GRIFFITH JOURNAL OF
LAW & HUMAN DIGNITY

GRIFFITH JOURNAL OF LAW & HUMAN DIGNITY

Volume 12 Issue 1
2024

Published on 11 September 2024, Gold Coast, Australia by the *Griffith Journal of Law & Human Dignity*

ISSN: 2203-3114

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AUSTRALIA, DRIVE IT LIKE YOU STOLE IT: THE DIRE NEED FOR CHANGE AFTER THE VOICE REFERENDUM

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** Please note this article may include the names of First Nations people who have died.**

This article is a reflection upon the treatment of First Nations people by the legal system in Australia and the dire need for socio-political and legislative change given the rejection of the Voice referendum. It takes the decisions of the High Court in Bugmy *and* Munda *as a point of departure for a wider reflection on racism in Australia, which explains the disproportionate rates of First Nations incarceration. It considers structural bias in criminal justice and policing frameworks, as well as socio-economic bias in sentencing and bail options. The article exhorts the need for new structures of co-existence in Australian society.*

* Andrew Boe is an Australian barrister. He appeared in two of the cases referred to in this article: *Munda* and *Del Vecchio v Couchy.* Whilst he assumes responsibility for all opinions in this article, he acknowledges the research and editorial assistance of others, including William Holbrook, Julia Pincus, Adam Hussain, and Greer Boe. The author attributes the slogan 'Drive it like you stole it' in the title to Vernon Ah Kee, a contemporary First Nations Australian artist, political activist and founding member of ProppaNOW. Ah Kee is a member of the Kuku Yalandji, Waanji, Yidinji and Gugu Yimithirr peoples in Queensland and whose work *Tall Man* 2010 was acquired by the Tate Modern, London, but notes that the slogan has been used in other academic articles such as by Georgine W Clarsen, University of Wollongong in 2017.

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I INTRODUCTION

There is abundant evidence of the chronic over-representation of Indigenous people in gaols in nations where Indigenous communities have been subjected to colonial laws.[1] Some argue that 'the objective of settlers was primarily to remove the rich resources of these countries to Europe to enrich the reigning powers'.[1] Others have 'addressed the devastating impacts of the Stolen Generations policy and the Northern Territory Emergency Response (the 'Intervention'), acknowledging the role of the police in enforcing these policies and the resultant intergenerational trauma'.[2] The consequent theft of Indigenous lands and the systemic destruction of Indigenous language,[3] culture

[1] Iceland (Inuit), North America (Native Indian), Australia (First Nations), New Zealand (Māori) etc.
[2] Michael Murphy, 'An apology to Aboriginal Territorians' (Media Release, NT Police, Fire and Emergency Services, 3 August 2024) <https://pfes.nt.gov.au/newsroom/2024/northern-territory-police-commissioner-delivers-apology-speech-garma-festival>.
[3] Noting however that in some places where a treaty was negotiated, Indigenous language has remained intact eg Māori in New Zealand and cf the work of Jagera and Dulingbara woman Jeanie Bell who spent a lifetime seeking to preserve Indigenous language, see Jeanie Bell, 'Why we do what we do! Reflections of an Aboriginal linguist working on the maintenance and revival of ancestral languages' (2007) 30 *Ngoonjook: A Journal of Australian Indigenous Issues* 12.

and lore has resulted in a living environment for many Indigenous people which is, using first world metrics, substantially disadvantaged in terms of educational opportunities and outcomes, access to safe housing, and participation in meaningful vocational opportunities.

Australia, at least statistically, leads the way and by a discernible margin. As of 2023, the United States had the highest rates of incarceration in the G20 countries, around 531 people per 100,000, more than any other place in the world.[4] Australia was ninth in the G20 at around 158 people per 100,000. Yet when viewed as numbers within their own ethnicity, First Nations Australians were incarcerated at the rate of 1,617 people per 100,000 people[5], which more than elsewhere in the world. In the Northern Territory, 'Aboriginal and Torres Strait Islander people are (even more) significantly overrepresented in the prison population at 85%, though they make up (only) 26% of the Territory's population. The children detained are almost exclusively [First Nations]'.[6]

This article takes the decisions of the High Court in *Bugmy v The Queen* ('*Bugmy'*)[7] and *Munda v Western Australia* ('*Munda*'),[8] which were heard together ten years ago, as a point of departure for a wider reflection on racism in Australia, particularly toward its First Nations people, which explains these statistics. The judges in those cases applied the principle of equality before the law, a tenet of the rule of law. It is argued below that this tenet is one of several philosophical constructs brought by the colonisers, to a place where the notion of imprisonment as a form of punishment was not ingrained, if at all evident as a traditional practice.

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[4] Sentence Advisory Council of Victoria, 'International Imprisonment Rates', *Sentencing Statistics* (Web Page, 8 May 2024) <https://www.sentencingcouncil.vic.gov.au/sentencing-statistics/international-imprisonment-rates>.
[5] Sentence Advisory Council of Victoria, 'Imprisonment Rates for Aboriginal and Torres Strait Islander People in Victoria', *Imprisonment Rates for Aboriginal and Torres Strait Islander People* (Web Page, 8 May 2024) <https://www.sentencingcouncil.vic.gov.au/sentencing-statistics/victorias-indigenous-imprisonment-rates>.
[6] Justice Reform Initiative, 'Jailing Is Failing: State of Incarceration - Insights Into Imprisonment In The Northern Territory' (Research Paper, September 2022) 3 <https://assets.nationbuilder.com/justicereforminitiative/pages/337/attachments/original/1681695627/6_JRI_Insights_NT_FINAL-7.pdf?1681695627>.
[7] *Bugmy v The Queen* (2013) 249 CLR 571 ('*Bugmy*').
[8] *Munda v Western Australia* (2013) 249 CLR 600 ('*Munda*').

There are three propositions that will be examined. The first is that there is an inherent structural racist bias in the criminal justice and policing framework that results in First Nations people being disproportionately targeted by police and caught breaching criminal statutes. The second is that sentencing and bail options disfavour those who live in poverty or are experiencing homeless. The third is that if the first two premises are correct, the statistics are unlikely to improve until there is a root-and-branch re-negotiation of co-existence.

Before these matters are examined, the author makes it clear that this article does not attempt to canvass the plethora of scholarly articles on race theory, colonialism, First Nations culture and practice or for that matter descend to detailed analysis of the relevant judgements. Nor is there any attempt to examine the issue of deaths in police custody. Rather, this article is intended to provoke further discussion through opinions and commentary from the author's experience as a practitioner who has been involved in some of these cases.

II THE RULE OF LAW

It would be unfair to attribute the status quo solely to a lack of insight, empathy, or effort by those who operate within the criminal justice system. Some legislators, administrators, judicial officers and other legal practitioners have made valiant attempts to address this distortion through statutory provisions, executive and administrative decisions, and seminal decisions of courts across the country. Moreover, there has been sizeable financial investment by successive federal governments, following the prescient perspective brought in the Whitlam era.[9] Further, in a focussed tangible sense, the Closing the Gap and Evidence Fund will reportedly have made available $38.6 million from 2021 to 2026 to various agencies, in part, to seek to address these statistics.[10]

Nevertheless, in *Bugmy*, the most recent opportunity for the highest court in Australia to examine these issues, the majority[11] though allowing the offender's appeal and holding

[9] For example, the introduction of legal aid and the spawning of Aboriginal legal services throughout Australia.

[10] Australian Government Department of Social Services 'Closing the Gap Outcomes and Evidence Fund' (Web Page, 21 November 2023) <https://www.dss.gov.au/closing-the-gap-outcomes-and-evidence-fund>.

[11] *Bugmy* (n 7) 608–25 (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

that an offender's background of deprivation is a relevant factor when determining an appropriate sentence for that offender, applied a race-neutral approach. The Court stated that the deprived background of a First Nations offender may mitigate the sentence appropriate for an offence, just as the deprived background of a non-First Nations offender may mitigate that offender's sentence. Specifically, the majority rejected a principle argument on behalf of Mr Bugmy and held that s 5(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) does not direct a sentencing judge to give attention to the circumstances of an First Nations offender in a way that is different from the attention they would give to the circumstances of an offender who is not First Nations. In doing so, the Court disregarded the approach taken in Canada where s 718.2(e) of the *Canadian Criminal Code* directs a sentencing judge to pay 'particular attention to the circumstances of Aboriginal offenders'.[12] The majority in *Bugmy* further held that to consider the circumstances of First Nations offenders differently to those of non-First Nations offenders would cease to involve individualised justice, a tenet of the rule of law.[13]

Yet, it is important not to ignore the evidence that the vast majority of personal crimes committed by First Nations offenders are acts of violence in what are called 'domestic' relationships.[14] Indeed, *Munda* is an example of where a Court of Appeal increased a sentence for a man, who had a prior conviction for another manslaughter, who bludgeoned to death his former partner in respect of whom he had a lifetime ban from having any contact. This approach was upheld by the majority of the High Court, who observed that the criminal law was more than a tool of regulation to deter deviant behaviour, but also a means for the state to 'vindicate the dignity of each victim of violence, to express the community's disapproval of that offending, and to afford such protection as can be afforded by the state to the vulnerable against repetition of violence'.[15]

The appellant in *Munda:*

> disclaimed any contention that Aboriginality *per se* warrants leniency. Rather, the appellant's submission was that the disadvantage associated with the social and

[12] C*anadian Criminal Code*, RSC 1985, c C-46, s 718.2(e).
[13] *Bugmy* (n 7) [36] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).
[14] Joy Wundersitz, *Indigenous perpetrators of violence: Prevalence and Risk Factors for Offending* (Report No 105, Australian Institute of Criminology, 1 April 2010).
[15] *Munda* (n 8) [54] (French CJ, Hayne, Crennan, Kiefel, Gageler and Keane JJ).

> economic problems that commonly attend Aboriginal communities affected the appellant and that his antecedent circumstances should be treated as mitigatory, notwithstanding the weight to be given to considerations such as deterrence.[16]

The majority found that 'it is not possible to say that the Court of Appeal's synthesis of competing considerations was affected by error'.[17] My concession as counsel for Mr Munda might have been better expressed and confined to an acknowledgement that there was no Australian equivalent statutory provision as in place in Canada.

It may have been more persuasive, and of greater assistance to the Court, for Mr Munda to have submitted that to apply the principle of individualised justice in these cases, it is incumbent upon the judge to have regard to the systemic disadvantage brought about by colonisation, which continues to impact communities, because such systemic disadvantage often informs the very underlying issues that give rise to the offending in that individual case.[18] Courts have been willing to take such an approach when identifying disadvantages to other 'classes' of citizens, for example; gender, refugees from Vietnam during the 1970s and persons with disabilities. This complex argument is expanded upon below.

Leaving aside the individual merits of either appeal, *Bugmy* and *Munda*, in which the High Court was unduly constrained by hidebound notions of 'individualised justice';[19] no principle was identified which requires a sentencing judge to take into particular account the indigeneity of the offender. This is expounded below. Of further note is that the whole Court in *Munda* declined to consider the relevance of the likelihood that he would face further 'traditional punishment' from his own community upon his release, despite the State conceding that it was a relevant factor to be taken into account.[20]

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[16] *Munda* (n 8) [48] (emphasis added).
[17] *Munda* (n 8) [60]. Cf *Munda* [80] (Bell J dissenting).
[18] This point is made following recent reflections by the author including conversations with Yehia J, who as counsel appeared for Mr Bugmy (with G Bashir) at the same hearing at which *Munda* was argued by the author (with D Brunello).
[19] *Bugmy* (n 7) [36]: 'There is no warrant, in sentencing an Aboriginal offender in New South Wales, to apply a method of analysis different from that which applies in sentencing a non-Aboriginal offender. Nor is there a warrant to take into account the high rate of incarceration of Aboriginal people when sentencing an Aboriginal offender. Were this a consideration, the sentencing of Aboriginal offenders would cease to involve individualised justice'.
[20] *Munda* (n 8) [63], [127].

It is not yet sufficiently recognised that most tenets of the rule of law as recognised in Australia, are philosophical constructs, which were devised as a means of bringing about social order in largely homogenous societies. The concept of the rule of law is ill-fitting if viewed as a rigid superstructure in a post-colonial society where there is a cohort that has been marginalised through the process of colonisation. The statistical over-representation of First Nations prisoners may be an incident of the structural effect of colonisation for which there is no remedy conformable to imported notions of social disorder. Some tenets of the rule of law, such as 'individualised justice' and 'equality before the law', are interpreted merely as requiring that the same law be applied to everyone; a premise which has attracted powerful disagreement. The author also does not accept this premise and adopts the approach taken by Brennan J (as his Honour then was) in *Gerhardy v Brown*.[21] There, Brennan J embraced the reasoning of the Supreme Court of India:

> As Mathew J said in the Supreme Court of India in *Kerala v Thomas* (35), quoting from a joint judgment of Chandrachud J and himself:
>
> > It is obvious that equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of differential treatment in order to attain a result which establishes an equilibrium between different situations.
>
> In the same case, Ray CJ pithily observed (36):
>
> > Equality of opportunity for unequals can only mean aggravation of inequality.[22]

Chief Justice McCallum (Australian Capital Territory) recently argued in an extra-judicial speech which bears close attention, that:

> We are not hidebound [to the Rule of Law]. The destructive cycle of disproportionate incarceration of indigenous offenders can be addressed by the judiciary in a principled way. Justice can be done within the rule of law. The idea of legal equality does not mean that taking special measures in sentencing indigenous offenders amounts to special treatment or is otherwise unfair.[23]

[21] (1985) 159 CLR 70.
[22] Ibid 128–9 quoting original references (35) (1976] I SCR 906, 951, and (36) (1976) I SCR 906, 933.
[23] Chief Justice Lucy McCallum, 'The Rule of Law in Modern Australia' (Paul Byrne Memorial Lecture, University of Sydney, 28 February 2024) 13:54 <https://www.youtube.com/watch?v=h4O0QRV1SKA>.

This is not however a universal view and given the context in which it was expressed, is not of precedent value to other courts. Some may even view this as being inconsistent with the way in which the High Court sought to explain their reasons in *Bugmy* and *Munda.*

III THE VOICE

The marginalisation of First Nations people that has manifested in Australia through the colonial process has left many, if not most First Nations people in a fraught state of social disrepair and imbued with systemic and intergenerational dysfunction. Of course this is not universal, with many notable individual exceptions.

The voting patterns in the referendum in respect of the Voice[24] reinforced the view that many if not most Australians remain ignorant of the full effects of the steps taken to create their riches through laws imposed by colonisation and hold an unfounded fear of losing this advantage, for example the public furore that followed the *Mabo* decision recognising native title rights and privileges.[25] It is not intended to canvass here the obvious complexities and political machinations that may explain the vote at this referendum, however, it does exemplify how difficult it is for the Australian people to be persuaded to adjust their thinking about the plight of First Nations Australians.

It cannot be rationally suggested that First Nations people are more genetically criminogenic, so there must be another explanation for the disproportion in the statistics referred to above. If criminality invariably reflects structural disadvantage in economic, health and educational systems then there will always be this level of disproportion. This is especially so if the primary form of punishment is incarceration notwithstanding the

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[24] On 14 October 2023, Australians voted in a referendum about whether to change the *Constitution* to recognise the First Peoples of Australia by establishing a body called the Aboriginal and Torres Strait Islander Voice (the 'Voice'). The question that was put to the Australian people: 'A Proposed Law: to alter the *Constitution* to recognise the First Peoples of Australia by establishing an Aboriginal and Torres Strait Islander Voice. Do you approve this proposed alteration?' The referendum did not pass. See generally: Australian Electoral Commission, '2023 federal referendum' (Web Page) < https://www.aec.gov.au/Elections/referendums/2023.htm>. See also, the 'Disinformation register - Referendum process' (Web Page) <https://www.aec.gov.au/media/disinformation-register-ref.htm>; Blake Cansdale, 'Getting back on Track to Uluru', *ANTAR* (Blog Post, 19 August 2024) < https://antar.org.au/blog/getting-back-on-track-to-uluru/>.

[25] *Mabo v Queensland [No 2]* (1992) 175 CLR 1 ('*Mabo*'); Film Australia Digital Learning, 'Legislation in Australia after Mabo', *Mabo: The Native Title Revolution* (Web Page, 2008) <https://mabonativetitle.com/nt_12.shtml>.

efforts invested into the criminal justice system through decisions such as *Bugmy* and *Munda*. There have been other, albeit limited, measures taken to address this obvious social inequality such as the Walama Court in New South Wales District Court,[26] noting however that the vast majority of sentences concerning First Nations offenders are laid down at the local court level. Additionally, the Bugmy Bar book is an innovative addition to the field as it endeavours to bring practical application to the principles enunciated in *Bugmy* and *Munda*.[27]

This article seeks to take a more radical view of how this landscape must be reshaped.

A *There is an inherent structural racist bias in the criminal justice and policing framework that results in First Nations people disproportionately being targeted by police and caught breaching criminal statutes.*

First, it may be observed that few non-First Nations Australians have First Nations people as friends, partners or as people with whom they socialise and break bread.[28] Few have had First Nations people in our homes or think about learning their languages or embracing their culture. Except of course if they happen to excel in sport[29] or where they are willing to leave their culture and identity 'at the door' or are selected to entertain. Whether this is a function of opportunity, choice, or from not being able to see First Nations people as equal, may be debated. This limited contact and connection serves to dehumanise First Nations people or at least leads to a reduction in concern for their entitlement to enjoy the same rights and protections assumed for non-First Nations Australians. It also legitimises structural unfairness, whether it be benign or pernicious, intentional or merely incidental to the non-First Nations sense of greater sophistication and cultural superiority.

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[26] Keely Mcdonough, 'Momentous Occasion for the NSW District Court: Walama List marked with official ceremony', *Law Society Journal* (online, 4 April 2022) <https://lsj.com.au/articles/momentous-occasion-for-the-nsw-district-court-walama-list-marked-with-official-ceremony/>.
[27] Bugmy Bar Book Project Committee, 'The Bugmy Bar Book', (Web Page) <https://bugmybarbook.org.au/>.
[28] This is the writer's personal experience; see also Reconciliation Australia*, 2022 Australian Reconciliation Barometer* (Summary Report, 22 November 2022).
[29] For example, when Cathy Freeman won the 400m athletics final at the Sydney Olympics in 2000 after lighting the flame in the Opening Ceremony. The same athlete was officially rebuked by Australian chef de mission Arthur Tunstall for carrying the First Nations flag after winning the same event at the 1994 Commonwealth Games.

Non-First Nations Australians pay lip service to First Nations music, art and culture at sporting events or international functions where it is felt desirable to be seen in a favourable light and often only where 'they' show a sufficient semblance of assimilation so as not to cause offence. Again, there are exceptions, for example the work of Richard Bell, a visual artist, and a member of the Kamilaroi, Jiman and Gurang Gurang communities, whose work adorns several Australian galleries[30] as well as the Tate Modern in London and includes word art such as: 'White People are Lazy', 'Genocide is not Illegal', and 'We don't own our Poverty'.

Second, if any of non-First Nations Australians slip in language when speaking about 'them' there has been a reluctance to accept that it is reflective of inherent racism, and make excuses with responses like: 'this is not who I am'[31] or 'it was just a joke' and 'it was just a slip of the tongue'.[32] Yet, in almost every state or territory, for many decades, many First Nations people were charged with using 'offensive' or 'insulting' words during arrest situations with police, taken into custody, convicted and fined.[33] These were fines which most could not pay, and which led to default terms of imprisonment. Some, with a history of these sorts of offences, were even sentenced to imprisonment.[34] The recent controversy concerning Australian born footballer of Indian descent, Sam Kerr, who faces charges in the United Kingdom for allegedly calling an English police officer a 'stupid white bastard' exemplifies misconceptions amongst white people on issues of colour and race.[35] A further example of this issue involves a 'brown Samoan' footballer who was

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[30] Richard Bell, *About* (Web Page) <richardbellart.com/about>.
[31] For example, several police officers at the Inquest of Kumanjayi Walker in the NT in 2024, when presented with racist text messages exchanged with Constable Rolfe, the constable who was been acquitted of the murder of Kumanjayi Walker after killing him by shooting him three times in the space of seconds at point blank range.
[32] For example, Eddie McGuire, TV presenter and then president of the Collingwood Football Club after saying that First Nations Australian Football League player Adam Goodes might be used to promote the musical 'King Kong', a reference to a giant fictional ape.
[33] Christine Feerick, 'Policing Indigenous Australians: Arrest as a method of oppression' (2004) 29(4) *Alternative Law Journal* 188.
[34] For example, *Vagrants, Gaming and Other Offences Act 1931* (Qld) s 7 as repealed by *Summary Offences Bill 2004* (Qld); see *Del Vecchio v Couch* [2002] QCA 9, where a young woman was sent to gaol by a magistrate for 3 weeks for saying to a police officer: 'you fucking cunt', a conviction upheld by the Court of Appeal after the intermediate appeal court reduced the sentence to the seven days she had served; see also Mary Williams and Robyn Gilbert, *Reducing the unintended impacts of fines* (Current Initiatives Paper No 2, January 2011).
[34] Nadeem Badsah 'Footballer Sam Keer charged with racially aggravated harassment of London police officer', *The Guardian* (online, 4 March 2024) <https://www.theguardian.com/uk-news/2024/mar/05/sam-kerr-charged-with-alleged-racially-aggravated-harassment-of-london-police-officer-after-taxi-dispute>.

recently suspended from playing for eight games for saying to an First Nations opponent during the course of a rugby league game, 'fuck up you monkey'. He showed immediate remorse after unsuccessfully explaining to the all-white tribunal that it was 'just one brown man saying something to another brown man'.[36]

Individual racism leads to institutional dysfunction of the identified in a 2024 Child Death Review Board's annual report from Queensland involving the reported suicide of two First Nations boys held in youth detention.[37] According to the report, one boy spent 376 days in a youth detention centre and the other 319 days of which he was confined to his cell for 78 per cent of the time.[38] The first boy was confined to his cell for more than 22 hours a day on 55 separate days. On 22 days he was in his cell for more than 23 hours. Three times he spent 24 hours in his cell without a break.

The report raised concern that the youth detention system — particularly the practice of placing children in separation, isolation or solitary confinement — can affect their health and wellbeing in 'severe, long-term and irreversible ways':[39]

> Many of the children and young people in detention have experienced a life of significant disadvantage and marginalisation, with many being the victims of abuse and neglect… Being confined in a cell for extended periods of time, without interaction with peers, family, culture and support networks creates an environment of re-traumatisation. Research has shown pre-existing mental health problems are likely exacerbated by experiences during incarceration, such as isolation, boredom and victimisation.[40]

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[36] Australian Associated Press, 'Spencer Leniu suspended for eight NRL matches for racist slur against Ezra Mam', *The Guardian* (online, 11 March 2024) <https://www.theguardian.com/sport/2024/mar/11/spencer-leniu-suspended-for-eight-nrl-matches-for-racist-slur-against-ezra-mam>. It may be noted however that after receiving some initial criticism for being racist, one critic apologised after acknowledging that: 'interpersonal comments can be offensive, abusive or inappropriate, however, racism can only be perpetrated against a marginalised person or group, which anti-racism frameworks are specifically designed to protect'.

[37] Queensland Family & Child Commission, Child Death Review Board, *Annual Report 2022-23* (Report, 31 October 2023). On page 10 the Report identified that 47 per cent of youths who died in Youth Detention centres in Queensland in 2023 were First Nations.

[38] Ibid 36, 38.

[39] Ibid 38 citing Eileen Baldry and Chris Cunneen, 'Locking up kids damages their mental health and sets them up for more disadvantage. Is this what we want?', *The Conversation* (online, 21 June 2019) <https://theconversation.com/locking-up-kids-damages-their-mental-health-and-sets-them-up-for-more-disadvantage-is-this-what-we-want-117674>.

[40] Ibid.

The explanations for most of the recorded separations were due to staff shortages.[41]

Third, in recent years, some police commissioners have finally acknowledged[42] that there has been systemic institutional racism in the provision of police services,[43] albeit only after the most damning evidence has been uncovered at Royal Commissions and public inquiries. The most recent of these apologies, viz, from Northern Territory ('NT') police Commissioner Murphy bears special attention. Speaking at the Garma Festival the commissioner, amongst other things, bluntly apologised for the impact of racist policing practices. This apology has been posted on the official NT Police, Fire and Emergency Services ('NTPF') website.[44] Murphy referenced failed government policies such as the Intervention. Given the subsequent criticism of the making of this apology by the NT Police Association, one might be forgiven for viewing the words of recognition and regret from this commissioner as mere platitudes and unlikely to lead to any real change.

There may be some merit in the view that racism in the police service is in fact merely reflective of racism generally in the broader community. What may not be as easily accepted, but should be, is that there is, at least in the author's experience, a special and particular racism in the broader multicultural Australian community towards First Nations people connected to the view, long held, that they are responsible for their own marginalised circumstances because they are lazy and less civilised.

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[41] Ibid 41.

[42] See especially Murphy (n 2). See also Queensland Police Services, 'A Call for Change: Commission of Inquiry into Queensland Police Service Responses to Domestic and Family Violence' (Report, 2022); Ciara Jones, 'Queensland Police Commissioner Katarina Carroll questioned at inquiry over senior officers' misogynistic comments', *ABC News* (online, 18 August 2022) <https://www.abc.net.au/news/2022-08-18/dfv-inquiry-qld-police-commissioner-carroll-misogynistic/101343216>: 'The inquiry did uncover instances of racism and sexism and misogyny and for an organisation that is so important to the community that we serve that is unacceptable' after a Commission of Inquiry found 'ample evidence of sexism and racism in the QPS'.

[43] For example Yoorrook Commissioner Travis Lockett acknowledged that 'systemic racism and discriminatory action in the Victorian police force had gone 'undetected, unchecked and unpunished,' prompting the Police Commissioner Shane Patton to 'formally and unreservedly apologise for police actions that have caused or contributed to the trauma experienced by so many Aboriginal families in our jurisdiction.' See Dan Oakes, 'Victorian chief commissioner apologises for treatment of Indigenous people by police at Yoorrook inquiry', *ABC News* (online, 8 May 2023) <https://www.abc.net.au/news/2023-05-08/yoorrook-commission-police-chief-shane-patton-apology/102316124>.

[44] See Murphy (n 2): 'I, Michael Murphy, Commissioner of the Northern Territory Police am deeply sorry to all Aboriginal Territorians, for the past harms and injustices caused by members of the Northern Territory Police. I formally apologise for the hurt inflicted upon Aboriginal people, and together with my fellow officers, I commit the NT Police service to do the hard work to transform our relationship with Aboriginal Territorians for a safer community for all. We know that we cannot change or undo the past, but together we can commit to not repeating our mistakes and the injustices'.

Try imagining this: that Australia was invaded by the Burmese and they changed the legal landscape under which we were all required to live.[45] We were prevented from speaking English and faced systemic bigotry about the food we ate, how we ate, the values we held and the culture we wished to preserve. The playing of rugby and cricket were banned and replaced with *Chinlone* (a game a bit like volleyball but with a cane ball using your feet) and table tennis as the national sports. The Melbourne Cricket Ground was razed to the ground to make way for a Buddhist temple surrounded by *Chinlone* courts, with no regard to the hundreds of years of cricketing and AFL heroics on that ground. How would we feel?

And what if their 'rule of law' included that proof of criminal behaviour was assumed and an alleged offender must establish their innocence; that there was no concept of bail pending conviction and that every convicted offender must endure some form of corporal punishment, with more serious conduct resulting in amputations and the worst conduct, mandatory execution.

How would we feel? How might we be affected by their rule of law?

Accepting that the victors of any invasion can do what they please, if we pretend to be part of an international community that believes in the fundamentality of universal human rights, we must do better than we have towards First Nations people since we came here, whether as colonisers, refugees or migrants.

B *Sentencing and bail options*

Sentencing and bail options disfavour those who live in poverty or are homeless[46] (a high proportion of whom are First Nations).

The discretion to detain and arrest an alleged offender and grant bail lies first in the hands of police. They decide whether to arrest or issue a summons. If the individual is taken into custody, the watchhouse keeper decides, except in the case of certain serious crimes, whether to grant bail, and the police attitude will be critical. If neither is willing to release

[45] The author was born in Burma and is ethnically Burmese.
[46] See also Philip Lynch and Jacqueline Cole, 'Homelessness and Human Rights: Regarding and Responding to Homelessness as a Human Rights Violation' (2003) 4(1) *Melbourne Journal of International Law* 139.

the alleged offender, a magistrate will determine whether the person poses an unacceptable risk of re-offending or failure to appear in court.

First, it must not come as any surprise that the recent exposure of systemic racism in some police services will affect the police discretion when it comes to policing, charging and the release on bail of an alleged offender who is First Nations. An example of policing practice which has an unintended consequence is one that was utilised by the New South Wales Police Force ('NSW Police') called the Suspect Targeting Management Plan ('STMP'). The plan was a bit like the system used in the sci-fi movie *Minority Report.*[47] It sought to prevent future offending by targeting repeat offenders and people police believed were likely to commit future crimes. The STMP was both a police intelligence tool that used risk assessment to identify suspects and a policing program that guided police interaction with individuals who were subject to the program. However, a detailed study of its use unsurprisingly revealed that it resulted in unduly targeting First Nations youth in urban settings, and after many years of advocacy by the Public Interest Advocacy Centre, the NSW Police abandoned the STMP.[48]

Second, an essential criterion for bail is that the offender identifies a place of residence. This is obviously difficult where an alleged offender is homeless or uses parks and other public places as their places to sleep at night[49]

Third, *Bugmy* and *Munda* exemplified the reluctance of sentencing courts to take into account indigeneity *per se* as a relevant factor (as much as their poverty and trauma-filled life which informs many criminal offences). The court focused upon the 'evidence-based' requirements of sentencing, with little attention on this being contingent upon the limitations for most First Nations offenders to access lawyers who will apply the time, energy and resources to put together the identified subjective factors for use in determining remorse. These include attempts at rehabilitation and expert opinion evidence through psychologists or psychiatrists on the explanation of the offending and

[47] The film takes place in Washington DC and Northern Virginia in the year 2054, where Precrime, a specialized police department, apprehends criminals by use of foreknowledge provided by three psychics called "precogs".
[48] Vicki Sentas and Camilla Pandolfini, *Policing young people in NSW: a Study of the Suspect Targeting Management Plan* (Youth Justice Coalition Report, 26 October 2017).
[49] Government of South Australia, Office of the Director of Public Prosecutions, 'Bail Conditions', *The Court Process* (Web Page) <https://www.dpp.sa.gov.au/court-process/bail/bail-conditions>.

likelihood of re-offending. Therefore, unless the judicial officer is pro-active, as seen in examples in McCallum CJ's address, there is an inherent likelihood that First Nations people are less likely to get bail, less likely to have access to rehabilitation programmes and more likely to get sent to gaol.[50]

Finally, even where there is an acceptance that an offender's indigeneity warrants specific attention in an individual case, there is little if any guidance in the authorities as to how that might be practically used to determine the appropriate sentence. Merely leaving it to the particular judge to determine, is fraught with problems, even accepting that the sentencing discretion is regarded as a wide discretion. Not providing that a discernible allowance should be made also makes the exercise almost impossible to review.

This is a big discussion, not just about the reduction of the term of imprisonment but also about what revision should be made of the modes of punishment that are available. It is a discussion in which many of us will disagree, but it is a discussion that has not yet been had.

C *There is a need for root and branch overhaul of how the co-existence with First Nations people in Australian society is re-negotiated.*

There have been some significant points in Australia's recent history where the treatment of First Nations people has attracted political and public attention. On 27 May 1967, Australians voted to change the *Constitution* so that like all other Australians, Aboriginal and Torres Strait Islander peoples would be counted as part of the population and the Commonwealth would be able to make laws for them. A resounding 90.77 per cent said 'Yes' and every single state and territory had a majority result for the 'Yes' vote. It was one of the most successful national campaigns in Australia's history. It highlighted the racist political and legal framework within which Australia operated since the *Australian Constitution* was enacted in 1901, a document largely written by jurists who are still generally revered. Such frameworks allowed racist legislation which dehumanised First

[50] Lucy McCallum, 'The Rule of Law in Modern Australia' (Paul Byrne Memorial Lecture, University of Sydney, 28 February 2024).

Nations people such as the *Vagrants Gaming and Other Offences Act* to be enacted,[51] albeit by a state parliament in 1931.

In 2000, at the time of the Sydney Olympics when Australia was again under the international gaze, in a monumental display of support for reconciliation, around 250,000 Australians walked across the Sydney Harbour Bridge. It raised significant hope. Professor Henry Reynolds[52] noted: 'It was one of the most significant political mobilisations in the country's history'.[53] It followed on from landmark Inquires such as the Royal Commission into Aboriginal Deaths in Custody in 1991 and the National Inquiry into the Separation of Aboriginal and Torres Strait Island Children from their Families in 1997.[54]

On 13 February 2008, Prime Minister Kevin Rudd offered a formal apology to Australia's First Nations peoples, particularly the Stolen Generations, on behalf of the nation. It included a 'reflection on their past mistreatment' and 'apologised for the laws and policies of successive Parliaments and governments that have inflicted profound grief, suffering and loss'.[55]

Yet, the statistics as to the over-representation of First Nations people in the criminal justice system have worsened and worsened.

And of course, as already noted, the Voice referendum in 2023 failed to pass a modest reform that would have required the Australian parliament to listen to an First Nations panel as to the effect of laws which would likely affect them. It is not intended to canvass here the obvious complexities and political machinations that may explain the vote at this

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[51] The Second Reading speech bears close examination. It includes references to Indigenous women as 'gins' and decries white men who chose to partner with them: Northern Territory, *Parliamentary Debates,* Legislative Assembly, Thursday 22 November 1979, 47 (Elsey MacFarlane).

[52] Henry Reynolds FAHA FASSA is an Australian historian whose primary work has focussed on the frontier conflict between European settlers and First Nations Australians. In many books and academic articles Reynolds has sought to explain his view of the high level of violence and conflict involved in the colonisation of Australia, and the First Nations resistance to numerous massacres of First Nations people.

[53] Reconciliation Australia, 'The Bridge Walks: A Defining Moment For Reconciliation' (May 2020) *Reconciliation News* <https://www.reconciliation.org.au/wp-content/uploads/2021/02/Reconciliation-News-May-2020.pdf>.

[54] See *Royal Commission into Aboriginal Deaths in Custody* (Final Report, April 1991) ('*RCADIC*'); Australian Human Rights Commission, *Bringing them Home* (Final Report, April 1997).

[55] It may be noted that the present Opposition leader, Peter Dutton MLA left the parliamentary chamber as a personal protest against the Australian parliament providing such an apology. Mr Dutton was later successful in leading the 'No' vote against the Voice referendum.

referendum; however, it does exemplify how difficult it is to persuade the non-First Nations Australians to adjust their thinking about First Nations Australians.

This difficulty might explain the announcements by Prime Minister Albanese stepping back from his pre-election commitment to a federally funded Makarrata. 'Makarrata' is a Yolgnu word meaning 'a coming together after a struggle'. A Makarrata Commission would have two roles: supervising a process of agreement-making and overseeing a process of truth-telling.[56] Perhaps it is too harsh to view Albanese's earlier commitment as a mere platitude within an election cycle, rather than his getting cold feet following the rejection of the Voice referendum, yet that is how many must feel.

In addition, as already noted, the Voice referendum in 2023 failed to pass a modest reform that would have required the Australian parliament to listen to a First Nations panel as to the effect of laws which would likely affect them.

The symbolism associated with these events is of course important but has little value unless matched with a structured commitment to change. The makeup of our courts is one aspect that bears examination.

The intentional redress of the gender imbalance on our courts has only improved the capacity and function of courts.[57] Not just on the High Court but, and importantly, on courts lower in the hierarchy, which have to exercise judicial discretion far more frequently. The absence of First Nations judges might be explained by percentages of First Nations people in the community. However, given the disproportionate number of First Nations people who are sentenced in our criminal courts there is a need for an intentional redress. The fact that there has literally been fewer than a handful of First Nations judges appointed to 'superior courts' and none ever to the High Court, must be the subject of a concerted effort by the executive, similar to the way gender issues have been addressed.[58]

As may be seen, this need has not been met, despite decades of awareness; hence the statistics of significant and appalling disproportion of First Nations incarceration.

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[56] *Uluru Statement from the Heart* (Statement, First Nations National Constitutional Convention, 26 May 2017).
[57] Sean Cooney 'Gender and Judicial Selection: Should there be more women on the courts?' (1993) 19(1) *Melbourne University Law Review* 20.
[58] It is self-evident that more judges of 'colour' and from non-English speaking countries should also be appointed.

A system that relies heavily on individual acts of effort and excellence is simply not a system of justice that adequately protects the vulnerable within it, especially where the vulnerability is possessed by those trapped in intergenerational poverty and as victims of structural racism as a consequence of colonisation.

Good intentions by good people can still lead to unintended consequences.

IV INCARCERATION AS PUNISHMENT

It is useful to consider, at least briefly, traditional modes of punishment in some First Nations communities before colonisation. In Australia, a recent Law Reform Commission report indicated:

> Aboriginal traditional punishments can take a wide variety of forms, depending on factors such as the locality, the sex, status and previous history of the wrongdoer, the sex, status and conduct of the victim and of the person(s) required or expected to respond, the community's perceptions of the seriousness of the offence and the surrounding circumstances, and the extent of (and concern about) external intervention. Traditionally they might have included: death (either directly inflicted or by 'sorcery' or incantation; spearing (of greater or lesser severity) or other forms of corporal punishment (e.g., burning the hair from the wrongdoer's body); individual 'duelling' with spears, boomerangs or fighting sticks; collective 'duelling' (including specially structured encounters (*makarrata* or *minungudawada*); shaming or public ridicule; more rigorous forms of initiation or teaching; certain arrangements for compensation (e.g. through adoption or marriage) and exclusion from the community (e.g. to a particular outstation or another community, or more rarely, total exclusion).[59]

Interestingly enough there is no mention of imprisonment as a form of punishment.

Law students may recall that critical discussions about the notion of imprisonment are sourced to an English philosopher and scholar Jeremy Bentham who was born in the late eighteenth century.[60] Bentham believed that any person or group who carried out acts

[59] Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws* (Report No 31, 9 February 1977) 499.

[60] Bentham's wealthy parents were reportedly supporters of the Tory party whose policies are akin to the Republicans in the US and the conservative coalition in Australia on issues such as crime and punishment.

that were detrimental to society should be punished with imprisonment. He worked on a panoptic concept for a prison in which prisoners would be able to be surveilled by guards at any time without the prisoner knowing whether or not someone was watching. His theory was that if those who were locked up felt that they were under constant surveillance, they would behave more obediently. Since the prisoners would never be certain if armed guards were watching them, they would be forced to become model prisoners out of fear of retribution.[61]

Bentham's philosophies were not universally adopted, and have since been severely criticised, but he did have a significant impact on modern ideas of punishment which have informed policy makers in Britain, and some of its colonies including the United States and Australia.

It may be observed how disconnected these and other philosophies of privileged white men, which are so ingrained in modern approaches to prisons, are from the way communities such as the Mandan tribes and First Nations communities in Australia had treated similar human failings and criminal behaviour. This disconnect may inform the limited relevance of the common law notions of specific and general deterrence as associated with imprisonment, which are hallmarks of sentencing objectives in Australia, when applied to First Nations offenders who live in traditional First Nations communities.

A recent *Guardian* article concerning a political issue in Queensland also bears some consideration in this context.[62] The State government received advice from its principal legal adviser, the Solicitor-General, that the housing of children in adult police watchhouses would likely breach its own *Human Rights Act*,[63] which had only been implemented by the same government a few years earlier.[64] Faced with huge damages payments were any of these children to litigate, instead of addressing the situation, the ministers involved foreshadowed simply amending the *Act*, or at least suspending its

[61] Jeremy Bentham, *The Rationale of Punishment* (Robert Heward, 1830).
[62] Eden Gillespie and Ben Smee, 'Queensland to Create Watch House for Children Amid Fears of Looming 'Human Rights Disaster', *The Guardian* (online, 8 September 2023) <https://www.theguardian.com/australia-news/2023/sep/08/queensland-police-watch-houses-caboolture-child-facility>.
[63] *Human Rights Act 2019* (Qld) ('*Human Rights Act*').
[64] Gillespie and Smee (n 62).

application to the plight of these children, who, statistically would more likely, if not predominantly, be First Nations. Far more recently, the New South Wales government has proposed specific changes to bail laws in an attempt to curb juvenile property crimes in Moree[65] a town which has a large First Nations community, despite being cognisant of the fact that these special measures will add to the statistical disproportion of First Nations youths in custody.

The *Guardian* newspaper included another piece which foreshadowed a lecture to be delivered by human rights law expert, Professor Renée Jeffery, about Australia's human rights record.[66] It included the following excerpt:

> … much of Australia's discomfort stems from its reluctance to address its own human rights performance or to confront its own human rights history, from its exploitation of South Sea Islander labourers and efforts to curtail non-white immigration to its treatment of its First Nations people.

and

> … Australia remains on the defensive over the detention of asylum seekers, the high rate of incarceration of Indigenous people, and slow progress in raising the age of criminal responsibility. Despite successive governments vowing to speak up about human rights – and casting them as a core value of liberal democracy' – Jeffrey adds the issue is often given a lower priority than promoting "prosperity".[67]

This examination provides for consideration of the need for lawmakers to review the effectiveness of gaol as a punishment in our courts given that a disproportionate percentage of those who are being sentenced are First Nations. There are multiple government commissioned reports which have shown that incarceration as institutional punishment has not operated as an effective deterrence to First Nations offenders,

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[65] New South Wales Government, 'New Bail and Performance Crime Laws Passed to Prevent Youth Crime' (Media Release, Attorney General, 22 March 2024).
[66] Daniel Hurst, 'Australia Seen as 'Soft on Human Rights' for Failing to Confront 'Uncomfortable' History', *The Guardian* (online, 7 September 2023) <https://www.theguardian.com/australia-news/2023/sep/07/australia-seen-as-soft-on-human-rights-for-failing-to-confront-uncomfortable-history-expert-says>.
[67] Ibid.

particularly the youth, and is inimical to their rehabilitation, even if it is still felt in the wider community that it might.[68]

The tension between how 'individualised justice' is viewed by the High Court in *Bugmy* and *Munda* and how McCallum CJ does so in her address raises a complex and nuanced jurisprudential issue. It may be that they are both saying the same thing. On the one hand, the law in this country is that, unlike a jurisdiction with a specific statutory mandate such as Canada, a court must be race-neutral when sentencing an offender for an offence. On the other hand, individualised justice requires that full attention must be given to all of the detail of an offender's background to structure a sentence that meets the statutory requirement to take into account all relevant factors pertaining to that individual.

To do that, the court must be apprised of systemic issues which will apply to many First Nations offenders (and it must be said not all, and these factors may also apply to non-First Nations offenders) which places a burden on judges to be informed and for lawyers to put in the effort to obtain that information and place it before them. What is especially and invariably needed is for counsel to submit a 'report' about the offender's community, that community's history, including the history of children being taken from there and evidence of over policing etc to demonstrate how the systemic disadvantage is relevant to individual justice.[69]

This, therefore, raises issues of the kind addressed above, as to the limited pool from which judges are appointed and the need for more resources to be made available to legal services which conduct the majority of these cases. As may be seen, this need has not been met, despite decades of awareness; hence the statistics of significant and appalling disproportion of First Nations incarceration.

A system that relies heavily on individual acts of effort and excellence is simply not a system of justice that adequately protects the vulnerable within it, especially where the vulnerability is possessed by those trapped in intergenerational poverty and victims of structural racism as a consequence of colonisation.

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[68] See *RCADIC* (n 54) vol 1 ch 3 [3.2.11], vol 2 ch 11 and 14; Standing Committee for Aboriginal and Torres Strait Islander Affairs, House of Representatives, *Inquiry Into The High Level Of Involvement Of Indigenous Juveniles And Young Adults In The Criminal Justice System*: *Doing Time -Time for Doing - Indigenous Youth in the Criminal Justice System* (Final Report, June 2011).
[69] Cf *Kentwell v R (No 2)* [2015] NSWCCA 96.

V CONCLUSION

The rule of law in Australia governs how the judiciary is permitted to interpret laws crafted by Australian parliaments. It would be wrong to suggest that all aspects of the rule of law are flawed. This is not the contention being advanced here. Contrary to the powerful and reasoned argument by some judges, as evident in *Bugmy* and *Munda,* they are in fact 'hidebound' by particular tenets of it, which has had a detrimental impact upon the needs of the First Nations community.

Until recently, white men have been over-represented in all state and federal parliaments. The same cohort has, until recently, also been over-represented in the judiciary across the nation. Those who police the laws are still mostly white men, many of whom likely bring in their skills, prejudices and mindsets after serving in the military.[70] Most, if not all, of the police forces in which they operate remain bastions of racism towards First Nations people. Yet, as a cohort, are much more likely to interact with First Nations people than any other in Australian society.

The seismic change that is needed in the socio-political framework that has led to the over-representation of First Nations people in Australian gaols is not likely to occur any time soon, given the glacial pace at which the demographics of those occupying and leading the institutions which have been responsible for this framework are diversifying or made more welcome to 'others'.

But more fundamentally, despite the hopes and aspirations of the Australian people, most of us remain largely ignorant of First Nations lore, language and culture, even though it is understandable that many of us are distracted by our own desire to acquire and maintain material wealth and by our vested lifestyle pursuits. Politicians do not blink at spending

[70] This article will not examine the impact of military experience upon those who become police officers, however the author commends the work of Dr Dobos, Senior Lecturer, International and Political studies at UNSW Canberra (located at the ADF Academy). On the subject which includes this chilling view: '… military conditioning can potentially cause so-called 'moral injury'. Ethicists use this term to describe the loss of goodness or virtue or human decency. It has been variously defined as 'character deterioration'; 'damage to a person's moral foundation and 'corrosion of moral foundation'.; an unseen wound 'that 'reduces the functioning or impairs the performance of the moral' self, in his evidence admitted in the Inquest into the Death of Kumanjayi Walker, where an Indigenous teenager was shot and killed at point blank range by a police constable who had served in the ADF. See Ned Dobos, 'The Sacrifices of War: Can Soldiers be Trained to Kill Without Being Morally Damaged?', *ABC* (online, 27 April 2023) <https://www.abc.net.au/religion/ned-dobos-military-conditioning-and-moral-damage/102272430>.

millions on infrastructure such as a new sport stadium,[71] refurbishing a North Sydney swimming pool[72]or renovating the national war memorial[73] yet remain miserly when faced with the cost of reforming a system to address what Chief Justice McCallum described as a 'chronic failing in the administration of justice.'[74]

Surely a significant part of the answer lies in re-examining the utility of imprisonment as the singular form of condign punishment and asking what a far more effective means of deterrence for most members of the First Nations community may be, given what we now know about what was sustained for a millennia before this place was shrouded with colonial concepts of the rule of law.

Progress may be frustratingly slow, even to the point of seeming to run in reverse, but it should not be a vain hope that it will only be a matter of time. In decades to come, the lack of recognition of the post-colonial devastation wreaked upon First Nations people, as relevant and compelling and amounting to a form of mitigation that requires particular focus, will be a matter of considerable regret and shame. Nevertheless, until our parliaments recognise their power to reframe aspects of the rule of law, and despite the valiant efforts of individuals in the system, there will be no discernible change in the statistics.

The status quo remains our collective shame as a nation: 'our (children) will not forgive in us what we forgave'.[75]

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[71] Joe Hinchcliffe, 'Plan to redevelop Gabba for Brisbane Olympics to cost 2.7b and a primary school, sparking outcry', *The Guardian* (online, 17 February 2023) <https://www.theguardian.com/sport/2023/feb/17/brisbane-2032-olympics-live-arena-gabba-rebuild-redevelopment-queensland>.
[72] Megan Gorrey, 'North Sydney Pool Rebuild to exceed 100m, as costs and delays blows out' *Sydney Morning Herald* (online, 11 February 2024) <https://www.smh.com.au/national/nsw/north-sydney-pool-rebuild-to-exceed-100m-as-costs-and-delays-blow-out-20240206-p5f2qm.html>
[73] David Watt, 'Australian War Memorial Development: a Quick Guide', *Parliament of Australia* (Research Paper, 30 September 2020).
[74] Chief Justice Lucy McCallum, 'The Rule of Law in Modern Australia' (Paul Byrne Memorial Lecture, University of Sydney, 28 February 2024) 9:06 <https://www.youtube.com/watch?v=h4O0QRV1SKA>.
[75] Paraphrased 'Lies' in Yevgeny Yevtushenko, *Yevtushenko: Selected Poems* (Penguin Classics, 2008).

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