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

ANDREW BOE*

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

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

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

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I INTRODUCTION

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

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

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

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

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

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

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

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

II THE RULE OF LAW

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

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

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

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

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

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

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

The appellant in *Munda:*

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

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

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

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

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

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

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

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

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

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

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

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

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

III THE VOICE

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

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

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

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

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

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

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

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

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

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[26] Keely Mcdonough, 'Momentous Occasion for the NSW District Court: Walama List marked with official ceremony', *Law Society Journal* (online, 4 April 2022) <https://lsj.com.au/articles/momentous-occasion-for-the-nsw-district-court-walama-list-marked-with-official-ceremony/>.

[27] Bugmy Bar Book Project Committee, 'The Bugmy Bar Book', (Web Page) <https://bugmybarbook.org.au/>.

[28] This is the writer's personal experience; see also Reconciliation Australia*, 2022 Australian Reconciliation Barometer* (Summary Report, 22 November 2022).

[29] For example, when Cathy Freeman won the 400m athletics final at the Sydney Olympics in 2000 after lighting the flame in the Opening Ceremony. The same athlete was officially rebuked by Australian chef de mission Arthur Tunstall for carrying the First Nations flag after winning the same event at the 1994 Commonwealth Games.

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

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

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

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

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

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

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

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

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

[38] Ibid 36, 38.

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

[40] Ibid.

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

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

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

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[41] Ibid 41.

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

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

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

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

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

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

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

B *Sentencing and bail options*

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

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

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[45] The author was born in Burma and is ethnically Burmese.

[46] See also Philip Lynch and Jacqueline Cole, 'Homelessness and Human Rights: Regarding and Responding to Homelessness as a Human Rights Violation' (2003) 4(1) *Melbourne Journal of International Law* 139.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV INCARCERATION AS PUNISHMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

and

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

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

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

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

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

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

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

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

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

V CONCLUSION

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

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

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

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

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

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

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

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

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

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[71] Joe Hinchcliffe, 'Plan to redevelop Gabba for Brisbane Olympics to cost 2.7b and a primary school, sparking outcry', *The Guardian* (online, 17 February 2023) <https://www.theguardian.com/sport/2023/feb/17/brisbane-2032-olympics-live-arena-gabba-rebuild-redevelopment-queensland>.

[72] Megan Gorrey, 'North Sydney Pool Rebuild to exceed 100m, as costs and delays blows out' *Sydney Morning Herald* (online, 11 February 2024) <https://www.smh.com.au/national/nsw/north-sydney-pool-rebuild-to-exceed-100m-as-costs-and-delays-blow-out-20240206-p5f2qm.html>

[73] David Watt, 'Australian War Memorial Development: a Quick Guide', *Parliament of Australia* (Research Paper, 30 September 2020).

[74] Chief Justice Lucy McCallum, 'The Rule of Law in Modern Australia' (Paul Byrne Memorial Lecture, University of Sydney, 28 February 2024) 9:06 <https://www.youtube.com/watch?v=h4O0QRV1SKA>.

[75] Paraphrased *'Lies'* in Yevgeny Yevtushenko, *Yevtushenko: Selected Poems* (Penguin Classics, 2008).

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'IT BEGINS WITH VICTORIA' — THE YOORROOK JUSTICE COMMISSION & INNOVATING TRANSITIONAL JUSTICE FOR FIRST NATIONS AUSTRALIA

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Transitional justice is long overdue to address colonialism and ongoing harms to First Nations people in Australia. The full truth of Australian history is ripe for recognition; yet, until recently, national efforts to address the colonial past have been partial, disconnected and State-centric. Moreover, the Federal government has often used the term 'reconciliation' politically as a rhetorical device, rather than a term of transitional justice. Nevertheless, in 2021, the State of Victoria established Australia's first ever comprehensive truth-telling process with the Yoorrook Justice Commission. Seeking to address the harms since colonisation, the state process is unprecedented, based on its scope, First Nations ownership, powers of a Royal Commission and ability to hold the state accountable. This article examines the Commission's contribution to structural truth-telling, First Nations empowerment, and institutional reform. It also identifies the Victorian initiative as a ground-breaking transitional justice model for settler-colonialism. Despite the challenges, incorporating truth and reconciliation through a First Nations lens might allow actual healing and practical change to occur.

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I INTRODUCTION

Australia's colonial era is formally over. Yet legacies of structural inequality, dispossession, exploitation, and racism against First Nations, Australians remain alive and well. From inter-generational trauma to historical massacres, Australia is yet to fully grapple with its dark past. Today, Australia finds itself at a critical juncture. The absence of constitutional protection of First Nations rights and national truth-telling, as well as the lack of treaty agreements, places First Nations' people in a uniquely vulnerable position. The Australian experience of transitional justice has been largely piecemeal and relatively ineffective in achieving the goals of truth-telling, reconciliation, and national healing. Moreover, Australia has engaged in 'reconciliation' as a political discourse rather than one of transitional justice.

Nevertheless, in 2021, Victoria established Australia's first ever truth-telling process with the Yoorrook Justice Commission. Seeking to address the harm perpetrated against First Nations people since colonisation, the state process is unprecedented in Australia and abroad. This article considers its relevance to national truth-telling, accountability, and structural reform. It also contends that the recent Victorian development marks an innovative transitional justice model for settler-colonialism departing from previous practices and scholarship. Indeed, the Yoorrook Justice Commission sets a valuable precedent for the establishment of a national Makarrata Commission. Ultimately, its work and design reflect the importance of First Nations ownership over transitional justice processes, and the need to name 'race' in conversations about harm and healing.

II COLONIAL LEGACIES OF HARM, RACE AND DENIAL

A *Harm and Race*

Since British settlement in 1788, large-scale political violence has been perpetrated against First Nations people. This has included the use of armed force, wars, over-incarceration, deaths in custody, the removal of children, and territorial dispossession.[1]

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[1] Henry Reynolds, *An Indelible Stain?: The Question of Genocide in Australia's History* (Viking Press, 2001); Jens Korff, 'Timeline results for 1770 to 1899', *Creative Spirits* (Web Page) <https://www.creativespirits.info/aboriginalculture/timeline/searchResults?q=&category=any&yearFrom=1770&yearTo=1899>.

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Unlike other settler-colonial states, like Canada and New Zealand, no formal treaty was signed with the over 200 separate First Nations communities who possessed the land for over 60,000 years.[2] Many communities resisted colonial invasion, but settler diseases, frontier wars, and mass atrocity deprived First Nations peoples of much of their community, culture, and country. First Nations peoples 'were dispossessed of their land parcel by parcel, to make way for expanding colonial settlement… [t]heir dispossession underwrote the development of the nation'.[3]

Specifically, race has been a conduit and catalyst for the legacies of abuse.[4] Colonisation was predicated on the indefensible notion that First Nations people were 'less civilised, less human, and less deserving than white people'.[5] This ideology coupled with land confiscation led to a suite of laws, policies, and practices that both enabled and supported the colonial project. For example, it was through 'the intersection between race and property' that the legal fiction of terra nullius was invoked by the British Crown to justify White land settlement.[6] Indeed, in *Mabo v Queensland [No 2]* ('*Mabo No. 2*') Brennan J noted that '[t]he theory that the indigenous inhabitants of a "settled" colony had no proprietary interest in the land thus depended on a discriminatory denigration of indigenous inhabitants, their social organization, and customs'.[7]

Accordingly, race has been embedded into the legal structures of the Australian state in a way that has allowed the harm to continue. At Federation, First Nations people were largely regarded as a 'dying race'[8] and 'marginal' by the drafters of the *Constitution*.[9] In this light, there were only two references to First Nations people in the *Constitution*, both

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[2] Peter 2, 'The past 50,000 years: an archaeological view' in Alison Bashford and Stuart Macintyre (eds), *The Cambridge History of Australia* (Cambridge University Press, 2013) 17, 19.
[3] (1992) 175 CLR 1, 69 (Brennan J) ('*Mabo No. 2*').
[4] Mark McMillan and Sophie Rigney, 'Race, reconciliation, and justice in Australia: from denial to acknowledgment' (2018) 41(4) *Ethnic and Radical Studies* 759, 759.
[5] Victorian Government, Submission to the Yoorrook Justice Commission (28 April 2023) [10] citing *Royal Commission into Aboriginal Deaths in Custody* (Final Report, April 1991) vol 1, [1.4.8]–[1.4.9] ('*RCIADIC*').
[6] Aileen Moreton-Robinson, 'Writing off Indigenous sovereignty: The discourse of security and patriarchal white sovereignty' in A Moreton-Robinson (ed) *Sovereign Subjects: Indigenous Sovereignty Matters* (Routledge, 2007).
[7] *Mabo No. 2* (n 3) 39 (Brennan J).
[8] Geoffrey Sawer, 'The Australian Constitution and the Australian Aborigine' (1966) 2(1) *Federal Law Review* 17, 18.
[9] John Chesterman and Brian Galligan, *Citizens Without Rights: Aborigines and Australian Citizenship* (Cambridge University Press, 1997) 71.

of which were exclusionary.[10] It was not until 1967 that the nation's founding document was amended to allow First Nations people to be counted in the Australian population.[11]

Racial laws have also been used to justify ongoing violence. Since European occupation, protection laws sought to dispossess First Nations people through assimilation and segregation on racial grounds.[12] For example, a complex set of laws underpinned by racial belief systems led to the removal of First Nations children from their families.[13] Other laws denied basic civil and political rights, such as voting, political participation, citizenship and freedom of movement and association. More recent examples include laws regarding the administration of criminal justice that appear unbiased yet are applied in a manner that reflects entrenched racism.[14]

B *Denial*

Not only has harm been inflicted on racial grounds, but it has been repeatedly denied.[15] In 1969, William Edward Stanner called upon historians to break 'the great Australian silence'.[16] White Australian institutions have created a narrative that has denied and/or minimised responsibility for harm.[17] Indeed, the Australian state and its laws have mirrored and perpetuated the denial of First Nations identity, presence, customs, and rights. Thus, legal proceedings frequently failed to redress many instances of harm perpetrated against First Nations people in the name of protection and welfare.[18] While

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[10] Section 51(xxvi) of the *Australian Constitution* provided that the Commonwealth had power to make laws with respect to 'the people of any race, *other than the aboriginal race in any State*' (emphasis added). Section 127 stated '[I]n reckoning the numbers of people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted'.
[11] Section 51(xxvi) altered by *Constitution Alteration (Aboriginals) 1967* (No 55 of 1967) s 2 and s 127 repealed by *Constitution Alteration (Aboriginals) 1967* (No 55 of 1967) s 3.
[12] As well as protectionist legislation, this included the *Neglected and Criminal Children Act 1864* (Vic) and the *Adoption Act 1928* (Vic); Australian Human Rights Commission, *Bringing them Home* (Final Report, April 1997) 50–8 ('*Bringing them Home*').
[13] *Bringing them Home* (n 11) 50–8.
[14] See Melissa Castan, 'Reconciliation, Law, and the Constitution' in Michelle Grattan (ed), *Reconciliation* (Bookman Press, 2000) 202, 206.
[15] McMillan and Rigney (n 4) 763.
[16] William Edward Hanley Stanner, *After the dreaming: black and white Australians – an anthropologists' view* (Australian Broadcasting Commission, 1969) 25 cited in Damien Short, 'When sorry isn't good enough: Official remembrance and reconciliation in Australia' (2012) 5(3) *Memory Studies* 293, 297 ('When sorry isn't good enough').
[17] McMillan and Rigney (n 4) 774.
[18] See *Kruger v Commonwealth* (1997) 190 CLR 1; Megan Davis, *Competing notions of constitutional 'recognition': truth and justice or living 'off the crumbs that fall off the White Australian tables?'* (Parliamentary Paper No 62, October 2014).

the landmark *Mabo No. 2* decision in 1992 paved the way for legislative recognition of native title, its limitations have caused new trauma for those who could not meet the stringent eligibility tests. For example, native title also established that such claims may be swept away "by the tides of history".[19] Legal decisions have thus denied the spiritual and ongoing First Nations connection to country.[20]

In 1996, the Federal Minister for Indigenous Affairs claimed that the Stolen Generations was not a 'generation' at all — because only ten per cent of children that potentially could have been removed from their families, were in fact removed.[21] More recently, former Prime Minister Scott Morrison denied that black slavery ever took place in Australia.[22] Although he later apologised, First Assembly Co-Chair and Taungurung man Marcus Stewart said that in 2020 such a statement from the nation's leader suggests "there's something fundamentally wrong about our nation's narrative and our state's narrative".[23] In sum, recognition of White Australia, and its systems, in the discrimination against First Nations peoples, as well as protection from ongoing racial oppression remain to be reckoned with.

III NATIONAL EFFORTS TO ADDRESS THE COLONIAL PAST

A *National Inquiries and Royal Commissions*

There is a history in Australia of Royal Commissions and inquiries on specific experiences of First Nations injustices. In 1987, the Royal Commission into Aboriginal Deaths in Custody was established to address concerns over Aboriginal and Torres Strait Islander

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[19] Bruce Buchan and Mary Heath, 'Savagery and Civilization: From Terra Nullius to the 'Tide of History''(2006) 6(1) *Ethnicities* 5, 21 quoting *Mabo No. 2* (n 3) (Brennan J).
[20] See, eg, *Members of the Yorta Yorta Aboriginal Community v State of Victoria & Ors* (2002) 214 CLR 422, [63]; Peter Seidel, 'Native title: The struggle for justice for the Yorta Yorta Nation' (2004) 29(2) *Alternative Law Journal* 70.
[21] Phillip Coorey, 'A party torn by semantics and pedantry', *The Sydney Morning Herald* (online, 4 February 2008); John Host and Jill Milroy, 'The stolen generations: John Herron and the politics of denial' (2001) (22) *Studies in Western Australian History* 141.
[22] Thalia Anthony and Stephen Gray, 'Was there slavery in Australia? Yes. It shouldn't even be up for debate', *The Guardian* (Web Page, 11 June 2020) <https://www.theguardian.com/australia-news/2020/jun/11/was-there-slavery-in-australia-yes-it-shouldnt-even-be-up-for-debate>.
[23] Caitlin Reiger, 'Australia's First Truth Commission: Transitional Justice to Face Colonial Legacies', *Justice Info* (Web Page, 30 June 2020) <https://www.justiceinfo.net/en/45000-australia-s-first-truth-commission-transitional-justice-to-face-colonial-legacies.html>.

People frequently dying in custody.[24] The Royal Commission investigated 99 incidents of Aboriginal and Torres Strait Islander People deaths in gaols, police stations and juvenile detention centres between 1 January 1980 and 31 May 1989.[25] It concluded that the high number of deaths was mainly due to First Nations people being grossly over-represented in the criminal justice system.[26] Importantly, the report exposed patterns of systemic disadvantage and institutional racism.[27] Nevertheless, three decades on, many of the Commission's 339 recommendations have not been implemented.[28] Indeed, there have been 527 First Nations deaths in custody across Australia since the Royal Commission.[29]

In 1995, the Human Rights and Equal Opportunity Commission was tasked with tackling the laws, policies, and practices that led to the state's removal of First Nations children. This became known as the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families (1997).[30] The inquiry interviewed over 500 affected individuals and spoke to organisations and First Nations groups across the country. The resulting *Bringing them Home* report contained harrowing evidence of First Nations children being removed from their families and communities.[31] By some estimates, up to 100,000 children were removed from the early years of settlement up until the late 1970s.[32] According to the report: 'not one Indigenous family has escaped the effects of forcible removal'.[33]

In many respects, this national inquiry was critical and powerful.[34] The report was 'widely read, with sixty thousand copies purchased in the first year of its release alone'.[35]

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[24] *RCIADIC* (n 5) vol 1, [1.1.2].
[25] Ibid [1.1.1].
[26] Ibid [1.3.1]–[1.3.2].
[27] Patrick Dodson, '25 Years On from Royal Commission into Aboriginal Deaths in Custody Recommendations' (2016) 8(23) *Indigenous Law Bulletin* 24, 24.
[28] 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, Australian National University) 17.
[29] 'Deaths in Custody in Australia', *Australian Institute of Criminology* (Web Page) <https://www.aic.gov.au/statistics/deaths-custody-australia>.
[30] *Bringing them Home* (n 12).
[31] Ibid.
[32] Ibid 37.
[33] Ibid 37.
[34] Colin Tatz, 'The Reconciliation "Bargain"' (1998) 25 *Melbourne Journal of Politics* 1, 1–8.
[35] Anne Orford, 'Commissioning the Truth' (2006) 15(3) *Columbia Journal of Gender and Law* 851, 867 citing John Bond, 'Time to Say Sorry to "Stolen Generations"', *For a Change* (Web Page, 1 February 1998) <https://www.foranewworld.org/material/articles/time-say-sorry-stolen-generations>.

Indeed, public awareness of the Stolen Generation and the colonial impact on First Nations lives increased significantly.[36] Nevertheless, the report's recommendations of an official apology and for compensation were dismissed by the Howard government.[37] Whilst the Rudd government publicly apologised in 2008,[38] no federal reparations scheme has been created. The report also failed to categorically characterise the harm perpetrated against the Stolen Generation as genocide. Rather, the report concluded that the forcible removal of First Nations children could 'be labelled genocidal'.[39] This more equivocal language allows space for contestation.[40] In so doing, it supports further denial, apologetics, and qualifications about state accountability for the past.

No doubt, national inquiries and commissions have helped to expose White Australians to aspects of historical injustices experienced by First Nations people.[41] During the twentieth century, there were 118 government investigations into Indigenous Affairs.[42] There have also been a range of First Nations-focused inquiries in Victoria, primarily in the areas of youth justice and child protection.[43] Nevertheless, such processes have generally been unable to translate truth-telling into structural reform and material compensation.[44] In sum, while '[t]ruth-telling has not been absent in the relationship between First Nations and non-First Nations Australia',[45] past inquiries have been limited narrowly focused, 'ad hoc and piecemeal'.[46]

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[36] Shireen Morris and Harry Hobbs, 'Imagining a Makarrata Commission' (2022) 48(3) *Monash University Law Review* 19.
[37] Lindy Kerin, 'Long Journey to National Apology', *ABC News* (Web Page, 13 February 2008) <https://www.abc.net.au/news/2008-02-13/long-journey-to-national-apology/1041564>.
[38] The speech was part of a formal motion that the Parliament then adopted. It was simultaneously broadcast on national television, as well as on large screens outside the Parliament building, reaching a significant audience: 'Apology to Australia's Indigenous Peoples', *Parliament of Australia* (Web Page) <https://www.aph.gov.au/Visit_Parliament/Art/Icons/Apology_to_Australias_Indigenous_Peoples#>.
[39] *Bringing them Home* (n 12) 239.
[40] McMillan and Rigney (n 4) 766–7.
[41] Christabel Chamarette, 'Terra Nullius Then and Now: Mabo, Native Title, and Reconciliation in 2000' (2000) 35(2) *Australian Psychologist* 167, 170.
[42] Tatz (n 34) 2.
[43] Commission for Children and Young People, *Always Was, Always Will Be Koori Children: Investigation into the Circumstances of Aboriginal Children and Young People in Out-of-Home Care in Victoria* (Report, 2016).
[44] Morris and Hobbs (n 36) 20.
[45] Gabrielle Appleby and Megan Davis, 'The Uluru Statement and the Promises of Truth' (2018) 49(4) *Australian Historical Studies* 501, 501.
[46] Ibid 502.

B *Political Reconciliation*

To the extent that the Australian government has reckoned with First Nations harm and healing, it has done so using the language of 'reconciliation'.[47] This discourse is individualised, with a focus on formal equality and socioeconomics,[48] rather than state accountability and past atonement.[49] It has denied claims to First Nations self-determination and sovereignty.[50] In 1991, the Council for Aboriginal Reconciliation was established 'to promote… a deeper understanding by all Australians of the history, cultures, past dispossession' and to provide a forum for discussion on reconciliation issues.[51] Composed of 25 First Nations and non-First Nations Australians,[52] the Council supported a range of large-scale national and local reconciliation initiatives during the 1990s. However, the federal government ultimately rejected the Council's recommendations for constitutional reform and treaty.[53]

The reconciliation policy prevailed over the next two decades. It was echoed in Prime Minister Kevin Rudd's formal apology to the Stolen Generation in 2008. On the one hand, his speech to Parliament marked an important national and discursive milestone.[54] On the other hand, it fell short of naming the state practices of removing First Nations children as genocide. According to Damien Short: 'the apology failed to describe the harm inflicted accurately, and in the terms favoured by many of the victims'.[55] In this way, 'the

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[47] Damien Short, *Reconciliation and Colonial Power: Indigenous Rights in Australia* (Routledge, 2008) 39–41 ('*Reconciliation and Colonial Power*')cited in McMillan and Rigney (n 4) 768.
[48] 'The key focus of the 'practical reconciliation' approach was addressing Indigenous disadvantage in employment, health, education and housing, policies that would be developed and implemented by the government with very little input from Aboriginal and Torres Strait Islander People': Samara Hand and Damien Short, 'Indigenous Rights and Reconciliation: Lessons from Australia' in Sheryl Lightfoot and Sarah Maddison (eds), *Handbook of Indigenous Public Policy* (Edward Elgar Publishing, 2024) 308, 308.
[49] See Short, *Reconciliation and Colonial Power* (n 47); Nicola Henry, 'From Reconciliation to Transitional Justice: The Contours of Redress Politics in Established Democracies' (2015) 9(2) *International Journal of Transitional Justice* 199.
[50] Ibid.
[51] *Council for Aboriginal Reconciliation Act 1991* (Cth) ss 6(1)(b), (d).
[52] Ibid ss 5, 14(1)(h).
[53] Sara Tomevska, 'Australia Had a Chance to Recognise First Nations Peoples in the Constitution 20 Years Ago. Why Didn't We?', *SBS News* (Web Page, 1 January 2023) <https://www.sbs.com.au/news/article/australia-had-a-chance-to-recognise-first-nations-peoples-in-the-constitution-20-years-ago-why-didnt-we/l27d3r0ew>; Harry Hobbs and George Williams, 'Treaty-Making in the Australian Federation' (2019) 43(1) *Melbourne University Law Review* 178, 221–2.
[54] Andrew Gunstone, 'Reconciliation, Reparations and Rights: Indigenous Australians and the Stolen Generations' in Corinne Lennox and Damien Short (eds), *Handbook of Indigenous Peoples' Rights* (Routledge, 2016) 301, 308.
[55] Short, 'When sorry isn't good enough' (n 16) 299.

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state supports reconciliation, rather than participating in it — this passive role allows the state to gain legitimacy, by making invisible the state's role as the cause of harm to Indigenous people'.[56] Arguably, successive governments have used reconciliation as a rhetorical device to silence First Nations calls for justice and truth-telling.[57] The temporal framing of reconciliation policy also situates harm in the past in a way that absolves White Australia from the ongoing harm of colonisation.[58] The discourse of political reconciliation has thus enabled White Australia to deny the scale and type of harm inflicted, as well as failing to engage in truth-telling in any depth or on Blak terms.[59]

C *Constitutional Reform*

More recently, the national discourse in Australia was focused on a constitutional amendment to recognise First Nations people. In 2015, the government appointed the Referendum Council. Following a series of regional dialogues, it facilitated a National Convention. This led to the *Uluru Statement from the Heart* ('*Uluru Statement*')[60] which called for a First Nations Voice to Parliament enshrined in the *Australian Constitution* ('Voice to Parliament') and a Makarrata Commission for agreement-making and truth-telling between Aboriginal and Torres Strait Islander people and Governments.[61] The Voice to Parliament was intended to 'redistribute public power via the *Constitution*' and create an 'institutional relationship' between governments and First Nations people.[62] In May 2022, the newly elected Prime Minister Anthony Albanese committed to a referendum on the Voice to Parliament and to full implementation of the *Uluru Statement*.

On 14 October 2023, Australians voted on recognition of First Nations people and creation of a permanent First Nations-led advisory body in the *Constitution*. The

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[56] McMillan and Rigney (n 4) 768.
[57] Hand and Short (n 48) 323, 327; Damien Short, 'Australian 'Aboriginal' Reconciliation: The Latest Phase in the Colonial Project' (2003) 7(3) *Citizenship Studies* 291, 297.
[58] Davis describes political reconciliation as 'a manifesto for maintaining the status quo': Megan Davis, 'The Truth About Truth-Telling' (December 2021) *The Monthly* ('The Truth About Truth-Telling').
[59] Blak is a term used by some First Nations people to reclaim historical, representational, symbolical, stereotypical and romanticised notions of Black or Blackness.
[60] *Uluru Statement from the Heart* (Statement, First Nations National Constitutional Convention, 26 May 2017) ('*Uluru Statement*'); Referendum Council, *Final Report of the Referendum Council* (Report, 30 June 2017) 1, 16–21 ('*Final Report of the Referendum Council*').
[61] Castan Centre for Human Rights Law, Submission to the Expert Mechanism on the rights of Indigenous peoples, *Treaties, Agreements and Other Constructive Arrangements between Indigenous peoples and States* (January 2022) 4 ('Submission to the Expert Mechanism').
[62] Megan Davis and George Williams, *Everything You Need To Know about the Uluru Statement from The Heart* (NewSouth Publishing, 2021) 143, 151–2.

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referendum was rejected nationally and by a majority in every state, thus failing to secure the double majority required. The referendum marked the 45th time Australia has attempted to change its founding document — but only eight proposals have ever cleared. Arguably, despite widespread public support for better outcomes for First Nations people, the Voice to Parliament failed due to a lack of political bipartisanship.[63] According to McAllister and Biddle, the questions put before voters 'lacked the crucial political clarity required to elicit broad public support'.[64] Australians generally support reconciliation policy but remain divided over how to operationalize it.

In any event, First Nations leaders have stressed that constitutional recognition requires more than symbolic 'acknowledgement' but substantive structural reform.[65] Indeed, since the failure of the Voice to Parliament referendum, little has been said about national truth-telling and treaty-making. It therefore remains to be seen whether political will still exists for the necessary unfinished transitional justice business. Moreover, attempts to 'close the gap' between First Nations and non-First Nations people have largely failed. Most recently the government's 2024 *Close the Gap* report, revealed that only five out of 19 targets are currently on track, emphasising the need for urgent changes in the state's approach to First Nations people.[66] Specifically, the targets for criminal justice, unemployment, youth justice, child protection and suicide prevention have all remained either unchanged or worsened. In these ways, structural and political harms are ongoing.[67] In sum, Australia still needs to meaningfully reckon with its historical past and its persistent legacies of abuse.

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[63] Ian McAllister and Nicholas Biddle, 'Safety or change? The 2023 Australian voice referendum' (2024) 59(2) *Australian Journal of Political Science* 1, 2.
[64] Ibid 2.
[65] See, for example, Megan Davis, 'Constitutional Recognition for Indigenous Australians Must Involve Structural Change, Not Mere Symbolism', *The Conversation* (Web Page, 18 February 2020) <https://theconversation.com/constitutional-recognition-for-indigenous-australians-must-involve-structural-change-not-mere-symbolism-131751>.
[66] Lowitja Institute, *Close the Gap: Voyage to Voice, Truth, Treaty and Beyond* (Final report, March 2024) ('*Close the Gap*').
[67] McMillan and Rigney (n 4) 770–1.

IV TRANSITIONAL JUSTICE FOR VICTORIA

A *Transitional Justice for Settler-Colonialism*

Transitional justice has become the dominant international framework for redressing mass harm and historical injustices. Broadly speaking, the field may be defined as a 'process' that aims to do justice at times of transition from authoritarianism or armed conflict. It addresses the wrongs of the previous regime[68] through judicial and non-judicial measures.[69] Traditionally, established democracies, like Australia, have not been regarded as requiring transitional justice.[70] Numerous authors have noted the difficulties of applying such mechanisms within settler-colonial societies.[71] For example, official truth-telling frequently risks emboldening rather than challenging the state.[72] Transitional justice as a field can lean towards state-centric, Western concepts which reinforce the settler-colonial relationship.[73]

At the same time, a recent trend exists towards applying transitional justice measures to democratic nations.[74] As the cases of Canada and the United States ('US') aptly demonstrate, truth-seeking endeavours have become increasingly relevant to facing colonial legacies. For example, Canada's Truth and Reconciliation Commission (2008–15) examined residential schools for Indigenous children and the Maine-Wabanaki Truth Commission (2013–15) dealt with the US state of Maine's child welfare system.[75] Whilst

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[68] Ruti Teitel, *Globalizing Transition Justice: Contemporary Essays* (Oxford University Press, 2014) xii.
[69] Fabián Salvioli, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, GA Res 45/45, UN Doc A/HRC/45/45 (9 July 2020) 4.
[70] See, eg, Colm Campbell, Fionnuala D Ní Aoláin and Colin Harvey, 'The Frontiers of Legal Analysis: Reframing the Transition in Northern Ireland' (2003) 66(3) *Modern Law Review* 317; Christine Bell, 'Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'Non-Field'' (2009) 3(1) *International Journal of Transitional Justice* 5.
[71] See, eg, Jennifer Balint, Julie Evans, and Nesam McMillan, 'Rethinking Transitional Justice, Redressing Indigenous Harm: A New Conceptual Approach' (2014) 8(2) *International Journal of Transitional Justice* 194; Jennifer Henderson and Pauline Wakeham, 'Colonial Reckoning, National Reconciliation?: Aboriginal Peoples and the Culture of Redress in Canada' (2009) 35(1) *English Studies in Canada* 1.
[72] Stephen Winter, *Transitional Justice in Established Democracies: A Political Theory* (Palgrave Macmillan, 2014); Balint, Evans and McMillan (n 71) 201–2.
[73] Victoria Roman, 'From Apology to Action: A Comment on Transitional Justice in the United States and Canada' (2022) 37(1) *Maryland Journal of International Law* 122.
[74] See generally Balint, Evans and McMillian (n 71).
[75] In Canada, refer to the various reports issued by the Truth and Reconciliation Commission: 'Reports', *National Centre for Truth and Reconciliation* (Web Page) <https://nctr.ca/records/reports/#trc-reports>. See also *Beyond the Mandate: Continuing the Conversation* (Maine Wabanaki-State Child Welfare Truth & Reconciliation Commission Report, 14 June 2015) 6.

some academics adhere to a narrow legalistic concept of transitional justice,[76] others persuasively argue for a thicker view, in which 'dealing with the past' extends beyond fixed transitional periods or democratisation.[77] As Ní Aoláin and Campbell observe, authoritarian entities are not the only ones to commit systematic rights violations.[78] To this end, transitional justice is also an extremely useful framework to examine historical injustices in established democracies.[79]

In the Australian context, human rights violations warrant a transitional justice response as the wrongdoing against its first inhabitants remains embedded in state policy.[80] This is particularly urgent given that national processes in Australia have not adequately engaged the past, the limitations of political reconciliation and the recent failure of the Voice referendum. A meaningful process about the ongoing violence of colonisation seems critical to transforming the First Nations–settler relationship.[81] Victoria is happily applying a transitional justice approach to reconciling with First Nations Australians. It has the most advanced truth-telling and treaty model of all Australian jurisdictions. On 11 July 2020, the Australian state government of Victoria announced it will work with First Nations communities to establish Australia's first truth and justice process to formally recognise historic wrongs and address ongoing injustices against its First Nations peoples.

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[76] See, eg, Campbell, Ní Aoláin and Harvey (n 70); Bell (n 68); Christine Bell, Colm Campbell and Fionnuala Ní Aoláin, 'Transitional justice: (re)conceptualising the field' (2007) 3(2) *International Journal of Law in Context* 81. For example, Bell, Campbell and Ní Aoláin claim, '[a]t the very least, there needs to be an awareness that legalism, a focus on law's normativity, and the imperative to frame questions in legal terms may privilege elite understandings and render invisible key issues affecting disenfranchised groups': at 83.

[77] See, eg, Kieran McEvoy, 'Beyond Legalism: Towards a Thicker Understanding of Transitional Justice' (2004) 34(4) *Journal of Law and Society* 411; Ron Dudai, 'A Model for Dealing with the Past in the Israeli-Palestinian Context' (2007) 1(2) *International Journal of Transitional Justice* 249.

[78] Fionnuala Ní Aoláin and Colm Campbell, 'The Paradox of Transition in Conflicted Democracies' (2005) 27(1) *Human Rights Quarterly* 172, 174.

[79] Nicola (n 49) 205.

[80] Stephen Winter, 'Towards a Unified Theory of Transitional Justice' (2013) 7(2) *International Journal of Transitional Justice* 224, 244.

[81] Hand and Short (n 48) 323, 327. Damien Short, 'Australian 'Aboriginal' Reconciliation: The Latest Phase in the Colonial Project' (2003) 7(3) *Citizenship Studies* 291.

B *Treaty-Making*

The development of a treaty between the Victorian Government and First Nations peoples in the state is currently underway.[82] In 2018, the Government formally committed to the treaty process by passing the *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic). This led to the establishment of the First Peoples' Assembly of Victoria, a democratically elected representative body for First Nations Victorians.[83] In 2022, an independent Treaty Authority was recognised and legally empowered by the *Treaty Authority and Other Treaty Elements Act 2022* (Vic).[84]

This Treaty Authority is the first of its kind in Australia, and places First peoples' culture at the heart of its practices.[85] The Treaty Authority seeks to mediate the significant power imbalance by creating an institution independent of the Parliament and the Government.[86] The Treaty Authority is an important example of the realisation of First Nations' right to self-determination as recognised in international human rights law.[87] The Self-Determination Fund (through which the independent funding of First Peoples' negotiation with the State is generated) was established in November 2022.[88] The Victorian treaty provides an opportunity to enhance the legal protections and reinforce rights of First Nations people in Victorian and facilitate the transfer of authority and resources to allow traditional owners and First Nations people to exercise control over matters that impact upon them.[89]

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[82] 'Treaty for Victoria', *First Peoples – State Relations* (Web Page, 30 March 2021) <https://www.aboriginalvictoria.vic.gov.au/treaty>.
[83] 'We are the First Peoples' Assembly', *First Peoples' Assembly of Victoria* (Web Page) <https://www.firstpeoplesvic.org/about/the-assembly/>.
[84] *Treaty Authority and Other Treaty Elements Act 2022* (Vic) pt 2.
[85] Melissa Castan, Kate Galloway and Scott Walker, 'A New Treaty Authority between First Peoples and the Victorian Government is a Vital Step Towards a Treaty', *The Conversation* (Web Page, 16 June 2022) <https://theconversation.com/a-new-treaty-authority-between-first-peoples-and-the-victorian-government-is-a-vital-step-towards-a-treaty-184739>.
[86] Ibid.
[87] Ibid.
[88] 'Treaty Fund to Help Lebel the Playing Field for First Peoples in Victoria', *First Peoples' Assembly of Victoria* (Web Page, 24 November 2022) <https://www.firstpeoplesvic.org/news/treaty-fund-to-help-level-the-playing-field-for-first-peoples-in-victoria/>.
[89] 'Pathway to Treaty', *First Peoples – State Relations* (Web Page, 18 July 2024) <https://www.aboriginalvictoria.vic.gov.au/treaty-process/>.

C *Truth-Telling: Yoorrook Justice Commission*

In the *Uluru Statement*, First Nations people called for 'truth-telling about our history' to build a 'fair and truthful relationship with the people of Australia'.[90] First Nations leaders have long campaigned for recognition of history and accountability for the past.[91] Building on this activism, in June 2020, Victoria's First People's Assembly agreed that truth-telling must be a fundamental part of treaty-making and called on the government to establish a formal truth-telling process.

In 2021, the Victorian Government established the Yoorrook Justice Commission to undertake a formal and comprehensive inquiry into colonial violence.[92] It has charted a course expressly aligned with transitional justice.[93] Unlike previous truth-seeking inquiries and commissions, the Yoorrook Justice Commission is the first one explicitly labelled as such.[94] This state process is vested with the powers of a Royal Commission and is unprecedented.[95] Indeed, the Victorian initiative marks the first time any Australian government has embarked on treaty-making accompanied by a comprehensive process of truth-telling with First Nations peoples at the same time. The Commissioners were appointed through a transparent nomination process and include four First Nations Victorians and one non-First Nations Commissioner. Former Federal Court Judge, the Honourable Anthony North KC, has recently been appointed as a Commissioner of Victoria's formal truth telling process within the Yoorrook Justice Commission.

The terms of reference and the form of the Commission were designed by the First People's Assembly and the government and were based on consultations with local Aboriginal communities. In institutional form, the Yoorrook Justice Commission is a transitional justice commission grounded in international human rights law.[96]

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[90] *Final Report of the Referendum Council* (n 60) 1, 16–21.
[91] Morris and Hobbs (n 36) 22.
[92] Victoria, *Victoria Government Gazette*, No S 217, 14 May 2021 ('Victorian Gazette No S 217').
[93] Megan Davis, 'Speaking up' (2022) *Griffith Review 76: Acts of Reckoning* (online) <https://www.griffithreview.com/editions/acts-of-reckoning/>.
[94] Yoorrook' is a Wamba Wamba word meaning 'truth'.
[95] Under the *Inquiries Act 2014* (Vic) s 5 the Royal Commission has the power to summons witnesses to appear before it, produce a document or other material piece of evidence and require them to answer questions under oath or affirmation.
[96] See Human Rights Council, *Human rights and transitional justice,* GA Res 21/15, UN Doc A/HRC/RES/21/15 (11 October 2012).

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Specifically, the Commission has a broad mandate to inquire into and report on historical systemic injustices perpetrated against First Nations people since colonisation (such as massacres, wars, and genocide), as well as ongoing systemic injustices (such as policing and child protection).[97] The Commission's role is to listen to First Nations' stories and to establish an official public record of First Nations' experiences of systemic injustices since the colonisation of Victoria. The Commission is expected to make detailed recommendations for changes to laws, policy and education and the types of matters to be included in future treaties.

Since 2021, the Commission has been investigating the impacts of colonisation in Victoria. The Yoorrook Justice Commission first convened on 24 March 2022 for a ceremonial first hearing and has subsequently sat formally several times since to hear evidence.[98] The Commission delivered an interim report in June 2022,[99] and a critical issues report two month later into systemic injustice within the child protection and criminal justice systems. Following a one-year inquiry, the report found evidence of gross human rights abuses and issued 46 recommendations.[100] In April 2024, Yoorrook Justice Commission completed another series of hearings about the colonial impact on land, sky and waters in Victoria. Most recently, the Commission's public hearings (May 2024) focuses on systemic injustice in relation to First Nations health, education, housing and economic life. The Yoorrook Justice Commission will deliver its final report and official public record to the Co-Chairs of the First Peoples' Assembly and Governor of Victoria by 30 June 2025.

V YOORROOK JUSTICE COMMISSION: OPPORTUNITIES AND TRANSITIONAL JUSTICE INNOVATION

The application of transitional justice to Australia is a relatively new field of scholarship.[101] This section outlines the unique opportunities offered by the Yoorrook Justice Commission to reckoning with historic harms in Australia. It also explores the

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[97] 'Truth and Justice in Victoria', *First Peoples – State Relations* (Web Page, 4 April 2024) <https://www.aboriginalvictoria.vic.gov.au/truth-and-justice> ('Truth and Justice in Victoria').
[98] 'Past Hearing Videos', *Yoorrook Justice Commission* (Web Page) <https://yoorrookjusticecommission.org.au/hearings/>.
[99] Yoorrook Justice Commission, *Yoorrook With Purpose* (Interim Report, 30 June 2022) ('*Yoorrook With Purpose*')
[100] Yoorrook Justice Commission, *Yoorrook for Justice* (Report, 31 August 2023) ('*Yoorrook for Justice*').
[101] Balint, Evans, and McMillan (n 71) 194–216; Henry (n 49).

Yoorrook Justice Commission as an innovative transitional justice mechanism for settler-colonialism. By adopting a radically local approach to truth-telling, the Commission might serve as a corrective to critiques of the field. These have included narrow legalism,[102] top-down processes[103] and sidelining structural issues.[104] Traditionally, transitional justice is a liberal template that privileges civil and political rights,[105] which has excluded groups such as First Nations peoples.[106] In these respects, and others, the Yoorrook Justice Commission is unprecedented. The level of First Nations involvement and ownership, its authority as a Royal Commission and the range and breadth of its inquiry warrant international attention. Indeed, in a recent report on 'Transitional Justice Measures in Colonial Contexts', the United Nations Special Rapporteur mentioned the Yoorrook Justice Commission as a unique example of a transitional justice commission for First Nations peoples.[107]

At a national level, the Yoorrook Justice Commission marks a radical departure from past inquiries and the political rhetoric of reconciliation. By placing the Victorian state properly at the centre of any questions of redress, the Commission opens a space for institutional accountability. In addressing systemic harms, it also gives socio-economic harms a place in the construction of what healing might look like for First Nations Australia and official truth-telling mechanisms. In this way, Victoria is developing its potential as a truth-telling lab where First Nations peoples, together with transitional justice policy, transcend the conceptual comfort zone and dominant practices of the field.

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[102] McEvoy (n 77) 411–40.

[103] Rosalind Shaw, 'Memory Frictions: Localizing the Truth and Reconciliation Commission in Sierra Leone' (2007) 1(2) *The International Journal of Transitional Justice* 183; Kieran McEvoy and Lorna McGregor (eds), *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (Hart Publishing, 2008).

[104] Mahmood Mamdani, 'A Diminished Truth' in James Wilmot and Linda. Van de Vijver (eds), *After the TRC: Reflections on Truth and Reconciliation in South Africa* (Ohio University Press, 2001) 58; Zinaida Miller, 'Effects of Invisibility: In Search of the 'Economic' in Transitional Justice' (2008) 2(3) *International Journal of Transitional Justice* 266, 266–91; Claire Moon, *Narrating Political Reconciliation: South Africa's Truth and Reconciliation Commission* (Lexington Books, 2008).

[105] Paul Gready and Simon Robins, 'From Transitional to Transformative Justice: A New Agenda for Practice' (2014) 8(3) *International Journal of Transitional Justice* 339, 341.

[106] Maja Davidovic, 'Transform or Perish? The Crisis of Transitional Justice' (2019) 20(1) *Conflict, Security & Development* 293, 294.

[107] Fabian Salvioli, Special Rapporteur, *Promotion of truth, justice, reparation and guarantees of non-recurrence,* GA Res 76/180, UN Doc A/76/180 (19 July 2021). The Special Rapporteur noted that '[t]he Yoorrook Justice Commission provides a positive example of a broad approach and the involvement of affected communities': at [51].

A Transitional Justice from 'Below': Locally Owned and Culturally Autonomous

> *"To move forward together, we must reckon with this past, and that includes understanding history from First Peoples' perspective*." [108]

The Yoorrook Justice Commission is marked by a conceptual and normative paradox. It is established as a Royal Commission, drawing its legal powers and authority from the very colonial framework it seeks to hold accountable. At the same time, the Commission's mandate and decision-making is independent of Government and entirely First Nations led. The Commission innovated operational practices to bolster perceptions of its independence.[109] Thus, unlike other Royal Commissions, which use a government server, the Yoorrook Justice Commission engaged an First Nations-owned digital agency to develop its own website and domain name. The Letters Patent also recognises that the Commission upholds the sovereignty of First Nations over their knowledge and stories by consulting with First Nations people and ensuring adequate information and data protection without interference.[110]

As scholars have argued, communities must have input into their own transitional justice mechanisms: this is transitional justice 'from below'.[111] In the post-colonial context, the need for participation, representation and ownership is fundamental to Indigenous people.[112] It is therefore commendable that the Yoorrook Justice Commission has integrated cultural values and First Nations voices into its practices. This includes the use of First Peoples' language. The Commission's title 'Yoorrook' (meaning 'truth') is itself derived from the Wemba Wemba language. The Commission has also incorporated First Nations art into its work, logo, and branding.

According to Cohen, '[i]n many indigenous cultures, wisdom about how to restore harmony in the aftermath of violence is embedded in ritual practices.'[113] Thus, a defining

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[108] Yoorrook Justice Commission, 'Newsletter Issue 11' (20 October 2023) *Newsletter.*
[109] *Yoorrook With Purpose* (n 99) 14.
[110] *Letters Patent*, Yoorrook Justice Commission (at 8 September 2021) para 4(f)(iv) <https://yoorrookjusticecommission.org.au/wp-content/uploads/2023/03/Yoo-rrook-Justice-Commission-Letters-Patent-14-05-21-1.pdf > ('*Letters Patent*').
[111] McAvoy and McGregor (n 102).
[112] Carsten Stahn, 'Confronting Colonial Amnesia Towards New Relational Engagement with Colonial Injustice and Cultural Colonial Objects' (2020) 18(4) *Journal of International Criminal Justice* 814.
[113] Cynthia Cohen, 'Reimagining Transitional Justice' (2020) 14(1) *The International Journal of Transitional Justice* 1, 3.

feature of Yoorrook is acknowledging the cultural authority of Elders through guidance and communal processes. In early 2022, Commissioners travelled across Victoria to meet with Elders on numerous Traditional Owners' countries.[114] The Commissioners met with around 200 Elders at 29 traditional 'yarning circles.' More recently, the Yoorrook Justice Commission has held roundtables with over 850 Traditional Owners in Victoria on land and water injustices. This local ownership extends transitional justice theory by refusing 'the state's framing of the issues'.[115] In this way, the Commission has laid strong foundations for trust and cultural legitimacy with First Nations people. Culturally informed advice has become ever more pressing in the wake of the failed Voice to Parliament advisory body.[116]

B *Comprehensive Truth-Telling, Connecting the Dots, and Blak Voices*

> *"The systemic injustices that First Peoples have experienced are not confined to history*."
>
> Gabrielle Williams, Victorian Minister for Aboriginal Affairs[117]

Whilst past inquiries and the Rudd apology marked moments of national reckoning, they only ever addressed one aspect of the violence and were not part of a comprehensive truth-telling process. Significantly, the Yoorrook Justice Commission is mandated to address the multiplicities of harm inflicted on First Nations peoples, in a more holistic manner. Firstly, the period of inquiry extends from colonisation to the present.[118] Secondly, it considers the historical and ongoing structural injustices inflicted by the settler-colonial state. This includes massacres, protectionist laws, Christianising and assimilation policy, land justice, and the First Nations welfare system.[119] From May 2024, the Yoorrook Justice Commission conducted social justice hearings and gathered an enormous body of evidence on health, housing, education and economic injustices. This

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[114] *Yoorrook With Purpose* (n 98) 16.
[115] Leanne Betasamosake Simpson, *As We Have Always Done: Indigenous Freedom through Radical Resistance* (University of Minnesota Press, 2017) 15.
[116] Narelle Bedford, 'The Aftermath: What if The Voice Referendum Does Not Succeed?' (2023) 34(2) *Public Law Review* 156, 161.
[117] Hand and Short (n 48) 326.
[118] Colonisation is defined as 'from 1788': *Letters Patent* (n 110) para 6.
[119] *Yoorrook With Purpose* (n 99) viii.

is innovative as official transitional justice measures tend not to focus on the welfare of the population and its contextualised needs.[120]

Under this broad mandate, the Yoorrook Justice Commission must identify how institutional injustices continue to affect First Nations Victorians today.[121] Indeed, the challenge in post-colonial contexts is to find ways in which truth-recovery could tackle not just the forensic details of violations, but also the systemic and ongoing nature of abuses. Given the recent debates around the Voice referendum, many Australians remain unable to link the colonial past with Aboriginal people being a persistently vulnerable minority.[122] Thus, facing the racial past is more than just than documenting abuses, it's about exposing 'implicit truths' surrounding white privilege, power, and bias. This is no small task. As discussed, the colonial past has been too frequently denied, silenced, and even implicitly reproduced in contemporary legal frameworks.[123] For example, the recognition of native title shows how laws passed to rectify historic injustices also risk inadvertently reinforcing them.[124]

To this end, the Yoorrook Justice Commission has embarked on a process of truth-telling, that connects the dots between the past and present, seeking to 'un-do history'.[125] There is an urgency to this undertaking. Evidence shows that the child protection and criminal justice systems are only deteriorating for First Peoples.[126] At the end of 2022, the Yoorrook Justice Commission completed two weeks of public hearings, during which 84 witnesses, including First Nations leaders and experts, universities and First Nations community gave evidence about systemic injustices in the child protection and criminal justice sectors.[127] Just as race has operated as a factor in the infliction of harm, race can also be central to truth-telling practices. To this end, the Yoorrook Justice Commission is

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[120] Gready and Robins (n 105) 341.
[121] Victorian Gazette No S 217 (n 92) 3.
[122] Catriona Elder, 'Unfinished Business in (Post)Reconciliation Australia' (2017) 61 *Australian Humanities Review* 74, 79.
[123] Antony Anghie, 'Towards a Postcolonial International Law' in Prabhakar Singh and Benoît Mayer (eds), *Critical International Law: Postrealism, Postcolonialism and Transnationalism* (Oxford University Press, 2014) 123.
[124] Buchan and Heath (n 19).
[125] Courtney Jung, 'Canada and the Legacy of the Indian Residential Schools: Transitional Justice for Indigenous People in a Nontransitional Society' in Paige Arthur (ed), *Identities in Transition: Challenges for Transitional Justice in Divided Societies* (Cambridge University Press, 2010) 217, 231; Morris and Hobbs (n 35) 20.
[126] *Close the Gap* (n 66).
[127] Yoorrook Justice Commission, 'Newsletter, Issue No. 4' (24 February 2023) *Newsletter.*

giving a platform to Victoria's Blak voices to articulate their harm and healing, and as such is supporting First Nations conceptions of justice.[128]

Over the course of one year, Yoorrook Justice Commission heard from First Peoples with first-hand experience of harm in the child protection and criminal justice systems.[129] At public hearings, Commissioners were told deeply personal stories of the impact of police racism and brutality, of the harm of child removal, and of failures within Victoria's prison system.[130] The Commission documented gross human and cultural rights violations, past and ongoing, committed at the hands of the state.[131] Creating a historical record that links dispossession and colonial policy *with* current laws and attitudes that perpetuate the harm is the Victorian key to reckoning with the past, and to heralding institutional reform.

The Yoorrook Justice Commission's wider framing of truth-telling is vital to dealing with settler-colonialism. Comparable transitional justice experiences have been criticised for failing to recognise colonial continuities.[132] For example, the South African Truth and Reconciliation Commission focused on human rights abuses between 1960–94, 'missing the bigger picture of apartheid and its historical foundations in colonisation'.[133] Similarly, the Canadian Truth and Reconciliation Commission examined 'the tragedy of residential schools' rather than the ongoing harms of settler colonialism.[134] By squarely addressing how past actions are rooted in systemic harm, the Yoorrook Justice Commission sets a new precedent for liberal democracies.[135]

C *State Accountability*

> *"For over 100 years…Victoria Police contributed to the Stolen Generations by enforcing policies and laws…"*

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[128] McMillan and Rigney (n 4) 772.
[129] More than 15 witnesses appeared before the Commission in a combination of public, closed and pre-recorded hearing sessions: Yoorrook Justice Commission, 'Newsletter, Issue No. 5' (11 April 2023) *Newsletter.*
[130] Yoorrook Justice Commission, 'Newsletter, Issue No. 10' (4 September 2023) *Newsletter.*
[131] Ibid.
[132] Augustine SJ Park, 'Settler Colonialism, Decolonization and Radicalizing Transitional Justice' (2020) 14(2) *International Journal of Transitional Justice* 260, 272; Henderson and Wakeham (n 69).
[133] Mamdani (n 104) 58.
[134] Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (University of Minnesota Press, 2014).
[135] Roman (n 73).

Chief Commissioner of Victorian Police, May 2024[136]

The Yoorrook Justice Commission seeks accountability for past atrocities 'perpetrated by state and non-state entities against First Peoples since the start of colonisation'.[137] In this way, the Commission enters a new relationship with the Victorian state, as the entity responsible for much of the harm, and now required to acknowledge the injustices against First Nations Victorians. This is unprecedented. As discussed, Australia has a long history of state institutions refusing to acknowledge the type and scale of harms perpetrated against First Nations Australia; and the reconciliation movement has favoured political rhetoric over material redress.[138] In Victoria, there has been little progress in accountability for gross violations of First Nations rights. There have been an estimated 34 Aboriginal deaths in custody since the 1991 Royal Commission in the state, and yet the issue remains largely unresolved. [139]

Nevertheless, the Yoorrook Justice Commission seems to be making inroads on this front. In April 2023, the Commission held public hearings in which Commissioners questioned ministers and senior bureaucrats about First Nations injustices in the criminal justice and child protection systems. These historic hearings marked the first time an Aboriginal-led Royal Commission has publicly held to account the authorities that have exercised power over the lives of First Peoples for generations.[140] Significantly, seven government representatives made formal apologies for past and current harms against First Peoples.[141] The Secretary of the Department of Justice and Community Safety acknowledged that one of the primary drivers of over-representation of First Peoples in the criminal justice system is systemic racism. Similarly, the Victorian Attorney-General, acknowledged that structural racism inherited from the colonial past persists in the criminal justice system.[142] The Minister for Police accepted that many police racially

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[136] 'Apology to the Stolen Generation', *Victoria Police* (Web Page, 24 May 2024) < https://www.police.vic.gov.au/apology>.
[137] 'Truth and Justice in Victoria' (n 97).
[138] McMillan and Rigney (n 4) 759.
[139] Submission to the Expert Mechanism (n 61) 4.
[140] Yoorrook Justice Commission, 'Newsletter, Issue No. 6' (31 May 2023) *Newsletter* ('Newsletter, Issue No. 6')1.
[141] Ibid. These included the Victorian Attorney-General, Chief Commissioner of Victoria Police and the Minister for Children Protection and Family Services. Many other witnesses who didn't make formal apologies, acknowledged the suffering of First Peoples caused by government actions.
[142] Ibid.

profile First Peoples, and acknowledged the lack of accountability for Aboriginal deaths in custody since the 1991 Royal Commission.[143] After decades of denial, these on the record admissions are considerable achievements.

In October 2023, Yoorrook Justice Commission made a series of 46 recommendations to address injustices in the criminal justice system, many of which related to policing.[144] On 3 April 2024, the Victorian Government formally accepted 28 of the recommendations in full or in principle, and another 15 remain under consideration. [145] Arguably, this official response reflects the effectiveness of First Nations led truth-telling. At the same time, the state rejected three recommendations on raising the age of criminal responsibility, bail reform and pursuing human rights abuses through the Victorian Civil and Administrative Tribunal. This has been widely criticised.[146] Yet, it does not detract from the Commission making space for First Nations experience to confront institutions of power.[147]

VI YOORROOK JUSTICE COMMISSION: PRACTICAL CHALLENGES

A *Responsibility for a Distant Past?*

> *"We want our fellow Victorians to stand with us and walk with us on this journey…We all need to shoulder this responsibility..."*
>
> First People's Assembly Co-Chair Marcus Stewart[148]

It is worth recalling that post-colonial harm involves multi-generational trauma far removed from the present. Invoking collective responsibility for violations committed hundreds of years ago is therefore no small task. Perhaps for this reason, truth commissions have frequently examined the more recent past and narrower subject-matter. The U.S. Greensboro Truth and Community Reconciliation Commission focused

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[143] Ibid.
[144] *Yoorrook for Justice* (n 100).
[145] Yoorrook Justice Commission, 'Newsletter, Issue No. 16' (22 May 2024) *Newsletter.*
[146] Kieran Rooney and Rachel Eddie, 'Yoorrook Hits Back After Government Rejects "Crucial" Indigenous Reforms', *The Age* (Web Page, 3 April 2024) <https://www.theage.com.au/politics/victoria/government-delays-call-on-separate-indigenous-child-protection-system-20240403-p5fh16.html>.
[147] Rosemary Nagy, 'Settler Witnessing at the Truth and Reconciliation Commission of Canada' (2020) 21(3) *Human Rights Review* 219, 237; Roman (n 134).
[148] Nicole Asher, 'Commissioners chosen for Australia's first Aboriginal truth-telling inquiry', *ABC News* (Web Page, 14 May 2021) <https://www.abc.net.au/news/2021-05-14/aboriginal-truth-telling-inquiry-commissioners-selected/100139586>.

on two weeks in November 1979. As noted, Canada's Truth and Reconciliation Commission (2008–15) was established to examine the Canadian First Nations residential school system. However, the Yoorrook Justice Commission is challenging the entire colonial enterprise and its current footprint. On one hand, this is exceedingly ambitious. On the other, it is a crucial project if Victoria is to meaningfully account for historical and ongoing injustices.

Mainstream accountability for the past continues to face resistance.[149] In 2002, Keith Windschuttle published 'The Fabrication of Aboriginal History', inciting a national academic/media war over responsibility for the colonial past. The extent to which the present generation might atone for historical violence remains uncertain.[150] The recently failed Voice proposal also marks a setback for recognition of First Nations rights. At the same time, it underscores the urgency for truth-telling processes in mainstream society.[151] Accordingly, Yoorrook Justice Commission must be adequately equipped to invoke a sense of responsibility in the wider community to 'narrow the range of permissible lies'[152] about the past and present.

Until recently, the Yoorrook Justice Commission has prioritised engagement with the First Nations community.[153] The Canadian experience provides a cautionary tale. Whilst its Truth and Reconciliation Commission operated for over five years across Canada, the average non-Indigenous Canadian remains unaware of it.[154] The Commission must continue to reach out to those members of society who most need to hear the truth-telling. If a sense of collective awareness about the past is not fostered, the Yoorrook Justice Commission risks playing a diminished role or else largely preaching to the choir. A meaningful truth-telling process is therefore dependent on mobilising 'White' Victoria. In the words of Mayor: 'If First Nations people and the rest of the nation who benefits from our dispossession and oppression cannot agree about what we have suffered, then

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149 Elder (n 122) 79.
150 Ibid.
151 Bedford (n 116) 161.
152 Michael Ignatieff, 'Articles of Faith' (1996) 25(5) *Index on Censorship* 110, 113.
153 'Strategic Priorities', *Yoorrook Justice Commission* (Report, 2021).
154 Virginie Ladisch and Anna Myriam Roccatello, 'The Color of Justice: Transitional Justice and the Legacy of Slavery and Racism in the United States' (ICTJ Briefing, April 2021) 8.

a settlement can never be achieved'.[155] The Commission must therefore continue to engage those members of society who most need to hear the truth-telling.

B Structural Reform: Smoke and Mirrors?

> *"Aboriginal people are all too familiar with promises written in the sand"'*
>
> Reuben Berg, Co-chair of the First Peoples' Assembly[156]

After decades of failed policy and rhetoric, it is unsurprising that First Nations people have prioritised structural reform over truth-telling as represented in the *Uluru Statement*. Even in Victoria, the goal of truth has followed the establishment of the First Peoples' Assembly and preparatory work for Treaty. Accordingly, there are valid concerns over whether an First Nations truth-telling body could deliver substantive justice.[157] Indeed, the Yoorrook Justice Commission does not itself have the power to order reparations or implement reforms.[158] From this standpoint, '…implementation is in many ways beholden to a settler-colonial state that too often engages in the rhetoric of reconciliation rather than meaningful change.'[159] As Davis quips: 'The idea that truth automatically will lead to justice is fraught. It is illusory…'[160]

In this light, the Yoorrook Justice Commission must meet the challenges of connecting truth to reform and restitution. The Commission will only succeed if it helps to tell a broader story that could inform the treaty process and effect institutional and political change.[161] This remains to be seen. However, the necessity for concrete action and reform is not lost on the Commission. During its 2023 hearings with state authorities on the

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[155] Thomas Mayor, 'Reconciliation is more than a word: it needs a voice', *The Jewish Independent* (online, 25 May 2021) <https://thejewishindependent.com.au/reconciliation-is-more-than-a-word-it-needs-a-voice>.
[156] Rooney and Eddie (n 146).
[157] Davis, 'The Truth About Truth-Telling' (n 58).
[158] Harry Hobbs, 'Unfinished Business? The Victorian Yoo-rrook Justice Commission and Truth-Telling in Australia', *Australia and New Zealand School of Government* (Web Page, 3 March 2022) <https://anzsog.edu.au/research-insights-and-resources/research/unfinished-business-the-victorian-yoo-rrook-justice-commission-and-truth-telling-in-australia/>; Dani Larkin, Harry Hobbs, Dylan Lino and Amy Maguire, 'Aboriginal and Torres Strait Islander Peoples, Law Reform and the Return of the States' (2022) 41(1) *University of Queensland Law Journal* 35, 56.
[159] Rosemary Nagy, 'Transformative Justice in Settler Colonial Transition Implementing the UN Declaration on the Rights of Indigenous Peoples in Canada' (2022) 26(2) *International Journal of Human Rights* 191, 208.
[160] Davis, 'The Truth About Truth-Telling' (n 57).
[161] Morris and Hobbs (n 36) 20.

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criminal justice system, Commissioners stressed that apologies without actions are hollow; that change must follow, and that change must involve self-determination.[162] Indeed, throughout the hearings, ministers and bureaucrats committed to addressing injustices. Notably, the Yoorrook Justice Commission has strong powers to compel government and others, if necessary, to produce documents and official records.

In May 2024, Victoria Police responded to the Commission's Report by committing to complete 79 reforms by the end of 2025.[163] As part of these reforms, the police will apologise for its involvement with the Stolen Generations, improve oversight and monitoring of complaints made by First Peoples, reduce the over-representation of Aboriginal people in the criminal justice system, and expand cultural awareness and human rights training across the organisation. Victoria Police said that six of the 79 reforms had already been completed.[164] Clearly, the Yoorrook Justice Commission is not merely paying lip service to First Nations rights. It is contributing dynamically to the process by which those rights will be protected, especially in terms of making recommendations for implementing self-determination and structural reform as well as promoting treaty-making.[165]

VII CONCLUSION

While the Yoorrook Justice Commission itself is not a panacea for resolving colonial injustice, it provides an important means of relational and structural truth-telling toward more just relations and righting racial wrongs. This article demonstrates how an First Nations driven transitional justice mechanism that decentres the settler-state, and prioritises socio-economic harms as well as structural ones, sets a valuable precedent. In mobilising grass-roots efforts, the Victorian initiative departs from the political rhetoric at the federal level and comparable truth-seeking experiences.

No less important, the Yoorrook Justice Commission holds significance for other Australian States and Territories looking for a model for their own truth, justice, and

[162] 'Newsletter, Issue No. 6' (n 140).
[163] Shane Patton, 'The Chief Commissioner's Statement of Commitment' *Victoria Police* (Web Page, 11 March 2024) <https://www.police.vic.gov.au/statement-commitment>.
[164] Yoorrook Justice Commission, 'Newsletter Issue No. 15' (5 March 2024) *Newsletter.*
[165] Kevin Bell, 'Aspects of the changing face of the rights of Indigenous people in Australia' (Speech, Victoria Criminal Law Conference Institute, 21 July 2022) 6.

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treaty-making processes.[166] First Nations control of truth-telling is now regarded as essential for creating better outcomes for First Nations Australians.[167] The Northern Territory process (2022) noted the 'importance of truth telling and the view that there is unfinished business without truth telling .[168] The Yoorrook Justice Commission is also a blueprint for a national Makarrata Commission. Ultimately, the Commission must continue to prioritise First Nations understandings of harm and healing, to ensure that the Victorian state takes the necessary political and legal action for structural reform. So, while there is past disappointment, there is also much hope that innovated transitional justice processes will provide a genuine pathway towards recognition of First Nations rights and history. It begins with Victoria.

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[166] For Queensland, see the Path to Treaty process: Community Support and Services Committee, Parliament of Queensland, *Path to Treaty Bill 2023* (Parliamentary Paper No 30, April 2023); For the Northern Territory, see the Northern Territory Treaty Commission, *Final Report* (Final Report, 29 June 2022); For Tasmania, see the Premier's Announcement in March 2022 about the government's intention to take the next steps in the truth-telling and treaty-making process following publication of the report Pathway to Truth-Telling and Treaty (2021): Kate Warner, Tim McCormack and Fauve Kurnadi, *Pathway to Truth-Telling and Treaty: Report to Premier Peter Gutwein* (Report, November 2021).
[167] Richard Martin and Fred Pascoe, 'Tommy Burns and the Challenge of Truth-telling on the Pastoral Frontier in the Gulf Country of Northern Australia' in Cameo Dalley and Ashley Barnwell (eds), *Memory in Place: Locating Colonial Histories and Commemoration* (ANU Press, 2023) 88, 89.
[168] The Northern Territory Treaty Commission, *Final Report* (Report, 29 June 2022) 23.

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DEFINING DIGNITY AND ITS APPLICATION TO AUSTRALIAN MENTAL HEALTH LEGISLATION

BIANCA MANDEVILLE*

The Convention on the Rights of Persons with Disabilities *(*'CRPD'*) has shaped the evolution of mental health legislation and policy so that people with a mental illness can participate in society 'on an equal basis with others' and as 'equal members'. This article will define dignity through a human rights discourse as it applies to the context of mental health legislation in Australia, in order to promote and support the human rights and autonomy of people with psychosocial disabilities. Applying the concept of dignity as an overarching principle, as it is in the* CRPD*, will help individuals with a mental illness exercise their capabilities in a way that protects their human rights and minimises stigma and discrimination.*

* Bianca Mandeville is a consumer researcher with extensive experience as a Commonwealth Government and Community Lawyer. Bianca is currently completing her PhD, which critically examines the use of Community Treatment Orders, exploring legal and policy mechanisms and reforms that can support consumers within a human rights framework.

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I PROLOGUE

So many roads, so much at stake

So many dead ends, I'm at the edge of the lake

Sometimes I wonder what it is going to take

To find dignity.[1]

The words above from Bob Dylan's song encapsulate how elusive it can be to attain dignity. Most individuals who have been diagnosed with a severe mental illness will have experienced this elusiveness and have had their inherent dignity infringed. This article will consider the importance of 'dignity' and how it relates to the treatment of mental health to people with psychosocial disabilities.[2]

II INTRODUCTION

Dignity is an important concept relating to people with psychosocial disabilities. Despite growing awareness, it will be argued that there has not been sufficient exploration in

[1] Bob Dylan, *Dignity* (1963).

[2] A term used to describe people with mental health conditions such as depression, bipolar, anorexia, schizophrenia and catatonia. Other terms used interchangeably in this paper are 'mental illness', 'mental disorder' and 'mental health issues' to be consistent with usage in current literature from different scholarly articles. Variability in language choice helps to ensure a connection with common parlance.

relation to how this concept can be applied to the treatment of mental illness and what the obligations are under the *Convention on the Rights of Persons with Disabilities* ('*CRPD*').[3] The *CRPD* is the first international treaty specifically concerning the rights of people with psychosocial disabilities.[4] The *CRPD* signals a paradigm shift in the application and practice of disability rights.[5] This paradigm shift means that the status of a person with a disability has moved from an 'object of charity' to a 'subject with rights' who can make choices and actively participate in the community.[6]

This article will introduce a new focus on how the concept of dignity can be applied to the wording of contemporary mental health legislation in Australia, in a way that addresses the human rights of people with a mental illness. Firstly, an overview of the philosophical foundations of dignity will be explored, as it forms the basis of the understanding we have today.[7] Secondly, human dignity in a human rights context, including the *CRPD*, will be defined and examined. Thirdly, the denial of dignity inflicted upon people with a mental illness will be considered. Finally, evaluating how inherent dignity is applied to domestic mental health legislation in Australia will be assessed. The *Mental Health and Wellbeing Act 2022* (Vic) ('Victorian Act') which came into force in September 2023, will be reviewed as an example of dignity being recognised and respected as an overarching principle in the Act. It will be argued that other Australian jurisdictions need to review, revise, or replace their mental health legislation to embrace dignity as an overarching concept that is compatible with the *CRPD*.

III BRIEF PHILOSOPHICAL FOUNDATION OF DIGNITY

There is no broad agreement on the definition of dignity in philosophy or law.[8] However, there is a body of philosophical and legal literature that considers the meaning and role of human dignity from Roman antiquity.[9] At that time, the word *dignitas* referred to the

[3] *Convention on the Rights of Person with Disabilities,* opened for signature 30 March 2017, 2515 UNTS 15 (entered into force 3 May 2008) ('*CRPD*').
[4] George Szmukler, '"Capacity", "Best Interests", "Will and Preferences" and the UN Convention on the Rights of Persons with Disabilities' (2019) 18(1) *World Psychiatry* 34, 34.
[5] Neeraj Gill, *Human Rights of Persons with Mental Disabilities* (PhD Thesis, University of New South Wales, 2020) 4.
[6] Ibid.
[7] Lucy Michael, 'Defining Dignity and Its Place in Human Rights' (2014) 20(1) *The New Bioethics* 1, 13.
[8] Julia Duffy, *The Indivisibility of Human Rights and Decision-Making by, with and for Adults with Cognitive Disabilities* (PhD Thesis, Queensland University of Technology, 2022) 177.
[9] Ibid.

honour and respect given to someone due to their high social status.[10] Cicero formulated a broader concept of *dignitas*, holding that humans have inherent *dignitas* solely because they are human, not dependent on any particular additional status.[11] During the Middle Ages, the idea of *dignitas* was used to distinguish between Man and others because Man is made in the image of God.[12] During the Renaissance period, Pico della Mirandola connected dignity with freedom and autonomy, arguing that our dignity originated from our free will, which he believed was a gift from God.[13] During the Enlightenment, Immanuel Kant grounded dignity in morality and autonomy.[14] He stated that dignity was mostly associated with autonomy, which meant people ought to be treated as autonomous individuals able to choose their own destiny.[15] He stated that human dignity was innate and intrinsic to all humans.[16] This Kantian conception of dignity was secular and formed the foundation of our current understanding of inherent dignity that is used in many human rights instruments.[17]

IV DEFINING HUMAN DIGNITY IN A HUMAN RIGHTS CONTEXT & IN THE CRPD

It was not until the first half of the 20th century that dignity began to be part of human rights legal discourse in a significant way.[18] After the atrocities of World War II, the importance of dignity was recognised and emerged widely in international legislation.[19] This was clearly stated by the United Nations ('UN') in the *Universal Declaration of Human Rights* ('*UDHR*'),[20] which states in the Preamble: 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'.[21] Article 1 further states: 'All human beings are born free and equal in dignity and rights'.[22] Much of the inspiration for the use of

[10] Michael (n 7).
[11] Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19(4) *European Journal of International Law* 655, 657.
[12] Ibid 658.
[13] Michael (n 7) 14.
[14] Ibid.
[15] McCrudden (n 11) 660.
[16] Duffy (n 8) 175.
[17] Michael (n 7) 14.
[18] McCrudden (n 11) 664.
[19] Michael (n 7) 15.
[20] *Universal Declaration of Human Rights,* GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) ('*UDHR*').
[21] Ibid Preamble para 1.
[22] Ibid art 1.

dignity in international and domestic human rights instruments originates from its use of dignity in the *UDHR*.[23] There are five explicit references to the concept of human dignity in the *UDHR*, two in the Preamble and three in the Articles.[24]

Even though dignity is regarded as a guiding principle, it has not been considered as a substantive basis for a specific claim under human rights. Dignity has been considered a foundation of the *UDHR*, and other rights flow from dignity, but it has not generally been considered a stand-alone, justiciable right. The *International Covenant on Civil and Political Rights* ('*ICCPR*')[25] and the *International Covenant on Economic, Social and Cultural Rights* ('*ICESCR*')[26] both include that the rights in each covenant 'derive from the inherent dignity of the human person'.[27]

The *CRPD* begins by confirming the principles of the UN Charter, including acknowledging the 'inherent dignity and worth and equal…rights of the people'.[28] The *CRPD* rests more heavily on dignity than any other UN human rights convention.[29] It is cited several times in its Preamble; its purpose outlined in art 1 incorporates the promotion of respect for dignity; and recognition for inherent dignity is declared in the first of its General Principles.[30] Article 1 *CRPD* begins with:

> The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.[31]

The concept of human dignity is the key element and purpose of the *CRPD* because people are to be valued for their inherent self-worth by focusing on the equal moral status of every person simply by being human.[32] The Preamble acknowledges 'the inherent dignity

[23] McCrudden (n 11) 667.
[24] Viviana Bohorquez Monsalve and Javier Aguirre Roman, 'Tensions of Human Dignity: Conceptualization and Application to International Human Rights Law' (2009) 11(1) *International Journal on Human Rights* 39, 45.
[25] *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').
[26] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('*ICESCR*').
[27] Duffy (n 8) 171.
[28] Ibid.
[29] Duffy (n 8) 178.
[30] Ibid.
[31] Ibid 173.
[32] Elif Celik, 'The Role of the CRPD in Rethinking the Subject of Human Rights' (2017) 21(7) *The International Journal of Human Rights* 933, 939.

and worth and the equal and inalienable rights of all members of the human family';[33] that 'discrimination…is a violation of the inherent dignity and worth of the human person';[34] and in addition that 'the rights and dignity of persons with disabilities will make a significant contribution to redressing…profound social disadvantage…and promote…participation in the civil, political, economic, social and cultural spheres, with equal opportunities'.[35] Furthermore, art 3(a) starts with 'Respect for Inherent Dignity' and dignity is defined as 'inherent' and is linked with worth, equality and autonomy.[36]

Cumulatively, the concept of dignity as self-worth and equality interacts with the idea of dignity and autonomy, as illustrated in the *CRPD*. This demonstrates that the meaning of dignity has evolved in the human rights context, specifically in the *CRPD*. This recognition of dignity in the *CRPD* reflects a broader response by scholars that the dignity of persons with a mental illness is inherent and associated with equality, worth, and fulfilment of their human rights.[37] The *CRPD* is groundbreaking international legislation because it emphasises positive rights by ensuring that state parties provide the services and support for people with psychosocial disabilities, promoting and protecting their human rights. The *CRPD* incorporates civil-political rights, including non-discrimination, autonomy,[38]and the right to be free from abuse,[39] alongside socio-economic rights, such as education and health,[40] necessary for social development.[41]

Under the *CRPD*, State parties are obligated to take measures to modify or abolish existing discriminatory laws, regulations, and practices, as well as providing services and support for persons with disabilities.[42] These obligations include: a duty to provide necessary training regarding disability issues to those concerned with the administration of justice,[43] special programmes to assist people with psychosocial disabilities and their caregivers to deal with and combat exploitation,[44] providing

[33] *CRPD* (n 3) Preamble para 1.
[34] *CRPD* (n 3) Preamble para 8.
[35] *CRPD* (n 3) Preamble para 8.
[36] *CRPD* (n 3) art 3; Duffy (n 8) 173.
[37] Duffy (n 8) 178.
[38]*CRPD* (n 3) art 3 (a).
[39] *CRPD* (n 3) art 16 [4].
[40] *CRPD* (n 3) arts 24 [2], 25.
[41] *CRPD* (n 3) art 15 [d]; Duffy (n 8) 174.
[42] George Szmukler, Rowena Daw, and Felicity Callard, 'Mental Health Law and the UN Convention on the Rights of Persons with Disabilities' (2014) 37(3) *International Journal of Law and Psychiatry* 245.
[43] *CRPD* (n 3) art 13.
[44] *CRPD* (n 3) art 16.

community support services,[45] and overarching duties on States to increase understanding of disability services and issues[46] and to fight against discrimination.[47]

The UN Committee on the Rights of Persons with Disabilities is established by the Convention.[48] States Parties must report to the Committee on their progress in implementing the *CRPD* on a periodic basis, after which the Committee publishes comments about this progress. Fundamentally, art 33 of the *CRPD* insists that governments ensure persons with disabilities and their representative organisations are fully engaged in monitoring the application of the *CRPD*.[49]

The *CRPD* has been viewed as a global paradigm shift for the rights of people with mental illness because it has adopted an innovative human rights model, thus replacing the outmoded medical model present in preceding UN documents.[50] Mental disorder has transformed into a universal rights language as opposed to being an issue of charity.[51] In other words, as stated in the *CRPD*, people with psychosocial disabilities now have a voice where their human rights are respected and promoted, and should no longer be treated as 'charity cases' whose rights, wills, and preferences are not heard. The *CRPD* adopts a human rights approach as it preserves the universal right to mental health by placing positive duties on states to uphold the mental health and well-being of their citizens to protect their dignity.[52] The *CRPD* can progress the welfare and dignity of persons with mental health issues because human rights are what individuals are entitled to, and governments have a duty to uphold them.[53]

Claims are made under specific rights, such as freedom of movement and privacy, and this has been the case in human rights claims regarding treatment of mental illness. This is also relevant as persons with psychosocial disabilities often have to deal with the illness itself as well as issues such as poverty, homelessness, social dislocation, and being stigmatised due to the social consequences of their illness.[54] Respect for dignity is very

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[45] *CRPD* (n 3) art 19.
[46] *CRPD* (n 3) art 8.
[47] *CRPD* (n 3) art 5; Szmukler, Daw and Callard (n 42).
[48] Ibid.
[49] Ibid.
[50] Celik (n 32) 934.
[51] Ibid.
[52] Andrew Molas, 'Defending the CRPD: Dignity, Flourishing and the Universal Right to Mental Health' (2016) 20(8) *The International Journal of Human Rights* 1264, 1264.
[53] Ibid 1266.
[54] Ibid 1265.

important for people with a mental illness as Janet E. Lord states, 'disability rights advocates…have long argued that seeing persons with disabilities as equal in dignity is a necessary precondition to recognition of disability rights'.[55] The concept of dignity embraces equality and in particular socioeconomic equality because, without it, people with psychosocial disabilities cannot participate in society on an 'equal basis with others' and as 'equal members'.[56]

As stated, in the UN High Commissioner on Human Rights report titled *Human Rights and Disability: The Current Use and Future Potential on United Nations Human Rights Instruments in the Context of Disability:*

> Recognition of the value of human dignity serves as a powerful reminder that people with disabilities have a stake in and claim on society that must be honoured quite apart from any considerations of social or economic utility.[57]

Specifically, human rights are often denied to people with disabilities because they may lack capacities or functions valued by the community. However, their value lies in their inherent human dignity.[58] Dignity, as an inherent value, has significant importance for mental illness due to the widespread history of people with mental illnesses being considered lesser and thus being treated without dignity. In 1817 the House of Commons established a committee to investigate the predicament of people with psychosocial disabilities in Ireland.[59] The committee described a distressing picture:

> When a strong man or woman gets the complaint (mental disorder), the only way they have to manage is by making a hole in the floor of the cabin, not high enough for the person to stand up in, with a crib over it to prevent his getting up. The hole is about 5 feet deep, and they give this wretched being his food there, and there he generally dies.[60]

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[55] Janet E Lord, 'Preamble' in Ilias Bantekas, Michael Ashley Stein, and Dimitris Anastasiou (eds), *The UN Convention on the Rights of Persons with Disabilities: A Commentary* (Oxford University Press, 2018) 8.
[56] *CRPD* (n 3).
[57] Gerard Quinn et al, *Human Rights and Disability*: *The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability* (United Nations, 2002) 14.
[58] Duffy (n 8) 174.
[59] Brendan Kelly, 'Dignity, Human Rights and the Limits of Mental Health' (2014) 31(2) *Irish Journal of Psychological Medicine* 75, 76.
[60] Edward Shorter, *A History of Psychiatry: From the Era of the Asylum to the Age of Prozac* (John Wiley and Sons, 1997) 1–2, cited in Brendan Kelly, 'Dignity, Human Rights and the Limits of Mental Health' (2014) 31(2) *Irish Journal of Psychological Medicine* 75, 76.

Two hundred years later, in 2010, *The Guardian* reports on the death of a man diagnosed with schizophrenia in inner London:

> [Mr AB] was found dead…having died from heart disease. Ulcers in his stomach were a strong sign of hypothermia. The 59-year-old, who had schizophrenia, lived in a dirty, damp and freezing flat, with mould growing on the floor and exposed electrical wires hanging off the walls. His boiler had broken, the bathroom ceiling had collapsed, and neighbours began to complain about the smell. His brother…describing the scene as 'squalor', said: *Even an animal couldn't have lived in that.*[61]

Even though there are two centuries between these reports, both incidents concern the denial of human rights to individuals with a mental illness and a violation of their human dignity.

V DIGNITY INFRINGED

An example of an infringement of dignity involves a mental health patient who does not feel that he is living in accordance with his own standards and values:

> What chills my bones is indignity. It is the loss of influence on what happens to me. It is the image of myself in a hospital gown, homogenized, anonymous, powerless, no longer myself. It is the sound of a young nurse calling me 'Donald', which is a name I never use… That's what scares me: to be made hapless before my time, to be made ignorant when I want to know, to be made to sit when I want to stand, to be alone when I need to hold my wife's hand, to eat what I do not wish to eat, to be named what I do not wish to be named, to be told when I wish to be asked, to be awoken when I wish to sleep.[62]

People living with mental health issues may undergo many forms of discrimination in their society which can affect their ability to live a life with dignity.[63] As Harding argues, persons living with mental health issues:

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[61] Brendan Kelly, 'Dignity, Human Rights and the Limits of Mental Health' (2014) 31(2) *Irish Journal of Psychological Medicine* 75, 76, quoting Eleanor Harding, 'Intervening behind closed doors', *The Guardian* (online, 31 March 2010) < https://www.theguardian.com/society/2010/mar/31/mental-health-law-vulnerable-people-intervention>.
[62] Linda Barclay, 'In Sickness and in Dignity: A Philosophical Account of the Meaning of Dignity in Health Care' (2016) 61 *International Journal of Nursing Studies* 136, 139.
[63] Molas (n 52) 1265.

> Not only have to deal with the symptoms of their illness but they are subject to coercive and repressive forms of abuse and large-scale neglect which comes from chronic institutionalisation in inhuman and humiliating conditions or through deinstitutionalisations and the failure to provide adequate community care.[64]

For people living with a psychosocial disability, one of the most obvious challenges to dignity and a form of inhumane living conditions is shackling. This refers to the practice of imprisoning a person with a psychosocial disability using chains, locking them in a room, a shed, a cage, or an animal shelter, where they are forced to eat, sleep, urinate, and defecate in the same tiny area.[65] Human Rights Watch found evidence of shackling in 60 countries across Asia, Africa, Europe, the Middle East, and the Americas.[66] In many countries where shackling takes place, there is a widespread belief that mental health conditions are the result of possession by evil spirits or the devil, having sinned, displaying immoral behaviour, or having a lack of faith.[67] Consequently, people first consult faith or traditional healers and often only seek medical advice as a last option.[68] Shackling remains a largely hidden problem as it happens behind closed doors, often masked in secrecy, and hidden even from neighbours due to the shame and stigma.[69]

While shackling is uncommon in Western democracies, in Australia many people with psychosocial disabilities are subject to mental health treatment that infringes on their dignity. Coercive practices may include compulsory admission and treatment, medication without consent, involuntary electroconvulsive therapy, seclusion and mechanical/physical/chemical restraints.[70] These coercive practices deny people with psychosocial disabilities their autonomy, dignity, and equality. In Australia, when people with psychosocial disabilities are denied freedom from violence and mistreatment, autonomy and independence, inclusion in the community and taking part in their own

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[64] Harding quoted in Andrew Molas, 'Defining the CRPD: Dignity, Flourishing and the Universal Right to Mental Health' (2016) 20(8) *The International Journal of Human Rights* 1265.
[65] Human Rights Watch, 'Living in Chains: Shackling of People with Psychosocial Disabilities Worldwide' *Human Rights Watch* (Webpage, 2020) <https://www.hrw.org/report/2020/10/06/living-chains/shackling-people-psychosocial-disabilities-worldwide.>.
[66] Ibid.
[67] Ibid.
[68] Ibid.
[69] Ibid.
[70] Piers Gooding et al., *Alternatives to Coercion in Mental Health Settings: A Literature Review* (Report, Melbourne Social Equity Institute, University of Melbourne, 2018). Gooding was commissioned by the United Nations Office at Geneva to inform the report of the United Nations Special Rapporteur on the Rights of Persons with Disabilities.

decision-making, their inherent dignity needs to be promoted and protected.[71] Persons with psychosocial disabilities in Australia face discrimination, humiliation, and marginalisation and are exposed to emotional and physical exploitation in both mental facilities and the community, which infringes on their dignity.[72] All these coercive practices infringe on the dignity of people in Australia living with a mental illness, who have the right to be protected against any kind of inhuman treatments, not to be subjected to stigma and discrimination, and to have access to high-quality treatments and care.[73] For this to happen, mental health legislation that abides by the *CRPD* would help guarantee a regulatory framework for mental health services, ensuring the human rights of people living with a mental illness are promoted and protected.[74]

VI APPLICATION OF HUMAN DIGNITY ON AUSTRALIAN MENTAL HEALTH LEGISLATION

Australia generally has a reformist approach to mental health laws, reflective of international developments in human rights.[75] The mental health legislation is consigned to six states and two territories (totalling eight jurisdictions) allowing mental health acts to be revised, reviewed, or replaced at any given time.[76] Due to the ratification of the *CRPD*, the protection of rights for people subject to coercive practices under mental health legislation has been reformed in most Australian jurisdictions.[77]

There are two ways of interpreting dignity as it relates to mental health legislation in Australia. Firstly, there are the enforceable legal rights that are actionable and tangible in the legislation, such as the right to legal capacity as asserted in art 12 of the *CRPD*, which guarantees the right to recognition before the law on an equal basis with others.[78] The

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[71] Catalina Devandas-Aguilar and Dainius Pûras, '"Dignity Must Prevail" – An Appeal to Do Away with Non-Consensual Psychiatric Treatment World Mental Health Day' (Press release, United Nations Office of the High Commissioner, 8 October 2015) 1 <https://www.ohchr.org/en/press-releases/2015/10/dignity-must-prevail-appeal-do-away-non-consensual-psychiatric-treatment>.
[72] Ibid.
[73] Getinet Ayano, 'Significance of Mental Health Legislation for Successful Primary Care for Mental Health and Community Mental Health Services: A Review' (2018) 10(1) *African Journal of Primary Health Care & Family Medicine* 1, 1.
[74] Ibid.
[75] Kenneth Kirkby and Scott Henderson, 'Australia's Mental Health Legislation' (2013) 10(2) *International Psychiatry* 38, 38.
[76] Ibid.
[77] Ian Freckelton, 'Mental Health Treatment and Human Rights' (2019) 44(2) *Alternative Law Journal* 91.
[78] Anna Arstein-Kerslake and Jennifer Black, 'Right to Legal Capacity in Therapeutic Jurisprudence: Insights from Critical Disability Theory and the Convention on the Rights of Persons with Disabilities' (2020) 68 *International Journal of Law and Psychiatry* 1, 3.

least restrictive principle is also in the mental health legislation. This ensures that any order made regarding care and treatment is to the least degree restrictive of the person's rights that is possible in the circumstances.[79] The concept of supported decision making is also a tangible right which, under the *CRPD*, requires that people with psychosocial disabilities be supported to make their own decisions regarding treatment.[80]

The second interpretation of dignity, over and above the enumerated rights, could be applied as a broader cultural shift in the treatment of mental illness. This is accomplished through providing effective services and supports like access to education, health, and employment for people with psycho-social disabilities, backed by mental health policies and legislation that promote and protect their inherent dignity. The concept of dignity plays an essential role in the legislation to allow for this shift in treating people with a mental illness. To treat individuals with psychosocial disabilities with dignity is to use a holistic approach that goes beyond treatment and into the wider realm of providing the right services and assistance to achieve the best outcomes. This wider cultural shift is not just about providing services in the socio-economic sphere but applying the concept of dignity as it is in the *CRPD* to Australian mental health legislation to reduce, prevent, and end coercive practices.

In terms of recommendations on dignity-based legislation, it is important to take into consideration the wording of the Victorian Act, which embraces dignity in one of its new objectives:

> To protect and promote the human rights and dignity of people living with mental illness by providing them with assessment and treatment in the least restrictive way possible in the circumstances.[81]

This new legislation acknowledges dignity front and centre. In addition, there are mental health and wellbeing principles that directly relate to implementing the principle of dignity in practice such as the dignity and autonomy principle that states:

[79] *Mental Health Act 2007* (NSW) s 68.
[80] Chris Maylea and Asher Hirsch, 'The Right to Refuse: The Victorian Mental Health Act 2014 and the Convention on the Rights of Persons with Disabilities' (2017) 42(2) *Alternative Law Journal* 149, 150.
[81] *Mental Health and Wellbeing Act 2022* (Vic) s 12(e).

> The rights, dignity and autonomy of a person living with mental illness or psychological distress is to be promoted and protected and the person is to be supported to exercise those rights.[82]

The least restrictive principle asserts:

> Mental health and wellbeing services are to be provided to a person living with mental illness or psychological distress with the least possible restriction of their rights, dignity and autonomy with the aim of promoting their recovery and full participation in community life. The views and preferences of the person should be key determinants of the nature of this recovery and participation.[83]

These guiding principles in mental health legislation may provide people with psychosocial disabilities comprehensive mental health and wellbeing treatment, recovery, and support services to be treated with dignity. These principles reflect the *CRPD* in that there is a conceptual shift from an 'object of charity' to a 'person with human rights' who can make decisions and actively participate in community life.

According to a Victorian Press release on 1 February 2023, one of the changes to the mental health care system resulting from the legislation was the establishment of an Independent Review Panel.[84] This panel was set up to review Victoria's mental health compulsory treatment criteria and to explore how the Victorian Act can better promote human rights. As stated by the Minister for Mental Health:

> The Panel's work builds on the progress we've made to provide more robust safeguards and oversights to protect the dignity and autonomy of people experiencing mental illness.[85]

Given the relatively recent enactment of the Victorian Act, it is difficult whether this legislation is effective for people with psychosocial disabilities and whether their dignity and autonomy are being promoted and protected. It is fundamental to have the right wording in the legislation that promotes dignity and encourages the effective exercise of rights and freedoms, all of which derive from the inherent dignity of a person. Real change may happen when the legislation applies human rights principles to people with

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[82] Ibid s 16.
[83] Ibid s 18.
[84] Hannah Jenkins, 'Work Begins to Amend Compulsory Treatment Orders' (Media Release, 1 February 2023) <https://premier.vic.gov.au/work-begins-amend-compulsory-treatment-laws>.
[85] Ibid.

psychosocial disabilities. The language of the Victorian Act promotes respect for human worth and non-humiliation and to be treated with dignity and autonomy. To conclude this point, it is apparent that human dignity can be viewed as the 'foundation and justification of rights and duties: because of human dignity, human beings have rights and duties'.[86] It is clear that dignity is an all-embracing principle and if this is reflected in the way people with psychosocial disabilities are treated, then we shall see substantive change.

The Victorian Act is the only mental health legislation that seems to comply with the *CRPD* in terms of using dignity as an overarching principle that actively facilitates individuals with mental illness in exercising their capabilities and helps promote and protect their human rights. In other words, real change comes through the application of human rights language and being treated with dignity. It ensures that people with psychosocial disabilities are considered with respect, autonomy, and equality. As it has been argued, dignity is essential to human rights and having it in the Victorian Act as an overarching principle helps protect the rights of people living with mental illness from being devalued or discriminated against. The language of the Victorian Act promotes and encourages the effective exercise of rights and freedoms, all of which derive from the inherent dignity of the human person. To conclude this point, it is apparent that human dignity is the 'foundation and justification for rights and duties: because of human dignity, human beings have rights and duties'.[87]

The concept of dignity is applied to the treatment of mental illness as it is linked to the rights, views, and preferences of the person. These factors are key determinants of the nature of recovery and participation, emphasising self-determination and autonomy. In the wording of the Victorian Act, it is clear that the rights, dignity and autonomy of the person should be protected and promoted. This is a paradigm shift in comparison with other Mental Health Acts in Australia. For example, the Victorian Act has adopted an innovative human rights model that contrasts with the New South Wales[88] and Northern Territory's mental health legislation.[89] The *Mental Health Act 2007* (NSW) and *Mental*

[86] Doron Shulziner, 'Human Dignity — Functions & Meanings' (2003) 3(3) *Global Jurist Topics* 1, 3.
[87] Ibid 3.
[88] *Mental Health Act 2007* (NSW).
[89] *Mental Health and Related Services Act 1998* (NT).

Health and Related Services Act 1998 (NT) do not have dignity as an overarching principle, and dignity is not cited in any major principle or guiding objective.

There are discrepancies and a lack of uniformity between the mental health Acts in the use of dignity. Using human rights language is fundamental, but it must be accompanied by recovery services that promote inherent dignity. The Victorian Act uses human rights language and is the only legislation that implements change through promoting recovery and self-determination services for people with psychosocial disabilities.

One effective way of helping to decrease disadvantage for people with psychosocial disabilities is through peer support services. Peer support in mental health is the help and support that people with lived experience of mental illness can provide to one another.[90] This approach involves people treating each other with dignity and respecting each other's inherent rights, thereby stripping away disadvantage, stigma and discrimination. Incorporating peer support into the healthcare system instils hope, improves community engagement and understanding of mental illness, enhances quality of life, and helps decrease disadvantage.[91]

Morgan, Wright and Reavley have noted that there are three long-standing education and community awareness programs that have achieved widespread impact over the past decade: *Mental Health 101*, *Mental Health First Aid* training, and SANE Australia's *Peer Ambassador Program*:

> Mental Illness Education ACT (MIEACT) has run *Mental Health 101* courses for youth and adults in the ACT since 1993 with 8,000 people trained each year. These are 60-min workshops delivering contact and education to schools or workplaces. Consumer educators are guided by the Do NO Harm safe story-telling framework. A controlled trial of Mental Health 101 Youth found increased knowledge about mental illness and reduced stigma after the training.
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> Mental Health First Aid (MHFA) training was established in 2000 and has trained 800,000 people across Australia. Training focuses on how to support a person developing a mental health problem or crisis and includes contact, education, and (optionally) a hallucination simulation activity. Training is delivered by accredited instructors who choose where to offer the course, such as workplaces, universities,

[90] Reham A Hameed Shalaby and Vincent O Agyapong, 'Peer Support in Mental Health: Literature Review' (2020) 7(6) *JMIR Mental Health* 1.
[91] Ibid.

> and other organisations. To maintain program fidelity, accredited instructors are required to regularly deliver MHFA courses and undertake continuing professional development. MHFA has been rigorously evaluated in Australia and internationally since its inception with 3 meta-analyses, 16 RCTs, 7 controlled trials, and a number of uncontrolled trials. Meta-analyses show the program leads to a reduction in stigmatising attitudes after training and up to six months later. Of note, the course has been evaluated in several culturally and linguistic diverse populations in Australia, including Vietnamese, Chinese, 'multicultural' communities, and Chinese international students, with positive effects on stigma. It has also been evaluated with health professional students, including nursing students and pharmacy students.
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> SANE *Australia's Peer Ambassador Program* also involves presentations in workplaces and community settings across Australia by people with lived experience. Ambassadors receive training and support to share their personal experiences and also contribute to advocacy projects. This is a long-running program which currently supports 110 Peer Ambassadors, with more than 1000 trained since 1986. [92]

Having references to dignity in the legislation and as the overarching principle as it is in the Victorian Act means that people with psychosocial disabilities can be identified as having status, rights, autonomy and capabilities.[93] In addressing justice for people with psychosocial disabilities, it would mean that they enjoy equal status, respect, and recognition.[94] In more practical terms, adding references to dignity in the legislation and having it as an all-encompassing principle should help improve services when it is properly implemented as it would mean that practitioners, mental health tribunals, and courts would have to categorically take into account the effects of their decisions on the dignity of patients in every jurisdiction.[95] Treatment would have to be offered in a fashion that prioritises the provision of effective and efficient care in a respectful and dignified way.[96] It would advance the principles of the *CRPD* by protecting the human rights of all persons with a mental illness, giving them access to services such as employment, health,

[92] Amy J. Morgan, Judith Wright, and Nicola J. Reavley, 'Review of Australian Initiatives to Reduce Stigma towards People with Complex Mental Illness: What Exists and What Works?' (2021) 15(10) *International Journal of Mental Health Systems* 1, 32.
[93] Elif Celik, 'Exploring the Use of the Concept Human Dignity in Disability Human Rights Law: From UNCRPD to EctHR' (2021) 17 *The Age of Human Rights Journal* 149.
[94] Ibid.
[95] Kelly (n 59) 1.
[96] Ibid.

and education, and promoting respect for their inherent dignity.[97] Prioritising dignity in this way would encourage all the other jurisdictions to review, revise and replace their mental health Acts.

The current Victorian mental health legislation is the worthiest Act to date that incorporates the concept of dignity, compared to other Australian jurisdictions. However, according to the then Minister for Mental Health, the Honourable James Merlino, 'there is a lot more work to do before we have the mental health and wellbeing system that protects the rights and dignity of all consumers, their families, and carers'.[98] While there is always room for improvement with legislation, it is not realistic to think that mental health legislation on its own protects or promotes the broader human rights of people living with a mental illness, specifically social and economic rights.[99] These rights may be protected through social and mental health policy and greater societal understanding, recognition, and reform.[100]

In the context of mental health, there is a specific requirement for a wide-ranging, co-operative approach to human rights and dignity. An inclusive approach to treatment should include mental health service-users, families and carers, mental health service providers, social services, health and policy planners, voluntary groups, researchers, and legal practitioners.[101] The actions of all these stakeholders directly influences the dignity and human rights of individuals with a mental illness and minimises stigma and discrimination.[102] That is why it is crucial that the principle of dignity becomes the overarching principle in Australia's mental health legislation. This human rights concept should be taken well beyond mental health services and tribunals into the arenas of health and social policy, and throughout our community, to protect and promote the rights of people living with mental illness.[103]

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[97] Ibid.
[98] Victoria, *Parliamentary Debates*, Legislative Assembly, 22 June 2022 (James Merlino, Minister for Education, Minister for Mental Health), cited in Chris Maylea, 'Does Mental Health Legislation in Victoria, Australia, Advance Human Rights?' (2023) 25(1) *Health and Human Rights Journal* 149, 151.
[99] Kelly (59) 12.
[100] Ibid.
[101] Ibid.
[102] Ibid.
[103] Ibid.

VII CONCLUSION

As stated in this article, people living with a mental illness in Australia have had their dignity infringed upon. One way to protect and promote the inherent dignity of persons with mental health issues is to evaluate Australia's mental health legislation. Dignity is central to the *CRPD* and needs to be reflected in mental health legislation. It has been argued that dignity is an overarching principle in the Victorian Act, which will help ensure individuals with a mental illness are treated with inherent dignity and respect. This approach safeguards their human rights and helps eliminate discrimination and stigma. Dignity is vital to the treatment of mental health and to all people living with a mental illness, not just the minority who are subjected to involuntary detention and treatment.[104]

[104] Kelly (n 59) 5.

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ADOPTION LAW REFORM: A PERSONAL VIEW

THE HONOURABLE NAHUM MUSHIN AM*

Adoption law does not adequately apply the best interests of the child as the paramount consideration. As a consequence of each of the States and Territories of the Commonwealth of Australia having enacted their own laws, a child who is adopted in one jurisdiction is subject to different laws from a child adopted in another. That particularly applies to the application of the paramountcy principle. There have been significant changes to adoption law which have benefited parents, adoptees and adoptive parents by enabling greater transparency, allowing adoptees to learn their identities and assist in reunions in appropriate cases. The consequences of forced adoptions highlighted the antithesis of greater transparency. This article argues that each of the States and Territories refer the legislative power in adoption to the Commonwealth to overcome the diversity of adoption laws and enable the enactment of a national uniform adoption law. The Commonwealth should vest the jurisdiction in the Federal Circuit and Family Court of Australia. What is now known as an order for adoption should be determined by the Court in the same manner as a parenting order in family law. In referring the powers, the States and Territories should reserve questions of succession law and adult applications for discharge of adoption orders to their own courts. Consideration should be given to abandoning the term 'adoption'.

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I INTRODUCTION

Twenty-one years as a Justice of the Family Court of Australia (as it then was) and more than a decade of involvement with the difficult issue of forced adoptions in Australia have led me to the view that the law and practice of adoption in this country does not adequately meet the fundamental requirement of the paramountcy of the best interests

of the subject child (the 'paramountcy principle').[1] Consequently, I offer this personal view of adoption law reform which, I suggest, will better achieve that fundamental requirement.

My basic proposition may be summarised as follows:

(1) Adoption should be regarded as part of family law;

(2) Each of the States and Territories should refer their powers relating to adoption law to the Commonwealth;

(3) The Commonwealth should enact legislation incorporating adoption into the *Family Law Act 1975* (Cth) ('*FLA*'), thereby enabling decisions with regard to adoption to be made pursuant to the same principles as are in the *FLA* and, in particular, the paramountcy principle;[2]

(4) The jurisdiction pursuant to that national adoption law should be vested in the Federal Circuit and Family Court of Australia ('FCFCA'); and

(5) Consideration should be given to referring to an adoption order as a parenting order.

I now turn to a development of those basic propositions.

II THE LANGUAGE OF ADOPTION

At the outset, it is necessary to make reference to the use of language when discussing adoption and those affected by it. I use the terminology decided on by the Senate Community Affairs References Committee (the 'Senate Committee') in their inquiry into forced adoptions.[3] The essential concept is that the mother of a child should be known as "the mother" with no adjective such as "birth mother" or "natural mother".[4] The adopted

[1] Standard referred to in *Family Law Act 1975* (Cth) s 60CA ('*FLA*').
[2] See below Part VIII.
[3] Senate Community Affairs References Committee, Parliament of Australia, *Commonwealth Contribution to Former Forced Adoption Policies and Practices* (Report, 29 February 2012) 2–3 [1.9]–[1.14] ('*Senate Forced Adoption Report*').
[4] Ibid [1.9].

child is usually referred to as "the adoptee" or "the adopted person".[5] The person or persons who have adopted the child are referred to as "the adoptive parent/s".[6]

III WHY ADOPTION?

A civilised community must recognise the fact that at times the parents of a child are unable to care for that child. That may be brought about by one or more factors including mental illness, alcohol or other drug dependence, or serious criminality including violence by one partner to the other or to the child. In the case of 'forced adoption', as discussed below, it is usually young women in harsh social and economic circumstances, confronted with an unsought pregnancy with little or no support.[7] In these circumstances, it is appropriate to look to extended family such as grandparents, aunties, uncles, or older siblings. At times, extended family may also not be available or appropriate for various reasons. In those circumstances, the option of placing the child in the care of strangers to the child must be considered.

The placement referred to in the previous paragraph may be achieved by foster care or, relevantly to this paper, by way of adoption. The essential element of adoption is the placement of the child with strangers. As much as I believe that there are significant shortcomings with adoption, my experience brings me to recognise that there are circumstances concerning the best interests of a child that can only be accommodated by such a placement.

An adoption order may also be made in favour of a step-parent of the child.[8] That may occur when the primary parent of a child, the parent who has the greater responsibility for the care of the child, marries another person and the other parent is either deceased or has no real contact with the child. Such an order has the effect of placing the step-parent in the same relationship with the child as the primary parent.

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[5] Ibid [1.10].
[6] Ibid [1.12].
[7] Ibid [1.29].
[8] *Adoption Act 1993* (ACT) s 14(c)–(d); *Adoption Act 2000* (NSW) s 30; *Adoption of Children Act 1994* (NT) s 15; *Adoption Act 2009* (Qld) div 4; *Adoption Act 1988* (SA) s 12; *Adoption Act 1998* (Tas) s 20; *Adoption Act 1984* (Vic) s 11; *Adoption Act 1994* (WA) s 67.

IV RELEVANT FEATURES OF THE DEVELOPMENT OF ADOPTION LAW

It is not the purpose of this paper to detail the development of adoption law and practice. In that regard I refer to a publication of the Australian Institute of Family Studies which sets out that development and some of the drawbacks which it presented.[9] For present purposes, it is only necessary to refer to the concepts of "closed adoption" and "open adoption" which are described below:

> From the 1920s, adoption practice in Australia reflected the concept of secrecy and the ideal of having a "clean break" from the birth parents. Closed adoption is where an adopted child's original birth certificate is sealed forever and an amended birth certificate issued that establishes the child's new identity and relationship with their adoptive family. Legislative changes in the 1960s tightened these secrecy provisions, ensuring that neither party saw each other's names… The practice of closed adoption changed gradually across each of the states and territories in Australia from the late 1970s through the 80s and 90s. With the implementation of these legislative changes, adoption practices shifted away from secrecy. Now, the vast majority (84% in 2010–11) of local adoptions (but not intercountry adoptions) are "open", where the identities of birth parent(s) are able to be known to adoptees and adoptive families.[10]

In my view, the transition from closed adoption to open adoption constituted a marked improvement in the application of the paramountcy principle. As Dr Higgins wrote:

> Open adoption has led to a number of improvements in practices, such as: more accountable processes for obtaining consent from (birth) parents; a requirement for consent to be provided by both birth parents (or the need for a parent's consent to be dispensed with by a court for a child's adoption to proceed); and higher quality assessments and benchmarks for assessing the suitability of prospective adopters.[11]

In my view, the improvements to the application of the paramountcy principle would be further enhanced by the reforms which I am advocating in this paper.

A further relevant feature of present-day adoption is the fact that there are a very small number of adoption orders being made throughout Australia. The Australian Institute of

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[9] See Daryl Higgins, 'Past and present adoptions in Australia', *Australian Institute of Family Studies* (Fact Sheet, February 2012) <https://aifs.gov.au/sites/default/files/publication-documents/fs201202_0.pdf>.
[10] Ibid 2–3.
[11] Ibid 3.

Health and Welfare, an independent statutory authority of the Commonwealth Government, recorded 208 adoptions in the 2021–22 year.[12] Of those, Australian child adoptions totalled 192 or 92%.[13] That last figure may be subdivided into known child adoptions (161 or 77%) and local adoptions (31 or 15%).[14] Intercountry adoptions totalled 16 or 7.7%.[15] A "known child adoption" is an adoption by a person, such as a carer of the child, who is already known to and by the child.[16]

The adoption numbers referred to in the previous paragraph have reduced markedly from those recorded in the forced adoptions era to which I now turn.

V FORCED ADOPTIONS

On 21 March 2013, the then Prime Minister Gillard, formally apologised on behalf of the Australian people to the large number of Australians affected by forced adoptions.[17] The apology, together with many concrete measures, was recommended by the Senate Committee. Their report was the fundamental underpinning of the forced adoptions issue in Australia and has been widely quoted in many countries which have considered similar apologies.[18]

I was privileged to chair the Government's Forced Adoptions Apology Reference Group which recommended the wording of the apology to the Government. Following the apology, I chaired the Forced Adoptions Implementation Working Group. Part of my obligations arising out of those positions was to consult with people affected by forced adoption throughout Australia. The following observations are derived from those consultations.

For the purposes of the inquiry, the Senate Committee defined forced adoption as 'adoption where a child's natural parent, or parents, were compelled to relinquish a child

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[12] Australian Institute of Health and Welfare, *Adoptions Australia 2021-22* (Report, 28 April 2023) <https://www.aihw.gov.au/reports/adoptions/adoptions-australia-2021-22/contents/summary>.
[13] Ibid.
[14] Ibid.
[15] Ibid.
[16] Ibid.
[17] Amanda Rishworth MP, 'National Apology for Forced Adoptions: 10th Anniversary' (Speech, National Apology for Forced Adoptions: 10th Anniversary, 28 March 2023) <https://www.dss.gov.au/sites/default/files/documents/03_2023/minister-rishworth-national-apology-forced-adoptions-10th-anniversary_0.pdf>.
[18] *Senate Forced Adoption Report* (n 3) ix [9.56]–[9.58].

for adoption'.[19] The evidence to the Senate Committee regarding the compulsion makes difficult reading. Essentially, forced adoption was experienced by young women in harsh social and economic circumstances confronted with unsought pregnancy. They had no effective choice as to whether they should consent to the adoption of their newly born child. They did not have guardians or independent advice, were often drugged, tied to their beds and suffered similar abuses which removed any independence that they might have otherwise had. They were often prevented from seeing their newly born babies and were not permitted to feed them. At times their consents were forged or post-dated to overcome the requirements of the legislation.[20] The trauma experienced by mothers has continued to the present-day and has become intergenerational. It has affected adopted children, siblings and wider families including grandparents. As a consequence, the mere mention of the word adoption triggers profoundly upsetting memories for a large number of people within the Australian community.

I have referred to the particular trauma suffered by mothers who were affected by forced adoptions. It is also necessary to refer to the adoptees. The main area of the adoptees' trauma arising out of all adoptions, including forced adoptions, is the question of their identity. No matter whether their adoption has been a positive experience or otherwise, adoptees demonstrate an overwhelming need to learn their identity dating back to their birth and beyond. One major advantage of the development of open adoption has been the more ready availability of information with regard to their identity.

The Senate Committee estimated that the '[t]otal adoptions from 1940 (the first year for which the committee found records) to the present day would be well in excess of 210,000 and could be as high as 250,000'.[21] It also concluded that 'it is impossible to estimate the number of *forced* adoptions which have taken place'.[22]

I have discussed the issue of forced adoptions to illustrate the profound trauma which affects a large portion of the Australian society and the fact that it operates as a significant trigger of memories for that segment of the community. I will return to this issue below.

[19] Ibid 6 [1.28].
[20] Ibid chs 3–4.
[21] Ibid 8 [1.35].
[22] Ibid 10 [1.39].

VI THE FRAGMENTATION OF THE ADOPTION JURISDICTION IN AUSTRALIA

A child adopted in Albury, New South Wales ('NSW') would be adopted pursuant to a different Act of Parliament than a child adopted on the other side of the Murray River in Wodonga, Victoria. I use that example to illustrate what I regard as being an outdated legislative framework that twin cities sitting adjacent to each other across a state border do not have a uniform adoption law. The same can be said of any two places in different States or Territories.

Until 1 February 1961, matrimonial causes, which are within the Commonwealth's power pursuant to section 51(xxi) and (xxii) of the *Commonwealth Constitution*, were governed by State legislation. Each State had its own matrimonial causes Act,[23] a structure which is the jurisdictional equivalent of adoption law today. The inappropriateness of the fragmentation of the matrimonial causes jurisdiction was properly recognised as requiring substantial law reform which resulted in the Commonwealth enacting the *Matrimonial Causes Act 1959* (Cth). Jurisdiction pursuant to the newly enacted legislation was vested in the state Supreme Courts which all applied the same law. Likewise, to give further effect to section 51(xxi) of the *Constitution*, the marriage power being exercised by the States was brought within the Commonwealth's jurisdiction with the enactment of the *Marriage Act 1961* (Cth).

The ultimate remedy for the fragmentation of matrimonial causes law was the enactment of the two Acts and the creation of the Family Court of Australia. That Court has been subsumed into the FCFCA but the essential conduct of the jurisdiction by one court, divided into a superior court of record (Division 1) and an inferior court of record (Division 2), has remained intact. I note that notwithstanding the creation of the FCFCA, Western Australia has maintained its own family court with state family law legislation which is essentially identical to that of the Commonwealth legislation.

In my view, the inappropriateness of previous state legislation in matrimonial causes is the same as the inappropriateness of current adoption legislation. I will expand on that

[23] See e.g. *Matrimonial Causes Act 1873* (NSW); *Matrimonial Causes Jurisdiction Act 1864* (Qld); *Matrimonial Causes Act 1858* (SA); *Divorce and Matrimonial Causes Act 1860* (Tas); *Divorce and Matrimonial Causes Act 1861* (Vic); *Divorces and Matrimonial Causes Act 1863* (WA).

proposition below. The issues of integrated birth certificates, and particularly the paramountcy of the best interests of the child, are specific examples of the need for uniformity of adoption law.

VII INTEGRATED BIRTH CERTIFICATES

Closed adoptions provided for the effective obliteration of any record relating to the adoptees' birth. The enactment of open adoptions has resulted in a significant increase in the availability of information to adoptees and their parents. That has been potentially significantly advanced by the proposed national introduction of integrated birth certificates ('IBCs'). IBCs entitle an adoptee to obtain a birth certificate that shows their parents and siblings at birth, as well as their parents and siblings after the adoption.

The Senate Committee recommended that:

> all jurisdictions adopt integrated birth certificates, that these be issued to eligible people upon request, and that they be legal proof of identity of equal status to other birth certificates, and jurisdictions investigate *harmonisation* of births, deaths and marriages register access and the facilitation of *a single national access point* to those registers.[24]

In my view, this is a major positive development which advantages parents, adoptees and adoptive parents. To date, NSW, Victoria, South Australia and Western Australia have introduced IBCs.[25]

I suggest that uniform law throughout Australia regarding IBCs, together with the national access point, would significantly benefit adoptees in ascertaining their identity following their adoption. It would also benefit parents in their search for adopted children. The remaining States and Territories — Queensland, Tasmania, the Australian Capital Territory and the Northern Territory — should accept and put into effect the recommendation for harmonisation quoted above.

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[24] *Senate Forced Adoption Report* (n 3) x–xi [12.33] (emphasis added).

[25] *Adoption Act 2000 (No 75)* (NSW) ch 8 pt 2, Dictionary; *Births, Deaths and Marriages Registration Act 1995* (NSW) s 52; *Adoption Act 1988* (SA) pt 2A; *Births, Deaths and Marriages Registration Act 1996* (Vic) s 46A; *Births, Deaths and Marriages Registration Act 1998* (WA) ss 27–28, 68; *Adoption Act 1994* (WA) pt 4.

VIII THE BEST INTERESTS OF THE CHILD — THE PARAMOUNTCY PRINCIPLE

It is commonly accepted that the best interests of the subject child are the most important consideration in any decision relating to the child's placement. It is usually expressed as those best interests being 'paramount'. I refer to this principle as the 'paramountcy principle'. It is expressed in section 60CA of the *FLA* that '[i]n deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration'.

Section 60CC of the *FLA* also outlines the considerations that a court must take into account in determining the paramountcy principle which I regard as a vital aspect of decision making.[26]

The *FLA* includes a specific discretionary jurisdiction to the FCFCA, and any other court with jurisdiction in family law, to grant leave to a limited class of potential applicants to apply for adoption of a particular child.[27] That class is confined to:

(a) a parent of the child;

(b) a spouse or de facto partner of a parent of the child; or

(c) a parent and their de facto partner.

The condition for the granting of leave is a determination that the order is in the best interests of the child, subject to a number of factors which are not relevant for the purpose of this paper.[28] The reader is otherwise encouraged to refer to the section for further details.

Each of the six States and two Territories has its own adoption legislation, each of which is different. In particular, the provisions with regard to the paramountcy principle are very diverse. The NSW, Queensland, South Australia and Australian Capital Territory legislation are closest to mirroring the *FLA* provisions although each of them is different.

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[26] Please note that s 60CC of the *FLA* (n 1) was significantly amended by the *Family Law Amendment Act 2023* (Cth) which came into effect on 6 May 2024.
[27] *FLA* (n 1) ss 60G, 4 (definition of 'prescribed adopting parent').
[28] Ibid ss 60G(2), 60CB, 60CG.

They contain an express provision of the paramountcy principle and include criteria for applying that principle on a case-by-case basis.[29]

By contrast, the legislation of Victoria, South Australia, Western Australia and Tasmania express the paramountcy principle, again differently worded, but give little or no further detail as to how it is to be applied.[30] The legislation of the Northern Territory also has little to add to the paramountcy principle with the exception of significant provisions for children of First Nations ethnicity, culture and/or race.[31]

IX A PROPOSED MODEL

In my view, adoption law needs radical reform. That reform should commence with the States and Territories referring their legislative powers with regard to adoption to the Parliament of the Commonwealth of Australia, thereby vesting jurisdiction in adoption in the Commonwealth.[32] That will enable the Commonwealth to enact uniform legislation which applies throughout Australia, with the possible exception of Western Australia, thereby removing the possibility of children born in different States and/or Territories possibly experiencing different adoption outcomes depending on the law pursuant to which the order is made.

There are two possibilities for the vesting of the uniform legislation. One possibility is vesting the jurisdiction in the State and Territory courts. That would replicate the structure which existed until the enactment of the *FLA* with regard to matrimonial causes. The other possibility, and to my mind the preferable one, is the Court. The basis of my preference arises from the fact that an application for adoption is essentially an application for parenting orders. It might be by a stranger or strangers to the child, a step-parent or wider family member, a scenario which is very common in family law applications and for which the Court is very well equipped. That includes all the necessary assessment, reporting and evidentiary skills within the family law jurisdiction which are necessary in determining adoption applications.

[29] *Adoption Act 1993* (ACT) s 5; *Adoption Act 2000* (NSW) ch 2, particularly s 8; *Adoption Act 2009* (Qld) s 6; Adoption *Act 1988* (SA) s 3.
[30] *Adoption Act 1988* (Tas) s 8; *Adoption Act 1984* (Vic) s 9; *Adoption Act 1994* (WA) s 3.
[31] *Adoption of Children Act 1994* (NT) s 8 sch 1.
[32] *Australian Constitution* s 51(xxxvii).

The most important advantage of uniform legislation would be in the area of the best interests of the child. That legislation already exists in optimum form in the *FLA* as referred to above. In my view, the present legislation would accommodate most of the issues which arise in adoption.

X SOME SPECIFIC ISSUES

A *Permanency or Long Term*

There are several issues which require specific consideration. The first of those is a distinction that might be drawn between an application for adoption and an application for parenting orders in family law. It is sometimes suggested that an adoption application requires a greater degree of permanency in the placement of the child arising out of the fact that the application is made by strangers to the child. We know that a child of three years has different needs to a child of thirteen years. Therefore, it would not be in the best interests of a child if a significant change of that child's circumstances could not lead to a variation or setting aside of the adoption order. The issue was considered by the Full Court of the Family Court of Australia (as it then was) in the context of a parenting application in the following terms:

> Firstly, s 60CA of the Act requires that a court, in deciding whether to make a particular parenting order in relation to a child, must regard the best interests of the child as the paramount consideration. It is obvious that what particular order is in the best interests of a child may change as time passes and as circumstances change. Indeed, the decision in Rice and Asplund accepts this but places a brake on repeated applications by insisting that the change in circumstances must be such as to warrant a reconsideration of the orders.[33]

B *Adult Application for Discharge of an Adoption Order*

While the issue of variation or discharge of an adoption order of a child under the age of 18 years should remain in the jurisdiction of the court, there is an additional question of the discharge of an adoption order on the application of an adult adoptee. There is a further inconsistency in the State legislation with regard to one of the grounds for making

[33] *Elmi v Munro* [2019] FamCAFC 138 [32]–[33].

such an application. While the various legislation generally empowers a court to set aside an adoption order on the application of an adult adoptee on the basis of fraud, duress and like bases,[34] the more significant ground is similar to that referred to above. However, the NSW legislation provides a ground of 'other exceptional reason',[35] while the Victorian legislation provides for 'special circumstances'.[36]

While the legislation should be consistent throughout Australia, an application by an adult adoptee for discharge of their adoption order should remain within the jurisdiction of the court that made the order.

C *Succession*

Upon the making of an adoption order, the child effectively becomes the child of the adoptive parents and the adoptive parents effectively become the parents of the child.[37] That particularly concerns the question of succession with respect to inheritance. States and Territories have legislated to provide for inheritance of property where a deceased has not left a will, known as dying intestate.[38] Relevant for present purposes is the question of the standing of an adoptee where the deceased is a parent or adoptive parent of that adoptee. Conversely, the standing of the parents, adoptive parents or siblings is relevant if the deceased is the adoptee.[39]

Upon the referral of powers as suggested above, that legislation would remain in the State and Territory jurisdiction and be adapted to apply to adoption orders made under the proposed Commonwealth legislation.

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[34] See, eg, *Adoption Act 1993* (ACT) s 39L(1), 39L(10); *Adoption Act* 2000 (NSW) s 93(1); *Adoption of Children Act 1994* (NT) s 44(1); *Adoption Act 2009* (Qld) s 221(1); *Adoption Act 1988* (SA) s 14(1); *Adoption Act 1988* (Tas) s 28(1), 28(2); *Adoption Act 1984* (Vic) s 19(1), 19(2); *Adoption Act 1994* (WA) s 77(1).
[35] *Adoption Act 2000* (NSW) s 93(4)(a).
[36] *Adoption Act 1984* (Vic) s 19(1)(b).
[37] See, eg, *Adoption Act 2000* (NSW) s 95; *Adoption Act 1984* (Vic) s 53.
[38] See, eg, *Administration and Probate Act 1929* (ACT) Pt 3A Divs 1-3; *Succession Act 2006* (NSW) Ch 4; *Administration and Probate Act 1969* (NT) Pt III Divs 4, 4A, 5; *Succession Act 1981* (Qld) Pt 3; *Administration and Probate Act 1919* (SA) Pt 3A; *Intestacy Act 2010* (Tas) Pt 5; *Administration and Probate Act 1958* (Vic) Pt I Div 6; *Administration Act 1903* (WA) Pt II.
[39] See for example *Succession Act 2006* (NSW) s 109; *Administration and Probate Act 1958* (Vic) pt 1A and s 90 (definition of 'eligible person').

D *The Role of State and Territory Child Welfare Authorities*

Typically, the current process that results in the making of an adoption order is conducted by State child welfare authorities (the 'Authorities').[40] They receive a notification of a child's need for special care outside of the home and are responsible for making arrangements to advance the child's best interests. That will often involve placing the child in foster care but ultimately there is a need for a long-term outcome. If it is not in the child's best interests to be placed in the care of a relative or other person known to the child, the outcome will usually be arranging for strangers to the child to apply for adoption with the Authorities supporting that application. The Authorities identify the need, make the necessary arrangements, support the adoption application in court and undertake supervision of the operation of the adoption order.

The process which could properly operate in the proposal put forward in this paper would require the Authorities to undertake all the present steps up until the decision to recommend an adoption. At that point, the matter would be referred to the FCFCA and placed within the assessment, counselling and evidentiary processes referred to above. In the normal course of events, an independent children's lawyer would be appointed to represent the child, a process which occurs in present applications for adoption. Again, the FCFCA is well equipped to undertake that process.

E *Intercountry Adoption*

Intercountry adoption is governed by the *Family Law (Hague Convention on Intercountry Adoption) Regulations 1998*. Jurisdiction pursuant to that convention is vested in the FCFCA and State and Territory courts.[41] While it may be preferable for that jurisdiction to be exercised only by the FCFCA, the State and Territory courts are exercising the uniform jurisdiction of the Commonwealth, thereby avoiding fragmentation of the law as now occurs in adoption law.

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[40] Child and Youth Protection Services Australian Capital Territory; Department of Communities and Justice New South Wales; Department of Territory Families, Housing and Communities Northern Territory; Department of Child Safety, Seniors and Disability Services Queensland; Department for Child Protection South Australia; Department for Education, Children and Young People Tasmania; Department of Families, Fairness and Housing Victoria; Department of Communities Western Australia.
[41] *Family Law (Hague Convention on Intercountry Adoption) Regulations 1998* (Cth) pt 5.

F *The Term "Adoption"*

My experiences of forced adoption described above lead to the question of whether it remains necessary to refer to what is now called "adoption" by that term. The concept of adoption is an extremely emotional trigger for people who experienced forced adoption. It is suggested that that in itself should cause a reconsideration of the terminology of adoption.

In my view, it is consistent with the proposal in this paper to regard what is now an "application for adoption" as an "application for parenting orders in accordance with the *FLA*". It is suggested that the essential character of what is now referred to as adoption is essentially the same as an application for parenting orders, particularly because of the paramountcy principle which is common to both parenting and adoption orders.

XI CONCLUSION

I suggest that the law and practice of adoption of children in Australia requires significant modernisation to better realise the application of the paramountcy principle. That modernisation should commence with the referral of the legislative powers of the States and Territories to the Commonwealth. The Commonwealth should enact uniform adoption law thereby vesting the jurisdiction and power of that law in the Court.

The States and Territories should continue to administer child welfare matters until such time as there is a recommendation for the adoption of the subject child. Upon the Commonwealth's enactment of the uniform adoption law, the matter should be referred to the FCFCA by the Authorities for consideration of the making of an adoption order.

In referring the powers, the States and Territories should reserve the question of recognition of adoption orders in their respective jurisdictions for the purpose of the application of succession law which is within their jurisdiction and retain the jurisdiction to set aside adoption orders on the application of adult adoptees.

Finally, it is questionable as to whether the term "adoption" should continue to describe these applications. They should be described as "parenting orders" in accordance with the *FLA*.

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LUCK IS NOT A STRATEGY: WHY AUSTRALIA MUST JOIN THE TREATY ON THE PROHIBITION OF NUCLEAR WEAPONS

THE HONOURABLE MELISSA PARKE*

This article examines Australia's complex relationship with nuclear deterrence in the context of the Treaty on the Prohibition of Nuclear Weapons *(*'TPNW'*). Despite Australia's historical leadership in disarmament, it remains outside the* TPNW*. The* TPNW *directly challenges the legitimacy of nuclear deterrence, advocating for a complete ban on nuclear weapons and offering a path toward their abolition. As most Southeast Asian and Pacific Island states have joined the* TPNW*, Australia is increasingly seen as the 'gap in the map'. This article calls for Australia to reconsider its stance, on the basis of international law, public opinion and the importance of joining other nations showing leadership on disarmament, and to explore non-nuclear defense strategies that maintain its alliances. With the third Meeting of States Parties approaching in 2025, Australia has a significant opportunity to shift its position and join the global effort to eliminate nuclear risks, but this requires a change in political will and policy direction.*

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I INTRODUCTION

Arundhati Roy famously described nuclear weapons as 'the ultimate coloniser'.[1] She stated that the pervasive politics and daily threat of these weapons have buried themselves like meat hooks deep in the base of our brains.[2]

Insidious and persistent mythology around the power of these weapons to avoid wars through threats of ultimate violence continues to this day. The cognitive dissonance in nuclear deterrence doctrines would have you believe that these weapons, designed for mass and indiscriminate destruction, offer protection through the threat of use.

The *Treaty on the Prohibition of Nuclear Weapons* ('*TPNW*')[3] directly challenges nuclear deterrence theories by affirming a total ban on nuclear weapons and providing a path toward their abolition.

This article outlines the work of the *TPNW* and its challenge to nuclear deterrence theory. As an important state within the Asia-Pacific region but not yet a signatory to the *TPNW*, Australia has complex ties to nuclear deterrence. Do these ties complicate Australia's ability to sign a treaty that eliminates these weapons? Or can Australia move away from nuclear defence while maintaining its alliance with the United States? With repeated

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[1] Arundhati Roy, *The End of Imagination* (Haymarket Books, 2016) 57.
[2] Ibid.
[3] *Treaty on the Prohibition of Nuclear Weapons*, opened for signature 9 August 2017, 3379 UNTS 161 (entered into force 22 January 2021) ('*TPNW*').

commitments to sign and ratify the *TPNW* through the Australian Labor Party's national policy, there are increasing expectations for Australia to join the Treaty, as most of its neighbours in Southeast Asia and the Pacific have already done. Since the universalisation of this Treaty is both an international and government concern, this article examines claims to extended nuclear deterrence as a potential obstacle to Australia's accession.

II THE TPNW

In a time of global instability — from geopolitical, societal, economic, human rights and environmental standpoints — the *TPNW* has fostered a sustained and positive dialogue of hope. It has achieved this through the collaboration of an engaged community of governments and civil society from around the world.

This engagement contrasts greatly with the disappointing lack of action from nuclear-armed states, which have failed for decades to honour disarmament in accordance with their legal obligations, including by boycotting the *TPNW* negotiations in 2017. Instead, these nuclear aggressor states have been squandering tens of billions of dollars every year to renew and expand their arsenals.[4] Nuclear brinkmanship has been increasingly evident in Europe, the Middle East, and in Asia. Some nuclear weapons 'states are also waging wars of aggression', resulting in 'staggering death tolls and undeniable nuclear risks'.[5] Against this backdrop of bloodshed, states and civil society have renewed calls not only for nuclear disarmament but also for 'multilateral approaches to peace and security and adherence to the international rule of law', based on the *Charter of the United Nations*, rather than an undefined 'international rules-based order'.[6]

The *TPNW* establishes that under international law, nuclear weapons are now banned, similar to other weapons of mass destruction. The Treaty is already having a demonstrable impact, solidifying the international consensus that nuclear threats are inadmissible, shifting norms on nuclear ownership and the threat of use, and challenging the financial and political infrastructure that previously enabled nuclear possession. The

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[4] International Campaign to Abolish Nuclear Weapons, *Wasted: 2022 Global Nuclear Weapons Spending* (Report, June 2023) <www.icanw.org/wasted_2022_global_nuclear_weapons_spending>.
[5] Melissa Parke, 'Statement by the International Campaign to Abolish Nuclear Weapons', *Treaty on the Prohibition of Nuclear Weapons*, UN GAOR, States Parties, 2nd mtg, Agenda Item 8, 27 November 2023 <https://docs-library.unoda.org/>.
[6] Ibid.

ban on nuclear weapons has prompted financial institutions to divest billions of dollars from companies that manufacture these weapons,[7] a process expected to accelerate as more nations join the Treaty. The *TPNW* has also brought the fight for nuclear justice to the forefront, led by survivors of nuclear use and testing.

Proponents of the *TPNW* seek to release humanity from the ever-present and growing threat of nuclear annihilation. More work is needed to universalise the Treaty and popularise its norms. Each new ratification or accession strengthens the global resolve to rid the world of these weapons, fundamentally challenging the legitimacy of nuclear weapons. With 93 signatories, and 70 states parties to the Treaty just three years after its entry into force, the *TPNW* is a rare good news story in international diplomacy.[8] *TPNW* states parties have shown principled leadership. They are laying the foundations for a more secure, just and peaceful future for all, addressing the challenge of nuclear abolition with systematic, progressive and strategic policy.

III NUCLEAR DETERRENCE

Lawrence Freedman explains that military deterrence is based on manipulating others through the use of conditional threats.[9] Theorist Patrick M. Morgan has described it as a psychological relationship, where 'the goal is to shape an opponent's perceptions, expectations, and ultimately its decisions about launching an attack'.[10] Nuclear deterrence dramatically alters the scope and threat of deterrence, elevating the inherent threat of violence to a new level, potentially challenging norms of proportionality and almost certainly involving indiscriminate impacts on civilians and the environment. Henry Kissinger observed that, 'the nuclear age turned strategy into deterrence, and deterrence into an esoteric intellectual exercise'.[11] As Morgan notes, the retaliatory threats inherent in nuclear deterrence were a 'retrograde development' where

[7] International Campaign to Abolish Nuclear Weapons, *Rejecting Risk: 101 Policies Against Nuclear Weapons* (Report, January 2022).
[8] 'Treaty on the Prohibition of Nuclear Weapons', *United Nations Treaty Collection* (Webpage) <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-9&chapter=26>.
[9] Lawrence Freedman, *Deterrence* (Polity Press, 2004) 6.
[10] Patrick M Morgan, 'Applicability of Traditional Deterrence Concepts and Theory to the Cyber Realm' in National Research Council (ed), *Proceedings of a Workshop on Deterring Cyberattacks: Informing Strategies and Developing Options for U.S. Policy* (The National Academies Press, 2010) 56.
[11] Henry Kissinger, *Diplomacy* (Simon & Schuster, 1994) 608.

'deterrence became hostage-taking on a vast scale', particularly in relation to attacks on civilians.[12] Nobel Prize winner Joseph Rotblat was more blunt, describing nuclear deterrence as 'the ultimate form of terrorism'.[13]

Nuclear deterrence theory remains the supposed privilege of the nine nuclear-armed states and is based on assumptions of unerring predictability in all actors, including enemies. The theory fails to take into account accidents, miscalculations, unhinged leaders, terrorist groups, cyber-attacks or simple mistakes. The very existence of these weapons holds an intrinsic threat of use. It also fails to provide security or avoid wars, as is more than evident in the world today. The fact that we are here today close to eight decades since the advent of the nuclear age is more a result of dumb luck than good management or inherent system integrity. 'But luck is not a strategy', as the United Nations Secretary-General Antonio Guterres stated in his remarks to the tenth Review Conference of the Parties to the Treaty on the Prohibition of Nuclear Weapons.[14]

There are those who claim a reliance on a "nuclear umbrella" through the nuclear weapons of other states. Extended nuclear deterrence ('END') claims to guarantee a nuclear response on behalf of certain protégés in reaction or retaliation to nuclear threats against them. This concept of extended nuclear deterrence often includes North Atlantic Treaty Organization ('NATO') states, as well as Japan and South Korea, and can involve nuclear stationing. Australia has long expressed a reliance on United States ('US') nuclear weapons for its defence, despite questions about the evidence of overt commitments from the US. END agreements are notoriously complex and hard to qualify, as will be shown later in this article concerning Australia. A claim to END by successive Australian governments exposes a conflict, contradicting their claims of aiming for a world free from nuclear weapons.

There is another fundamental flaw in the logic of nuclear deterrence. The insidious reality is that the manufacturing, maintenance, and their eventual disposal of these weapons all come at an enormous cost, even without any direct use. These weapons displace people

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[12] Patrick Morgan, *Deterrence Now* (Cambridge University Press, 2003) 14.
[13] Joseph Rotblat, *A Quest for Global Peace: Rotblat and Ikeda on War, Ethics, and the Nuclear Threat* (I.B. Tauris, 2007) 78.
[14] António Guterres, 'Secretary-General's Remarks to the Tenth Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons' (Remarks, UN Headquarters, 1 August 2022).

and communities from cradle to grave, diverting funds and scientific know-how from pressing global needs. Deterrence theory is a distraction and an abstraction. The reality is that these weapons create harm on many levels through their very existence. Survivors of the over 2,000 nuclear weapons tests conducted worldwide can verify the breadth of harm from developing this supposed deterrent. Such tests were crucial in demonstrating the credibility of a nuclear deterrent.

The feasibility of nuclear deterrence was called into serious question at the second Meeting of States Parties to the *TPNW* in late 2023.[15] As governments gathered at the United Nations ('UN') alongside survivors of nuclear use and testing, intergovernmental agencies, scientific experts, and a vibrant array of civil society representatives from across the world, deterrence doctrines were critiqued and challenged.

The final declaration from the meeting notes that:

> Far from preserving peace and security, nuclear weapons are used as instruments of policy, linked to coercion, intimidation and heightening of tensions. The renewed advocacy, insistence on and attempts to justify nuclear deterrence as a legitimate security doctrine gives false credence to the value of nuclear weapons for national security and dangerously increases the risk of horizontal and vertical nuclear proliferation.[16]

Concerns about the erosion of the nuclear disarmament and non-proliferation regime were strongly voiced at the meeting. The increase in states seeking nuclear-sharing, extended nuclear security guarantees, and nuclear stationing arrangements was noted. Under the *TPNW*, no state can claim a licence to either possess or host nuclear weapons. All such activities would contravene *TPNW* commitments, which bans the transfer of, control over, or stationing, installation or deployment of nuclear weapons. The final declaration noted that:

[15] *Treaty on the Prohibition of Nuclear Weapons*, UN GAOR, States Parties, 2nd mtg, Agenda Item 15, UN Doc TPNW/MSP/2023/14 (13 December 2023).
[16] Ibid annex I ('*Declaration of the second Meeting of States Parties to the Treaty on the Prohibition of Nuclear Weapons*') [17].

> The perpetuation and implementation of nuclear deterrence in military and security concepts, doctrines and policies not only erodes and contradicts non-proliferation, but also obstructs progress towards nuclear disarmament.[17]

The States Parties agreed to establish a consultative process, led by Austria, '[t]o better promote and articulate the legitimate security concerns, threat and risk perceptions enshrined in the Treaty that result from the existence of nuclear weapons and the concept of nuclear deterrence' and '[t]o challenge the security paradigm based on nuclear deterrence by highlighting and promoting new scientific evidence about the humanitarian consequences and risks of nuclear weapons and juxtaposing this with the risks and assumptions that are inherent in nuclear deterrence'.[18] A report containing 'a comprehensive set of arguments and recommendations' in this regard will be submitted to the third Meeting of States Parties to the *TPNW* in March 2025.[19]

As Austria has said, 'states who think they must rely on nuclear weapons are on a mistaken and dangerous track … the seemingly unwavering belief in a security approach that is based on the threat of global mass destruction, humanitarian catastrophe and profound environmental damage is not only morally unacceptable but a high-risk gamble with the security of all humanity'.[20]

IV NUCLEAR DETERRENCE AND THE AUSTRALIAN CHALLENGE

The problematic concepts of nuclear deterrence become further complicated when extended beyond the nuclear-possessing state. Australia has expressed a general commitment to END through defence White Papers since the 1990s,[21] but no explicit agreement has ever been clearly articulated by the US. The first explicit record of Australia's reliance on END was in the *1994 Defence White Paper*.[22] In this, the White

[17] Ibid [19].
[18] Ibid annex II ('*Decisions of the second Meeting of States Parties to the Treaty on the Prohibition of Nuclear Weapons*') Decision 5 (a)(i),(ii).
[19] Ibid Decision 5 (a).
[20] Alexander Kmentt, 'Second Meeting of States Parties to the Treaty on the Prohibition of Nuclear Weapons General exchange of views Statement by the Republic of Austria' (Speech, New York, 28 November 2023).
[21] Dimity Hawkins and Julie Kimber, 'Australia's Stance on Nuclear Deterrence Leaves it on the Wrong Side ofHistory', *The Conversation* (online, 26 August 2016) <https://theconversation.com/australias-stance-on-nuclear-deterrence-leaves-it-on-the-wrong-side-of-history-64163>.
[22] Commonwealth, Department of Defence, *1994 Defence White Paper* (Report, 1994) 96 ('*1994 White Paper*').

Paper noted firstly that, '[t]he Government does not accept nuclear deterrence as a permanent condition. It is an interim measure until a total ban on nuclear weapons, accompanied by substantial verification provisions, can be achieved'.[23] However, the White Paper went on to state that:

> In this interim period, although it is hard to envisage the circumstances in which Australia could be threatened by nuclear weapons, we cannot rule out that possibility. We will continue to rely on the extended deterrence of the US nuclear capability to deter any nuclear threat or attack on Australia. Consequently, we will continue to support the maintenance by the United States of a nuclear capability adequate to ensure that it can deter nuclear threats against allies like Australia.[24]

Subsequent Defence White Papers have continued this posture, though not the position on a non-acceptance of deterrence as a permanent condition. Instead, we have seen the further entrenchment of deterrence concepts, alongside the rather confused position that has become the norm for successive governments — a reliance on US nuclear weapons for Australia's defence, while claiming to be working towards a world free from nuclear weapons. The *2013 Defence White Paper* exemplified this, stating, 'Australia is confident in the continuing viability of extended nuclear deterrence under the Alliance, while strongly supporting ongoing efforts towards global nuclear disarmament'.[25] Most recently, the independent 2023 Defence Strategic Review, commissioned by the Albanese government, claimed:

> In our current strategic circumstances, the risk of nuclear escalation must be regarded as real. Our best protection against the risk of nuclear escalation is the United States' extended nuclear deterrence, and the pursuit of new avenues of arms control.[26]

The nature of threats that would justify the engagement of END for Australia has never been clearly articulated. Is END the most effective strategy to combat such threats? Are these threats exacerbated by Australia's willingness to host US war-fighting bases and increased engagement in military exercises and infrastructure on behalf of allied states?

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[23] Ibid 96 [9.7]
[24] Ibid.
[25] Commonwealth, Department of Defence, *2013 Defence White Paper* (Report, 2013) 29 [3.41].
[26] Commonwealth, Department of Defence, *National Defence: Defence Strategic Review* (Report, 2023) 38 [4.10].

Does the trilateral AUKUS[27] agreement bring new justification or pressures for END for Australia? Ultimately, what would be the implications of nuclear use against another state in Australia's name?

There is also a lack of clarity of any commitment from the US to extend nuclear deterrence to Australia. Without a clear commitment to use nuclear force in Australia's defense, questions remain about the credibility of any such claims. Ambiguity is not commonly a feature of nuclear deterrence postures.[28] Additionally, questions arise about whether Australia willingly adopted END or if it has been bound to END through its alliance to a nuclear superpower. These questions deserve greater scrutiny and examination.

V AN OPPORTUNITY FOR AUSTRALIA

Instead of maintaining a questionable policy of reliance on the nuclear weapons of the US, Australia has the opportunity to forge a new path through the *TPNW*. For those states that have yet to fully join the international efforts to abolish nuclear weapons, like Australia, the opportunity to join meetings of states parties ('MSP') as observers offers valuable insights. Several non-signatory states have been constructively engaging in the first two MSPs as observer states. The Australian example is noteworthy in this regard.

Australia was represented at the MSPs for the *TPNW* in 2022 and 2023 by observer delegations led by Labor Member of Parliament Susan Templeman. Foreign Minister Penny Wong appointed Templeman to the role, stating in 2023 that, 'Australia is considering the *TPNW* systematically and methodically as part of our ambitious agenda to advance nuclear non-proliferation and disarmament'.[29] In committing Australia to be an observer state, Foreign Minister Penny Wong reiterated three considerations that Australia has been prioritising in its work towards signing and ratifying the *TPNW*. These

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[27] Trilateral security partnership between Australia, the United Kingdom, and the United States.
[28] Peter Hayes and Richard Tanter, 'Beyond the Nuclear Umbrella: Re-Thinking the Theory and Practice of Nuclear Extended Deterrence in East Asia and the Pacific' (2011) 26(1) *Pacific Focus* 5; 'Australia: Extended Nuclear Deterrence', *Nautilus Institute* (Web Page) <https://nautilus.org/projects/by-ending-date/a-j-disarm/aust-japan-coop/extended-nuclear-deterrence-contemporary-theory-and-policy/>; Allan Behm, 'Extended Deterrence and Extended Nuclear Deterrence in a Pandemic World' (2020) 4(sup1*) Journal for Peace and Nuclear Disarmament* 135.
[29] Penny Wong, 'Second Meeting of States Parties to the Treaty on the Prohibition of Nuclear Weapons' (Media Release, 26 November 2024) <www.foreignminister.gov.au/minister/penny-wong/media-release/second-meeting-states-parties-treaty-prohibition-nuclear-weapons>.

include investigating verification and enforcement regimes, addressing issues around complementarity with other disarmament instruments, and seeking universality of the Treaty. Much work has gone into each of these considerations and other issues, led by inter-sessional working groups of states parties formed at the first Meeting of States Parties in Vienna in June 2022.[30]

Universalisation is more than simply a matter of attaining further signatures and ratifications for the Treaty. As the states parties have said, it should be 'understood broadly' to include greater acceptance of 'the underlying rationale of the total elimination of nuclear weapons owing to their inherent risks and catastrophic humanitarian consequences' and 'serve as a strategy to maximise the authority of the core norms and principles of the Treaty in international politics'.[31]

Importantly, it is about the process and growth of engagement, building confidence in the Treaty to encourage states towards signature and ratification. While some states outside of the Treaty attempt to undermine it by questioning its legitimacy without the participation of nuclear-armed states, it is worth reminding them that the *TPNW* prohibits nuclear weapons comprehensively, not selectively. It provides a legal framework for disarmament, not merely an obligation to pursue that goal. Therefore, it seeks to treat all states equally, under the same rules, dispensing with the double standards inherent in other disarmament and non-proliferation instruments. Nuclear-armed states are welcome to join the *TPNW*, but they must do so on the same level as any other state and accept the obligation to eliminate their nuclear weapons completely.

Key to the goal of universality is the work to address foundational misconceptions about the value and legitimacy of deterrence doctrines. Australia needs to examine its own role in this, guided by international efforts through science, diplomacy and policy. The humanitarian consequences of nuclear weapons and the ever-present risk of further nuclear use are pressing concerns for all governments. Security paradigms that accept the concept of nuclear weapons by any nation undermine true national and regional stability. With the majority of the Southeast Asian and Pacific Island states now parties

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[30] *Treaty on the Prohibition of Nuclear Weapons*, UN GAOR, States Parties, 1st mtg, Agenda Item 15, UN Doc TPNW/MSP/2022/6 (21 July 2022).
[31] Ibid annex II [6].

to the *TPNW*, Australia appears to be the 'gap in the map'. Australia has long boasted of a principled and activist position on disarmament and non-proliferation issues, being a strong advocate in the past for some of the world's most established international law in these matters. However, the last multilateral nuclear disarmament treaty that Australia took an active role in was the *Comprehensive Nuclear-Test-Ban Treaty* in 1996.[32] Nearly 30 years on, it is time for Australia to step up again and join the community of nations working towards nuclear abolition.

The *TPNW* also includes novel provisions on victim assistance and environmental remediation. This is an important consideration for Australia, as a state that was the test site for the first dozen of Britain's atmospheric nuclear weapons and hundreds of bomb development trials through the 1950s and 1960s.[33] The legacies of harm from these tests continue to challenge governments and create intergenerational burdens on nuclear veterans and local populations, particularly First Nations Peoples. The *TPNW* seeks to assist communities still suffering from the legacy of tests, more often than not conducted by colonial powers that showed little or no concern about the devastating human and environmental toll. They selected their test sites for their supposed remoteness — whether in the deserts of Australia and Algeria, Pacific atolls, the steppes of Kazakhstan, or deserts of southern US — but remoteness from whom? Not from those living nearby, downwind or downstream. Remote, certainly, from the decision-makers in national capitals, who deemed the local populations expendable, their lands and waters worthless, as they worked to perfect their ability to kill and destroy on a massive scale. It is this same colonial attitude — the belief in one people's superiority over another, the desire to dominate and control, the flagrant disregard for the consequences of one's actions upon others — that guides much of the ongoing work to enhance nuclear armaments today. Such ideas deserve contest and rebuttal. Through the *TPNW*, we are seeing the long-term fights for justice for survivors of this nuclear violence gaining voice and force.

There is significant evidence of a groundswell of public opinion in support of the *TPNW*. Currently, 110 federal and many state parliamentarians have signed a parliamentary

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[32] *Comprehensive Nuclear-Test-Ban Treaty*, opened for signature 24 September 1996 (not yet in force) ('*Comprehensive Nuclear-Test-Ban Treaty*').

[33] 'Nuclear Weapons Testing in Australia', *International Campaign to Abolish Nuclear Weapons* (Web Page) <www.icanw.org.au/learn/nuclear-testing-in-australia>.

pledge to support the *TPNW*.[34] Cities and towns across Australia have joined the global Cities Appeal, expressing concern for the grave threat nuclear weapons pose for communities around the world and calling on the national government to sign and ratify the treaty.[35] Consistently, national polling shows majority support for the treaty.

Particularly in light of AUKUS, growing militarism in the region, and the stated position that AUKUS in no way involves nuclear weapons, Australia is under a spotlight in the region right now. If Australian claims to honouring the *Treaty of Rarotonga*[36] are to be believed, Australia's acquiescence to the *TPNW* could provide a significant confidence-building measure in the region.

Undeniably, there is work ahead for Australia to sign and ratify the *TPNW*. Shifts in entrenched positions of advisers and policy heads, a true exploration of the possibilities of a non-nuclear defence with Australia's largest alliances, and collaborative discussions with international experts and *TPNW* states parties will be required. As we work towards the third Meeting of the States Parties in early 2025, Australia has a real opportunity to join the global community working to eliminate nuclear risks. It is only a matter of political will to see this change.

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[34] 'Parliamentary Pledge', *International Campaign to Abolish Nuclear Weapons* (Web Page) <icanw.org.au/pledge>.
[35] 'Cities and Towns', *International Campaign to Abolish Nuclear Weapons* (Web page) <www.icanw.org.au/cities>.
[36] *South Pacific Nuclear Free Zone Treaty*, opened for signature 6 August 1985, 1445 UNTS 177 (entered into force 11 December 1988) ('*Treaty of Rarotonga*').

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