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REFLECTING ON WRONGFUL CONVICTIONS OF WOMEN IN AUSTRALIA: DEFINITIONS, DEBATES AND DATA

ROBYN BLEWER* AND DR. CELINE VAN GOLDE[†]

** Please note this article includes the name of a First Nations woman who has died and may include names of other First Nations women who have died.**

The quashing of Kathleen Folbigg's convictions in June 2023 caused many to reflect upon the way in which Australian criminal justice systems might judge women. The growing body of research into wrongful convictions of women overseas is developing an understanding of how and why the criminal justice process often fails to consider the experiences of women, incarcerates them – and makes it more difficult for their wrongful convictions to be uncovered and corrected. This article considers that research and applies its findings to known cases of wrongful convictions of women in Australia. The exploratory analysis offered in this article highlights possibilities for further research that will develop a more precise understanding of prosecution processes in Australia, the risk factors for wrongful conviction of women, and the barriers to uncovering wrongful convictions. Understanding these issues will help prevent wrongful convictions and improve pathways to justice.

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I INTRODUCTION

At 8:00am on 6 October 1909 Martha Rendall was executed in Fremantle gaol, in Western Australia. She is said to have ‘walked firmly to the scaffold’, her last words: ‘I will meet my end peacefully’. A prison warden, Mrs Cook, later made a statement to the press:

She was a brave woman, Mrs Rendall. I have ministered to numerous women in this gaol during many years, but I have seldom believed in a woman’s innocence as I did in hers.... Now and then, when opportunity offered, she repeated the statement of her innocence. *I did not kill those little children.*¹

Less than one month earlier, on 15 September 1909, Rendall had been convicted of murdering her teenage stepson (and was suspected of murdering her five, and seven-year-old stepdaughters over the course of the previous three years).² While five doctors apparently could not agree on the cause of the teen’s death (or that of Rendall’s stepdaughters), circumstantial evidence of a child witnessing Rendall buy ‘spirits of salt’ (hydrochloric acid) and evidence that she and the father of the children had been ‘trying to delude the world into believing they were man and wife’ appears to have been enough

¹ ‘A Woman Executed’, *Leader* (Melbourne, 16 October 1909) 34 <<http://nla.gov.au/nla.news-article197078087>>.

² Mark Finnane et al, ‘Western Australian Courts’, *The Prosecution Project Database* (28 July 2023) <<https://prosecutionproject.griffith.edu.au/other-resources/western-australian-courts/>>.

for the all-male jury to convict Rendall while acquitting her partner and co-accused, Morris.³

One hundred and fifteen years on, we will never know if Rendall was innocent or not. The circumstances in which she was tried, convicted, and executed, however, are reminders of the hurdles and inequities women have long faced in Australia's criminal justice systems. The differences between Rendall's and Morris' experiences of the same prosecution were described in one press report as 'the woman is consigned to the scaffold, and the man is left with his thoughts'.⁴

In this article we set out to do two things: first, review research findings that demonstrate various ways in which women come to be wrongly convicted, and how those so-called 'causes' of wrongful conviction differ from cases involving men; second, consider how this research can explain known cases of miscarriages of justice involving female defendants in Australia – or not.

We conclude by considering the extent to which this small collection of cases reflects research and issues that arise in the extant literature. We do not suggest that emerging themes are to be interpreted as evidence of guilt or innocence of women, or that these cases are representative of all convictions (wrongful or otherwise) of women. This article is not intended to be a comprehensive study. Rather, our intention is to start the critical consideration of how women might be wrongly convicted in Australia, how these miscarriages of justice exhibit or could be explained by the broader research on wrongful convictions of women that point to issues of gendered, racial, and classed stereotypes as contributing factors to wrongful convictions of women. Our intention here is to establish a starting point for further academic debate and research into defining wrongful convictions and understanding the nuances of a prosecution process that purports to treat all defendants equally.

³ 'The Murder of Arthur Morris', *The Sunday Times* (Perth, 19 September 1909) 9–16 <<http://nla.gov.au/nla.news-article57593131>> ('Murder of Arthur Morris').

⁴ 'The Murder of Arthur Morris' (n 3).

II FACTORS IN WRONGFUL CONVICTIONS OF WOMEN GENERALLY

Like men, women have been wrongly convicted and are at risk of wrongful conviction. Globally and historically, however, research on wrongful convictions has disproportionately focused on men.⁵ This is at least partially because the confirmed cases of wrongful convictions have occurred in relation to serious crimes, such as murder and sexual assault that tend to involve male defendants at greater rates than female defendants.⁶ Dioso-Villa's 2015 study stands out as an important contribution documenting 71 known Australian cases of wrongful conviction.⁷ In that study, thirteen per cent ($n = 9$) of the 71 wrongful convictions involved female defendants.⁸ Of the 3,316 known exonerations in the USA since 1989, however, 9 per cent ($n = 285$) of the wrongly convicted were women.⁹

Since the late 1980s, studies of DNA-related exonerations have identified a broader range of factors that are now recognised to most frequently contribute to wrongful convictions, not just in relation to DNA cases.¹⁰ These causal and contributing factors include eyewitness misidentification, issues with police and prosecution practices, erroneous forensic science, false confessions, inadequate defence representation, and false informant testimony.¹¹

Subsequent research now indicates these causal factors of wrongful conviction impact wrongfully convicted men and women differently. In Ruesink and Free Jr's 2005 study of wrongful convictions in the USA, for example, eyewitness misidentification was the main cause of wrongful convictions for men, followed by police or prosecutorial misconduct.¹²

⁵ Marvin D Free Jr. and Mitch Ruesink, *Wrongful Convictions of Women: When Innocence Isn't Enough* (Lynne Rienner Publishers, 2022) 16.

⁶ Ibid.

⁷ Rachel Dioso-Villa, 'A Repository of Wrongful Convictions in Australia: First Steps Toward Estimating Prevalence and Causal Contributing Factors' (2015) 17(2) *Flinders Law Journal* 163.

⁸ Dioso-Villa (n 7) 179.

⁹ Newkirk Center for Science & Society, 'Exonerations by year: DNA and Non-DNA', *The National Registry of Exonerations* (Web Page, 28 July 2023) <<https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx>>.

¹⁰ Brandon L. Garrett, 'Convicting the Innocent Redux' in Daniel S Medwed (ed), *Wrongful Convictions and the DNA Revolution: Twenty-Five Years of Freeing the Innocent* (Cambridge University Press, 2017) 45–6.

¹¹ Ibid. See also Dioso-Villa (n 7) 181–2; Debra Parkes and Emma Cunliffe, 'Women and Wrongful Convictions: Concepts and Challenges' (2015) 11 *International Journal of Law in Context* 219, 225.

¹² Mitch Ruesink and Free D. Marvin Jr., 'Wrongful Convictions Among Women: An Exploratory Study of a Neglected Topic' (2005) 16(4) *Women & Criminal Justice* 1, 13.

For women, however, the situation was reversed with police or prosecutorial misconduct impacting 86 per cent of cases with female defendants, 'far exceeding any other factor' in the study.¹³ In comparison, eyewitness issues (the primary factor impacting men) only 19 per cent of cases impacting women.¹⁴

Police conduct that contributes to a wrongful conviction is a complex issue. Many cases can be attributed to misconduct, even corruption, on the part of officers. Other cases, however, can be attributed to conduct that Brian Reichart describes as 'something shy of intentional misconduct'.¹⁵ Tunnel vision, for example, is a type of police and prosecutorial misconduct that refers to a common cognitive bias that leads investigators and/or prosecutors to selectively focus on information appearing to support what they already believe and resulting in them disregarding contradictory evidence.¹⁶ In Australia, more than half of the cases in Dioso-Villa's 2015 study involved some form of police misconduct and it was the most common of the causal and contributing factors identified at 55 per cent of the 71 cases ($n = 39$).¹⁷ While the cohort of cases with female defendants is small, at only nine, significantly, police misconduct impacted upon seven of these cases (77 per cent).¹⁸

Police [mis]conduct in relation to female defendants or suspects is frequently particularly insidious. Parkes and Cunliffe 'observed a pervasive police strategy' that essentially exploits 'a mother's presumed sense of responsibility' for her children'.¹⁹ US case law has demonstrated instances where police officers have threatened a mother's custody of her children to coerce a confession or guilty plea.²⁰ Having dependents may form a strong

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Brian Reichart, 'Tunnel Vision: Causes, Effects, and Mitigation Strategies' (2016) 45(2) *Hofstra Law Review* 451, 451.

¹⁶ Reichart (n 15) 453; Keith A. Findley, 'Tunnel Vision' in Brian L. Cutler (ed), *Conviction of the Innocent: Lessons from Psychological Research* (American Psychological Association, 2012) 303, 303.

¹⁷ Dioso-Villa (n 7) 182.

¹⁸ Dioso-Villa (n 7).

¹⁹ Parkes and Cunliffe (n 11) 233.

²⁰ See, e.g., *Lynumn v. Illinois* 372 U.S. 528 (1963) cited in Dean A. Strang, 'Inaccuracy and the Involuntary Confession: Understanding *Rogers v Richmond* Rightly' (2020) 110(1) *The Journal of Criminal Law and Criminology* 69, 78; Allison Redlich, 'False confessions, false guilty pleas: Similarities and differences' in G. D. Lassiter and C. A. Meissner (eds.), *Police interrogations and false confessions: Current research, practice, and policy recommendations* (American Psychological Association, 2010) 49–66; Stephen Jones, 'Under Pressure: Women Who Plead Guilty to Crimes They Have Not Committed' (2011) 11(1) *Criminology & Criminal Justice* 77–90.

motivation for women to avoid or minimise the time spent in prison.²¹ Police have been found to exploit this relationship in cases where evidence of the cause of death may be weak and confession evidence is used in varying ways to obtain evidence that the woman intended to harm or kill her child/ren.²² False confessions and false guilty pleas are alike in that both refer to accepting responsibility for a crime that was not committed and they often involve similar motives.²³ Some studies have indicated that women, especially Indigenous women, appear to be more likely to falsely confess or plead guilty than men, possibly because of gratuitous concurrence.²⁴

A further difference between wrongful convictions of men and women is that wrongly convicted women are overrepresented in cases where it is subsequently found that not only was the woman innocent, but there was actually no crime to begin with.²⁵ The National Registry of Exonerations in the USA reports that women are nearly twice as likely to be wrongly convicted for these 'no-crime' cases as men.²⁶ In Gross and Shaffer's 2012 study, '54% of female exonerees (31/57), but only 12% of the men (96/816), were convicted of crimes that never occurred'.²⁷ No-crime cases often involve convictions for child abuse-related crimes, or where babies have died.²⁸ In the USA, for example, it took Kristine Bunch 17 years to prove an electrical fault in her home had caused the fire that killed her young son, not that she had deliberately started the fire, killing her child in the process.²⁹

At the core of these differences in how men and women come to be wrongly convicted is likely to be a fair degree of stereotypes and sexism, both in terms of how police and

²¹ Jones (n 20). See also Rowena Lawrie, 'Speak out, speak strong: Researching the needs of Aboriginal women in custody' (2003) 5(24) *Indigenous Law Bulletin* 5.

²² Parkes and Cunliffe (n 11) 233.

²³ Redlich (n 20).

²⁴ Kent Roach, 'The Wrongful Conviction of Indigenous People in Australia and Canada' (2015) 17(2) *Flinders Law Journal* 203, 229.

²⁵ Samuel Gross and Michael Shaffer, 'Exonerations in the United States, 1989–2012: Report by the National Registry of Exonerations' (2012) *University of Michigan - Michigan Law Scholarship Repository* 13 <<https://repository.law.umich.edu/other/92>>.

²⁶ *Ibid.*

²⁷ Gross and Shaffer (n 25) 30.

²⁸ Gross and Shaffer (n 25) 13.

²⁹ Bluhm Legal Clinic – Center on Wrongful Convictions, 'Kristine Bunch – Convicted of Murder by Arson but the Fire was Accidental', *Northwestern Pritzker School of Law* (Web Page) <<https://www.law.northwestern.edu/legalclinic/wrongfulconvictions/exonerations/in/kristine-bunch.html>>.

prosecutors conduct the case, how defence lawyers defend women, how juries determine guilt or innocence, and within judicial decision-making.³⁰ Parkes and Cunliffe have argued that there is ‘no one “women’s story” of wrongful conviction’ but it is nevertheless important to consider ‘gendered, raced and classed stereotypes’ when considering wrongful convictions of women.³¹ Common tropes in cases involving female defendants accused of harming or killing their children rely on an expectation that women will naturally take to motherhood and where there is a suggestion that they have not, they are often condemned more harshly than men in cases of child abuse or killing.³² Lewis and Sommervold demonstrate, for example, how ‘flawed mothers’ are often victims of wrongful conviction and, like Kristine Bunch, mentioned above, whose house burned down resulting in her son’s death, how many wrongly convicted women have come to be suspects *because* they were women and mothers.³³

Stereotypes can also come in to play when it comes to race.³⁴ In Australia, there is a vast overrepresentation of First Nations peoples within the criminal justice systems, both as suspects and victims. For example, while less than 3 per cent of the Australian population identifies/classifies as Indigenous, 27 per cent of prisoners do so.³⁵ One of the reasons for this overrepresentation, among other reasons, is the historically fraught relationship Indigenous peoples have with police, caused by, and resulting in over-policing of Indigenous peoples. This over-policing can be explained by often racist stereotypes held by law enforcement personnel, associating Indigenous peoples with crime.³⁶

Similarly, but not surprisingly, when it comes to wrongful convictions, this discrepancy is still present. Of the 71 cases documented by Dioso-Villa 17 per cent concerned Indigenous peoples.³⁷ However, when it comes to Indigenous women, this discrepancy is even bigger. Not only do Indigenous women suffer from sexism and accompanying

³⁰ For a detailed analysis, see Andrea L. Lewis and Sara L. Sommervold, ‘Death, but Is It Murder: The Role of Stereotypes and Cultural Perceptions in the Wrongful Convictions of Women’ (2014) 78(3) *Albany Law Review* 1035.

³¹ Parkes and Cunliffe (n 11) 220.

³² Elizabeth Webster and Jody Miller, ‘Gendering and racing wrongful conviction: Intersectionality, “normal crimes,” and women’s experiences of miscarriage of justice’ (2015) 78(3) *Albany Law Review* 973, 1004-1005; Lewis and Sommervold, (n 30) 1036.

³³ Lewis and Sommervold (n 30) 1041.

³⁴ Parkes and Cunliffe (n 11) 220.

³⁵ Roach (n 24) 204.

³⁶ *Ibid* 206.

³⁷ *Ibid* 206.

stereotypes, but racism comes into play as well. Moreover, reflecting on the main causes of wrongful convictions for women (i.e. overzealous policing and police misconduct), compared with the type of crimes women often get wrongfully convicted for (i.e. no-crime crimes), it becomes apparent why Indigenous women are at a greater risk of being wrongfully convicted than non-Indigenous women.

III WRONGFUL CONVICTIONS OF WOMEN IN AUSTRALIA

Given what research tells us about wrongful convictions of women, in this section we turn to applying those research findings to known cases of wrongful conviction of women in Australia. To locate this cohort of cases, we drew on the work of Moles,³⁸ Dioso-Villa,³⁹ and Langdon and Wilson.⁴⁰

Before addressing these cases, it is important to explain the approach we have taken in relation to identifying women who have been wrongly convicted and the limitations of this approach. Currently, 'wrongful conviction' is usually limited to factual innocence, meaning instances whereby a person was convicted for a crime they did not commit or a crime that did not occur.⁴¹ In the past, this focus on factual innocence has formed the basis of the Innocence movement in the US, as well as many US studies surrounding wrongful convictions.⁴² If we accept the above body of research that indicates racism and sexism may impact upon convictions and wrongful convictions of women, it is appropriate to consider the very definition of a 'wrongful' conviction as it might apply to women.⁴³

There are several reasons why deeper consideration of the definition of a wrongful conviction is important. First, defining what is a wrongful conviction allows for more accurate data collection to better understand the causes of wrongful convictions and how

³⁸ Robert Moles, 'Welcome to Networked Knowledge' *Networked Knowledge* (Web Page) <<http://netk.net.au/>>.

³⁹ Dioso-Villa (n 7).

⁴⁰ Langdon, Juliette and Paul Wilson, 'When Justice Fails: A Follow-Up Examination of Serious Criminal Cases Since 1985' (2005) 17(2) *Current Issues in Criminal Justice* 179.

⁴¹ Keith A. Findley, 'Defining Innocence' (2010) 74(3) *Albany Law Review* 1157, 1159-60; Dioso-Villa (n 7) 175; Parkes and Cunliffe (n 11) 223-4.

⁴² Findley (n 41); Dioso-Villa (n 7) 175; Parkes and Cunliffe (n 11) 223-4.

⁴³ For more on the definition of a wrongful conviction more broadly see Roach (n 24) 218. See also David Hamer, 'Conceptions and degrees of innocence: the principles, pragmatics, and policies of the innocence movement' (2023) 35(1) *Current Issues in Criminal Justice* 81.

miscarriages of justice can be mitigated.⁴⁴ Second, it allows the determination of the impact of such a definition on procedural matters, including which women can appeal against their convictions and on what basis.⁴⁵ Third, as Parkes and Cunliffe note, if women are being convicted of crimes that may not have even occurred because of racism or sexism, it is appropriate to consider, more broadly, the possibility that many women will be wrongly convicted in circumstances where they may have had a defence but pleaded guilty.⁴⁶ Canadian academic Kent Roach highlights the importance of not limiting wrongful convictions to cases of proven factual innocence.⁴⁷ In identifying and accepting the following cases as examples of wrongful convictions of women in Australia in this article, we have adopted Roach's view⁴⁸ and thus prioritised cases where convictions of women have been quashed on appeal, including via High Court appeals, second or subsequent appeals, and following an Attorney-General or Governor's referral back to a state court of appeal. We acknowledge that in several of the cases below, the women's convictions that were quashed may not meet the definition of wrongful conviction according to some. However, in addition to considering convictions of women, we want this article to raise questions and contribute to discussions of the appropriate definition of a wrongful conviction.

The cases are set out in chronological order of the date of the woman's conviction. These cases are deserving of far more analysis and critique than this article has scope for. We intend to continue with more detailed consideration of these cases in future research.

1. *Perry v The Queen* - 1981⁴⁹

Emily Perry was convicted of two counts of attempting to murder her third husband. The circumstances of her convictions are set out in the decision of Gibbs CJ in *Perry v The Queen* (1982) 150 CLR 580.⁵⁰ The issue in Perry's case was the admission at trial of evidence that three other men close to Perry had died of poisoning as well. Like Rendall, at the start of this article, Perry was not charged with any offences in relation to the other

⁴⁴ Findley (n 41).

⁴⁵ *Ibid.*

⁴⁶ Parkes and Cunliffe (n 11) 230.

⁴⁷ Roach (n 24) 241.

⁴⁸ A view that mirrors those of other academics such as Parkes and Cunliffe (n 11) and Hamer (n 41).

⁴⁹ *Perry v The Queen* (1982) 150 CLR 580, 582.

⁵⁰ *Ibid.*

men. Instead, evidence was led to suggest some propensity for Perry to kill or attempt to kill by poisoning. The South Australian Court of Criminal Appeal dismissed Perry's appeal following her convictions. She appealed to the High Court which quashed her convictions.⁵¹

2. *R v Chamberlain - 1982*⁵²

Lindy Chamberlain was convicted of murdering her nine-week-old daughter, Azaria in 1982. Chamberlain maintained her daughter had been taken from the family tent by a dingo as their family camped at Uluru in central Australia. Witnesses testified to having heard dingoes in and around the campsite that night. A forensic scientist gave evidence at the trial that suggested foetal blood was found in the family's car. It was this evidence that appears to have been instrumental in Chamberlain's conviction.⁵³ A subsequent inquiry in 1987 confirmed the 'foetal blood' in the car was not blood but rather very likely to be a liquid used in car batteries.⁵⁴

The later discovery of baby's clothing in a dingo lair a short distance from where the family had been camping that evening was finally recognised in 2012 thus confirming Chamberlain's assertions.

3. *R v Hayman - 1987*

Suezanne Hayman, a New Zealand citizen, was convicted in New South Wales in 1988 of conspiracy to import heroin into Australia. A detective later admitted that Hayman's entire unsigned confession had been falsified.⁵⁵ Hayman was deported to New Zealand following her release from prison and it took her 13 years to be granted permission to re-enter Australia (despite having had her conviction overturned). A New Zealand press report of Ms Hayman's fight to visit Australia suggests an Australian departmental

⁵¹ *Ibid.*

⁵² *Chamberlain v R (No. 2)* (1984) 153 CLR 521.

⁵³ *Chamberlain v R (No. 2)* (1984) 153 CLR 521, 598 (Brennan J). See also Lynne Weathered, 'Pardon Me: Current Avenues for the Correction of Wrongful Conviction in Australia' (2005) 17(2) *Current Issues in Criminal Justice* 203, 204.

⁵⁴ Weathered (n 53); *Royal Commission of Inquiry into Chamberlain Convictions* (Final Report, 5 June 1987) <<https://catalogue.nla.gov.au/catalog/1731342>>.

⁵⁵ Langdon and Wilson (n 40) 184, 187.

spokesperson's response to her predicament was a comment suggesting Hayman was 'just one of a heap of people who were done basically by these crooked cops'.⁵⁶

4. *R v Schafer - 1987*⁵⁷

Colleen Schafer was exonerated by the Queensland Court of Appeal in 1988 following an appeal against her conviction a year earlier for murdering her fiancé.⁵⁸ In a two-to-one decision, the Court of Appeal quashed Schafer's conviction. The decision of the Court of Appeal indicates that the jury heard evidence that Schafer had 'giggled' when being questioned by police,⁵⁹ did not mention having screamed when first questioned by police (she was not asked if she screamed until a subsequent conversation),⁶⁰ referenced to 'inappropriate behaviour'⁶¹, and being 'calm and composed at the scene'.⁶² The Court of Appeal ultimately determined the conviction was based on the jury's inappropriate impression of Schafer which, in turn, had been constructed around police tunnel vision and the Crown's over-reliance on evidence suggesting Schafer had not screamed.

5. *R v Kina - 1988*⁶³

Robyn Kina, an Indigenous woman, was convicted in 1988 of murdering her partner.⁶⁴ Her trial took less than three hours. Kina did not call or give evidence and was sentenced to life in prison with hard labour. Kina's case is usually excluded from the narrow definition of wrongful convictions because factually she did kill her partner.⁶⁵ However, in considering her pardon application, Queensland's Court of Appeal agreed Ms Kina's case was a clear miscarriage of justice. Analysis of this case illuminates and enhances understanding of how women, particularly Indigenous women, can become a victim of a wrongful conviction.

⁵⁶ Catherine Masters, 'Goff Fights to Clear Woman' *New Zealand Herald* (Web Page, 28 June 2002) <<https://www.nzherald.co.nz/nz/goff-fights-to-clear-woman/NIBUZGBYXMWAHUAWD23VLBYOZ4/>>.

See also Langdon and Wilson (n 40) 187.

⁵⁷ *R v Schafer* [1988] QSCCCA 50 ('Schafer').

⁵⁸ Langdon and Wilson (n 40).

⁵⁹ *Schafer* (n 57) 4.

⁶⁰ *Ibid* 10.

⁶¹ *Ibid* 12.

⁶² *Ibid* 25.

⁶³ *R v Kina* [1993] QCA 480 ('Kina').

⁶⁴ *Ibid* 3.

⁶⁵ See, e.g., Dioso-Villa (n 7) 178; Roach (n 24).

The decision of the Court of Appeal in this case illustrates some of the limitations of ordinary common law trial and appellate processes. Ms Kina had been subjected to horrendous violence at the hands of her partner.⁶⁶ Self-defence or provocation were not raised as possible defences. In pardoning Ms Kina, the Court of Appeal acknowledged Ms Kina's tragic and violent life – even before meeting the deceased, and the difficulties she experienced in communicating with her legal representatives. The Court concluded its decision:

The matter is one in which it must be conceded the evidence was available at the trial, and in that sense the evidence was not 'fresh'. It is nevertheless one of those exceptional instances ... in which the conviction should be quashed and the verdict set aside because of a serious doubt about whether the petitioner was guilty of the offence of which she was convicted.⁶⁷

6. *R v Angel - 1989*⁶⁸

Jeanie Angel, an Indigenous woman from the Pilbara region in Western Australia, was convicted of murdering her stepmother in South Headland, Western Australia, in 1989 and sentenced to life in prison. Western Australia's Court of Criminal Appeal's decision to quash Angel's conviction in 1991 is only half a page long and briefly notes Angel was granted an extension of time to appeal following which the Crown conceded the appeal should be allowed.⁶⁹ The Court noted a retrial would not be useful given the evidence that had since become available and been investigated.⁷⁰ No information about this evidence was provided in the Court's reasons.

Additional information, however, was reported by journalist Tony Barrass in *The Australian* in 2007.⁷¹ A prison officer set in motion the actions that led – within weeks – to new evidence that other women had committed the offence. Angel later alleged detectives physically assaulted her and tricked her into signing a confession 'despite her

⁶⁶ Details of this violence are set out in the judgment wherein the Court states a 'summary of the appellant's life with the deceased would not be as eloquent as her own sworn statements'. See *Kina* (n 63) 9–16.

⁶⁷ *Kina* (n 63) 53.

⁶⁸ *Angel v R* [1997] WACCA 67.

⁶⁹ *Ibid* [3].

⁷⁰ *Ibid*.

⁷¹ Tony Barrass, 'Murder suspect forced to confess', *The Australian* (Web Page, 6 December 2007) <netk.net.au/Aboriginal/Aboriginal66.asp>.

being unable to read or write' by telling her she would be released on bail and allowed to see her children if she confessed.⁷² Angel was released from prison in 1991 – tragically, not before her three-year-old son died during her incarceration.

7. *R v Catt-Beckett - 1991*⁷³

Roseanne Catt-Beckett served 10 years in prison, convicted in 1991 of attempting to murder her husband.⁷⁴ The investigator, a friend of her husband's, appears to have framed Catt-Beckett by planting a gun in her bedroom, forcing witnesses to provide false testimonies and likely falsifying evidence regarding poisoning.⁷⁵

8. *R v Hanson - 2003*⁷⁶

Hanson's conviction for electoral fraud was quashed by Queensland's Court of Appeal due to an alternative interpretation of contract law principles that led the Court to find the verdict was unsafe and unsatisfactory.⁷⁷

9. *R v Folbigg - 2003*⁷⁸

Like Martha Rendall and Lindy Chamberlain before her, Kathleen Folbigg was widely despised as a child-killer – and a *serial* child-killer at that.⁷⁹ Folbigg was convicted in 2003 of five separate charges relating to harm (including murder) of four of her children based on a case that included equivocal medical evidence as to the children's health at the times of their deaths.⁸⁰ Medical opinions were divided as to how the babies died and whether

⁷² Ibid.

⁷³ *R v Catt* [2005] NSWCCA 279.

⁷⁴ Ibid [6].

⁷⁵ Ibid.

⁷⁶ *R v Hanson; R v Ettridge* [2003] QCA 488.

⁷⁷ Ibid.

⁷⁸ *Folbigg v R* [2023] NSWCCA 325.

⁷⁹ Donna Lu, 'Kathleen Folbigg: Science Sheds New Light on Case of Mother Convicted of Murdering her Children', *The Guardian* (Web Page, 7 May 2023) <<https://www.theguardian.com/australia-news/2023/may/07/kathleen-folbigg-science-sheds-new-light-on-case-of-mother-convicted-of-murdering-her-children>>.

⁸⁰ Folbigg was convicted of: the manslaughter of Caleb Folbigg on 20 February 1989; maliciously inflicting grievous bodily harm upon Patrick Folbigg on 18 October 1990, with intent to do grievous bodily harm; the murder of Patrick Folbigg on 13 February 1991; the murder of Sarah Folbigg on 30 August 1993; and the murder of Laura Folbigg on 1 March 1999.

sudden infant death syndrome (SIDS) could recur.⁸¹ Circumstantial evidence in the form of diary entries written by Folbigg were interpreted at trial as being admissions of guilt.

In June 2023 NSW's Attorney-General unconditionally pardoned Kathleen Folbigg.⁸² Expert opinions of over 100 scientists established that genetic features of the children were likely causes of their deaths. In December 2023 Court of Criminal Appeal for New South Wales formally quashed the convictions.⁸³

10. *R v Campbell – 2008*⁸⁴

Vivian Campbell, an Indigenous woman, was one of five charged with affray. In relation to Campbell's co-accused (all Indigenous men), evidence demonstrated police had not followed correct procedure for interviewing Indigenous witnesses/suspects. Campbell, however, did not give a statement to police nor give evidence at court. Her conviction thus rested on the evidence of the complainant identifying Campbell as one of his assailants. While the trial judge (in a judge-alone trial) accepted that evidence and convicted Campbell, on appeal, Hidden J rejected those findings. Hidden J concluded: 'I am left with a sense of real unease about this conviction. In all the circumstances, I am satisfied that his Honour ought to have had a reasonable doubt about this charge'.⁸⁵

11. *R v Greensill - 2010*⁸⁶

Greensill, a teacher, was convicted of various sexual offences against children (students of hers). Part of a previously undisclosed psychologist's report was accepted as fresh evidence. The Court of Appeal found the undisclosed report undermined the credibility of the relevant witness which, in turn, led them to quash Greensill's conviction.⁸⁷

⁸¹ Sharmila Betts and Jane Goodman-Delahunty, 'The case of Kathleen Folbigg: How did justice and medicine fare?' (2007) 39(1) *Australian Journal of Forensic Sciences* 11, 14.

⁸² Tamsin Rose, 'Kathleen Folbigg pardon: what evidence emerged over her children's deaths and what happens next?', *The Guardian* (Web Page, 5 June 2023) <<https://www.theguardian.com/australia-news/2023/jun/05/kathleen-folbigg-pardon-what-evidence-emerged-over-her-childrens-deaths-and-what-happens-next>>.

⁸³ *Folbigg v R* [2023] NSWCCA 325.

⁸⁴ *Campbell and Ors v Director of Public Prosecutions (NSW)* [2008] NSWSC 1284.

⁸⁵ *Ibid* [49].

⁸⁶ *Greensill v R* [2012] VSCA 306.

⁸⁷ *Ibid*.

IV IMPLICATIONS FOR RESEARCH AND REFORM

This set of cases is too small for a systematic analysis that would allow for observable patterns. Notwithstanding such limitations, it is worth considering these cases both thematically and doctrinally contribute to the current discourse on women in Australian criminal justice systems that has been enlivened by Kathleen Folbigg's case.

Even in this small group of cases, findings of the research overseas regarding causes of wrongful convictions of women are clearly demonstrated. Of these eleven cases of women being wrongly convicted in Australia, seven involved murder/manslaughter or attempted murder of family members; five involved police misconduct; seven were, or possibly were, 'no-crime' cases; and three involved First Nations women.

Further avenues for research could include more detailed analysis of how each woman came to be a suspect in each case, how they were prosecuted, and the different pathways to their convictions being quashed, or pardons granted. Options for reform that could be explored considering the above discussion include the definition of 'fresh' evidence, and the need for streamlined pathways back into court. Ones that do not rely on personal and highly political applications to Attorneys-General as we saw in Chamberlain and Folbigg's cases. Importantly, given the high proportion of cases involving police misconduct, more research needs to be done on how police biases impact their investigations of cases like those referred to above.

V CONCLUSION

In even beginning to answer the question of how a miscarriage of justice like Kathleen Folbigg's happened – or how the justice system can prevent such cases – it is important to understand more broadly just how women come to be wrongly convicted. In this article we started to outline how the main causes of wrongful convictions of women are different to those of men. This was followed by the types of (non) crimes women were more likely to be wrongfully convicted of. We demonstrated how stereotypes, sexism and racism increased the risk for women to be wrongfully convicted, after which we provided various examples of women who have been exonerated or pardoned in Australia. While certainly addressing the main factors to consider regarding women and miscarriages of

justice, this article is merely the start of a broader discussion which should be had around the myriad ways in which women can be wrongly convicted.

To ensure the substantive equality of all who come before them, Australian criminal justice systems should acknowledge and confront the problems that create opportunity for bias, racism, and sexism to unjustly pervade the prosecution process.

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THE PUBLIC MORALS EXCEPTION: A FAILING BY THE HUMAN RIGHTS COMMITTEE AND A THREAT TO INTERNATIONAL HUMAN RIGHTS LAW

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By way of its construction, the public morals exception located in the International Covenant on Civil and Political Rights is a function of international law which allows for restrictions on the most fundamental of our human rights. However, despite these implications, this justifying ground remains severely understudied and unexplained. This paper seeks to discuss the jurisprudence which surrounds the public morals exception from two angles: first, the requirements for 'legitimacy' of such exceptions and second, the broader interpretation of what is meant by the term 'public morals' in international human rights law. After analysing the work of the Human Rights Committee on these two concepts, the paper asserts that the level of clarity which has been provided by the body in terms of its discussions on the requirements of human rights exceptions has not been reflected in the Committee's limited guidance concerning the larger concept of public morality — a complex yet vital part of the discussion surrounding the public morals exception. Due to this lack of clarity by the Human Rights Committee, the paper finds that the international recognition of human rights faces two major issues — a vacuous idea of 'morality' which often allows for excessive State discretion, and an overwhelming number of claims under the public morals exception which are clearly unlawful.

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I INTRODUCTION

Located in the *International Covenant on Civil and Political Rights* ('ICCPR'),¹ the protection of 'public morals' is listed as a valid reason for departing from the mandatory recognition of individual liberties in international human rights law.² Unfortunately, while other exceptions such as protections of public health, public safety, and public order have been extensively studied, the protection of public morals remains 'the least clear and most controversial of all the legitimating grounds for justifying restrictions'.³

¹ See *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966 (entered into force 23 March 1976) 999 UNTS 171 arts 12, 18, 19, 21, 22 ('ICCPR').

² Ibid Preamble paras 2, 6.

³ Manfred Nowak and Tanja Vospernik, 'Permissible Restrictions on Freedom of Religion or Belief' in Tore Lindholm, W Cole Durham, Jr. and Bahia G Tahzib-Lie (eds), *Facilitating Freedom of Religion or Belief: A Deskbook* (Springer 2004) 159.

With this state of affairs in mind, this paper seeks to discuss the jurisprudence which governs the public morals exception and its use. Overall, this discussion will include an analysis of the *ICCPR*, as well as the relevant communications which have been published by the United Nations Human Rights Committee ('Committee'), the treaty body charged with monitoring the implementation of the *ICCPR*.⁴ Firstly, this article will summarise the requirements for validity which govern the legitimating grounds as a whole, including the public morals exception. Secondly, this article will outline the evolution of the term 'public morals' throughout the history of the Committee. Finally, the paper will assess how the continuing ambiguity resulting from the absence of guidance regarding the public morals exception, presents a threat to the recognition of human rights in international law.

II REQUIREMENTS FOR A VALID PUBLIC MORALS EXCEPTION

Since its inception, the aim of the *ICCPR* has been to ensure the 'recognition... of the equal and inalienable rights of all members of the human family'.⁵ However, from the moment of its enactment in 1966, the *ICCPR* has allowed for numerous grounds upon which States could restrict human rights, provided that these restrictions satisfy certain requirements for legitimacy. Relevant to this paper, the public morals exception constitutes one of these justifying grounds.

Overall, this section will address the legitimacy requirements which States must satisfy to carry out restrictions to human rights. These include the requirements of 'necessity' and 'provision by law' which are expressly stated in the *ICCPR*.⁶ Further, this section will discuss the requirements of 'non-discrimination' and 'universality', terms that have always been implied by the *ICCPR* but have now been cemented via the jurisprudence of the Committee.⁷ Note that while the Committee has recently suggested that public morals be assessed in light of 'pluralism',⁸ no further discussion concerning this potential

⁴ 'What are Treaty Bodies?', *United Nations* (Web Page) <<https://www.ohchr.org/en/treaty-bodies#:~:text=What%20are%20the%20treaty%20bodies,set%20out%20in%20the%20treaty>>. See also *ICCPR* (n 1) art 28.

⁵ *ICCPR* (n 1) Preamble.

⁶ See, eg, *ICCPR* (n 1) arts 12(3), 18(3), 19(3).

⁷ Human Rights Committee, *General Comment 34: Article 19*, 102nd sess, UN Doc CCPR/C/GC/34 (29 July 2011) [18], [26] ('*General Comment 34*').

⁸ See Human Rights Committee, *General Comment No 37: Right of Peaceful Assembly*, 129th sess, UN Doc CCPR/C/GC/37 (17 September 2020) [46] ('*General Comment 37*').

requirement has occurred. As a result, this article will not analyse the concept of pluralism in depth.

A Legitimacy According to the ICCPR

When addressing possible restrictions on human rights, the *ICCPR* demands that any such limitations be 'provided by law' and be 'necessary' for the protection of an enumerated ground such as public health, public order, or public morals.⁹ In terms of being provided by law, the Committee has made clear that this may include statutes concerning parliamentary privilege or contempt of court.¹⁰ However, any restrictions that are 'enshrined in traditional, religious or other such customary laws' will not satisfy this requirement.¹¹ Further, laws which purport to restrict human rights without sufficient precision for individuals to regulate their conduct accordingly, will also fall foul of this prerequisite.¹² This is because, laws may never confer 'unfettered discretion',¹³ and cannot impair the 'essence' of the human right which they are limiting by reversing 'the relation between right and restriction, between norm and exception...'.¹⁴ In terms of being necessary for the protection of public morals, the Committee has opined that there must be a 'direct and immediate connection' between the restricted conduct and the [moral] threat'.¹⁵ In addition, the requirement of necessity includes the principle of proportionality, meaning that the restriction 'must be appropriate... must be the least intrusive instrument amongst those which might achieve the desired result; and must be proportionate to the interest protected'.¹⁶ As a result, restrictions can only be employed in temporary circumstances, they cannot be permanent nor indefinite bars to the

⁹ See, eg, *ICCPR* (n 1) arts 12(3), 18(3), 19(3).

¹⁰ *General Comment 34* (n 7) 9 [32], [24].

¹¹ *Ibid.*

¹² *Ibid* [25]. See also Human Rights Committee, *General Comment 27: Article 12*, 67th sess, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) [13] ('*General Comment 27*').

¹³ *General Comment 34* (n 7) [25]; *General Comment 27* (n 12) [13].

¹⁴ *General Comment 27* (n 12) [13].

¹⁵ *General Comment 34* (n 7) [27].

¹⁶ *General Comment 27* (n 12) [14]. See also *General Comment 34* (n 7) [34]; Human Rights Committee, *General Comment 22: Article 18*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 1 (30 July 1993) 37 [8] ('*General Comment 22*').

enjoyment of *ICCPR* rights.¹⁷ Further, limitations cannot be overly broad and must be individualised to a particular threat.¹⁸

Through these interpretations of the *ICCPR*, the Committee has worked extensively to prevent the undue expansion of State power in terms of restricting human rights.¹⁹ As will be shown below, the Committee has also engaged further jurisprudence beyond the interpretation of these provisions with aims towards this goal.

B Non-Discrimination

Since its issuing of *General Comment 22*, the Committee has maintained that States must always 'proceed from the need to protect the rights guaranteed under the *ICCPR*'.²⁰ As the term 'rights' in this context extends to concepts such as article 2(1)'s principle of non-discrimination,²¹ any employment of the public morals exception must always start from the point of preventing discriminatory restrictions on human rights (in addition to satisfying the requirements discussed above).

Recent jurisprudence of the Committee has only strengthened the importance of non-discrimination in the context of human rights exceptions.²² In terms of public morals specifically, multiple concluding observations by the Committee have made clear that the maintenance of 'cultural diversity and moral principles... [must] always remain subordinate to the principle... of non-discrimination'.²³ Consequently, non-discrimination is no longer the starting point against which the protections of public morals should be weighed, but rather a consideration which functions as an absolute bar to the legitimacy of any such exceptions.²⁴ However, while non-discrimination has now crystallised as a doctrine of paramount importance in the context of the public morals exception, not all distinctions between persons will be considered discriminatory. For

¹⁷ Alfred de Zayas and Áurea Martín, 'Freedom of Opinion and Freedom of Expression: Some Reflections on General Comment No. 34 of the UN Human Rights Committee,' (2012) 59(3) *Netherlands International Law Review* 425, 430, 440.

¹⁸ *Ibid* 430.

¹⁹ *Ibid*.

²⁰ See *General Comment 22* (n 16) [8].

²¹ *Ibid*.

²² See, e.g., *General Comment 34* (n 7) [18].

²³ Human Rights Committee, *Concluding Observations on the Initial Report of Mauritania*, UN Doc CCPR/C/MRT/CO/1 (2013) [8]. See also Human Rights Committee, *Concluding Observations on the Fifth Periodic Report of Iraq*, UN Doc CCPR/C/IRQ/CO/5 (2015) [11].

²⁴ See *General Comment 34* (n 7) [26], [32]. See also *General Comment 27* (n 12) [18].

instance, where differentiation of treatment is justified on 'reasonable and objective' grounds and 'the aim is to achieve a purpose which is legitimate under the [ICCPR]', a restriction on human rights may be valid.²⁵ Therefore, where protections of public morality are a 'legitimate aim', as maintained by the Committee, such exceptions may not be barred by the principle of non-discrimination.²⁶

C Universality

As shown above, the Committee has emphasised that States prioritise the protection of rights and freedoms guaranteed by the ICCPR.²⁷ However, the Committee has also opined that human rights exceptions must be consistent with both the operative sections of the ICCPR as well as its overall aims and objectives.²⁸ According to *General Comment 34*, this requirement includes the recognition of the ICCPR's overarching principle of the universality of human rights.²⁹

In recent years, the pre-eminence of universality has been confirmed by the Committee in both its general comments as well as its communications on individual complaints.³⁰ For example, in the recent case of *Kirill Nepomnyashchiy v Russia*³¹, the Committee found that an administrative prohibition on gay propaganda in the city of Arkhangelsk violated this principle despite Russia's claim that the restriction protected public morals.³² The Committee also noted that the provisions were far too ambiguous, and were unnecessary for Russia's argued aim of protecting the welfare of minors.³³ However, it is clear that universality was a significant factor in the Committee's findings.

According to Vincent Vleugel, the Committee's emphasis on the doctrine of universality indicates that 'where there is a tension between morals and traditions, which are closely

²⁵ See *General Comment 18* (n 8) [13].

²⁶ See Ignatius Yordan Nugraha, 'From "Margin of Discretion" to the Principles of Universality and Non-Discrimination: A Critical Assessment of the "Public Morals" Jurisprudence of the Human Rights Committee' (2021) 39(3) *Nordic Journal of Human Rights* 243, 244.

²⁷ See Part II(A)-(B). See also *General Comment 22* (n 16) [8].

²⁸ See *General Comment 34* (n 7) [26]. See also *General Comment 27* (n 12) [21].

²⁹ *General Comment 34* (n 7) [32].

³⁰ See, eg, Human Rights Committee, *Views: Communication No 1932/2010*, 106th sess, UN Doc CCPR/C/106/D/1932/2010 (2 November 2012) ('*Fedotova v Russia*'). See also, eg, Human Rights Committee, *Views: Communication No 2318/2013*, UN Doc CCPR/C/123/D/2318/2013 (5 October 2013) [7.8] ('*Kirill Nepomnyashchiy v Russia*').

³¹ *Kirill Nepomnyashchiy v Russia* (n 30).

³² *Ibid.*

³³ *Ibid* [7.7], [7.8].

linked to culture and the universality of human rights, the latter must prevail'.³⁴ As a result, this overarching principle represents another requirement with which the public morals exception must comply.

III PUBLIC MORALS AS A TERM IN THE *ICCPR*

As discussed above, the requirements which surround the legitimacy of any public morals exception have become increasingly clear over time. However, while these limitations are implied or explicit in the *ICCPR*, neither the treaty nor any of its preparatory works define what is actually meant by the phrase 'public morals'.³⁵ As a result, the interpretive work of the Committee is the primary source of jurisprudence on this concept.

A First Look: Public Morals as a 'Matter of Discretion'

In 1979, Leo Hertzberg brought the first individual petition to the Committee which considered the issue of public morals.³⁶ In terms of substance, the petition focused on chapter 20 of the Finnish Penal Code which prohibited 'public encouragement of indecent behaviour between persons of the same sex'.³⁷ While Hertzberg claimed that this restriction violated the right to freedom of expression enshrined in article 19(2) of the *ICCPR*, the Finnish Government's defence was that the purpose of the law 'reflect[ed] the prevailing moral conceptions in Finland as interpreted by the Parliament and by large groups of the population'.³⁸ Thus, the member State claimed that the law was a valid restriction as allowed by article 19(3) of the *ICCPR*.³⁹

In its views communicated on 2 April 1982, the Committee found that because 'public morals differ widely' no 'universally applicable common standard' could be applied to the meaning of the term.⁴⁰ As a result, the Committee maintained that a 'margin of discretion'

³⁴ Vincent Willem Vleugel, *Culture in the State Reporting Procedure of the UN Human Rights Treaty Bodies: How the HRC, the CESCR and the CEDAWCee Use Human Rights as a Sword to Protect and Promote Culture, and as a Shield to Protect against Harmful Culture* (Intersentia, 2020) 166.

³⁵ See Nugraha (n 26) 255.

³⁶ See Human Rights Committee, *Views: Communication No 61/1979*, 50th sess, UN Doc CCPR/C/OP/1 (2 April 1982) (*Leo Hertzberg et al v Finland*). See also Nugraha (n 26) 245.

³⁷ See *Leo Hertzberg et al v Finland* (n 36) [2.1]-[2.6].

³⁸ *Ibid* [6.1].

³⁹ *Ibid* [6.3].

⁴⁰ *Ibid* [10.3].

should be allowed for national authorities concerning such topics.⁴¹ Because the Finnish Government was within its discretion to pass chapter 20 of its Penal Code, the Committee found that there was no violation of article 19(2) in this instance.⁴² Through this communication, the Committee made clear that member States would be allowed to define public morals in their own way.⁴³ In addition, the Committee's position on the lack of a universal morality indicates that the body was unwilling to impose its own thoughts or constraints on such an amorphous and subjective concept.

B Recent Guidance: Public Morals as a Matter of International Concern

Because of its approach in *Leo Hertzberg et al v Finland* ('*Hertzberg*'), the Committee was briefly able to avoid prolonged discussion concerning the concept of public morality as well as the potential applications of the term across the diverse cultural environments of the international community. However, any avoidance of these difficult considerations was short lived as the Committee soon began to address the meaning of public morality more directly.

In 1993, the Committee issued *General Comment 22*, which focused on the freedom of thought guaranteed by article 18 of the *ICCPR*.⁴⁴ As article 18 references the possibility of a 'public morals exception',⁴⁵ the Committee took the opportunity to clarify that no valid restriction to the *ICCPR* could coerce a person into adopting a particular religion or belief.⁴⁶ In addition, the Committee departed from its views in *Hertzberg* by imposing a restriction on the public morals discretion of States, indicating that '[such] limitations... must be based on principles not deriving exclusively from a single tradition'.⁴⁷ Around the same time, the Committee was also preoccupied with a second individual petition concerning public morality: *Toonen v Australia* ('*Toonen*').⁴⁸ In *Toonen*, the state of Tasmania defended its criminalisation of homosexual acts on the basis of the public

⁴¹ *Ibid.*

⁴² *Ibid* [10.4], [11].

⁴³ See Nugraha (n 26) 245.

⁴⁴ *General Comment 22* (n 16) [8].

⁴⁵ See *ICCPR* (n 1) art 18(3).

⁴⁶ *General Comment 22* (n 16) [8].

⁴⁷ *Ibid.*

⁴⁸ Human Rights Committee, *Views: Communication No 488/1992*, 50th sess, UN Doc CCPR/C/50/D/488/1992 (25 December 1991) ('*Toonen v Australia*').

morals exception.⁴⁹ In response, the Committee found that the prohibitions by the Tasmanian government were not necessary for the protection of public morals citing the widespread decriminalisation of homosexual acts throughout Australia, a lack of consensus in Tasmania as to the relevant criminal sections, and the absence of prosecutions by Tasmanian authorities for homosexual acts.⁵⁰ More generally, the Committee also opined that public morals should not be ‘exclusively a matter of domestic concern’.⁵¹

On its own, *General Comment 22* marks a significant change in the Committee’s jurisprudence. However, when the views of the Committee expressed in *General Comment 22* are combined with the implications of the *Toonen* complaint, it is clear that at this point in its history the Committee dismissed the notion of cultural relativism which had guided its views on the moral issues in *Hertzberg*.⁵² Beyond this implication, the communications of *General Comment 22* and the *Toonen* complaint also represent an introduction by the Committee of its own opinions into how the phrase ‘public morals’ should be applied.⁵³ Thus, it seems clear that the Committee considers the meaning of public morals to be an interpretive exercise within its purview as a treaty body.

C A Lack of Clarity: The State of Jurisprudence on the Concept of Public Morals

Given the changing jurisprudence outlined above, it might be assumed that the Committee has continued to shed light on how the phrase ‘public morals’ is meant to be understood since the turn of the century. Unfortunately, while the Committee has reiterated certain positions in more recent communications,⁵⁴ the comments above holistically represent the efforts by the Committee to define public morals. As a result, there remains a large gap in the Committee’s jurisprudence concerning what is meant by public morals as a term — an understandable omission given the complexity of the topic, but a glaring oversight given the importance of the concept for understanding the public morals exception.

⁴⁹ Ibid [6.5], [6.8].

⁵⁰ Ibid [8.6].

⁵¹ Ibid.

⁵² Holning Lau, ‘Sexual Orientation: Testing the Universality of International Human Rights Law’ (2004) 71 *The University of Chicago Law Review* 1689, 1700.

⁵³ General Comment 22 (n 16). See also *Toonen v Australia* (n 48).

⁵⁴ See *General Comment 34* (n 7) [32], [36].

IV THE ISSUES WITH AMBIGUITY IN THE PUBLIC MORALS EXCEPTION

As shown above, there has been a significant amount of discussion by the Committee concerning what a legitimate public morals exception should *not* be (unnecessary, unprescribed by law, discriminatory, etc.). However, there has been little clarity provided by the Committee in terms of what a public morals exception *should be*. This means, that the sources of these traditions, when they should be prioritised, and even what beliefs should be captured by the term ‘public morals,’ are ideas that remain unexplored. Overall, this lack of jurisprudence results in two main issues for the employment of the public morals exception: a vacuum around the meaning of morality and continued use of the exception where it is obviously unlawful.

A Issue 1: What is Morality?

In *Toonen*, the Committee dismissed the idea of cultural relativism because of the lack of scrutiny which would occur if States were free to determine moral issues on their own.⁵⁵ However, while the Committee’s views on this complaint clearly acknowledge the threat which excessive State discretion poses to human rights,⁵⁶ the body has, to this day, neglected to propose any universal standards by which the concept of public morality could be measured. Do public morals require a majority level of support? How does one define a single tradition for the purposes of the term? Must public morality reflect only the predominant beliefs within a single community, or should such values be accepted by the global community as a whole? These questions remain unanswered by the jurisprudence of the Committee.⁵⁷ As a result, State discretion remains the sole device by which a determination of morality can start for the purposes of the public morals exception.

As demonstrated in Part I, the Committee can issue detailed opinions when it comes to the human rights exceptions.⁵⁸ In fact, the precise guidance concerning the requirements of these justifying grounds indicates that the Committee will enact firm stances against

⁵⁵ *Ibid*; *Toonen v Australia* (n 48) [8.6].

⁵⁶ *Toonen v Australia* (n 48) [8.6]. See also Nugraha (n 26) 248.

⁵⁷ Nugraha (n 26) 249.

⁵⁸ See above Part I.

the undue expansion of State power if it deems so appropriate.⁵⁹ Where then, is the Committee's corresponding effort to elucidate the very meaning of the term upon which the legitimating ground of public morals based?⁶⁰ For all of its insistence against State discretion, the Committee's lack of practical guidance concerning the concept of public morality leaves only State discretion to guide the employment of the public morals exception.⁶¹ As a result, the Committee's jurisprudence does little work when it comes to preventing State abuse of this justifying ground.

B Issue 2: Unlawful Public Morals Exceptions

As shown above, the lack of jurisprudence surrounding the meaning of public morals results in a tremendous amount of legal uncertainty concerning the public morals exception.⁶² While it is possible that some States may avoid this justifying ground due to this lack of certainty, an assessment of forums such as the Universal Periodic Review ('UPR') demonstrates that member States are actively exploiting the ambiguity as a way to violate human rights with impunity even where their claims to exception are plainly unnecessary or unlawful.⁶³ In addition, forums like the UPR make it clear that while the Committee reserves the power to assess particular exceptions as they appear,⁶⁴ this power has been insufficient to confine State use of the public morals ground in the absence of clear constraints on their interpretation of morality.

By way of example, when Ethiopia was asked to indicate whether it had plans to repeal articles criminalising 'homosexual and other indecent acts' in order to comply with its obligations under the *ICCPR*, the member State claimed that the public morals exception was relevant in its decision to maintain these laws.⁶⁵ In response, the Committee made clear that the State had presented no connection between the protection of public morals and the present situation.⁶⁶ In addition, the Committee stated that '[t]he protection of morals used by the State party... was an unacceptable argument, not least because article 17 of the *ICCPR* did not provide for restriction of the right to respect for privacy on moral

⁵⁹ See above Part I. See also de Zayas and Martín (n 17) 430.

⁶⁰ See de Zayas and Martín (n 17) 442.

⁶¹ See de Zayas and Martín (n 17) 440-2.

⁶² See Nugraha (n 26) 250.

⁶³ See Vleugel (n 34) Ch 6.

⁶⁴ See *General Comment 34* (n 7) [36]. See also de Zayas and Martín (n 17) 440.

⁶⁵ Human Rights Committee, *Replies of Ethiopia to the list of issues*, CCPR/C/ETH/Q/1/ADD.1 (2011) [25].

⁶⁶ See Human Rights Committee, *Summary Record of the 2804th meeting*, CCPR/C/SR.2804 (2011) [17].

grounds'.⁶⁷ In response to the Committee's comments, Ethiopia merely cited that no complaints concerning these laws had been brought before the Committee.⁶⁸ Further, despite the Committee's concerns, same-sex sexual activity remains a criminal offence within the State,⁶⁹ and the Government has recently announced a severe crackdown 'against institutions where homosexual acts are carried out'.⁷⁰

Unfortunately, the example above as well as the periodic reports more generally demonstrate the prevalence of State use of the public morals exception despite its irrelevance to the particular rights involved, the clearly unlawful nature of the legislation in question, and the 'concerns' which may be raised by the Committee.⁷¹ Thus, while the current jurisprudence of the Committee attempts to confine the risks of abuse posed by the public morals exception,⁷² these efforts have thus far failed to ensure the recognition of 'inalienable rights ... [for] all members of the human family'.⁷³

IV CONCLUSION

By way of its construction, the public morals exception is a device which prioritises the collective ethics of a community over the rights of individuals, rights which are supposedly 'inalienable' under international law.⁷⁴ Unfortunately, the jurisprudence of the Committee on the topic remains a lacuna of uncertainty where the lack of guidance on the phrase 'public morals' is allowing for unlawful employments of the human rights exception. In some ways, this larger discussion concerning the role of morality in our modern world may feel disconnected from the issues faced by individuals in their everyday lives.⁷⁵ However, as the Special Rapporteur in the field of cultural rights recently stated, our polarised world 'need[s] a sophisticated multi-directional stance' on

⁶⁷ See *ibid* [27].

⁶⁸ See *ibid* [61].

⁶⁹ See Human Dignity Trust, 'Ethiopia,' *Human Dignity Trust* (Web Page) <<https://www.humandignitytrust.org/country-profile/ethiopia/>>.

⁷⁰ *Ibid*.

⁷¹ See Vleugel (n 34) 293–302.

⁷² See Nowak and Vospernik (n 3) 159.

⁷³ *ICCPR* (n 1) Preamble.

⁷⁴ *Ibid*.

⁷⁵ See Vleugel (n 34) 5.

morality now more than ever — one which can defend the universality of human rights while also respecting cultural diversity where its principles come under attack'.⁷⁶

If the jurisprudence of the Committee is to have any weight on the future balancing of public morals versus individual human rights, the body must employ a clear, universally applicable moral yardstick.⁷⁷ Otherwise, the opinions of the Committee on the public morals will remain 'a meaningless platitude reflecting the obvious point that there are a multitude of different sources from which any individual State might draw morality.'⁷⁸

⁷⁶ See *ibid* 5-6. See also Report of the Special Rapporteur in the field of cultural rights, *Universality, cultural diversity and cultural rights*, A/73/227, 25 (July 2018) [69].

⁷⁷ See Nugraha (n 26) 250. See also Neville Cox, 'Justifying Blasphemy Laws: Freedom of Expression, Public Morals, and International Human Rights Law' (2020) 35 *Journal of Law and Religion* 33, 47.

⁷⁸ *Ibid*.

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BEYOND BARS: TOWARD ABOLITIONIST JUSTICE IN AUSTRALIA

DEBBIE KILROY*

This narrative examines the prevailing carceral system in Australia, with a specific focus on Queensland, Victoria, and the Northern Territory. Drawing on firsthand experiences and empirical data, the author challenges the efficacy of punitive measures and the proliferation of prisons as responses to social issues. Through case studies such as the Dame Phyllis Frost Centre in Victoria and Don Dale in the Northern Territory, the narrative underscores the disproportionate impact of incarceration on marginalised communities, particularly First Nations peoples and women. By interrogating the intersections of race, gender, and class within the criminal justice system, the narrative advocates for a paradigm shift towards abolitionist approaches. It explores alternatives to imprisonment, such as Participatory Defence, emphasising community empowerment and restorative justice principles. Ultimately, this narrative calls upon legal professionals and policymakers to engage in transformative justice practices and envision a future devoid of incarceration and punitive systems.

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I INTRODUCTION

In this country, 40,000 people are sitting in cages and tens of thousands more are on community orders. At present, in this country, laws continue to be enacted that protect the few and damage the many. Many people reading this article right now are likely complicit in the violence exacted against the criminalised and have had a hand in their incarceration because the colonial carceral system exists to keep people like you safe from people like me.

My name is Debbie Kilroy, and I am one of the tens of thousands of people who have been warehoused in this country's criminal punishment system. I am a lawyer and a social worker, but it is my experience garnered from the inside of a cage that underpins all of my expertise. It is those experiences that inform my life's work of abolishing prisons, policing, surveillance, and every arm of the criminal injustice system — including the criminal legal system.

II QUEENSLAND SENTENCING ADVISORY COUNCIL AND THE ROYAL COMMISSIONS

Where I live in Queensland, we are experiencing an incarceration boom. Our prisons are full. The number of women sentenced to imprisonment quadrupled between the periods of 2005-06 and 2018-19, making Queensland the state with the most imprisoned women

in the country.¹ The number of girls sentenced to detention tripled between the periods of 2005-06 and 2015-16.² The Queensland Government argues that building new prisons is the answer to this mass imprisonment crisis. This is evidenced by the state's police minister, Mark Ryan, who commented to *The Guardian* in 2023, 'the construction of a new correctional centre near Gatton in the Lockyer Valley as a development... will reduce strain on the system'.¹ This country has a love affair with punishment, exile, and imprisonment. Despite many protestations otherwise, we *are* an incarceration nation.

A sentencing profile report by the Queensland Sentencing Advisory Council ('QSAC') considered the trends and patterns in the sentencing of women and girls in Queensland.² The stated purpose of this report was to provide an analysis of quantitative data gathered from Queensland courts spanning the years 2005–06 to 2018–19 to better understand the criminalisation of women and girls in Queensland.³ The numbers in the QSAC report are damning: in 2005-06, 1.7 per cent of all sentenced women received a prison sentence, which increased to 6.2 per cent in 2018-19.⁴ Women and girls are far more likely to be sentenced in remote parts of the state, with 35.6 per 1,000 women and girls sentenced, compared to 9.9 per 1,000 in major cities.⁵ The number of girls sentenced to prison has tripled.⁶ Around one-third of women sentenced in Queensland identify as Aboriginal and Torres Strait Islander and more than 74 per cent of the girls under 12 years of age sentenced in Queensland are Aboriginal and Torres Strait Islander.⁷

These statistics should make your blood boil. They should make you feel sick. As legal professionals, they should make you really uncomfortable. Certainly, as citizens, they should make you stand up and take responsibility for what is happening to women and

¹ Laura Hilderley et al, *Engendering Justice: The Sentencing of Women and Girls in Queensland* (Sentencing Profile Report No 4, August 2022) 1

<https://www.sentencingcouncil.qld.gov.au/_data/assets/pdf_file/0008/735425/Sentencing-profile-on-womens-and-girls.pdf>.

² Ibid.

¹ Eden Gillespie, "'Extreme Self-Harm': Queensland Labor Faces Internal Criticism over Prison System", *The Guardian* (online, 4 June 2023) <<https://www.theguardian.com/australia-news/2023/jun/04/extreme-self-harm-queensland-labor-faces-internal-criticism-over-prison-system>>.

² Hilderley et al (n 1).

³ Ibid iii.

⁴ Julius Dennis, 'Number of women being sentenced to prison in Queensland quadruples in 15 years', *ABC News* (online, 17 August 2022) <<https://www.abc.net.au/news/2022-08-17/qld-prison-female-incarceration-rate-quadruples-raise-the-age/101336904>>. See also Hilderley et al (n 1).

⁵ Ibid.

⁶ Hilderley et al (n 1) iii.

⁷ Ibid.

girls in this state and across this country. However, the QSAC report is just one report in a long line of reports. Reports that likely rest upon your bookcases in your law offices. I don't say this to diminish the stories or data held within the glossy binds of the report, or to diminish the work done by many good people. I say this to remind people that we have decades and decades of confronting reports with hundreds — potentially thousands — of non-implemented, and deliberately ignored recommendations. The Women's Safety and Justice Task Force,⁸ the Queensland Productivity Commission Report,⁹ Walter Sofronoff's report on Parole,¹⁰ and crucially the Royal Commission into Aboriginal Deaths in Custody¹¹ in 1991, come to mind. This country not only has a love affair with punishment but also with the industry that the prison system upholds and generates. No matter how well intentioned these reports, inquiries and royal commissions are, sadly, the only people who benefit from them are those who are paid to conduct them. This is because the criminal punishment system is a beast, and all beasts must be fed in order to survive. The criminal punishment system in this country *is* an industry — an industry with inordinate power, sway, and money (including a budget that continues to rise and expand).

In fact, the power and reach of the prison industrial complex are ever-expanding. The industry sells the expansion of surveillance and prisons in our community as 'progress' and good for the local area.

III DAME PHYLLIS FROST CENTRE VICTORIA: HOMES NOT PRISONS

On 19 March 2021, the Victorian Government unveiled plans for the expansion of the Dame Phyllis Frost Centre, a high-security women's prison located in Ravenhall,

⁸ Women's Safety and Justice Task Force, *Hear Her Voice: Women and Girl's Experiences of the Criminal Justice System* (Report No 2, July 2022) vol 1, vol 2 <<https://www.womenstaskforce.qld.gov.au/>>.

⁹ Queensland Productivity Commission, *Inquiry into Imprisonment and Recidivism* (Final Report, 31 January 2020) <[¹⁰ Walter Sofronoff QC, *Queensland Parole System Review* \(Final Report, November 2016\) <<https://parolereview.premiers.qld.gov.au/>>.](https://apo.org.au/node/273991#:~:text=Key%20points%3A,reduce%20community%20safety%20over%20time.>>.</p></div><div data-bbox=)

¹¹ Elliott Johnston, *Royal Commission into Aboriginal Deaths in Custody* (Report, 9 May 1991) <<https://www.naa.gov.au/explore-collection/first-australians/royal-commission-aboriginal-deaths-custody>>; Thalia Anthony et al, '30 years on: Royal Commission into Aboriginal Deaths in Custody recommendations remain unimplemented' (Working Paper No 140/2021, Centre for Aboriginal Economic Policy Research, 2021) <<https://caep.r.cass.anu.edu.au/research/publications/30-years-royal-commission-aboriginal-deaths-custody-recommendations-remain>>.

Melbourne. This initiative comes with a hefty price tag of \$188.9 million.¹² The proposed expansion entails the construction of 106 additional cells, alongside the establishment of two new 20-bed 'Management Units' designed for solitary confinement.¹³ Solitary confinement! Really? Are we still doing that?

Before the commencement of the expansion, Dame Phyllis Frost had the capacity to imprison 604 women. In June 2020, at the height of the COVID pandemic, the number of imprisoned women there was 330, which has now increased to over 400.¹⁴ According to the 2019/20 Victorian Budget, the expansion of Victoria's women's prison is part of a \$1.8 billion expansion of prisons for women, men, transgender, and gender-diverse people across Victoria.¹⁵ Despite reductions in prisoner numbers in Victoria during the COVID pandemic, the Victorian Government remains committed to building thousands of new prison cells.¹⁶

The abolitionist campaign, Build Homes Not Prisons¹⁷ is essentially a prison moratorium campaign. It calls on the Victorian Government to stop the expansion of Dame Phyllis Frost and reallocate the budget for prison building to public housing. This would provide 'housing first' and support for criminalised women and their children. The campaign argues that a brief incarceration period for mothers can result in their children being placed in out-of-home care, subsequently leading them into the cycle of juvenile detention and prison.¹⁸ What I know as someone who has been inside, and as someone who works with and alongside women and girls in prisons, that over half of those released from prison will be re-criminalised and put back into prison within two years. These consequences can extend across generations. What we also know is that by

¹² Victoria State Government, 'Construction Set To Start On Women's Prison Upgrade' (Media Release, 19 March 2021).

¹³ 'Don't expand Dame Phyllis Frost prison for women', *Build Homes Not Prisons* (Web Page) <<https://homesnotprisons.com.au>> ('Build Homes Not Prisons'); Rachael Knowles, 'Victoria to Expand Prison System One Week After Death in Custody', *National Indigenous Times* (Online, 22 March 2021) <<https://nit.com.au/22-03-2021/1856/victoria-to-expand-prison-system-one-week-after-death-in-custody>>; State Government of Victoria, 'Dame Phyllis Frost Centre', (Web Page, 2023) <<https://csba.vic.gov.au/our-projects/dame-phyllis-frost-centre>>.

¹⁴ *Ibid.*

¹⁵ Noel Towell, 'Victoria to spend an extra \$1.8 billion on jails', *The Age* (online, 24 May 2019) <<https://www.theage.com.au/national/victoria/victoria-to-spend-an-extra-1-8-billion-on-jails-20190524-p51qra.html>>.

¹⁶ Build Homes Not Prisons (n 15).

¹⁷ *Ibid.*

¹⁸ *Ibid.*

allocating more resources to prisons, at the expense of housing and social services, we will experience higher rates of criminalisation.¹⁹ Conversely, higher investments in housing could lead to a reduction in criminal activity and therefore lower incarceration rates.²⁰

Compared to any other Australian State or Territory, Victoria spends the least on public housing per capita.²¹ According to the Big Housing Build project announced in the State's 2020/21 budget,²² Victoria is focused more on privately operated 'community' and 'affordable' housing, rather than on public housing that is accessible to criminalised and highly disadvantaged women and families.²³ In stark contrast to this underinvestment in public housing, the government has allocated a significant \$188.9 million to expand the Dame Phyllis Frost prison. The additional 106 cells will cost \$12.5 million per annum to operate, which could alternatively fund basic operating costs for 1,614 public homes.²⁴

What we know about the propaganda of the prison industrial complex is that more often than not, prisons are sold as being financially beneficial to communities. Certainly, the Andrews government had been spruiking job creation as one of the primary benefits of expanding the Dame Phyllis Frost prison. Build Homes not Prisons argues that construction of public and Aboriginal community-controlled housing would create more and better jobs, both in construction and in support for the women and children who will live there.²⁵ They argued that all workers — whether we are builders, social workers, nurses, architects, educators, carers, labourers, doctors, therapists, gardeners, lawyers, counsellors, artists or planners — want jobs that build and strengthen our communities, not jobs that cause harm. Therefore, they campaign on the platform that we should spend on a 'Big Public Housing Build', not a 'Big Prison Build'.

¹⁹ See, e.g., Australian Human Rights Commission, *Social Justice Report 2009* (Report, 2009) <<https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/social-justice-report-1>>; Queensland Productivity Commission, *Inquiry into Imprisonment and Recidivism* (Final Report, August 2019) <<https://s3.treasury.qld.gov.au/files/Imprisonment-Volume-1-final-report.pdf>>; Thalia Anthony et al (n 14).

²⁰ *Ibid.*

²¹ Reference.

²² Victorian Department of Families, Fairness and Housing, 'Social Housing Growth Fund', *Homes Victoria* (Web Page) <<https://www.homes.vic.gov.au/social-housing-growth-fund>>.

²³ Build Homes Not Prisons (n 15).

²⁴ *Ibid.*

²⁵ *Ibid.*

IV PRISON ABOLITION

In October 2022, Anastacia Palaszczuk, the Premier in my home state of (so-called) Queensland²⁶ stated that Queensland's Labor government is considering expanding youth justice detention and building a youth prison in Cairns.²⁷ Notably, the previous year also saw the Palaszczuk government use the override declaration of the *Human Rights Act 2019* (Qld) s 43 to amend other statutes²⁸ creating an offence for breach of bail conditions in relation to a child, carrying a maximum sentence of 2 years imprisonment.

In response, we formed a campaign called the 'End Toxic Prisons — Block the Pipeline' which calls for the end of the incarceration of First Nations girls, boys and other criminalised young people.²⁹ We are seeking an investment in community-controlled solutions to end the criminalisation of marginalised people. We demand that the government prioritise the development of local community care to address the underlying social issues that youth in Far North Queensland are subjected to.

'End Toxic Prisons - Block the Pipeline' believes that the youth most targeted and disproportionately affected by the development of this latest state-sponsored carceral project, will be First Nations girls and boys.³⁰ These new developments will enable the carceral machine to more effectively entrap young First Nations people in the criminal legal system. Our campaign seeks to end the gendered and racialized violence endured by First Nations people and to abolish the age of criminal responsibility in order to prevent First Nations people being killed in custody.

²⁶ The use of the term '(so called) Queensland' reflects my respect for the Traditional Owners of all of the lands that make up the place the colonialists now call Queensland. I recognise that Queensland was once many Aboriginal nations and that the state it is now is a wholly colonial construct.

²⁷ Christopher Testa, 'Premier Floats New Youth Detention Centre for Cairns, where Police are Warning Against Vigilantism', *ABC News* (Online, 5 October 2022) <<https://www.abc.net.au/news/2022-10-05/premier-floats-cairns-youth-detention-police-warn-vigilantes/101505070>>.

²⁸ See *Strengthening Community Safety Act 2023* (Qld) which amended the *Youth Justice Act 1992* (Qld), *Bail Act 1980* (Qld), *Police Powers and Responsibilities Act 2000* (Qld) and the *Criminal Code Act 1899* (Qld).

²⁹ Sisters Inside, 'End Toxic Prisons – Block the Pipeline' (Web Page) <<https://sistersinside.com.au/end-toxic-prisons/>>.

³⁰ See generally Australian Law Reform Commission, *Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No 133, 9 January 2018) <<https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/2-context/social-determinants-of-incarceration/>>.

You will note I said, ‘abolish the age of criminal responsibility’ not ‘raise the age of criminal responsibility’. I am not a supporter of the Raise the Age campaign.³¹ This is not because I want to see 13-year-olds in prison — on the contrary. I do not want to see any child in a cage — no matter their age. I am an abolitionist. I will not kneecap my demands of ending the reign of punishment and exile in this country, and I will not leave any child behind when we liberate kids from cages in this country.

V DON DALE

Don Dale, a prison recommended for closure by the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory,³² continues to cage and contain children — despite local and international calls for its immediate closure. The conditions inside Don Dale are horrific. The situation is critical and Don Dale is dangerous. Kids huddle in corners of their cells to avoid being rained on and are forced to stay in their cells for nine hours a day due to short-staffing.³³ The number of children in Don Dale continues to skyrocket because of bail reforms, yet we hear barely a whisper, let alone a roar, across mainstream Australia — and why? Because a majority — actually, nearly all — of the children in Don Dale are Black.³⁴ The only voices we hear are the dedicated activists of the Close Don Dale Now group (‘CDDN’).³⁵ The CDDN comprises previous Don Dale detainees and their families, Elders and Community members, professionals, experts, students, and volunteers. They are calling on the Northern Territory Government to immediately close Don Dale and they regard their work as especially urgent. I know the work they do and have stood shoulder to shoulder with them. Getting the children out of Don Dale is an urgent aspect of a much larger need

³¹ See ‘Raise the Age’ (Web Page) <<https://raisetheage.org.au/campaign>>.

³² Royal Commissions, *The Protection and Detention of Children in the Northern Territory* (Final Report, 17 November 2017) vol 2A, 32. <<https://www.royalcommission.gov.au/child-detention/final-report>> (‘Royal Commissions’)

³³ Darwin Action Group, ‘Close Don Dale Now’ *Amnesty International* (Web Page) <<https://www.amnesty.org.au/events/close-don-dale-now-2-2-2>>. See also John Lawrence SC, ‘Indigenous Child Abuse Continues in Australia’ (online, 29 June 2022) <<https://arena.org.au/indigenous-child-abuse-continues-in-australia/>>; John Lawrence SC, ‘What the Meaning of Don Dale is’, *Arena* (Web Page, 9 March 2023) <<https://arena.org.au/what-the-meaning-of-don-dale-is/>>

³⁴ Department of Territory Families, Housing and Communities, ‘Youth Detention Census’ (Web Page) <<https://tfhc.nt.gov.au/youth-justice/youth-detention-centres/youth-detention-census>>.

³⁵ For information on this campaign, see ‘Close Don Dale Now’, *Close Don Dale Now* (Web Page) <<https://closedondale.com>>.

to address systemic issues facing First Nations peoples in the Northern Territory, and it can no longer be delayed.

Don Dale is not a purpose-built juvenile facility. The Royal Commission report itself states that 'a fundamental principle underpinning youth justice and detention is that children and young people should not be managed in the same way as adults'.³⁶ Yet they are using the former Berrimah adult prison which was built in the 1970's, never intended for kids. The prison was condemned in 2014 and deemed 'only fit for a bulldozer' by the CEO of Correctional Services.³⁷ Yet, it continues to cage children. I want Don Dale closed and I do not want to see another juvenile prison built in its place. Rather I want to see an investment in children and families in the Northern Territory.

I am an abolitionist and I believe that transformative justice, rather than punishment, is a proper response to so-called criminal acts. The present criminal (in)justice systems focus on someone to punish, caring little about the person's need or the victim's loss. The abolitionist response, in contrast, seeks to restore both the person who has caused harm and the victim to full humanity, ensuring lives of integrity and dignity within the community. Abolitionists advocate for minimal coercion and intervention in an individual's life and the maximum amount of care and services to all people in society.

We are seeing an upsurge in interest in building an abolitionist future. The Sisters Inside 10th International Conference, held in 2023, brought together leading abolition activists from around the world with First Nations and Indigenous thinkers and leaders in this country.³⁸ The opportunity to gather and share, to reflect and to learn from each other is critical. While abolition as a practice in the United States may seem way ahead of us here in so-called Australia, Indigenous communities here have been practising abolition long before there was a word to define it. I see it practised every day in the First Nations' celebration of Blak love, Blak joy and Blak care:³⁹ the love, care and sense of community

³⁶ Royal Commissions (n 33) 43.

³⁷ Helen Davidson, 'Young Indigenous imprisonment in NT: "You Wouldn't Believe it in a Modern-Day Society"' *The Guardian* (online, 22 October 2015) <<https://www.theguardian.com/australia-news/2015/oct/22/young-indigenous-imprisonment-in-nt-you-wouldnt-believe-it-in-a-modern-day-society>>.

³⁸ See Sisters Inside, 'Guest Speakers' (Web Page) <<https://sistersinside.com.au/guest-speakers/>>.

³⁹ The use of the word Blak is done with respect to Destiny Deacon and her deployment of the word in 1994. See also Kate Munro, 'Why "Blak" not Black?: Artist Destiny Deacon and the origins of this word',

that abounds in the Aboriginal and Torres Strait Islander community. As white settlers, we could learn a lot. After all, the colonial carceral system is only 233 years old in this country. It is relatively young compared with the traditional lore systems that rest in the lands we occupy.

In short, imprisonment is morally reprehensible and indefensible and must be abolished. Along with imprisonment, policing, systems of exile and surveillance, and our jobs as lawyers, cops and welfare must go. In an enlightened, free society, prison cannot endure, or these will continue to prevail. The task of abolition is a long-range goal, an ideal. After all, the eradication of any oppressive system is not an easy task. However, it is realisable, like the abolition of slavery or any liberation, so long as there is the will to engage in the struggle.

I'm a lawyer, so I figure start with my own backyard. So where do you, as a legal professional, fit into the abolition space?

VI PARTICIPATORY DEFENSE

Participatory Defense⁴⁰ is a powerful and innovative strategy for overhauling public defence and could address the mass incarceration crisis we are facing in this country. The model brings together all of the stakeholders in a matter, including individuals facing criminal charges, their families, and their communities. Together, they strive to resolve the legal matters within a process centred on care, accountability, and reciprocity. By empowering participants to transition from passive recipients of legal services to proactive change agents, Participatory Defense enables heightened transparency, accountability, and fairness within a justice system. It operates as a community organising model, allowing those facing charges, along with their families and communities to impact case outcomes and reshape the power dynamics within the court

NITV (online, 29 June 2020) <<https://www.sbs.com.au/nitv/article/why-blak-not-black-artist-destiny-deacon-and-the-origins-of-this-word/7gv3mykzv>>.

⁴⁰ For information on this initiative, see Raj Jayadev, 'The Origin Story of Participatory Defense', *Participatory Defense* (Web Page) <<https://www.participatorydefense.org/about>>; Janet Moore, Marla Sandys and Raj Jayadev, 'Make Them Hear You: Participatory Defense and the Struggle for Criminal Justice Reform' (2015) 78(3) *Albany Law Review* 1281.

system. This transformative initiative is spearheaded by the very families directly affected by their loved ones involvement in the legal process.

Originating from Silicon Valley's De-Bug Cobarrubias Justice Project,⁴¹ Participatory Defense has evolved into a nationwide initiative. Initially focused on advocating for police accountability, it now seeks justice beyond the initial interaction with law enforcement. The architects of this model recognised its potential to bridge the gap between street-level activism and courtroom support to address the challenge of mass incarceration. Their journey from street advocacy to courtroom engagement inspired the creation of Participatory Defense. This thoroughly developed model has been refined over the past decade and currently being applied in diverse cities across the nation.

The Participatory Defense model is guided by three principles:

FAMILY and COMMUNITY STRENGTH can play a pivotal role in stopping and reducing incarceration for a loved one and a community.

Families and communities can be even more powerful when taking the role of ORGANIZER AND AGENT OF CHANGE, rather than service recipient.

By working on individual cases, communities can BUILD THE MOVEMENT of directly impacted peoples to hold the actors of the court accountable, make systemic change, and ultimately end mass incarceration.⁴²

From my perspective, the strength of Participatory Defense as a model is its community-based approach to justice that empowers individuals to actively engage in the legal process. The model seeks to democratise the justice system by involving those directly affected by criminal cases in the defence strategy. It shifts the traditional dynamics, where legal professionals take the lead, to allow those directly affected to have a voice and agency in their legal outcomes. This provides us with an opportunity to provide education and training to community members, equipping them with the knowledge and skills needed to navigate the legal system. This includes understanding legal procedures, terminology, and the intricacies of the criminal justice process. In turn, we can start to

⁴¹ For information see 'De-Bug the System', *Silicon Valley De-Bug* (Web Page) <siliconvalleydebug.org>; See also Sajid Khan, 'Protect Your People: A Public Defender's Reflection on Participatory Defense', *Albert Cobarrubias Justice Project* (Blog Post, 23 May 2017) <<https://acjusticeproject.org/>>.

⁴² Participatory Defense, 'Principles and Practices', *Participatory Defense Network* (Web Page) <<https://www.participatorydefense.org/about>>.

address systemic issues within the justice system, such as mass incarceration and disparities in legal outcomes. By actively engaging communities, the model challenges aspects of the system that contribute to injustices.

As an activist, one of the values of this model is that it takes us one step closer to abolition. A Participatory Defense model establishes a connection between grassroots movements advocating for social justice and activism within courtrooms. By linking these movements, Participatory Defense creates a holistic approach that addresses both the broader societal issues and individual legal cases. The model promotes transparency and accountability within the justice system. By involving community members, it encourages a more open and accountable legal process, helping to develop trust between communities and the legal system. Beyond individual cases, Participatory Defense can serve as a catalyst for advocacy and policy change. By actively engaging communities in the legal process, the model contributes to broader conversations about abolition.

This potential is very much within reach for Australia. The model has the capacity to free all of us. Our collective well-being suffers when individuals disappear from our communities and our homes and are put in cages. This model has the potential to revive communities drained by the presence of prisons, allowing life to flourish once more. It grants communities the ability to wield their power, offering a unique opportunity to scrutinise legal proceedings and court actions collectively. In that way, it harnesses our combined strength for positive change, fostering healthier and safer communities and enabling shared prosperity.

The proposal behind Participatory Defense is not entirely revolutionary. Currently, individuals across the country stand resolute in courtrooms, in solidarity with their children facing hearings, while employers or church leaders write letters to judges during sentencing hearings. These actions exemplify the widespread potential of Participatory Defense. If such efforts were viewed as integral components of a larger, named practice rather than isolated responses, a more profound and sustained transformation of the criminal punishment system could follow, fuelled by the impacted communities. This is our ongoing commitment until we liberate ourselves. It is our persistent endeavour as we work towards dismantling the carceral system, with the ultimate objective being the complete dismantling of the criminal punishment system as we currently know it.

Total annihilation as a goal shouldn't scare you. I see abolition not just as a goal that focuses on tearing down prisons, but also as a building project. Not a building project where we replace one flawed system with another oppressive system, but rather a project of building up community together. It is a process of collectively coming together to dream up possibilities for communities to flourish, and to generate processes of reciprocity and accountability, where we transform environments and systems into care collectives. Abolition is two-pronged work: a process of defunding, demolishing, and abolishing, but also about building, creating, and dreaming — people often forget this — and this is why they tell people like me that abolition of prisons and punishment is impossible.

I don't think it's impossible — in fact I think that the process has already begun, and I am here for all of the disruption and dreaming that is to come.

Because I will do this work until we are all free.

If you would like to join me on the emancipatory pathway to an abolitionist future, feel free to join our Abolition in Practice Network. We would love to welcome you.

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STRATEGIC LITIGATION AND RACISM IN HEALTHCARE

GEORGE NEWHOUSE* ARIANE DOZER⁺ ISABEL JANSSEN⁺⁺ AND NATHALIE MACGREGOR⁺⁺⁺

** Please note this article includes the name of a First Nations woman who has died and may include names of other First Nations peoples who have died.**

In Australia, until recently, the use of strategic litigation to achieve broad societal change has not been widely employed, due to historical, constitutional, social, and cultural factors; however, the landscape is changing. This article traces a ground-breaking Australian case, the Inquest into the death of Wiradjuri woman, Naomi Williams, which was run as part of a broader campaign to seek justice for First Nations people affected by racial bias in the healthcare system. The tragic circumstances of the case reignited a national conversation on health inequality through the judicial finding of ‘implicit racial bias’ and served as a platform for Aboriginal communities, organisations, and academics to demand new ways forward, notably by mandating culturally safe care — demands which are being slowly implemented. The authors demonstrate, through a detailed breakdown, how strategic litigation theory functions in practice, showing that litigation is most effective when conducted in conjunction with public advocacy within a multi-faceted campaign for change.

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I INTRODUCTION

Naomi Williams was a proud Wiradjuri woman who was well-loved and respected in her local community. Naomi died within hours of leaving the emergency ward of Tumut Hospital, a small country hospital in the Snowy Mountains of New South Wales ('NSW') located within the Murrumbidgee Local Health District ('MLHD'). At the time of her death, Naomi was 27 years old and six months pregnant. In the 8 months before her death, Naomi had presented to the hospital 18 times without receiving a referral to a specialist.¹

¹ See *Inquest into the Death of Naomi Williams* (State Coroners Court of New South Wales, Deputy State Coroner Magistrate Harriet Grahame, 29 July 2019) 25 [114] ('*Inquest into the Death of Naomi Williams*').

Just after midnight on New Year's Eve 2016, Naomi drove herself to the hospital in extreme pain. She was sent home with two Panadol after being monitored for only 34 minutes. She subsequently deteriorated and died from septicaemia. Naomi was repeatedly failed by her local healthcare system and the wider NSW Health system. She was denied access to adequate healthcare and her serious symptoms and concerns were not taken seriously.

Naomi's story is a familiar one for First Nations people in Australia, who have been living with institutional racism for over 230 years. However, non-Indigenous Australians are often unaware of the institutional and interpersonal racism that First Nations people experience in the healthcare system.² The death of Naomi and her unborn child was a wake-up call and prompted broader public outrage.

For three years, Naomi's mother and her family worked with a team from the National Justice Project ('NJP') and the Jumbunna Institute for Indigenous Education and Research ('Jumbunna Institute') to expose the causes of Naomi's death and shed light on the role racial prejudice played in it. Through thorough forensic work, community outreach and the assistance of strategic partners, a number of notable outcomes have been achieved and are ongoing.

After reviewing the compelling evidence, Deputy State Coroner Grahame made the historic finding that 'implicit racial bias' in the healthcare system contributed to Naomi's death. In response to Naomi's family's strong submissions, the Deputy State Coroner in her findings stressed the importance of providing culturally safe care to First Nations patients. The Coroner also made recommendations that have been accepted by the NSW Department of Health and, if implemented in full, will radically change the way health services are administered to First Nations people.

The outcomes of the Naomi Williams Inquest ('Inquest') have laid the foundations for an overarching strategic litigation and advocacy campaign, which is part of a broader partnership with First Nations health bodies and academics who work together to promote health justice. The purpose of this ongoing campaign is to highlight the extent of

² Alison Markwick et al, 'Experiences of Racism Among Aboriginal and Torres Strait Islander Adults Living in the Australian State of Victoria: A Cross-Sectional Population-Bases Study' (2019) 19(1) *BMC Public Health* 1, 2.

institutional racism in the Australian health system and to give a voice to those harmed by it. Though NJP's Health Justice Campaign aims to address all forms of discrimination in the healthcare system, this article will focus on discrimination and racism experienced by First Nations people. Because racism is insidious and difficult to prove, it was essential to take a strategic approach to expose it and to seek reform. This article explores how a multi-faceted strategy of litigation and advocacy enabled the Naomi Williams Inquest to be a catalyst for change in Australian healthcare.

II BACKGROUND TO THE NAOMI WILLIAMS INQUEST

NJP's legal strategy to improve health outcomes for marginalised peoples was grounded in the many cases that its lawyers had undertaken over the years before Naomi's case on behalf of refugees, asylum seekers, and First Nations people who had experienced discrimination in the Australian healthcare system. These cases included a range of instances of medical negligence, demonstrating a pattern of consistent institutional and interpersonal racial bias in Australian healthcare.³ The sheer volume of cases involving harm to First Nations patients and the lack of public awareness about racism in healthcare compelled the NJP and the Jumbunna Institute to consider how a combination of civil litigation, advocacy, and accountability could drive systemic change. In Australia, where there is a lack of legislated and enshrined human rights and civil protections, and limited options for litigation funding, developing a non-governmental strategic focus and framework is a novel mechanism to circumvent such limitations.

NJP's Health Justice Campaign aims to address discrimination in the health system experienced primarily by three groups of people: refugees and asylum seekers; First

³ In one such case, a woman with an ectopic pregnancy was misdiagnosed by a Western Australian hospital with gastric reflux and nearly died as a result. At the same hospital, an Aboriginal man had his facial palsy misdiagnosed by staff who assumed he was intoxicated; he had in fact experienced a stroke. NJP also represented an Aboriginal singer who bled internally for 8 hours in the emergency ward of Darwin Hospital without treatment because hospital staff assumed his illness was related to alcohol abuse. See, e.g., *Inquest into the Death of Fenika Junior Tautuliu Fenika (Junior Fenika)* (Coroner's Court of New South Wales, Deputy State Coroner Teresa O'Sullivan, 13 July 2018); *Inquest into the Death of Fazel Chegeni Nejad* (Coroner's Court of Western Australia, Coroner Sarah Helen Linton, 2 May 2019); *Inquest into the Death of David Dungay* (Coroner's Court of New South Wales, Deputy State Coroner, Magistrate Derek Lee, 22 November 2019). See also Melissa Davey, "How Could This Happen?": Indigenous Health Tragedies Spark Search for Answers', *The Guardian* (online, 12 August 2016) <<https://www.theguardian.com/australia-news/2016/aug/12/how-could-this-happen-indigenous-health-tragedies-spark-search-for-answers>>.

Nations people; and people with disabilities. The first area of focus for the Health Justice Campaign was the use of tort law as a tool to assist asylum seekers and refugees in Nauru struggling with mental health crises. Learnings from representing refugee and asylum seeker clients in a cross-cultural context led to NJP increasingly interacting with First Nations clients who had experienced discrimination in the health system. This led the NJP and Jumbunna Institute team to develop a second strand of the Health Justice Campaign to expose discrimination against First Nations people in health care and press for reform. Integral to this campaign was selecting and conducting effective test-case litigation and coronial inquests and conducting research on the criteria for the same. Additionally, the Jumbunna Institute is a research institute and, as such, serves as a valuable partner by offering an academic and research-based perspective on each issue and case.

Prior to the Naomi Williams Inquest, and a key milestone in the development of the Health Justice Campaign, was the *Inquest into the Death of Ms. Dhu*.⁴ Ms. Dhu, a 22-year-old Yamatji Nanda-Bunjima woman, was being held in police custody for unpaid fines totalling only \$3,622.34. This inquest was the first to acknowledge and examine the role of racial prejudice in relation to a death. Before being arrested, Ms. Dhu had sustained a rib injury, as a result of domestic violence, which she complained of when she was arrested and throughout her time in detention.⁵ Two days after being arrested, Ms. Dhu died of cardiac arrest at Headland Health Campus ('HHC'). This was the third time she had been taken by officers to the hospital in two days. The Western Australia ('WA') State Coroner found that the two doctors that treated Ms. Dhu attributed her symptoms to 'behavioural issues', influenced by her occasional drug use.⁶ Their diagnosis may have been influenced by comments made by Police Officers to hospital staff and/or the fact that Ms. Dhu had been accompanied to the hospital by WA Police. Their 'premature diagnostic closure' regarding the alternatives had disastrous results: their actions cleared

⁴ *Inquest into the death of Ms Dhu* (Coroner's Court of Western Australia, State Coroner Fogliani, 16 December 2016). For further discussion on the role race played in the Ms Dhu inquest see, e.g., Ethan Blue, 'Seeing Ms Dhu: Inquest, Conquest, and (in)visibility in Black Women's Deaths in Custody' (2017) 7(3) *Settler Colonial Studies* 229, Amanda Porter, 'Reflections on the Coronial Inquest of Ms Dhu' (2016) 25(3) *Human Rights Defender* 8.

⁵ *Inquest into the death of Ms Dhu* (n 4) 45 [251], [256].

⁶ *Ibid* 81, 114 [445], [624].

the visibly ill Ms Dhu for ongoing incarceration and delayed the detection of Ms. Dhu's sepsis (developed from her rib injury) until it was too late.⁷

The Coroner found that both doctors did not believe Ms. Dhu was unwell, interpreting her complaints as 'exaggerated or not entirely genuine'.⁸ Despite the evidence, the Coroner stopped short of finding racial bias, instead stating that 'all of the persons involved were affected, to differing degrees, by underlying preconceptions about Ms. Dhu that were ultimately reflected... in how they treated her'.⁹ The Coroner found that HHC staff and the police were not motivated by conscious racism, but noted 'it would be naïve to deny the existence of societal patterns that lead to assumptions being formed in relation to Aboriginal persons'.¹⁰ Unexamined stereotypes are themselves an example of racial bias and Australian courts have displayed a long-standing reluctance to make any findings of racism.¹¹

The Ms. Dhu inquest was one of a series of cases that contributed to the stark narrative of deeply embedded systemic discrimination and inequity in the health system and the emerging legal and advocacy campaign for health justice needed to address it. The findings highlighted to NJP lawyers that healthcare services were rarely held accountable for the role institutional racism and bias plays in the preventable deaths of First Nations people.¹²

⁷ Ibid [269]–[453].

⁸ Ibid [444].

⁹ Ibid [264].

¹⁰ Ibid [858]–[860].

¹¹ David Thorpe, 'Structures of Judicial Racism in Australia' (1987) 26(4) *The Howard Journal of Crime and Justice* 259; Chris Cunneen, 'Judicial Racism' (1992) 1(58) *Aboriginal Law Bulletin* 9; George Newhouse, Daniel Ghezelbash and Alison Whittaker 'The experience of Aboriginal and Torres Strait Islander participants in Australia's coronial inquest system: Reflections from the front line' (2020) 9(4) *International Journal for Crime, Justice and Social Democracy* 76.

¹² The *Ms Dhu Inquest* did lead to other significant outcomes. Since the inquest, the number of people imprisoned for defaulting on fines in WA has decreased, see, Rhiannon Shine, 'Indigenous woman jailed over unpaid fines after violent robbery as WA considers changing law', *ABC News* (online, 25 September 2019) <<https://www.abc.net.au/news/2019-09-25/woman-jailed-unpaid-fines-after-violent-robbery-wa-law-changes/11543234>>. The Fines, Penalties and Infringement Notices Enforcement Amendment Bill 2019 (WA) passed through the WA Legislative Assembly in 2019 and was passed by the Legislative Council in June 2020. In his statement before the assembly, WA Attorney General John Quigley referenced Ms Dhu's death and the Coroner's inquest recommendations as the catalyst for the introduction of this bill, see, Western Australia, *Parliamentary Debates*, Legislative Assembly, 26 September 2019, 7490a–92a (John Quigley, Attorney-General).

The team put out feelers to First Nations health academics, the Jumbunna Institute, journalists, and First Nations community organisations for suitable test cases. The original coronial ‘desktop’ investigation in Naomi’s death found nothing of note and left her family frustrated and without answers. In 2016, Aunty Sharon Williams, Naomi Williams’ mother, sought legal advice from NJP to find out what else could be done. After the team had obtained the coronial brief and Naomi’s medical records, they were able to uncover crucial evidence of racial prejudice, and realised the case had the potential to change attitudes, policies, and practices in the healthcare sector. Once they had reviewed the medical evidence, the NJP and Jumbunna Institute team recognised that the circumstances of Naomi’s ultimate death could expose the seriousness of institutional racial prejudice in the Australian health system and thus strengthen public demand for real accountability from the healthcare sector.

III NJP’S APPROACH TO STRATEGIC LITIGATION

Strategic litigation — using the legal system to drive societal change — is gaining popularity in Australia. NJP and the Jumbunna Institute are amongst a group of social and climate justice organisations that employ a strategic approach to litigation and public advocacy/campaigning. A wide range of definitions and uses of the term “strategic litigation” has led to some confusion about its meaning and how organisations employ it as a tool to create change. It is commonly used alongside or interchangeably with the terms “cause-lawyering” and “public interest litigation”. We dispute the siloing of definitions as there is clear overlap between them. In practice, the team’s work often encompasses all three terms, using a legal strategy with the object of advancing public interest cases or a cause.

Through a comprehensive review of strategic litigation references, Ramsden and Gledhill have identified four main indicia of strategic litigation:

1. An extrinsic legacy concept—it seeks outcomes with a long-term impact, going beyond the origins of the claimant’s complaint;
2. It is a method of advocacy adaptable to a range of purposes;
3. Its objectives are multi-faceted and go beyond creating effects within the court system; and

4. It views 'litigation' broadly, to include tribunals and international mechanisms of redress.¹³

Strategic litigation should align with an organisation's objectives. NJP and its partners have a strategic focus on eliminating racism in health care, which is consistent with their mission to eradicate all forms of discrimination.¹⁴

Strategic litigation is often used by organisations as one form of advocacy, as a tool within a broader strategy, and alongside other advocacy activities such as the use of media to advocate for clients and campaigns, or political lobbying.¹⁵ Durbach et al note that litigation is 'frequently an important strategy, as either a trigger or catalyst to launch a campaign, or a "back-end" mechanism to secure the gains of a multi-strategy campaign'.¹⁶ It is commonly associated with human rights issues and violations, but not always. In recent times, conservative groups have used the strategy to fight for a form of religious expression, including making homophobic comments about LGBTIQ+SB people.¹⁷

The Australian legal community has been uneasy in locating strategic litigation alongside other traditional methods of advocacy.¹⁸ NJP and the Jumbunna Institutes' approach to situating strategic litigation within well-defined campaigns is unusual. O'Brien notes that campaigns usually have a 'cause' as opposed to a 'case' as their focus: the 'campaign will often involve a number of activities, which could include litigation, but may not... [s]ome of the other possible campaigning techniques pose a challenge as to what is understood as the job of a lawyer'.¹⁹

¹³ Michael Ramsden and Kris Gledhill, 'Defining Strategic Litigation' (2019) 38(4) *Civil Justice Quarterly* 407.

¹⁴ Scott Calnan, 'Planned Litigation: Should it Play a Greater Role in Human Rights Litigation in Australia?' (2019) 42(2) *UNSW Law Journal* 7.

¹⁵ Ramsden and Gledhill (n 13) 28.

¹⁶ Andrea Durbach et al, 'Public Interest Litigation, Making the Case in Australia' (2013) 38(4) *Alternative Law Journal* 219.

¹⁷ See, e.g., Aaron Patrick, 'Inside Story: How Israel Folau's Legal Team Played Rugby Australia' *The Australian Financial Review* (online, 21 December 2019) <<https://www.afr.com/companies/sport/inside-story-how-israel-folau-s-legal-team-played-rugby-australia-20191216-p53kcr>>.

¹⁸ Nicole Rich, 'Reclaiming Community Legal Centres: Maximising our Potential so we can Help Clients Realise Theirs' (Final Report, Victoria Law Foundation Community Legal Centre Fellowship, April 2009) 53.

¹⁹ Paula O'Brien 'Changing Public Interest Law, Overcoming the Law's Barriers to Social Change Lawyering' (2011) 36(2) *Alternative Law Journal* 82, 83-5.

In practice, NJP runs multiple campaigns in line with its mission to create a fairer society and create change by tackling systemic injustice and prejudice within government institutions. After the Naomi Williams case, NJP worked with peak First Nations health and research bodies to establish the Partnership for Justice in Health ('P4JH'). The P4JH is a component of the Health Justice Campaign dedicated to addressing racism in health care for First Nations people to prevent what happened to Naomi and her family happening to others. In cooperation with stakeholders and partners such as the Jumbunna Institute and the P4JH, NJP uses a variety of legal processes strategically, such as administrative law, tort, discrimination litigation, coronial inquests, strategic advocacy, complaints to authorities, and other mechanisms, such as education, to achieve systemic reforms in Australia.

Through the open exchange of information acquired through different methodologies, focuses, and skillsets, the P4JH partnership became a useful forum and sounding board for NJP's strategic litigation. NJP uses the research and data from trusted partners as evidence for strategic litigation and campaigns. The Aboriginal Steering Committee — which was later incorporated into NJP's First Nations Advisory Committee — reviewed its campaign (for uniformity, hereafter the 'First Nations Advisory Committee'). In turn, the findings and decisions from NJP's cases contribute to political advocacy, academic research, education, and policy work of stakeholders and partners. Strategic litigation is commonly used as a form of advocacy, alongside other techniques such as activism. In NJP's experience, successful campaigns for change often come from years of grassroots engagement, tracking cases and complaints, tracing patterns and themes to their source, and identifying gaps in policy or legislation. Importantly, they also emerge directly from impacted communities that that intimately understand the challenges and barriers.²⁰ Because NJP is a frontline responder and works nationally and non-governmentally, it is in a position to assess complaint data and observe patterns. The Health Justice campaign sprang from years of consistent complaints to NJP from First Nations clients and communities about racism and negligence in the provision of health care. The fact that

²⁰ See, e.g., Anna Talbot and George Newhouse, 'Strategic Litigation, Offshore Detention and the Medevac Bill' (2019) 13 *UNSW Law Society Court of Conscience* 85; Redfern Legal Centre, 'Redfern Legal Centre launches campaign to stop strip searches' (Media Release, 19 December 2018) <<https://rlc.org.au/publication/media-release-redfern-legal-centre-launches-campaign-stop-strip-searches>>.

the campaign grew from concerns raised at the grassroots level by numerous communities, rather than by being selected by lawyers, ensured it was authentically grounded in client and community concerns from day one.

In accordance with the strategic litigation framework process set out below, the team consulted with Sharon Williams' and Naomi's family, the Brungle and Tumut Aboriginal community, NJP's First Nations Advisory Committee, and the Jumbunna Institute to seek alignment on the shared priorities and intentions of both the legal team and community. Not only were NJP and Jumbunna Institute running this inquest to seek accountability on behalf of Naomi's family and community, but they had a desire and commitment to ensure that this inquest was an appropriate strategic focus within the broader Health Justice Campaign. Strategic litigation and social justice lawyering raise issues of morality that have existed since the establishment of the field of modern theoretical legal ethics.²¹ David Luban, a prominent first wave legal philosopher, famously posed the central ethical conflict of a lawyer and his morality as a question. He asked, '[d]oes the professional role of lawyers impose duties that are different from, or even in conflict with common morality?'²² Modern legal ethics has answered this question in many different ways, with some theorists also considering the particular ethics of social justice lawyering.²³ Cantrell notes that 'unlike cause-lawyers, traditional lawyers remain neutral regarding the "rightness" of the client's "cause" while remaining wholly partisan in service of the client's efforts to fulfil a cause'.²⁴ She says that by contrast, 'at its core, cause-lawyering is not about neutrality but about choosing sides'.²⁵ She further notes that a second distinguishing feature of the cause-lawyer is that they 'actively embrace the political and policy dimensions of their work'.²⁶ Crucially, Cantrell observes that 'it is not always clear when an attorney is acting as a cause-lawyer or as a traditional lawyer. At times, a lawyer may be doing both'.²⁷ Ramsden and Gledhill have stated that cases are often selected for

²¹ See David Luban and W. Bradley Wendel, 'Philosophical Legal Ethics: An Affectionate History' (2017) 30 *Georgetown Journal of Legal Ethics* 337; Leslie Griffin 'The Lawyer's Dirty Hands' (1995) 8(2) *Georgetown Journal of Legal Ethics* 219.

²² David Luban, *The Good Lawyer: Lawyers' Roles And Lawyers' Ethics* (Rowman & Allanheld, 1983) 123, cited in Leslie C Griffin, 'The Lawyer's Dirty Hands' (1995) 8(2) *Georgetown Journal of Legal Ethics* 225.

²³ See, e.g., Christine Parker, 'A Critical Morality for Lawyers: Four Approaches to Lawyers' Ethics' (2004) 30(1) *Monash University Law Review* 48.

²⁴ Deborah Cantrell, 'Sensational Reports: The Ethical Duty of Cause Lawyers to be Competent in Public Advocacy' 30(3) *Hamline Law Review* 568.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Ibid.*

strategic litigation by organisations because they ‘epitomis[e] the interests of a particular community’.²⁸ The ethical selection of cases, discussed further below, is a delicate and crucial aspect of strategic litigation. NJP is fortunate to have formed trusted relationships with the Jumbunna Institute and peak First Nations health organisations, clinicians, health workers, journalists, researchers, and advocates in communities who are able to refer clients when they most need help. NJP only acts where there is an alignment of interests between its clients, community needs, and when there is a genuine potential for strategic impact in priority campaign areas.

Strategic litigation emphasises ‘proactive agenda setting and control’.²⁹ Preliminary research suggests that such proactive and systemic elements of a planned approach to strategic litigation has led to more success in Australian courts.³⁰ The development of NJP’s strategic litigation framework and strategy was encouraged by one of its US-trained directors, retired Lieutenant Colonel Dan Mori, who brought his experience in US-style litigation to Australia. With the establishment of the Health Justice Campaign, the collective experience and preparation of NJP, and the Jumbunna Institute lawyers, ensured they were prepared to engage when passionate clients presented with suitable cases of institutional racism and harm in the healthcare system with the potential to drive systemic change. Naomi’s experience in the healthcare system was an important case that had strong prospects of achieving the strategic campaign objectives. The following framework was followed when considering Naomi’s case and how best to commit limited resources for maximum impact:

- A *Identify the issue;*
- B *Consider stakeholders and partners;*
- C *Find a way forward;*
- D *Identify legal and other mechanisms to achieve outcomes and maintain them;*
- E *Consider the limitations of chosen mechanisms;*
- F *Consider the resources involved and identify risks; and*

²⁸ Ramsden and Gledhill (n 13) 7.

²⁹ Ibid.

³⁰ Calnan (n 14) 10, 63.

G Develop a narrative.

These factors are generally considered at the outset of any strategic litigation run by NJP and are periodically reviewed as appropriate.

A Identify the Issue

Identifying a social or human rights-based problem that can be framed as a legal issue is the natural first step in strategic litigation. Once identified, a client's case must be grounded in the context of this issue. In his article emphasising the importance of context in cause-lawyering, Calmore states, 'seldom will a client's legal problem be just a legal problem'.³¹ It is well established that First Nations people experience vastly poorer health outcomes, educational outcomes, and levels of poverty when compared with the non-Indigenous population.³² First Nations people experience higher levels of morbidity and mortality, poorer management of chronic diseases, and are less likely to receive a medical or surgical procedure.³³ NJP and the Jumbunna Institute team had reviewed published research demonstrating racism as a key determinant of this discrepancy.³⁴ First Nations people may find health services unwelcoming and even traumatic to the point where they will discharge themselves against medical advice.³⁵ It should also be noted that concepts

³¹ John Calmore, 'A Call to Context: The Professional Challenges of Cause Lawyering at the Intersection of Race, Space and Poverty' [1998-1999] 67(5) *Fordham Law Review* 1927.

³² See, e.g., Commonwealth of Australia, Department of the Prime Minister and Cabinet, *Closing the Gap Report 2020* (Report, 12 February 2020) (the 'Closing the Gap Report'); NSW Health, Workforce Planning and Development, *Respecting the Difference: An Aboriginal Cultural Training Framework for NSW Health* (Policy Directive, 1 November 2011) (the 'Respecting the Difference Framework'); Australian Health Ministers' Advisory Council, *Aboriginal and Torres Strait Islander Health Performance Framework* (Report, 30 May 2017) ('The HFP Report').

³³ Australian Institute of Health and Welfare, 'Cultural Safety in Health Care for Indigenous Australians: Monitoring Framework' (Web Page, 28 October 2019) <<https://www.aihw.gov.au/reports/indigenous-australians/cultural-safety-health-care-framework/contents/summary>>; The HFP Report 157 [3.03].

³⁴ Yin Paradies et al, 'Racism as a Determinant of Health: A Protocol for Conducting a Systematic Review and Meta-analysis' (2013) 2(1) *Systematic Reviews* 85 ('Racism as a Determinant of Health'); Alison Markwick et al, 'Experiences of Racism Among Aboriginal and Torres Strait Islander Adults Living in the Australian State of Victoria: A Cross-sectional Population-based Study' (2019) 19(1) *BMC Public Health* 2; Ann Larson et al, 'It's Enough to Make you Sick: The Impact of Racism on the Health of Aboriginal Australians' (2007) 31(4) *Australian and New Zealand Journal of Public Health* 322, 322-9; Alison Markwick et al, 'Perceived Racism may Partially Explain the Gap in Health between Aboriginal and Non-Aboriginal Victorians: A Cross-sectional Population Based Study' (2019) 7 *SSM Population Health* 1; Naomi Priest et al, 'Racism and Health Among Urban Aboriginal Young People' (2011) 11(568) *BMC Public Health* 1; Christopher Bourke et al, 'Transforming Institutional Racism at an Australian Hospital' (2019) 43(6) *Australian Health Review* 611.

³⁵ Australian Healthcare and Hospitals Association et al 'Cultural Safety Crucial in Aboriginal and Torres Strait Islander Healthcare' (Joint Statement, 26 March 2018) <<https://ahha.asn.au/news/cultural-safety-crucial-aboriginal-and-torres-strait-islander-healthcare>> ('AHHA').

of health can be fundamentally different for many First Nations communities, where their holistic understanding of health — encompassing social, emotional and spiritual wellbeing — can conflict with western concepts of health, where the mind and body are deemed separate. These differing worldviews, combined with racism, have a direct impact on all facets of a person’s wellbeing and engagement with health services. Racism in the provision of healthcare can lead to ‘poorer self-reported health status, lower perceived quality of care, underutilisation of health services, delays in seeking care, failure to follow recommendations, societal distrust, interruptions in care, mistrust of providers, and avoidance of health care systems’.³⁶

However, despite prejudice playing a key role in health outcomes, relevant comprehensive data on racism in health care is hard to find.³⁷ One well-known report, conducted by the Anti-Discrimination Commission in Queensland, found that of sixteen Health and Hospital Services in Queensland, ten had ‘very high’ levels of institutional racism and the remaining six had ‘high’ levels.³⁸ The Aboriginal and Torres Strait Islander Health Performance Framework Report 2017 provides the following statistics:³⁹

- 35% of Indigenous Australians aged 15 years and over reported that they had been treated unfairly in the previous 12 months because they are Aboriginal and/or Torres Strait Islander;
- Around 14% of Indigenous Australians reported that they avoided situations due to past unfair treatment. Of those persons, 13% had avoided seeking health care because of previous unfair treatment;

³⁶ Yin Paradies et al, ‘Racism as a Determinant of Indigenous Health and Wellbeing’ (2011) 194(10) *Medical Journal of Australia* 546, 576; Vickie Shavers et al, ‘The State of Research on Racial/ethnic discrimination in the Receipt of Health Care’ (2012) 102(5) *American Journal of Public Health* 953, 953–66; Australian Indigenous Doctors’ Association, ‘Racism in Australia’s Health System’ (Policy Statement, 2016) (‘AIDA’).

³⁷ The HPF Report (n 32) 161–2 [6.6].

³⁸ Queensland Aboriginal and Islander Health Council ‘Audit Finds High Levels of Institutional Racism in Queensland’s Health System, but Experts Hopeful of Brighter Future’ (Media Release, 4 December 2018) <<https://www.qaihc.com.au/media/audit-finds-high-levels-of-institutional-racism-in-queensland-s-health-system-but-experts-hopeful-of-brighter-future>>.

³⁹ Statistics in The HPF Report (n 32) are from the 2014–15 National Aboriginal and Torres Strait Islander Social Survey and General Social Survey unless otherwise specified.

- In a study⁴⁰ of 755 Aboriginal Victorian adults, 30% had experienced racism in health settings in a 12- month period;
- 6% of Indigenous Australians aged 15 years and over disagreed or strongly disagreed with the statement '[y]our doctor can be trusted'; and
- Indigenous Australians in non-remote areas reported that their General Practitioner, rarely or never showed respect for what was said (15%), listened to them (20%), or spent enough time with them (21%).

The issue of racism in healthcare is extremely complex and not one that can be easily addressed. However, it cannot be addressed meaningfully until it is acknowledged. The Australian healthcare system is steeped in colonial history and misconduct, which continues to shape many First Nations people's perceptions of healthcare.⁴¹ For example, Tumut Hospital, where Naomi was treated, was segregated until the 1960's.⁴² The legacy of this oppression and discriminatory practice continues to impact the Tumut community and surrounding areas. Despite the health discrepancy being identified as an area of focus at the highest levels of government,⁴³ and despite the hard work of many nurses, doctors, and public health officials, the problem of institutional racism persists.⁴⁴ Meanwhile, the lack of progress continues to cost First Nations people, like Naomi Williams, their lives.

⁴⁰ Margaret Kelaher, Angeline Ferdinand and Yin Paradies, 'Experiencing Racism in Health Care: The Mental Health Impacts for Victorian Aboriginal Communities' (2014) 201(1) *The Medical Journal of Australia* 44, 44–7.

⁴¹ Australian Institute of Health and Welfare, *Cultural Safety in Health Care for Indigenous Australians: Monitoring Framework* (Report, 28 October 2019) <<https://www.aihw.gov.au/reports/indigenous-australians/cultural-safety-health-care-framework/contents/summary>> ('AIHW'); Royal Australian College of General Practitioners, 'Racism in the Healthcare System', (Position statement, September 2018) <<https://www.racgp.org.au/advocacy/position-statements/view-all-position-statements/health-systems-and-environmental/racism-in-the-healthcare-sector>>; Australian Health Practitioner Regulation Agency, *The National Scheme's Aboriginal and Torres Strait Islander Health and Cultural Safety Strategy 2020-2025* (Report, 12 January 2018) ('AHPRA').

⁴² George Newhouse, 'Ron Castan Humanitarian Award 2017' (Speech, Ron Castan Humanitarian Award 2017, 22 October 2017).

⁴³ Council of Australian Governments, 'COAG Statement on the Closing the Gap Refresh', (Communique, 12 December 2018).

⁴⁴ Australian Indigenous Doctors' Association, 'Australians Must Not Accept the Widening Life Expectancy Gap as the Norm' (Media release, 22 November 2018) <<https://www.aida.org.au/wp-content/uploads/2018/11/AIDA-MEDIA-RELEASE-Australians-must-not-accept-the-widening-life-expectancy-as-the-norm.pdf>>; Australian Human Rights Commission, 'Close the Gap: Indigenous Health Campaign' (Web Page, 19 March 2020) <<https://www.humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/projects/close-gap-indigenous-health>>.

Another complicating factor in addressing prejudice in healthcare is that First Nations people face barriers to accessing the legal system. Research from the Law and Justice Foundation in NSW has found that around 8 per cent of Aboriginal people needed health justice legal services, which is more than double the rate of non-Indigenous people.⁴⁵ However, there are limited legal services available to address this need.

B Consider Stakeholders and Partners

Stakeholders and partners are at the heart of all NJP's campaigns. The stakeholders in the Naomi Williams Inquest could be divided along four lines:

- Naomi's immediate family and friends;
- The local Aboriginal community in Tumut;
- NJP's First Nations Advisory Committee; and
- The Jumbunna Institute and peak Aboriginal and Torres Strait Islander health organisations and academics.

NJP, as a non-Indigenous-run organisation, relies on its First Nations Advisory Committee, staff, board members and partners to provide culturally appropriate oversight, accurate information on grass roots concerns and to ensure that legal and advocacy strategies are trauma-informed, culturally respectful and conducted in a culturally safe manner.⁴⁶ Numerous legal scholars have addressed the delicacies of ethical strategic litigation/public interest litigation, encouraging weighty consideration of stakeholders and partners. Calmore, in analysing the role of public interest litigation specifically to serve America's poor, inner-city minority communities, states that 'practicing law in the community is not a tourist adventure' and that practitioners 'must search for an invitation, opportunity, and connection that legitimate our presence and committed practice'.⁴⁷ Calmore emphasises the role of the lawyer in collaborating with

⁴⁵ Christine Coumralos et al, 'Collaborative Planning Resource – Service Planning' (Research Report, Law and Justice Foundation of New South Wales, November 2015) 34.

⁴⁶ A significant portion of NJP's work is for Aboriginal clients and centred around issues of Aboriginal health justice. However, the majority of NJP lawyers are not Aboriginal. The ultimate aim of NJP is for Aboriginal lawyers to take over its work and take control of their own advocacy. NJP is currently training Aboriginal lawyers for this purpose.

⁴⁷ John Calmore, 'A Call to Context: The Professional Challenges of Cause Lawyering at the Intersection of Race, Space and Poverty' (1999) 67(5) *Fordham Law Review* 1927.

communities and empowering them to transform their struggles from within the community.

NJP represents clients who themselves have a desire for both legal accountability and wider societal change. In this way, advocating for the client's best interests aligns with its strategic objectives. Quigley has called this approach 'empowerment lawyering', and like Calmore, emphasises the lawyer 'joining' a community as opposed to 'leading' it.⁴⁸ Quigley states that 'unless the lawyer recognises that advocacy with groups cannot proceed without community organising, there can be no effective empowering advocacy'.⁴⁹ He states, 'in fact, if an organisation could only have one advocate and he had to choose between the most accomplished traditional lawyer and a good community organiser, it had better, for its own survival, choose the organiser'.⁵⁰ Tyner refers to this as 'collaborative lawyering' and describes it as a type of lawyering which 'extends beyond the traditional notion of lawyering, which explores how to solve a legal dilemma and begins to examine participatory and democratic questions: "what shall we do together?"'.⁵¹ Collaborative lawyering is a 'joint partnership with clients that can effect social change... [it] promotes client autonomy, upholds respect, and fosters a sense of equality whilst furthering collaborative efforts'.⁵²

The central aim of strategic litigation is to have an effect beyond that of the individual litigant and this concept has been well explored by commentators.⁵³ Calnan has stated that strategic litigation 'involves a balancing of the individual interest of the client with the wider structural goals it tries to obtain while acting ethically and on the client's instruction. As long as it involves acting on such instructions and the client is fully informed about the litigation and consents to it, a planned litigation approach is generally seen as having a human rights framework in dealing with its clients'.⁵⁴ Coroner Grahame

⁴⁸ William Quigley, 'Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations' (1994) 21(2) *Ohio Northern University Law Review* 455.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ Arika Tyner, 'Planting People, Growing Justice: The Three Pillars of New Social Justice Lawyering' (Summer 2013) 10 *Hastings Race and Poverty Law Journal* 219, 226.

⁵² *Ibid.*

⁵³ See, e.g., Ramsden and Gledhill (n 13) 8-10; Melissa Coade, 'Strategic Justice' (2019) 56 *Law Society Journal* 34, 36-7; Calnan (n 14) 9.

⁵⁴ *Ibid.*

best described the successful intersection of these interests in the Naomi Williams Inquest as follows:

It is clear to the court that [Naomi's family and friends'] motivation has been twofold. They have been dedicated to trying to find out exactly why Naomi died, but they have also been looking for ways to improve health outcomes for other Indigenous patients in their local community. In this way they are honouring Naomi's life and acknowledging her status as an emerging leader of her community.⁵⁵

The Williams family, who, in seeking to honour Naomi's memory, are continuing to empower local and national communities to achieve changes to healthcare for First Nations people.

NJP undertook two community outreach trips to Tumut in order to hear directly from local Aboriginal community members about their experiences of racism and healthcare. As Naomi was loved and active in her local community, people were willing to collaborate and talk openly about their concerns. The Inquest became an opportunity for truth-telling, not only around Naomi's death, but also the state of the local health system. The concerns and experiences that Tumut residents shared directly influenced the Inquest submissions and recommendations.

The Jumbunna Institute and NJP both run strategic litigation and advocate for social justice for First Nations people. In order to achieve significant change in a culturally appropriate fashion, they formed a cohesive partnership. The Jumbunna Institute has vital relationships with academics, legal experts and grassroots organisations that it could draw on during preparations for the Inquest. Lawyers from the Jumbunna Institute and NJP worked together to prepare submissions and attend hearings. They were aided by the tireless legal work of members of the Bar who offered their expertise pro bono as well as the contributions of a number of experts. NJP and the Jumbunna Institute continue to work together in order to analyse the findings, opportunities and recommendations handed down by the Coroner and to advocate for health justice together.

⁵⁵ *Inquest into the Death of Naomi Williams* (n 1) [5].

C Find a Way Forward

The way forward to health justice was mapped out by the Royal Commission into Aboriginal Deaths in Custody ('RCIADIC') in 1991.⁵⁶ Recommendations 246–271 address the health of Aboriginal people. The RCIADIC report represented a shift in focus to the importance of culturally safe care and also recognised the need for a 'multi-sectoral approach to improve the quality of life in general for Indigenous people, rather than simply provision of more and improved health and sickness care services'.⁵⁷ The relevant RCIADIC health recommendations were:

246. Improving collection and access to accurate and comprehensive data

247. Increasing and improving training

248. Learning from the Aboriginal Primary Health Care Unit

249. Improving access to skilled interpreters

250. Sharing information about patients

251. Improving access to health care facilities

252. Reviewing hospital procedures

253. Improving design of facilities

254. Involving Indigenous people in decision making roles

255. Addressing stereotypes

256. Employing more Indigenous people

257. Expanding training initiatives

258. Increasing participation of Aboriginal Health Services

259. Better resourcing of Aboriginal Health Services

260. Evaluation of programs

261. Use of Indigenous hospital liaison officers

⁵⁶ Elliott Johnston, *Royal Commission into Aboriginal Deaths in Custody* (Report, 9 May 1991) vol 5 <<https://www.naa.gov.au/explore-collection/first-australians/royal-commission-aboriginal-deaths-custody>> ('*Aboriginal Deaths In Custody Report*').

⁵⁷ Amnesty International, *Review of the Implementation of RCIADIC – Chapter 21 Towards Better Health (Recommendations 246-271)* (Report, 2015) 1, 93-6, [6] <https://changetherecord.org.au/resources/files/Chapter%2021_Towards%20Better%20Health.pdf>.

262. Recognition and development of Indigenous Health Workers
263. Review of style of operation of health professionals
264. Expansion of Aboriginal mental health services
265. Development of Indigenous health workers with appropriate mental health training
266. Linking Indigenous mental health services with other services
267. Reviewing of aerial medical services and diagnostic protocols
268. Research into Indigenous health issues
269. Indigenous health research compliance with National Health and Medical Research Council's Advisory Notes on Aboriginal health research ethics
270. Involvement of Indigenous people in development of health statistics
271. Funds to be urgently made available to implement the National Aboriginal Health Strategy.

It is disappointing that most recommendations have not been effectively implemented or implemented at all. The RCIADIC recommendations offered an opportunity for desperately needed reform in the Australian health system and continue to operate as a roadmap for campaigners for First Nations health justice.

Since RCIADIC, a new philosophy of patient-focused care has developed a framework to provide culturally safe services. Cultural safety 'identifies that health consumers are safest when health professionals have considered power relations, cultural differences, and patients' rights'.⁵⁸ Part of this process requires health professionals to examine their own unconscious biases, beliefs, and attitudes. Cultural safety is not defined by the health professional, but is defined by the health consumer's experience — the individual's experience of care they are given, the ability to access services, and to raise concerns.⁵⁹ Aspects of cultural safety include good communication, respectful treatment, empowerment in decision-making, and the inclusion of family members.⁶⁰ Cultural safety

⁵⁸ Australian Health Ministers' Advisory Council's National Aboriginal and Torres Strait Islander Health Standing Committee, *Cultural Respect Framework 2016-2026 for Aboriginal and Torres Strait Islander Health* (Communique, 2016) 18 [4] ('Cultural Respect Framework') <https://nacchocommunique.files.wordpress.com/2016/12/cultural_respect_framework_1december2016_1.pdf>.

⁵⁹ Ibid 18.

⁶⁰ AIHW (n 41).

is a proven solution to achieve systemic change in order to address racism in healthcare,⁶¹ and is widely supported by medical professionals for being instrumental to the improvement of First Nations people's health outcomes.⁶² Cultural safety was developed in New Zealand by Maori nurses in order to address the poorer health outcomes of Maori peoples in New Zealand. Like Australia, New Zealand's health system is grounded in the colonial context. Australian First nations health organisations, such as The Congress of Aboriginal and Torres Strait Islander Nurses and Midwives ('CATSINaM'), Australian Indigenous Doctors' Association ('AIDA'), National Aboriginal Community Controlled Health Organisation ('NACCHO'), National Association of Aboriginal and Torres Strait Islander Health Workers and Practitioners ('NAATSIHWP') and Indigenous Allied Health Australia ('IAHA') led the way in introducing cultural safety to Australia — and it was soon widely adopted as the benchmark standard. Durbach et al have outlined that 'existing and widespread public support for social change on a specific issue' is one of the defining features of successful strategic litigation.⁶³

State and Federal governments are working to ensure that culturally safe care is the experience of all First Nations people.⁶⁴ In a major step forward, in 2023, State, Territory and Federal governments agreed to slowly mandate culturally safe care across 16 different areas of practice.⁶⁵ However, as the Inquest demonstrated, existing care frameworks are often not implemented fully or with the appropriate consideration of local communities. These efforts have revealed a divide between what some health services thought to be effective community engagement and the view of the community itself. Health administrators appeared genuinely surprised when they learned that Aboriginal people did not feel safe at Tumut Hospital.⁶⁶ The Health Justice Campaign

⁶¹ Royal Australian College of General Practitioners, 'Position Statement - Aboriginal and Torres Strait Islander Health' (Position Statement, 2015) <<https://changetherecord.org.au/review-of-the-implementation-of-rciadic-may-2015>> ('RACGP').

⁶² AIDA (n 36); AHHA (n 35).

⁶³ Durbach (n 16) 220.

⁶⁴ For example Cultural Respect Framework (n 58), Closing the Gap Report (n 32), Department of Health, *National Aboriginal and Torres Strait Islander Health Workforce Strategic Framework and Implementation Plan 2021-2031* (National Workplace Plan, 7 March 2022)

<<https://www.health.gov.au/sites/default/files/documents/2022/03/national-aboriginal-and-torres-strait-islander-health-workforce-strategic-framework-and-implementation-plan-2021-2031.pdf>>; NSW Ministry of Health, *Integrated Trauma-Informed Care Framework: My Story, My Health, My Future* (Integrated Trauma-Informed Care Framework, 22 February 2023).

⁶⁵ Aboriginal and Torres Strait Islander Health and Cultural Safety at Heart of National Law Changes (Web Page, 13 October 2022) <<https://www.ahpra.gov.au/About-Ahpra/Ministerial-Directives-and-Communiqués/National-Law-amendments/Joint-statement.aspx>>.

⁶⁶ *Inquest into the Death of Naomi Williams* (n 1) 53–4 [269]–[275].

offered a unique opportunity to raise the profile of culturally safe care, and to utilise legal and political mechanisms to demand best practice standards. Naomi's family had the opportunity to offer recommendations, through their lawyers, about how to improve that community engagement. At the Inquest, the Coroner took these recommendations seriously. She focused on important elements of culturally safe care by including a section of her findings titled 'Measures to embed values to promote culturally safe healthcare for Aboriginal people'⁶⁷ and referenced cultural safety in her Recommendations 8 and 9.⁶⁸ The Coroner recommended improved education, training focusing on culturally safe care within a local context, changes to professional standards and increased and proportional employment of Aboriginal health workers.

Cultural safety offers an agile way forward as it draws on research and expertise from governmental, academic, medical, and social sciences sectors in relation to institutional racism and healthcare. This multi-sectoral and multi-disciplinary breadth is advantageous in that diverse stakeholders can implement pathways across their relevant fields in order to achieve the overarching goal: a high standard of culturally safe care across Australia.

D Identify Legal and Other Mechanisms to Achieve Outcomes and Maintain them

NJP and the Jumbunna Institute use civil litigation, discrimination and health complaints processes, and other legal/quasi-legal mechanisms in order to further their campaigns. Legal aims of strategic litigation include setting new precedents and advancing legal standards, influencing the quality of law and its implementation, and establishing specific legal points or definitions.⁶⁹ However, broader aims may include functioning as a dialogic tool to prompt public discussion, highlighting potential injustices in the legal status quo in order to build momentum for reform, or create broad social change.⁷⁰ In Naomi Williams' case, NJP and the Jumbunna Institute successfully used the coronial process, not only to bring some level of closure to her family, but as a vehicle to answer questions about Naomi's death, to hold individuals accountable, and to achieve significant findings

⁶⁷ Ibid 52.

⁶⁸ Ibid 57.

⁶⁹ Ramsden and Gledhill (n 13) 12.

⁷⁰ Ibid 13–4.

and recommendations that have the potential to create real change in the way health services are delivered.

However, NJP and the Jumbunna Institute are conscious that the use of legal mechanisms is less effective if they are siloed from other important advocacy tools. Their approach aligns with that of some academics, including Calnan, who have suggested that strategic litigation is most effective as part of a coordinated plan (for example, involving political and social campaigning) which will lead to better healthcare outcomes for First Nations people. O'Brien has stated that although Australian public interest lawyers are often critical of the law and of the legal system's treatment of disadvantaged people, the liberal model of the law remains a 'forceful influence' and makes it difficult for lawyers to see their role other than in a conventional way.⁷¹ This has resulted in public interest lawyers looking to the courts for justice, knowing it does not always provide it. O'Brien suggests that 'social change lawyering [should] not [be] so concerned with the liberal commitment to the promotion of formal equality in the legal system, but with what needs to be done to realise a more substantively equal society'.⁷² Traditionalists find it difficult to accept social justice lawyers operating campaigns or being activists. In response, Isabelle Reinecke of the Grata Fund notes that activism and strategic litigation complement each other: 'activism pushes for social change by targeting decision-makers through campaign strategies like non-violent direct protest, petition and mass mobilisation...[in court] you're not winning the hearts and minds of judges - you're winning with detailed facts, precise reasoning, and the applicable legal principle'.⁷³ Ramsden and Gledhill put it simply: 'strategic litigation is often best used together with other techniques'.⁷⁴ NJP's community partners use the political and social mechanisms and processes at their disposal to build their own pathways. These pathways complement NJP's legal work to form an overarching strategy addressing institutional racial prejudice. Partners develop pathways to culturally safe care and health justice reform through academic research, data collection, policy lobbying, grassroots advocacy, calling for further funding, for educational reform, for professional standards reform, and for increased transparency by health institutions.

⁷¹ O'Brien (n 19).

⁷² *Ibid.*

⁷³ Coade (n 53) 36.

⁷⁴ Ramsden and Gledhill (n 13) 28.

A NSW Coroner has judicial powers to call witnesses and experts in order to make a finding as to the identity of the deceased and the date, place, manner, and cause of death. In some states, Coroners must also comment on ‘the quality of the supervision, treatment, and care of the person while in that care’ where there is a death in custody.⁷⁵ A well-run coronial process can offer clients some therapeutic benefits, lead to closure, and provide healing.⁷⁶ Such responses are often driven by inquest participants feeling ‘heard’ and understood through the coronial process.⁷⁷ Unfortunately, a poorly run or unsympathetic coronial process can re-traumatise grieving families and communities. Lawyers and advocates need to be aware of this risk. They should make every effort before commencing proceedings and in court to ensure that their clients are prepared for the potential downside of a culturally unsafe or disappointing court process.

The RCIADIC emphasised the role of post death inquiries, such as coronial inquests, as an important mechanism for truth-telling and systemic change in relation to deaths of First Nations people. The commission highlighted how coroners are uniquely placed to make policy recommendations in order to influence policy and prevent future deaths. The Attorney General of the Northern Territory explained as much in his second reading speech for the *Coroners Bill 1993* (NT) which was quoted in the case of *Bauwens & Anor v The Territory Coroner*:

The purposes of the [proposed NT Coroners] Act were, *firstly, to implement various recommendations of the Royal Commission into Aboriginal Deaths in Custody (“Royal Commission”); and, secondly, to generally improve and modernise the coronial process.* The expressed purpose of the *Coroner’s Act* (NT) was to increase the breadth and intensity of coronial inquiries for all reportable deaths, but *particularly deaths in custody, and in that way to identify systemic failures by police, corrections and other public institutions which may, if acted on, prevent future deaths in similar circumstances.* Its purpose was to *save lives.*⁷⁸

⁷⁵ See *Coroners Act 1996* (WA) s 25(3).

⁷⁶ Coronial Assistance Legal Service Caxton Legal Centre, *Coronial Investigations in Queensland: (Counter) – Therapeutic Effect* (Report, 26 November 2019) <<https://caxton.org.au/wp-content/uploads/2019/11/Coronial-Assistance-Legal-Service-report-2019.pdf>>.

⁷⁷ Stephanie Dartnall, Jane Goodman-Delahunty and Judith Gullifer, ‘An Opportunity to Be Heard: Family Experiences of Coronial Investigations Into Missing People and Views on Best Practice’ (2019) 10(2322) *Frontiers in Psychology* 1.

⁷⁸ *Bauwens & Anor v The Territory Coroner* [2022] NTSC 92, [59]–[60].

NJP's first step as Sharon Williams' representatives was to lobby for a new coronial inquest to be held. Successfully lobbying for an inquest is known to be difficult as it is resource intensive and is often a matter of coronial discretion. It is not immediately clear to many that this step is even available. In Naomi's case, NJP lawyers undertook a detailed forensic investigation and submitted comprehensive records and medico-legal reports about Naomi's health care in the years leading up to her death. NJP compiled detailed records of Naomi's complex health history and obtained medico-legal opinions from pathologists, expert nurses, and emergency specialists. The Inquest offered Naomi's family and the Aboriginal community in Tumut an opportunity to stand up for their community and tell the truth about the care they were receiving, to hold those responsible accountable, and to demand change on a far-reaching public platform.⁷⁹ Together, these voices ensured transparency in relation to the circumstances of Naomi's death and healthcare in Tumut, accountability for those involved in it, and a call for reform.

Consistent with the recommendations of RCIADIC, under section 82 of *The Coroners Act 2009* (NSW), the coroner has the power to make recommendations they consider 'necessary or desirable' in relation to public health and safety.⁸⁰ Such recommendations aim to improve processes, policies, and legislation to prevent similar deaths in the future and are a powerful mechanism to achieve social change.⁸¹ NJP's main aim in the Inquest was to vindicate Sharon Williams' concerns, uncover the truth about Naomi's death, and secure findings and recommendations that would define pathways to quality and non-discriminatory culturally safe care, among other measures. The lack of transparency of health institutions is a common challenge for medico-legal practitioners and increases the importance of forensic research based on evidence. Inquests can uncover documents and evidence that might otherwise remain hidden.

As a result of NJP's comprehensive forensic work in conjunction with the Williams family and the Jumbunna Institute, substantial evidence of prejudice was discovered in Naomi's

⁷⁹ The Feed, 'Turned Away: The Death of Naomi Williams, *SBS* (online, 10 October 2018) <<https://www.sbs.com.au/ondemand/video/1340515395915/turned-away-the-death-of-naomi-williams>>.

⁸⁰ *Coroners Act 2009* (NSW) s 82.

⁸¹ Commonwealth Ombudsmen, 'Principles for Good Practice in Responding to Coronial Recommendations' Principles for Good Practice (Fact Sheet, 1 January 2024) <https://www.ombudsman.gov.au/_data/assets/pdf_file/0015/36213/Principles-of-Good-Practice.pdf>.

case. Five key pieces of evidence made the difference in selecting Naomi's case as a driver of the NJP and Health Justice Campaign:

1. The complaint letter sent by Sharon Williams outlining Naomi's experience of being racially stereotyped and the hospital's response;
2. The medical records from Calvary Hospital in Canberra which proved that Naomi wanted to have her baby in Canberra because she didn't feel safe at Tumut Hospital because of the inadequate care she was receiving there;
3. The Facebook messages sent by Naomi the night before she died that directly contradicted nurses' characterisations of Naomi's symptoms and her level of pain;
4. The Panadol found in Naomi's bathroom by the investigating police which also contradicted the nurses' claim that Naomi had come to the hospital for Panadol; and
5. Substantial evidence from community in the geographic area that suggested Naomi's experience was representative of a widespread perception of racism in relation to the Tumut Hospital.

At the Inquest, the Coroner's expert witness Professor Paradies outlined the importance of the NSW Respecting the Difference training framework in relation to improving culturally safe care standards. Professor Paradies gave evidence on the importance of Aboriginal Liaison Officers, data collection, and support from all levels of a hospital hierarchy for organisational change. After NJP's presentation of strong evidence, Coroner Grahame focused on the importance of culturally safe care in her findings and recommendations.

Coroners' findings are important in the context of strategic litigation as they determine the perception of the deceased in the media and establish a public narrative of the facts. They also can provide a roadmap for reform. By uncovering the 'truth', inquest findings are often a foundation on which to launch later lawsuits and claims in order to hold the system accountable for its failures. It is noteworthy that the Williams family campaign did not end with the Inquest but continued through lobbying the government to implement the recommendations, through the establishment of the P4JH, civil law claims, and health care complaints.

E Consider the Limitations of Chosen Mechanisms

Coronial recommendations have limitations, particularly in relation to providing outcomes for First Nations people. The RCIADIC provides a sober reality check. 339 recommendations were made at the conclusion of the commission, and the majority of these have not been implemented 33 years later.⁸² The lack of implementation displays a lack of genuine commitment by the Government to take the recommendations seriously and address a history of systematic disempowerment of First Nations people.⁸³

Recommendation 36 states that ‘investigations into deaths in custody should be structured to provide a thorough evidentiary base for consideration by the Coroner on [an] inquest into the cause and circumstances of the death and the quality of the care, treatment, and supervision of the deceased prior to death’.⁸⁴ The decision in *Bell v Deputy Coroner of SA*⁸⁵ demonstrates the cost of failure by South Australia to implement recommendation 36.⁸⁶ The impact of that decision is that if “penalty privilege” is established, a witness to coronial proceedings may have a basis to decline to answer a question or produce a document at the inquest. This creates an unnecessary hurdle to determining the cause and the circumstances of death and runs against the spirit of the RCIADIC recommendations, although the impact of that case has led to legislative reform of the South Australian Coroner’s Act.⁸⁷

Under the *Coroners Act 2009* (NSW) after recommendations are made by a coroner, a copy of the findings is required to be given to the coroner, the relevant government authority/department, and the Minister in charge.⁸⁸ However, there is no statutory obligation on the agency or organisation to consider or respond to them. Because recommendations are not required to be mandatorily implemented, they are essentially

⁸² RACGP (n 61).

⁸³ Royal Australian College of General Practitioners, ‘Position Statement - Aboriginal and Torres Strait Islander Health’ (Position Statement, May 2010) <<https://www.racgp.org.au/FSDEDEV/media/documents/RACGP/Position%20statements/RACGP-Aboriginal-and-Torres-Strait-Islander-Health-Position-Statement.PDF>>.

⁸⁴ *Aboriginal Deaths In Custody Report* (n 56) vol 5, Recommendations [36].

⁸⁵ *Bell v Deputy Coroner of SA* (No 2) [2020] SASC 77.

⁸⁶ Amnesty International, *Review of the Implementation of RCIADIC - Chapter 3 The Adequacy of Post Death Investigations (Recommendations 6-40)* (Report, 2015) 93–6 <https://changetherecord.org.au/resources/files/Chapter%2003_%20Post-Death%20Investigations.pdf>.

⁸⁷ See also *Bauwens & Anor v The Territory Coroner* [2022] NTSC 92 where the plaintiffs’ application not to give evidence on the basis of a claim of penalty privilege was refused.

⁸⁸ *Coroners Act 2009* (NSW) s 82.

only as effective as stakeholders can ensure. Through its Health Justice Campaign, NJP employs multiple mechanisms to ensure recommendations are not made in vain.

Following the Naomi Williams inquest findings, NJP:

- Helped to establish the P4JH;
- Continued civil litigation against the health system;
- Continued making complaints to the Health Care Complaints Commission;
- Lobbied Federal and State Parliamentarians to ensure ongoing change is delivered and recommendations are implemented, facilitating face-to-face meetings between the NSW Minister for health and Naomi Williams' family to advocate for change; and
- Continued to follow up the NSW Department of Health with regular face to face meetings.

Resistance to organisational change is another challenge that NJP considered in the context of the Inquest. Institutional racism will only be eliminated in Australia by widespread systemic change. As Professor Paradies' evidence highlighted, cultural safety training programs are difficult to implement effectively and require periodic review as well as tailoring to the local area.⁸⁹ Organisational change is difficult to effect, and hospitals are especially resistant to change. One widely-quoted figure puts the failure rate for organisational change at 70 per cent.⁹⁰ The National Health Service in the United Kingdom found that 33 per cent of quality improvement projects are not sustained when evaluating one year after completion.⁹¹ A systemic response is required by creating an organisational culture with a zero tolerance towards racism from the top down and by incorporating anti-discrimination and anti-racism practices and guidelines into the educational curriculum and professional standards of clinicians and other healthcare

⁸⁹ *Inquest into the Death of Naomi Williams* (n 1), 45 [228]–[230], 53.

⁹⁰ Michael Beer and Nitin Nohria, 'Cracking the Code of Change' (2000) *Harvard Business Review* 78; Samuel Silver et al, 'How to Sustain Change and Support Continuous Quality Improvement' (2016) 11(5) *Clinical Journal of the American Society of Nephrology* 916; Matthew Xerri et al, 'NPM and Change Management in Asset Management Organisations' (2015) 28(4) *Journal of Organizational Change Management* 641.

⁹¹ Maher, Lynne, David Gustafson and Alyson Evans, 'Sustainability Model and Guide', *National Health Service - Institute for Innovation and Improvement* (Guide, 1 February 2010) <https://webarchive.nationalarchives.gov.uk/20160805122935/http://www.nhs.uk/media/2757778/nhs_sustainability_model_-_february_2010_1_.pdf>

workers. If this does not happen, then any legal result achieved by strategic litigation cannot have a lasting effect.

F Consider the Resources Involved and Identify the Risks

Strategic litigation involves constant and continuous examination of risks and resources. It can be slow, expensive, and does not always achieve its goals.⁹² Risk considerations include financial, emotional, legal, and strategic risk. NJP runs complex strategic litigation matters that require significant resources over long periods of time. The Inquest took three years of preparation, relying on the strength and commitment of Naomi's mother, her family, and a team of dedicated lawyers, and the follow-up work is ongoing.

NJP relies on key partners, generous organisations, and donations, and crowdfunding of individuals to give clients the attention their cases deserve. The lack of funding available to Australian NGO's and civil justice organisations is a known barrier preventing more strategic litigation from occurring.⁹³ Most organisations in Australia that do receive funding rely, at least in part, on the Government. However, Government grants are often not large enough and are not permanent. They can limit the ability of the grantee to speak out publicly against the Government that funds them. In order to retain independence, NJP receives no Government funding. This creates uncertainty, risks, and challenges, but it allows NJP the flexibility and confidence to speak out and advocate publicly without fear or hesitation. Because of the risks involved and limited resources, strategic cases must be carefully selected.

All inquests are emotionally traumatic for the client, but how they are conducted by some judicial officers can make them more so. This emotional risk is something that lawyers must take seriously and be mindful of throughout the legal process. Studies have shown that 'poor communication about the coronial process, a lack of preparation as to what to expect, preclusion of family voice, poor access to legal or counselling support, and insensitive treatment, are key contributors to family distress'.⁹⁴ Lawyers have a duty to explain the failings and limitations of the process and manage their clients' expectations from the outset. It is particularly important to maintain communication after legal

⁹² Durbach (n 15) 219.

⁹³ Coade (n 53) 36; Calnan (n 14) 12; O'Brien (n 19) 82.

⁹⁴ Stephanie Dartnall et al, 'An Opportunity to Be Heard: Family Experiences of Coronial Investigations Into Missing People and Views on Best Practice' (2019) 10(2322) *Frontiers in Psychology* 1 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6861418/>>.

proceedings have concluded or during lull periods, as these are often the times when a grieving client can feel most distressed or alone.⁹⁵

The use of the law as a mechanism to create social change can be effective, but it can also be unpredictable. Calnan has emphasised that seeking to control as much of the strategic litigation process as possible (e.g. building relationships with courts, employing strategies such as using test cases or bringing multiple cases together, and controlling the field of litigants) can be an important element of strategic litigation.⁹⁶ However, he also acknowledges that strategic litigation is by its nature unpredictable.⁹⁷ In litigation, a palpable risk in cutting-edge cases is that of a judge setting a bad legal precedent. In all legal proceedings, there is a risk that the desired legal judgement, findings, or orders will not be granted, or the facts do not fall in a way that is expected. Such a risk is further amplified by the relatively undeveloped nature of human rights laws and norms in Australia. Australia is 'uniquely defined by the absence of a national human rights law, and reliance on a patchy network of common law and statutory provisions', making the legal results even more difficult to assess.⁹⁸ Legal and strategic discussions need to be had in order to determine if a case will achieve the desired objective, what the legal weaknesses are, and what evidence is available. One way in which such an effect can be avoided may be by putting less emphasis on the outcome of the litigation. As O'Brien states, 'too often in public interest lawyering, the running of the litigation becomes the focus and the end of the litigation...however, the litigation may only be a step along the way, and there may be considerable work which remains to be done, leveraging the outcome of the litigation to achieve the ultimate goal'.⁹⁹

All these risks must be considered on a fact-specific basis in relation to all potential strategic litigation cases. When NJP, the Jumbunna Institute, and their partners considered the facts and evidence of Naomi's case, they weighed up the strengths and weaknesses. Ultimately, with strong evidence, committed stakeholders and partners, and a commanding narrative, the NJP, together with Naomi's mother, determined the risk was

⁹⁵ Ibid.

⁹⁶ Calnan (n 14) 10-1.

⁹⁷ Ibid 13.

⁹⁸ Durbach (n 16) 221.

⁹⁹ O'Brien (n 19) 85.

outweighed by the potential outcomes and progress towards health justice more broadly, as well as the client.

G Develop a Narrative

The real success of Naomi's case came from the strength and commitment of Naomi's mother, her partner, and the extended Aboriginal community from Brungle (a former Aboriginal mission located 20 minutes from Tumut) who allowed her story to be told so powerfully from the depths of their pain. They made the advocacy campaign a success.¹⁰⁰

An individual's story gives a campaign a human face, allowing the audience to look beyond statistics to see the human impact of an issue. Strategic litigation provides an opportunity to raise public awareness on an issue, to reinvigorate public debate, educate and change public attitudes.¹⁰¹ As audiences are exposed to large amounts of information every day, effective storytelling was a key mechanism to ensure that Naomi's story was able to gain national media traction. Under the guidance of Naomi's family and with their consent, a narrative was carefully developed to reflect Naomi's story and complement the case and campaign. The importance of consent cannot be underestimated. Quigley highlights the importance of this message stating that, in his view, there are only two instances when it is appropriate for a lawyer to speak to the media about someone: 'first, if the [individual] asks the lawyer and gives specific instructions on how to proceed, and second, in an emergency'.¹⁰²

Sharon Williams' legal team considered its media strategy carefully and agreed on the narrative with her, creating ways for the voices of her family and those who loved her to be heard. To prepare for the Inquest, NJP gathered all of the witness statements from the Brungle Aboriginal community and successfully argued for them to form part of the Coronial brief so that they would form a part of the public record. Aboriginal voices led the media effort publicising an authentic narrative. The legal team put the Williams family's recommendations, in their words, directly to witnesses. In a promising development, Naomi's family sought and were granted the opportunity to perform a traditional Aboriginal dance and smoking ceremony at the Coroner's Court.

¹⁰⁰ See especially, Rachel Ball, *When I tell my story, I'm in Charge. Ethical and Effective Storytelling in Advocacy* (CLC Fellowship Report, 2013).

¹⁰¹ Ramsden and Gledhill (n 13) 13 [4].

¹⁰² Quigley (n 48).

The story of Naomi's experience was powerful because she was a loved and extremely compassionate individual. Personal accounts of family and friends built up a sympathetic picture of Naomi in the media. In order to seek justice for Naomi, her family and friends were prepared to overcome their emotional distress to make statements publicly and be interviewed by the media. Naomi was passionate about social justice and was a disability support worker. She died young and pregnant in tragic circumstances. Her story was memorable to many who heard it.

From 2016–19, NJP kept the media informed about developments in the case and worked closely with local media and journalists who were horrified by the circumstances of the case or shared a common interest in social justice. The case received a positive response from the media. The media were hungry for statistics and information on institutional racism in healthcare and were eager to follow the events of the Inquest. Local First Nations and national television networks and newspapers were interested in communicating Naomi's story, producing a number of in-depth investigative style pieces exploring the issues.¹⁰³ The role of media for an Australian strategic litigation practitioner can be particularly tenuous.¹⁰⁴ An advocate conducting strategic litigation for social justice purposes is required to have sound public relations skills, as they are often required to coordinate media conferences for family members and speak out on high profile cases. In fact, Cantrell argues that 'cause-lawyers are often called upon to be a voice for the cause,' which means that public advocacy skills are not optional or exceptional behaviour, but are 'baseline, ordinary' skills that all cause-lawyers should be well practiced in order to achieve social change.¹⁰⁵ However, in Australia, lawyers' use of the media is 'limited by the ethical and professional codes of conduct governing lawyer-client confidentiality and lawyers' non-disclosure obligations'¹⁰⁶ as well as various statutory prohibitions on publication and defamation laws. A culturally safe and

¹⁰³ See, e.g., The Feed, 'Turned Away: The Death of Naomi Williams, *SBS* (online, 10 October 2018); Gina Rushton, 'If An Aboriginal Woman Had Been From Sydney's Eastern Suburbs, She Might Have Been Treated Better, Coroner Says', *Buzzfeed* (online, 14 March 2019) <<https://www.buzzfeed.com/ginarushton/naomi-williams-inquest-coroner-hospital>>.

¹⁰⁴ See, e.g., Alysia Debowski, 'Old Dog, New Tricks: Public Interest Lawyering in an 'Age of Terror'' (2009) 34(1) *Alternative Law Journal* 15; Francesca Bartlett 'The Ethics of "Transgressive Lawyering: Considering the Defence of Dr Haneef' (2009) 28(3) *University of Queensland Law Journal* 309.

¹⁰⁵ Cantrell (n 24) 584–5.

¹⁰⁶ Durbach (n 16) 221.

respectful approach to ‘cause-lawyering’ would ensure that the voices of those impacted by the discrimination are at the forefront of any public campaign.

When the Inquest findings and recommendations were handed down in July 2019, the tone of the media coverage evolved to focus on the potential for systemic change.¹⁰⁷ Importantly, the coroner made a finding of ‘implicit racial bias’, which appeared in many news publications’ headlines.¹⁰⁸ The team, led by Naomi’s family members and members of the Tumut/Brungle Aboriginal community, were invited to speak on a number of television programs to discuss Naomi’s life, the Inquest, institutional racism and culturally safe care.¹⁰⁹

IV INQUEST FINDINGS

A Naomi Received Inadequate Care

The findings of the Inquest demonstrate how the health system failed Naomi on multiple counts. The Inquest’s findings led to recommendations that address health injustice in the local and state healthcare system, demonstrating how through tragic circumstances, strategic litigation can be a catalyst for change.

After considering the evidence, Coroner Grahame found that there were ‘clear and ongoing inadequacies in the care [Naomi] received’.¹¹⁰ In the 8 months leading up to Naomi’s death, she had presented at Tumut Hospital more than 18 times. The sheer number of presentations by Naomi to Tumut Hospital without a specialist review was, in the words of Coroner Grahame, ‘deeply troubling’.¹¹¹ Hospital staff treated Naomi’s acute symptoms reactively when she sought their help, but there was no overarching assessment of her health and she often left the hospital feeling worse than she went in, as

¹⁰⁷ The Feed, ‘We are Amazed’: Friend Relieved Race Acknowledged as Factor in Pregnant Woman’s Death’, *SBS* (online, 29 July 2019) <<https://www.sbs.com.au/news/the-feed/we-are-amazed-friend-relieved-race-acknowledged-as-factor-in-pregnant-woman-s-death>>.

¹⁰⁸ See, e.g., Gabrielle Jackson, ‘Naomi Williams Inquest: Coroner Finds Bias in Way Hospital Treated Aboriginal Woman’, *The Guardian* (online, 29 July 2019) <<https://www.theguardian.com/australia-news/2019/jul/29/naomi-williams-inquest-coroner-finds-bias-in-way-hospital-treated-aboriginal-woman>>; Emma Brancatisano, ‘The System Let Naomi Down’: Coroner Finds ‘Implicit Bias’ in Death of Indigenous Woman’, *10 Daily* (Web Page, 29 July 2019) <<https://10daily.com.au/lifestyle/health/a190729ixspd/the-system-let-naomi-down-coroner-finds-implicit-bias-in-death-of-indigenous-woman-20190729>>.

¹⁰⁹ See, e.g., ‘The Point – Racism in Healthcare’, *The Point NITV* (YouTube, 18 September 2019) <<https://www.youtube.com/watch?v=fqAFeG41RWI>>.

¹¹⁰ *Inquest into the Death of Naomi Williams* (n 1) 24 [107].

¹¹¹ *Ibid* 20 [91].

she had been stereotyped as a drug user without a meaningful diagnosis. Naomi's story is particularly tragic, when considering the small community that Naomi lived in and the network of ties between the individuals involved. Indeed, Naomi's grandmother had previously worked as a domestic worker at the hospital — one of the first Aboriginal employees — and was known to some of the nurses who had interacted with Naomi.

The lack of referral to a specialist was singled out by Coroner Grahame as a particular area of inadequacy in Naomi's care.¹¹² Two expert emergency physicians agreed that, given Naomi's recurring symptoms and presentations, and her admissions for nausea, vomiting, and pain, Naomi should have been referred to a specialist.¹¹³ Serious inadequacies were found in relation to Naomi's antenatal care.¹¹⁴ Dr Golez, Naomi's physician at Tumut, stated that Naomi was not referred to an obstetrician because it was not known whether Naomi's pregnancy was viable at that time. Coroner Grahame found that Dr Golez's antenatal care did not rise to the standard of a Fellow of the College of Obstetricians and Gynaecologists.¹¹⁵

The inadequate care Naomi received from Tumut Hospital extended to the day she died. Naomi presented to the Emergency Department at about 12:15 am on New Year's Day 2016, aching all over. A number of red flags were not identified by nurses that night, including but not limited to: Naomi driving herself to hospital on New Year's Eve; three presentations in 24 hours; observations on the border of the "yellow [sepsis] zone", low blood pressure and a high heart rate (especially when compared to her records); and the failure of hospital staff to access and consult Naomi's paper records when she attended the Emergency Department.¹¹⁶ While initially a nurse made a record that Naomi had presented with 'generalised aches and pains', a retrospective note made after Naomi's death added significant material, including a previously unmentioned hip pain.¹¹⁷ Naomi's serious symptoms were documented by her texts and statements to her partner that she felt extremely unwell.¹¹⁸ Coroner Grahame found that Naomi would only have attempted to find someone else to drive her, and would only have taken herself to a

¹¹² Ibid 24 [107].

¹¹³ Ibid 20-1 [93]-[95]

¹¹⁴ Ibid [91]-[107].

¹¹⁵ Ibid 24 [106].

¹¹⁶ Ibid 36-7, 48 [179], [183], [186], [240].

¹¹⁷ Ibid 28 [131].

¹¹⁸ Ibid 32 [157]-[158].

hospital if her symptoms had been distressing. In the face of this evidence, the nurses' benign characterisation of events that Naomi had come to Tumut Hospital late at night to 'request' some Panadol was not accepted by the Coroner.¹¹⁹

Naomi did not receive a sufficient pain assessment and should have remained at the hospital longer so her symptoms could have been monitored.¹²⁰ Coroner Grahame found that had Naomi remained in the Emergency Department, her chances of having the presence of bacterial infection suspected or diagnosed and treated would have been 'greatly increased' (though her survival would not have been certain).¹²¹ Naomi was only monitored for 34 minutes; a longer period of observation should have been implemented, especially as Naomi was pregnant.¹²²

B Racial Bias

Naomi felt uncomfortable with her care and believed that she was 'not being heard'.¹²³ Naomi felt stereotyped as she was referred to Drug and Alcohol Services twice by staff at Tumut Hospital, when other possible causes for her acute symptoms were not investigated.

Coroner Grahame's consideration of events from May 2015 until Naomi's death allowed NJP to demonstrate the pattern of racial bias. When interpreting the meaning of 'manner of death', courts look to *Josephine Conway v Mary Jerram* where 'manner of death' was described as requiring 'broad construction to enable to the coroner to consider by what means and in what circumstances death occurred'.¹²⁴ NSW courts have also cautioned against a 'wide ranging inquiry...exploring any suggestion of causal link'.¹²⁵ Coroner Grahame noted that having considered the authorities, she was satisfied that a proper investigation of events occurring in the lead-up to Naomi's death would be appropriate. Such a finding is significant as it shows the direct link between implicit racial bias and how it contributed to Naomi's death. The finding also allowed NJP to present expert evidence on culturally safe care and how it can lead to systemic change.

¹¹⁹ Ibid 32 [157]–[159].

¹²⁰ Ibid [192], [194], [197], [202], [223].

¹²¹ Ibid 44 [223].

¹²² Ibid [192], [194], [197].

¹²³ Ibid 24 [109].

¹²⁴ *Josephine Conway v Mary Jerram, Magistrate and NSW State Coroner & Anor* [2010] NSWSC 371, [52] (Barr AJ) (*Josephine Conway v Mary Jerram*).

¹²⁵ *R v Doogan; Ex p Lucas-Smith* (2005) 158 ACTR 1, [28]; *Harmsworth v State Coroner* [1989] VR 989.

It was Sharon Williams' concerns about racism and stereotyping that prompted her to make a formal complaint on behalf of her daughter. Sharon's letter clearly outlines Naomi's experiences of being stereotyped as a drug user and Naomi's wish to see a specialist. was being overlooked and "she was being stereotyped as some sort of drug addict".¹²⁶ This evidence was crucial to the case as Sharon clearly places Naomi's experiences within the context of perceptions in the Tumut community.¹²⁷ Expert evidence was given in the Inquest that although Naomi's cannabis use would be a factor that doctors should have considered, other diagnoses should have been actively investigated and considered.¹²⁸ Implicit bias is difficult to prove in a healthcare context. This letter and the hospital's dismissive response was crucial to NJP's ability to build a strong case for Naomi. It shows a clear link between racial stereotyping and Naomi's standard of care. The letter also demonstrates that Sharon's distress at her daughter's quality of care rose to a level where she acted to email the hospital.

After months of discrimination, Naomi decided that she would have her baby in Canberra because she felt she would receive a better quality of care there. Evidence presented at the Inquest in relation to Naomi's intention to move residence and travel to another place to have her baby at a different hospital clearly demonstrated her strong perception of discrimination experienced in Tumut Hospital. In Canberra, Naomi would have access to a local Aboriginal Medical Service, where she felt more comfortable and believed they would 'hear what she was saying'.¹²⁹

C Lowered Expectation of Care

The clear inadequacies Naomi experienced affected her decisions in relation to medical care by the end of December 2015. Naomi felt she was not being taken seriously, felt unheard and was planning to have her baby outside of Tumut Hospital for this reason. The Coroner found that at the time of Naomi's death she had already lost confidence in Tumut Hospital, which affected her decisions in the hours before her death. Coroner Grahame found Naomi's concerns to be 'legitimate', and that the treatment she had received informed the low expectations of care she developed.¹³⁰

¹²⁶ *Inquest into the Death of Naomi Williams* (n 1) 15 [61].

¹²⁷ *Ibid* 44 [224].

¹²⁸ *Inquest into the Death of Naomi Williams* (n 1) 22 [100].

¹²⁹ *Ibid*.

¹³⁰ *Ibid* 22 [111].

D Recommendations

After considering the evidence before her, the Coroner made the following powerful recommendations to the Murrumbidgee Local Health District (MLHD):¹³¹

1. Additional training on safety alerts such as re-presentation calls for medical review and high-risk pregnancy;
2. Introduction of a policy on Nurse Directed Emergency Care urgently;
3. Strengthening the Aboriginal Health Liaison Worker programme and making it available 24 hours a day;
4. Adopting targets for the employment of Aboriginal healthcare professionals;
5. Auditing implicit bias/racism and recording statistics;
6. Identifying and using assessment tools to measure implicit bias;
7. Establishing targets for proportional representation of Aboriginal people on local health boards and advisory committees;
8. Ongoing and meaningful consultation with HEAL (Healthy Enriched Aboriginal Living) Mawang (Together) Group with a view to developing a strong local model for providing culturally safe care; and
9. Investigating the strategies used in the Hunter New England area to develop culturally appropriate care.

Many of these recommendations have already been implemented and the MLHD:¹³²

- Has adopted targets for the employment of First Nations healthcare professionals;
- Is auditing implicit bias/racism and recording statistics;
- Is exploring tools to measure implicit bias;

¹³¹ Ibid 56–7. Note Recommendations have been paraphrased.

¹³² See Melinda Hayter, 'New Bias Concerns Emerge at Hospital Two Years after Inquest', *ABC News* (online, 30 August 2021) <<https://www.abc.net.au/news/2021-08-31/naomi-williams-mother-calls-out-ongoing-indigenous-bias-health/100417522>>.

- Has appointed two First Nations representatives on the MLHD health board and on advisory committees; and
- Commenced ongoing and meaningful consultation with HEAL (Healthy Enriched Aboriginal Living) Mawang (Together) Group with a view to developing a strong local model for providing culturally safe care.

The Centre for Aboriginal Health within the NSW Ministry of Health ('the Centre') was established in 2007.¹³³ It was created to focus specifically on improving the health and wellbeing of Aboriginal and Torres Strait Islander peoples in NSW. Following the Naomi Williams Case it has responsibility for the following strategic deliverables:

- Influence improved Aboriginal health and wellbeing outcomes through effective partnerships and responding to emerging health priorities, crises, or emergency public health issues.
- Enable NSW Health to provide culturally safe, considered and competent care, experiences, policy and workplaces.
- Drive system-wide accountability for Aboriginal health outcomes throughout NSW Health.
- Facilitate a greater focus on Aboriginal concepts of health and wellbeing across NSW Health and to other state or national agencies.
- Strengthen and communicate the evidence base on what works to improve Aboriginal health and wellbeing outcomes.
- If implemented in full, the Coroner's recommendations will establish the Naomi Williams Inquest as a strategic contributor to the changes in health care demanded by First Nations organisations and communities.

Although progress is being made, the death of Dougie Hampson¹³⁴ and others makes it clear that there is much more that needs to be done.

¹³³ Carmen Parter and Kim Browne, 'How Can We Do Things Differently in Aboriginal Health? The Same Challenges Seen through New Eyes' (2012) 23(4) *New South Wales Public Health Bulletin* 45, 56 [1].

¹³⁴ See Chelsea Watego et al, "I Catch the Pattern Of Your Silence", *Meanjin* (Web Page, 14 September 2022) <<https://meanjin.com.au/essays/i-catch-the-pattern-of-your-silence/>>; Zaarkacha Marlan, 'Ricky Hampson Died Just Hours after Leaving Dubbo Hospital. His Family Believe Racial Prejudice Was a Factor', *ABC News* (online, 3 July 2023) <<https://www.abc.net.au/news/2023-07-03/inquest-indigenous-man-ricky-dougie-hampson-junior-death-dubbo/102555672>>.

V END GOAL, OUTCOMES AND EVALUATION OF SUCCESS

The Inquest and the Health Justice Campaign, in conjunction with First Nations activists and community organisations, have contributed to and achieved various significant outcomes. This collective effort has led to:

- Ground-breaking findings by the Coroner, including the determination that ‘implicit racial bias’ contributed to Naomi Williams’ death;
- Powerful recommendations by the Coroner regarding culturally safe care and institutional change as set out above;
- Establishing and working with the P4JH to advocate and address racism in healthcare, including publishing of ground-breaking research on racism in health;¹³⁵
- The implementation of recommendations by MLHD (as outlined above); Commitments from the NSW Minister for Health and the Secretary of NSW Health to fulfill the Coroner’s recommendations, including through the strategic objects of the Centre;
- Public statements by Ms Maria Roche, cluster manager for MLHD, promising change and improvement at Tumut Hospital. Ms Roche acknowledged the local community’s perception of the hospital as unsafe for Aboriginal people, noting that some drive to other hospitals to avoid it;¹³⁶
- Amendments to the Nurses and Midwives’ Professional Standards to mandate culturally safe care;
- The development of a new strategy by First Nations partners prioritising cultural safety presented by the Australian Health Practitioner Regulation Agency and endorsed by 43 organisations, academics and individuals;¹³⁷

¹³⁵ See Chelsea Watego, David Singh and Alissa Macoun, *Partnership for Justice in Health Scoping Paper on Race, Racism and the Australian Health System* (Discussion Paper, 8 June 2021).

¹³⁶ *Ibid* 58 [281].

¹³⁷ Rachael Knowles, ‘First Nations-led Health Strategy Makes Cultural Safety Priority one for Indigenous Patients’ *National Indigenous Times* (online, 27 February 2020) <<https://nit.com.au/first-nations-led-health-strategy-makes-cultural-safety-priority-one-for-indigenous-patients/>>.

- Ongoing changes in the education of health workers, medical practitioners, and other clinicians to end racism and discrimination in healthcare;
- Sanctions against the health staff involved in Naomi's mistreatment; and
- Ongoing work with peak Aboriginal health bodies to advocate for change; and the development and implementation of an Aboriginal Patient Advocacy Training Programme.

VI SUMMARY

The long-term end goal of the Health Justice Campaign, and the work that NJP, the Jumbunna Institute, P4JH and other community activists and organisations are doing is to end discrimination in healthcare. In the short to medium term, these organisations work to achieve outcomes that lead to significant improvement and systemic change.

Through the Inquest, NJP, the Jumbunna Institute, and the Williams family ensured that the Coroner made significant findings and recommendations that recognised the role that prejudice and bias played in Naomi's death. NJP and the Jumbunna Institute were successful in emphasising the importance of culturally safe care to the Coroner. The Inquest enabled NJP and its partner organisations to expose the truth and leverage the findings and the recommendations to generate media attention in order to pursue multiple pathways to achieve culturally safe care. The Inquest recommendations offer a useful benchmark by which to judge campaign outcomes. NJP will continue to monitor the success of the strategic litigation against these recommendations and strive to ensure they are implemented broadly to protect future generations from the fatal consequences of racism, prejudice and discrimination in healthcare.

A The Fight Continues

Whilst the NJP, its stakeholders, and its partners achieved important outcomes through the Naomi Williams Inquest, their work to eradicate all forms of discrimination in healthcare is far from over. The campaign for justice continues.

As the NSW system lacks mandatory implementation of coronial recommendations, the outcomes of the Inquest must be continuously and proactively followed up.

The commitments made by the NSW Minister for Health and the Secretary of NSW Health are promising. However, these commitments were received in 2019, before the uncertainty brought by the COVID-19 pandemic. Ideally, health services and governments should self-monitor recommendations with vigilance and implement them effectively to ensure the required systemic change occurs. Until then, Naomi's mother, her family, the NJP, and its partners will continue to work together to ensure relevant institutions are held accountable and that the recommendations and proposed reforms are implemented.

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