 2003* (Qld) s 15(1)-(2).

<sup>58</sup> *Ibid* s 16 (1)-(2).

<sup>59</sup> *Ibid* s 16(2)(a).

<sup>60</sup> *Ibid* s 13(a).

<sup>61</sup> *Ibid* s 13(b).

<sup>62</sup> *Ibid* s 13(c).

<sup>63</sup> Explanatory Note, *Aboriginal Cultural Heritage Bill 2003*, 9.

familial links to engender ownership in the human remains, to not take all reasonable steps to ensure that the remains are taken into the custody of the chief executive.<sup>64</sup> Section 18 is more robust and makes it an offence to not advise the chief executive of the existence and location of Aboriginal human remains when that information was known and it was or should reasonably have been known that those remains are Aboriginal human remains and that the chief executive is not aware of them.<sup>65</sup>

*(b) The Return of 'secret and sacred object[s]'*

Part 2, div 3, s 19 makes provision for the return of Aboriginal cultural heritage that is a 'secret and sacred object',<sup>66</sup> such as a ceremonial item,<sup>67</sup> as distinct from Aboriginal human remains. Section 19 differs from s 16 as, provided the Aboriginal people can establish the necessary traditional or familial link with the object, they become the owners of the object that is in the custody of the State entity before, at the time of, or after the commencement of the section. As with Aboriginal human remains, Aboriginal peoples found to be owners may request the return of the object at any time.<sup>68</sup>

Unlike the provisions for the return of Aboriginal burial remains, the 'secret and sacred object' return provisions are not supported by explicit offence creating provisions requiring the surrender, or reporting of the location, of 'secret and sacred objects'. Instead, s 26, which does not apply to Aboriginal burial remains,<sup>69</sup> makes it an offence for a person to unlawfully possess an object that is Aboriginal cultural heritage where that person knows or ought reasonably to know that the item is Aboriginal cultural heritage.<sup>70</sup> The penalty for an individual found guilty of this offence is 1000 penalty units.<sup>71</sup> There are a number of

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<sup>64</sup> *Aboriginal Cultural Heritage Act 2003* (Qld) s 17(1)-(2).

<sup>65</sup> *Ibid* s 18.

<sup>66</sup> See Michael Pickering, 'The Big Picture': the repatriation of Australian Indigenous sacred objects' (2015) 30(5) *Museum Management and Curatorship* 427, 431-432 for a discussion on secret and sacred objects.

<sup>67</sup> *Aboriginal Cultural Heritage Act 2003* (Qld) s 19(1)(a).

<sup>68</sup> *Ibid* s 19(3)(b).

<sup>69</sup> *Ibid* s 26(4).

<sup>70</sup> *Ibid* s 26(1).

<sup>71</sup> *Ibid* s 26(1)(a) and (b). The penalty for a corporation found guilty of the offence is 10,000 penalty units.

exceptions to the offence, such as if the person is possessing the object under a cultural heritage management plan<sup>72</sup> or native title agreement.<sup>73</sup>

As of 2007, the Compliance Information Register Management System had recorded 79 notifications relating to compliance with the *ACHA*.<sup>74</sup> One notification involved a prosecution in the Bundaberg Magistrate's Court in 2006 for the unlawful possession of a 'rare Aboriginal stone axe hand tool'.<sup>75</sup> Conversely, the Department of Natural Resources and Water compliance unit decided not to prosecute a person attempting to smuggle an axe from Jandowae out of Australia and to the United States.<sup>76</sup> The reasons why prosecution in the latter case was not pursued are unclear; at least one commentator has suggested the motive of 'obtaining positive publicity for the legislation'.<sup>77</sup> The Authors have not been able to find any more return-related cases under the *AHCA*. This may be, in part, because there are simply very few return requests made under the legislation. This would be consistent with the experiences of Australian museums, where return requests have been described as 'surprisingly rare'.<sup>78</sup> If this is true of the non-legal, more consultative and accessible return regimes of museums, one might reasonably hypothesise that the State, operating under the stricter legislative regime, would receive even less requests from Indigenous peoples. The voluntary return regimes of museums are considered later in this Article.

### (c) *State Ownership*

Section 20 is titled 'Ownership of Aboriginal cultural heritage' and addresses State ownership of Aboriginal cultural heritage. In essence, s 20 provides that, except where ownership in Aboriginal cultural heritage is created by the *ACHA*, and except where a person becomes an owner by subsequent lawful transfer, ownership of Aboriginal cultural heritage is vested in the State. The ostensible effect is that when Aboriginal cultural heritage

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<sup>72</sup> Ibid s 26(2)(a)(iii).

<sup>73</sup> Ibid s 26(2)(a)(ii).

<sup>74</sup> Queensland Government, Department of Environment and Heritage Protection, *State of Environment Queensland 2007* (DEHP, Brisbane, 2007), 336.

<sup>75</sup> As described in Rowland et al, above n 45, 339.

<sup>76</sup> Natural State Magazine, 'USA-bound Axe United with Traditional Owners' (Department of Natural Resources and Water, Queensland, 2008) 13 referred to in Rowland et al, above n 45, 339; as described in Rowland et al, above n 45, 339.

<sup>77</sup> Rowland et al, above n 45, 339.

<sup>78</sup> Pickering, above n 66, 430.

is lawfully transferred *after* the commencement of the ownership vesting provisions, it no longer comes within the aegis of the *ACHA* return regime.

### B *Commonwealth Regime*

With respect to the Commonwealth domestic regime, acts such as the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) ('*ATSIHPA*') and the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) establish practices, such as a National Heritage List,<sup>79</sup> that pre-emptively protect sites that are of cultural and traditional significance to Indigenous peoples. The *ATSIHPA* makes provision for the making of emergency declarations by the Minister for the preservation and protection of specified areas upon the application of Aboriginal peoples.<sup>80</sup> In this way, the *ATSIHPA* provides a means for Aboriginal peoples to seek assistance from the Commonwealth where State or Territory protection is not sufficient.<sup>81</sup> Section 12 makes similar provision for the making of emergency declarations in relation to 'significant Aboriginal objects'.<sup>82</sup>

With the exception of the *ATSIHPA* requiring the unconditional return of burial remains to Aboriginal people entitled to them under Aboriginal tradition,<sup>83</sup> the domestic Commonwealth domestic legislation does not directly address the return of cultural property to Indigenous peoples. Rather, repatriation of cultural property is a topic left to State legislatures.

### C *Policies*

Outside of Australia's formal legislative regime, various government-funded programs, in collaboration with museums and other organisations, pursue the return of Aboriginal cultural heritage on a voluntary basis. One such example is the Return of Indigenous Cultural Property Program ('RICPP'), a joint initiative between the Cultural Ministers Council and Australia's major government funded museums funded by State and Commonwealth governments, to return Aboriginal cultural heritage, including human

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<sup>79</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

<sup>80</sup> *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) s 9(1).

<sup>81</sup> Rowland et al, above n 45, 330.

<sup>82</sup> *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) s 12(1)(b)(i).

<sup>83</sup> *Ibid* s 21(1)(a).



remains, to their communities of origin upon request.<sup>84</sup> As of 2016, it was estimated that the museums participating in the RICPP held 7070 ancestral remains and 11,448 secret-sacred objects, that were amenable to repatriation, between them.<sup>85</sup> In 2000, the National Museum of Australia ('NMA') established a repatriation unit for the return of aboriginal cultural heritage. The repatriation unit abides by strict policies that require the unconditional<sup>86</sup> return of Aboriginal burial remains<sup>87</sup> and cultural objects<sup>88</sup> provided the applicant(s) for return is or are the correct communities or custodians of the burial remains according to provenance,<sup>89</sup> or in the case of cultural objects, whether the applicant is the better owner or custodian in accordance with prescribed and criteria.<sup>90</sup> The repatriation process is consultative with indigenous communities.<sup>91</sup> Recent data on NMA repatriations is difficult to find, but from 2002-2003, NMA repatriated 405 humans' remains, then, in 2004-2005, NMA repatriated 39 humans' remains. From 2003-2004, NMA repatriated 308 secret or sacred objects.<sup>92</sup>

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<sup>84</sup> Department of Social Services, 'Extension of the Return of Indigenous Cultural Property Programme' (2007), available at <<https://www.dss.gov.au/about-the-department/publications-articles/corporate-publications/budget-and-additional-estimates-statements/indigenous-affairs-budget-2007-08/extension-of-the-return-of-indigenous-cultural-property-programme>>; Marilyn Truscott, *Repatriation of Indigenous cultural property* (2006) (paper prepared for the 2006 Australian State of the Environment Committee, Department of the Environment and Heritage, Canberra), available at <<http://www.environment.gov.au/soe/2006/publications/emerging/repatriation/pubs/repatriation.pdf>>.

<sup>85</sup> Australian Government Department of Social Services, *Extension of the Return of Indigenous Cultural Property Programme* (8 December 2016) Australian Government Department of Social Services <<https://www.dss.gov.au/about-the-department/publications-articles/corporate-publications/budget-and-additional-estimates-statements/indigenous-affairs-budget-2007-08/extension-of-the-return-of-indigenous-cultural-property-programme>>.

<sup>86</sup> Pickering, above n 66, 439.

<sup>87</sup> National Museum of Australia, 'Aboriginal and Torres Strait Islander human remains policy (Policy, POL-C-011, National Museum of Australia, 19 April 2011) cl 4.9.

<sup>88</sup> National Museum of Australia, 'Collections – return of cultural objects policy' (Policy, POL-C-037, National Museum of Australia, 15 April 2011) cl 4.1-4.3.

<sup>89</sup> National Museum of Australia, 'Aboriginal and Torres Strait Islander human remains policy (Policy, POL-C-011, National Museum of Australia, 19 April 2011) cl 4.6 and 4.9.

<sup>90</sup> National Museum of Australia, 'Collections – return of cultural objects policy' (Policy, POL-C-037, National Museum of Australia, 15 April 2011) cl 4.1-4.3.

<sup>91</sup> Pickering, above n 66, 436-437.

<sup>92</sup> Library of Congress, *Repatriation of Historic Human Remains: Australia* (6 September 2015) Library of Congress <[http://www.loc.gov/law/help/repatriation-human-remains/australia.php#\\_ftnref31](http://www.loc.gov/law/help/repatriation-human-remains/australia.php#_ftnref31)>.

Pickering describes the repatriation by public Australian museums as driven by an 'evolved philosophy' that relies not on legal compulsion, but on engagement with Australian indigenous communities and voluntary participation, so much so that the repatriation of indigenous cultural heritage by museums can now be described as 'business as usual'.<sup>93</sup>

It can thus be seen that Australia's domestic regime is a synthesis of separate, self-contained regimes across State and Commonwealth law, and policy. At the turn of the 21<sup>st</sup> century, the regime in Queensland moved to a more indigenous-specific, self-determinist return regime, leaving behind a general and ethnocentric one. However, the new regime is not without its flaws; enforcement appears to be lacklustre and, relatedly, the operative return provisions have yet to receive serious judicial consideration. For these reasons, the voluntary return regime administered by the various governmental bodies and museums, while not enjoying the force of law, is integral to Australia's domestic return regime.

#### IV CONCLUSION

*'But I have promises to keep, And miles to go before I sleep, And miles to go before I sleep.'*<sup>94</sup>

While progress has been made, there is still a long way to go until legislators, policy-makers and advocates can rest. Both international and domestic actors have promises to keep to the world's Indigenous peoples. This Article has established that those promises vary significantly in the extent to which they are legally binding and effective. Yet, they remain promises of outstanding importance. Nothing will ever truly and completely mend the harm inflicted upon Indigenous peoples by the historical theft and dispossession of their cultural property. Repatriation of this property, however, is a step closer to reparation.

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<sup>93</sup> Pickering, above n 66, 429.

<sup>94</sup> Robert Frost, 'Stopping by Woods on a Snowy Evening' in Edward Connery Lathem (ed), *The Poetry of Robert Frost* (Henry Holt: 1969).



## An Interview with Jocelyn Bosse\*

### Editors

*Thank you for talking with us today, Jocelyn. Many countries are in the process of implementing the Nagoya Protocol 2010.<sup>1</sup> What is the purpose of the treaty, and how successful has it been?*

The *Nagoya Protocol* is a supplementary agreement to the *UN Convention on Biological Diversity 1992*.<sup>2</sup> The treaty aims to regulate access to biological materials (eg a scientist collecting samples of a native plant) and the sharing of any benefits from the subsequent use of those materials (eg if the researchers discover a chemical in the plant which can be commercialised as a new medicine).

The desire to regulate those activities came from two directions. First, the UN parties imagined that the access and benefit sharing regime would create an incentive to protect biological diversity by framing natural resources as a library of unique compounds with commercial potential. In that view, the loss of biodiversity would be tantamount to the loss of valuable opportunity for commodification of biological materials.

Second, the UN parties faced increasing pressure from Indigenous and local communities to recognise and protect their traditional knowledge associated with natural resources. The early 1990s saw a wave of lawsuits, advocacy, and publicity about incidents where international companies had used traditional knowledge to identify plant species for investigation, only to patent and commercialise derivative

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\* Jocelyn Bosse is a PhD student in the TC Beirne School of Law, The University of Queensland. This is a revised version of an interview conducted by Julius Moller on 13 September 2018.

<sup>1</sup> *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity*, opened for signature 2 February 2011, UNEP/CBD/COP/DEC/X/1 (entered into force 12 October 2014).

<sup>2</sup> *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993).

products without any returns or benefits to the Indigenous communities whose knowledge was used.

The access and benefit sharing provisions of the *Convention on Biological Diversity* can be generously described as vague. Supplementary, non-binding guidelines were developed in 2002, which spurred some legislative action in Australia, but the *Nagoya Protocol 2010* was heralded as the more comprehensive, binding framework through which countries could develop access and benefit sharing regimes.

Has it been a success? Well, the *Nagoya Protocol* entered into force in 2014, so it has not been a long time. The European Union finally implemented the treaty in 2016, and the effects are just starting to manifest. Even so, the general principles and the guidelines have been in place for about two decades. The fundamentals of the *Nagoya Protocol* were nothing new for the international community. In theory, Australia could have met nearly all of the requirements of the *Nagoya Protocol* back in 2002 based on the *Convention* and the guidelines alone, if there had been the political will.

In saying that, I think we need to look at the ratification of the *Nagoya Protocol* with a critical eye. Just because the framework was developed by the United Nations, it certainly does not mean that it serves the best interests of the people and entities it was intended to protect. One major criticism is that the *Convention on Biological Diversity*, and by extension the *Nagoya Protocol*, is fundamentally built on the sovereignty of nation states. For Indigenous and local communities, whose knowledge and rights are ostensibly protected by the access and benefit sharing provisions, this means that the power resides entirely with national governments as signatories to the treaties. The determination of whether benefit sharing is 'fair and equitable' and whether 'prior informed consent' has been given is still mediated through the nation state.

The UN parties were not completely blind to this: multiple Indigenous non-governmental organisations were active during the treaty negotiations and meetings. But that participation only goes so far. Domestically, the nation state has a monopoly

on authoritative legal interpretation, which translates into the power to recognise or contest claims to Indigenous status, land, and cultural practices. Internationally, nation states have the exclusive status of being subjects of international law, with the exclusive power to interpret the law. In that regard, the *Nagoya Protocol* provides little – if any – substantive change for Indigenous rights vis-à-vis the appropriation of traditional knowledge and associated biological materials.

For Indigenous peoples in Australia, who never ceded sovereignty, one can only imagine the sting of reading the preamble to the *Convention on Biological Diversity*, ‘reaffirming that States have sovereign rights over their own biological resources’, and then Article 3, that ‘States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies’. Australia’s statehood is uncontested under international law, but that masks the contentious power relationships within the country, including when it comes to access to biological resources.

*Some commentators have raised concerns that the added bureaucracy and legislative red-tape will make research and conservation efforts more difficult. Large corporations aside, how much of a balancing act is it between the rights of traditional owners and researchers?*

Administrative burden is a genuine concern for all players – whether a large pharmaceutical company, a research institute in a university, or an Aboriginal community. Despite the initial optimism about the access and benefit sharing regime, it has become abundantly clear that the risks associated with benefit sharing agreements are perceived to be too high.

For scientific organisations, that manifests as the investment risk. Plants and other biological materials do not respect the boundaries that humans draw, whether those are the boundaries between jurisdictions or the boundaries between different Indigenous communities (both of which can be quite contested). This leads organisations, rightly, to ask the question: if we negotiate a benefit sharing contract

with community X, but the species that we are collecting is also used by community Y, are we at risk of claims from community Y?

There is also the issue of recognition that I alluded to earlier. In Australia, for example, the access and benefit sharing regime has become somewhat linked to the native title system, which creates serious uncertainties for scientists or commercial entities that are negotiating with communities whose native title rights have not been recognised by the state via judicial determination. In the end, these organisations are very risk averse – especially when millions of dollars of research funding is on the line – which means that they simply do not engage with Indigenous communities much of the time. It is seen to be safer to work with synthetic biology or to acquire materials from jurisdictions where access and benefit sharing laws do not apply.

You are quite right to bring up red tape here, too. If an organisation does take the risk of establishing a benefit sharing arrangement, they are facing months, if not years, of meetings and negotiations. From the point of view of scientists, they already have to spend inordinate amounts of time out of the lab, writing grant applications, getting ethics approval, and completing other bureaucratic tasks. It is not appealing to spend even more time on contract negotiations or permit applications, if they can avoid it.

Turning to Indigenous communities, the risk is often about loss. It was not very long ago that ‘biopiracy’ cases were a big international concern – arguably, it is still rampant today. Communities have reasonable fears about researchers who might come to them with big plans and attractive promises about the economic returns and collaborative opportunities. But Indigenous communities have not forgotten the unethical conduct of previous researchers who took materials and were never seen or heard from again.

As I mentioned before, it also does not help that the Indigenous communities do not have the main authority in this space. When you go to the *Nagoya Protocol* website and look at the Access and Benefit Sharing Clearinghouse, the only entities which can provide evidence of prior informed consent and a benefit sharing agreement with mutually agreed terms, are state parties. If a state does not contest the legitimacy of

an access and benefit sharing arrangement, there is no mechanism under the *Nagoya Protocol* for Indigenous or local communities to dispute it independently.

Australia has seen many instances of native biological materials that were taken overseas and commercialised – think about macadamia nuts, tea tree – without repercussions. Likewise, once traditional knowledge is shared or published, there is no mechanism to withdraw it from the public domain. So, you can imagine why Indigenous communities would be incredibly hesitant to disclose sacred knowledge, or indeed, any traditional knowledge, to researchers who have not developed a robust relationship of trust and confidence with the community.

*To what extent has the Nagoya Protocol been implemented in Australia?*

The short answer is: not at all. The situation in Australia is an awkward product of being a federation where the legislative power to develop environmental laws that would comply with the *Nagoya Protocol* is held by the States, Territories and the Commonwealth (the ruling in the *Tasmanian Dams* case<sup>3</sup> is relevant here).

The Northern Territory and Commonwealth have legislation which, broadly speaking, could meet the requirements of the *Nagoya Protocol*. Queensland is halfway there, and is currently reviewing the *Biodiscovery Act 2004* (Qld) to potentially comply with the *Nagoya Protocol* as well. At the moment, the Queensland law does not recognise traditional knowledge or Indigenous rights at all. The other States have no legislation in this space.

I feel rather conflicted about whether Indigenous interests would be better protected if all the Australian jurisdictions implement the *Nagoya Protocol*. On the one hand, if the rules were enforced, access and benefit sharing laws could have consequences for organisations that are taking native biological resources and using traditional knowledge without consent. But on the other hand, that approach is still dependent on the state taking action on behalf of Indigenous communities.

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<sup>3</sup> *Commonwealth v Tasmania* (1983) 158 CLR 1.



Furthermore, where benefit sharing arrangements must be developed under the auspices of government oversight, it can limit the opportunity for Indigenous communities and their collaborators to be creative in their approach. There are examples in Australia of researchers who have negotiated contracts with Indigenous communities that were not covered by access and benefit sharing laws, and that gave them a lot of freedom to focus on the priorities of the community, rather than achieving government priorities.

*How did you become interested in your current field of research and its focus on protecting Indigenous rights to traditional knowledge?*

I studied law and science, and conducted a number of research projects in plant biology during my undergraduate degrees. I was always hyper-aware of the presence of legal regulation in the laboratory; everything from a door to an important piece of equipment would be plastered with signs that declared requirements under the *Gene Technology Act 2000* (Cth); the laboratory would sometimes be abuzz with discussion about compliance audits from regulatory authorities; senior researchers lamented the money and hours spent on intellectual property licensing arrangements, permit applications, ethics clearance, and other government approvals.

But the complaints aside, I was always impressed by the fact that these scientists remained passionate about doing something good for the world. When they are talking privately behind closed doors, or speaking in front of a large public audience, the message is the same: scientists genuinely want to improve life for everyone. Interestingly, the scientists tend to agree with the principles behind the laws – they care about safety, they understand the importance of ethical research. The issue was with the way that these principles manifest in the regulations as bureaucratic hurdles that do not seem to achieve the real objectives.

As for the Indigenous perspective, I recognise that I cannot possibly speak for Indigenous persons. While I am passionate about protecting Indigenous rights to traditional knowledge, it is not my place to determine how that objective should be achieved. That is why my approach to my thesis is heavily grounded in seeking Indigenous perspectives on the access and benefit sharing regime: my personal

opinion is not the important thing, the opinions of Indigenous persons are what matter.

At the end of the day, I want to use my ‘insider knowledge’ of scientific research and the law, informed by the views of Indigenous persons, to critically analyse these regulations. Perhaps that will culminate in recommendations for minor legislative reform. But it could mean rethinking the whole system. We cannot keep doing the same thing and expecting different results. That would be madness. But if that is what my research uncovers, then I will have to be willing to call it what it is. Stay tuned!

*I have no doubt we will! Thank you again for sitting down with us, I am sure this interview will provide our readers with a fantastic insight into this rarely discussed but incredibly important area of the law.*



## Proceed with Caution: Restorative Justice and Domestic Violence

Samantha O'Donnell\*

### I INTRODUCTION

The human and economic cost of domestic violence is currently one of the biggest public policy challenges for States and Territories in Australia. The fact that it is a public challenge represents a shift in the public perception of domestic violence from a silent, personal issue to a social issue that the whole community must address. Currently, Australia's primary law-related approach to domestic violence is to punish offenders under the criminal justice system, and protect victims using civil protection orders.<sup>1</sup> Despite the punitive approach, domestic violence remains prevalent in Australia and the protective orders, the response for many of those affected by domestic violence, remains unsatisfactory. The complex issue of addressing domestic violence cannot be viewed solely through the lens of legislated criminal or civil justice procedures. Rather, the specific needs of all parties affected by domestic violence must be more broadly understood and must be taken into account to fully address and provide solutions to the issues. Acceptance that a criminal justice response alone will not be effective in all cases of domestic violence will allow consideration of additional options that may better meet the particular needs of the individuals concerned.

Restorative justice is one option. A restorative conference brings together offenders, victims and communities in an attempt to bring about healing and restoration. Use of this approach for domestic violence offences has faced backlash, predominantly within feminist literature, where academics and practitioners rightly fear it may again privatise the issue, rather than keeping it as a public concern owned by communities.<sup>2</sup> One argument sees a restorative conference as a failure to effectively punish violence, thus adversely affecting victims'

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\* An earlier version of this paper was developed as part of the Bachelor of Laws (Honours) at the Australian National University. The author would like to thank Dr Tony Foley of the ANU College of Law for his guidance and invaluable advice. Any outstanding mistakes are the authors.

<sup>1</sup> Australian Law Reform Commission, *Family Violence – A National Legal Response*, Report No 114 (2010) vol 1, 351 [8.30] ('*Family Violence*').

<sup>2</sup> See, eg, Julie Stubbs, 'Relations of Domination and Subordination: Challenges for Restorative Justice in Responding to Domestic Violence' (2010) 33(3) *UNSW Law Journal* 970.

safety.<sup>3</sup> This paper considers the potential of a restorative justice approach to domestic violence and broadly addresses four criticisms of its use: power imbalances; re-victimisation; unfavourable emphasis on reconciliation and apology; and, inappropriate community involvement. These criticisms represent real and valid problems with using a standard restorative conference for domestic violence offences.

This paper analyses two case studies from New Zealand that have addressed these criticisms and successfully utilised restorative justice for domestic violence offences. This suggests if standard conferences are moderated to properly address these real challenges, a restorative conference has a better chance for a successful outcome measured in effectiveness and safety, than punitive justice alone. This analysis also reveals that appropriate community involvement could be used to address the problematic link between Indigeneity and domestic violence in Australia. Indigenous Australians remain disproportionately represented within domestic violence statistics. Safe restorative conferences involving Indigenous community representatives who condemn violence may present an opportunity for Indigenous community involvement as part of the solution.<sup>4</sup> It is evident that safe restorative conferences could provide additional choices for victims, strengthening the legal system that presently fails offender rehabilitation and victim safety.<sup>5</sup>

## II PRIORITISING SAFETY

In the early 1990's, feminist social movements sought to take domestic violence from the private sphere into the public domain.<sup>6</sup> Treating domestic violence with 'real seriousness' aimed to change the perception of domestic violence as inherently private, to a community

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<sup>3</sup> Chris Cunneen and Carolyn Hoyle, *Debating Restorative Justice* (Hart Publishing, 2010) 76.

<sup>4</sup> Australian Institute of Health and Welfare, *Family, domestic and sexual violence in Australia 2018*, (2018) Reports & Statistics <<https://www.aihw.gov.au/reports/domestic-violence/family-domestic-sexual-violence-in-australia-2018/contents/table-of-contents>> 85–87; Harry Blagg, 'Restorative Justice and Aboriginal Family Violence: Opening a Space for Healing' in John Braithwaite and Heather Strang (eds), *Restorative Justice and Family Violence* (Cambridge University Press, 2002) 191, 191.

<sup>5</sup> This paper acknowledges disagreement about appropriate terminology while adopting the following terms: '*domestic violence*', '*victim*', the person who has suffered, and '*offender*', the individual who has pleaded guilty or been charged with an offence.

<sup>6</sup> *R v Hamid* [2006] NSWCCA 302, [67]–[70] ('*Hamid*').

taboo requiring serious punishment.<sup>7</sup> As a separate movement, contemporary restorative justice practice had emerged in the 1970s, beginning with pilot programs in Canada and, soon after, New Zealand and Australia.<sup>8</sup> The restorative justice movement found value in an informal justice process geared towards repairing victims, offenders and communities.<sup>9</sup> This development has had a significant impact on criminal justice in Australia. Today, restorative justice exists as a form of justice response, to varying degrees, in criminal jurisdictions throughout Australia.<sup>10</sup> In Australia, restorative practices have predominantly existed as conferences within juvenile justice. However, there is movement within Australia to extend restorative responses to domestic violence offences and sexual offences.<sup>11</sup> This utilisation of restorative justice conferences to respond to domestic violence has been highly contentious and is fiercely debated.<sup>12</sup> Despite this, more agreement between both sides of the debate has occurred recently than is generally acknowledged. Conferencing procedures and protocol tailored to the domestic violence context may address the remaining areas of contention.<sup>13</sup>

### A *Domestic Violence*

Domestic violence: is more common than is widely acknowledged; constrains victims' freedom; denies fundamental human rights; and, can negatively impact victims' decision-making.<sup>14</sup> Policy makers in Australia have made domestic violence eradication and prevention strategic objectives,<sup>15</sup> although the current public climate seems to suggest the

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<sup>7</sup> *R v Edigarov* [2001] NSWCCA 436, [558] ('*Edigarov*').

<sup>8</sup> John Braithwaite, *Restorative Justice & Responsive Regulation* (Oxford University Press, 2002) 8.

<sup>9</sup> *Ibid* viii.

<sup>10</sup> Michael S King, 'Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice' (2008) 32 *Melbourne University Law Review* 1096, 1104.

<sup>11</sup> See, eg, *Crimes (Restorative Justice) Act 2004* (ACT) s 16 ('*Restorative Justice Act*').

<sup>12</sup> See Stubbs, 'Relations of Domination', above n 2.

<sup>13</sup> Anne Hayden, 'Reflections on Family Violence and Restorative Justice' in Anne Loraine Gelsthorpe, Anne Harden, Venezia Kingi and Allison Morris (eds), *A Restorative Approach to Family Violence: Changing Tack* (Routledge, 2016) 211, 211.

<sup>14</sup> See, eg, ACT Government, 'ACT Prevention of Violence Against Women and Children Strategy 2011-2017' (Report, ACT Government, 2011); See Anne Hayden, 'Safety issues associated with using restorative justice for intimate partner violence' (2012) 26(2) *Women's Studies Journal* 4.

<sup>15</sup> ACT Government, above n 14; NSW Government, 'NSW Domestic Violence Justice Strategy, Improving the NSW Criminal Justice System's Response to Domestic Violence 2013-2017' (Report, NSW Government, 2013).

public perception is that domestic violence is not being treated with enough seriousness. According to the Australian Bureau of Statistics, across States and Territories at least two of five Assaults recorded during 2016 were family and domestic violence related offences (as defined by the Bureau). Of the number of sexual assaults recorded, 36% of all victims were victims of Family and Domestic Violence related sexual assault.<sup>16</sup> These statistics highlight the large-scale problem domestic violence is in Australia, and may even be understating the extent of such violence. This is because the availability of data is dependent on victims reporting domestic violence and police detecting domestic violence. In many instances, domestic violence may go unreported and undetected.

## 1 *Scope*

Domestic or family violence is defined in the various legislative provisions at State and Territory level. The definitions broadly include conduct directed at a current or former domestic partner, a relative, a child of a current or former domestic partner, someone who the person has been in an intimate relationship with or someone who the person has lived in the same household as, including a carer.<sup>17</sup> This conduct may include: causing physical or personal injury, sexual abuse, emotional abuse, economic abuse, damage to property, threatening or coercive behaviour, harassing offensive conduct including stalking, animal related violence, threatening self-harm or suicide as a form of intimidation, and the threat of any of the aforementioned violence.<sup>18</sup> Therefore, domestic violence extends beyond intimate partner violence with a male offender and female victim to include all violence within families. Arguably, similar dynamics can arise in all familial violent relationships, yet

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<sup>16</sup> Australian Bureau of Statistics, *4510.0 – Recorded Crime – Victims, Australia (2016)* Report <

<sup>17</sup> *Family Violence Act 2016* (ACT) ss 9–11 ('*Family Violence Act ACT*'); *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 5 ('*Crimes Act NSW*'); *Domestic and Family Violence Protection Act 2012* (QLD) ss 13–20 ('*Family Violence Protection Act QLD*'), *Family Violence Act 2004* (TAS) s 7 ('*Family Violence Act TAS*'); *Family Violence Protection Act 2008* (VIC) ss 8–10 ('*Family Violence Act VIC*'), *Domestic and Family Violence Act 2007* (NT) s 9 ('*Family Violence Act NT*'), *Intervention Orders (Prevention of Abuse) Act 2009* (SA) ss 8(1)–(7) ('*Intervention Orders Act SA*'), *Restraining Orders Act 1997* (WA) s 4 ('*Restraining Orders Act WA*').

<sup>18</sup> *Family Violence Act ACT* s 8; *Crimes Act NSW* s 11; *Family Violence Protection Act QLD* s 8; *Family Violence Act TAS* s 7; *Family Violence Protection Act VIC* s 5; *Family Violence Act NT* s 5, *Intervention Orders Act SA* ss 8(8); *Restraining Orders Act WA* s 5A.

they may be exacerbated where certain categories of relationships exist, such as intimate partner violence.<sup>19</sup>

Australian judicial definitions of domestic violence bear similarities to the legislated definitions. These include: i) a victim who is in a physically, economically, or otherwise compromised position,<sup>20</sup> ii) an offender who is disassociated from the wrongness of their actions, iii) a personally targeted victim,<sup>21</sup> and iv) dynamics of power and control leading to the victim's vulnerability.<sup>22</sup> Julie Stubbs, a prominent Australian feminist scholar, confirms this characterisation. She emphasises that domestic violence involves the exercise of power or control over the victim and often occurs more than once with violence escalating over time. People other than the main victim, such as children, may also be subjected to violence.<sup>23</sup> Pennell and Burford emphasise that '(a)t one point in time, an abused wife may be abusing her young children; later, she may become the victim of her now adolescent children'.<sup>24</sup> Therefore, any unduly narrow classification does not reflect reality, where multiple forms of abuse may occur against multiple targets under one roof.

## 2 *Current Legislative Approach*

There are a myriad of legislative responses at State and Territory level, with several commonalities. In all Australian States and Territories, an offender of domestic violence may be subject to a protection order or criminal prosecution, or both. In more serious cases, they will invariably be the subject of criminal prosecution.<sup>25</sup> This is evidence that the move to treat domestic violence with 'real seriousness' has generated change. All States and Territories have in place a legislated protection order regime. An order will seek to restrain the perpetrator from conduct constituting domestic violence, as defined by the various legislative provisions, against the victim. Under the various State and Territory provisions,

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<sup>19</sup> See especially Stubbs, 'Relations of Domination', above n 2.

<sup>20</sup> *Edigarov*, [558].

<sup>21</sup> *R v Dunn* (2004) 144 A Crim R 180, 195 [47].

<sup>22</sup> *R v Devine* [1993] TASSC (5 July 1993), quoted in *Hamid*, [74].

<sup>23</sup> Julie Stubbs, 'Restorative Justice, Domestic Violence and Family Violence' *Australian Domestic and Family Violence Clearing House*, Issues Paper 9, 2004, 6–7.

<sup>24</sup> Joan Pennell and Gale Burford, 'Family Group Decision Making: Protecting Children and Women' (2000) 79(2) *Child Welfare* 131, 133–134.

<sup>25</sup> *Family Violence*, above n 1, 351 [8.30].



the content of the order may include: prohibiting the offender from any contact with the victim, including restricting the offender from accessing certain places, and prohibiting the offender from contacting the victim and engaging in any behaviour that would constitute domestic violence under the relevant provisions. This conduct may also apply to the victim's child, or any child at risk of exposure to violence.<sup>26</sup> This content is either agreed in some jurisdictions at a conference before a Deputy Registrar, such as is the case in the Australian Capital Territory,<sup>27</sup> and in other jurisdictions or if there is no agreement at conference it is determined at a court hearing with jurisdiction under the relevant legislation. There are also legislated provisional protection orders in most States and Territories, which may be put in place in lieu of a final protection order being granted by the court and may be issued by an authorised police officer.<sup>28</sup> Under the various legislative provisions, a person will be guilty of an offence if they engage in conduct contravening the protection order.<sup>29</sup>

There is evidence that protection orders are not as successful as they should be in protecting victims. For example, looking at the Australian Capital Territory as an example, during the period, 1 July 2014 and 30 June 2015, 440 domestic violence final orders were made in the ACT Magistrates Court.<sup>30</sup> The ACT Supreme Court Sentencing Database reveals during the same period, 79 offenders came before the ACT Magistrates Court for engaging in conduct contravening a protection order, breaching s90(2) of the *Protection Orders Act*.<sup>31</sup> Although

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<sup>26</sup> *Family Violence Act ACT* pt 3; *Crimes Act NSW* pt 4–5; *Family Violence Protection Act QLD* pt 3; *Family Violence Act TAS* pt 4; *Family Violence Protection Act VIC* pt 4; *Family Violence Act NT* ch 2; *Intervention Orders Act SA* div 3; *Restraining Orders Act WA* pt 1B.

<sup>27</sup> ACT Magistrates Court, *Annual Review 2014-15* (21 December 2015) <[http://www.courts.act.gov.au/resources/attachments/ACT\\_Magistrates\\_Court\\_Annual\\_review\\_2015.pdf](http://www.courts.act.gov.au/resources/attachments/ACT_Magistrates_Court_Annual_review_2015.pdf)> 24.

<sup>28</sup> *Family Violence Act ACT* s 99; *Crimes Act NSW* pt 7; *Family Violence Protection Act QLD* pt 4; *Family Violence Act TAS* pt 3; *Family Violence Protection Act VIC* pt 3; *Family Violence Act NT* pt 2.6; *Intervention Orders Act SA* div 2; *Restraining Orders Act WA* s 30A.

<sup>29</sup> *Family Violence Act ACT* s 43; *Crimes Act NSW* s 14; *Family Violence Protection Act QLD* s 177; *Family Violence Act TAS* s 35; *Family Violence Protection Act VIC* s 123; *Family Violence Act NT* ss 120–122; *Intervention Orders Act SA* s 31; *Restraining Orders Act WA* s 61.

<sup>30</sup> ACT Magistrates Court, above n 27, 24.

<sup>31</sup> ACT Sentencing Database, developed by the ACT Courts and Tribunal Administration with assistance from the Judicial Commission of NSW <[https://www.courts.act.gov.au/magistrates/services2/act\\_sentencing\\_database\\_actsd\\_and\\_sentencing\\_snapshot](https://www.courts.act.gov.au/magistrates/services2/act_sentencing_database_actsd_and_sentencing_snapshot)> - accessed on 22/08/2016.

these are not matching groups, and the available data has limits,<sup>32</sup> it does suggest nearly 1 in 5 protection orders made may be breached. Moreover, many breaches may never result in court action, suggesting this statistic may underestimate their lack of effectiveness. Similar evidence of the failings of protection orders exists in other jurisdictions.<sup>33</sup> For example, the Victorian Royal Commission into Family Violence concluded that Court processes may have the opposite effect to that intended. The Commission found many instances where the judicial process retraumatised victims and further compounded the effects of domestic violence.<sup>34</sup>

The current approach allows little scope for victims who may want to maintain a relationship with the offender.<sup>35</sup> This approach may place serious and often unrealistic expectations on offenders who may have children with the victim, or who may be a parent or child of the victim. Equally, while protection of victims guides the application of protection orders, a procedure that is ‘simple, quick and inexpensive as is consistent with achieving justice’ is adopted. This seems to be incompatible with the dynamics of familial relationships.<sup>36</sup> The problem of domestic violence is complex and difficult to solve. A quick response will often not allow for effective change or choice. Practices developed from the second social movement outlined – restorative justice – may provide an additional response and could lead to better outcomes for the victims of domestic violence and others affected.

## B *Restorative Justice*

Contemporary restorative justice, as it emerged in the 1970s, is usually defined as ‘a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications’.<sup>37</sup> While this is an accurate procedural definition it fails to: specify process outcomes, define stakeholders,

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<sup>32</sup> (i) breaches are not categorised according to types of protection orders, and (ii) there may be multiple breaches of the same order.

<sup>33</sup> See, eg, Victoria, Royal Commission into Family Violence, *Royal Commission into Family Violence – Summary and Recommendations* (2016).

<sup>34</sup> Victoria, Royal Commission into Family Violence, *Royal Commission into Family Violence – Volume IV – Report and Recommendations* (March 2016) 136.

<sup>35</sup> *Family Violence*, above n 1, 526; *ibid*.

<sup>36</sup> See, eg, *Family Violence Act ACT* s 7(c).

<sup>37</sup> Tony F Marshall, *Restorative Justice: An Overview* (London Home Office, 1999) 5; Cunneen and Hoyle, above n 3, 1–2; Braithwaite, above n 8, 11.

and, define the core values of restorative justice.<sup>38</sup> Of these, restorative justice values, such as respectful dialogue, forgiveness, responsibility and apology are considered core. The emphasis placed on victims as well as offenders and community is at the center of most definitions,<sup>39</sup> and is reflected in Australian and International understandings of the stakeholders involved in restorative processes.<sup>40</sup> This collection of stakeholders facilitates a 'collaborative problem-solving approach', whereby dialogue and fairness is seen as crucial to restorative justice.<sup>41</sup>

A standard restorative justice conference occurs once the offender admits the wrongdoing. Both the victim and offender nominate support persons, and the conference is a meeting of these people in a facilitated environment.<sup>42</sup> Normally this includes, discussion of the offence, its consequences, and steps to repair harm. A plan of action can then be agreed and signed by the offender and others.<sup>43</sup>

### *C Restorative Justice and Domestic Violence*

#### *1 Criticisms*

Early feminist commentary on domestic violence sought to address the woeful criminal justice response and take domestic violence out of the private sphere where it was largely ignored by the criminal justice system and by the community. As restorative justice gained traction as a justice response, its use in domestic violence matters was criticised as a step backwards towards women accepting domestic violence and apologies, rather than effective punishment and deterrence.<sup>44</sup> Feminist scholars generally critiqued the claims of restorative

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<sup>38</sup> Braithwaite, above n 8, 11; Cunneen and Hoyle, above n 3, 1–2; King, above n 10, 1102–1103.

<sup>39</sup> King, above n 10, 1102–1103.

<sup>40</sup> See United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programmes*, (November 2006) United Nations Office on Drugs and Crime <[https://www.unodc.org/pdf/criminal\\_justice/06-56290\\_Ebook.pdf](https://www.unodc.org/pdf/criminal_justice/06-56290_Ebook.pdf)> 7.

<sup>41</sup> Cunneen and Hoyle, above n 3, 1–2; Howard Zehr, *Changing Lenses: A New Focus for Crime and Justice* (Herald Press, 3<sup>rd</sup> ed, 1990).

<sup>42</sup> Braithwaite, above n 8, 2; Daniel W Van Ness, 'Proposed Basic Principles on the Use of Restorative Justice: Recognising the Aims and Limits of Restorative Justice' in Andrew von Hirsch, Julian V Roberts and Anthony Bottoms (eds), *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (Hart Publishing, 2003) 157, 157.

<sup>43</sup> Braithwaite, above n 8, 2.

<sup>44</sup> Cunneen and Hoyle, above n 3, 76.

justice as victim focused, arguing that the empirical research focused on victim satisfaction is inconsistently conceptualised.<sup>45</sup> More specifically, they argued that these findings are not tailored to restorative justice and gendered violence, specifically intimate partner violence.<sup>46</sup> These critiques, framed by victim safety considerations, fall into four categories: unequal power dynamics between the offender and victim; potential for re-victimisation; the unfavourable emphasis placed on apology and reconciliation; and, the problematic reliance on a community that condemns domestic violence.<sup>47</sup> These are justifiable and valid criticisms. If restorative justice is to succeed in responding to domestic violence each criticism must be adequately addressed.

(a) *Power Imbalance*

Restorative justice is seen to rely on a 'structurally neutral victim', thereby presuming an equal relationship between the parties.<sup>48</sup> Stubbs argues this is problematic when referring to domestic violence that involves an offender who by definition and practice maintains a high level of power and control over their victim.<sup>49</sup> The communicative nature of restorative justice arguably means this power imbalance is likely to be reproduced within a conference as a dialogue opens up between the victim and offender.<sup>50</sup> Even without appearing to do so, offenders may be able to manipulate information and shift blame to diminish their guilt. If this occurs during or through restorative processes, a victim's safety has been violated and further violence in the wider sense as defined by Stubbs has occurred.<sup>51</sup> A critical aspect of restorative conferences is that they are voluntary for all participants. However, this choice

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<sup>45</sup> Stubbs, 'Relations of Domination', above n 2, 971.

<sup>46</sup> Ibid 979.

<sup>47</sup> Heather Nancarrow, 'In search of justice for domestic and family violence' (2006) 10(1) *Theoretical Criminology* 87, 90–91; Stubbs, 'Relations of Domination', above n 2, 974; Ruth Busch, 'Domestic Violence and Restorative Justice Initiatives: Who pays if we get it wrong?' in John Braithwaite and Heather Strang (eds), *Restorative Justice and Family Violence* (Cambridge University Press, 2002) 223, 236.

<sup>48</sup> Stubbs, 'Relations of Domination', above n 2, 973.

<sup>49</sup> Cunneen and Hoyle, above n 3, 78.

<sup>50</sup> Stubbs, 'Relations of Domination', above n 2, 980.

<sup>51</sup> Cunneen and Hoyle, above n 3, 78.

to participate is not adequate protection from these underlying power imbalances within the process.<sup>52</sup>

The reproduction of negative power relations within a conference setting is understood as a real risk by both critics and proponents of restorative justice and best practice restorative processes focus on redressing power inequities.<sup>53</sup> It is not contested that a standard conference will be ineffective, and that a poorly run conference with facilitators who are not expert in the dynamics of family violence will most likely reconfirm negative power dynamics arising from violent relationships.<sup>54</sup> For this to be avoided, the risk must be effectively mitigated by facilitators and participants with specialist training and an understanding of these dynamics before any conference takes place.<sup>55</sup> The presence of an appropriate and supportive network of family and friends actively condemning the violence may help.<sup>56</sup> This is a serious challenge for a move to use restorative justice processes in domestic violence. To address this challenge, domestic violence services providers should be deeply involved in the process.<sup>57</sup> If domestic violence experts are involved in the design stage and the operative stage of developing a suitable model tailored to domestic violence offences, the best chance to alleviate these concerns exists.<sup>58</sup>

### (b) *Re-victimisation*

If, despite safeguards, an offender is able to assert dominance within the restorative process, this will result in re-victimisation. This re-victimisation may be the result of coercive control

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<sup>52</sup> Stubbs, 'Relations of Domination', above n 2, 982; Julie Stubbs, 'Gendered Violence and Restorative Justice' in Anne Loraine Gelsthorpe, Anne Harden, Venezia Kingi and Allison Morris (eds), *A Restorative Approach to Family Violence: Changing Tack* (Routledge, 2016) 200, 205.

<sup>53</sup> See *Basic Principles on the use of Restorative Justice Programmes in Criminal Matters* ESC Res 2002/12, UN ESCR, UN Doc E/RES/2002/12 (24 July 2002) [9]–[10]; *RJA* s 33(1)(d).

<sup>54</sup> Stubbs, 'Relations of Domination', above n 2, 977.

<sup>55</sup> Stubbs, 'Gendered Violence', above n 52, 206.

<sup>56</sup> Hayden, 'Reflections on Family Violence', above n 13, 216; Linda G Mills, Mary Helen Maley and Yael Shy, 'Círculos de Paz and the Promises of Peace: Restorative Justice Meets Intimate Violence' (2009) 33 *N.Y.U Review of Law and Social Change* 127, 132.

<sup>57</sup> Joan Pennell and Stephanie Francis, 'Safety Conferencing: Toward a Coordinated and Inclusive Response to Safeguard Women and Children' (2005) 11(5) *Violence Against Women* 666, 686, cited in Hayden, 'Safety issues', above n 14, 8.

<sup>58</sup> Kay Pranis, 'Restorative values and confronting family violence' in John Braithwaite and Heather Strang (eds), *Restorative Justice and Family Violence* (Cambridge University Press, 2002) 32–33.

including coercion through 'subtle signs' that may be 'discreet or overt'.<sup>59</sup> A simple word or gesture perceived as non-harmful may be historically associated with violence in the mind of the offender and their victim.<sup>60</sup> If this subtle manipulation occurs during a restorative conference, this will likely result in new trauma for victims. If an offender is not serious regarding a commitment to end violence, any newfound trust the victim places in the offender may be dangerous and contribute to a continued pattern of violence.<sup>61</sup>

Similarly to power imbalances, restorative justice proponents stress the importance of specially trained and experienced facilitators as one protection to alleviate re-victimisation. Firstly, an understanding of the behaviour patterns of the offender is crucial.<sup>62</sup> Though this is likely to be fraught in practice, the length of the preparatory process, including appropriate selection protocols and evaluation, might help provide this understanding. Determination of suitability should include extended preparation before conference, including screening and assessment of readiness for conference, and continued re-assessment during this preparatory stage.<sup>63</sup> Extended preparation with offenders before conferences can help create an awareness of their personal triggers and habits that previously led to violence which can be monitored during the conference. Extended preparation with victims can focus on providing them with mechanisms and skills that shift the power balance in their favour. However, caution is necessary. This process is difficult to judge. Rather than focusing solely on the offender's power and behaviour to determine suitability, the focus must be on protecting the victim.<sup>64</sup> Intake selection is crucial. For instance, there should be no attempt at pre-determining candidates' suitability for restorative justice by looking at a fact file alone.<sup>65</sup> There must be continued assessment during the conference to gauge the sustained safety of participants. Even with these safeguards, the potential for re-victimisation remains.

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<sup>59</sup> Hayden, 'Safety issues', above n 14, 5.

<sup>60</sup> Stubbs, 'Gendered Violence', above n 52, 205.

<sup>61</sup> Mills, Maley and Shy, above n 56, 132.

<sup>62</sup> Stubbs, 'Gendered Violence', above n 52, 206.

<sup>63</sup> Hayden, 'Safety Issues', above n 14, 10.

<sup>64</sup> Stubbs, 'Gendered Violence', above n 52, 205.

<sup>65</sup> Christa Pelikan, 'Victim-Offender-Mediation in Domestic Violence cases – A Comparison of the Effects of Criminal Law Intervention: The Penal Process and Mediation. Doing Qualitative Research' (2002) 3(1) *Forum: Qualitative Social Research* [45].

(c) *Reconciliation and Apology*

Restorative conferences have been categorised as emphasising the problematic concepts of apology and reconciliation.<sup>66</sup> Within the domestic violence context, apologies are too often used as a way to buy favour with the victim then followed shortly after by re-offending. This same pattern can result in inauthentic apologies, with acceptance through fear subverting the victim's needs.<sup>67</sup> This same sequence of false apology and further violence is likely to feature in restorative conferences if it is not adequately addressed. Inadequately prepared conferences may see such 'derisory reparation' being accepted if facilitators are not well-versed in these dynamics.<sup>68</sup> The focus of restorative processes also seems to imply reconciliation. This may pressure victims to reconcile, even if this is not in their best interests. This pressure may arise from a restorative process that traditionally emphasises collective decision-making, focuses on the potential to change abusive behaviour and does not effectively anticipate or provide a means to monitor future violent behaviour.<sup>69</sup> Coker stresses that the word 'restorative' implies that the relationship will be returned to what it was pre-conference, and this may result in reconfirmation of a powerless victim, who is expected to return to a site of abuse.<sup>70</sup>

Proponents of restorative justice argue that successful restorative processes need place no pressure on reconciliation, but should leave the agenda open to addressing the victim's needs. This is considered crucial to domestic violence offences. Therefore, although the expectation of 'agreement' is acceptable, there should be no emphasis placed on apology.<sup>71</sup> Mills (et al) considers that the flexibility associated with restorative processes allows development of a model that meets these particular concerns. In outline, there should be

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<sup>66</sup> Stubbs, 'Relations of Domination', above n 2, 980; Mills, Maley and Shy, above n 56, 135.

<sup>67</sup> Stubbs, 'Relations of Domination', above n 2, 980; Stubbs, 'Restorative Justice', above n 23, 58; Amanda Dissel and Kindiza Ngubeni, 'Giving Women their Voice: Domestic Violence and Restorative Justice in South Africa' (Paper presented at the XIth International Symposium on Victimology, Stellenbosch, July 2003) 7–8.

<sup>68</sup> Cunneen and Hoyle, above n 3, 78.

<sup>69</sup> Mills, Maley and Shy, above n 56, 135.

<sup>70</sup> Donna Coker, 'Transformative Justice: Anti-Subordination Processes in Cases of Domestic Violence' in John Braithwaite and Heather Strang (eds), *Restorative Justice and Family Violence* (Cambridge University Press, 2002) 128, 143.

<sup>71</sup> Dissel and Ngubeni, above n 67, 9.

no emphasis placed on reconciliation and forgiveness. The focus should be on healing.<sup>72</sup> This model should educate participants about the choices they may have following the restorative process. Once the process is completed, there should be continued support and sufficient progress monitoring to ensure compliance with any agreement. Unlike the criminal justice system, where the victim may only appear again following another situation of violence, the restorative process has the potential to open up a trusted network that the victim and participants can contact independently in the future.

(d) *Community*

Restorative justice relies on the notion of ‘community’ participation. In domestic violence matters this necessitates a community that accepts domestic violence as a wrong. This assumes that communities possess uniform values condemning violence, which is not sustainable. Stubbs stresses that different constructions of community result in different interests and values regarding domestic violence.<sup>73</sup> The role played by a community is also relevant when criminal court sanction is now the recognised way of demonstrating that society views something as reprehensible. If domestic violence is dealt with through restorative justice, this can be seen to relieve the societal condemnation of domestic violence established after a long struggle.<sup>74</sup>

While this criticism is valid, a restorative process which deals with domestic violence can define the parameters of community involvement to ensure that the ‘community’ represented at a restorative justice conference is condemnatory of domestic violence. There is some evidence of this ‘community creation’ in the use of restorative conferences in non-domestic violence matters.<sup>75</sup> An inclusive community should understand domestic violence dynamics, the harm to the victim, and other political or personal dynamics which will impact

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<sup>72</sup> Mills, Maley and Shy, above n 56, 135.

<sup>73</sup> Stubbs, ‘Relations of Domination’, above n 2, 975; Project Restore, Stakeholders Meeting – 2/8/2016 at Pilgrim House Conference Centre, Jennifer Annan; Sarah Ferguson, Interview with Rosie Batty (National Museum Canberra, 1 November 2015).

<sup>74</sup> Nancarrow, above n 47, 92.

<sup>75</sup> See George Pavlich, ‘The Force of Community’ in Heather Strang and John Braithwaite (eds), *Restorative Justice and Civil Society* (Cambridge University Press, 2001), cited in Tony Foley, *Developing Restorative Justice Jurisprudence: Rethinking Responses to Criminal Wrongdoing* (Routledge, 2016) 79.



the process.<sup>76</sup> A model that focuses on anti-subordination and draws advice from family violence experts can build a strong and appropriate restorative process,<sup>77</sup> and may involve creating an artificially controlled community.<sup>78</sup> The creation of such an artificially controlled community may draw on a relevant cultural community, allowing for community leaders to be directly involved.<sup>79</sup> As Indigenous offenders are disproportionately represented in domestic violence statistics, this presents a unique opportunity. Although, research suggests that restorative justice, as it has traditionally been delivered, 'may not suit the needs of Indigenous people'. By way of example, restorative conferences that are heavily scripted and facilitated without any focus on aligning the cultural background of the facilitators with that of the victim or offender, may not be successful.<sup>80</sup>

## 2 *Benefits*

Restorative justice has the potential for high rates of success for domestic violence offences, as these offences are categorised as serious. Empirical research indicates that restorative justice is most successful when used for serious offences, due to the personal nature of the offence.<sup>81</sup> Yet, this potential for success remains unproven in Australia.

Restorative justice may provide a broad solution that is suitable for offences involving family relationships. The complications associated with families, including shared responsibilities for children, mean that it is harder to sever ties with someone, even if they are violent.<sup>82</sup> Justice Refshauge in *R v Michael Taylor* cites a typical situation that a breach of an Interim Domestic Violence Order was made more worrying by 'the fact that they have a son for whom they must jointly care', noting that the victim would 'have to have some contact with ... [the offender] for many years to come' as an ancillary consideration during sentencing.<sup>83</sup> This paper does not suggest that a victim should ever be allowed to accept or

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<sup>76</sup> Hayden, 'Safety issues', above n 14, 7.

<sup>77</sup> Stubbs, 'Relations of Domination', above n 2, 986.

<sup>78</sup> Foley, above n 75, 79.

<sup>79</sup> Blagg, above n 4.

<sup>80</sup> Ibid.

<sup>81</sup> Cunneen and Hoyle, above n 3, 73.

<sup>82</sup> Ibid 76–77; Hayden, 'Reflections on Family Violence', above n 13, 213; Dissel and Ngubeni, above n 67.

<sup>83</sup> *R v Michael Taylor* (2008) ACTSC 270.

consent to family violence, but suggests that restorative justice may allow victims to repair and restore some aspects of a relationship. This may increase the victim and other family members' safety where there has to be future contact. Restorative justice may address these concerns with the criminal justice response and can offer support to restore and repair aspects of a relationship, depending on the particular circumstances. Alternatively, if a victim wants to end a relationship, a restorative process may provide stronger support and information to facilitate this. Additionally, a domestic violence order may prove more successful if managed with a restorative process.<sup>84</sup> In the context of Indigenous communities, allowing for additional programs and solutions that are not enmeshed in the criminal justice system may help to break the cycle of violence. This is particularly where engagement with the criminal justice system may be viewed in highly negative terms. What is clear is that any strategy to support victims of domestic violence must take into account Indigenous cultural and family obligations. Restorative justice could satisfy the demands of Indigenous victims and communities, and consultation should be had on its value and potential effectiveness.<sup>85</sup>

Domestic violence is rarely, if ever, a black and white picture. It will involve multiple incidents and often multiple offenders. A restorative process may present an opportunity to engage in past histories and reveal inter-generational violence.<sup>86</sup> Through the inclusion of family and support persons this also presents an opportunity to link other forms of abuse, such as child abuse and neglect, as triggers for the abuse that is in focus. This may encourage an ongoing process whereby the family network can effect change.<sup>87</sup> If appropriately managed, the family presence can enhance family unity, cooperation and significantly overall safety.<sup>88</sup>

### D *Conclusion*

There has been a shift away from a complete denial of the use of restorative justice for domestic violence offences, towards greater acceptance of its potential as an alternative path

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<sup>84</sup> Cunneen and Hoyle, above n 3, 76–79.

<sup>85</sup> Blagg, above n 4.

<sup>86</sup> Hayden, 'Reflections on Family Violence', above n 13, 214.

<sup>87</sup> Pennell and Burford, above n 24, 152–153.

<sup>88</sup> Ibid 151.

to justice. Yet there remains undeniable concerns and challenges for victims, offenders and communities associated with using a standard restorative conference for domestic violence offences. Proponents of restorative justice for domestic violence offences do not deny these challenges accepting that a standard restorative conference is inappropriate. Alternatively, they suggest a restorative process specifically tailored to the safety concerns of victims may be possible and may produce beneficial outcomes, particularly if coupled with other measures, such as programs directed at behavioural change and where appropriate, domestic violence orders.<sup>89</sup> Therefore, critical analysis of relevant restorative justice case studies that have sought to address these challenges is an appropriate next step.

### III LEARNING BY EXAMPLE

The often fierce debate surrounding the use of restorative justice conferences for domestic violence offences is reflected in government reluctance to run pilot programs. This has restricted availability of practical case studies. There have been limited circumstances where restorative conferences have been used for domestic violence and/or sexual violence offences.<sup>90</sup> This section considers two such circumstances using case studies from New Zealand that have restorative justice conference processes. Discussion will focus on whether and how these programs have effectively addressed the challenges associated with restorative justice use identified above: power imbalances; re-victimisation; unfavourable emphasis on reconciliation and apology; and, inappropriate community involvement. As outlined, these challenges: have an impact on the effectiveness of standard restorative conferences; pose safety concerns for victims; and, cause particular issues within conferences which need to be addressed. These programs have addressed each of these issues to varying degrees, at different levels and with differing degrees of complexity.

#### *A Case Studies*

The two chosen case studies are:

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<sup>89</sup> See, eg, Victoria, Department of Justice and Regulation, *Restorative Justice for Victim Survivors of Family Violence Framework*, (October 2017).

<sup>90</sup> While the *Restorative Justice Act* has recently become voluntarily available for victims of domestic and sexual violence in the ACT, there has been no publicly accessible assessment of this process considering this program is still in the early stages.

i) Project Restore; and

**Case Study 1: Project Restore**<sup>91</sup>

Project Restore is a restorative justice conference program specifically for sexual offences based in Auckland, New Zealand.<sup>92</sup> The majority of matters are court referred, however the program is also offered to some self-referred community matters. The model includes extended preparation, a 1-day conference, and follow-up.

ii) Mana Social Services Trust.

**Case Study 2: Mana Social Services Trust**<sup>93</sup>

The Mana Social Services Trust offers a restorative conference program in Rotorua, New Zealand. The program exists as a pre-sentence court-referred program and is offered for a range of offences, including a large proportion of domestic violence offences. The structure of the program includes preparation, a conference and follow-up.

Table 1 summarises the two programs. The salient features in this table reflect the processes and protocols that address the four discussed challenges. These features include: i) general features, ii) the structure of the programs, and iii) the conditions for participation.

<sup>91</sup> Shirley Julich, 'Project Restore: An Exploratory Study of Restorative Justice and Sexual Violence' (Research Report, Project Restore, 2010) 82.

<sup>92</sup> Although this program caters to sexual offences and not domestic violence offences, the challenges faced bear similarities.

<sup>93</sup> Maxine W Rennie, 'Titiro Whakamuri – Looking Back: Titiro Whakamua – Looking Forward' in Anne Loraine Gelsthorpe, Anne Harden, Venezia Kingi and Allison Morris (eds), *A Restorative Approach to Family Violence: Changing Tack* (Routledge, 2016) 77, 77–78.

	PROJECT RESTORE <sup>94</sup>	MANA SOCIAL SERVICES TRUST <sup>95</sup>
<i>Location</i>	Auckland, New Zealand	Rotorua, New Zealand
<i>Development</i>	Based on RESTORE, a demonstration project in Arizona for minor sexual offences	Developed in 1996 to deliver free social services and counseling, offering restorative justice programs in 1999
<i>Offences</i>	Sexual offences (including, domestic violence offences of a sexual nature)	All offences <ul style="list-style-type: none"> <li>• 1/3<sup>rd</sup> intimate partner violence offences</li> </ul>
<i>Victim support services collaboration</i>	✓	✓
<ul style="list-style-type: none"> <li>• <i>Participants:</i></li> <li>• <i>Offender</i></li> <li>• <i>Victim</i></li> <li>• <i>Support Persons</i></li> <li>• <i>Community</i></li> </ul>	✓	✓
<i>Facilitator</i>	Clinical Team: <ul style="list-style-type: none"> <li>• Restorative Justice Facilitator</li> <li>• Victim Expert</li> <li>• Offender Expert</li> </ul>	Court Coordinator <p>Facilitator – 1+ for more serious matters</p>

<sup>94</sup> Shirley Julich, 'Restorative Justice and Gendered Violence in New Zealand – A Glimmer of Hope' in James Ptacek (ed), *Restorative Justice and Violence Against Women* (Oxford University Press, 2010) 239; Shirley Julich and Helen Bowen, 'Restorative Justice in Aotearoa, New Zealand: Improving our Response to Sexual Violence' (2015) 4 *Revista de Asistencia Social* 93; Shirley Julich et al, 'Yes, There is Another Way!' (2011) 17 *Canterbury Law Review* 222; Julich, 'Project Restore', above n 91; Project Restore, above n 73.

<sup>95</sup> Rennie, above n 93; Ken McMaster, 'Restoring the Balance: Restorative Justice and Intimate Partner Violence' in Anne Loraine Gelsthorpe, Anne Harden, Venezia Kingi and Allison Morris (eds), *A Restorative Approach to Family Violence: Changing Tack* (Routledge, 2016) 93.

<i>Court referral</i>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
<i>Suitability assessment</i>	Meetings: <ul style="list-style-type: none"><li>• Offender</li><li>• Victim</li><li>• Support persons</li></ul>	<ul style="list-style-type: none"><li>• Primary assessment before referral</li><li>• Interview with offender</li><li>• Contact made with victim; victim interview</li></ul>
<i>Psychological assessment</i>	Weekly meetings: <ul style="list-style-type: none"><li>• Clinical Team</li><li>• Clinical Psychologist</li></ul>	<input checked="" type="checkbox"/>
<i>Conference length</i>	Conference – 1 day	Final Conference
<i>Follow-up</i>	Post-conference plan monitored	Agreement monitored
<i>Alternatives to face-to-face conference</i>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
<i>Review process</i>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
<i>Guilty plea</i>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
<i>Treatment program</i>	Offender Treatment Program is a condition of participation	Offender and victim directed to substance abuse programs

Table 1

B Addressing the Challenges

1 Power Imbalances

Domestic violence is characterised by an unequal power relationship. Negative power relations may be reproduced in a standard restorative conference negatively impacting victim safety.

(a) *Project Restore*

Project Restore's Clinical Team utilises a three-person facilitation model that encompasses: 1) a restorative justice facilitator trained in dynamics of family violence, 2) an offender community expert, and 3) a victim community expert, all of whom work with parties during the preparatory stages and the conference. This approach also actively seeks to address power imbalances before, during and after the conference. The Clinical Team seeks to tailor the conferences to each individual, and ensure a safe, appropriately paced process.<sup>96</sup> The model focuses on facilitation that involves 'balanced partiality' towards the victim and is not 'neutral'.<sup>97</sup>

During the selection phase, the Clinical Team meets with an independent psychologist, to discuss preparations and whether it is safe for the conference to proceed.<sup>98</sup> During this time, the offender is also carefully assessed for suitability. During the preparation stage, the facilitation team actively seek to rebalance power by discussing the power relations the offender has with the victim, exploring their offending, and coaching the offender about the conference by identifying some of the ways in which they currently utilise their power in inappropriate ways.<sup>99</sup> During the conference, the panel challenges any ideas of denial, actively working with the facilitator to redress any imbalances and take a break when any dangerous tension arises.<sup>100</sup>

(b) *Mana Social Services Trust*

Mana Social Services Trust manages power imbalances at a variety of stages. At the first stage, court processing, the offender must be assessed as having taken full responsibility for their offending. If the court coordinator is fully satisfied that the offender is genuinely motivated, they will advise the judge that a referral to the trust can be made.<sup>101</sup> When first assessed as to suitability, if the offender does not agree to the facts detailed by police, this

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<sup>96</sup> Yvette Tinsley and Elisabeth McDonald, 'Is There Any Other Way? Possible Alternatives to the Current Criminal Justice Process' (2011) 17 *Canterbury Law Review* 192, 201.

<sup>97</sup> Julich et al, above n 94, 227.

<sup>98</sup> Julich, 'Restorative Justice', above n 94, 246–247.

<sup>99</sup> Julich, 'Project Restore', above n 91, 82.

<sup>100</sup> Julich, 'Restorative Justice', above n 94, 246–247.

<sup>101</sup> Rennie, above n 93, 78.

will preclude the conference from going ahead, as any disagreement may render the conference ineffective at redressing power imbalance or manipulation and compromise the safety of the victim.<sup>102</sup> During the restorative conference itself, facilitators focus on redressing inequality between the victim and offender rather than adopting a neutral stance.<sup>103</sup>

*(c) Critical Analysis*

Both programs include specialists who are experienced in the dynamics of domestic violence/sexual violence, or have received specialised training in the area. Project Restore uniquely includes two panel experts who have extensive experience in the dynamics particular to sexual assault, as well as the conference facilitator who has specialist training in such dynamics. While the facilitators involved in the Mana Social Services Trust have acquired extensive experience working within a community-based organisation dealing with social work, counselling and family violence matters, it appears that they do not have any designated specialist training. This is arguably an inadequate safeguard to protect victim safety. Project Restore clearly provides the highest level of specialist expertise throughout all stages of the process and is the exemplary model. Its program is based firmly on prioritising the particular needs of victims and offenders. This can allow perceived imbalances to be addressed during a conference, and inappropriate offenders to be screened out at an early stage.

Conference facilitators in both case studies do not adopt a neutral approach. They maintain balanced partiality in favour of the victim. In the case of Project Restore this is explicit partiality. This approach, directed in favour of the victim, has the best chance to: reaffirm to the victim that their experiences and feelings are justified; condemn violent behaviour; and, help to foster an environment that is conducive to healing. However, the approach cannot tip the balance too far. If a conference environment is hostile, or demands made on the offender are overly retributive, this may cause the offender to retreat and the process to

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<sup>102</sup> McMaster, above n 95, 100.

<sup>103</sup> Ibid 102.



fail, providing a real risk of further violence towards the victim.<sup>104</sup> Care needs to be taken to ensure the approach, while partial, is balanced, rather than overly dismissive of the offenders' desire to change. Such an approach would limit the effectiveness of a restorative conference.

## 2 *Re-victimisation*

A standard restorative conference may provide an opportunity for the offender to manipulate the victim and assert their dominance, thus resulting in re-victimisation.

### (a) *Project Restore*

Project Restore's three-person facilitation approach also actively addresses concerns regarding re-victimisation. The lengthy screening and preparation process performed by a facilitator trained in the dynamics of family violence, as well as an offender and victim expert is seen as crucial to screening out inappropriate matters. Additionally, during the conference the victim expert will monitor for any signs the victim is not comfortable, and the offender expert will actively intervene to prevent aggressive behaviour by the offender and look for signs of agitation.<sup>105</sup> The commitment to behavioural therapy, included as a condition of participation, also helps address underlying issues that may contribute to the violence.<sup>106</sup>

The three-person facilitation model is 'survivor' driven.<sup>107</sup> This particular restorative approach has developed through extensive collaboration with victim-survivor advocates, established community organisations as well as academic researchers and restorative justice providers. The process is actively reviewed to ensure safety and effective prevention of re-victimisation.<sup>108</sup>

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<sup>104</sup> Mary P Koss et al, 'Expanding a Community's Justice Response to Sex Crimes Through Advocacy, Prosecutorial, and Public Health Collaboration – Introducing the RESTORE Program' (2004) 19(12) *Journal of Interpersonal Violence* 1435, 1450–1451.

<sup>105</sup> Julich et al, above n 94, 227; Julich, 'Project Restore', above n 91, 46.

<sup>106</sup> Mary P. Koss, 'The RESTORE Program of Restorative Justice for Sex Crimes: Vision, Process, and Outcomes' (2014) 29(9) *Journal of Interpersonal Violence* 1623, 1631.

<sup>107</sup> Project Restore, above n 73.

<sup>108</sup> Julich et al, above n 94, 223.

(b) *Mana Social Services Trust*

Mana Social Services Trust actively addresses re-victimisation primarily during the conference process. When offenders face more serious charges, two facilitators and the court coordinator attend to ensure the conference is safely run. Any support people that are nominated by the offender or victim are also evaluated to confirm their suitability. The times of arrival for the conference are also carefully planned so that victims can choose whether they want to arrive first and whether they wanted to be escorted from the building by a facilitator at the end of the process. Finally, an immediate debriefing follows every conference, where the process is reviewed for safety and effectiveness with consideration of any necessary adjustments to the process.<sup>109</sup>

During the restorative process, facilitators direct the offender towards appropriate treatment programs. These programs are also offered to victims where there may be drug and alcohol counselling required for both partners. This is necessary to prevent re-victimisation upon completion of the conference by connecting the offender and victim with further treatment and counselling.<sup>110</sup>

Finally, the Mana Social Services Trust is positioned as not only a restorative justice provider but also as a service provider in the areas of: social work, counselling, family conflict resolution and parenting assistance. This emergence of the restorative process out of a community family violence organisation highlights that facilitators and coordinators must understand domestic violence dynamics. However, it was unclear from the program literature whether specific training is offered.

(c) *Critical Analysis*

The three-person facilitation model utilised by Project Restore is once again the most successful way to prevent re-victimisation prior to and during a conference. This model uses three experts during the conference who are actively looking for signs of subtle manipulation and victim discomfort. This approach is mirrored to some extent in Mana

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<sup>109</sup> Rennie, above n 93, 80–81.

<sup>110</sup> Ibid.

Social Services Trust where multiple facilitators and the coordinator are also present during conferences for more serious offences. However, such staff do not seem to have the same degree of capability as exists in Project Restore.

Extended preparation and assessment prior to the conference is included in all programs. This includes preparing and assessing the victim, offender and support persons to ensure suitability. It is evident that a safe restorative process must be victim centred and driven. Project Restore and Mana Social Services Trust both adopt a victim driven approach. Victims are personally assessed for suitability, and their needs are the focus. This is particularly the case with Project Restore, where a dedicated victim expert is solely engaged with the needs of the victim.

### 3 *Reconciliation and Apology*

A standard restorative conference emphasises reconciliation between the parties and apology as a method of resolving the harm. However, within the context of domestic violence these concepts are problematic.

#### (a) *Project Restore*

An apology sometimes plays a role in Project Restore's conference process. Despite this, the combination of experts and a facilitator trained in the complexities of assault mean there may be a heightened awareness of subtly manipulative and insincere apologies. Although, in sexual assault cases, pressure to reconcile and extract insincere apologies may not face the same challenges as they do in the context of domestic violence. Yet, this will depend on the context and circumstances of each case.

#### (b) *Mana Social Services Trust*

The Mana Social Services Trust coordinator provides support and services for the victim if they want to and need support separating.<sup>111</sup> The availability of this support may limit the pressure victims may sometimes feel to reconcile.

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<sup>111</sup> Rennie, above n 93, 78.

### *(c) Critical Analysis*

Both programs acknowledge the nature of apologies being a common tool for manipulation in the context of sexual and domestic violence. Project Restore seems to accept apologies only if they can be assessed as sincere. Therefore, in both cases the structure of the restorative conferences has been modified to exclude any focus on apology. By comparison, Mana Social Services Trust includes an apology within their basic conference structure. This is problematic. Regardless of the precautions taken,<sup>112</sup> an apology may still be insincere within the context of repeated patterns of violence. It seems better to omit any focus on apology.

The two case studies all have provision for an agreement, or a post-conference plan outlining: ways to redress the harm caused, and steps forward towards offender rehabilitation. The focus of these plans is never on reconciliation, and the programs have support provided to participants who either want to or do not want to continue a relationship. Equally, both programs are flexible enough to ensure a range of different options are available following program completion. Mana Social Services Trust also provides support to separate at the earliest stage of referral, aligning the victim with relevant support services.<sup>113</sup> This provision seems beneficial in relieving any pressure to stay with a violent partner or to ‘forgive’ a partner. This approach by the Mana Social Services Trust program is the most successful aspect.

## *4 Community*

Restorative justice engages a participatory community. This relies on a false assumption that all communities condemn domestic violence.

### *(a) Project Restore*

The offender and victim experts included in the Project Restore Clinical Team are intended to represent community involvement, creating an artificial community. The role of the ‘community of interest’ is to actively condemn violence and perform an educative role due

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<sup>112</sup> McMaster, above n 95, 103–104.

<sup>113</sup> Rennie, above n 93, 78.

to their extensive experience in the sexual violence realm. This procedure was modelled from the RESTORE model where community members were selected from 'healthy, pro-victim segments of the community'.<sup>114</sup>

(b) *Mana Social Services Trust*

The community inclusion in Mana Social Services Trust, finds foundation primarily in culture. The predominant culture of the Trust is Māori, and the senior restorative justice facilitator has senior tribal status. This seniority is one mechanism used to restore a positive power balance between victims and perpetrators during the conference. This cultural community means the conference begins with a prayer, and female and male elders are encouraged to attend. The elders are seen to bring balance and wisdom to a conference while actively discouraging violence.<sup>115</sup>

(c) *Critical Analysis*

The 'community' involved in both programs is carefully designed to ensure their participation does not support the violent behaviour of the offender. In Project Restore, this is in the form of an artificial community – an offender and victim expert. The Mana Social Services Trust has developed predominantly as a Māori social services community group. This creates a shared cultural community that seeks to condemn violence. This development of a 'cultural community' can also exist in the sense of shared language, religion, economic status, race or ethnicity, and/or sexual orientation. Such shared cultural values may shape any resolution and agreement that is reached. Mary Koss emphasises that this acculturation may also help to balance a criminal justice system that is usually monocultural.<sup>116</sup> In Australia, while domestic violence affects people from all backgrounds, Indigenous Australians are disproportionately represented in domestic violence statistics. The creation of a 'cultural community' presents an opportunity for the Indigenous community to play a key role in supporting Indigenous victims and rehabilitating Indigenous

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<sup>114</sup> Koss et al, above n 104, 1450.

<sup>115</sup> Rennie, above n 93, 81

<sup>116</sup> Koss et al, above n 104, 1451–1452.

offenders. A model drawing on the lessons learnt from Mana Social Services Trust may be appropriate.

### C *Key Lessons*

Drawing lessons from the case studies reveal a number of structural similarities which should be considered the baseline of any restorative program for domestic violence offences. The programs reviewed are similar and they are: conditional on a guilty plea, voluntary, include a review process, and, include a treatment program as either a condition of or a recommendation during participation. Both programs, also, offer alternatives to face-to-face conferences in situations where this is the victim's wish, or where a face-to-face conference is not viewed as safe. Arising from these case studies, there are also a number of key lessons to be learnt that may support a successful restorative conference for domestic violence offences. However, these lessons should be informed by further research and testing to ensure their applicability in an Australian context.<sup>117</sup> Additionally, any restorative process should be regularly reviewed.

To address concerns relating to power imbalances and re-victimisation, at a basic level Victim's should be connected with victim support agencies following a restorative justice referral. In addition, any convenor or expert involved in the restorative process must have extensive training and experience in the dynamics of domestic violence. A model that draws on the success of Project Restore, including a victim specialist and offender specialist for domestic violence offence, is critical.

To address concerns in relation to reconciliation and apology, no formal script should be used. Alternatively, the structure should be agreed upon prior to the conferences and the conference progressed by the convenors. There should be no emphasis placed on reconciliation or apology as part of any restorative conference for domestic violence offences.

To address concerns regarding inappropriate community involvement, any community members, where included, must actively condemn violence. Attendance of a restorative

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<sup>117</sup> See, eg, Victoria, Department of Justice and Regulation, *Restorative Justice for Victim Survivors of Family Violence Framework* (October 2017).

justice and domestic violence training course prior to participation should be considered the minimum requirement for community participants. Additionally, where appropriate, consideration must be given to cultural background and in the case of Indigenous victims and/or offenders, Indigenous community involvement.

#### IV THE WAY FORWARD

Restorative justice is currently being used in several jurisdictions in Australia. Its use has also been legislated for domestic violence offences in the Australian Capital Territory.<sup>118</sup> Yet these programs seem to be conducted in isolation and no extensive national review has been conducted to determine success. This paper makes no claims regarding whether restorative justice will be successful in reducing domestic violence in Australia. Examination of the case studies also reveals the difficulties in addressing the key challenges, highlighting that a generic framework will not be effective. Despite these difficulties, what is clearly revealed by assessment of the literature and case studies is that restorative justice, that prioritises victim safety, may exist as a safe additional justice choice, parallel to the criminal justice response. Therefore, safe restorative conferences, that prioritise victim safety should be tested and reviewed. Comprehensive assessment of current restorative initiatives and practices is crucial to providing victims, offenders and communities with access to safe additional options.<sup>119</sup> While far from a complete solution, restorative justice can add a testable alternative to the traditional punitive justice response.

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<sup>118</sup> See, eg, *Restorative Justice Act*.

<sup>119</sup> James Ptacek, 'Research on Restorative Justice in Cases of Intimate Partner Violence' in Claire Renzetti, Diane Follingstad and Ann Coker (eds) *Preventing Intimate Partner Violence: Interdisciplinary Perspectives* (Policy Press, 2017) 159, 178.

## An Interview with Associate Professor Hilde Tubex\*

### Editors

*Associate Professor Tubex, thank you for agreeing to speak with us for this year's edition of Pandora's Box. To start off, for the benefit of our readers, could you give us a brief introduction on the Australian experience on Indigenous incarcerations and how this compares to other countries around the world?*

Indigenous over-representation in the criminal justice system in Australia is a very big, well-known, and longstanding problem. My focus will be on the over-representation in the prison system, firstly, because that is what I am more familiar with and secondly, because that is where we have the most data available.

One of the problems is that, in the earlier stages of the criminal justice system, there is often a lack of data, particularly a lack of detailed data where they make distinctions between Indigenous and non-Indigenous people and a lack of intersectional data where they make distinctions not only between Indigenous and non-Indigenous people, but, also between Indigenous women and Indigenous men. That is quite a problem because it is particularly Indigenous women who are rapidly increasing in the prison population and in other segments of the criminal justice system.

Setting that aside, what we know is mainly based on data gained from the Australian Bureau of Statistics. According to the last census data, less than 3% of the population in Australia identify as being Aboriginal or Torres Strait Islander. In the national prison population, Aboriginal or Torres Strait Islander make up 27% of all people.

The problem is most significant in the Northern Territory and Western Australia. Of course, in the Northern Territory, a larger proportion of the Territory population is Indigenous (25.5%) but 84% of the prison population is Indigenous. In Western Australia, 37% of the prison population is Indigenous, while they only account for 3% of the general population. So, the Indigenous proportion of the prison

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\* Associate Professor Hilde Tubex is Deputy Head of School, Research, at the Law School of the University of Western Australia. This is a revised version of an interview conducted by Julius Moller on 7 September 2018, and transcribed by Molly Thomas.



population in both the Northern Territory and Western Australia are well above the national average (27%). However, when you look at the over-representation compared to the proportion in the general population per state or territory, then the over-representation rate is actually the worst in Western Australia (15%) and that's been the situation for a long time.

This is, I think, a very concerning issue because the over-representation problem is getting worse, particularly for Indigenous women. I think from memory that Indigenous women are about twenty-one times more likely to find themselves in prison and Indigenous men are about seventeen times more likely to find themselves in prison, but these statistics can be checked with the Australian Bureau of Statistics.

This problem isn't confined to Australia. We actually see the same problem occurring in other countries with First Nations people, like Canada and New Zealand. In Canada, their whole historical background as to how their Indigenous population has clashed with the criminal justice system is very similar to the Australian example. This has to do with the ongoing impact of colonisation and the destruction of the traditional ways of life which existed before White intervention. That's the big picture.

*That paints a very concerning picture. Taking what you said about the particular concerns around Indigenous women, given that they are the fastest growing group in the remand population, is that due to any particular factor, a combination of factors or a particular flaw in the system at the moment?*

I think when it comes to remand, we don't really know, because often there is not sufficient data available. When they are sentenced, I've looked a bit more into that, and the most concerning trend is that there has been a significant increase in Indigenous women being involved in violence, as offenders and victims.

A large proportion of Indigenous women have experienced various forms of violence in their lives and obviously, there can be responses in violent behaviour which means they find themselves in prison and being sentenced for offences involving violence more and more.

*Following on from that, while you may not have researched in this area, do you think there needs to be a specific response to how domestic violence is dealt with in an Indigenous context?*

Recently, I have read some very interesting publications on that issue, for example, the PhD thesis of Heather Nancarrow where she says that the general way we conceptualise and deal with domestic violence is just not working for Indigenous communities because we mainly see domestic violence as a white male perpetrator who is trying to exercise coercive control on his wife. This is completely different in the Indigenous context. In that context, domestic violence is much more complex and involves extended families, has to do with kinship, jealousies, fights and traditional practice and is therefore better theorised as ‘family violence’ rather than as ‘domestic violence’, as it is occurring in the context of those extended family relationships.

The individual approach of taking these men out of the community and sentencing them with the hopes of achieving deterrence in the broader community is just not working. Taking them out of the Indigenous community is not necessarily what the women want and, in fact, you might exacerbate the problem in the community because men have certain community responsibilities, including spiritual responsibilities. Similarly, Elders and Respected community Persons may need to be physically present to pass on values and traditional roles to younger people. If you take too many of them away, then you create a huge cultural problem. The same thing is true for women. These women have particular roles and responsibilities which are not easily taken over by men if these women are incarcerated. Given the fact that most of these women are the primary caregivers for their own children or other people’s children, that has a direct flow-on effect on children getting in trouble for not attending school, drug use and other sorts of problems. This has all been documented in social justice reports.

When children are taken into care outside of their communities and disconnected from their culture, it has been demonstrated that it increases their risk of becoming involved in the criminal justice system. This demonstrates the possible effects on intergenerational offending.

*So, ultimately, the traditional reasons for incarceration, which include rehabilitation and retribution, don't really work in the Indigenous context?*

I'm not even convinced they work in a non-Indigenous context but they are certainly more problematic in an Indigenous context. In the areas I've done research, which is mainly the northern parts of Western Australia, in the Kimberley region, and the areas around Darwin and Alice Springs,<sup>1</sup> there's a lot of regional and remote communities where cultural traditions are still very important and where traditional law is still actively practiced. Often for these people, traditional law is more important to them than the White law which has been imposed on them, which they often don't see the sense of and which tends to cause a lot of additional problems for them.

In the throughcare project, we found that if people are incarcerated and taken away from country, that has a huge impact on them. Because they are very closely connected to the land of their ancestors, it has a huge effect on their identity, on their feeling of belonging and their inability to fulfil cultural obligations due to being in prison.

If they don't fulfil their responsibilities, it not only makes them feel anxious and like they've let their family down, it also can have consequences for them when they return to their community and issues of payback. That causes people to have a lot of stress and anxiety while in prison. That stress and anxiety is then exacerbated by the fact that the person has no knowledge of what is happening in the community in their absence which is particularly difficult as in Indigenous culture, a lot of the day is spent in reconfirming relationships and community life. They don't have the individual kind of lifestyles which we have so that process of keeping in touch with the community is very important for security, safety, self-insurance and identity.

I also think that a lot of the rehabilitative programs available in prison often don't make sense to them in the way they are offered. There is often a lack of Indigenous knowledge underpinning the programs and a lack of Indigenous involvement in

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<sup>1</sup> Cf. Project on 'Building affective community-based throughcare strategies for Indigenous offenders' by Hilde Tubex, John Rynne and Harry Blagg, supported by an AIC Criminology Research Grant (CRG 23/15-16).

providing these programs, with only slight adjustments being made to accommodate Indigenous people.

During my research, I was told from the corrective services perspective that whatever they achieve in the prison all seems to fall over when people return to their communities. That is because there is a complete clash between what is organised in the prisons from the White perspective and the reality they go back to. To give an example, sometimes in prisons, we will train Indigenous people for a profession which is non-existent in their community. The skills that they have gained are actually useless.

Another major problem is that the way we offer rehabilitation programs is very bureaucratic. A person has to fill out a large number of forms, then wait for 'x' weeks, then provide a birth certificate and other official documentation. Indigenous people don't necessarily have that documentation, or at least don't carry it with them. They don't necessarily live by the name which is on their birth certificate; a driver's license is often very difficult to obtain as you need to have a whole set of official documents to obtain it and it is very easy to lose. It frequently ends up in the 'too hard' basket so giving people numbers and referrals isn't working. It needs to be hands-on and it needs to involve working *with* people, and working with people before they leave prison. When they leave prison, they might be leaving with a certain amount of money obtained through work and they will likely be meeting up with family shortly afterwards and those family members may have ideas as to how to spend that money.

Furthermore, on the practical level, if there is no system in place to get people back to their communities, they might not have the means to return to their community as there might not be access to public transport or they might not have the money for public transport. So people end up in the long grass around Darwin and they hang around in the open space or go to the pub and get drunk, even before ever making it back home. Therefore, the way we're managing the system at the moment structurally is not working.

We came across a lot of non-governmental organisations who are working in this space and doing a very good job. The main problem is that it is quite uncoordinated and depends on very unstable funding. There is never the time or certainty you would need to set up a network of services that provide what is needed and when and where it is needed. These services don't necessarily know from each other what is happening inside and outside the prisons. There are often too many 'fly-in, fly-out' services and frequently services are duplicating efforts, leaving gaps or working well but then the funding stops. At a certain point, I think Indigenous people in the communities get tired of it. They see these new white faces driving in with their new white Toyota four-wheel drives and by the time they figure out how this new service works, it stops and someone else turns up.

Our finding was that it is very important to build personal relationships with people in the community, that you work through the Elders and the Respected People, so that you gain trust and you start from acknowledging that Indigenous people have other businesses and other sorrows rather than waiting for you to come and deliver a service and that you have to be respectful about what is important for them, and when is the best time to approach them, rather than just acting when it suits you. Because it might be when law business is going on or when most people are away for a funeral or another cultural practice which is important for them.

*Just off the back of that, and to go more in depth about what 'throughcare' is, the Council of Australian Governments' Prison to Work Report described it as 'comprehensive case management for prisoners in the lead up to their release from prison and throughout their transition to life outside. You've already touched on forming relationships and working with community Elders to assist with that process, but why is it particularly important that it should be community-based for Indigenous offenders?*

I think that because the whole experience with the criminal justice system is different for Indigenous people, everything that is organised without Indigenous involvement is never going to work. Because Indigenous people don't have that individual lifestyle but rather have a community lifestyle, as I've said, you can't fix the individual. You have to fix the network in the broader community context.

It's very important from the start of the process, beginning when someone is arrested. We only have to refer to the very sad case of Ms Dhu, in WA. It's very important that Indigenous people are notified of someone's arrest so they can intervene and ascertain the needs of that person. These kinds of program are in place in some other jurisdictions, and they seem to work well.

You also need to prevent trouble from happening after release from the beginning. For example, when someone ends up in prison, you need to check what agencies need to be informed of that fact. If they live in supported housing, which most of them do because they don't have the same access to private housing, then the Department of Housing should be informed that the person is now in prison and no longer living there so that they are no longer being charged rent while in prison. Otherwise, when people get out of prison, they have huge rent debts for a house they didn't live in.

Then, during prison, you have to start thinking about how the prisoner is going to organise their life after release. Most throughcare programs start six months before release, which is not always enough, but definitely it needs to be in place well before the release date. I think it is of particular importance that Indigenous people have explained to them what early release is, how they can obtain it, what the consequences are, and how they can benefit from it.

A lot of Indigenous people don't apply for parole for various reasons. They may think they won't get it or they may think it would be too much intervention in their life after release. This means that they just serve their full term and walk out. There is a lot of work to be done with them about early release and parole so that they can have support after release. As I said, it's very important that while they are still in prison, basic matters such as where the prisoner is going to live, how they're going to get there and what might be their initial source of income, are organised.

Once they're out, it may be appropriate to have a hands-on approach where people go with them to appointments and make phone calls for them. Even I, when I migrated here, had difficulties with the hurdles of bureaucracy. If a person has to

organise their life, and make calls to Centrelink and Telstra and government agencies, it is a long and difficult process. For people without support and knowledge of the process, they just don't do it and tend to rely on their family or social network. This can mean that they simply move in with someone who does receive Centrelink benefits and those people become magnets for more and more people, which can then cause problems for that person because the house gets crowded, which can mean that the housing company complains and you get evicted or you simply have a disrupted life, with lots of family members contacting you at all hours of the night, which may make it difficult for you to turn up to appointments or work commitments.

That is why some communities feel overburdened if they are contacted to accept Indigenous people released from prison because accepting them comes with a duty of care and if they don't get any information and they don't get support for drug and alcohol abuse problems, for example, that could have consequences for the safety of their own community. You can't just ask them to open their arms and their doors and to look after people released from prison without supporting them with basic service providers who they can turn to if there are problems.

*In terms of implementing that change and making this particularly community-focused, what do you see as the role of yarning as a way of communication in assisting with that?*

I think yarning is the only way to do it. When we did our research, and there's a lot that has been written about it by Indigenous people, I think it's only respectful to accept their traditional form of communication. This involves you explaining who you are, who your kinship connections are, what the project is about and how the information will be used, and you allowing for this contextual communication to happen rather than direct questioning, which doesn't work anyway. So we tend to bring up themes, so that people can tell their stories.

It is also respectful in the sense that you are not leading the conversation. You leave it to the participant for them to tell you what they think is important or what they want to tell you, which might be something completely different to what you had in mind.

*Following on from that then, from your research and your experience, are there any Australian throughcare projects currently being implemented and how successful have they been?*

There's some bigger organisations that are organising throughcare. We worked with Men's Outreach in Broome, worked with NAAJA in Darwin and with CAALAS in Alice Springs. In Queensland, there's Sisters Inside who are doing brilliant work, but it's all very fragmented and on a very unstable financial basis. Overall, it's a bit of a tricky business.

There are also a lot of smaller organisations at all levels who are doing wonderful work but unfortunately, you just never know if they're still going to be there the next time you visit a place due to funding issues.

*It seems that potentially the best approach to have smaller groups who are able to work with communities but having a uniform approach to provide structural support. Do you think there's any ability for state governments to implement these programs in such a way that they preserve the community element?*

I don't think they have to work in a uniform way, but it would be handy if they could work on a more long-term strategy for, say, the next five years, rather than constantly having concerns about funding. This would enable groups to identify overlap and issues or areas to target. I wouldn't be in favour of a big national organisation going in to try to fix the situation. It can be grassroots, but someone needs to be given the time, the task and the money to coordinate it.

*Finally, for young law students and young lawyers who want to get involved in this kind of work, what do you think their role could be in assisting with or supporting throughcare projects?*

I work at the University of Western Australia, at the Centre for Indigenous Peoples and Community Justice.<sup>2</sup> We are advised by an Aboriginal reference group with whom we regularly meet to discuss how we can best do our work. We encourage law students who are interested in this area to come along to these meetings and to listen to the reference groups. This then teaches the students how to work in this area without

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<sup>2</sup> See <<http://www.law.uwa.edu.au/research/Centre-for-Indigenous-Peoples-and-Community-Justice>>.



doing more harm than good, which is very easy to do. It encourages students to reflect on what work they want to be doing and whether that work is actually wanted or needed by the relevant community. The work done in Indigenous communities has to be led by Indigenous people and informed by them. Otherwise, we will just continue what we have been doing wrong. That for me is an everyday learning, as I listen to Indigenous people and I read the work of Indigenous people. Because I am white, I cannot and do not claim to have any Indigenous knowledge but I can act as a messenger. I can offer them my skills as a researcher and my position as an academic and I try to understand what they want to share with me and to bring it where they think it needs to be heard.

*Thank you so much, Associate Professor Tubex. The treatment of Indigenous people in the criminal justice system is an issue which needs to have more light shed on it and I think it's been so valuable to have your insights on the role that throughcare plays in that process.*