

## Chapter 3

### First Nations Peoples, Law and Injustice

#### Uluru Statement from the Heart

We, gathered at the 2017 National Constitutional Convention, coming from all points of the southern sky, make this statement from the heart:

Our Aboriginal and Torres Strait Islander tribes were the first sovereign Nations of the Australian continent and its adjacent islands, and possessed it under our own laws and customs. This our ancestors did, according to the reckoning of our culture, from the Creation, according to the common law from “time immemorial”, and according to science more than 60,000 years ago.

This sovereignty is *a spiritual notion: the ancestral tie between the land, or “mother nature”, and the Aboriginal and Torres Strait Islander peoples who were born therefrom, remain attached thereto, and must one day return thither to be united with our ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty.* It has never been ceded or extinguished, and co-exists with the sovereignty of the Crown.

How could it be otherwise? That peoples possessed a land for sixty millennia and this sacred link disappears from world history in merely the last two hundred years?

With substantive constitutional change and structural reform, we believe this ancient sovereignty can shine through as a fuller expression of Australia’s nationhood.

Proportionally, we are the most incarcerated people on the planet. We are not an innately criminal people. Our children are aliened from their families at unprecedented rates. This cannot be because we have no love for them. And our youth languish in detention in obscene numbers. They should be our hope for the future.

These dimensions of our crisis tell plainly the structural nature of our problem. This is *the torment of our powerlessness.*

We seek constitutional reforms to empower our people and take *a rightful place* in our own country. When we have power over our destiny our children will flourish. They will walk in two worlds and their culture will be a gift to their country.

We call for the establishment of a First Nations Voice enshrined in the Constitution.

Makarrata is the culmination of our agenda: *the coming together after a struggle.* It captures our aspirations for a fair and truthful relationship with the people of Australia and a better future for our children based on justice and self-determination.

We seek a Makarrata Commission to supervise a process of agreement-making between governments and First Nations and truth-telling about our history.

In 1967 we were counted, in 2017 we seek to be heard. We leave base camp and start our trek across this vast country. We invite you to walk with us in a movement of the Australian people for a better future.<sup>1</sup>

1 Uluru Statement from the Heart (National Constitutional Convention, 26 May 2017) <<https://ulurustatement.org/the-statement>>. Commonly and hereafter referred to as the “Uluru Statement”.

### (a) Introduction: rethinking “race” for the 21st century

In 1991, this chapter of the first edition of *Law in Context* was titled “Aborigines”, later revised as “Race”, which was then supplemented with “Multiculturalism”. The last edition reverted back to the title “Race”, which reflected growing difficulty and discomfort subsuming Indigenous matters within the broader legal and policy commitment to protecting and promoting cultural diversity. This vacillation is not simply a reflection of the idiosyncratic linguistic preferences of the authors. Rather, it reflects the ongoing task of reimagining how issues of First Nations peoples and the Law may be placed within a context that is relatable to students engaged in the learning of the law in Australia or indeed any other jurisdiction struggling with legacies of colonialism, dispossession of Indigenous peoples from their lands, laws and cultures, and the persistent racism and structural inequalities that persist today. In the Australian context, our journey to refocus and renew attention upon legacies of colonisation, dispossession and racial discrimination begins at the moment of nationhood, with the adoption of the Constitution of the Commonwealth of Australia (1901); at its heart lies a provision defining the new nation’s powers to regulate and legislate upon matters of “Race”.

Since the last edition of this book was penned, much has happened in Australia in relation to matters of indigeneity and “Race”. In 2017, the Uluru Statement above was finalised and presented to the Australian people. It was the culmination of a meeting at Uluru of 250 delegates “coming from all points of the southern sky”.<sup>2</sup> To date, it stands as the most widely canvassed statement for constitutional change by Indigenous peoples.<sup>3</sup> While the Uluru Statement is not without critics, both Indigenous and non-Indigenous,<sup>4</sup> it offers Australia a roadmap for a better future for Indigenous and non-Indigenous peoples. Its centrepiece is a constitutionally enshrined First Nations “Voice to Parliament”, which would advocate to ensure First Nations interests. It also calls for the establishment of a Makarrata Commission, which would possess powers to supervise treaty-making processes and, vitally, “Truth-Telling”.<sup>5</sup>

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2 Ibid.

3 Henry Reynolds, *Truth Telling – History, Sovereignty and the Uluru Statement* (NewSouth Publishing, 2021) 2.

4 See Tony Birch, “On sovereignty” *Overland* (Website, Summer 2017) <<https://overland.org.au/previous-issues/issue-229/column-tony-birch>>; Malcolm Turnbull, George Brandis and Nigel Scullion, “Response to Referendum Council’s report on Constitutional Recognition” (Joint Media Release, 26 October 2016).

5 “Makarrata” means “coming together after a struggle” and is common to several First Nations languages including the Yolngu language: Lester Hiatt, “Treaty, Compact, Makarrata ...?” (1987) 50(2) *Oceania* 140. The term is also translated as “payback”, an Aboriginal English term that includes a wide array of dispute resolution practices, including “payback” by spearing which is discussed below. “Makaratta” has long usage: it was first chosen to describe the treaty-making process by the National Aboriginal Conference in 1979, before being adopted by the first federal parliamentary body to recommend that a preferred method for entering into treaties (then diminished as “compacts”) with First Nations be established: Senate Standing Committee on

The former Coalition government's response, led by then Prime Minister, Malcolm Turnbull, was swift and unsympathetic.<sup>6</sup> On 14 October 2023, the Federal Labor Government put forward a referendum proposal to amend the Australian Constitution to establish an "Aboriginal and Torres Strait Islander Voice" that would make representations to Parliament and the Executive on matters relating to First Nations people. The amendment proposal failed to receive the required double-majority support, with all of the States and approximately 60% of the electorate voting "No". The only jurisdiction to record a majority "Yes" vote was the Australian Capital Territory. As we write this chapter, the future of reconciliation with First Nations people in Australia is uncertain. However, what has never been uncertain, and never will be, is that First Nations peoples have an ancient and unbroken connection to this land, and that their continuing culture, territories, and laws cannot be affected by the result of the referendum – as Irene Watson wrote, "the law continues to live in those places because of the 'Dreaming that will never be taken away'."<sup>7</sup>

So, although constitutional recognition is no longer on the political agenda, as this chapter reveals, the questions concerning the legal and social status of our First Nations remain alive. For this reason, the Uluru Statement continues to provide an enduring testament of the aspirations of First Nations peoples and should be read with respect.

As the leading historian Henry Reynolds remarked with prescience, the Uluru Statement is "a masterpiece of forensic advocacy – succinct, with scarcely a wasted word, utilitarian where necessary, elegant, even poetic in places. It is a document that will endure. But its lasting political impact is yet to be determined."<sup>8</sup> While the failure of the 2023 Voice Referendum may have been a setback for First Nations justice, the Uluru Statement, and hope, endure.

While the Uluru Statement is the most recent, and broadest, expression of a First Nations desire for treaty, it is not the first. In 1972 the Larrakia people of the Kulaluk region expressed desire for political representation and treaties similar to those enjoyed by the "Māoris in New Zealand and the Indians [sic] in North America".<sup>9</sup> In 1979 the National Aboriginal Conference formally

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Constitutional and Legal Affairs, Parliament of Australia, *"Two Hundred Years Later"-Feasibility of a Compact, or "Makarrata", between the Commonwealth and Aboriginal people* (Parliamentary Paper No 17, 1983) (*"Two Hundred Years Later"*).

6 Malcolm Turnbull, George Brandis and Nigel Scullion, "Response to Referendum Council's report on Constitutional Recognition" (Joint Media Release, 26 October 2016).

7 Irene Watson, *Aboriginal Peoples, Colonialism and International Law* (Routledge, 2015) 146, citing Evidence to House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Inquiry into the Reeves Report on the Aboriginal Land Rights (Northern Territory) Act*, Kalkarindji, 13 April 1999, 294 (Banjo).

8 Reynolds (n 3) 2.

9 Amy Thomas, "The Princess and the Protestors: The 1972 Larrakia Petition and Discourses of Failure in Aboriginal Protest" in Amy Thomas, Andrew Jakubowicz and Heidi Norman, *Does the Media Fail Aboriginal Political Aspirations? 45 Years of News Media Reporting of Key Political Moments* (Aboriginal Studies Press, 2019) 37.

requested that a Treaty be executed with the Australian Government. In 1988 the Barunga Statement called on the Australian Government to recognise their rights to self-determination and negotiate a treaty recognising Indigenous Australians' unceded sovereignty.<sup>10</sup> None of these calls were heeded.

Australia is not alone in this journey, and many former British colonies, including Canada and New Zealand, are rethinking their relationships with First Nations peoples. The Canadian-Australian philosopher Duncan Ivison recently posed the question in the title of his masterful book: *Can Liberal States Accommodate Indigenous Peoples?*<sup>11</sup> Ivison argues that the Uluru Statement provides an opportunity to "rethink some of the normative foundations of liberal democracy".<sup>12</sup> He suggests "its core conceptual elements – of voice, history, truth-telling, agreement-making, legitimacy and justice – prefigure a potential normative foundation for First Nation and liberal state relations".<sup>13</sup>

As lawyer Gary Rumble pointed out in his submission to the 1983 Senate Standing Committee on "Makarrata", while the situation of First Nations peoples within the Australian Government's community and jurisdiction is not at all incongruous with their claim to sovereignty, it does create a substantial disparity between the negotiating positions of each party.<sup>14</sup> In Canada, some scholars have expressed concern that the treaties in place between their First Nations and Government do nothing more than extinguish Indigenous nationhood by "bringing Indigenous peoples into Canada's own domestic political and legal structures with certainty and finality".<sup>15</sup> Similar concerns have been raised in New Zealand, and also more recently in Australia by progressive campaigns against the Voice.<sup>16</sup>

Indeed, to minimise the inherent structural inequity which First Nations face in the negotiations process, Australia must learn from the successes and (far more numerous) failures that the treaty-making processes in Canada, New Zealand and the United States have experienced.<sup>17</sup>

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10 Amy Thomas, Andrew Jakubowicz and Heidi Norman, *Making Black Stories Matter: Understanding Media Narratives on Treaty and Aboriginal Aspirations* in Harry Hobbs, Alison Whittaker and Lindon Coombes (eds), *Treaty-Making: 250 Years Later* (Federation Press, 2021) 67-8 ("Treaty-Making").

11 Duncan Ivison, *Can Liberal States Accommodate Indigenous Peoples?* (Polity, 2020).

12 Ibid xv.

13 Ibid.

14 See Gary Rumble's submissions to: *Two Hundred Years Later* (n 5) 29.

15 Taiaiake Alfred, "Deconstructing the British Columbia Treaty Process" (2001) 3 *Balayi: Culture, Law and Colonialism* 27, 40 in Stephen Young and Harry Hobbs, *Treaty-Making: Critical Reflections on Critiques from Abroad* in *Treaty-Making* (n 10) 164.

16 Carwyn Jones, "Re-balancing, Renewing, Re-structuring: Strengthening the Constitution of Aotearoa through a Treaty Relationship" in *Treaty-Making* (n 10) 104; Dana Morse, 'Lidia Thorpe announces she will be backing No campaign against Indigenous Voice', *ABC News* (online, 20 June 2023) <<https://www.abc.net.au/news/2023-06-20/lidia-thorpe-will-back-no-campaign-against-indigenous-voice-/102500592>>.

17 In the United States, Native American tribes have repeatedly been exploited both in relation to negotiations and the honouring of treaty rights and obligations: see

## (b) Truth-telling: “coming to terms” with colonial genocide and national amnesia

The Uluru Statement has encouraged many within the legal community to rethink how our system of “settler law”, which is bound up in the history of brutal conquest, dispossession, and “stolen generations” policies, relates to the questions of sovereignty for our First Nations peoples. On a yearly basis, new “Truth-Telling” histories are being published exposing the true scale of the crimes and injustices meted upon Australia’s First Nations peoples, with massacres revealed to be more deadly and recent than hitherto believed.<sup>18</sup> These facts are not ancient history for the people whose ancestors have lived, walked and cared for the land we call “Australia” for more than 60,000 years. There is much “reckoning” to be done, and this will fall heavily on the shoulders of the next generation of judges, lawyers, academics and politicians, as we strive to re-examine the founding legal history of Australia and take greater responsibility for wrongs not yet righted.<sup>19</sup>

Two decades ago, the question was posed by Henry Reynolds, an eminent Australian historian, in the title of his evocative memoir, *Why Weren’t We Told?*<sup>20</sup> The answer can be answered simply: as the distinguished Australian anthropologist WEH Stanner observed in 1968, there has been a great national “forgetting” of the violent dispossession and genocides committed against First Nations of Australia. Since Stanner first offered his theory of our collective national amnesia more than 50 years ago, a new generation of historians, mentored and inspired by Henry Reynolds, set out to confront Australia’s “cult of forgetfulness” through painstaking research dedicated to uncovering lost or overlooked archival sources and oral histories.<sup>21</sup> What Reynolds and others have uncovered through archival research is the extent of criminal violence meted out by settlers, colonial administrations and British military (violence that was reprehensible even when judged by moral and legal standards of

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generally Karen Diver, former Chairperson of the Fond du Lac Band of Lake Superior Chippewa, in Daryle Rigney, Damein Bell and Alison Vivian, “Talking Treaty: A Conversation on how Indigenous Nations can become Treaty Ready” in *Treaty-Making* (n 10) 24-5.

18 Reynolds (n 3); Henry Reynolds and Nicholas Clements, *Tongerlongeter: First Nations Leader and Tasmanian War Hero* (NewSouth Publishing, 2021).

19 Recognition that Australia’s legal history must refocus attention on First Nations’ experiences of colonisation is reflected in Peter Cane, Lisa Ford and Mark McMillan (eds), *The Cambridge Legal History of Australia* (Cambridge, 2022). Divided into seven parts, the edited collection ranges across cultures of law, public authority, environment, social organisation/order and reckoning, with First Nations issues addressed in many of its 32 constituent chapters.

20 See Henry Reynolds, *Why Weren’t We Told?* (Penguin, 2000). See also Bain Attwood, “Denial in a Settler Society: the Australian Case” (2017) 84(1) *History Workshop Journal* 24-43: “Contemporary denial was the product of legal, moral and psychological forces that were largely the consequence of the peculiar terms upon which the Australian colonies were founded and the particular conditions in which the country was colonized.”

21 Alison Palmer, *Colonial Genocide* (Crawford House, 2000).

their times).<sup>22</sup> What is striking is that this violence was not limited to immediate decades following “first contact”. Frontier wars came to be waged more intensely as the continent was opened up for agricultural settlement: as Reynolds has demonstrated, settler colonial violence in fact intensified over time, marked with the Black War in Tasmania,<sup>23</sup> reaching its peak at the end of the 19th century in Queensland on the eve of federation.<sup>24</sup>

The true nature of Australia’s “settlement” is now undeniable and has many implications. Perhaps foremost, it demands a reassessment of the legacy of many of Australia’s colonial political and legal luminaries. Reynolds’ latest work focuses on the complicity of senior legal figures including the much esteemed Queensland politician-lawyer and first Chief Justice of the High Court of Australia, Sir Samuel Griffith.<sup>25</sup> While orthodox histories have lauded Sir Samuel Griffith as the progressive jurist, one of the drafters of the Commonwealth Constitution, and Queensland’s much admired and influential “Griffith Criminal Code” (1899), Reynolds puts a new spotlight on Sir Samuel’s lesser known, deeply shameful, legacy: as Queensland’s Attorney-General, Griffith authorised and defended far-reaching “kill or capture” missions by a paramilitary force of “Native Police” across the colony. Opening up the region of Far North Queensland for settlers and mining operations was achieved through “killing expeditions” against Aboriginal people throughout the 1880s (in effect extra-judicial murders) conducted by police and settlers with impunity. In Reynolds’ assessment these “campaigns”, though occurring in the late colonial period, were more lethal and merciless than the earlier frontiers wars waged in New South Wales and Tasmania in the first half of the 19th century. This led to the ultimate conclusion, beyond the “reach of reasonable doubt”, that the “killing times” in Queensland in the 1880s produced a staggering death toll, upwards of 65,000 Indigenous deaths, which is far beyond earlier estimates, and now rivals the national death toll in World Wars One and Two combined!<sup>26</sup> For decades, indiscriminate atrocities were conducted in plain sight: at the time, media and concerned settlers and administrators frequently

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22 Henry Reynolds, *A History of Tasmania* (Cambridge University Press, 2012) 68-9.

23 Nicolas Clements, “Tasmania’s Black War: A Tragic Case of Lest We Remember?”, *The Conversation* (News Article, 24 April, 2014) <<https://theconversation.com/tasmanias-black-war-a-tragic-case-of-lest-we-remember-25663>>.

24 Henry Reynolds, “On the Queensland Frontier: Tragedy in the Tropics” (2022) 76 *Griffith Review* 142.

25 We do not dwell on the divisive debates in the 1990s, where historians like Reynolds were derided as peddling a “Black Armband” view of history, in which the scale of conflict and genocide in the frontier wars was being wrongfully exaggerated. Stoked by historian Geoffrey Blainey, and then Prime Minister, John Howard, it cultivated a war of words shamefully disputing and denying the true impact and scale of the violence used by colonial forces and settlers to dispossess First Nations of their lands. For an excellent review of this period, and the main protagonists in the debates, see Mark McKenna, “Different Perspectives on Black Armband History” (Research Paper No 5, Politics and Public Administration Group, 10 November 1997).

26 Reynolds (n 24) 147.

denounced these operations in the press, local parliaments and the Colonial Office in London. An 1880 newspaper editorial described the *modus operandi* of the Queensland Native Police as follows:

The least show of resistance [by Aboriginal inhabitants] is answered by a rifle bullet; in fact the first introduction between blacks and whites is often marked by the unprovoked murder of some of the former – in order to make a commencement of the work of “civilising” them. Little difference is made between the treatment of blacks at first disposed to be friendly and those who from the very outset assume a hostile attitude.<sup>27</sup>

While unable to stem the blood-letting in Queensland, such revelations did have an impact on how other British colonies were being “settled” at that time: to minimise repetition of the Queensland atrocities, imperial control was tightened against wayward settlers and Native Police in Western Australia.<sup>28</sup> Throughout his time in office in Queensland, Sir Samuel Griffith sought to defend these operations – morally, politically and legally – with full knowledge that such actions by wayward police and settlers to disperse native subjects were illegal under the common law. As Reynolds concludes, Sir Samuel’s “neatly manicured hands were deeply stained with the blood of murdered men, women and children”.<sup>29</sup>

No doubt, for many people living in Australia today, and some student readers of this book (perhaps even those studying law at Griffith University in Queensland), this retelling of Sir Samuel’s legacy may be considered to be historical “water under the bridge”. However, as the Uluru Statement acknowledges, the ongoing national failure to accept responsibility for past wrongs – that today would be viewed as crimes against humanity – must be remedied. Truth-telling is vital to healing open wounds within First Nations, as well as resolving many of the pressing legal issues, including native title claims, that continue to be “live matters” before Australian courts. The future of Australia will be based on both truth-telling about the processes of violent, unlawful dispossession of land, the state-sanctioned policies that enabled genocide and cultural destruction. But fundamentally, as the Uluru Statement embodies, it needs a commitment to devise a new model of shared sovereignty between the First Nations and the people of Australia.<sup>30</sup>

In the next section, we examine the legal construction of “Race” under the Australian Constitution, and how ideas of racial superiority and xenophobia were entrenched into the constitutional fabric at the birth of the Australian nation in 1901. The power to regulate matters of “Race” granted to the new federal parliament was selective; whether for purposes of their legal protection or persecution, First Nations peoples were placed beyond the reach of federal law – rendered “outlaw” in the eyes of the law of the newly founded Australian nation.

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27 Ibid.

28 Ibid 150.

29 Ibid 149.

30 Gabrielle Appleby and Eddie Synot, “A First Nations Voice: Institutionalising Political Listening” (2020) 48(4) *Federal Law Review* 529-42. See generally Reynolds (n 3).

### (c) **Legal-constitutional constructions of “race”: contesting power and identity**

The issue of race is culturally and socially constructed and structured, directly or indirectly, by relations of power.<sup>31</sup>

The concept of “Race” is often used to distinguish between different groups in a society. Fundamentally, as the above quote states, it is a socio-cultural, political and legal construct. While individuals may describe themselves as “Aboriginal”, “Anglo-Saxon” or “Celtic”, “European” or “Asian” in background, these apparently stable constructions contain elements of unity and disunity. Indeed, lumping people who descend from Celts with Anglo-Saxons, a common tendency in Australia, can provoke a fierce reaction from those of Irish and Scottish descent!<sup>32</sup>

Our point here is that “Race” is a construct of identity that is malleable as well as historically contingent. The emergence of “Race” as an object of socio-cultural, political and legal power in late 19th century was aided by the efforts of new sciences including anthropology and eugenics, which stoked fears of degeneracy caused by the mixing of races. The civilising missions of European powers over Indigenous “inferior races” has been long-standing, based on spreading Christianity across the globe. The rise of these new disciplines in the 19th century conferred scientific legitimacy to these earlier missions. In the next section, we will examine how these ideas of racial superiority provided the justification for the adoption of protectionist laws, assimilationist policies, and ultimately genocide in the 20th century.

The inclusion of the “Race” power in the Australian Constitution at the beginning of the 20th century reflected the political aspiration of its founders that Australia should be a White, British nation. Section 51(xxvi) of the Australian Constitution, as originally drafted, granted federal parliament the power to make laws with respect to:

(xxvi) the people of any race, *other than the aboriginal race in any State*, for whom it is deemed necessary to make special laws.<sup>33</sup>

31 Barry Morris, “Racism, Egalitarianism and Aborigines” (1990) 3 *Journal of Social Justice Studies* 61, 63.

32 Although the labels “Anglo-Celtic” and “Anglo-Saxon-Celtic” are commonly used in Australia, implying an inappropriate homogeneity between the English and the Celts, there are strong claims that the Celts themselves (the Scots and Welsh, as well as the Irish) have suffered from colonialism at the hands of the English. See Michael Hechter and Paul Kegan, *Internal Colonialism* (Routledge, 1975) and Tom Nairn, *The Break-Up of Britain* (New Left Books, 1977). An example of mashing together of distinct often antagonist groups is apparent in *Masciantonio v The Queen* (1995) 183 CLR 58, where McHugh J at 73 rejected the objective standard of self-control in provocation defence on the grounds that the juries would judge the accused by “the standard of self-control attributed to a middle class Australian of Anglo-Saxon-Celtic heritage, that being the stereotype of the ordinary person with which the jurors are most familiar.”

33 Australian Constitution s 51(xxvi) (emphasis added). Section 127 (repealed) of the Australian Constitution also excluded First Nations from the Census: “[i]n reckoning

The inclusion of this power, combined with and the “Aliens power” in s 51(xix) of the Constitution, reflected the drafter’s intention to restrict the migration of non-British “alien” races to Australia and to further regulate their behaviour after immigration: specifically, Chinese and Kanaka labourers that had migrated to the Australian colonies in the late 19th century.<sup>34</sup> The extent of racial fear was apparent in Sir John Forrest’s speech addressed to the Constitutional Convention in 1898: “[i]t is of no use for us to shut our eyes to the fact that there is a great feeling all over Australia against the introduction of coloured persons. It goes without saying that we do not like to talk about it, but it is still so”, suggesting that one motivation was to limit the movement of the Chinese.<sup>35</sup> Tony Blackshield and George Williams point to the speech at the Convention of Sir Edmund Barton, who became Australia’s first Prime Minister, arguing that the inclusion of a Race power was necessary to “regulate the affairs of the people of coloured or inferior races who are in the Commonwealth”.<sup>36</sup> A crucial plank in the construction of the “White Australia” policy, s 51(xxvi), provided the constitutional foundation for the passage of the federal *Pacific Island Labourers Act 1901* (Cth), which discriminated against any potential workers and immigrants from the Pacific Island.<sup>37</sup> At the same time, it limited

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the numbers of people of the Commonwealth, or of a State or any other part of the Commonwealth, aboriginal natives shall not be counted.”

- 34 John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Lexis Nexis Australia, 1901) 622: described the purpose of s 51(xxvi) in its original form as follows: “It enables the Parliament to deal with the people of any alien race after they have entered the Commonwealth; to localize them within defined areas, to restrict their migration, to confine them to certain occupations, or to give them special protection and secure their return after a certain period to the country whence they came.” See also, with thanks to Dr Joel Harrison: *Kooivarta v Bjelke-Petersen* (1982) 153 CLR 168, 186 (Gibbs CJ), quoting Geoffrey Sawer, “The Australian Constitution and the Australian Aborigine” (1966) 2 *Federal Law Review* 17, 20.
- 35 Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander People in the Constitution: Report of the Expert Panel* (Commonwealth of Australia, January 2012) 16 <<http://www.recognise.org.au/uploads/assets/html-report/>>. Chinese migration was targeted as a source of cheap labour and “cultural contamination” leading to laws imposing significant restrictions their freedoms, but also criminalising the so-called Chinese “vice” of opium-smoking: Desmond Manderson, *From Mr Sin to Mr Big – A History of Australian Drug Laws* (Oxford UP, 1993).
- 36 *Official Record of the Debates of the Australasian Federal Convention (1891-1898)* (Legal Books, 1986) vol 4. This view was not universally held, and some of the delegates spoke against the race power, such as Josiah Symon QC who stated “It is monstrous to put a brand on these people when you admit them. It is degrading to us and our citizenship to do such a thing. If we say they are fit to be admitted amongst us, we ought not to degrade them by putting on them a brand of inferiority”: *Official Record of the Debates of the Australasian Federal Convention (1891-1898)* (Legal Books, 1986) vol 4, 250. See further Kim Rubenstein, “Citizenship and the Constitutional Convention Debates: A Mere Legal Inference” (1997) 25(2) *Federal Law Review* 295, 307.
- 37 Our sincere thanks to Associate Professor Elisa Arcioni for correcting an earlier issue of this chapter which said that the race power was the basis for the *Immigration Restriction Act 1901* (Cth), the main piece of White Australia policy; in reality, the immigration

federal legislative power in relation to the governance of people of the “aboriginal race” (see italics above). This limitation meant that the newly federated States, and eventual Territories, of the Commonwealth could continue their legal regulation of “native affairs” unhindered by federal interference until 1967, when it was removed following constitutional referendum.<sup>38</sup>

(i) *Constructing “race”: from protection statutes to anti-discrimination legislation*

Powerlessness means, among other things, having others say who you are, with the naming usually counting against you. Aborigines have been rendered largely invisible and Aboriginal rights have been effectively denied throughout much of white Australian history. Who is “really” Aboriginal, and what flows from that, has been laid down by governments, policemen, local officials and, more recently, anthropologists. Many Australians still make a distinction between “real” Aborigines (usually presumed tribal/traditional/“full-blood”) and “part” and/or urban Aborigines – despite the discrediting of genetic determinism, and the fact that many “urban” Aborigines know and have close links with country and kin. Such distinctions are not only personally and socially offensive and hurtful; they also have powerful political functions in challenging many Aborigines’ right to speak for, or even about, Aboriginal claims.<sup>39</sup>

Penned more than 30 years ago during Australia’s bicentenary, Jan Pettman’s observation still rings true – many First Nations people continue to live with painful “identity contestation” on a daily basis.

Defining and typologising “Aboriginality” has a long pedigree in Australian law, before and after federation. “Protection” statutes enacted during the colonial period used elaborate pseudo-scientific classifications based on *degrees* of “Aboriginality”. As Peggy Brock observed, a “caste system” was constructed under Australian law but only for people of Aboriginal descent. There was a plethora of definitions, with one survey identifying 67 distinct legal classifications of “Race” identified in Australian colonial legislation:

There were “full bloods”, “three quarter castes”, “half castes”, “quarter castes” (also referred to as “quadroons”) and “octoroons”. These people were all defined as Aboriginal despite their European-Australian (or

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power of s 51(xxvii) was. See also Laksiri Jyasuryiya, David Walker and Jan Gothard (eds), *Legacies of White Australia: Race, Culture and Nation* (University of Western Australia Press, 2003).

38 The *Constitution Alteration (Aboriginals) Act 1967* was passed unanimously, leading to a referendum motion that successfully removed the above limitation on federal power. See Australian Parliament House, “The 1967 Referendum” (Website, May 2017) <[https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/FlagPost/2017/May/The\\_1967\\_Referendum](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2017/May/The_1967_Referendum)>.

39 Jan Pettman, “Learning about Power and Powerlessness: Aborigines and White Australia’s Bicentenary” (1988) 29(20) *Race and Class* 69, 75-6.

Chinese-Australian etc) descent. There were part-Aborigines, but no part-Europeans or full-blood whites.<sup>40</sup>

These classifications applied only to Aboriginal people; while other ethnic or racial groups were discriminated against in terms like “mixed-race”, their blood was not quantified. Falling within this Aboriginal caste system offered none of the benefits of British subject-status, or later Australian citizenship. Instead, there was a suite of detriments; for example, both corporal and capital punishment were available to many of the colonial courts in the sentencing of Indigenous peoples – whether by practice or statute – long after they had been banned as punishment for settlers.<sup>41</sup> As public sentiment shifted to the realisation that Indigenous people would not die out, the colony shifted towards protectionism – the domination of not just the body, but the soul: “[p]rotection statutes enacted across the colonies from the 1860s onwards created a disciplinary regime of segregation on ‘native reserves’, assimilation policies, and welfare interventions by Aboriginal Protection or Welfare Boards that came to exercise near total control over the lives of First Nations peoples”.<sup>42</sup>

As Amanda Nettlebeck observed in her survey of Protection Regimes: “By the onset of World War I, a legal regime of protection grounded on principles of state surveillance and guardianship was in place across the country.”<sup>43</sup> These protection laws justified “wage theft”, curfews and marriage bans, and most notoriously, the forcible removal of “half caste” or “mixed race” children from their families for adoption, the latter causing significant inter-generational trauma to successive “Stolen Generations”.<sup>44</sup> Indeed Queensland bears the dubious honour of enacting one of the first criminal laws globally prohibiting the supply of opium prepared for smoking: in 1891, it was made an offence to supply any opium to “any aboriginal native of Australia or half caste of that race ... except for medicinal purposes”. This was followed by the *Aboriginal Protection and Restriction of the Sale of Opium Act 1897* (Qld) that Desmond Manderson has described as the “zenith of paternalism” as it aimed to protect Aboriginal natives from the Chinese vice of opium-smoking, and their exploitation and moral corruption by the “unscrupulous Chinaman”.<sup>45</sup>

40 Peggy Brock, “Aboriginal families and the law in the era of segregation and assimilation, 1890s-1950s” in Diane Kirkby (ed), *Sex Power and Justice: Historical Perspectives on Law in Australia* (Oxford UP, 1995) 134.

41 Thalia Anthony, *Indigenous People, Crime and Punishment* (Routledge, 2013) 39-42.

42 See generally Amanda Nettlebeck, “Protection Regimes” in *The Cambridge Legal History of Australia* (n 19) 482-501.

43 *Ibid* 496.

44 Australian Human Rights Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (also known as the “Stolen Generations Report”, chaired by Ronald Wilson) (Commonwealth of Australia, 1997) <<http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/hreoc/stolen/>>.

45 Desmond Manderson, *From Mr Sin to Mr Big – A History of Australian Drug Laws* (Oxford UP, 1993) 32-6. As Manderson points out, at 50-4, no restrictions were placed upon the supply of addictive “patent” medicines, often laced with opium, that were

From a modern perspective, racial legislation is a legal anathema: legal classifications explicitly based on determining the “quantum of native blood” are offensive and have been expunged from Australia’s statute books.<sup>46</sup> That said, the law continues to grapple with the definitional contours in the context of modern anti-discrimination laws, where discrimination on the grounds of “race” or “racial characteristics” is one of the proscribed grounds. In many respects, the persistence of the “Race power” as a head of power in s 51(xxvi) of the Australian Constitution appears anomalous. Today, the “Race” power, which once served as the basis for directly harming racial groups, is used to support the enactment of beneficial legislation like the *Native Title Act 1993* (Cth). While the Race power might be thought to support the anti-discriminatory *Racial Discrimination Act 1975* (Cth) (“RDA”),<sup>47</sup> members of the High Court – perhaps controversially – disagreed or did not consider as to whether it could validly do so: Gleeson CJ, for example, wrote that the RDA could not be a law with respect to “race” as it conferred rights on *all* races, rather than specifically benefiting or disaffecting a particular race.<sup>48</sup> Like the Constitution itself, the RDA contains no statutory definition of “Race”, leaving the High Court to define the concept in specific contexts. By contrast, anti-discrimination legislation at the State and Territory level does include definitions of “Race”, which in New South Wales is defined as including physical or cultural criteria such as colour, nationality, descent and ethnic, ethno-religious or national origin.<sup>49</sup> The Australian Capital Territory and Victoria have subsumed such provisions with their respective human rights legislation, following the approach in the *International Covenant on Civil and Political Rights* (“ICCPR”) that recognises a right to equality before the law and equal protection of the law and human rights without discrimination: “Race” is included as one of several categories of discrimination along with colour, sex, language, religion, political or other

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widely supplied by pharmacists and doctors in the 19th century for the relief of pain, coughing and insomnia.

46 These laws bear some similarity to the Nuremberg Laws of the Nazi Reich: the Reich Citizenship Law and the Law for the Protection of German Blood and German Honour enacted in in the 1930s. These laws, based on pseudo-scientific formulas for determining the degree of Jewish/Juden “taint”, ultimately provided the basis for employment and marriage restrictions, forced removal to labour camps and the Holocaust genocidal “Final Solution”: see Citizenship Law of 15 Sept 1935 (Reichsgesetzblatt) pt 1 s 1146; Harry Reicher, *Law and the Holocaust: Cases and Materials* (UPenn Law School, 4th ed, 2001); for a summary of these laws, see The United States Holocaust Memorial Museum (Website) <<https://encyclopedia.ushmm.org/content/en/article/nuremberg-laws>>. Elisa Arcioni does however make the point that potentially racially divisive language may remain dormant in s 25 of the Constitution: “Tracing the Ethnic and Racial Identity of the Australian Constitutional People” (Legal Studies Research Paper Series No 18/16, The University of Sydney Law School, April 2018) 15-20.

47 *Racial Discrimination Act 1975* (Cth) s 9(1).

48 *Koovarta v Bjelke-Petersen* (1982) 153 CLR 168, 187 (Gibbs CJ).

49 *Anti-Discrimination Act 1977* (NSW) s 4; *Discrimination Act 1991* (ACT) Dictionary; *Racial and Religious Tolerance Act 2001* (Vic) s 3.

opinion, national or social origin, property, birth or other status.<sup>50</sup> While these anti-discrimination provisions aim to be protective, outlawing different, less favourable treatments, they raise questions about the scope and limits of legal definitions of “Race”: it remains the case that “proving identity” as a member of a First Nations peoples is complex and vexed. As we shall examine below, racial identity (whether based on descent, recognition by or connection with First Nations peoples) can only be clarified by the application of principles of Australian law.

Contestation over racial identity and powerlessness are intertwined. Scholars have emphasised the importance of recognising the social and political context of attempts to construct “racial identity”. The history of the “Race” power in s 51(xxvi) and the High Court’s approach to its interpretation reflect the difficulty and contestation of legally conceiving and regulating racial identities in exclusively scientific or quasi-scientific terms. Mindful of the history of racist protection laws above, the High Court has consistently rejected exclusively biological or “bloodline” notions of Aboriginality. In *Commonwealth v Tasmania* (“*Tasmanian Dam Case*”), the Court was called upon to determine whether Tasmanian Aboriginals fell within s 51(xxvi). In so doing, Brennan J endorsed the application of a broad definition of “Race”:

Though the biological element is ... an essential element of membership of a race, it does not ordinarily exhaust the characteristics of a racial group. Physical similarities, and a common history, a common religion or spiritual beliefs and a common culture are factors that tend to create a sense of identity among members of a race and to which others have regard in identifying people as members of a race. As the people of a group identify themselves and are identified by others as a race by reference to their common history, religion, spiritual beliefs or culture as well as by reference to their biological origins and physical similarities, an indication is given of the scope and purpose of the power granted by para (xxvi) [within section 51]. The kinds of benefits that laws might properly confer upon people as members of a race are benefits which tend to protect or foster their common intangible heritage or their common sense of identity. Their genetic inheritance is fixed at birth; the historic, religious, spiritual and cultural heritage are acquired and are susceptible to influences for which a law may provide. The advancement of the people of any race in any of these aspects of their group life falls within the power.<sup>51</sup>

50 *Human Rights Act 2004* (ACT) s 8; *Charter of Fundamental Rights and Responsibilities Act 2006* (Vic) s 8; *Human Rights Act 2019* (Qld) s 15; *International Covenant on Civil and Political Rights*, opened for signature 19 December 1996, 999 UNTS 171 (entered into force 23 March 1976) (“ICCPR”): the ICCPR contains a similar provision at Art 26, which states that “the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

51 (1983) 158 CLR 1, 244 (Brennan J) (“*Tasmanian Dam Case*”).

A similar contextual approach to “Race” was endorsed by the Australian Law Reform Commission (“ALRC”) in its report on *The Recognition of Aboriginal Customary Laws* (1986):

95. The Commission’s View.

Experience under Commonwealth and State legislation suggests that it is not necessary to spell out a detailed definition of who is an Aborigine, and that there are distinct advantages in leaving the application of the definition to be worked out, so far as is necessary, on a case by case basis. Constitutionally this presents no difficulties, as the High Court’s decision is [sic] *Commonwealth v Tasmania* show. On the other hand, it has sometimes been suggested that a special and more restrictive definition of “traditional Aborigine” should be adopted for the purposes of this Report and its implementation. There are several reasons why such a special definition is both unnecessary and undesirable. Restrictive definitions of this kind have not been adopted in other related contexts. Experience so far does not suggest a need for more stringent definitions. The application of the Commission’s recommendations in appropriate cases is to be achieved by the substantive requirements of the provision in question, and by related evidentiary requirements. Indeed, there may be cases where it is appropriate that provisions for the recognition of Aboriginal customary laws should apply to persons who are not Aborigines. These questions have to be considered on their merits, and cannot be resolved through the adoption of any more-or-less restrictive definition of “traditional Aborigine”. (footnotes omitted).

As examined in the following case study, the law’s approach to defining First Nations identity is not conclusively settled, as revealed in the recent High Court case of *Love v Commonwealth; Thoms v Commonwealth* (“*Love & Thoms*”).<sup>52</sup>

#### CASE STUDY

##### **Reconciling Australian citizenship and Aboriginality in *Love & Thoms* (2020)**

There is no universal formula for identifying First Nations people – it will inevitably be context-dependent, a matter falling for determination under Australian law. This is apparent in the *Love* decision in the context of the application of the legal definition of “alien” under Australian citizenship and migration law. The legal category “alien” has changed over time. In earlier times, when the Constitution was drafted, it was clear that British subjects were not regarded as falling within the status of “aliens”. Today, in general terms, “alien” means “non-citizen”.<sup>53</sup> However, this straightforward definition has been subject to a significant qualification by the High Court in relation to non-citizen residents

52 (2020) 270 CLR 152 (“*Love & Thoms*”).

53 Ibid 183-4 [53], citing *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178: as Bell J noted, “since Australia’s emergence as a fully independent sovereign

who prima facie would be treated as alien but are excluded from alienage by virtue of their status as members of First Nations peoples. This controversy has arisen in the context of migration law where non-citizens have sought to challenge their deportation following criminal conviction on the grounds of “Aboriginality”.

In *Love & Thoms*,<sup>54</sup> the plaintiffs, Daniel Love and Brendan Thoms, were born overseas and both identified as Aboriginal Australians. Thoms was a descendant and elder of the Gungaarri People born in New Zealand and Love was a descendant of the Kamilaroi tribe and was born in Papua New Guinea. Neither of them sought to become Australian citizens as they lived in Australia under non-permanent visas. Both had been convicted and sentenced for offences under the *Criminal Code* (Qld) and their visas were consequently cancelled. The Commonwealth sought to deport the plaintiffs pursuant to s 501(3A) of the *Migration Act 1958* (Cth), since they were facing more than 12 months’ imprisonment. The Government argued that under the “aliens power” in s 51(xix) of the Australian Constitution, the Commonwealth has jurisdiction to deport the plaintiffs as they were “aliens” as well as non-citizens. Before the High Court, the plaintiffs argued that they should be accorded special status as non-citizens and non-aliens, flowing from their connection to Australia possessed as First Nations people. In legal terms, the issue was whether Aboriginal Australians could be considered “aliens” for the purposes of s 51(xix) of the Constitution. If they were not aliens, the plaintiffs could not be liable to deportation.

By a 4:3 majority (Bell, Nettle, Gordon and Edelman JJ), the High Court held that Aboriginal Australians, according to the tripartite test in *Mabo (No 2)*, who are born overseas and are not citizens of Australia are not within the reach of the aliens power under s 51(xix) of the Constitution.<sup>55</sup> Leading constitutional scholar, Peter Gerangelos, has neatly summarised the *ratio* of the High Court ruling as follows:

First, “Aboriginal Australians” (as defined) are not within the reach of Parliament’s power to make laws with respect to “aliens” pursuant to s 51(xix) of the Constitution (“the aliens power”). Second, the status of “Aboriginal Australian” is determined by reference to “the tripartite test in *Mabo v Queensland [No 2]* (1992) 175 CLR 1” that requires demonstration of biological descent from an Indigenous people, together with mutual recognition of the person’s membership of the Indigenous people by the person, the elders and other persons enjoying traditional authority among those people. Thus, Aboriginal Australians, not otherwise Australian citizens, even due to foreign birth, could not be deported as “aliens” pursuant to the relevant provisions of the *Migration Act 1958* (Cth).<sup>56</sup>

nation with its own distinct citizenship, alien in s 51(xix) has come to be synonymous with ‘non-citizen’.”

54 See *Love & Thoms* (n 52).

55 *Ibid* 192 [81].

56 Peter Gerangelos, “Reflections upon Constitutional Interpretation and the ‘Aliens Power’: *Love v Commonwealth*” (2021) 95 *Australian Law Journal* 109, 109 (footnotes omitted).

The reasoning supporting the decision of the majority was not uniform, and the minority in dissent suggest that the *ratio* will not be beyond challenge in future proceedings, particularly in relation to the durability of “tripartite test”, discussed above, based on biological descent, self-identification as an Aboriginal Australian and acceptance of such by elders of an Aboriginal community.

The majority found that the recognition by the common law of the unique spiritual connection between Aboriginal Australians and their traditional lands is incongruous with the finding that an Aboriginal Australian can be described as “alien”, and accordingly the *Migration Act 1958* (Cth) must be “read down” to exclude application to Aboriginal Australians.<sup>57</sup> The minority rejected the plaintiffs’ submissions. Kiefel CJ (at [29]-[30]) doubted whether the tripartite test in *Mabo* applied beyond native title cases, as to accept this effect would be to attribute to the group the kind of sovereignty which was implicitly rejected by *Mabo* and expressly rejected in subsequent cases. Gageler J (at [125]) expressed similar concern that accepting the plaintiffs’ argument would in effect recognise a form of supranational sovereignty for First Nations, and would “come perilously close to an assertion of Aboriginal and Torres Strait Islander sovereignty, albeit that the argument is deployed to assert not independence from, but an indelible connection with, the polity of the Commonwealth of Australia”. Keane J (at [177]) expressed the view that the proposed test by the plaintiffs could not be reconciled with the principle of equality of all persons under the law: “Alienage or citizenship is a status created by law. That status is a relationship between an individual and the sovereign nation. It is not a relationship between an ethnic group and the nation. Nor is it a relationship between an individual and an ethnic group ... In this regard, membership of a particular race does not afford an entitlement to membership of the Australian body politic under the Constitution or any Act of Parliament. Considerations of race are irrelevant to the requirements for membership of the Australian body politic.”

The barest of majorities (4:3) in *Love & Thoms*, and the fact that the majority delivered separate concurring judgments, means that the *ratio* of the decision is not beyond challenge. Indeed, the majority were not of one mind in how to approach the “tripartite test”. In determining the question of “non-alien” status, Nettle J (at [277]) emphasised that Aboriginal Australians, as a matter of history and continuing social fact, maintain “a special and unique connection to the land and waters of Australia which is not dependent on the identification of any legal title in respect of particular land or waters within the territory”. This connection with Country will be established “only upon proof of recognition for the person’s membership by persons having authority under laws and customs” that have been observed since before the “Crown’s acquisition of sovereignty” of Australian lands. The more restrictive approach to Aboriginality, as well as the objections raised by the minority, will form the basis of future submissions in the High Court.

57 *Love & Thoms* (n 52) 189 [71], 253 [270], [272], 315 [454].

Prior to the election of the Labor government in early 2022, the decision in *Love & Thoms* was due to be re-examined by the High Court. The case involved the Commonwealth's right to place the respondent, Shayne Montgomery, a New Zealand citizen, into immigration detention: The respondent in this case, while not a descendant of an Aboriginal person, had been culturally adopted by a person enjoying traditional authority among the Mununjali people. The Federal Court ordered Mr Montgomery's release after he submitted that he did not need to have a biological Aboriginal ancestor to be Aboriginal according to the traditional laws and customs of the Mununjali people.<sup>58</sup> The newly elected Labor government withdrew the case, though the scope and limits of the "tripartite test" in *Love & Thoms* will inevitably fall to be tested in future cases.

The High Court majority's attempted clarification in *Love & Thoms*, though welcomed, is not beyond criticism. A leading writer on identity and belonging, Peter Prince, has expressed the view that the decision nonetheless suffers from a degree of "whitewashing".<sup>59</sup> Although the judgments of both the majority and the minority in *Love & Thoms* affirmed that "Aboriginal Australians were regarded as British subjects following settlement" and that "Aboriginal people in Australia were a necessary part of the "people of Australia ... not ... a foreigner to the political community",<sup>60</sup> the historical record presents a very different portrait of subjecthood and citizenship under the law. Using the lived experience of Albert Namatjira, an Arrrente man who was renowned for his skills in watercolour painting, Prince challenges the legal myths around First Nations identity and Australian law. Namatjira was introduced to the Queen on her delegation to the Northern Territory in 1954.<sup>61</sup> Just two years earlier, however, the Commonwealth Minister for the Territories had declared his legal status to be that of an "aboriginal", not a citizen. His talent and newfound international fame slightly helped him – in 1957, Namatjira was only one of six First Nations people in the Northern Territory not to be named on the Register of Wards, which conferred the privilege that he could eat in white-only restaurants and vote in elections – but it did not protect him from the impact of the criminal justice system. Following his conviction for a minor offence, one which settlers often committed, he was imprisoned for six months of hard labour, and passed away shortly after his release from gaol.<sup>62</sup> As the life course of Namatjira – one of our nation's most renowned Indigenous artists – reveals, there was significant gap between the "law in books" and "law in action": Namatjira's

58 Naomi Neilson, "Federal Government Fights to Overturn Landmark Decision in *Love v Commonwealth*" *Lawyers Weekly* (News Article, 2 February 2022) <<https://www.lawyersweekly.com.au/biglaw/33537-federal-government-fights-to-overturn-landmark-decision-in-love-v-commonwealth>>.

59 Peter Prince, "Was Namatjira an Alien? The High Court's Flawed History of Belonging in Australia" in Kate Bagnall and Peter Prince (eds), *Subjects and Aliens: Histories of Nationality, Law and Belonging in Australia and New Zealand* (ANU Press, 2023) 151.

60 Ibid 155, citing *Love & Thoms* (n 52) 267 [314] (Gordon J), 313 [449], 296 [410] (Edelman J).

61 Ibid 154.

62 Ibid 159-65.

treatment, as one of the few “Aboriginal people [who] were a necessary part of the people of Australia”, highlights the historical and continuing difficulty in accepting the view that Aboriginal people are not foreigners to the political community, as stated in *Love & Thoms*.

As revealed in the above case study, there is some degree of fluidity and contingency within the legal concept of Aboriginal identity. The significance and relative weight of ancestry, “blood-lines” and/or DNA, as well as present-day acceptance within Community continue to be debated – but the fundamental issue is whether this is a matter for the common law of Australia to resolve or whether it should be First Nations peoples, governed by their own laws and practices, to determine whether a person is regarded as “belonging” to a particular nation or nations.

The law post-*Love* seems trapped within a settler-sovereignty paradigm – should Australia commit to a state of legal pluralism beyond that recognised in *Mabo (No 2)*? Is it a matter for the common law, or for First Nations Law, to decide the permissible limits of inclusion/exclusion for the purpose of determining membership? While there is a timeless aspect to both the common law and First Nations Law, it is important to recognise that norms constituting the “legal subject” are never frozen. First Nations Law cannot be an exclusive matter for “settler” lawgivers. To do so would entertain the unsettling prospect that the recognition of “true and valid” Aboriginal law (upon which Aboriginal identity would rest) is determined by a state-approved caste of “forensic experts” and their judgments as to whether the threshold criteria of settler law, outlined above, have been met. Such a model of “identity-policing” by settler law and justice officials would maintain the subordination of First Nations Law, requiring the instruments and norms of settler justice to serve as “gatekeepers” of First Nations legal knowledge.

In our view, it is important as a matter of self-determination to empower and give voice to the current generation of elders and lawgivers within Community to determine and apply their Law. Like the common law, it is a generative process, which should not involve applying only those laws held to be in continual operation since the time of First Contact. Ceding legal space for First Nations Law may be challenging for Australian lawyers and judges, who are familiar only with settler laws. But this familiarity can be acquired by sitting with First Nations communities and listening with humility and care, avoiding cultural stereotypes and biases. An ongoing legacy of *Mabo* is that it created some legitimate legal space for First Nations Law. Much like the proverbial small crack in a dam, it may become one that proves difficult if not impossible to plug.

As with “Gender”, most legal discussion of “Race” focuses on questions of “difference”, namely the unequal treatment of or discrimination *against* individuals and groups. This conception of equality as non-discrimination

has been examined in Chapter 2. Rather than view categories of difference – whether based on gender, race or sexuality or other status – in negative terms, this concept may be constructed in *positive* terms, imposing on the state and its legal system an obligation to adopt laws promoting respect for cultural difference and multiculturalism. Former tendencies to conflate the discriminatory treatment of Indigenous peoples with other “non-Anglo/White” minorities were understandable, perhaps even aided by the adoption of the omnibus *Racial Discrimination Act 1975* (Cth) which played a direct role in challenging overtly racist policies and practices against both Indigenous and non-Indigenous peoples. But in our continually evolving view, the position of the First Nations of Australia has been, and continues to be, distinct in so many ways that it demands legal and policy engagement on its own terms. The reason relates to the unique place of First Nations in the history of this continent, as High Court Justice, Murphy J, noted:

The history of the Aboriginal people of Australia since European settlement is that they have been the subject of unprovoked aggression, conquest, pillage, rape, brutalization, attempted genocide and systematic and unsystematic destruction of their culture.<sup>63</sup>

In this context, the “culture” that must be protected includes the central place of First Nations Law, which has governed Indigenous peoples and their relationship to land since “time immemorial”, as the common law would say, and as affirmed in the Uluru Statement from the Heart, above. For these reasons, the legal issues relating to First Nations and multiculturalism *must* be considered separately, and, in this respect, we too adopt the pioneering approach taken by the ALRC in their separate reviews of Aboriginal Customary Law and Multiculturalism in the 1980s and 1990s.<sup>64</sup>

From these foundational issues of identity, we now turn to the recognition of Aboriginal laws, and the extent to which legal pluralism can be reconciled with the fundamental liberal ideals at the heart of the Australian legal system.

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63 *Tasmanian Dam Case* (n 51) 180 (Murphy J).

64 See Australian Law Reform Commission (“ALRC”), *The Recognition of Aboriginal Customary Laws* (Final Report No 31, 1986); ALRC, *Multiculturalism and the Law* (Final Report No 57, 1992). In the 1990s, “cultural difference” more broadly displaced “racial difference” as a focus for policy makers. In Australia an agenda was advanced that tied the concept of multiculturalism to core liberal values—in particular, the right not to be discriminated against on the basis of race, religion or culture. “Fundamentally, multiculturalism is about the *rights* of the individual – the right to equality of treatment; to be able to express one’s identity; to be accepted as an Australian without having to assimilate to some stereotyped model of behaviour”: Commonwealth of Australia, Office of Multicultural Affairs, *National Agenda for a Multicultural Australia* (AGPS, 1989), as discussed in Luke McNamara, “Regulating Racism: Racial Vilification Laws in Australia” (2002) *Sydney Institute of Criminology Monograph Series No 16*. The centrality of equality to the idea of multiculturalism resonates strongly with the liberal philosophical foundations of law, explored in Chapter 1.

### (d) **First Nations Law: rethinking “equality before the law” and legal pluralism**

At this point, we offer a prefatory note over terminology. In our view, designation of “custom” and “customary” as a synonym or prefix for First Nations Law is problematic, and has in recent years fallen into disfavour as a means of distinguishing Indigenous from Australian Law. Our chapter favours the use of “First Nations Law” and “Aboriginal Law” rather than “Aboriginal Customary Law” or “Lore”. The latter term, although common in earlier literature, is avoided here as it implies some lesser legal status due to its oral, unwritten and non-codified character. As Mary Spiers Williams recently observed:

While English language cannot capture what First Law is, I am grateful that we have moved on from terms that suggest that it is not real law. First Law is, thankfully, less-and-less referred to by state lawyers as “lore” (that can evoke taletelling) or “customary” law (that evokes a sense that it is “lite” law).<sup>65</sup>

It should be apparent to readers that “customary” characteristics are equally evident (indeed valorised) in many legal systems of the world, including the common law system which is rarely described as being “customary” in nature!

The preference for “First Nations” nomenclature also signals that Australia comprises several hundred separate Indigenous nations, each with their own distinct laws and languages, rather than a single, unified Aboriginal or Indigenous polity. It also emphasises that in relation to each of these polities, sovereignty – so far as the First Nations of Australia themselves are concerned – has never been ceded.<sup>66</sup> Williams concludes her essay by offering a powerful provocation to Australian law and lawyers, inviting them to listen more attentively to First Law knowledge-holders.<sup>67</sup> It must be recognised that “First Law” is local, tied to specific Country. It is not homogenous, and it certainly does not translate easily into “Western” legal concepts and categories. The failure to acknowledge our ignorance entails much risk for the “recognition” of First Law; not only may we misunderstand or distort that knowledge, but through

65 Mary Spiers Williams, “Challenging Settler State Legal Fantasies: Basic Precepts of First Law” in *The Cambridge Legal History of Australia* (n 19) 61, 67.

66 See the *AIATSIS Map of Indigenous Australia* (1996) for a powerful visual representation of this diversity, with more than 250 nations represented: <<https://aiatsis.gov.au/explore/map-Indigenous-australia>>; Michael Ghillar, “For the record: Sovereignty Never Ceded” *National Unity Government* (Webpage Article, 9 April 2015) <<http://nationalunitygovernment.org/content/sovereignty-never-ceded>>; Callum Clayton-Dixon, “I can’t call myself an Indigenous Australian and also say sovereignty never ceded” *The Guardian* (Webpage Article, 10 December 2015) <<https://www.theguardian.com/commentisfree/2015/dec/11/i-cant-call-myself-an-Indigenous-australian-and-also-say-sovereignty-never-ceded>>; “NAIDOC Week: Always Was, Always Will Be” *Reconciliation Australia* (News, 9 November 2020) <<https://www.reconciliation.org.au/naidoc-week-always-was-always-will-be/>>.

67 Mary Spiers Williams, “Challenging Settler State Legal Fantasies: Basic Precepts of First Law” in *The Cambridge Legal History of Australia* (n 19) 61-84.

the process of engagement, there is a risk that First Law will be subordinated or swallowed up by colonising state/settler laws, a potentially destructive process which Williams describes as “jurispathic” to First Law.<sup>68</sup>

The status and recognition of the laws of First Nations by first British colonial and Australian legal systems has been both partial and inconsistent. This story of “recognition” (or more often, *non*-recognition) may be viewed as an example of how liberalism and the Rule of Law – embodied in principles like equality before the law – has struggled to accommodate legal pluralism including more complex and fragmented notions of sovereignty, jurisdiction and law for First Nations peoples. An essential element of liberalism and the Rule of Law is the idea that all persons stand “equal before the law”. As discussed in Chapters 1 and 2, the liberal commitment to equality before the law is a powerful and legitimating force in many legal cultures, and is reflected in the Rule of Law. Yet it is also beyond dispute that this legal commitment has not eradicated many (if any) racial, gender or socio-economic inequalities. Part of law’s failure to live up to its “liberal promise” lies in the deeply contested definitions of equality. Chapter 3 explored the “logic of equality” in the context of gender discrimination, revealing the limitations of formal and substantive equality as well as remedial versions, such as equality of opportunity. As we shall explore below in relation to treatment of First Nations peoples, “Whitefella” law rarely delivered on the liberal promise of equality before the law. Harsher treatment is often justified by reference to one law for all; contemporary criminal justice policies and practices such as the “zero tolerance” policing of street crime and public disorder, and mandatory sentencing laws, are often justified by reference to equality before the law. However, there is mounting evidence that suggests that these policies of treating “all persons the same” may in fact compound the suffering of disadvantaged groups, which as the Uluru Statement notes results in First Nations peoples in Australia being proportionately “the most incarcerated people on the planet”.<sup>69</sup>

The next section examines how the notion of “equality before the law” took root in Australia, specifically the legal constitutional dogma that *all* subjects of the British Crown share the protection of, and are burdened by, the *same laws*. It was an ideal of British Justice embodied within the Rule of Law, discussed in Chapter 2, that promised First Nations subjects both liberty and rights according to law. However, as our brief historical overview reveals, the arrival of British Justice to Australia came at a great cost for First Nations, purporting to extinguish claims of prior sovereignty and pre-existing systems of justice

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68 Ibid 66. At note 10, Williams writes that the term “jurispathic” was coined by Robert Cover to describe the US Supreme Court’s tendency to “kill the diverse legal traditions that compete with the State”.

69 See the ALRC’s discussion of mandatory sentencing in *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Final Report 133, 2017). Evidence suggests that mandatory sentencing increases incarceration, is costly and is not effective as a crime deterrent.

and laws including foremost those related to land. In relation to the latter, this blindness toward pre-existing “native” laws in relation to land persisted until the High Court’s landmark decision in *Mabo (No 2)* in 1992, which is explored the next section.

(i) *Colonial legacies of terra nullius: contesting historical and legal fictions*

At a fundamental level, the Rule of Law espouses a commitment to “one law for all”. During the colonial period, however, Aboriginal people were not always recognised as rights-holders especially in relation to land. On one view, the Aboriginal “natives” encountered by early settlers should have been regarded as British subjects from the outset, benefiting from the protection of the received English common law and statutes. Although silent on the precise legal status of Aboriginal “natives” and their laws, Governor Phillip’s Instructions suggest that they were to be protected by English law against the predations of the British colonists:

You are to endeavour, by every possible means to open an intercourse with the natives, and to conciliate their affections, enjoining all our subjects to live in amity and kindness with them. And if any of our subjects shall wantonly destroy them, or give them any unnecessary interruptions in the exercise of their several occupations, it is our will and pleasure that you do cause such offenders to be brought to punishment according to the degree of the offence.<sup>70</sup>

While “natives” were supposed to enjoy the legal protection due to them as British subjects, in fact their status remained highly ambiguous.<sup>71</sup> As David Neal pointed out more than three decades ago, First Nations peoples were variously characterised as “some hybrid of outlaw, foreign enemy and protected race [to whom] the rule of law provided cold comfort”.<sup>72</sup> Neal suggests that much of the violence between settlers and Aboriginal communities was understood at that time as an exercise in diplomacy and conciliation, rather than as a negotiation over territoriality or jurisdiction.<sup>73</sup> From 1788 until the 1820s, this led to cycles of violence and bloody reprisals between First Nations and

70 George Barton, “Phillip’s Instructions” (1889) 481, 483, 485, 486, excerpted from Heather McRae, Garth Nettheim and Laura Beacroft (eds), *Indigenous Legal Issues: Commentary and Materials* (Law Book Company, 2nd ed, 1997) 33.

71 It appears that this ambiguity was not unique to the Australian colonies, as Lisa Ford has pointed out in her comparative study of the legal treatment of Indigenous people in America and Australia: Lisa Ford, *Settler Sovereignty – Jurisdiction and Indigenous People in America and Australia 1788-1836* (Harvard UP, 2010). In both the newly founded State of Georgia and the Colony of New South Wales, the legal landscape until the 1820s was characterised by a deliberate policy of not extending the jurisdiction of the common law to persons who were not in a position either to understand the law or participate fully in legal proceedings.

72 David Neal, *The Rule of Law in a Penal Colony* (Cambridge, 1991) 78, 151.

73 *Ibid* 37.

settlers groups, though crimes were rarely if ever brought before the courts for trial. From the perspective of many colonial administrators and early settlers, “natives” who lived outside the pale of settlement were simply beyond the reach of British justice due to their inability to understand the nature of the proceedings and the legal disability at common law that barred them offering sworn testimony.

In the 1990s, the archival discovery of long-lost, forgotten early cases in New South Wales by legal historian Bruce Kercher revealed more nuanced and complex accounts of the operation of British law and justice in the first four decades following the arrival of the British. Kercher’s discovery and publications of these cases in the late 1990s stimulated re-evaluation of questions of British jurisdiction and sovereignty over First Nations, particularly in relation to crimes committed *between* First Nations peoples, known as “*inter se* crimes”.<sup>74</sup> It is now clear that early settlers, judges and colonial administrators engaged with the “native problem” in a variety of different ways: for many years, there was uncertainty whether “natives” living beyond the limits of settlement were subject to British law for *inter se* crimes. It was not until the 1820s that the newly constituted Supreme Court of New South Wales tackled this issue in a series of cases; initially the Court held that natives charged crimes who were in “savage state” at the time of the alleged *inter se* murders should be discharged for lack of jurisdiction. This position was affirmed in *R v Ballard* in 1829, and later in other cases, where the Court held that the common law of murder did not apply to the killing of an Aboriginal man by another Aboriginal man.<sup>75</sup> The rationale for disapplying the English common law from these disputes between natives was framed in terms of their personal status (as a “native” governed by their own laws and customs), rather than in terms of territoriality, the physical space in which the crime occurred (which is the foundation of criminal jurisdiction today). In this case, the New South Wales Supreme Court, led by Forbes CJ, held that in the absence of legal authority to the contrary and consistent with practices of the North American colonies, English law had no application to crimes committed between Aborigines *inter se*. In Forbes CJ’s view, it was improper to interfere with the institutions of natural justice in which natives redressed their wrongs by retaliation rather than through the courts. What is interesting is that cases like *Ballard* slipped from view in later debates about the recognition of Aboriginal laws.<sup>76</sup> Lisa Ford

74 Bruce Kercher, “Recognition of Indigenous Legal Autonomy in Nineteenth Century New South Wales” (1998) 4(13) *Indigenous Law Bulletin* 7; Bruce Kercher, “Publication of Forgotten Case Law of the New South Wales Supreme Court” (1998) 72 *Australian Law Journal* 876; Heather Douglas and Mark Finnane, *Indigenous Crime and Settler Law – White Sovereignty after Empire* (Palgrave-Macmillan, 2012).

75 [1829] NSWSC 26 (21 April 1829).

76 See Bruce Kercher, “*R v Ballard*, *R v Murrell* and *R v Bonjon*” (1998) 3(3) *Australian Indigenous Law Reporter* 410, 412.

has further demonstrated in her pioneering study that this was not an isolated occurrence at that time.<sup>77</sup>

This early Australian foray into legal pluralism was not to last. With the arrival of more judges from England, these early cases were effectively reversed. In the subsequent decision of *R v Jack Congo Murrell* in 1836,<sup>78</sup> the Supreme Court adopted a broader territorial, expansionist conception of jurisdiction that attached to *the land*, of which the British had taken *possession*. Recently arrived from England, Burton J emphatically proclaimed that in relation to the eastern half of the Australian Continent, “the law of England is the law of the land”.<sup>79</sup> Forbes CJ sat on both decisions, though he was careful to distinguish the earlier decision of *Ballard* on the facts. *Murrell* was viewed as effectively reversing *Ballard* and the earlier legal opinions. Today *Murrell* is cited as legal authority for the point that Aboriginal law did *not* survive “settlement” – that the English common law applied to Aboriginal people even in relation to crimes committed among themselves. As Bruce Kercher notes, interpreted in this way, “[*Murrell*] has the dubious reputation of being the founding case for the application of the *terra nullius* doctrine in Australia”.<sup>80</sup>

The designation of Australia as *terra nullius*, literally “land belonging to no-one”, meant it would be available for lawful settlement. Although the Latin phrase itself was not employed by Burton J, his emphatic denial of First Nations prior sovereignty, recognition of First Laws and land ownership was consistent with *terra nullius*. These ideas of territorial acquisition, reflecting the emerging position under international law or the “law of nations”, found neat expression in William Blackstone’s *Commentaries on the Laws of England* (1759).<sup>81</sup> The law governing acquisition of “desart [sic] and uncultivated” territory rested on a tripartite distinction between “settled, ceded and conquered territories”, which Blackstone described in the following terms:

[I]f an uninhabited country be discovered and planted by English subjects, all the English laws are immediately there in force. For as the law is the birthright of every subject, so wherever they go they carry their laws with them. But in conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws; but, till he does

77 Ford (n 71).

78 (1836) 1 *Legge* 72.

79 Shaunnagh Dorsett, “Plural Legal Orders: Concept and Practice” in *The Cambridge Legal History of Australia* (n 19) 19-39.

80 See Kercher (n 74). Historical research has pointed out that while the courts took this formal position that “natives” were both subject to and protected by colonial law, “[n]ineteenth century colonial practice was quite capable of staying at a distance from Indigenous law ... there appears to have been a general reluctance to prosecute Aborigines for deaths arising within their own communities”: Mark Finnane, “Payback’, Customary Law and Criminal Law in Colonised Australia” (2001) 29 *International Journal of the Sociology of Law* 293, 303.

81 Thalia Anthony, “Blackstone on Colonialism: Australian Judicial Interpretations”, in Wilfrid Prest (ed), *Blackstone and his Commentaries: Biography, Law, History* (Hart Publishing, 2009) 129-50.

actually change them, the ancient laws of the country remain, unless such as are against the law of God, as in the case of an infidel country.<sup>82</sup>

*Blackstone's Commentaries* being regarded as the “bible of colonial lawyers” provided the legal blueprints for British imperial expansionism.<sup>83</sup> This tripartite distinction came subsequently to be accepted by colonial and Australian courts. In *Milirrpum v Nabalco Pty*<sup>84</sup> Blackburn J summarised in the position in the 1970s as follows:

There is a distinction between settled colonies, where the land, being desert and uncultivated, is claimed by right of occupancy, and conquered or ceded colonies. ... The difference between the laws of the two kinds of colony is that in those of the former kind all the English laws which are applicable to the colony are immediately in force there upon its foundation. In those of the latter kind, the colony already having law of its own, that law remains in force until altered.

The application of the *terra nullius* doctrine to Australia is problematic at many levels. As Lisa Ford points out in her examination of settler sovereignty, the legal doctrine of *terra nullius* did not actually come into wider currency until the late 19th century.<sup>85</sup> From her survey of colonial material, theories of jurisdiction, territory and sovereignty were more “fluid and uncertain” in the first decades of settlement, as the above discussion reveals.<sup>86</sup> That said, Blackstone’s writings above did play a key role in subsequent cementing of the doctrine of *terra nullius* in Australia. Thalia Anthony insightfully points out that application of the common law’s theory of settlement was based on a misconstruction of Blackstone, in particular by taking his phrase “desart (sic) and uncultivated” territory out of context. From the 1830s onwards, it is clear that in denying recognition of native law and jurisdiction, local courts seized on the fact that Aboriginal natives lacked any recognisable system of land tenure or titles, and did not engage in the cultivation of land. As Anthony points out, from the surrounding passages, and the discussion of the position in the American colonies, it is clear Blackstone did not intend such an interpretation. Whatever the precise status of *terra nullius* at the time of first contact, over the course of the 19th century the designation of Australia as *terra nullius* became conventional legal wisdom, and was finally put beyond challenge by the Privy Council in *Cooper v Stuart* (1889).<sup>87</sup> By this time, a decade before federation, *terra nullius* had spread across the whole of the continent, a legal fiction that denied the patent truth to the colonisers and the First Nations themselves, that “natives” were living in tribes, formed as part of distinct nations, both making and policing their own laws and customs across the continent.

82 William Blackstone, *Blackstone's Commentaries* (Oxford, 17th ed, 1830) vol 1, 104-5.

83 Anthony (n 81) 133.

84 *Milirrpum v Nabalco Pty Ltd (Gove Land Rights Case)* (1971) 17 FLR 141, 201 (Blackburn J).

85 Ford (n 71) 28.

86 *Ibid* 29.

87 (1889) 14 App Cas 286.

*Terra nullius*, although an undoubted legal fiction, survived as the accepted legal and constitutional basis for Australia's colonisation until the High Court's watershed decision in *Mabo (No 2)* in 1992.<sup>88</sup> Until this legal fiction was ousted by *Mabo*, Australian law did not recognise native land rights unless these rights were created by State or Territory legislation.<sup>89</sup> Notwithstanding 60,000 years of prior occupation by Indigenous peoples, it was only in 1982, when Eddie Koiki Mabo and his fellow claimants commenced proceedings against the State of Queensland and the Commonwealth, that Australian courts were required to determine whether customs and traditions (incorporating rights to, and interests in, land) delivered enforceable property rights under the common law. The claimants in *Mabo*, all members of the Meriam People, brought proceedings in the original jurisdiction of the High Court seeking declarations that they held traditional native title to lands and waters in the Murray Islands of the Torres Strait that had not been extinguished by colonisation or subsequent legislative or executive action. The *Mabo* litigation lasted for 10 years and resulted in two separate decisions of the Full Court of the High Court. In the final decision, handed down on 3 June 1992, the Court held by a 6:1 majority that the Australian common law did recognise the pre-existing land rights of Indigenous peoples. As a result they found that the Meriam People were entitled, as against the whole world, to the possession, occupation, use and enjoyment of the Murray Islands. *Mabo* involved a re-examination of the classification of Australia as *terra nullius*, which was the basis for the acquisition of sovereignty over uninhabited lands by colonising nations. Brennan J described the application of such a notion to the continent of Australia as "false in fact"<sup>90</sup> and the High Court found that native title to land survived the Crown's acquisition of sovereignty and radical title.

The High Court in *Mabo* left unremedied the issue of the loss of First Nations sovereignty, though it did open a basis for argument, by analogy with

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88 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 ("*Mabo*"). *Mabo* departed from the leading case of *Cooper v Stuart* (1889) 14 App Cas 286 in which the Privy Council had advised that the colony of New South Wales was "peacefully annexed" rather than conquered, because, at the time, it "consisted of a tract of territory practically unoccupied": at 291. Until *Mabo*, the High Court had accepted this view, though with significant dissent from Murphy J who described it as a "convenient falsehood": *Coe v Commonwealth* (1979) 24 ALR 118 at 138. Gibbs J, speaking for the majority in that case, continued to affirm the view that "settled colony" theory in *Cooper v Stuart* was "fundamental": at 129.

89 The first piece of legislation to do so was the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). The Act established a legislative regime of land rights in the Northern Territory under which traditional owners could make land claims over various areas of land listed as available for claim. It was enacted following the findings and recommendations of the Woodward inquiry into Aboriginal land rights in 1974: Parliament of Australia, *Aboriginal Land Rights Commission: Second Paper* (Parliamentary Paper No 69, April 1974). The inquiry was established by the federal Government in response to the decision of Justice Blackburn in *Milirrpum v Nabalco Pty Ltd (Gove Land Rights Case)* (1971) 17 FLR 141.

90 *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 40 (Brennan J).

native title, that Aboriginal criminal laws (including so called “customary” law defences) may have survived British occupation. As Deane and Gaudron JJ observed in *Mabo*:

The common law so introduced was adjusted in accordance with the principle that, in settled colonies, only so much of it was introduced as was “reasonably applicable to the circumstances of the colony”. This left room for the continued operation of some local laws or customs among the native people and even the incorporation of some of those laws and customs as part of the common law.<sup>91</sup>

The legacies of *Mabo* have been profound, most significantly, empowering them, beyond the arena of land rights, with a new *legal* vocabulary in which rights, customs and laws can be expressed and potentially recognised under Australian law. Before examining modern arguments from liberalism that hamper recognition of First Nations Law – especially those founded in equality before the law – we return to the legal dynamics of colonisation, specifically how the introduction of English law in the early decades of the colony was not so much a process of adoption, but rather an *adaptation* to the settler concerns and needs.

(ii) *Common law’s inherent pluralism: colonial adaptations to “local conditions”*

Under the theory of “settled colonies”, English law travelled with British settlers though with one significant qualification – as Blackstone pointed out, only so much English law (common law and statute) as appropriate to “local conditions” was received into the colonial legal system. It has been erroneously claimed that with the arrival of settlers, the laws of England applied automatically to the whole continent to the exclusion and extinguishment of local Aboriginal laws.<sup>92</sup> But closer scrutiny of the surviving historical material suggests that the common law as received and applied in the early colonial period, consistent with practices in other British colonies in North America, was more pluralistic than conventional legal wisdom would have it.<sup>93</sup> Colonial law was a highly adaptive system of law, selectively importing (or ignoring) English legal rules depending on their perceived suitability to local conditions. As explored above, during the first 40 years of settlement the newly established superior courts in the Australian colonials refused consistently to apply English law to “natives” in relation to crimes *inter se*.

91 Ibid 79 (Deane and Gaudron JJ).

92 Three decades ago, the first edition of this book formulated the legal position of “Aborigines” in these terms: “as a consequence of British settlement Aborigines became subject to British, and later Australian, law. Any rights which they may have had arising from their own system of law were extinguished by that very act of settlement”: Stephen Bottomley, Neil Gunningham and Stephen Parker, *Law in Context* (Federation Press, 1991) 287 (footnotes omitted).

93 See Ford (n 71); Bruce Kercher, “Colonial Settlement to Colony” in *The Cambridge Legal History of Australia* (n 19) 90-6.

The resulting legal pluralism that recognised Aboriginal peoples, *in relation to matters between themselves*, lived under their own laws and customs, should not be viewed as a deviation from the unity of the common law. Indeed, the English legal system familiar to settlers at the end of the 18th century was inherently pluralistic, recognising multiple and overlapping jurisdictions and bodies of law. At its heart was the English common law, administered centrally from the Royal Courts of Justice in London. However, the common law was supplemented by, and often competed with, specialised and local courts applying their own legal rules (such as equity, mercantile, maritime and ecclesiastical law). Courts thus competed for litigants' business and inevitably this generated jurisdictional conflict, the most famous being the historic struggle between the common law courts and courts of equity which was only resolved by the "fusion" of common law and equitable jurisdictions by legislation in the 19th century. There were also many localised variations. Different localities within England developed their own customary rights and practices, particularly in relation to land. These were confined to specific regions, recognised both in local courts and also within the common law courts. By the 19th century, this complexity had become untenable, conflicting with the universalising tendency of the common law and parliament's efforts to eradicate local customs through the enactment of general statutes.<sup>94</sup> This historical digression reveals that legal pluralism is not something alien to the traditions of English common law. In fact, it is quite the reverse.<sup>95</sup>

The point to draw from this discussion is that the prevailing theories of settlement did not necessarily deny a space for First Nations Laws and systems of justice.<sup>96</sup> For several decades after first contact in 1788, "native" and English common law systems of justice co-existed, albeit uneasily at times, in defined spheres applying their own laws, systems of dispute resolution and punishments. As Kercher concludes, this period of legal "first contact", manifested in the cases like *Ballard*, is worthy of further critical attention:

[n]ot least because they are more consistent with the writings of Vattel [a distinguished international law scholar of the period] on the rights of nomadic peoples and ... because they are more consistent with the rights of native peoples in other jurisdictions.<sup>97</sup>

94 Nineteenth century England witnessed much political and legal conflict over the enclosure of the "commons", a process which sought to displace or abolish customary rights in relation to land, especially those rights held communally rather than individually: see Edward Palmer Thompson, *Customs in Common* (The New Press, 1991).

95 The similar point has been made by Shaunnagh Dorsett, "Plural Legal Orders: Concept and Practice" in *The Cambridge Legal History of Australia* (n 19) 26-7.

96 See further Bruce Kercher, "Native Title in the Shadows: the Origins of the Myth of *Terra Nullius* in Early New South Wales Courts" in Gregory Blue, Martin Bunton, and Ralph Crozier (eds), *Colonialism and the Modern World Order: Selected Studies* (ME Sharpe, 2002); Bruce Kercher, "The recognition of aboriginal status and laws in the Supreme Court of New South Wales under Forbes CJ, 1824-1836" in Andrew Buck, John McLaren and Nancy Wright (eds), *Land and Freedom: Law, Property Rights and the British Diaspora* (Ashgate, 2001).

97 Kercher (n 74).

This considered reappraisal of historical sources suggests that the denial of First Nations Law and jurisdiction was not inevitable. However, as the 19th century proceeded, the spreading fiction of Australia as being *terra nullius* and the arrival of more European “settlers” greedy to take land for cultivation, made it difficult, if not impossible, to preserve legal space in Australia for First Law and Indigenous ways of doing justice.

From a comparative perspective, we can identify different approaches to the legal recognition of the rights of First Nations people, especially in relation to land rights.<sup>98</sup> In the colonisation of New Zealand, from the settler perspective, the *Treaty of Waitangi* (1840) ceded Māori sovereignty to the British, while preserving a range of Māori rights. The significance of this development for the Māori is apparent today, with the Treaty occupying a central place in public debate. This is not to suggest that recognition of Indigenous law and rights was always benign or indeed beneficial to Indigenous peoples. There were clearly assimilationist tendencies in these colonial processes of recognising Indigenous practices as “rights”. As distinguished English historian EP Thompson points out, in New Zealand, through the process of managing native title, the law radically redefined “communal” landholding:

The Native Land Act of 1865 whose aim was to assimilate native rights to land “as nearly as possible to the ownership of land according to British law”. Since British law could never recognise a communist legal personality, section 23 of the Act ordered that communal rights could not be vested in more than ten persons.<sup>99</sup>

As we have demonstrated here, the historical denial of First Nations Law and jurisdiction within Australia neither was inevitable nor followed in other British colonial societies. We now turn our attention to how the modern law has engaged with First Nations Law and its claims to recognition, and assess arguments that Indigenous systems and norms conflict with liberal legal values such as legal certainty and equality before the law.

### (iii) *Recognition of First Nations Law: liberal objections to legal pluralism*

Shortly after *Mabo (No 2)* was handed down, Professor Stanley Yeo, a leading criminal lawyer, wrote an article in which he proposed, by analogy with the High Court’s recognition of native title, that native criminal jurisdiction had survived unless expressly abrogated by parliament or executive action.<sup>100</sup> Yeo suggested that even if native criminal jurisdiction was held to have been abrogated by the enactment of comprehensive criminal codes or consolidating

98 See EP Thompson, *Customs in Common* (The New Press, 1991) 165-6 for a discussion of these various colonial approaches.

99 Ibid 166-7.

100 Stanley Yeo, “Native Criminal Jurisdiction after *Mabo*” (1994) 6 *Current Issues in Criminal Justice* 9.

legislation in the Commonwealth, States and Territories, *Mabo (No 2)* provided at least a “moral basis” for its reinstatement as a gesture of reconciliation consistent with the trend toward recognition of rights to Indigenous self-determination or self-management.<sup>101</sup>

The window for recognition of First Nations jurisdiction or “native criminal jurisdiction” as Yeo envisaged within the law of Australia, opened up by *Mabo (No 2)*, was firmly shut with the handing down of the High Court decision of *Walker v New South Wales* (1994).<sup>102</sup> This case concerned a claim, through the civil courts, that the Commonwealth and State Parliaments lacked power to legislate over Aboriginal people without their consent. During the course of oral argument, the plaintiff introduced the further argument that “Aboriginal customary criminal law” had not been extinguished by British settlement. Refusing leave to appeal, Mason CJ noted that an argument framed in terms of Indigenous sovereignty and rights of self-determination was doomed to failure, as it had been in *Mabo (No 2)*.<sup>103</sup> The second argument also failed on the ground that the proposed recognition of multiple, potentially overlapping, systems of native criminal law was not only confusing to citizens, more fundamentally, it contradicted the principle of equality before the law:

It is a basic principle that all people should stand equal before the law. A construction which results in different criminal sanctions applying to different persons for the same conduct offends that basic principle. The general rule is that an enactment applies to all persons and matters within the territory to which it extends, but not to any other persons and matters. ... The presumption applies with added force in the case of the criminal law, which is inherently universal in its operation, and whose aims would otherwise be frustrated.<sup>104</sup>

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101 Stanley Yeo, “Editorial – Recognition of Aboriginal Criminal Jurisdiction” (1994) 18 *Criminal Law Journal* 193, 196. This argument is an example of how debate about recognition of First Nations Laws *within* the framework of Australian law slips into wider and distinct discussion of self-determination and self-management.

102 (1994) 182 CLR 45.

103 Drawn from the international human rights treaties, the “right to self-determination” suggests that colonised peoples are entitled to autonomy in wide range of domains, and ultimately a right to liberation and independence. In the Australian context, Aboriginal claims of self-determination are not liberationist, but seek to use the language of self-determination to frame human rights claims and secure some degree of autonomy in the governance of their own communities. See generally Barbara Hocking, *Unfinished Constitutional Business? Rethinking Indigenous Self Determination* (Aboriginal Studies Press, 2005), and Sean Brennan et al, *Treaty* (Federation Press, 2005) which examines the processes of treaties in the United States, Canada and New Zealand, raising the question whether Australia too should go down the treaty path. As Mick Dodson, then federal Aboriginal and Torres Strait Islander Social Justice Commissioner, pointed out, “self-determination is the river in which all other rights swim”: quoted in Chris Cunneen, *Conflict, Politics and Crime – Aboriginal Communities and the Police* (Routledge, 2001) 240. As Cunneen notes at 242, the Howard Government abandoned the language of self-determination in favour of a diluted administrative concept of self-management and self-empowerment.

104 *Walker v New South Wales* (1994) 182 CLR 45, 49-50.

Even if some elements of the First Nations criminal laws had survived settlement initially, Mason CJ took the view that it had been subsequently extinguished by the passage of criminal statutes of general application, specifically in this context, the *Crimes Act 1900* (NSW).<sup>105</sup> In his view, no analogy could be drawn with native title:

English criminal law did not, and Australian criminal law does not, accommodate an alternative body of law operating alongside it. There is nothing in *Mabo (No 2)* to provide any support at all for the proposition that criminal laws of general application do not apply to Aboriginal people.<sup>106</sup>

This use of “equality before the law” to snuff out legal argument about the recognition of native criminal jurisdiction has been criticised by Jennifer Nielsen and Gary Martin: “[T]his formal reading of the notion of equality is out of kilter with international jurisprudence, and so the continued denial of the Indigenous criminal justice system contravenes the cultural rights of Indigenous Australians.”<sup>107</sup> For the time being, the *Walker* case appears to have laid to rest arguments about further recognition of First Nations Law beyond matters relating to land.<sup>108</sup> The ongoing denial of Indigenous legal pluralism, according to Mason CJ, is justified by reference to the fundamental principle of equality before the law, an idea rooted deeply in liberalism. His claim that English and Australian law *never* recognised parallel systems of Aboriginal law and justice is not beyond challenge: ongoing re-evaluation of our colonial legal history reveals that courts were more open to hearing and recognising claims contesting British jurisdiction over First Nations peoples than previously thought.

Liberalism, as noted in Chapter 1, embodies a number of core tenets. In addition to “equality before the law”, and its centrality to the Rule of Law in Chapter 2, there is the requirement that laws must be clear and certain in form and consistent in their application. This permits individuals to know the laws in force, and to regulate their conduct accordingly. It is a mark of a free (and liberal) society, where people are governed by consent, not coercion. A commonly heard objection to the recognition of First Nations Law is that its governing norms are “customary”, unwritten and contained in “informal” sources that vary significantly from one group to another: as a result, it is difficult to obtain accurate information both about the content and the scope

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105 Ibid 50.

106 Ibid.

107 Jennifer Nielsen and Gary Martin, “Indigenous Australian peoples and human rights” in David Kinley (ed), *Human Rights in Australian Law* (Federation Press, 1998) 111. See further Greta Bird, Gary Martin and Jennifer Nielsen, *Majah: Indigenous Peoples and the Law* (Federation Press, 1996).

108 The High Court ruling in *Walker* in relation to matters of sovereignty is undoubtedly the law of the land. That said, there is willingness among some judges to acknowledge, that First Nations peoples are “sovereign in a spiritual sense”: see for example, obiter dicta in *Indigenous Land and Sea Corporation v Anderson* [2022] NSWSC 1650, [33] (Griffiths JA).

of particular “Aboriginal law”. The ALRC in its report on the *Recognition of Aboriginal Customary Laws*<sup>109</sup> noted how the relative lack of visibility presented significant obstacles for recognition within the Australian legal system as disclosure and publicity of some laws could even be regarded as constituting serious criminal wrongdoing from an Indigenous perspective: “some aspects of Aboriginal laws, especially concerning certain sacred and ritual matters, are secret, and disclosure to unqualified persons is a serious offence.”<sup>110</sup>

Underlying the concerns articulated by the ALRC is a view that the legal pluralism involved in the recognition of First Nation Laws “is divisive and violates the principle of the unity of the law”.<sup>111</sup> This argument, which some have termed “legal centralism” in contradistinction to “legal pluralism”, is that there should be one law for all, and “that should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions”.<sup>112</sup> Another objection to legal pluralism is that, unless confined to a particular geographical territory or space, jurisdiction in relation to Aboriginal law would be determined on the basis of one’s *status* as a member of a particular race or tribal group. Reading all of these objections together gives us a clear impression of the powerful hold which liberalism exerts on the recognition debate. The objections invoke most of the Rule of Law ideals discussed in Chapter 1: that laws should be promulgated in advance, be certain and be general in their application.

These liberal objections to the recognition of First Nations Law are not, however, irrefutable. A concern that First Nations Law resides in the hands of an unelected caste of knowledgeable elders seems to be one that may be equally levelled at Australian legal system: appointed judges are tasked with adjudication of disputes applying, and in some cases developing, the common law from inherent principles and the “justice of the case” in the particular context of the dispute before them. The structural difference between Aboriginal “customary” law and Australian common law is less stark if the positivist “rule-book” concept of law, reviewed in Chapter 1, is regarded descriptively and prescriptively as being contestable. The lack of legal certainty presents problems for all systems of law, including those based on the common law, but these concerns should not be overstated. Definition in law is often ambiguous or uncertain, the product of the inherent limitations of law-making by legislature and the courts. Legal scholars and senior judges fashion careers pursuing the elusive tasks of rationalising legal doctrine and promoting legal certainty. Notwithstanding ambiguity and uncertainty, the current system of law continues to work tolerably well. As we will explore in Chapter 6 in the context of litigation, the indeterminacy of legal rules will be negotiated and

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109 ALRC, *The Recognition of Aboriginal Customary Laws* (Final Report No 31, 1986).

110 *Ibid* [115].

111 *Ibid* [166].

112 John Griffiths, “What is Legal Pluralism?” (1986) 18(24) *Journal of Legal Pluralism and Unofficial Law* 1, 3.

resolved by the parties without recourse to the courts. Indeed, even in relation to First Nations Law today, it is significant that disputes over native title have been mainly resolved, to the satisfaction of the parties, without necessarily resorting to a judicial hearing to determine the validity of those claims.<sup>113</sup>

Another objection is that expanding the recognition of First Nations Law would promote and multiply conflict between overlapping and potentially contradictory systems of law. Yet such an objection is hardly persuasive in federal systems like Australia where “conflicts of laws” are commonplace. As Jennifer Nielsen and Gary Martin point out, the rejection of Indigenous criminal law by the High Court in *Walker* ignored “the pluralism already inherent within the Australian federation, which is comprised of three tiers of law-making authority, each of which is supposed to complement the others”.<sup>114</sup> Law within Australia is already fragmented, divided between the nine jurisdictions of the Commonwealth, States and Territories, not to mention the various external territories. With such fragmentation, legal and administrative mechanisms are used to resolve conflicts of law and to enable the sharing of jurisdiction where possible. In some spheres, federal law simply has overriding effect: State and Territory laws successfully subject to challenge under s 109 of the Australian Constitution are inoperative to the extent of their inconsistency with federal legislation. Within a federal system legal fragmentation and overlapping jurisdictions is the norm rather than the exception. Potential conflicts of law however are rarely insurmountable. Turning from the inherent pluralism of Australia’s legal system to the question of the recognition of Aboriginal law, it is clear that Federal, State and Territory legislation could be adopted to address any potential conflict of laws. Indeed, the federal race power could be utilised to provide a constitutional basis for the recognition of key Aboriginal laws, selected on a case-by-case basis, including specific cultural defences. In this way, the potential conflict between Indigenous and non-Indigenous systems would be addressed and resolved through legislation. Such legislation may clarify the scope and limits of Indigenous law, including determining how First Nations Laws and practices are to be established in the courts, as in the case of native title claims.

Another objection to the recognition of First Nations Law, in whole or in part, is that it would violate the principle of equality before the law, which is a fundamental tenet of the Rule of Law. But again, must equality before the law be conceived in terms which deny a place for Aboriginal law and justice? The continuing challenge in debates about the recognition of Aboriginal law is whether equality before the law can be reconceptualised as “equality as respect for difference” rather than “equality as sameness”. The proposed “difference” approach resonates with the feminist critique of equality discussed in Chapter 3,

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113 See Richard Bartlett, *Native Title in Australia* (LexisNexis Butterworths, 2nd ed, 2004) 198.

114 Jennifer Nielsen and Gary Martin, “Indigenous Australian peoples and human rights” in David Kinley (ed), *Human Rights in Australian Law* (Federation Press, 1998) 111.

which supports rather than undermines claims for recognition of parallel systems of justice. Law reform bodies have, from time to time, examined the feasibility of parallel systems. The ALRC addressed these equality arguments in its report on *The Recognition of Aboriginal Customary Laws* in 1986. In the view of the Commission, the principle of equality before the law did not rule out different treatment for Indigenous peoples, provided that any special measures were:

- reasonable responses to the special needs of Aboriginal people affected by the proposals;
- generally accepted by them; and
- [not to] deprive individual Aborigines [sic] of basic human rights, or access to the general legal system and its institutions.<sup>115</sup>

Applied to the criminal law context, the ALRC was generally reluctant to propose the adoption of special offences and a general cultural defence. Its preferred strategy was to recommend that the issue of Aboriginality and Aboriginal law should be addressed, with adaptation where necessary, within the administration of *existing* substantive and procedural laws.

The Northern Territory Law Reform Committee in 2003 took a different approach, recommending that recognition of Aboriginal laws should be permitted at community level, subject to two conditions: first, the consent of the particular communities must be obtained, and secondly, Aboriginal laws being applied must conform both with the general laws of the Northern Territory and international human rights law.<sup>116</sup> The alternative approach favoured by the ALRC permits only the “reasonable accommodation” of First Nations Law within *existing* Australian legal frameworks. An example is the approach to sentencing in *Bugmy v The Queen* (2013), where the High Court held that while an offender’s background of deprivation is a factor relevant to sentencing, it would be “antithetical to individualised justice” to require the sentencing consideration of a “systemic background of deprivation of Aboriginal offenders”.<sup>117</sup>

Recognition of First Nations Law “at the margins” is also revealed in the longstanding judicial practice of giving due consideration to “traditional laws and customs” in sentencing and other decisions.<sup>118</sup> Recognising the relevance

115 ALRC, *The Recognition of Aboriginal Customary Laws* (Final Report No 31, 1986) [165].

116 Northern Territory Law Reform Committee, *Report on Aboriginal Customary Law* (2003) 19 <[http://www.nt.gov.au/justice/docs/lawmake/ntrlc\\_final\\_report.pdf](http://www.nt.gov.au/justice/docs/lawmake/ntrlc_final_report.pdf)>.

117 *Bugmy v The Queen* (2013) 249 CLR 571, 594 [41] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

118 ALRC, *Same Crime, Same Time: Sentencing of Federal Offenders* (Final Report No 103, 2006). Similar recommendations, including requiring prosecutors to consider whether Aboriginal customary law had already dealt with the offence and requiring judicial officers to consider the impact of customary law punishments in sentencing, were made by the Law Reform Commission of Western Australia in *Aboriginal Customary Laws* (Final Report, Project No 94, 2006) 183. For a survey of those jurisdictions (Australian Capital Territory, Northern Territory and Queensland) where culture continues to be recognised by legislation as a factor relevant to sentence, see Thalia

of Aboriginal law and cultural practices serves potentially to ameliorate the disproportionately high levels of Aboriginal incarceration as well as assist in restoring peace within Aboriginal communities. However, not all scholars are supportive of this approach: as Heather Douglas points out, limiting the recognition of Aboriginal law to sentencing and bail decisions is “a kind of weak legal pluralism”<sup>119</sup> that provides “some small space for an alternative legal authority to operate albeit under conditions purported to be scrutinised by the white legal authority.”<sup>120</sup>

The various recommendations of the ALRC and State and Territory law reform commissions on recognition of Aboriginal law have been largely ignored. In 2006, the issue of “customary law defence” achieved national attention following a series of high-profile sexual offences involving minors in the Northern Territory in which the cultural context and customary law were used to mitigate punishment.<sup>121</sup> The controversy over the decisions prompted swift political action at the national level. The Council of Australian Governments (“COAG”) met on 14 July 2006, and issued an intergovernmental agreement that stated in emphatic terms: “... no customary law or cultural practice excuses, justifies, authorises, requires, or lessens the seriousness of violence or sexual abuse. All jurisdictions agree that their laws will reflect this, if necessary by future amendment.”<sup>122</sup>

Federal legislation was swiftly enacted in 2006 that prohibits any court dealing with federal offences from considering “customary law or cultural practice” in relation to sentencing or bail decisions. Section 16A(2A) of the *Crimes Act 1914* (Cth), as amended, states:

... the court must not take into account [in sentencing or bail decisions] any form of customary law or cultural practice as a reason for:

- (a) excusing, justifying, authorising, requiring or lessening the seriousness of the criminal behaviour to which the offence relates; or
- (b) aggravating the seriousness of the criminal behaviour to which the offence relates.<sup>123</sup>

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Anthony, “Sentencing Indigenous Offenders” (Brief 7, March 2010) *Indigenous Justice Clearing House*.

119 Heather Douglas, “Customary law, sentencing and the limits of the state” (2005) 20(1) *Canadian Journal of Law and Society* 141, 141.

120 *Ibid* 156.

121 In the most controversial case, attracting media attention, the defendant was an Aboriginal man who anally raped a 14-year-old girl who he claimed, under customary law, to be his wife. Martin CJ of the Northern Territory Supreme Court sentenced him to one month of imprisonment, accepting the defendant’s view that he was entitled to act as he did under customary law: *The Queen v GJ* [2005] NTSC 48. The sentence was increased on appeal to three years’ imprisonment: *R v GJ* [2005] NTCCA 20. The High Court dismissed GJ’s appeal against the harsher sentence on 19 May 2006. The case is discussed in Department of Parliamentary Services (Cth), *Bills Digest* (Digest No 56 of 2006-2007, 27 November 2006).

122 COAG Communiqué (14 July 2006) 13.

123 *Crimes Act 1914* (Cth) s 16A(2A), as modified by *Crimes Amendment (Bail and Sentencing) Act 2006* (Cth).

Section 16AA of the Act similarly prohibits the consideration of First Nations Law for sentencing purposes in the Northern Territory.<sup>124</sup> The liberal rhetoric of equality before the law loomed large in the federal parliamentary debates on the bill. As Senator McDonald, one of the bill's sponsors, observed:

All Australians should be treated equally under the law. Every Australian may expect to be protected by the law, and equally every Australian is subject to the law's authority.

Criminal behaviour cannot in any way be excused justified, authorised, required or rendered less serious because of customary law or cultural practice. The Australian Government rejects the idea that an offender's cultural background should automatically be considered, when a court is sentencing that offender, so as to mitigate the sentence imposed.

Likewise, this bill will preclude any customary law or cultural practice from being taken into account, in the process of granting bail to an alleged offender, in such a way that the criminal behaviour concerned is seen as less culpable. All Australians, regardless of their background, will thus be equal before the law.<sup>125</sup>

As noted above, this liberal conception of formal equality before the law remains deeply contestable – not only does it suppress the relevance of salient differences, but it also subtly signals that the cultural context might justify a harsher penalty in order to deter cultural practices perceived as cruel or uncivilised.<sup>126</sup>

Despite the tenor of the intergovernmental commitment in 2006, the other jurisdictions have not followed the Commonwealth's approach. In the Australian Capital Territory, the legislature provides that the cultural background of the offender *must* be taken into consideration,<sup>127</sup> and in Queensland, any submissions made to the Court during the sentencing of a First Nations person regarding their relationship to the community or other cultural considerations *must* be considered.<sup>128</sup>

On one view, the individualised justice approach significantly diminishes the relevance of First Nations peoples experiences and laws to contextualise the actions of offenders, contradict the recommendations of the ALRC and other law reform commissions.<sup>129</sup> With ongoing over-representation in arrest, charge and custody statistics, the continued denial of the relevance of the cultural context and First Nations to offending behaviours will do little to address the structural disadvantage and injustice experienced by Aboriginal offenders.

124 Ibid s 16AA(1).

125 Commonwealth, *Parliamentary Debates*, Senate, 14 September 2006, 9 (Senator McDonald).

126 This prospect has been addressed in section 16A(2A)(b) of the *Crimes Act 1914* (Cth) which provides that customary law and cultural practice must *not* be considered as a factor *aggravating* the penalty.

127 *Crimes (Sentencing) Act 2005* (ACT) s 33(1)(m).

128 *Penalties and Sentencing Act 1982* (Qld) s 9(2)(p)(i)-(ii).

129 ALRC, *Same Crime, Same Time: The Sentencing of Federal Offenders* (Final Report No 103, 2006).

This is not to deny that some claims by defendants may be distortions or misrepresentations about Aboriginal law and cultural defences, “perpetuating myths about Aboriginal masculinity, playing to racist tropes of Aboriginal men as violent and Aboriginal women as subordinated to men. Aboriginal women decried this misrepresentation of Aboriginal law as ‘bullsh\*t law’.”<sup>130</sup> But blanket prohibitions on the consideration of Aboriginal law and culture, including those that were reflected in the 2006 federal reforms, are disproportionate, and are likely to do more harm than good.

A more proportionate solution to the controversial cases in the Northern Territory, discussed above, is to exclude First Nations Law defences and cultural arguments in cases involving violence against women and children, a position which is consistent with international human rights treaties. The United Nations’ *Declaration on the Elimination of Violence Against Women* (“DEVAW”), specifically provides that “States should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination”.<sup>131</sup>

Australia seems far from the position achieved in Canada, where substantial steps have been taken to recognise the self-determination and justice systems of First Nations tribes. The Canadian Parliament has created a self-governing region, called the Nunavut, which grants a large measure of legal and political autonomy to the Inuit, who comprise 85% of the population living in this territory in far North Canada.<sup>132</sup> At a conceptual level, the Canadian model has escaped the liberal straitjacket of (in)equality logic. Rather than regard the issue of anti-discrimination law and policy as a choice between “equal” or “special” treatment, as the ALRC acknowledged, the Law Reform Commission of Canada proposed instead the re-conceptualisation of equality in terms of the higher goals of “ensuring equal access to justice, equitable treatment and respect” for Aboriginal peoples within the criminal justice system.<sup>133</sup> On this view, equality before the law would be consistent with, rather than antagonistic to, the creation of parallel systems of First Nations Law.

To provide further context to these questions of legal pluralism and cultural accommodation, the following case study examines the difficulties that settler courts confront in recognising certain forms of punishment which are sanctioned or required by First Nations Law, including Payback.

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130 On the challenges of recognising culture as a defence, see generally: Alison Renteln and Marie-Claire Foblets (eds), *Multicultural Jurisprudence: Comparative Perspectives on Cultural Defense* (Hart Publishing, 2009).

131 See GA Res 48/104 (20 December 1993) Art 4. For an article that explores the legal and human rights issues around “culture and violence” against women, see Kumaralingam Amirthalingam, “Women’s Rights, International Norms, and Domestic Violence: Asian Perspectives” (2005) 27(2) *Human Rights Quarterly* 683.

132 The Nunavut was created as a self-governing territory in 1999. See generally <<http://www.gov.nu.ca/>>.

133 Law Reform Commission of Canada, *Aboriginal Peoples and Criminal Justice* (Report No 34, 1991) Ch 3.

## CASE STUDY

### Indigenous ways of justice: recognition and limits of “Payback”

There can be little doubt that Aboriginal law exists, in the sense of being practised and maintained in daily life; and it exists, moreover, whether “we” give formal recognition to it or not. History shows that Aboriginal people will find ways to hang on to their law in the face of the most intense attempts to smash it.<sup>134</sup>

Human rights concerns have been voiced from time to time in relation to certain punishment practices administered in accordance with First Nations Law. “Payback” is an Aboriginal-English term used to describe the wide range of methods used within some communities to punish wrongdoers and to appease victims. In one of its most serious forms, it involves the repeated spearing of the offender in the upper inner thigh. While inflicting serious injury, this payback is not intended to cause death. The type of payback varies according to the severity of the breach of First Nations Law, the factors surrounding the offence, the parties involved and any other relevant matters. It is important to understand that payback is not a form of revenge, but constitutes an admission of responsibility, typically involving some form of restitution or gift to the victim, or acceptance of punishment by the wrongdoer.<sup>135</sup>

There are many early settler accounts of “natives” engaging in this practice as an established system for remedying wrongs *inter se*, but also as a means of resolving disputes arising between First Nations peoples and settlers and as a method of minimising or averting further escalation of violence, bloodshed or outright war. An example of the latter includes payback spearing of the first Governor of New South Wales, Captain Arthur Phillip in 1790 – the Governor had kidnapped a number of natives including a young warrior, Bennelong, with a view to learning more about the language, strength and intentions of the Eora nation. Bennelong soon escaped captivity and returned to his tribe. A year later, a Whale Feast was convened at Manly Cove between the Governor, his men and the local leaders of the Eora Nation. Upon their first meeting, Governor Phillips was suddenly speared in the shoulder. It is now accepted by historians and anthropologists that this act was not indiscriminate violence, but administered according to Aboriginal Law in recognition of the wrongs he had done by the kidnapping of Bennelong and others:

One day, four months after Bennelong left Sydney, Phillip was invited to a great whale feast at Manly Cove. He and some of the officers hurried over in a boat and were greeted there by Bennelong. Relations were friendly and jovial, just like old times. But Phillip suddenly found himself surrounded by warriors and was then swiftly speared in the shoulder.

134 Harry Blagg, *Crime, Aboriginality and Decolonisation of Justice* (Hawkins Press, 2008) 153.

135 For a general review of the history and practices of payback, see Mark Finnane, “‘Payback’, Customary Law and Criminal Law in Colonised Australia” (2001) 29 *International Journal of the Sociology of Law* 293. See *Jadurin v The Queen* (1982) 44 ALR 424, 427-8 for a vivid description of a payback ceremony and the consequences for those involved.

There was panic as the officers and men rushed him into the boat and back to Sydney. But the spear was not a death spear and the wound was not fatal. Phillip soon recovered. Most importantly, he refused to retaliate, suggesting that he sensed the purpose of the spearing.<sup>136</sup>

Judges in the Northern Territory and Western Australia have a long history of recognising “customary law” in sentencing decisions.<sup>137</sup> As noted above, British settlement did not lead to the extinguishment of First Nations Law and punishment practices. From early years of settlement, the spectacle of public violence involved in payback, which could be administered to either the wrongdoers or their kinsfolk, vexed colonial authorities.<sup>138</sup> Although Australian law has consistently denied space for Indigenous criminal jurisdiction, at the margins domestic courts have been prepared to recognise payback sanctioned by Aboriginal law indirectly as a factor relevant to sentencing. Over time, forms of payback have varied significantly, ranging from death, spearing and duelling, through to shaming, education, compensation or exclusion.<sup>139</sup> For some First Nations peoples, payback may be purely symbolic, involving no more than merely touching the accused on the thigh with a spear.<sup>140</sup>

Today, Australian courts continue to struggle with the legality of spearing as payback under both domestic and international human rights law.<sup>141</sup> Law reform commissions have raised similar concerns, refusing to recognise payback in sentencing orders (as a matter of mitigation) where it would involve a breach of the general law or breach fundamental human rights.<sup>142</sup> The ALRC has recognised the relevance of Aboriginal law to sentencing and recommended that *lawful* forms of traditional punishment could be incorporated into sentencing orders. However, the ALRC refused to sanction the incorporation of traditional punishment into sentencing orders that would involve a breach of the general law. This partial recognition of Aboriginal law was justified as being consistent with Art 27 of the ICCPR, which provides:

136 Grace Karskens, “Governor Phillip and the Eora”, *Dictionary of Sydney* (Website, 2017) <[http://dictionaryofsydney.org/entry/governor\\_phillip\\_and\\_the\\_eora](http://dictionaryofsydney.org/entry/governor_phillip_and_the_eora)>.

137 See *R v Minor* (1992) 59 A Crim R 227, 237 (Mildren J). This was aided by legislation that permitted the court in murder cases to receive any evidence on native law or custom in mitigation of penalty: *Criminal Law Amendment Ordinance 1939* (NT).

138 Governor Macquarie’s *Proclamation* (1816) attempted to stamp out these punishment practices within or nearby British settlement deeming such gatherings to be disturbances of the peace and thus liable to summary prosecution. As Lisa Ford pointed out, the Proclamation was largely to no avail as Aboriginal tribes continued to administer collective punishments, sometimes with fatal consequences, in plain view of settlers and the local constabulary: Ford (n 71) 71-75.

139 ALRC, *The Recognition of Aboriginal Customary Laws* (Final Report No 31, 1986) [500].

140 *R v Minor* (1992) 59 A Crim R 227, 229 (Asche CJ).

141 *Jadurin v The Queen* (1982) 44 ALR 424, 427-8 contains a vivid description of a payback ceremony and its consequences for those involved. The legal controversy and arguments for and against recognition of payback is discussed in Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Thomson Reuters, 4th ed, 2017) 158-61.

142 ALRC, *The Recognition of Aboriginal Customary Laws* (Final Report No 31, 1986) [502].

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with others of the group to enjoy their own culture, to profess and practice their own religion or to use their own language.

While accepting the inevitability of payback involving the infliction of serious injury within some Indigenous communities, the courts point out that payback is neither retribution nor vengeance and that the deliberate infliction of serious harm cannot be judicially condoned.<sup>143</sup> This pragmatic approach allows courts to factor payback into sentencing, while deftly avoiding judicial consideration of the question of its legality under domestic or international law.

This legal indeterminacy of payback continues notwithstanding the High Court decision of *Munda v Western Australia*.<sup>144</sup> In this case, the defendant (an Aboriginal male) was convicted of the manslaughter of his partner (an Aboriginal woman), who had suffered in a long-term relationship characterised by serious domestic violence and alcohol abuse. In reviewing the adequacy of the sentence, the High Court reiterated the approach taken above. In reviewing the position of the offender, the Court noted that he was anxious to submit to payback, a prospect which had been taken into account by the sentencing court and affirmed by the Western Australian Court of Appeal. The correctness of that approach to payback was not pressed on appeal, so the High Court declined to rule on the matter:

In these circumstances, this case does not afford an occasion to express a concluded view on the question whether the prospect of such punishment is a consideration relevant to the imposition of a proper sentence, given that the courts should not condone the commission of an offence or the pursuit of vendettas, which are an affront and a challenge to the due administration of justice. It is sufficient to say that the appellant did not suffer any injustice by reason of the circumstance that the prospect of payback was given only limited weight in his favour by the courts below.<sup>145</sup>

While the status of payback remains open, the High Court's characterisation of the practice as an unlawful "vendetta" is an unfortunate misrepresentation of how payback is understood within First Nations Law, and the long-standing approach taken to payback by sentencing courts in jurisdictions where it still occurs.

Judicial recognition of payback raises the vexed question of whether Australian law is indirectly sanctioning human rights violations through the

143 *R v Jadurin* (1982) 7 A Crim R 182, 187 (St John, Toohey and Fisher JJ); *R v Minor* (1992) 59 A Crim R 227, 240 (Mildren J); *Re Anthony* (2004) 142 A Crim R 440, 458 (Martin CJ). In the 1990s, the debate in Australia over customary law recognition in sentencing decisions fixated negatively upon the violence of "traditional spearing", with media representation portraying payback as a form of private vengeance or vendetta, rather than on the more positive effects and restorative nature of community-based punishment.

144 *Munda v Western Australia* (2013) 249 CLR 600.

145 *Ibid* 621-2 [63] (French CJ, Hayne, Crennan, Kiefel, Gageler and Keane JJ).

infliction of “cruel, inhuman or degrading treatment or punishment”, which is prohibited by Art 7 of the ICCPR. This argument has not been raised before either domestic or international courts, but as the late James Crawford, the leading international law jurist who led the ALRC inquiry into the *Recognition of Aboriginal Customary Law*, observed, nothing in the text of the ICCPR prevents Australian courts from taking traditional spearing into account in sentencing decisions:

The question, then, is whether the Covenant requires States Parties actively to suppress all treatment considered “cruel” or “degrading”, even where the treatment occurs with the consent of the parties concerned, and as an aspect of the traditions and customs of the ethnic group within which it occurs, and no matter what other consequences such suppression, with its associated policing, would involve for the group in question. Quite apart from the question whether such punishment is “cruel” or “degrading”, the answer must be that it does not. Nothing in the Covenant prevents the law enforcement authorities from adopting a policy of intervening in Indigenous communities only upon complaint, in cases not involving threats of life or suppression of complaints.<sup>146</sup>

The above approach sidesteps the issue of legality, hiding behind victim consent and prosecutorial discretion not to proceed in the absence of a complaint. From an international perspective, recognition of payback by domestic law presents an unavoidable challenge to the universality of human rights. This claim of universality is strongest in relation to unqualified rights such as Art 7 of the ICCPR that prohibits “torture, cruel, inhuman or degrading treatment or punishment”.<sup>147</sup> In assessing this question of “culture clash” in the criminal law, the ALRC in its Discussion Paper No 17 (1980) conceded that it is impossible to escape the culturally determined nature of fundamental concepts:

But by what standard are the notions of human rights to be measured? Obviously there is a wide gap in some areas between Western notions of human rights and those which apply in Aboriginal society. These issues pose questions of justice which have never been answered satisfactorily anywhere and which are probably unanswerable. There is a direct clash between the imperative of imposed law and Indigenous custom, a clash between irreconcilable moral imperatives.<sup>148</sup>

This gap between Western and Indigenous notions of human rights – what is “cruel and inhuman” punishment or treatment – is apparent in the consultations

146 James Crawford, “International Law and the Recognition of Aboriginal Customary Law” in Barbara Hocking (ed), *International Law and Aboriginal Human Rights* (Law Book Company, 1988) 63; Sam Blay, “The International Covenant on Civil and Political Rights and the Recognition of Customary Law Practices of Indigenous Tribes: the Case of Australian Aborigines” (1986) 19 *Comparative and International Law Journal of Southern Africa* 199, 203-7; ALRC, *Aboriginal Customary Law – Recognition* (Discussion Paper No 17, 1980) 53.

147 ICCPR Art 7.

148 ALRC, *Aboriginal Customary Law – Recognition?* (Discussion Paper No 17, 1980) 52 [89].

by the Law Reform Commission of Western Australia in which some Aboriginal delegates argued that, from their point of view, while payback is “measured, final and relentless”, and by comparison “prison is cruel and inhumane”.<sup>149</sup>

This clash of moral imperatives requires courts and legislatures to choose between competing conceptions of human rights. After reviewing these issues, the ALRC concluded that the right to culture under Art 27 protects the right of a minority “to profess and practice” its religion, but is qualified in the sense that it does not in terms protect cruel or inhumane punishments connected with it.<sup>150</sup> On balance, the ALRC was satisfied that prohibiting “cruel” or degrading forms of punishment would not have a significant detrimental effect on Aboriginal culture since there were other means of preserving Aboriginal culture, such as land rights and language.

### (e) **First Nations Law and systems of justice: subordinate or sovereign?**

As noted above, there is concern that engaging with First Nations Law on terms set by the Australian courts only entrenches subordination, and risks distorting the meaning, substance and aims of First Nations Law. Accommodating First Nations cultural perspectives and punishment practices into settler forums can be beneficial in terms of reducing recidivism rates and strengthening cultural attachments in Community. However, it does nothing to address how settler-state criminalisation practices have impacted on First Nations – from the first responses to “larcenies” of cattle belonging to settlers that were left to roam across “native” lands, to the wide range of race-based offences enacted under Protection Laws discussed above, until today, when “street offences”, criminalising disorderly conduct and intoxication in public, operate harshly and unfairly against First Nations people.

While there is no denying that there are high levels of reported property and drug related crime, family violence and public disorder in many marginalised and poorer communities, the state and its agencies exercise “enhanced” surveillance, control and intervention in the lives of First Nations peoples. Resistance to coercive and unfair police intervention over public order offences, like the use of offensive language and public intoxication, can rapidly escalate into a “Trifecta” of additional related charges including resisting arrest, obstruction and assault of a police officer in the execution of their duty.<sup>151</sup>

149 The Law Reform Commission of Western Australia, *Aboriginal People, Criminal Law and Sentencing* (Background Paper No 15, 2005) 8.

150 *Ibid* Art 27.

151 “Trifecta” is a term used to describe a bet that predicts the first three places in a horse race. Some courts have attempted to limit overuse of minor public order offences by excluding key evidence on the ground that the police officer had obtained it unlawfully, namely by unlawfully arresting in cases where the officer should have proceeded by way of summons or court attendance notice: see Mark Dennis, “Is this the Death of the ‘Trifecta?’” (2002) 40(3) *Law Society Journal* 66, 67. There is little evidence this

The enhanced surveillance of Indigenous peoples directly translates into harm; in 45% of the incidents in which police used force in 2021-22, the victim was an Indigenous Australian,<sup>152</sup> even though they account for 3.8% of the population.<sup>153</sup> This (dis)proportion has risen steadily over the last five years.<sup>154</sup> This repeated pattern of excessive force and neglect of duties by police in Australia is attracting more political and media attention as parallels have been drawn with the “Black Lives Matter” movement in the United States to highlight the issue of systemic racism in policing and the administration of justice.<sup>155</sup> A few months before the police murder of George Floyd in the United States, which returned the “Black Lives Matter” movement to prominence in early 2020, Warlpiri man Kumanjayi Walker was fatally shot three times by Northern Territory Constable Zachary Rolfe. Rolfe was charged with murder and two alternative lesser charges, and subsequently acquitted on each count.<sup>156</sup> At the time of writing, a coronial inquest being held after the trial has exposed routine use of excessive force by police, and that officers involved in the incident leading to Kumanjayi Walker’s death held highly racist views toward Aboriginal people.<sup>157</sup>

Thirty years ago, the Royal Commission into Aboriginal Deaths in Custody (“RCIADIC”) exposed the scale of the problem. After holding its far-reaching inquiry between 1987 and 1991,<sup>158</sup> the Final Report made 339 recommendations spanning abuses during arrest, pre-trial detention and incarceration. One of

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pattern of over-policing has changed: and Elyse Methven, “A little respect: swearing, police and criminal justice discourse” (2018) 7(3) *International Journal for Crime, Justice and Social Democracy* 58. See also the excellent contextual linguistic analysis swearing within Aboriginal communities using the decision of *Jolly v The Queen* [2009] NSWDC 212 as a case study; Elyse Methven, “Weeds of our Own Making’: Language Ideologies, Swearing and the Criminal Law” (2016) 34(2) *Law in Context (Contemporary Issues in Criminal Law)* 117.

152 Christopher Knaus, “NSW police use force against Indigenous Australians at drastically disproportionate levels, data shows”, *The Guardian* (online, 31 July 2023) <<https://www.theguardian.com/australia-news/2023/jul/31/nsw-police-use-force-against-indigenous-australians-at-dramatically-disproportionate-levels-data-shows>>.

153 Australian Bureau of Statistics, *Estimates of Aboriginal and Torres Strait Islander Australians* (Catalogue, 21 September 2022).

154 Ibid.

155 In Australia, as in the United States, investigative journalism is playing a key role in tracking deaths in custody. *The Guardian* has created an interactive database, *Deaths Inside*, covering all deaths between 2008-2021: <<https://www.theguardian.com/australia-news/series/deaths-inside>>.

156 Anna Krien, “The death of Kumanjayi Walker”, *The Monthly* (online, 1 May 2022) <<https://www.themonthly.com.au/issue/2022/may/anna-krien/death-kumanjayi-walker>>.

157 Transcript of Proceedings, *An Inquest into the Death of Kumanjayi Walker On 9 November 2021 at Yuendumu Police Station*, Northern Territory of Australia Coroners Court, A51/2019, Coroner Armitage, 25 <[https://justice.nt.gov.au/\\_\\_data/assets/pdf\\_file/0006/1170654/kumanjayi-walker-inquest-transcript-25.11.22.pdf](https://justice.nt.gov.au/__data/assets/pdf_file/0006/1170654/kumanjayi-walker-inquest-transcript-25.11.22.pdf)>.

158 RCIADIC, *National Report* (Canberra, 1991) vol 5 <<https://www.Indigenousjustice.gov.au/resources/royal-commission-into-aboriginal-deaths-in-custody/>>.

the recommendations included the creation of a national database to record Aboriginal deaths in custody. For three decades, the Australian Institute of Criminology (“AIC”) has been monitoring deaths in custody: between 1991 and 2022, there have been 517 Aboriginal deaths arising during police pursuits and arrests, as well as failures to render necessary medical care while in custody.<sup>159</sup> These data reveal that Indigenous people are no more likely to die in custody than non-Indigenous people as a proportion of relative prisoners.<sup>160</sup> That said, since First Nations people, compared with members of the general population, are much more likely to be arrested, convicted and imprisoned, the likelihood of dying in custody is also far higher for First Nations people than for the rest of the population.

What are the causes of this chronic and systemic overrepresentation in the criminal justice system? Criminologists Robyn Lincoln and Paul Wilson offered four structural explanations: racism and discrimination; the history of colonisation and oppression; crime-as-resistance; and cultural differences.<sup>161</sup> Although three decades has passed since the RCIADIC, the numerous reviews and reforms have been unable to reverse the flow of First Nations youth into the criminal justice system: indeed, rates of arrest, detention and incarceration have increased, year on year, over the past three decades.<sup>162</sup> This ongoing national policy failure, acknowledged in the Uluru Statement, is reflected in the rising rates of detention notwithstanding the wide rollout of Indigenous youth crime prevention initiatives, diversionary programs and Indigenous sentencing courts across Australia.<sup>163</sup> That said, there have been some successful programs that have yielded positive outcomes: for example, for two decades Koori Courts in Victoria (comprised of judges and local Indigenous elders) have offered diversionary conferences that harness the moral and cultural authority, and expertise, of elders to address crime problems and to rehabilitate offenders. In New South Wales, circle sentencing has been shown to reduce recidivism.<sup>164</sup>

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159 Laura Doherty, “Deaths in Custody in Australia 2020-21” (Statistical Report No 37, *Australian Institute of Criminology*, 2 December 2021) <<https://doi.org/10.52922/sr78436>>.

160 *Ibid* vol 1 [1.3.1]-[1.3.2].

161 Robyn Lincoln and Paul Wilson, “The Aboriginal Crime and Justice Landscape: Time for a Rethink” in Duncan Chappell and Paul Wilson (eds), *Issues in Australian Crime and Criminal Justice* (LexisNexis Butterworths, 2005) 220, 227.

162 Progress in implementing the RCIADIC recommendations, according to the national government, has been successful according to the “desktop” review of Federal, State and Territory reforms undertaken by Deloitte: see *Review of the Implementation of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody* (2018): <<https://www.niaa.gov.au/resource-centre/Indigenous-affairs/review-implementation-royal-commission-aboriginal-deaths-custody>>.

163 There is high degree of variability in these programs; although having better outcomes than corrections-focused criminal processes, they are not uniformly applied across Australia or even within individual States: Elena Marchetti and Kathleen Daly, “Indigenous Courts and Justice Practices in Australia” (Trends & Issues in Crime and Criminal Justice No 277, Australian Institute of Criminology, 2004).

164 Steve Yeong and Elizabeth Moore, “Circle Sentencing, Incarceration and Recidivism” (2020) *Crime and Justice Bulletin* No 226: NSW Bureau of Crime Statistics and Research.

While sharing some of the structural features and objectives of restorative justice practices and drug courts,<sup>165</sup> First Nations courts and justice practices have distinctive characteristics. Drawing on empirical fieldwork from around Australia, Elena Marchetti and Kathleen Daly argue that these developments should be viewed as *sui generis*, that is, in a category of their own, rather than as a subset of restorative justice. The distinctiveness of such initiatives lies in the key role that Indigenous communities play especially the role of Elders in “correcting and modifying established criminal processes in ways that are less apparent to relevant ‘communities’ in other specialized courts”.<sup>166</sup> The survey by Marchetti and Daly further concludes that these developments have something to offer the wider system of criminal justice:

The core element of animating these courts – improved communication, citizen knowledge/control and appropriate penalties – could be applied to all court processes and all defendants.<sup>167</sup>

The criminal justice system is not an equal opportunity phenomenon. There is no shortage of research demonstrating that at every stage of the legal system – from encounters with police on the street, through to arrest, charge, bail, prosecution and imprisonment – Aboriginal people are significantly overrepresented compared with non-Indigenous people. How is it that Indigenous people are overrepresented in Australian prisons to the factor of 11.5 times the general population?<sup>168</sup> As a research brief by Troy Allard points out, the differences in charge and incarceration rates were higher around certain offences such as acts intended to cause injury (10.4 and 30.0 times); unlawful entry with intent (18.8 and 15.7 times); public order offences (21.5 and 9.2 times); offences against justice (20.9 and 7.6 times); dangerous and negligent acts (19.0 and 8.5 times); and robbery extortion and related offences (12.6 and 10.3 times).<sup>169</sup>

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Full report available at <[www.bocsar.nsw.gov.au](http://www.bocsar.nsw.gov.au)>. These data suggest that offenders participating in Circle Sentencing between 2005 and 2018 are less likely to receive custodial sentences (9.3%) and offend again within a year (3.9%).

165 Arie Freiberg, “Problem-Oriented Courts: Innovative Solutions to Intractable Problems?” (2001) 11(1) *Journal of Judicial Administration* 7. It should be noted that the restorative justice movements in Australia draws its inspiration from the community-based sentencing circles within Māori communities in New Zealand: Mark Finnane, “‘Payback’, customary law and criminal law in colonised Australia” (2001) 29 *International Journal of the Sociology of Law* 293, 308.

166 Elena Marchetti and Kathleen Daly, “Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model” (2007) 29 *Sydney Law Review* 415, 422 noting the distinct role of Elders in the process, and the “profound changes in court-community relationships and practices which are brought about by increased trust between ‘white justice’ and members of Indigenous communities”.

167 Ibid.

168 Australian Bureau of Statistics, *Corrective Services, Australia* (Catalogue, 15 September 2022).

169 Troy Allard, “Understanding and Preventing Indigenous Offending” (Brief 9, Indigenous Justice Clearinghouse, December 2010). As Allard points out, this compares unfavourably with the position in New Zealand, where Māori adults were 6.7 times

Table comparing the over-incarceration of First Nations people in each Australian jurisdiction<sup>170</sup>

In its 2017 Report *Pathways to Justice*, the ALRC shed further light on the rates of over-incarceration: while non-First Nations people are imprisoned as a result of their conviction 18% of the time, First Nations people are imprisoned 31% of the time.<sup>171</sup> In fact, even when these data are considered by reference to each category of crime, First Nations people receive imprisonment at a higher rate than non-First Nations people in every category except for “unlawful entry with intent/burglary, break and enter” crimes, where there is a 1% difference.<sup>172</sup> It remains an ongoing serious concern that this rate of incarceration is only a slight improvement on the rate of overrepresentation exposed by the RCIADIC in 1991.

Much more could be done in Australia – in political, constitutional and legislative terms – to recognise the legitimacy, authority and autonomy of First Nations systems of law and justice. Recent efforts toward treaty-making at the State-level in Victoria is a welcome step in the right direction.<sup>173</sup> As noted above, arguments for enhancing legal pluralism and sovereignty-sharing through treaty-making confront counterarguments based on “legal centralism” and the Rule of Law, specifically arguments that such steps would undermine the

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more likely than non-Māori to be convicted and 12.0 times more likely to be sentenced to detention during 2008.

170 This table was prepared from the following sources: Australian Bureau of Statistics, *Prisoners in Australia, 2021* (Catalogue, 13 April 2022); Australian Bureau of Statistics, *Estimates of Aboriginal and Torres Strait Islander Australians* (Catalogue, 21 September 2022).

171 ALRC, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Final Report 133, 2017) 107.

172 Ibid 110.

173 *Treaty Authority and Other Treaty Elements Act 2022* (Vic), creates an independent Treaty Authority to oversee the Victorian Government’s moves towards realising treaties between First Nations people and the state government.

principle of “equality before the law”. In our view, demands for an enhanced legal pluralism in Australia do not necessarily mean the fracturing of Australia’s systems of law or the death of the Rule of Law. Ideas of “equality before the law”, like sovereignty, territoriality and jurisdiction, are not immutable: how we think about equality in relation to categories of “difference” – whether related to race, gender and sexuality – is context-dependent and changes over time.

It is clear that the Australian criminal justice system, which subordinates both First Nations Law and Peoples, is not working to advance or protect the interests of First Nations peoples – indeed it achieves the opposite outcome. After decades of innovation in the criminal justice system and piecemeal cultural accommodation, it is time for a more radical rethink – one which accords greater respect for First Nations Law and systems of governance within a new model of sovereignty. The idea has been floated many times over the past decades, but ultimately the form and terms of this “rethink” must be led by First Nations peoples.<sup>174</sup>

## **(f) Rethinking Aboriginal crime and criminal justice**

Racism and discrimination can be overt, and there is no shortage of evidence that First Nations people suffer racist violence from within and outside the legal system.<sup>175</sup> But racism and discrimination may also be indirect, manifesting in how particular crimes are legally defined and enforced by police and prosecutors. For example, evidence of the NSW Police Force’s (“NSWPF”) confused attitude towards improving the criminal justice system for First Nations people is not hard to find. In a 2023 Law Enforcement Conduct Commission (“LECC”) review of the NSWPF’s “Aboriginal Strategic Direction”, Police Commissioner Karen Webb was quoted as writing that “the NSWPF is not responsible for the complex social, economic and intergenerational factors that have led” to the Gap, and that to attempt to achieve their statutory Closing the Gap targets on reducing over-representation would “lead to competing duties” with their mission of “law-enforcement”.<sup>176</sup> These statements, which have been criticised by the LECC and the media, are difficult to resolve with the NSWPF’s previous representations to the media and the analysis throughout this chapter.<sup>177</sup>

It is not drug offences and murder that feature most in the criminal histories of Aboriginal offenders, but rather minor assaults, property and public order

174 Lincoln and Wilson (n 161) 230-1.

175 See Human Rights and Equal Opportunity Commission, *Racist Violence* (AGPS, 1991).

176 Law Enforcement Conduct Commission, “NSW Police Force Aboriginal Strategic Direction 2018-2023” (Monitoring Report, October 2023) 53-4.

177 Ibid; Michael McGowan, “Police Should Not Be Responsible for Closing the Gap, Says Commissioner”, *Sydney Morning Herald* (online, 23 October 2023) <<https://www.smh.com.au/politics/nsw/police-should-not-be-responsible-for-closing-the-gap-targets-says-commissioner-20231023-p5eeen.html>>.

crimes.<sup>178</sup> Research has revealed that minor public order offences, particularly offensive conduct, are disproportionately enforced against Aboriginal people and juveniles. This raises the question about “over-criminalisation” and what precisely can be inferred from findings that minorities are over-represented in criminal statistics.

Is it not possible that the disproportionate use of minor summary offences against Aboriginal people and other minority groups simply reflects the fact that some communities have more disorder and crime problems than others? Janet Chan has rejected this suggestion, pointing out that the patterns of public order policing and the heavy-handed tactics used against Aboriginal people cannot be interpreted as simply “reactive policing”.<sup>179</sup> It is important to consider critically what *types* of behaviours are receiving high levels of police attention, and what impact these law enforcement strategies have on police-community relations. For example, what constitutes “offensive behaviour” in a public place has an obvious cultural dimension, with intoxication and swearing in public featuring largely as the basis for police intrusion into the lives of Aboriginal people. As observed above such intervention invariably escalates tension producing more serious charges of “assaulting police” and “resisting arrest”, which compound the underlying minor crime of “offensive behaviour or language”.<sup>180</sup> It has a particularly harsh impact on Aboriginal people, with available data suggesting that an initial arrest for an offensive language charge dramatically increases the risk of subsequent re-arrest.<sup>181</sup> While this pattern of Aboriginal offending might be described as “crime-as-resistance”, it would be wrong to view all crime within Aboriginal communities as simply political acts of resistance against harsh and discriminatory policing. Within these disadvantaged communities there are also high levels of intra-communal and domestic violence.<sup>182</sup> As Allard points out, successive reports by Australian governments have examined the reasons for high rates of violence against women and children.<sup>183</sup> Most identified the same causal elements as identified above, though Queensland’s Crime and Misconduct Commission’s 2009 report on crime prevention in Indigenous communities also noted high levels of known risk factors for violence in Indigenous communities: low income and employment, poor school attendance, high alcohol consumption and poor

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178 Lincoln and Wilson (n 161) 225; Allard (n 169).

179 Janet Chan, *Changing Police Culture: Policing in A Multicultural Society* (Cambridge, 1997).

180 See Bronitt and McSherry (n 141) 899-905.

181 This appears to be because an arrest record labels the person as “known to police” and therefore within the scope of legitimate police work: Chris Cunneen, *Conflict, Politics and Crime: Aboriginal Communities and the Police* (Allen and Unwin, 2001) 133.

182 *Ibid* 225.

183 Allard (n 169), discussing the Aboriginal Child Sexual Assault Taskforce 2006 (NSW), Northern Territory Board of Inquiry 2007, Aboriginal and Torres Strait Islanders Women’s Task Force on Violence Report 2000 (Qld), and Victorian Indigenous Family Violence Task Force 2003.

parenting – the latter being considered to be likely the most significant risk factor.<sup>184</sup> Clearly, as we explore in the next section, the legacy of protectionist policies of child removal and institutionalization have severely damaged the parenting capacity of many Indigenous people, and contributed to the cycles of poverty and crime in Aboriginal communities.

(i) *Policing Aboriginal communities: keeping the peace or over-criminalisation?*

As noted above, it is important to place Aboriginal crime within the history of colonisation and oppression. The present pattern of social control over Aboriginal people forms part of longer historical narrative. In the 19th and early 20th centuries, the police in Australia performed a wide range of welfare functions in Aboriginal communities, culminating in their complicity in the forcible removal of children in the 1950s under protectionist policies.<sup>185</sup> In the latter half of the 20th century, these overtly paternalist policies and protection laws were abandoned, though as Chris Cunneen has pointed out, the traditional policing role did not significantly change:

Policing acts as a “normalising” force which imposes the standards of sections of the non-Indigenous society as a universal norm. Excluded from the private venues of non-Aboriginal Australia, Indigenous social life become subject to regulation – not under the “special” legislation of the protection era, but under the general criminal law covering alcohol consumption, language and other aspects of public behaviour.<sup>186</sup>

Cunneen concludes that police intervention in the lives of Aboriginal young people has “shifted from one of government-authorised removal policies to increasing criminalisation”.<sup>187</sup> Liberalism may preclude race-based laws and policing powers, though discrimination continues to occur *indirectly* through discriminatory practices and cultures within law enforcement.

The laws relating to public intoxication are a good example of how formal changes to the statute book do not necessarily lead to a change in police functions over Aboriginal communities. There is no doubt that alcohol abuse is a significant problem affecting many communities and individuals in Australia, and its impact has been particularly heavy on socio-economically disadvantaged groups. Historically, police in Australia had extensive legal powers to lock up and charge individuals with being drunk and disorderly

184 Crime and Misconduct Commission, *Restoring order. Crime prevention, policing and local justice in Queensland's Indigenous communities* (Report, 2009).

185 Australian Human Rights Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (Commonwealth of Australia, 1997) (“Stolen Generations Report”) <<http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/hreoc/stolen/>>.

186 Chris Cunneen, *Conflict, Politics and Crime – Aboriginal Communities and the Police* (Allen and Unwin, 2001) 92.

187 *Ibid* 154.

in public places.<sup>188</sup> While these drunkenness offences have been repealed in all jurisdictions, in practice the police continue to use general public order offences and powers, supplemented by civil powers, to control and remove intoxicated individuals from public places. Indeed “street offences” which prohibit offensive behaviour or language and “move on powers” now provide the legal basis for responding to individuals who have been drinking in public places. There is no doubt that such laws, while formally neutrally and imposing the same restrictions on people regardless of their cultural background, are disproportionately used against young people, Aboriginals and minorities.<sup>189</sup>

In 1991 the RCIADIC portrayed the problem of overuse of minor public order offences in the following terms:

Charges about language just become part of an oppressive mechanism of control of Aboriginals. Too often the attempt to arrest or charge an Aboriginal for offensive language sets in train a sequence of offences by that person and others – resisting arrest, assaulting police, hindering police and so on, none of which would have occurred if police were not so easily “offended”. It particularly brings the law into disrepute when police use similar language, often with racist overtones, to Aboriginals.<sup>190</sup>

Notwithstanding these publicised abuses of the offensive language charges, the Royal Commission did not go so far as to recommend the abolition of the offence, rather it recommended restraint in the use of offensive language charges.<sup>191</sup> Such restraint is not apparent from a review of the criminal statistics in the last 15 years. Aboriginal and young people from ethnic minorities continue to be over-represented in the charging statistics.<sup>192</sup> One study in New South Wales suggests that Aboriginal persons continue to be grossly over-represented among arrests for offensive language and conduct offences, and that moreo-

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188 Public drunkenness was the most prosecuted public order offence in the 20th century: David Brown et al (eds), *Criminal Laws* (Federation Press, 3rd ed, 2001) 1000. Arrest and prosecution for public drunkenness are no longer available, though intoxicated persons can be detained until they become sober: *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 206.

189 Chris Cunneen, “Enforcing genocide? Aboriginal young people and the police” in Rob White and Christine Alder (eds), *The Police and Young People in Australia* (Cambridge, 1994) Ch 6.

190 RCIADIC (Regional Report NSW, Vic, & Tas, 1991) (“RCIADIC”) 145. This depressing pattern of policing was revealed in the television documentary *Cop it Sweet* (1992), which involved a TV crew following a group of new police recruits being inducted into beat policing in Redfern, Sydney.

191 Ibid Recommendation 86.

192 See Robert Jochelson, “Aborigines and Public Order Legislation in New South Wales” (1997) *BOCSAR Crime and Justice Bulletin* No 34. See also Sandra Egger and Mark Findlay, “The Politics of Police Discretion” in Mark Findlay and Russell Hogg (eds), *Understanding Crime and Criminal Justice* (Lawbook, 1988) 218. For a broader discussion of arrest rates in Aboriginal communities, see Boyd Hunter, “Indigenous Australian Arrest Rates: Economic and Social Factors Underlying the Incidence and Number of Arrests” (Research Paper, ANU Centre for Aboriginal Economic Police Research Australian National University, 2001).

ver there was a positive and statistically significant correlation between areas with higher proportions of Aboriginal residents and areas with higher court appearance rates for offensive conduct and language.<sup>193</sup> A report by the New South Wales Aboriginal Justice Advisory Committee in 2000 found that, on average, Aboriginal people were 15 times more likely to be prosecuted than non-Aboriginal people for offensive language or conduct.<sup>194</sup> In some places, this figure skyrocketed to around 80 times the State average.

Offensive language crimes have been an instrument of oppression against Aboriginal people. Although these summary offences *could* be used to criminalise public acts of racial vilification and racist insults, empirical evidence has revealed that these laws are enforced against minorities. The verbal hurtful victimisation of Aboriginal people at the hands of racists is simply not considered legally actionable under these laws. As legal theorist Wojciech Sadurski points out, the present pattern of law enforcement in Australia “over-emphasises the seriousness of insults against majority (in particular, against enforcement agents themselves) and undervalues insults against disadvantaged minorities”.<sup>195</sup> The question whether racial vilification should be specifically criminalised runs up against counter-arguments based on the freedom of speech.<sup>196</sup> At the federal level, notwithstanding Australia’s obligations under the *International Convention for the Elimination of All Forms of Racial Discrimination* (“CERD”), racial vilification was not made an offence under the RDA. Rather, the RDA simply made it “unlawful” (in the civil rather than criminal sense) to engage, otherwise than in private, in offensive conduct because of race, colour or national or ethnic origin.<sup>197</sup> Racial vilification provided a ground for making a complaint to the Human Rights and Equal Opportunity Commission (“HREOC”) for conciliation and, upon the decision of the Commission, allowed for review by the Federal Court of Australia.<sup>198</sup> One reason for declining to criminalise racial vilification with a federal offence

193 Jochelson (n 192).

194 Brendan Thomas, “Policing Public Order: Offensive Language and Conduct, the Impact on Aboriginal People” (Research Paper, Sydney Aboriginal Justice and Advisory Committee, 2000).

195 Wojciech Sardurski, “Racial Vilification, Psychic Harm and Affirmative Action” in Tom Campbell and Wojciech Sadurski (eds), *Freedom of Communication* (Dartmouth, 1994) 90.

196 See generally, Luke McNamara, “Regulating Racism: Racial Vilification Laws in Australia” (Research Paper, University of Sydney Institute of Criminology, 2002). Racial vilification offences perform an important symbolic role in outlawing racist violence. However, there is a contrary argument that it would be far better, symbolically and practically, to promote the rigorous enforcement of the existing offences (of which there are no shortage) and forthright punishment of such conduct: Paul Gordon, “Racist Harassment and Violence” in Elizabeth Stanko (ed), *Perspectives on Violence* (Quartet Books, 1994) 51.

197 *Racial Discrimination Act 1975* (Cth) s 18C.

198 *Racial Discrimination Act 1975* (Cth) ss 25ZB-25ZC, repealed by the *Human Rights Legislation Amendment Act (No 1) 1999* (Cth). A similar mechanism is now included under the *Australian Human Rights Commission Act 1986* (Cth) s 46PO.

was that racist threats and incitement to violence could be prosecuted under the general criminal law. The limitation with this approach is that the racial motivation behind such conduct would be deemed legally irrelevant by the court, or worse still, may lead to more lenient treatment by police and prosecutors, operating as a mitigating rather than aggravating factor.<sup>199</sup> Racial vilification offences unlike the general law direct legal attention towards the hateful and discriminatory motives of the accused.

In 1991, the HREOC recommended that specific federal offences should be enacted proscribing (1) racist violence and intimidation; and (2) incitement to racial violence.<sup>200</sup> These recommendations were implemented speedily in most Australian states and territories, though at the federal level there was an initial reluctance to enact similar offences due to the concern that they may violate the implied freedom of political discussion under the Commonwealth Constitution.<sup>201</sup> Federal Parliament did however relent in 2006, criminalising the urging of violence between different groups as one species of sedition, though some scholars criticised this reform for its inappropriate melding of security and human rights objectives within one provision.<sup>202</sup>

Racial vilification offences have been adopted in other common law jurisdictions including Canada, New Zealand, the United States and the United Kingdom.<sup>203</sup> In New South Wales, the offence of “serious racial vilification” was first enacted as an offence within the *Anti-Discrimination Act 1977* (NSW).<sup>204</sup> In 2017, an omnibus “hate crime” offence was inserted into the *Crimes Act 1900* (NSW) following an inquiry into the offence revealing there had been no successful prosecutions since its introduction:<sup>205</sup>

199 HREOC, *Racist Violence* (AGPS, 1991) 277.

200 *Ibid* 296-302.

201 *Discrimination Act 1991* (ACT) s 67A; *Crimes Act 1914* (NSW) s 93Z; *Anti-Discrimination Act 1991* (Qld) pt 4; *Racial Vilification Act 1996* (SA); *Anti-Discrimination Act 1998* (Tas) ss 19-20; *Racial and Religious Tolerance Act 2001* (Vic); *Criminal Code* (WA) Ch XI; *Anti-Discrimination Act 1992* (NT) s 27. The High Court has since found that the implied freedom applies to the laws of the States and Territories as well, but it has also been suggested constitutional objections to such laws were overstated since “there is no basis for concluding that racial vilification is “political speech” in terms relevant to the implied constitutional freedom recognised by the High Court”: Luke McNamara and Tamsin Solomon, “The Commonwealth *Racial Hatred Act 1995*: Achievement or Disappointment?” (1996) 18(2) *Adelaide Law Review* 259, 281. See further, Luke McNamara, *Regulating Racism – Racial Vilification Laws in Australia* (Federation Press, 2002) and generally Katharine Gelber and Adrienne Stone (eds), *Hate Speech and Freedom of Speech in Australia* (Federation Press, 2007).

202 See Simon Bronitt, “Hate speech, sedition and the war on terror” in Katharine Gelber and Adrienne Stone (eds), *Hate Speech and Freedom of Speech in Australia* (Federation Press, 2007) Ch 7 and Simon Bronitt and James Stellios, “Sedition, Security and Human Rights: ‘Unbalanced’ Law Reform in the ‘War on Terror’” (2006) 30(3) *Melbourne University Law Review* 923.

203 See generally, HREOC, *Racist Violence* (AGPS, 1991) Ch 11.

204 *Anti-Discrimination Act 1977* (NSW) s 20D (repealed).

205 Standing Committee on Law and Justice, Parliament of New South Wales, *Racial Vilification Law in New South Wales* (Report No 50, 2013).

93Z Offence of publicly threatening or inciting violence on grounds of race, religion, sexual orientation, gender identity or intersex or HIV/AIDS status

- (1) A person who, by a public act, intentionally or recklessly threatens or incites violence towards another person or a group of persons on any of the following grounds is guilty of an offence—
  - (a) the race of the other person or one or more of the members of the group,
  - (b) that the other person has, or one or more of the members of the group have, a specific religious belief or affiliation,
  - (c) the sexual orientation of the other person or one or more of the members of the group,
  - (d) the gender identity of the other person or one or more of the members of the group,
  - (e) that the other person is, or one or more of the members of the group are, of intersex status,
  - (f) that the other person has, or one or more of the members of the group have, HIV or AIDS.<sup>206</sup>

The issues of under-enforcement and over-enforcement of criminal laws present significant challenges for First Nations communities. This is most graphically illustrated in the Australian Government’s response to a Report in June 2007 exposing the failure of authorities in the NT to address the widespread sexual abuse of children within Aboriginal communities. As a result of this report, the federal government announced a package of legislation to combat the abuse of children in Indigenous communities in the Northern Territory, which was described as a “national emergency” and became known as the Northern Territory Emergency Response (“NTER”). As the then Prime Minister John Howard observed at the time, the NTER was needed due to the failure to uphold the Rule of Law in these communities:

In our system of government enforcing the criminal law and providing community law and order is overwhelmingly, on a day to day basis, the responsibility of state and territory governments and the reason we are intervening in the Northern Territory is that the Northern Territory Government hasn’t matched its responsibilities and we find it necessary to do so. ... the first thing we have to do in these remote communities is to establish law and order because unless you have law and order the women and children are scared to death that if they complain they’ll be bashed or further molested ... And because the whole thing has become so broken down and chaotic that we first of all have got to provide a breathing space to these communities.<sup>207</sup>

206 *Crimes Act 1900* (NSW) s 93Z(1)(a), as amended by *Crimes Amendment (Publicly Threatening and Inciting Violence) Act 2018* (NSW).

207 “Prime Minister of Australia: Interview with Geoff Hutchison”, *ABC Radio Perth* (ABC Radio, 25 June 2007).

The stated aim of the NTER package of legislation was to improve the “well-being of certain communities” in the Northern Territory.<sup>208</sup> It aimed to do this through placing significant restrictions on the availability of alcohol and pornography in prescribed areas (which were exclusively Aboriginal communities). These restrictions did not otherwise apply outside these communities.<sup>209</sup> Most radically, the NTER extended the powers of the Australian Crime Commission (“ACC”) beyond its remit of investigation of federally relevant serious and organised crime to include Indigenous violence and child abuse.<sup>210</sup> The extension of the ACC powers is not limited to offences *within* the Northern Territory but extends across Australia. It enables the ACC to use its extensive coercive powers and covert surveillance to uncover offending within or against Indigenous communities that ordinarily would be exclusively matters for State or Territory police. A key point to recognise is that the vulnerabilities of children to sexual abuse (and abuse of power more generally) are not unique to Indigenous Australians, though as a result of the NTER, the powers and resources available to law enforcement are now being deployed and differentiated along racial lines.<sup>211</sup> For this reason, it is not surprising that the package of legislation forming the NTER required formal exemption under the RDA!

(ii) *Zero tolerance and Aboriginal crime: the future of law and order*

Over-representation of Aboriginal people cannot be attributed solely to racism within law enforcement, but must be seen within the context of broader “law and order” campaigns within in Australia.<sup>212</sup> The prosecution of minor public order offences has become more prevalent in many parts of Australia. In the present climate of local “law and order” politics, politicians and the media

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208 There are five Acts that make up the NTER legislative package. The key enactment is the *Northern Territory National Emergency Response Act 2007*. Two Acts amend other existing Acts (*Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* and the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007*), and the remaining two are Acts to fund the NTER (*Appropriation (Northern Territory National Emergency Response) Act (No 1) 2007-2008*, and the *Appropriation (Northern Territory National Emergency Response) Act (No 2) 2007-2008*).

209 The restrictions on access and supply of (otherwise lawful) pornography were justified on the ground that these were widely available to children in the Territory and served as a tool for “grooming” Aboriginal children by paedophiles.

210 See further Rebecca Wallis, “Legislation Comment: the Role of the Australian Crime Commission in Policing Indigenous Violence and Child Abuse” (2011) 35 *Criminal Law Journal* 398.

211 This point was made in a report published by the ACC examining the sexualisation of children in Australia: see Wendy O’Brien, *Australia’s Response to Sexualised or Sexually Abusive Behaviours in Children and Young People* (Australian Crime Commission, 2011) 5.

212 Russell Hogg and Kerry Carrington, “Crime, Rurality and Community” (1998) 31 *The Australian and New Zealand Journal of Criminology* 160. See generally Russell Hogg and David Brown, *Rethinking Law and Order* (Pluto Press, 1998).

clamour for more “cops on the beat”, with wider powers to deal with the problems of “youth crime” and “street gangs”.<sup>213</sup> The politics of law and order in Australia promoted a style of law enforcement more consistent with “zero tolerance” policing than community policing. It has been suggested that there are three elements to “zero tolerance” policing:

- being “tough on crime”, including the enforcement of all applicable laws;
- strict, non-discretionary law enforcement; and
- police action against minor offences and disorder.<sup>214</sup>

“Zero tolerance” implies the *full enforcement* of applicable laws, an approach which is said to be consistent with the Rule of Law, in particular the principle of “equality before the law.” The idea that offenders will be subjected to the same impartial treatment under the same laws by the police is a powerful claim of neutrality for law enforcement. This strategy of policing, developed in the United States in the 1990s, has high levels of political appeal. Although “zero tolerance” is not the official policy of any police force in Australia, there is no doubt that aspects of the strategy have been deployed at both State and local command level across Australia.<sup>215</sup> “Zero tolerance” policing promises significant reductions in levels of crime, though it must be said that these claims have rarely been empirically tested and indeed, have been vigorously rejected in the United States.<sup>216</sup>

The philosophy of “zero tolerance” promises strict equality of treatment in law enforcement, though it overlooks the fact that the police possess a wide leeway in relation to the *choice* of laws to be subjected to these policies of full enforcement. “Zero tolerance” is applied most vigorously to the crimes of the powerless on the streets, rather than the “white collar” crimes of the powerful in corporate office suites.<sup>217</sup> As Chris Cunneen pointed out two decades ago:

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213 These public order powers, including the statutory power to “move on” persons who may not have committed any offence, are discussed in Bronitt and McSherry (n 141) Ch 13, 896-7 [13.100].

214 Jayne Marshall, “Zero Tolerance Policing” (Information Bulletin No 9, South Australian Office of Crime Statistics, 1999); Peter Grabosky, “Zero Tolerance Policing” (Australian Institute of Criminology Trends and Issues in Crime and Criminal Justice No 9, Australian Institute of Criminology, 1999).

215 For further discussion of “zero tolerance” in the Australian context, see Bronitt and McSherry (n 141) 902-3 [13.110].

216 As Bernard Harcourt notes: “[t]he basic plot is simple: fighting minor disorder deters serious crime”: *Illusion of Order: The False Promise of Broken Windows Policing* (Harvard, 2001) 27. While widely credited by politicians, media and some academics for solving crime problems in large cities including New York and Chicago, Harcourt and others note, at 8, that there is a pervasive lack of empirical data to support this hypothesis.

217 A class-based conspiracy is not the most persuasive explanatory of this differential pattern of enforcement. Crimes of the powerful (such as financial and tax crimes) are often more complex and difficult to detect, requiring significantly more resources in investigation and enforcement. On the different approaches to the criminalisation of tax and welfare cheats, see Bronitt and McSherry (n 141) Ch 12, 839 [12.265].

Zero tolerance policing rests on a spurious assumption that the law is neutral and can be enforced in all situations — that complete enforcement is a possibility. However, public order and the actions which constitute disorder are broadly defined and open to constant interpretation and discretionary decisions by police. By pretending that zero tolerance is possible, the more important question of who gets arrested is obscured.<sup>218</sup>

The rhetoric of “zero tolerance” suppresses and de-legitimises the significance of discretion in policing: discretion itself is universally recognised by scholars and police themselves as an unavoidable and legitimate aspect of police work.<sup>219</sup> Increased police attention on minor “street offences” may have a number of unintended consequences including: damaging the trust and perceived legitimacy of police within disadvantaged communities; and exacerbating levels of over-representation of minorities in the criminal justice system. As Chris Cunneen has concluded, the adoption of zero-tolerance policing significantly increases the level of criminalisation for Aboriginal people, and would be incompatible with the recommendations of the RCIADIC.

Nearly forty years ago, Colin Tatz summed up the position of Aboriginal people in the Australian legal system as follows:

Many laws omit reference to Aborigines, but are applied to them with excessive vigour by police and lower courts: being drunk and disorderly, using unseemly words, and vagrancy in particular. The working of the bail and remand system, the warehousing of Aborigines in inner cells and in country lockups, the absence of legal aid until recently, the structural inequality of the laws of landlord and tenant and of hire-purchase are examples of how to keep people in a position of inferiority by attitudes, actions and structures which don't use colour directly as the subordinating mechanism.<sup>220</sup>

In the intervening period there has been a Royal Commission, an ALRC report into Indigenous incarceration rates,<sup>221</sup> and extensive political and public policy attention to crime and justice within Aboriginal communities. There have been some improvements in the formal legal position of Indigenous people since Tatz's assessment in 1984. As we shall explore in Chapter 5, Aboriginal offenders who are prosecuted now benefit from legal representation through legal

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218 Aboriginal and Torres Strait Islander Commission, *Law and Justice Issues: Zero Tolerance Policing* (Executive Summary, 1999).

219 Discretion pervades common law systems of criminal justice at every stage (through arrest, prosecution, trial and sentencing), and may be contrasted with the principle of legality that seeks to limit discretion in criminal justice decision-making in European legal systems: see further Philip Stenning, “Discretion” in Alison Wakefield and Jenny Fleming (eds), *The SAGE Dictionary of Policing* (SAGE Publications Ltd., 2009) 85; see also Simon Bronitt and Philip Stenning, “Understanding Discretion in Modern Policing” (2011) 35 *Criminal Law Journal* 319-32.

220 Colin Tatz, “Aborigines and civil law” in Peter Hanks and Bryan Keon-Cohen (eds), *Aborigines and the law – essays in memory of Elizabeth Eggleston* (Allen & Unwin, 1984) 103, 110.

221 ALRC, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Final Report No 133, 2017).

aid, including from specialised Aboriginal Legal Services. That said, despite some gains, the patterns of policing and distrust have changed little.<sup>222</sup> Formal race-based inequalities embedded in the substantive law have been eradicated: overtly “protectionist laws” have repealed, though it should be recalled that the NTER has reinstated a version of protectionist-welfare controls for Aboriginal communities albeit now expressed in racially neutral terms of improving the “wellbeing of certain communities”. Offensive language charges and the “trifecta” remain continuing sources of conflict between police and Aboriginal communities, contributing to disproportionate levels of criminalisation and rates of imprisonment. In many respects, the patterns of over-policing may have intensified under the general, and formally race neutral “zero tolerance” and “law & order” political campaigns.

The challenge for the future lies in the recognition that Aboriginal communities *themselves* must play a critical role in finding the solutions for restoring peace and delivering justice for both offenders and victims within their communities. With the advent of Indigenous courts and justice practices in some jurisdictions, Aboriginal people, their customs and laws, now have a platform within the Australian legal system. This may provide the first steps towards the recognition of Aboriginal justice systems that complement rather than compete with the other legal systems in Australia. That said, this legal foothold remains somewhat perilous, as the increasingly regressive attitude toward the recognition of Aboriginal law in sentencing reveals.

## (g) Conclusion

It seems to me that there is no alternative to telling the truth about Aboriginal history and working through its consequences. What should be done instead? Re-enact the oppression and indignities of the past simply because some settler Australians find it difficult to admit the failings of the Australian nation? Try to build national pride by a deliberate denial of that past? If anyone is going to take pride in what is truly good about their nation’s past, they must also be prepared to accept what is truly bad in it. One can celebrate as well as mourn. Acknowledging the bad does not diminish the good. On the contrary: telling the truth about Aboriginal history can actually help us to pinpoint what was good in the past, the conditions that enabled this good to be achieved, and the lessons this has for us today. This would be a history to help realize a better future.<sup>223</sup>

The above sentiment, expressed by Australian colonial historian Bain Attwood in the early years of this century, aligns with the third call for action within the Uluru Statement from the Heart: that Australia should enshrine a Makaratta

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222 Robyn Lincoln and Paul Wilson, “The Aboriginal Crime and Justice Landscape: Time for a Rethink” in Duncan Chappell and Paul Wilson (eds), *Issues in Australian Crime and Criminal Justice* (LexisNexis Butterworths, 2005) 220.

223 Bain Attwood, *Telling the Truth about Aboriginal History* (Allen & Unwin, 2005) 195-6.

Commission empowered to oversee the process of truth-telling. As Attwood attests, Australia is mired by a dark colonial history marked by our collective resistance to confronting the truth about the genocidal violence of “settlement”, and the unfinished business of recognition of the sovereignty of its First Peoples. Professor Megan Davis, an architect of the Uluru Statement and the campaign for the Voice, has termed this amnesia and complete exclusion of First Nations from Australian law and public institutions a form of “psychological terra nullius”, co-opting the legal fiction described earlier.<sup>224</sup> Australia’s self-identity as a “Young and Free” nation can only stand by the erasing of history and ignoring the “lived experience” of its First Nations – in 2021, in part to recognise the long history of First Nations of this Continent, the verse in our national anthem proclaiming a nation that is “Young and Free” has been replaced with “One and Free”.<sup>225</sup>

The founders of Australia have a legacy that still requires some reckoning: it is not disputed that our nation’s founding document was penned by white men of power and privilege, who embedded the concept of “Race” and their racial fears into the textual fabric of the Constitution. The Constitution gave the fledgling Commonwealth Parliament powers to make special laws for “alien” races, entrenching “White Australia” into law. By exempting the “aboriginal race” from the “Race power” the founders were able to, and did, deny First Nations peoples their claim to full and equal status within this new British (and White) federal polity. Through today’s eyes, re-reading those formative Convention debates and federal parliamentary speeches, it is hard to deny that many founders of Australia were “uninhibited racists”.<sup>226</sup> The original exclusion of “aboriginal race” from the federal power to make “special laws” was intentional – many drafters would have viewed First Nations peoples as a “dying” and “inferior” race. For example, Alfred Deakin, who went on to

224 Megan Davis, “Chained to the Past: The Psychological Terra Nullius of Australia’s Public Institutions” in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights Without a Bill of Rights* (Routledge, 2006) 175, 175.

225 This revised wording, introduced in 2021, was intended to be inclusive of First Nations, though the then Prime Minister at time said that the new wording was intended to reflect the unity of the Australian people during the pandemic, the long history of Indigenous people, and the waves of migration subsequently: Scott Morrison, “Now is the time to recognise that Australia is ‘one and free’” *Sydney Morning Herald* (Sydney, 31 December 2020).

226 As evidence of this claim, Robertson quoted Australia’s first Prime Minister Edmund Barton’s attitude to what he called “inferior races”, and those of long serving Prime Minister Alfred Deakin who urged support of a “Race” power and race-based immigration control in the following terms: “In another century the probability is that Australia will be a White Continent with not a black or even dark skin among its inhabitants ... Other races are to be excluded by law if they are tinted to any degree”: see Geoffrey Robertson, “The Crown in Australia: From James Cook to Charles III, Another Perspective” (2021) 95 ALJ 539, 544, quoting *Official Record of the Debates of the Australasian Federal Convention, Third Session*, Melbourne, 27 January 1899, 229 (Edmund Barton), and also quoting Australian Parliamentary Library, *From Our Special Correspondent: Alfred Deakin’s Letters to the London Morning Post* (2019) vol 1, 204.

become Australia's second Prime Minister, said at the time of Federation that "We have power to deal with people of any and every race within our borders, except the Aboriginal inhabitants of the continent who remain under the custody of the States. There is that single exception of a dying race; and if they be a dying race, let us hope that in their last hours they will be able to recognise not simply the justice, but the generosity of the treatment which the white race, who are dispossessing them and entering into their heritage are according them."<sup>227</sup> This erasure denied a more progressive Commonwealth Government the chance to give First Nations people federal and full legal recognition or personhood until the amendments following the 1967 Referendum. Sadly, confusion and misinformation (and, often, racist views) about the inclusion of references to "race" in the Australian Constitution were a prominent feature of the successful "No" campaign against the 2023 Voice referendum.

By laying bare the *race-ism* that still inheres within the Constitution, it is important to be mindful that the concept is not immutable. As Justin Malbon has observed, "Race" held a different meaning at the dawn of Federation in 1901, at the time of the 1967 Referendum, and now in the early decades of the 21st century:

The characteristics which defined race in 1901 were identified for the purpose of ranking races according to a hierarchy of social and biological superiority. ... Hierarchy no longer serves as a basis for defining race. Instead, it is now taken that racial difference does not imply racial superiority. Legislation which now seeks to treat a race as inferior would be suspect and probably unconstitutional.<sup>228</sup>

Accepting "Race" is context-dependent in terms of time, place and purpose offers fresh perspectives on how courts and legislature could approach future interpretations and reforms of the Australian Constitution. Today, the power to enact "special laws on the grounds of race" (if used at all) would likely only ever be invoked to benefit rather than harm members of those groups, such as the law outlawing racial discrimination or serious racial vilification. It would not only be repugnant to pass a law which specifically harmed a particular race, but difficult to reconcile with Australia's various treaty obligations.

Legal efforts to accommodate "difference", which includes recognition of First Nations laws, customs and cultural practices, struggle with liberalism's commitment to the principle of "equality before the law". As in the case of affirmative action in relation to gender discrimination (see Chapter 4), "special laws" and different treatment of minorities, provoke protestation that such measures are discriminatory and inconsistent with the principle of equality before the law. For this reason, the federal government has rarely used its

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227 Robert French, "The Voice – Filling a Long Constitutional Silence" (Speech, National Press Club, 6 October 2023) 5 <[https://nswbar.asn.au/uploads/pdf-documents/The\\_Voice\\_-\\_Filling\\_a\\_Long\\_Constitutional\\_Silence.pdf](https://nswbar.asn.au/uploads/pdf-documents/The_Voice_-_Filling_a_Long_Constitutional_Silence.pdf)>.

228 Justin Malbon, "The Race power under the Australian Constitution: altered meanings" (1999) 21 *Sydney Law Review* 80, 113.

power under s 51(xxvi) of the Commonwealth Constitution to make “special laws” for people of any race. Indeed, the NTER in 2007 unsurprisingly avoided relying on the “Race” power in the Constitution, referring instead to the federal parliament’s power to legislate for its Territories directly and framing these powers carefully - in somewhat contrived race-neutral terms - as an Act to enhance the “well-being of certain communities”. Nevertheless, as noted above, the concerns about the discriminatory effect of these provisions justified the exclusion of the operation of RDA with respect to the entire NTER and Territory anti-discrimination laws, and their designation as “special measures” under the RDA.<sup>229</sup>

This chapter can be understood as offering a parallel thesis to the one developed for gender in Chapter 4. Within liberal philosophy, equality before the law is a powerful political and legal ideal that requires disadvantaged minorities to be treated the same as others. However, its limitation is that the implicit normative standard for comparison remains structured around needs and interests of individuals from within the dominant group, whether that be defined in gender terms (male) or racial terms (White/non-Indigenous). Shortly before the High Court handed down its decision in *Mabo (No 2)*, the limitations of equality as the foundation for anti-discrimination laws and policies were identified by two leading legal scholars, Frank Brennan and James Crawford in the following terms:

In a subtle but very significant way the notion of “equality” has been an obstacle to developments in Aboriginal affairs. To treat Aborigines as such is seen as “patronising”: thus the decision-makers have been able to rely on an unstated ideology of sameness which avoids by definitional means the issue which Aboriginality raises. For example, it is argued against legislative, and even administrative, recognition of Aboriginal rights or traditions that this would be discriminatory or unequal, or would violate the principle that all persons in a democratic society should be subject to “one law”.<sup>230</sup>

Equality of opportunity and affirmative action attempt to repackage the concept to address these limitations, though are susceptible to the same criticisms.

With its commitment to the principle of equality before the law and individualism, liberalism seems unable to remedy the underlying deeper structural causes of discrimination faced by marginalised minorities. Indeed, the law’s commitment to formal neutrality between different groups and cultures often masks the inherent privileging of dominant groups at the expense of others. Liberalism depicts the law as neutral and innocent, with the racial identity of

229 *Northern Territory National Emergency Response Act 2007* (Cth); *Northern Territory National Emergency Response Act 2007* (Cth) s 132(1) designates the NTNER provisions as “special measures” for the purposes of the *Racial Discrimination Act 1975* (Cth), but *Northern Territory National Emergency Response Act 2007* (Cth) s 132(2) states “The provisions of this Act, and any acts done under or for the purposes of these provisions, are excluded from the operation of Part II of the *Racial Discrimination Act 1975*”.

230 Frank Brennan and James Crawford, “Aboriginality, Recognition and Australian Law: Where to from Here?” (1990) 1 *Public LR* 53, 64.

individuals and groups denied any legal salience.<sup>231</sup> As students new to the law soon encounter, the legal standards applied across both torts and criminal law are based on those of the hypothetical “reasonable person”. While represented as being both gender and race neutral, the “reasonable person” is a normative standard created by lawyers, reflecting the values both of liberalism and the dominant majority culture. This is not necessarily a conspiracy against minorities, but simply a reflection that the law-makers, courts and juries will construct their standards of “reasonableness” according to their own values and experience – with limited participation of First Nations, ethnic and cultural minorities in our institutions of justice (except when disproportionately appearing as defendants or victims), there is little chance that the ongoing denial of the significance of difference – whether grounded in terms of race, religion or culture – in the justice system will be effectively addressed.

While our type of critical scholarship may offer a diagnosis of liberalism’s deficiencies, engagement with equality arguments is both legally and politically unavoidable – it remains the dominant legal philosophical paradigm within which policies and reforms related to First Nations, anti-discrimination and multiculturalism are debated.

An underlying theme in this chapter has been the extent to which the Australian legal system could do more to accommodate legal pluralism. Legal pluralism admits the possibility within one polity of the co-existence of multiple sovereignties, with the recognition of different bodies of law governing different groups. Deepening of our historical knowledge and widening our comparative perspective can provide powerful antidotes to hitherto “settled” legal fictions. Indeed, the doctrine of *terra nullius*, which sustained a claim that English and then Australian law cannot recognise parallel systems of Indigenous law and justice, was challenged in *Mabo (No 2)*, and is being further challenged by more recent, and ongoing, historical discoveries. During the first period of colonisation, until the 1830s, it is now clear that the sovereignty and jurisdiction of First Nations peoples did receive a degree of recognition – de facto and de jure – from both judges and colonial administrators. Over the course of the 19th century, the legal scope for recognition of First Nations sovereignty and jurisdiction narrowed almost to vanishing point, and certainly the legal fiction of *terra nullius* was unassailable at the time of federation in 1901.<sup>232</sup>

Returning to the past and challenging the theories of Australia as a “settled colony” is not merely of historical or academic interest. Although *Mabo* established that Australia was not acquired through peaceful occupation of uninhabited land, thus leaving room for the recognition of native title, it did not open the sovereignty issue. As Thalia Anthony points out, if *terra nullius*

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231 Peter Fitzpatrick, “Racism and the Innocence of Law” (1987) 14 *Journal of Law and Society* 119.

232 *Cooper v Stuart* (1889) 14 App Cas 286.

no longer holds true, the only other basis for colonising an inhabited country was by treaty or conquest:

Given that there was an absence of authoritative sources of law in 1788 - in terms of British policy or court decisions – and if Blackstone is to continue to be accepted as a valid source of law at that time, the legitimacy of colonisation depends on a treaty with Aboriginal and Torres Strait Islander peoples. While this may be an *ex post facto* initiative, it would provide a legitimate base for the Australian nation to assert sovereignty into the future.<sup>233</sup>

The issues relating to Treaty remain unfinished business, though there is clearly scope for granting enhanced levels of self-determination for many First Nations communities.<sup>234</sup> Inspired by the Canadian self-governing nation, the Nunavut, Australia could further consider the prospect of creating similar self-governing territories.

Earlier experiments in self-determination stalled or were derailed – most dramatically in 2004 with the abolition of Aboriginal and Torres Strait Islander Commission (“ATSIC”). Established by federal legislation in 1990, ATSIC was intended to provide a platform through which elected Indigenous representatives could exercise substantial authority: “they could identify local funding priorities, formulate and implement regional plans, make decisions over public expenditure, protect cultural material and information, and speak directly to government”.<sup>235</sup> Since ATSIC’s demise in 2004, First Nations self-determination has given way to a diluted administrative concept of “mainstreaming”, self-management and self-empowerment.<sup>236</sup> Perhaps a more realistic model for Australia today, in the face of the defeat of a constitutionally enshrined Voice to Parliament, but considering that the Uluru Statement endures, is community-led. Perhaps each ally of First Nations justice must take it upon themselves, in their workplace, community, and homes, to give effect to self-determination by listening more attentively and acting upon advice. As we will see throughout

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233 Thalia Anthony, “Blackstone on Colonialism: Australian Judicial Interpretations” in Wilfred Prest (ed), *Blackstone and his Commentaries* (Hart Publishing, 2009) 129, 150.

234 The issue of Treaty, and indeed self-determination, featured strongly in domestic political debate in the late 1980s. In 1998, the Federal Government and Aboriginal representatives in the Northern Territory produced what is known as the “Barunga Statement”. The history and failure of Treaty was examined in discussed an earlier edition of this book: Stephen Bottomley and Stephen Parker, *Law in Context* (Federation Press, 2nd ed, 1997).

235 Harry Hobbs, *Indigenous Aspirations and Structural Reform in Australia* (Hart Publishing, 2021) 118.

236 Mainstreaming policy was supported by some First Nations leaders including, most prominently, Noel Pearson. Influenced by neo-liberalism and the writings of Adam Smith, Pearson argued for a new form of self-determination as self-responsibility that properly understood, “...is the power to take responsibility, it is to arrogate to oneself the power that for too long has been assumed by government. Individuals, families, communities must take power over their own destinies.”: see “Taking our culture on the road of Adam Smith”, *The Weekend Australian* (Sydney, 20 August 2011).

this book, sometimes working outside, or beyond, conventional legal process is the better way to achieve just outcomes.

The Uluru Statement from the Heart provided a window of new hope and direction for Australia which was crushed by the failure of the Voice referendum. While that failure comes at the bitter end of writing this chapter, it is important to remember that a new chapter in the next edition is yet to be written – not just by the co-authors, but by future generations of litigants, lawyers, law-makers and judges (who may be among the law students reading this now). In our view, it is the duty of generations who follow us to open their hearts and minds to the voices of the First Peoples of Australia and to strive to support their legitimate claims for justice.

## Questions

1. Imagine that you are employed by the Aboriginal Legal Service as a research officer. To minimise discriminatory patterns of policing within the local Aboriginal community, you have been asked to develop guidelines on the police use of public order laws, with specific attention to the harmful impact of offensive behaviour and language charges on rates of juvenile incarceration in Community.
2. Should payback by thigh spearing be recognised as lawful in Australia? If so, under what conditions? (Students are encouraged to review the ALRC, *The Recognition of Aboriginal Customary Laws* (Final Report No 31, 1986), especially Chapter 8 which canvasses arguments for and against recognition of First Nations Law.)
3. The principle of equality before the law is central to sentencing law. An offender's racial or ethnic background cannot provide a basis for harsher or more lenient punishment. That said, courts are prepared to consider *the effects* that flow from the offender's membership of a particular ethnic group. Aboriginality does not generate a sentencing discount, though courts may consider as mitigating factors alcohol abuse and socio-economic deprivation that affect the offender's community. As Brennan J observed in *Neal v The Queen* (1982) 149 CLR 305, 326:

The same sentencing principles are to be applied, of course, in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group. But in imposing sentences courts are bound to take into account, in accordance with those principles, all material facts including those facts which exist only by reason of the offender's membership of an ethnic or other group. So much is essential to the even administration of criminal justice."

Ethnic identity is formally irrelevant. Is this exclusion of race and ethnic background justified? Why does Brennan J draw this subtle

distinction? Does it still remain persuasive in light of subsequent legislative and judicial developments? Rather than equality, what alternate principle should be used to guide the exercise of sentencing discretion?

4. Should serious racial vilification be made a federal criminal offence? What are the arguments for and against criminalisation? How far, if at all, should serious racial vilification criminalisation extend from the public into the private sphere?

Under s 18C of the *Racial Discrimination Act 1975* (Cth), it is unlawful (in civil rather than criminal terms) to offend, insult, humiliate or intimidate someone with race-based comments. The limits of this provision are being challenged in a case brought by Greens Senator, Mehreen Faruqi who alleges that Senator Pauline Hanson breached s 18C in a tweet calling on Faruqi to “piss off back to Pakistan”. Hanson will defend the case on the basis that s 18C infringes the implied constitutional freedom of political communication.<sup>237</sup>

5. What features of liberalism compound or protect against racism?
6. Drawing from any area of law that you have studied and/or your own “lived experience”, identify a legal rule that purports to apply equally to everyone, though in its impact, directly or indirectly, discriminates against people from particular ethnic, religious or cultural backgrounds.
7. His Majesty’s Colonial Office provided Governor Arthur Phillip with Letters Patent when he departed with the First Fleet in 1787. Phillip received no instructions as to the status of Aboriginal persons or their rights beyond simply entreating him to “conciliate the Aborigines” and to prevent settler predations against the natives. From the material reviewed above, and your own further research, on the early cases in New South Wales why were the legal rights and sovereignty of First Nations people largely ignored. In addressing this question, students may focus on the criminal jurisdiction for *inter se* homicide.
8. The new federal Attorney-General has asked for a submission on whether *Walker v New South Wales* (1994) 182 CLR 45 is “sound law” from both a legal doctrinal and policy perspective. In preparing the submission, the Attorney is seeking advice on the following specific matters:
  - Does the claim of Mason CJ in *Walker* that English colonial law, and now Australian criminal law, did not recognise Aboriginal law still hold true in light of more recent historical research?

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237 Paul Sakkal, “Hanson’s legal dream team to fight Faruqi ‘racism’ case”, *Sydney Morning Herald* (online, 4 July 2023) <<https://www.smh.com.au/politics/federal/hanson-s-legal-dream-team-to-fight-faruqi-racism-case-20230704-p5dll3.html>>.

What new-found historical sources can be used to support your submission?

- Mason CJ invoked the principle of “equality before the law” to preclude recognition of another body of law within Australia’s legal system. Drawing on new ideas about the concept of equality before the law and the Rule of Law (reviewed in Chapter 2), how can Mason CJ’s argument be rejoindered today?
  - Accepting for the sake of argument that there is scope for an enhanced legal pluralism in Australia, which First Nations model of recognition warrants further exploration. You may examine models and examples from other “settler” jurisdictions, such as New Zealand, Canada, the United States and South Africa.
9. How should Australian law distinguish between claims seeking recognition of cultural difference (based on policies of multiculturalism) from claims seeking recognition of Aboriginal Sovereignty and First Nations Law? In addressing this question, consider the findings and recommendations of ALRC, *Multiculturalism and the Law* (Final Report No 57, 1992).
  10. Compare the majority and the minority judgments in *Love v Commonwealth*. Which arguments do you find most compelling? Why?
  11. “There is a direct clash between the imperative of imposed law and Indigenous custom, a clash between irreconcilable moral imperatives”: ALRC, *Aboriginal Customary Law – Recognition?* (Discussion Paper No 17, 1980). Do you agree that this tension is “irreconcilable”?