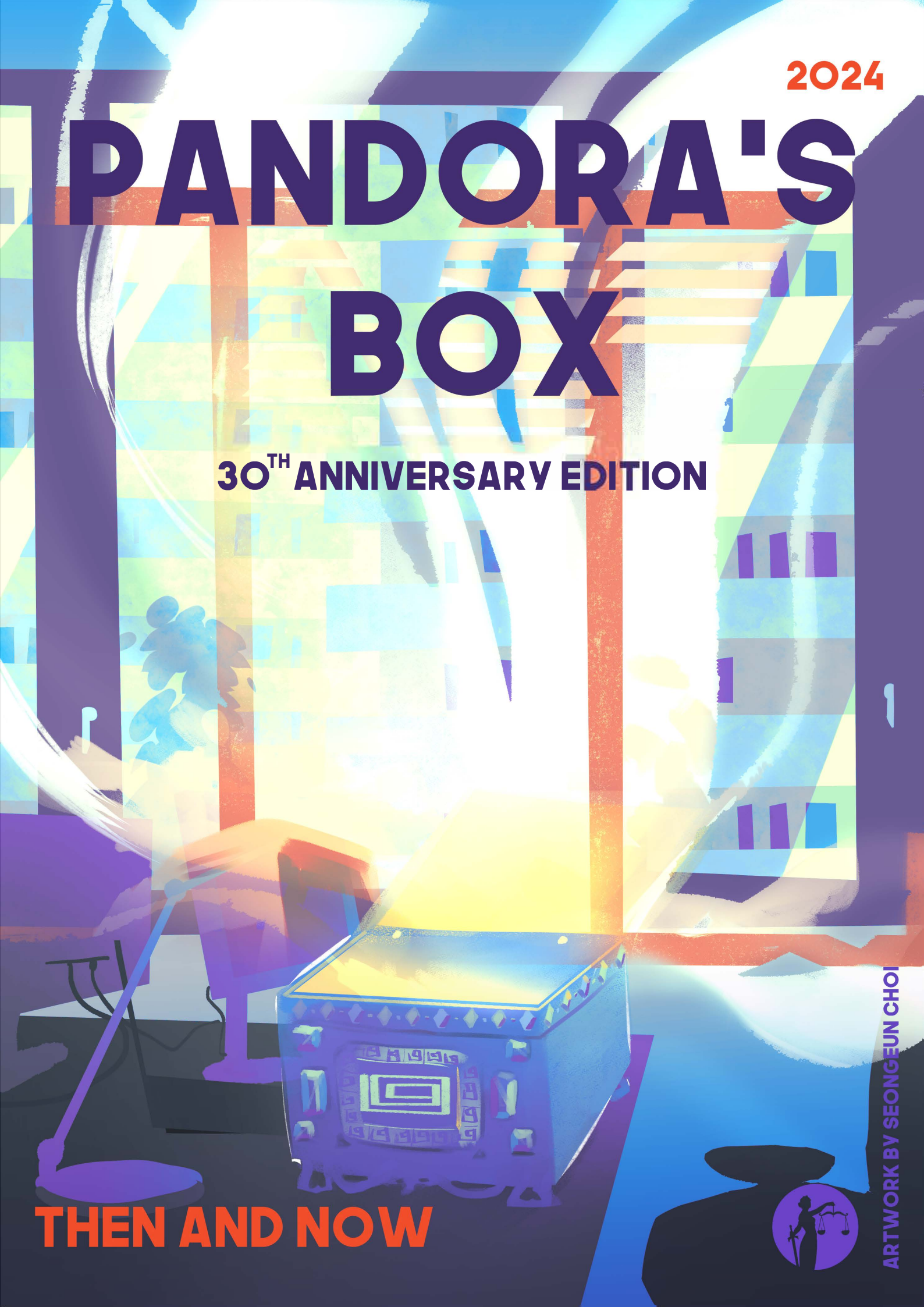
2024

PANDORA'S BOX

30TH ANNIVERSARY EDITION



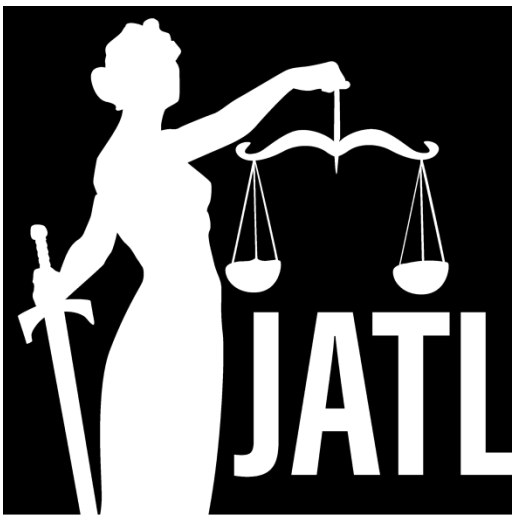
THEN AND NOW

ARTWORK BY SEONGEUN CHOI

Pandora's Box

2024

30th Anniversary Edition: Then and Now



Editors

Asha Varghese, Samuel Vecchi and Nickolas Sofios

ISSN: 1835-8624
Published by:
The Justice and the Law Society
The University of Queensland

The Justice and the Law Society extends its heartfelt thanks to The College of Law for its generous support of this year's edition of *Pandora's Box*.

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For 30 years, as the academic journal of the University of Queensland's Justice and the Law Society (JATL), *Pandora's Box* has sought to bring academic discussion of legal, political, and social justice issues to a wider audience. Previously launched at JATL's Annual Professional Breakfast, the journal has, since 2021, been released at a separate launch event, featuring a panel discussion with contributors to the latest edition.

Pandora's Box is not so named for the classical interpretation of the Pandora myth: that of a woman's weakness and disobedience unleashing evils upon the world. Instead, its editors through the years have understood Pandora as the heroine of the story – an individual with an inquisitive disposition and an open mind.

Over the last three decades, much about the law, its application, and surrounding social context has changed, and much has remained the same. This year's edition offers a broad spectrum of insights into how we arrived at the status quo and what the future might look like across a range of pressing issues.

As always, we encourage readers to approach the complex and challenging topics contained inside the journal with a balanced and critical eye.

We would like to thank our esteemed contributors for their generous support of this year's edition. Their diverse contributions – including perspectives from the Bench, political office, the Bar and the frontline of human rights advocacy – are a testament to the enduring importance of *Pandora's Box*.

We also express our sincere thanks to Seongeun Choi for designing the cover art of this year's edition.

Finally, we would like to thank the College of Law for sponsoring *Pandora's Box 2024* and its launch event.

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

Asha Varghese, Samuel Vecchi and Nickolas Sofios - 2024 Editors, *Pandora's Box*

FOREWORD

*The Hon Catherine Holmes AC SC**

In 1993, the Women and the Law Society (WATL) was formed by women students in the University of Queensland Law school. Evidently a need was perceived for some feminist solidarity; the landscape for women law students and women lawyers was not an encouraging one. There were few women legal academics in senior positions to act as role models for women law students, and few partners in law firms or female barristers to illuminate a professional way ahead. I can't really speak for the culture of the Law School itself, because this was 15 years after I had finished full-time study there; but unless it had changed dramatically, it was, to put it mildly, blokey. More generally, the legal system was an unwelcoming environment for women as complainants, parties or practitioners. It is not surprising that some enterprising women formed the Society with the aims of combatting gender bias and improving the position of women in the law.

The following year, WATL produced the first edition of *Pandora's Box*,[1] funded by a benefit concert given by the comedian, Judith Lucy. The publication's title was chosen to reflect the inquisitive approach of the

* The Honourable Catherine Holmes AC SC was appointed Chief Justice of Queensland in 2015 and retired in 2022. Ms Holmes has since served as Commissioner of the *Royal Commission into the Robodebt Scheme* (2023), and Reviewer of the *Independent review into the Crime and Corruption Commission's reporting on the performance of its corruption functions* (2024).

[1] The first edition of *Pandora's Box* can be accessed from the following link: https://espace.library.uq.edu.au/view/UQ:370392

mythical heroine, searching for answers particularly on questions of legal reform and social justice. As was the outcome of Pandora's quest, the results might be discomfiting.

Notable about that first edition of *Pandora's Box* is the variety of the contributors' experience. Mostly, of course, they had a background in law, but they ranged from the most senior - Professor Kathleen Mahoney was a Canadian constitutional expert and academic - to the most junior, a law student, Marianne Jago, who wrote on gendered language. The practitioners who contributed represented different areas of practice: the Bar, industrial relations and community legal centres. (Tony Woodyatt, coordinator of the Caxton Legal Centre, was a contributor). Other writers included a social worker, a Senator and party leader (Cheryl Kernot, then of the Australian Democrats), and the president of the Australian Nurses' Federation.

That first edition contained some contributions on issues which remain acutely topical today. Professor Mahoney wrote on the difficult balance between hate vilification legislation on the one hand and freedom of expression on the other; Jill Uhr, the social worker, on the legal response to domestic violence. Other papers were more a product of their time. Jean Dalton, barrister (now Justice of Appeal Dalton) gave a down-to-earth appraisal of the problems confronting women at the Bar in Queensland, while Helen Endre Stacy looked more generally at gender-based differences in the experiences of legal practitioners. Those papers have not lost all relevance, but reading them does provide some comfort that we have come a long way in the last 30 years.

That progress probably goes some way to explaining why, in 2008, WATL was renamed the Justice and the Law Society (JATL). The editorial for the 2008 edition of *Pandora's Box*[2] explains that the name change was made to reflect the Society's broader concerns with law and justice and also to encourage more male members to become involved, although the society would maintain its focus on gender equality. Till then the journal had been primarily (not solely) occupied with the experience of women, although its coverage increasingly extended to international issues. It had continued to attract distinguished contributors (among them Justice Mary Gaudron).

The 2008 edition reflected the broader approach; it was titled 'In the Service of Justice', with, as its theme, the people, processes and institutions of the justice system. Subsequent issues have embraced a mix of the practical, theoretical and philosophical, with topics as diverse as international and comparative law, criminal justice, law and technology, Indigenous perspectives, the experience of unrepresented parties in the legal system and the law of armed conflict. The journal has continued to feature essays from, and interviews with, an extraordinary array of eminent individuals. This 30th anniversary edition is no exception. Writers and interviewees include two retired High Court judges, a former prime minister (now an ambassador to the United States) and a number of highly regarded practitioners who have long been committed to bringing about social justice in different contexts. Two of them, the Hon Michael Kirby AC CMG and Stephen Keim SC, have been regular and generous contributors over the years.

[2] The 2008 edition of *Pandora's Box* can be accessed from the following link: https://www.jatl.org/pandoras-box

The theme of the 2024 edition is 'Then and Now'. On some issues the 'Then' is dispiritingly similar to the 'Now' or, worse, actually looks better; on others, progress is evident. It's a mixed message. But the thread that runs through the papers and interviews is an emphasis on human rights, generally and in particular contexts. While that concern was certainly present 30 years ago, it was not so explicit or pervasive. That in itself is a notable development.

The Hon Patrick Keane AC KC, like me, a baby boomer, reflects on how life at the Bar has changed, with rising litigation and the pressure of online communication, and on how the society in which barristers work has also changed. I was startled to learn of the 1970s rule of thumb that one in four Supreme Court judges should be Catholic; but looking back at the bench of my student days, it's plausible. (It's good to know that the religion into which I was baptised would not have precluded me from judicial appointment, just that unfortunate accident of birth into the wrong gender.) But as Mr Keane points out, the all-male, all-white judiciary was transformed and practitioners benefited from a much more amenable court environment as a result. Society and courts are now, as he says, much more receptive to different minority groups and sensitive to the victims of power imbalance. He mentions the evolving and improving approach to the rights of LGBTIQ members of the community (something other contributors also raise) and the fact that complaints of domestic violence and sexual abuse of children are today much more sensitively handled.

Also among Mr Keane's Reasons to be Cheerful are that our High Court, unlike the United States Supreme Court, remains apolitical. (We are also spared the horrors of judicial election, which is the means of appointment of about half the judges on United States State Supreme Courts. In Wisconsin

last year, according to the Brennan Centre for Justice, US$51,000,000 was spent on the Supreme Court race between two candidates, one Democrat- and the other Republican-aligned.).[3] Something which does not warrant celebration, though, is our failure to achieve reconciliation with our First Nations people, an issue explored in other essays in this journal.

Jilly Field, who leads a pro bono practice in a commercial law firm, is interviewed about her team's work supporting community legal centres and rights advocates. She speaks of the expansion of pro bono work during her years as a lawyer over a period when the cost of legal services and, correspondingly, unmet need for legal assistance has steadily increased. Ms Field emphasises the importance for pro bono practitioners of developing a larger understanding of the drivers of inequity and injustice and the need in their practice to defer to the work and views of those at the frontline, in the community legal centres.

From that frontline, in a reminder of Tony Woodyatt's contribution 30 years ago, comes a thoughtful essay from another Caxton Legal Centre lawyer. Rosalind Williams offers an illuminating analysis of the changes she has seen in the community legal centre sector in her 33 years working at Caxton. Caxton's progress over the past three decades indeed seems to be a paradigm of the sector's expansion and increasing sophistication. The commitment to social justice and human rights was always there, but the numbers of lawyers, social workers and support staff employed have increased exponentially; the range of programmes Caxton runs has broadened considerably; while the

[3] Douglas Keith, 'The Politics of Judicial Elections, 2021-2022', *Brennan Center for Justice* (Web Page, 29 January 2024) <https://www.brennancenter.org/our-work/research-reports/politics-judicial-elections-2021-2022>.

expanding numbers of people needing assistance has necessitated much higher levels of organisation and use of technology.

A development which can only be beneficial is the setting up of students' programmes for clinical legal education work run conjointly by Caxton and some of the university law schools. And Caxton, like other community legal centres, has increasingly assumed a role as a voice to government on law reform. With that has come, as Ms Williams explains, government funding, but a downside in the form of increasing bureaucratisation, a treadmill of data collection and reporting. Some things haven't changed: the high levels of unmet need for legal assistance and the abysmal remuneration of workers in the sector.

Among the changes Ms Williams has seen over her three decades in the sector is an increasing number of specialist services, like the Prisoners' Legal Service, the LGBTI Legal Service Inc, and Queensland Advocacy for Inclusion (QAI). Someone who has worked for all three services - and is now chief executive officer of QAI - is Matilda Alexander. Interviewed for this edition of the journal, she talks about her background in human rights work. Not surprisingly, she does not refer to seeing any positive change in prisons, which contrasts with her work in LGBTIQ rights where there has been substantial change for the better. In relation to QAI, Ms Alexander says that its focus on human rights, reflected in both individual casework and systemic advocacy has remained unchanged over the last 30 years; and now it engages in human rights advocacy both locally and on the international stage, working in United Nations fora. In the local context, she has some positive things to say about

the *Human Rights Act*[4] and the cultural change it is capable of producing, while sounding a little nervous about the Act's prospective longevity.

And on that subject, a key player in relation to the *Human Rights Act* and its implementation is interviewed. Scott McDougall is Queensland's first Human Rights Commissioner, with a long history of work in areas of discrimination, particularly race and disability discrimination. In respect of important developments over the last three decades he points to cases concerning the protection of human rights, chief among them *Mabo*[5] in 1992. He regards the *Human Rights Act* as the most significant development in the human rights sphere in this State and, intriguingly, raises a piece of history I suspect most of us have forgotten or never knew about: the unsuccessful attempt to introduce constitutionally enshrined human rights legislation back in 1998, when *Pandora's Box* was a mere toddler. The Act, he points out, has its limitations, but (like Matilda Alexander) he sees it as providing a useful prompt to cultural change, reminding decision-makers of the need to consider the rights and dignity of individuals affected by their decisions. Encouragingly, he does not mention the word "repeal" but expresses confidence that the rights the Act protects will increasingly be given substance as the jurisprudence resulting from it builds.

On the international front, the Hon Michael Kirby writes from a unique perspective of practical engagement. He describes his concern with human rights issues since his days as a law student focusing on local issues, and his later involvement in international matters, working with the United Nations

4 *Human Rights Act 2019* (Qld).
5 *Mabo v Queensland (No 2)* [1992] HCA 23; (1992) 175 CLR 1.

and the International Commission of Jurists. His roles have included inquiring into the activities of two of the worst offenders against human rights, the Khmer Rouge in Cambodia and the North Korean government. He points out, disturbingly, that Australia still does not have any national human rights legislation or comply with United Nations machinery for investigation of alleged abuses of human rights. In Mr Kirby's view, while earlier editions of *Pandora's Box* canvassed particular human rights issues, now it is necessary to look at larger human rights challenges: climate change (something which does receive attention in this edition), global population movements and in his view, most importantly, the danger posed by nuclear weapons.

Another international human rights issue, the imposition of capital punishment, is the subject of Stephen Keim's paper. Australia has been free of the death penalty for more than 30 years - since 1985, with Ronald Ryan the last person executed, in 1967 – and since 2010, Commonwealth legislation has prohibited its reintroduction in any Australian state or territory.[6] But the need to oppose it elsewhere remains, Mr Keim points out, both because it is the ultimate breach of human rights and, on a less lofty plane, because Australians can be caught by it overseas; it is something which might happen to a friend, a relative or a client. (I might add as a further reason that one should never be too complacent about the satisfactory state of the law; ten years ago, few Americans contemplated the overturning of *Roe v Wade*.[7] In this country, a series of particularly horrific crimes might shift the public conversation sufficiently for some politicians to see reintroduction of capital

[6] *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010* (Cth).
[7] *Roe v Wade,* 410 U.S. 113 (1973).

punishment as a vote-winning policy.) In this essay, the indefatigable Mr Keim describes the work he and others are doing, both to oppose actual executions and to promote abolition of the death penalty generally.

The troubling state of the treatment of First Nations people, particularly in the criminal justice system, is mentioned in a number of the papers, and there are two essays devoted to the topic. They are by two experienced criminal defence lawyers, Andrew Boe and Russell Marks, each of whom has thought long and deeply about the causes of the injustices he has seen in his work with Indigenous clients. Both write passionately about the connection between colonisation, dispossession and the disadvantage experienced by Indigenous people particularly reflected by disproportionate levels of incarceration. They point to racist bias in policing and criminal justice, particularly in relation to charging, bail decisions and sentencing. Dr Marks, who practises in the Northern Territory, also writes of the phenomenon of child removal by government agencies, where the physical and educational needs of Aboriginal children taken into "care" are nonetheless neglected.

There have been times, both Mr Boe and Dr Marks remind us, when the treatment of Indigenous people was promisingly at the forefront of public consciousness – with the 1967 Referendum; the Commissions of Inquiry into Aboriginal deaths in custody in 1991[8] and the Stolen Generation in 1997;[9] the *Mabo* decision in 1992, Paul Keating's Redfern speech that year and the passing of the *Native Title Act*[10] the following year; the walk for reconciliation

[8] *Royal Commission into Aboriginal Deaths in Custody* (Final Report, April 1991).
[9] National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, Parliament of Australia, *Bringing them home* (Report, 26 May 1997).
[10] *Native Title Act 1993* (Cth).

in different cities in 2000; and Prime Minister Rudd's formal apology to Australia's Indigenous peoples in 2008. But, in contrast, in 2023, the Voice Referendum failed, and, as both point out, none of the goodwill associated with those earlier events has led to change in the over-representation of Indigenous people in Australian gaols. Since Dr Marks contributed his essay, the new Northern Territory government has indicated its determination to lower the age of criminal responsibility back to 10,[11] thus ensuring that a cohort of child offenders passes through the juvenile detention system and is primed for adult incarceration.

Finally, two contributors address environmental issues, particularly climate change which will increasingly have a devastating impact on the human rights of millions to sustenance, safety and shelter. His Excellency the Hon Kevin Rudd AC writes with the particular insight of an insider of the environmental battles of the last 20 years, both domestically and on the world stage. He points to some wins: Australia's success in ending Japanese commercial whaling in the Antarctic;[12] the expansion of the renewable energy target[13] and the growth of that sector; the *Copenhagen Accord*[14] which led to the *Paris*

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11 Karen Middleton, 'Country Liberals to lower criminal age to 10 years old in NT as Finocchiaro talks tough on law and order', *The Guardian* (Web Page, 26 August 2024) <https://www.theguardian.com/australia-news/article/2024/aug/26/country-liberals-to-lower-criminal-age-to-10-years-old-in-nt-as-finocchiaro-talks-tough-on-law-and-order>.

12 *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening) (Judgment)* [2014] ICJ Rep 226.

13 'Renewable Energy Target Scheme', *Department of Crimate Change, Energy, the Environment and Water* (Web Page) <https://www.dcceew.gov.au/energy/renewable/target-scheme>.

14 *Copenhagen Accord,* 15th sess, Agenda Item 9, FCCC/CP/2009/L.7 (18 December 2009).

Agreement,[15] reflecting international concurrence that temperature increases must be held well below 2°C above pre-industrial levels. But in a year which looks set to be the hottest on record, and politicians aspiring to leadership still consider "Drill, baby, drill" to be a winning policy, it is hard not to feel dispirited.

The second writer on the environment, Dr Chris McGrath, paints a bleak picture on climate change. He regards the *Paris Agreement* as a significant milestone but points to the reality that even if the increase in mean global temperatures is limited to 1.5° C, important ecosystems including the Great Barrier Reef will be lost. Still, I've chosen his paper to end this survey of the contributions, because he offers the blessing which remained in Pandora's mythical box after all else was gone: hope. The world's success in protecting the ozone layer, he says, shows that a crisis which results in public demand for change can produce a global response of international co-operation research and action. So, his message is, although things will undoubtedly get worse before they get better, the reality of the climate crisis will ensure a change in public and political attitudes, galvanising states into action in a way which might now seem impossible.

[15] *Paris Agreement*, opened for signature 22 April 2016, [2016] ATS 24 (entered into force 4 November 2016).

This impressive collection of essays and interviews is, really, a call to arms to protect and advance human rights. There are some consistent messages: the inspiration which can be found in such progress as has already been made; the importance of being ever-vigilant to preserve hard-won positive change; and the need to do so much more. It will be interesting to see to what extent the "Now" of the 40th anniversary edition in 2034 reflects victory on these many fronts.

LIFE AT THE BAR: THEN AND NOW

Patrick Keane AC KC[*]

Human beings derive enormous satisfaction from solving problems. It may be said that it is the exercise of our capacity to solve the problems that life on our planet throws up that has defined us as a species. The satisfaction we derive from solving problems is integral to our evolutionary success. It is just as well that we enjoy problem solving so much, because we are the only species that actively goes out and creates problems that we then have to solve. And the most difficult problems that we create are in our relationships with one another.

Except for the use of force, as in war or other forms of organised violence, there is no exercise of problem-solving on a societal scale that is more demanding or rigorous or intense than litigation. Solving problems peacefully, honestly and reasonably is what the legal profession does. And that is hard on the lawyers. To help peacefully solve the problems that beset our fellow citizens is also a great privilege. It is a privilege that is jealously guarded. Our community takes care to ensure is exercised only by those who can be trusted not to abuse it. And so we have been organised within our legal tradition over the last thousand years into the legal profession generally and more especially of the Bar. In our tradition, the Bar encompasses the judiciary, which is, at

* The Hon Patrick Keane AC KC served as a Justice of the High Court of Australia from 2013 to 2022 and is currently serving as a non-permanent Judge of the Hong Kong Court of Final Appeal. He served as Chief Justice of the Federal Court of Australia from 2010 to 2013 and as a Judge of the Court of Appeal, Supreme Court of Queensland from 2005 to 2010. From 1992 to 2005, he served as the Solicitor-General of Queensland.

the same time as it is an arm of the legal profession, also an organ of the State. In this respect, the Bar is unique among the professions.

I have had the privilege of participating in the problem-solving work of the profession now for the best part of fifty years. It is timely to say something about the changes I have observed in the work of the profession over that time.

It is, I think, worth taking a moment at the outset to celebrate some of the respects in which the profession finds itself working within a more just society than it was fifty years ago, I will then say something about the challenges to the profession that have emerged. I will then conclude with the suggestion that the need to meet those challenges has not changed the essential things that make the work of the Bar worthwhile.

To begin on an upbeat, I want to mention some of the profound societal changes that affect both lawyers and citizens and that have been overwhelmingly for the good. It is only right and proper that we should remind ourselves that cynicism about the possibility of improving the quality of justice within our community is quite misplaced. Things can, and do, get better. And this should give us heart.

As Martin Luther King Jr., an upbeat guy if ever there was one, famously said: "The arc of the moral universe is long, but it bends towards justice."[1] With a focus on our justice system, there are a number of respects in which King's great insight has been vindicated in this country over the last half-century.

We are undoubtedly a fairer, and happier society and profession than we were in the mid-20th century when there were no women judges, no non-Anglo-Celtic judges, and very, very few women lawyers, or non-white lawyers.

In the 1970s, so far as the Queensland legal profession and judiciary were concerned, it is most unlikely that the idea that diversity might be a good thing occurred to anybody. If it occurred to anybody at all, it began and ended with the tacit understanding that one in four Supreme Court judges should be a Catholic. This understanding, observed without controversy was the legacy of the Irish-Catholic domination of the Labor Party governments that held office in Queensland from 1915 to 1957, with the exception of the three years of the Moore Liberal government at the beginning of the 1930s. During those years, Irish Catholics constituted about a quarter of the State's population. No one would even have given this protocol even a thought since 1980. But today, when we debate the need for greater diversity on the Bench, and people

[1] Martin Luther King Jr. paraphrased that from a sermon delivered by an abolitionist minister, Theodore Parker, in 1853. He said, "I do not pretend to understand the moral universe. The arc is a long one. My eye reaches but little ways. I cannot calculate the curve and complete the figure by experience of sight. I can divine it by conscience. And from what I see I am sure it bends toward justice."; See 'Theodore Parker', *Tufts University* (Web Page) <https://exhibits.tufts.edu/spotlight/john-brown-tufts/about/theodore-parker#:~:text=I%20do%20not%20pretend%20to,Parker%20was%20a%20radical%20abolitionist.>

make the strong points that the courts are not representative institutions and that the legitimacy of the courts derives from the legal expertise and other qualities of those appointed to the role, it may also be said with equal force, at least in historical terms, that it has been recognised that it is socially desirable that the courts before whom the citizenry are judged should look like the citizenry. In that way, we reduce the risk that the judiciary may be perceived, as it probably was for much of the 19th century by most of Queensland's white settlers, as the enforcement arm of the ruling class and, from the point of view of Indigenous Queenslanders, as that of an occupying power. However that debate stands at the current time, there can be no doubt that our courts are much more diverse than was the case for most of the 20th century and that this is a good thing.

The angry old men who seemed to dominate the Bench in my first decade at the Bar have been replaced almost entirely by more temperate souls. In my first couple of decades at the Bar, magistrates and judges were all men and white – many were older than their years (Wars and a Depression will do that) and some of them seemed to be always angry about things that could only be guessed at, that only rarely had much to do with competence, or lack thereof, of the lawyers appearing before them. They presided over their courts with a brutality that called to mind Churchill's description of the Royal Navy in the time of Nelson as a place of "rum, sodomy and the lash."[2]

[2] David Morgan-Owen, 'Rum, Sodomy, Prayers, and the Lash Revisited: Winston Churchill and Social Reform in the Royal Navy, 1900-1915', *Reviews in History* (Web Page, November 2018) <https://reviews.history.ac.uk/review/2291/>.

I should be clear that I am not suggesting that all of the judges of those times exhibited these behaviours – it just seemed that way. That was because the unpleasant ones even though there were only a tiny handful of them, made life for lawyers so very unpleasant. Unfortunately, the few truly unpleasant judges set the general mood, even though the vast majority of judges were thoroughly decent men and a pleasure to appear before. One consequence of this unpleasantness was that no barrister wanted to risk being like them; few barristers actually wanted to be a judge if being a judge could make one so unhappy. Many of the senior barristers I knew dreaded the phone call from the Attorney-General offering them a judicial appointment; and that reluctance was not just about money and the voluntary choice of a life of genteel poverty.

To put that unpleasantness into a broader perspective, it should be said that the business of conflict resolution is inherently very stressful. Litigation, is simply awful for those engaged in it as litigants. In an address to the Association of the Bar of the City of New York in 1921, Judge Learned Hand said: "After now some dozen years of experience, I must say that as a litigant I should dread a lawsuit beyond almost anything else short of sickness and death."[3] That great judge was speaking at a time when it was a momentous, and rare, thing to haul one's fellow citizen into court. At that time, litigation was generally regarded as something to be dreaded, and it was rare for law-abiding citizens to have anything to do with the courts. Now, it is not uncommon to see someone hauled into the courtroom for having made an allegedly defamatory statement on their Instagram story.[4]And our confident

[3] David Capper, 'Maintenance and Champerty in Australia – Litigation in Support of Funding!' (2007) 26 *Civil Justice Quarterly* 288, 290-291.
[4] See *BeautyFULL CMC Pty Ltd & Ors v Hayes* [2021] QDC 111.

and rights conscious fellow citizens demand access to justice. I will say something more about that later.

While litigation is usually most stressful for the parties to the conflict, it is also very stressful for those individuals who are tasked with resolving the conflicts. In most situations of social conflict, at least one of the parties is being unreasonable; often both are. Reconciliation of their positions may sometimes seem to the judge to be something beyond human wisdom, and the frustration engendered by that perception is not rendered any more bearable when the parties or their lawyers seem unable to take a hint as to the likely outcome of the contest.

Now, we all agree that judicial bullying behaviour is simply unacceptable, even when it is a symptom of an understandable desire for greater efficiency, or even a cry of pain from a fundamentally decent soul in torment. There can be little doubt that the change in the atmosphere in our courtrooms is due in no small part to the greater diversity of our judges. But having said that, we should, I think, also acknowledge that there was a serious and important reason for some of the anger of the old male judges apart from problems of testosterone, alcohol, ill-health and poor diet. That reason is endemic to the courts as the community's principal conflict resolution mechanism.

So, in defence of the angry old male judges I have spoken about, it is fair to say that they were, in their own mid-20th century way, howling at human folly and unreasonableness. They were giving voice, albeit in a most unhelpful way, to an understandable human reaction to the difficult, sometimes excessive, demands placed upon the peacemaker by their unreasonable fellow citizens. But we now recognise that judicial strategies for coping with the stresses

involved in the role of peacemaker must not include sharing our pain with the people we are trying to help.

And, while I am very much of the view that things have got better, not everyone thinks so. In 2018, the *Age* newspaper reported that more than 856 respondents to a survey of the Victorian Bar Association's members in relation to health and safety claimed to have been bullied by a judge or magistrate in a courtroom. The survey concluded that judicial bullying was the biggest issue of concern when barristers were asked to detail how their working life could be improved – outranking even the timely payment of fees. Two-thirds of the female barristers who responded to the survey reported that they had been bullied from the Bench, while 58% of their male counterparts claimed that they had also been subjected to demeaning or humiliating remarks. The most common form of bullying was said to be "grossly discourteous and disrespectful behaviour from the Bench." – rudeness, sarcasm and shouting.[5]

I have to say that I wonder whether the results of this survey reflect cultural issues peculiar to Victoria, and Victoria is peculiar. While no one should play down the problem of bullying in any professional context, we need to keep things in perspective. We need to recognise that the judicial bully does not any longer set the prevailing mood.

[5] Richard Baker and Nick McKenzie, 'Most Victorian barristers say they are bullied by judges, report finds', *The Age* (Web Page, 18 October 2018) <https://www.theage.com.au/business/workplace/most-victorian-barristers-say-they-are-bullied-by-judges-report-finds-20181018-p50akv.html>.

On International Women's Day in 2019, Baroness Hale of Richmond gave an interview to *The Times* of London[6] in which her Ladyship said:

> *"My impression is that judges are now a great deal more courteous and patient and respectful of everybody in front of them, both lawyers and litigants, than when I was at the Bar."*

I have to say that Lady Hale's view is very much my own. Her Ladyship went on to say:

> *"Being an advocate requires considerable courage. You've got to stand up t the court, to your opponents, your clients – and it requires courage to overcome the inevitable stage fright of appearing in court."*

I agree with Lady Hale about that as well. The need for advocates to be courageous is something that is no less essential today than it was 50 years ago – or, for that matter, 500 years ago. Stage fright or lack of preparation, an absence of judicial sympathy for your plight, and the rigorous expression of righteous frustration with your performance have never been, and should not be, mistaken for judicial bullying.

We are also undoubtedly a happier, freer, and more compassionate profession (and society) than we were when I first began my time as an articled clerk. Then, in Queensland, gay people were treated as criminals and were persecuted by the police with the social licence to do so. The courts were

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[6] Frances Gibb, 'Being an advocate takes considerable courage, says Baroness Hale', *The Times* (Web Page, 7 March 2019) <https://www.thetimes.com/uk/law/article/being-an-advocate-takes-considerable-courage-says-baroness-hale-x9hfj9gdn>.

slower to see the grave injustice in this than was society at large. That was the case both here, and in the United States.

In 1986, the Supreme Court of the United States decided in *Bowers v Hardwick*[7], by a 5-4 majority, that a Georgia statute that made sodomy a crime was not unconstitutional. One of the majority justices was Lewis Powell. In a conference with his fellow Justices about the case, he remarked that he had never met a homosexual. Justice Harry Blackman said in response: "Look around your chambers". And, of course, one of Justice Powell's then clerks was gay, as were several of the young men who had previously worked for him.

One of those clerks was Mr Paul Smith who, in 2003, argued and won the landmark case of *Lawrence v Texas*[8] which over-ruled *Bowers v Hardwick*. And in January 2013, Mr Paul Smith stood before Chief Justice Roberts and applied, successfully, for admission to the Bar of the Supreme Court of the United States of about 30 members of the National LGBT Bar Association. The lawyers stood, and the Chief Justice gave his customary cordial welcome to new members of the Supreme Court Bar.[9]

I mention this episode not simply to indulge in a feel-good moment, or to make the point that we have all come a long way from a time of what was, in retrospect, an irrational and terrible repression. I want to make the additional

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[7] (1986) 478 US 186.
[8] (2003) 539 US 558.
[9] See Stephanie Ward, 'Attorney for Lawrence v. Texas reflects on LGBTQ rights on 20th anniversary', *American Bar Association* (Web Page, 26 June 2023) <https://www.americanbar.org/groups/journal/podcast/attorney-for-lawrence-v-texas-reflects-on-lgbtq-rights-on-20th-anniversary/>.

point that it is something worth celebrating that we, in Australia, did not need a Supreme Court to overturn as unconstitutional a statute made by the people in order to remedy social injustice. Holding that a statute is invalid because it is unconstitutional is not something to be done lightly. It is, after all, the negation of the will of the people expressed through their elected representatives.

When now we look back at the overturning of *Roe v Wade,*[10] and the implications of the US Supreme Court's reasons for doing so in relation to the other rights based on constitutional notions of privacy, it throws into sharp relief the fragile basis of those rights founded as they are on the philosophical outlook of a handful of judges. When one considers the decisions of the Supreme Court that 'solve' broadly political problems, one may be inspired or depressed by the outcomes, depending on one's political outlook. But whatever one's views about the outcomes in these decisions, one cannot help noticing from an Australian perspective, that in these momentous cases, the outcome was not one that we would expect to be the product of a judicial decision rather than a decision of the representative branches of government. The American dependence on the courts has contributed to the evident infantilisation of American politics at the federal level, and, in turn, to the more intensive politicisation of the Supreme Court itself.

Again and again over the last 50 years I have been reassured of the vibrancy of Australian democracy where issues of great controversy - such as marriage equality - have been decided by our people rather than by the courts. The

[10] (1973) 410 US 113.

contrast with the United States - our cultural lodestar in so many respects - is remarkable and comforting. Representative politics in that nation is so sclerotic, and has been so for so long, that issues that divide political parties are now routinely resolved by the Supreme Court. That seems to be in large part because the political process is incapable of resolving them, marriage equality again being the most obvious example. Abortion law is another: the Supreme Court had to discover in the silences of the Constitution a right to abortion, the limits of which it has struggled subsequently to define. Here, our Parliaments chosen by the people, have addressed the problem on the basis of a broad social consensus expressed in the representative institutions of our democracy.

In the *Washington Post*, former Justice John Paul Stevens, speaking of his experience on the Supreme Court, said: "It happens so often that you have to get used to losing."[11] Even America's highest judges seem naturally to think in terms of winning or losing. In contrast, in Australia, judges do not have to get used to losing. It is still, I think, a universally accepted tenet of the professional ethos as judges that there is nothing in the contest for us to lose. We are not seeking to achieve any political agenda: we are not appointed with that in mind; and that is certainly not how we see our role.

In Australia, we have not yet accepted that the work of our courts is simply politics by another means. The approach of the Australian judiciary has been at once more modest in its view of the role of the judiciary as the provider of

[11] 'John Paul Stevens looks back on nearly a century of life and law, but worries about the future', *The Washington Post* (Web Page, 11 May 2019) <https://www.washingtonpost.com/politics/courts_law/john-paul-stevens-looks-back-on-nearly-a-century-of-life-and-law-but-worries-about-the-future/2019/05/11/494d5768-7332-11e9-9f06-5fc2ee80027a_story.html>.

solutions to society's problems, and more respectful of the democratic values implicit in the notion of 'the people' than that of our US counterparts.

In the United States, issues about judicial appointments divide political parties and the nation. There, the political branches of government, already seriously weakened by deep divisions of interests and values, have been further drained of vigour and resolution by an environment which both holds them captive and polarises their constituencies even more deeply in a way that has not yet blighted our public life. We need to avoid a judicial slide into political partisanship. CNN's exit polling at the 2016 US Presidential election disclosed that, for the 56% of those who voted for the Republican candidate, Supreme Court appointments were the *most* important factor in their vote, with only 37% saying that this issue was not important to them at all.[12] The Republican candidate at that election well understood the state of affairs reflected in these figures. Indeed, his appreciation of the point was a major part of his political strategy. He told a rally in July 2016 that even if conservative voters didn't like him, they would have to vote for him anyway. "You know why?" he asked: "Supreme Court Judges", he answered.[13] And in this regard, as President, he proved as good as his word, appointing Supreme and Federal Court judges to resounding applause from his political base.

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[12] Phillip Bump, 'A quarter of Republicans voted for Trump to get Supreme Court picks - and it paid off', *The Washington Post* (Web Page, 26 June 2018) <https://www.washingtonpost.com/news/politics/wp/2018/06/26/a-quarter-of-republicans-voted-for-trump-to-get-supreme-court-picks-and-it-paid-off/>.

[13] 'America's highest court needs term limits', *The Economist* (Web Page, 15 September 15 2018) <https://www.economist.com/leaders/2018/09/15/americas-highest-court-needs-term-limits>.

An area of our national life that we cannot celebrate concerns reconciliation with Australia's Indigenous people. This issue has not been resolved by the courts, and ultimately it cannot be. *Mabo,*[14] the great landmark that it was, did not even begin to address the problems of historical dispossession of Indigenous Australians from their traditional lands where dispossession was total, *Mabo* offered no remedy. What is better now than 40 years ago is that there is a broad societal awareness that we need reconciliation with Indigenous Australians even though the challenge of giving effect to that awareness is proving elusive for our political leaders. It remains for our people, through their elected representatives to resolve this great issue.

Technology

All the societal changes I have spoken about are important; but for us as lawyers and citizens of Australia and the world, the most significant change over the last 30 years has been in relation to the extent and intensity of our social interaction with each other through technological advances. The extent to which we are now so closely and intensely associated by technology means that the lives we are now living are like nothing in previous human experience. The closest analogy I can think of from the past is with the lives of the citizens of small ancient cities, like the Athens of Socrates, villages in which every citizen knew the business of every other citizen. And subject to intervention by authoritarian states such as China and Russia, this new global village does not respect national borders. In this ecosystem, the opportunity for privacy – the right just to be left alone – is rapidly disappearing.

[14] *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

The technological advances that began in the 20th century have aggravated, rather than mitigated, the problem of distinguishing between the public and the private aspects of our lives. In earlier and simpler times, people knew that they were crossing the line between the private and the public when they entered the agora or the forum or the town hall, or even when they appeared on television, to engage in debate. The physical fact of the public location of the activity both marked the activity as a matter of public concern and helps to ensure a minimum level of civility.

The coming of the digital age has, in large part, erased the gentling effect of physical prompts to civility. Civility is an indispensable virtue of democracy. It is the virtue that helps us to accept the unsatisfactory possibility that we may not be right about an issue, and that those who think differently may nevertheless be decent and honourable, and not to be despised.

Online communication, for all its intensity and ubiquity, is an isolated and isolating activity conducted without the ordinary social constraints provided by the physical presence of another human being and the possibility of provoking an uncivil reaction. The Information Revolution has largely removed these physical markers. Without these physical cues, there is a need to articulate a stable theoretical basis for drawing that crucial boundary between the private and the public. This need becomes at once more imperative and yet more difficult.

The problems that technological change will continue to create, combined with the concomitant wholesale and willing abandonment of privacy as a bedrock societal value, mean that the development of solutions to those problems will be the great challenge for your generation and the next.

We cannot even say that we know what those changes will be, not with any certainty. Only one thing is certain. Today's lawyers are not able to hide from the problem. They are not able, for example, to emulate Justice Louis Brandeis of the United States Supreme Court who reacted to the introduction of the telephone at the beginning of the 20th century by refusing to have one in his home and refusing to use the one that was installed in his chambers.

Changes in Workload

Substantial changes have been taking place in the nature of the work coming before courts in Australasia. Our courts are called upon more and more to regulate the exercise of power, whether by the State or by our fellow citizens over each other, to an extent that would have been unthinkable when I began my career in the law. Changes in the workload of the courts reflect the broad tide of cultural change that is itself reflected in the changing expectations held by our fellow citizens of what the courts can, and should, do for them. On the civil side, the litigation that comes before the courts reflects the demands of a diverse, prosperous and rights-conscious people who are determined to have their own way and to enlist the power of the State to do so.

The great change since the 1960s has been the rise of 'access to justice' as a mantra of public policy. Litigation is now widely regarded as a good thing – even something to be encouraged as a matter of public policy – as class actions provide a mechanism for the enforcement of consumer protection laws where the executive government is not sufficiently resourced to do so.

In one sense, it may be said to be a credit to the judicial institutions which we serve that the community has simply assumed that all kinds of social questions are amenable to solution by the courts. The open-ness and fairness and reasonableness of our courts make them attractive places for our fellow citizen to press their claims on each other.

And so the judicial branch of government, and the profession, is busier than ever before in areas of social concern with which we did not previously grapple as an institution of government.

For reasons at which lawyers, can only guess, issues of domestic violence and the sexual abuse of children are now among *the* major calls upon the time and resources of our courts. Great challenges have been presented to this generation of lawyers and judges by the revelation of the extent of these problems in institutions, but more often within the family. The courts are at the front line of these challenges. During most of the time that I was at the Bar, these problems were largely invisible. Domestic violence was ignored, not just by the police and the courts, but by society at large: no one wanted to be involved in a 'domestic'.

The instinctive reaction in all liberal democracies in which these problems have come to light has been to bring the power of the State to bear upon perpetrators through the machinery of the criminal law. Whether the criminal law is the instrument of State power best equipped to effect that solution has not seriously been debated. But whatever instrument was to be chosen to address the issue, it is inconceivable that the courts would not have some supervisory role. The fact is, however, that the courts have become the front line where our communities seek to resolve these issues.

When I began my time in the law, the problems of domestic violence and the sexual abuse of children were kept secret and out of the courts by the intimidation practised by the perpetrators and the sense of helplessness of their victims. While the very power imbalance between perpetrator and victim that allowed these crimes to be committed in the first place also helped to keep the crimes private, it must be acknowledged that a significant contribution to shielding perpetrators of these crimes from the criminal law was also made by rules devised by ancient authorities, like Sir Matthew Hale, regarded as the great sages of the common law, such as the need for corroboration of a female or child complainant.[15]

For a long time, these long established rules seriously impeded the prosecution of offenders in cases where complainants were willing to come forward. These rules were rigorously enforced by the courts for a significant part of my professional life, in deference to the long-standing scepticism of the great sages of the common law about the reliability of the evidence of complainants in cases of sexual assault.

Legislatures lost patience, both with judicial scepticism about complainants in sex cases, and with the assumption that judges are possessed of a wisdom about where the truth might lie in such cases that surpasses the understanding of everyone else. And that was fair enough. Why would one think that people in the privileged position of judges, who have, in many cases, enjoyed nurturing upbringings, know more about the dark horrors of intra-family child abuse, than everyone else? It certainly is not because we had any

[15] Matthew Hale, *The History of the Pleas of the Crown: in two volumes* (Payne, 1800) 635-636.

professional training in these matters. And to the extent that these assumptions were characteristically made by appellate courts, rather than by judges at the coal face, those assumptions were not grounded in practical experience.

We can now, I think, accept that the difficulty of the courts, especially the appellate courts, in letting go of the assumptions that we inherited from those we venerated as the great sages of the common law, as to the inherent mendacity of women and children and as to the superiority of judicial wisdom about these aspects of human behaviour, have not been our superior courts' finest moments. With the benefit of hindsight, the *Royal Commission into Institutional Responses to Child Sexual Abuse*, and the numerous taskforces and working groups of domestic and family violence, only the most reactionary traditionalists now harbour any concern that justice has not been well served by the retreat from these hoary assumptions led by our legislatures.

Until well after the Second World War, for most of the populace, courts were engines of social control, not social expression. The courts were institutions primarily concerned with the maintenance of the peace, to maintain order among the more rambunctious of our citizens. Not for nothing was the Magistrates Court then known among ordinary people as the 'Police Court'.

Today, our confident and rights-conscious citizens have a very different attitude to the courts. There can be no doubt that the zeitgeist has been captured by the demand for access to justice and that it is the courts that are expected to provide it. The notion that litigation is a necessary evil, not to be promoted by the courts – whose sole role was to resolve disputes – has been

replaced by the premise that litigation is to be encouraged as the necessary means to ensure access to justice.

In my time, the demand upon the State to provide dispute resolution services overwhelmed the capacity of the ordinary courts. Quasi-judicial tribunals such as the Queensland Civil and Administrative Tribunal (**QCAT**), were called into existence because, as those of us who were in practice as lawyers 30 years ago know, the ordinary courts were simply incapable of coping with the need for resolution in the vast range of disputes affecting our citizens that now require determination by organs of the State.

In the last 50 years, all our lives have become dependent upon exercises of State power through administrative decisions which are, as often as not, apt to confer benefits and privileges that improve the quality of the lives of our citizens. Now an extensive body of administrative law serves to ensure that the administrative apparatus of the modern State meets the responsibilities which its citizens demand of it.

We should not view the proliferation of administrative tribunals with alarm. Rather, that proliferation is an expression of the success of our society in showering rights upon our citizens in a way that could not have been imagined even in 1970, and of our community's determination to ensure that those rights are meaningful in improving the lives of our citizens.

The great pathology of these happy developments, though, has been the development of a litigation culture in which every reverse or grievance is perceived as an occasion to seek orders from a court. While the role of the judiciary taught to me at law school was the impartial quelling of controversies

between citizens, or between citizens and other organs of the State, the courts are now being drawn, inexorably, into a broader role as the synthesisers of concord within the community. By the beginning of the last decade of the 20th century, the pursuit of access to justice by our rights-conscious fellow citizens drove a litigation explosion.

Barristers at that time enjoyed the financial benefits of this explosion of litigation: personal injuries, building cases, planning and local government and commercial cases all boomed so that the Queensland Bar was busier than it had ever been. Delays and backlogs became endemic, especially in the Supreme Court. The public became understandably impatient with the delays, and in the 1990s for several years a Ligation Reform Commission comprised of members of the newly established Court of Appeal sought to streamline litigation. The *Uniform Civil Procedure Rules 1999* (**UCPR**) was a major reform that emerged from this era.

The courts responded heroically, but the problems were effectively resolved only by the emergence of alternative dispute resolution (**ADR**) and the introduction of QCAT. And the emergence of these solutions to the problems generated by the rights explosion changed radically the nature of practice at the Bar. Trials became even more rare than in the bad old days of the great delays as mediation became even more effective. It has been, for at least a quarter of a century, the availability of ADR that has allowed the courts to manage their workload and incidentally empower our fellow citizens themselves to resolve their disputes. The Bar has had to develop different skills as a result.

All this means, however, that today's barristers spend much less time actually in court than we did back in the day. And the growing emphasis on specialisation within the solicitors' branch of the profession has meant that solicitors value advice on their specialty only from barristers who are equally expert in their particular field. So there are fewer all-rounders today than even three decades ago when every one of the dozen or so acknowledged leaders of the Queensland Bar was an all-rounder.

But some things don't change. Queensland's barristers are still, in my experience, second to none. That is certainly so in relation to civil work. Our criminal bar leads the nation as it has since it was inspired by the likes of Casey, Brennan, Cuthbert, Sturgess and Spender.

The great specialist skill is still advocacy. Advocacy is not just the confidence to stand up and fight a case in court; real competence is much more than self-confidence. It is also the knowledge and skill to make the argument that persuades. Even, or maybe especially, in the context of ADR, the succinct but compelling argument is as valuable as it ever has been in any court. And it is made by a person sufficiently independent of the client to command the respect of the other side.

As Sir Harry Gibbs once put it, the job of an advocate is to say what can be said for the client, and to say it well. That is still the essence of the barrister's task.

It is not just because the work of the Bar is so well rewarded that lawyers are drawn into the all-consuming demands of this life. Rather, it is because it can be the most exciting and fulfilling work available to us problem solvers. It is still true to say, as Sir Gerard Brennan said to the Australian Bar Association in 1996:

> *"A life at the Bar [is] replete with its triumphs and tragedies, its wins and its losses, the friendships forged and battles fought, the long nights of reading and the flashes of inspiration that sometimes fail in their application. The Bar captures the mind and governs the life of those who join it. Its rewards are sometimes financially parsimonious. It is a profession to be entered only by those who have a passionate desire to be a barrister. But that is the best of all reasons. For those, the experience of practice does not disappoint."*

It has long been my view that only barristers can really understand the intensity of the pressures involved in doing what we do. Even our nearest and dearest have only a rough idea. But there are some others who can make an educated guess: they are all the other lawyers, solicitors and academics who choose not to be advocates. That choice reflects, to some extent at least, just how hard it can be to say what can be said for the client and to say it well. It is hard to be both the tip of the spear and the hard point in the shield; but so long as our community retain the adversarial mode of dispute resolution they will be necessary features of our particular system of problem solving. But if you enjoy solving problems of the most difficult kind you wouldn't want to do anything else.

AN INTERVIEW WITH JILLY FIELD*

Nickolas Sofios and Asha Varghese

PB: You've talked in your work about the importance of centring the front-line community legal centres and advocates on rights issues.[1] What do you mean by that?

JF: Addressing social unfairness is the core and everyday work of community legal centres. So, for me, it's important that their advocacy, their work, and their view is prioritised. They should be centred, their voice heard. They are at the front.

Equally, those with lived experience should also be prioritised. It is particularly important that they are given the space to direct the perspective, articulation and dissemination of narratives that are circulated about their experiences. Their standpoint holds significant epistemic and moral weight. Again, they should be centred, their voice heard. They are the ones who live it. I see this as preserving dignity, protecting agency and recognising privacy, making sure those with the

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1 See, eg, Jilly Field and Shakti Srikanth, 'Ethics and Education as the Foundation of a Pro Bono Practice: Gilchrist Connell's Experience' (June 2023) *Pro Bono Voco* 14.

lived authority (and those that commit their careers to them) are heard.

I feel lucky to work in a firm that values humility, realism and critical thought. The leaders are understated by nature. A straight-talking firm makes for a straight-talking pro bono practice.

PB: Relatedly, you've said that, at your firm, part of 'centring the front' is being relatively quiet about your pro bono work. Can you speak to that?

JF: We are conscious of the inherent complexity of a commercial firm responding to issues of social unfairness. When you think of the position, power, class and economic disparities – it is uncomfortable. The more I study on social unfairness the more certain I am that my discomfort is relevant. This study lifts our moral literacy.

I should stop here and be clear that these are my individual perspectives. Other practitioners would see their role and practice quite differently. I am not speaking for anyone else.

As practitioners, we are mostly observers to the lived realities of structural injustice. We are not often engaged in the experience. We are engaged in response. That is why I encourage a commitment to understanding the conditions of social unfairness and our role in it before we respond. This

understanding – including being conscious of what we should not do, what we should try and un-do, and where we just should not be – will help us assess our behaviour and tailor our response.

For me, there would have to be a compelling moral justification to publicly refer to our pro bono work. It is hard to imagine a time when I would be willing to publicly communicate on pro bono work we have done or on a social justice response we have leaned into. I always think, if the communication is necessary, there are likely better placed people and organisations to do that.

Our team works with a hypersensitivity to the trouble of communicating about issues of unfairness from a position of privilege. A huge part of that is knowing our unintended but undeniable involvement with structural disadvantage.

PB: Would you say that front-line community legal centres are in a better position than the commercial law firm to centre the lay client?

JF: Lawyers centre clients. That is our priority. We listen to instruction and will and act on it. But I try to consider agency and privacy from the perspective of broader communities. The communities are the authority on the issues that impact their people. Protecting the integrity of the lived experience of both clients and communities includes working against the

unintended dilution of their views by other interpretative narratives.

The communities that lived the unfairness should be in control of their narratives, the descriptions of their work or their challenges and how it is referred to publicly. Again, their voice and not our voice.

When you think about it objectively, the front-line and long-standing advocates and those with lived experience are better placed to speak to the issues they live or have dedicated their careers. It is logic. If you have advocated at the front for 30 years on an issue, imagine the depth of your response and the articulation of your language. You would have the nuance, the varied contexts, the awareness. Keeping the attention to the front line, raising their voice, their position and (hopefully) funding is vital.

When I think about corporate communications on civil society issues more generally, I am often asking myself, who is being heard, who is benefiting, and actually (lets be real) who is this for?

PB: Another theme that permeates your work is the importance, for pro bono practices and practitioners, of keeping visions realistic. Could you elaborate on this? What does it mean to 'keep visions realistic' in pro bono work and why is it important?

JF: At the most fundamental level the purpose of pro bono is to provide pro bono legal support to those who need legal advice yet do not qualify for free legal assistance and cannot afford legal fees.

These clients are often dealing with highly complex and intersecting social issues most always based in economic marginalisation. These issues are often wicked social problems. They are political, they are economic, they are gendered, they are classed and long-tailed problems. Not easy to speak to and near impossible to address systemically. I know there is little we can do systemically from the position we are in. The issues are far more complex than that. We must respect the complexity by accepting the minuteness of our work and our influence. I work to prioritise realism.

I also work against simplified solution-driven language. For instance, someone could have written multiple white papers across various issues of gendered violence but that does not mean, at all, that they are working towards ending gendered violence. What it means is that they wrote a white paper on issues of gendered violence. That's it. When I speak to our work, I describe what we do like a statement. This is what we did and no more. I respect the limit of the work.

I have always noticed how front-line lawyers are careful with their language. I learn so much from their humility and quiet

achievements. I recognise how fair and realistic their vision is, and I think, 'Well, who are we to have bigger goals than that?' They really are our core client. I feel strongly that my vision should follow their vision. My concern should follow their concern. My response should follow their need. They are the front. Solidarity to them.

PB: Does that form part of the reason you don't refer to 'social change' or 'social impact' resulting from your pro bono work?

JF: The pro bono goal is straightforward. It is addressing unmet legal need. With 78% of people still not being able to access legal support,[2] we are looking at a vexed social problem. I can't say I have made any impact on that pro bono goal over the last 15 years. Unmet legal need is rising.[3] Maybe I am a pessimist. But I struggle to see how my practice or my work could have a social impact on hugely complex inflamed social issues. We are just chipping at the edges.

Being a realist and taking great caution with language and communication is the safest place for the cautious. I think saying what we do and no more is ethically and commercially risk adverse. I am also really conscious that hope, when not met, in some contexts, can be harmful. Nothing worse than

[2] See Nigel J Balmer et al, *Public Understanding of Law Survey Volume 1: Everyday Problems and Legal Need* (Report, 30 August 2023) 10.
[3] See Emily Millane, Angela Jackson and Nathan Blane, *Justice on the Brink: Stronger Legal Aid for a Better Legal System* (Report, November 2023) 9–11.

the smiling optimists slinging solutions to what they have not lived. I see that as harmful. To me, feelings of passion and the desire to 'help' is a red flag.

Language is so important. I labour words. Making claims about what you can do or will do across a social issue, to me, carries moral weight. If I describe my work as addressing or progressing towards a social issue, I would want to make sure that is achieved. In most of this work, you can't. The issues are too complex.

If you are reading about power, privilege, saviourism, colonisation you are going to quickly come across concerns with approaches in international development. It is a quasi-parallel industry. I see the existential crisis of that industry as a warning sign. The canary in the coal mine. And it reinforces to me why I avoid heading into social impact. The issue of unmet legal need is unmeetable anyway. I'll stick to that mandate of addressing unmet legal need. Social impact is not for me. It is not realistic.

We all need to listen to the issues in international development and work actively and intentionally against saviourism. This means de-centring yourself and your firm. This means considering the actions, the behaviours to avoid – this is thinking around the un-do and what not to do. Less talking and profiling on the issues of unfairness that we do

not live and cannot solve. Make space. Be led. Move aside. This is most often about when we should get out of the way.

PB: With that in mind, we were wondering if you could expand on something we discussed briefly earlier: what accountability measures exist for pro bono work, traditional and otherwise? How can we best measure and oversee?

JF: There is no industry audit of pro bono legal work. It is a trust-based system backed by a pro bono definition and pretty settled pro bono policies. Basically, legal work is pro bono if it is without charge and addresses unmet legal need for people who are not eligible for legal assistance and cannot afford legal assistance. And, of course, legal work that is in the public interest.

With 20 or so years behind the pro bono industry, I think we should be curious about auditing what we do internally: whether the hours stack up against the definition. But when it comes to external measurement – which perhaps people will see as our "impact" – the issue becomes much more complex. Measurement would require significant and long term research (empirical, data, long view, peer reviewed). I think our energy should first be directed to measuring and auditing what we do internally as a starting point. I think external measurement is jumping the gun. I am sure others would not agree with me.

When people speak to measuring social impact my gut goes straight to - What are we measuring – individual or systemic work? Who is measuring – the firm conducting the work or the community receiving the work? Who is establishing what success looks like, and is that short-term and or long-term?. There are also issues of power and bias to consider, and really importantly: who are we actually measuring for?

We want to avoid any measurement that would lean us towards the favouring the dominant narratives – 'we think we did well' and the like. We really need to take a critical view of unintended impacts and also the long tail of experiences. This is particularly important in corporate response to unfairness. I think our time would be better spent on being curious about internal auditing of pro bono, further study of power and how unmet legal need is tackled through disruption. The majority of Australians are priced out of legal services and unable to qualify for legal assistance.[4] We really need to sit with that as a legal industry. We need some new thinking.

PB: You've touched on this already, but we wanted to ask: throughout your time in the profession, what have been some of the most significant developments you've seen, and where do you think change is still necessary?

[4] Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, 2014) 719, 1020–2, cited in Law Council of Australia, *The Justice Project Final Report* (Report, August 2018) pt 2, 7.

JF: The significant development would perhaps be the growth of pro bono practices and the increasing government and client expectations.

When I started, pro bono practices were developing, and now, they are pretty standard across most well-established firms. It is a matured industry, having been developed and guided by some formidable pro bono partners who remain my quiet mentors, the north stars of the sector.

As you can tell, I am pretty conservative about what I think we can achieve. For me, sticking to our telos – addressing unmet legal need – is vital. We are lawyers, these are legal practices, the best thing we can do is legal work. So, for me, our future really is our history. And perhaps some disruption based in ethics.

I hope to see my role continue to lean towards ethics and sociology . I won't get into social impact but I will get into ethics. I wonder if future pro bono roles will sit around ethics or deepened understanding of social patterns, power and the *isms*. Roles, of course, will always depend on the appetite and needs of the firm. We are driven commercially. And all firms are different.

Pro bono is born from a well-rehearsed and thriving business case. It is the reason why we are here, but it cannot centre and direct all our decision-making. It is a non-negotiable but let's

not become too distracted or influenced by it. I try and draw a line across it.

I would encourage the lifting of literacy on social unfairness, its patterns and causes, the social complexities and norms that create the unmet legal need. It is why I am pursuing a Master of Sociology degree, so I can better understand the patterns, systems, 'isms' and norms. My practice cannot fix things systemically, but we can work to better understand them and understand our place. The higher our literacy is on social issues, the better our eye is for level and realistic response.

Really reading, knowing your place and being a realist is part of being a good lawyer. So, for me, this is all essential lawyer behaviour. We are sharp-thinking, truth-seeking wordsmiths.

PB: Do you think there's merit in adopting what's sometimes called a 'multidisciplinary approach' to pro bono work, and what might that look like?

JF: The multidisciplinary approach is pretty embedded. Of course, there is more we can do but the general wraparound service support – legal and social – is maturing. The frontline community legal centres work really hard to provide broad services. They are resourceful with their collaborations and partnering. They know what is needed. They just need resources.

PB: So, in your view, if you want to say that you're having a sort of social impact, then that's what you should be committing to, and that may involve a multidisciplinary approach, but if we're going to return to unmet legal need…

JF: Yeah, I think it requires an approach that we haven't considered before, and that's a deeper investment into and commitment to the study of unfairness, of social injustice, and the study of systemic issues. There is a need to really come to terms with what not to do and what we should not say. For that, read from those with lived experience and on racism, classism, and the like; read from the communities living the minority, not the dominant.

Even though our firm leaves itself out of social impact talk we can still speak to what we have done if we really want. For instance, 'our lawyers did legal work for individuals at the local court who have experienced domestic violence'. Great, end of story. That's it. It is a local court application. It is not working to end gendered violence and it doesn't solve injustice.

In all reality, that applicant, despite our excellent work, still lives out an oppression. We have played a vital role in addressing their unmet legal need. But that applicant still lives an injustice experience. They still return to a (likely) damaged financial reality, compounded harm, long-standing financial and social consequences and trauma which will pass

generationally.[5] These legal matter outcomes may feel like injustice solved for us, but for the client and or community, they may not. This is because the injustice has a different application to their lives and their communities and often a more pervasive, multifaceted and long-standing impact. This is why our interpretation of what was achieved will be very different and therefore our communication will be inherently compromised.

Those broader social crises continue, always systemically and most often individually as well.

PB: You mentioned that, for you, the future of pro bono lies in its history, and possibly some disruption. Are you optimistic about young lawyers' potential to realise this future?

JF: Well, you're the future advocates. I see your generation demanding authenticity, transparency and fairness in social response. You not interested in the peddling of hope. You want intelligent action. You are realists. You understand what we need to un-do in order to address saviourism. I am excited to see you push the dial in university and in corporate organisations.

[5] See House Standing Committee on Social Policy and Legal Affairs, *Inquiry into Family, Domestic and Sexual Violence* (Report, 1 April 2021) ch 2.

Asking the questions, it is so powerful. We need critical thinkers and readers. Your generation is living through these vexed and wicked social problems. Your world is in turmoil. Like, it's really tricky. Tokenism and posturing must be hard to tolerate. I imagine it must be salt in wound. I would be ashamed if I added to that.

You must be tired of the big unfair things. You will stop tolerating the dominant narratives. Your generation will produce some great thinkers. Laser-sharp eyes, truth seekers, stoic hearts. I mean look around – you just have to be.

PB: What advice would you have for law students who are interested in joining a pro bono team at a commercial law firm?

JF: Be a good lawyer. Read a lot about social unfairness from those with lived experience and the academics who spend time at the front. Understand the seed point of injustice – the 'isms'. Always know your place. Align yourself with a firm that speaks your values, especially if you would die on a hill for them. It's more comfortable that way.

LIFE AS A COMMUNITY LEGAL CENTRE SOLICITOR AND THIRTY YEARS IN THE POVERTY LAW SECTOR

Rosalind Williams OAM[*]

I Introduction and Overview

While on a secondment from Caxton Legal Centre Inc (**Caxton**) as the 2024 Practitioner in Residence in the Pro Bono Centre (**PBC**) at the UQ Law School, I have had many conversations with law students volunteering on projects facilitated by the PBC. Similarly, I have also spoken with many students completing clinical placements at various Community Legal Centres (**CLC**s) as part of the subject LAWS5180 – Clinical Legal Education.[1] Talking to law students about my three decades in practice as a solicitor and listening to the students speak about their own professional aspirations has made me reflect upon the many changes I have seen in the legal practice landscape. Given that I have spent most of my time as a solicitor working at Caxton, it felt like synchronicity when I was asked to write an article reflecting upon 'then and now – and a trajectory for the future of CLCs' for this special 30th edition of *Pandora's Box*.

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[1] See 'Legal clinics', *The University of Queensland Law School* (Web Page) <https://law.uq.edu.au/current-students/course-information-and-support/legal-clinics>.

There have been so many changes in the community legal sector during my years in practice that it is difficult to know what to highlight. That said, the three most important points that immediately come to mind include: 1. the creative and multidisciplinary approaches CLCs have increasingly adopted to assist clients with their 'poverty law,'[2] problems; 2. the ongoing expansion and professionalisation of CLCs which has given the CLC sector a significant voice, notably in law reform; and 3. the sector's creative use of technology to effectively deliver both services and preventative legal educational responses.

II The Community Legal Sector

A *What are CLCs and what do they do?*

CLCs are not-for-profit, independent, community-based and community-run, free legal and advocacy services which seek to provide 'high-quality free and accessible legal and related services to everyday people, especially people experiencing financial hardship, discrimination and/or some other form of disadvantage, or who are experiencing domestic or family violence.'[3] CLCs are known for their human rights' advocacy, and their holistic responsiveness in service delivery. Crucially, most CLCs greatly expand their capacity to assist clients by recruiting volunteer lawyers (supported by law students) to help provide free, high quality legal services. CLCs provide a vital safety net in the legal assistance sector, helping needy clients who would otherwise fall through the cracks in our legal system.

[2] Stephen Wexler, 'Practicing Law for Poor People' (1970) 79(1) *Yale Law Journal* 1049, 1049.

[3] 'About our organisation', *Community Legal Centres Australia* (Web Page) <https://clcs.org.au/about-us/> ('About our organisation').

CLCs first appeared on the legal landscape in Australia at a time when there was a significant and growing movement for social change, following the 1960s 'radical program of social justice and protest.'[4] The activist impetus for the creation of CLCs generally was driven by young lawyers, certain academics, university students, and other workers from the community and welfare sectors. From the outset, 'CLCs … were a grass roots, bottom-up movement, unstructured, unfunded and fired by a passion for justice.'[5] Over time, CLCs have attracted government funding and become much more structured (and, some might argue, mainstream), but their commitment to social justice and, in particular, equal access to justice still proudly defines them.

CLC workers have always recognised that clients' legal problems are often enmeshed with profound social problems. CLC lawyers have a long history of working collaboratively with social workers, financial counsellors and tenancy advice workers to assist clients with complex, multi-layered problems, and this multidisciplinary approach clearly distinguishes CLCs from private law firms.

Importantly, CLCs adopt what I call the 'trident approach' to service delivery and, again, this sets them apart from the private legal profession. In addition to undertaking legal casework for individual clients (including important test-case work), CLCs engage in two other major and equally important types of

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[4] '50 years of Community Legal Centres in Victoria', *Federation of Community Legal Centres Victoria* (Web Page) <https://www.fclc.org.au/50_years_of_clcs> ('50 years of Community Legal Centres in Victoria').

[5] Jude McCulloch, Megan Blair and Bridget Harris, *Justice for all: A history of the Victorian Community Legal Centre movement* (Federation of Community Legal Centres Victoria, 2011) 10.

activities: Community Legal Education (**CLE**) with a focus on empowerment and prevention, and law reform work (informed by our clients' experiences) that is intended to benefit the wider community.

In general, successive governments have readily recognised the extraordinary value of volunteers' pro bono contributions to the legal assistance sector,[6] and this has enabled CLCs to attract operational funding, and, in turn, engage in expansion.

Many CLCs have long-standing relationships with law schools and actively engage in the formal clinical legal supervision/education of their volunteer law students. The PBC clinical placements mentioned earlier reflect this very practice. These partnerships deliver many benefits, including 'the exposure clinic students get to the multidisciplinary practice that characterises many centres.'[7] This is not something they will normally get at a private law firm or commercial corporation. They also, of course, get to see the creative work that CLCs do in the CLE and law reform spaces. When I first started at Caxton, there were no formal clinical arrangements, but, over my time at Caxton, six separate clinics were established in partnership with three different universities. The Clinical Legal Education work done by CLCs like Caxton has been a major boon for all concerned.

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[6] Louis Schetzer, 'Community Legal Centres: Resilience and Diversity in the Face of a Changing Policy Environment' (2006) 31(3) *Alternative Law Journal* 159, 164.
[7] Anna Cody and Simon Rice, 'Teaching Social Justice in Clinics' in Adrian Evans et al (eds), *Australian Clinical Legal Education: Designing and Operating a Best Practice Clinical Program in an Australian Law School* (Australian National University Press, 2017) 104.

B *CLCs and some relevant history*

The earliest Australian CLCs (sometimes called Community Legal Services) were established in the early 1970s, and this sector was already well established by the time I started working at Caxton in 1991. The first free legal service was the Redfern Aboriginal Legal Service in Sydney in 1970. The first CLCs were the Springvale Monash Legal Service, and the Fitzroy Legal Service, which were established in Melbourne in 1972.[8] Caxton was established in 1976 and was the first CLC established in Queensland. (It was originally called the Baroona Legal Service before it became The Caxton Street Legal Centre[9] and then Caxton Legal Centre Inc).

By 1992, the State and Territory peak bodies that made up the National Association of Community Legal Centres (**NACLC** – now called Community Legal Centres Australia (**CLCA**)) represented 112 member CLCs,[10] and there were 20 operational CLCs in Queensland.[11] Some CLCs were big generalist legal centres, like Caxton, Townsville Legal Service Inc (now Townsville Community Law) and the Cairns Community Legal Centre, while others were small locality-based centres. Other CLCs worked in specialist areas or for special 'cohorts of people.'[12] Examples include the Women's Legal Service, the Prisoners' Legal Service, the then Tenants' Union of Queensland, and the Youth Advocacy Centre.

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[8] 50 years of Community Legal Centres in Victoria (n 4).
[9] Des Galligan, *From Lodge to Labor & Law Reform: the history of the Caxton Street Hall (1883-1999)* (Desmond Galligan, 1999) 61.
[10] Rhonda Fadden, 'Community legal centres: National Overview 1992' (1992) 17(6) *Alternative Law Journal* 283, 283.
[11] Zoe Rathus, 'Community legal centres: National Overview 1992' (1992) 17(6) *Alternative Law Journal* 283, 285.
[12] 50 years of Community Legal Centres in Victoria (n 4).

A key addition to the Queensland CLC sector in my time has been the LGBTI Legal Service Inc, which was established in 2014 to help clients with 'legal problems which arise from their identification as LGBTIQA+ and/or because they feel more comfortable in dealing with a solicitor with specific skills, interest and understanding of LGBTIQA+ legal issues.'[13] Other more recently established client-group-focused Queensland CLCs include the Aboriginal Family Legal Services Queensland (Maruma-li-mari) Indigenous Corporation, ADA Law (Aged and Disability Advocacy Law), The Institute for Urban Indigenous Health, knowmore (which provides advice about justice and redress to survivors of child sexual abuse), and the Queensland Indigenous Family Violence Legal Service.

When I started at Caxton, CLCs had their own relationships with private firms and barristers for obtaining pro bono support for clients. With the 2001 establishment of the CLC LawRight (formerly QPILCH), such referral pathways became more organised. Via its strategic partnerships (which extend to benefit the CLC sector) LawRight now harnesses pro bono services of '65 law firms, 170 barristers and 140 law students'[14] to assist vulnerable clients.

The number of CLCs around the country has continued to grow over the last two decades and rural and remote service delivery has become an important feature of the sector. Unfortunately, there is still much to do in that regard.

The number of centres currently represented by the eight State and Territory peak bodies that make up CLCA now stands at 154, and this includes CLCs,

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[13] 'About Us – What we do', *LGBTI Legal Service Inc* (Web Page) <https://lgbtilegalservice.org.au/about-us/>.
[14] 'About LawRight', *LawRight* (Web Page) <https://lawright.org.au/about/>.

as well as two Aboriginal and Torres Strait Islander Legal Services and 11 Family Violence Prevention Legal Services.[15]

In some ways I think pure numbers under-represent the real growth in the sector. For example, the Toowoomba Advocacy and Support Centre (formally the Toowoomba Legal Service, which was first established in 1982) has gone from being a small regional service, mostly staffed by local volunteer solicitors working on a roster once a week,[16] to being a big generalist service (with branch offices) servicing an area of 'over 400,000 square kilometres of South West Queensland and a further 6,000 kilometres square across the Ipswich region [and including] other areas such as North and South Burnett and Gympie.'[17]

III Changes in the Sector

A *Caxton Legal Centre Inc as a case study in sector growth*

Caxton's expansion is another example of how much some individual centres have grown. When I started there our staff comprised three lawyers, one administrator, a social worker, and a receptionist/typist who literally did type up letters for the professional staff on an old typewriter. I believe that we had around 100 volunteer lawyers. The centre's sole employed social worker also coordinated the volunteer-staffed mediation service we ran at the centre at that time.

[15] About our organisation (n 3).
[16] Personal communication from Mark Orchard to the author, 8 August 2024.
[17] 'TASC Legal and Social Justice Services – Toowoomba', *Community Legal Centres Queensland* (Web Page) <https://www.communitylegalqld.org.au/legal-help/tasc-legal-and-social-justice-services-toowoomba>.

Law student numbers had dropped to one, which necessitated what became a very successful recruitment drive over the subsequent years. CLC work with students is so important because it encourages a deep commitment to social justice values, as well as to pro bono service, which is, in turn, encouraged within the profession.[18]

In 1991, Caxton operated a large generalist legal service, as well as a specialist program funded to help Centrelink carer parents obtain child support. About half the centre's work was family law (which has long been the trend there) and the rest was a mix of criminal/traffic law, debts and consumer disputes, employment law, neighbourhood disputes, co-tenancy matters, government/professional complaints, motor vehicle property damage claims, wills and estates, discrimination cases, incorporated association disputes and a wide variety of unusual one-off matters.

From its inception, Caxton has always run three free evening advice sessions each week staffed by volunteers. These sessions have always been regarded as core business. The employed professional staff then attended to legal and social work casework, CLE and law reform work during the day. In 1991, the service operated very much in a 'no frills' fashion. At the night sessions, for example, the volunteer lawyers used to hand-write advice for clients on individual advice sheets before tearing off a pink carbon copy of the advice to give to clients. It was a rough but practical solution for a service on a tight budget. This practice only changed once Caxton embraced electronic files six years ago.

[18] See, eg, Chief Justice Catherine Holmes, 'In the Matter of Admission Ceremonies' (Speech, Brisbane, 26 October 2015) 10.

Evening advice sessions could be very busy, and it was not uncommon for five or six (and sometimes 10) volunteer lawyers to see between 25 and 35 clients in an evening. The busiest night I recall involved our volunteers seeing 56 clients in a single evening. Initially clients were not allocated appointments in advance. The doors opened at 6:00pm three nights a week; clients poured in, and the volunteers worked until the clients had been seen. Caxton now has an appointment system, which it reluctantly introduced after 37 years of operation in 2013,[19] although staff will still always try to accommodate a high-needs client walking in off the street seeking help.

In the past, phone interviews were reserved for people who genuinely could not get to Caxton. This contrasted with some other centres like Women's Legal Service Queensland, which always offered a large amount of phone advice for the convenience of its clients. During the COVID-19 pandemic, Caxton had to quickly change how it provided client service – namely, by providing many more phone appointments. This has continued, and clients (especially the elderly/infirm, sole parents, and people living far afield) and volunteers alike seem to appreciate this expanded mode of engagement.

Caxton now employs 35 lawyers, 20 social workers, six paralegals, and 18 other professional/administrative staff-members.[20] Additionally, it has a UnitingCare community financial counsellor co-located at the centre full time, as well as a partnership with Good Shepherd's Financial Independence

[19] See the 'Director's Report' of Scott McDougall in Caxton Legal Centre Inc, *Annual Report 2013-14* (Report, 2014) 8.
[20] Personal communication from Cybele Koning to the author, 8 August 2024.

Hub for survivors of domestic violence.[21] Each year, it usually also has a pool of about 150 individual volunteers as well as additional law firm secondees and students doing clinics. Many former volunteer barristers are also able to be called upon occasionally for pro bono assistance. Caxton now runs major programs, including its family, domestic violence and elder law practice, a coronial and custodial justice practice, and a large human rights and civil law practice. Its social work practice, naturally, is particularly significant today.

In terms of the complex nature of the increasing specialisation of services, it is worth noting that Caxton runs three health justice partnerships, including one which has a lawyer and social worker operating out of the Princess Alexandra Hospital, and another service called its Multicultural Advocacy and Legal Service (**MALS**). Furthermore, it has duty lawyer programs at the Brisbane Federal Circuit and Family Court and at the Brisbane Magistrates (Domestic Violence) Court. Additionally, it runs the Queensland Retirement Village and Park Advice Service (an outreach service), and it periodically operates a Disaster Recovery Program service (such as was the case with the 2011[22] and 2022[23] Queensland floods). It also runs an employment law and workplace sexual harassment and discrimination service, as well as a consumer credit and debt service.

Caxton's Seniors Legal and Support Service (**SLASS**) was the first of its kind in Australia. Its genesis was the brainchild of a Caxton social worker,

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[21] Personal communication from Helen Wallace to the author, 8 August 2024.
[22] See Bridget Burton's 'Consumer law service' in Caxton Legal Centre Inc, *Annual Report 2010-11* (Report, 2011) 14.
[23] See 'Help for Queenslanders Affected by the 2022 Floods', *Caxton Legal Centre Inc* (Web Page) <https://caxton.org.au/help-for-queenslanders-affected-by-the-2022-floods/>.

Catherine Hunt, who believed that Caxton was not seeing sufficient elderly people out in the suburbs who needed help. From a simple Monday afternoon outreach advice session at a suburban respite centre staffed on alternate weeks by me and another colleague, recurring legal issues affecting this client group were quickly identified – including, sadly, pervasive elder abuse. From this grew Caxton's first elder law service, LOFOP (Legal Outreach for Older People) in 1999.[24] Caxton's service for older clients has grown significantly over the last 25 years, with the majority of Caxton's social workers now working in this area. SLASS has undertaken a huge amount of significant casework, strategic advocacy, and law reform work – including at a national level. It has pioneered new models of multidisciplinary practice, using an intervention approach incorporating 'home visits, case planning, a client-centred focus, risk assessment, safety planning and integrated services.'[25] The health justice partnerships and the financial protections service[26] further complement this work. There are now six SLASS services at several CLCs around Queensland,[27] most notably in Townsville, where the senior solicitor, Dr Bill Mitchell, has been actively involved in this work and has appeared at the United Nations 10 times since 2013 for CLCA, notably in relation to sessions pertaining to the introduction of a Convention on the Rights of Older Persons.[28]

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[24] Personal communication from Cynthia Tupicoff to the author, 7 August 2024.
[25] Caxton Legal Centre Inc, *Specialist Elder Abuse Service: Social Worker-Lawyer Intervention Model – Seniors Legal and Support Service* (Discussion Paper, July 2018) 1.
[26] Caxton Legal Centre Inc, *Annual Report 2022 – 2023* (Report, 2023) 13 ('Annual Report').
[27] 'Seniors Legal & Support Service (SLASS)', *Legal Aid Queensland* (Web Page) <https://www.legalaid.qld.gov.au/Listings/Organisations-directory/Seniors-Legal-Support-Service-SLASS>.
[28] Dr Bill Mitchell, 'From JCU to the United Nations' (Law Seminar Series, James Cook University, 7 March 2023).

The demand for Caxton's services has grown at an exponential rate and, like most centres, it can only meet a portion of the growing need for them. Two years ago, after much soul-searching, Caxton introduced an eligibility framework with a means test to target financially disadvantaged clients.[29] This is totally consistent with Caxton's goals, but I worry about 'the working poor' clients; people in poorly paid employment badly affected by the current 'cost-of-living crisis.'[30] I observe that they are increasingly being excluded from access to services like Caxton, and in turn, access to justice.

Personally, I always loved helping this group of clients because while they may not have much available money, they usually do have a lot of drive and ability. This meant that they could effectively use the 'unbundled'[31] service delivery mode so common in CLCs. Clients can come in for advice, and then go off to action steps in their own matter – sometimes, multiple times.

B *Bureaucratisation and conditions*

CLCs have become increasingly professional organisations during my years in practice, and, of course, this has partly been enabled by government funding being provided to CLCs to assist them to properly house, staff and run their services. As their reputations and profiles as experts in their various fields have grown, CLCs and their peak bodies have become important legal

[29] James Arthur and Asha Varghese, 'An Interview with Bridget Burton' (2022) 28(1) *Pandora's Box* 56.
[30] John Hawkins, 'You don't have to be an economist to know Australia is in a cost of living crisis. What are the signs and what needs to change?', *The Conversation* (Web Page, 21 August 2023) <https://theconversation.com/you-dont-have-to-be-an-economist-to-know-australia-is-in-a-cost-of-living-crisis-what-are-the-signs-and-what-needs-to-change-210373>.
[31] Gordon Renouf, Jill Anderson and Jenny Lovric, 'Pro bono opportunity in discrete task assistance' (2003) 54(1) *Law Society Journal* 1.

assistance sector stakeholders who are able to facilitate engagement with government.

Unfortunately, finding a 'voice at the table'[32] has not been without cost. I say this because one of the less positive changes that has occurred over the last couple of decades, in my view at least, has been the ever-increasing bureaucratisation of the sector, with pressure placed on CLCs to collect large amounts of data, and also to engage in extensive reporting tasks in exchange for funding. I have seen the number of workers employed to work in CLC administration, business, finance, IT and data-management increase dramatically, but, in my observation at least, this has not necessarily translated into increased service to clients. Additionally, the professional staff who would otherwise be helping clients often have to undertake a certain amount of data entry and I am of the opinion that this load shifting is highly undesirable.

In 1991, Commonwealth funding for CLCs almost doubled from 2.7 million dollars to 5.4 million dollars.[33] When the sector first started to get this type of funding, this was seen as a coup for the sector and recognition that CLCs did an extraordinary amount of work in a very cost-effective way. Government funding helped the sector enormously, although the fact that funding tends to come in cycles creates instability for centres and workers in the sector. I recall that when I first started at Caxton, a colleague recounted to me that one of our management committee members had once been on the point of

[32] Personal communication from Zoe Rathus to the author, 6 August 2024.
[33] 'History of community legal centres in NSW', *Community Legal Centres NSW* (Web Page) <https://www.clcnsw.org.au/index.php/history>.

signing mortgage documents to secure Caxton's ongoing viability, while we waited for delayed funding to come through.

Funding has improved over time and this year, the Commonwealth government has given an additional 9.3 million dollars[34] to CLCs; however, this was well short of the 124.5 million dollars sought by CLCA for viable funding.[35] The sector's future still remains insecure, and reporting pressures remain constant.

Progress leading to improved remuneration rates in the sector has been very slow. In 2006 the Mercer Human Resource Consulting report commissioned by NACLC found that 'award-based NSW CLC salaries were around 29-38% below the NSW and Australian public sector rates for equivalent positions.'[36] A CLCA report released earlier this year asserts that community lawyers still earn 10-35% less than lawyers in the public sector.[37] The report also found that CLCs needed 2000 extra workers to cope with client need[38] (including vast identified unmet need), and that the sector cannot achieve this goal because of factors such as vicarious trauma and burnout (partly caused by dealing with clients with increasingly complex needs) which are causing staff

[34] Mikayla van Loom, '"Tokenistic" funding not enough to support "overwhelming" legal service demand', *Star Mail* (online, 20 May 2024) <https://mountainviews.mailcommunity.com.au/news/2024-05-20/tokenistic-funding-not-enough-to-support-overwhelming-legal-service-demand/>.
[35] Community Legal Centres Australia, *2024-25 Pre-Budget Submission* (Submission, 22 January 2024) 5.
[36] See Mercer Human Resources Consulting, *Remuneration Recommendations: National Association of Community Legal Centres* (Report, October 2006).
[37] Community Legal Centres Australia, *State of the Sector 2022-23 survey report: A sector in crisis* (Survey Report, March 2024) 15.
[38] Ibid 14.

turnover, along with low pay rates.[39] The report also states that low remuneration was the main driver of resignations for 63% of centres and the principal barrier to attracting and retaining staff.[40]

C *Life at Caxton*

From its humble beginnings as the Baroona Legal Service squatting in the old hall (now Lefty's Music Hall) at 15 Caxton Street in Petrie Terrace, the legal centre moved to 28 Heal Street in New Farm in 1987 when the Queensland Law Society Grants Committee purchased a beautiful historic Queensland house for Caxton to occupy. Arriving at this building in 1991, I loved the old polished wooden floors, the pastel deck chairs and community artwork lining the waiting room, not to mention the swinging leadlight library doors, the old kitchen where our evening volunteers would congregate to brainstorm problems (while munching on cheese, salami and carrot sticks, put out to help sustain the volunteers through the busy evenings), and the space under the house that held many fun-filled volunteer events and Annual General Meetings over the years.

The environment was welcoming, and clients arriving knew they were being helped by a true community-based organisation. Staff attire was deliberately casual to make clients feel comfortable, something that had been promoted from the very early days in the CLC sector.[41] As various CLCs have tended to move into more centrally located and well-designed office spaces, we have still fought to keep a welcoming atmosphere for the sake of our vulnerable clients, but it seems to me that this has become much harder to do.

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[39] Ibid 4.
[40] Ibid 16.
[41] McCulloch, Blair and Harris (n 5) 11-13.

For example, as Caxton's elder law work expanded, it had to rent a second house in New Farm. This, in turn, precipitated Caxton's next move to a three-story office building in South Brisbane. The management committee finally decided to relocate the centre into the city's heart at level 23, 179 Turbot Street. The new Caxton premises, with its bird's eye view over Brisbane, is designed to meet the ever-changing needs of modern workplaces, and staff are able to hot desk anywhere in the building, whilst having access to purpose-designed interview rooms. While I initially felt very awkward about Caxton's move to such a polished and modern office space, the space suits many purposes, and the location is readily accessible by our many volunteer lawyers who work nearby in the city centre.

IV What Does the Future Hold?

A *The statistics tell the story*

In its 2023 Annual report, CLCA reported that across the country, CLCs had assisted over 179,000 people from across the community.[42] Australian Bureau of Statistics figures released on 9 May this year regarding the services provided by Legal Aid Commissions, Community Legal Centres and Aboriginal and Torres Strait Islander Legal Services, reported that 'more than 792,600 legal assistance services were completed across Australia in 2022-23 using funding provided under the National Legal Assistance Partnership Agreement (2020-25) … [with half of those services for legal advice and] almost a quarter, or 180,527 services, were duty lawyer services.'[43] Unfortunately, according to

[42] Community Legal Centres Australia, *Annual Report 2022-23* (Report, 2023) 17.
[43] Australian Bureau of Statistics, 'Nearly 800,000 legal assistance services reported in a year' (Media Release, 9 May 2024).

CLCA reports, there is still urgent unmet need given that over 350,000 people missed out on service last year as they had to be turned away.[44]

B *Work that still needs to be done*

The meticulous and client-centred law reform work undertaken by CLCs remains vital. The law reform work constantly undertaken by CLCs in areas such as family law and domestic violence, elder abuse prevention, consumer credit, tenancy, anti-discrimination and human rights, guardianship and substitute decision making, employment law, neighbourhood disputes, and police powers (especially in relation to street offences) – to name just a few key areas – is particularly important for the vulnerable clients of CLCs. The introduction of the Queensland *Human Rights Act 2019* (***Human Rights Act***) was a watershed moment and 'represent[ed] one of Caxton's most important law reform outcomes, the centre having taken a leading role in the preceding campaign.'[45] No doubt there is still much *Human Rights Act* work still to be done 'upholding the additional rights … especially in the areas of social housing, education, disability, state health care, and prisons.'[46] This is not to mention the role the *Human Rights Act* can play in the proper regulation of the manufactured home parks and retirement village sector, as well as in relation to elder abuse, aged care, and a long overdue International Convention on the Rights of Older Persons.

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[44] Julius Dennis, 'Lawyers are leaving the community legal sector due to low pay, creating an experience gap', *ABC News* (online, 9 April 2024) <https://www.abc.net.au/news/2024-04-09/qld-communty-legal-sector-young-lawyers-leaving-call-for-funding/103638270>.
[45] Caxton Legal Centre Inc, *Annual Report 2018-2019* (Report, 2019) 4.
[46] Ibid.

Over the last three decades, CLCs have also greatly expanded their work in the field of preventative CLE. One only has to peruse a couple of CLC websites to see the wide range of accessible educational resources that centres make available to members of the community. The various state Law Handbooks produced by centres like Caxton and Fitzroy Legal Service are models of high-quality CLE that work effectively to inform members of the community about their legal rights and responsibilities. In the 2022-23 year, Caxton's *Queensland Law Handbook*[47] alone had 314,610 online visits.[48] Access to such legal information helps people avoid being caught up in our complex legal system. This not only benefits the individuals concerned, but also saves treasury dollars otherwise unnecessarily spent on our court system.[49]

CLCs will continue to find ways to work with technology to innovatively deliver CLE, and as new interactive media forms continue to evolve, CLCs will no doubt embrace them. This accordingly means that the sector needs appropriate support for this work, and this may well come from CLC partners in the pro bono sector, including private law firms.

As a young lawyer, my life in legal practice was very different from what I observe for new members of the profession, and I think that there are many reasons for this. Most significantly, the advent of the internet, the explosion in accessible information, and the use of email communication seems to me to have dramatically increased the pace at which lawyers are working. This stressor, combined with the increasing complexity of CLC clients' lives and

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[47] See 'The Queensland Law Handbook', *Caxton Legal Centre Inc* (Web Page) <https://queenslandlawhandbook.org.au/the-queensland-law-handbook/>.
[48] Annual Report (n 26) 8.
[49] Mark Dreyfus QC MP, 'Speech to Legal Aid NSW Civil Conference' (Speech, Sydney, 25 June 2018).

behaviours, does impact upon CLC workers. In its 2023 *Impact Report*, Community Legal Centres Queensland reported that there had been a noticeable increase in CLC clients with a mental illness or disability.[50] I understand from colleagues across the sector that there is an increasing need for workers to be mindful of the impacts of vicarious trauma in their work, and it is important for CLCs to be properly resourced to support their staff working with complex clients. As our community becomes more diverse, relevant training and access to qualified interpreters is critical.

It seemed to me that the courts were slow to adjust to digital modes of interaction, but, following the COVID-19 pandemic, they were forced to adapt their practices. This has resulted in the streamlining of many filing and appearance processes. This has, in turn, reduced wasted legal costs previously incurred by lawyers or clerks having to attend at court.

Importantly, the advent of Artificial Intelligence (**AI**) systems poses a huge and immediate challenge for CLCs,[51] and it is difficult to predict how this will play out. Because CLCs historically are underfunded and under-resourced, it is hard to know how they will secure the necessary technical support (and funding) to quickly develop the expertise needed to adopt and harness AI systems and tools. In order to be able to match the speed at which large commercial law firms will be able to access and leverage these tools, CLCs need to be assisted in this regard, and additional IT support needs to be provided to ensure CLCs are protected from the threat of cyber-hacking.

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[50] Community Legal Centres Queensland, *Impact Report 2023* (Report, 2023) 7.
[51] Mark Thomas, 'Every day is pro bono day' (Panel Address, The University of Queensland, 14 May 2024).

One solution may be for the large law firms committed to providing pro bono support to the sector to allow their IT teams to help support CLCs.

Considering the issue of legal need generally, there is no doubt that there is an extraordinary amount of unmet legal need in the community. Gerard Brody, the Chairperson of CLCA, stated earlier this year that 'Australia's 165 [community] legal centres are facing unprecedented demand and funding shortages, [and] some centres were closing outreach clinics, while others were considering shutting down completely.'[52] Cybele Koning, Caxton's CEO, said in the same news report that 150,000 people reached out to Caxton over the last five years but Caxton was able to help less than one percent due to the centre's limited resources, despite Caxton being one of the biggest CLCs. She asserted that the centre needed at least a doubling of its funding just to make 'a dent' in addressing unmet need.[53]

Most CLCs obtain a mix of state and Commonwealth funding, and some centres these days receive direct donations from philanthropists and benefactors, which has been crucial for centres like the Environmental Defenders Office, which sometimes comes under fire from certain politicians who dislike its environmental lobbying work.

In my view, our modern communities are increasingly fractured, and individuals and families are experiencing incredible stress, both emotionally and financially. The lack of affordable housing is indeed a national crisis.

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[52] Sarah Richards, '"Unprecedented" demand means Australia's community legal centres are having to turn people away', *ABC News* (online, 8 Feb 2024) <https://www.abc.net.au/news/2024-02-08/queensland-caxton-legal-service-domestic-violence/103438104>.
[53] Ibid.

These sorts of social conditions tend to result in people needing advice about family law, domestic and family violence, consumer law and credit advice, tenancy advice and criminal law advice. Further to this, we know that in times of financial stress, pressures are put upon older relatives to help family members. This environment fosters elder abuse.

It is crucial for governments to allocate proper funding to CLCs and Legal Aid providers to help ensure access to justice for vulnerable clients. Ideally, the National Legal Assistance Partnership, which is a funding agreement for legal assistance services between the Commonwealth and the states, will increase funding to viable levels, secured on an ongoing basis.

CLCs will, I think, continue to do what they have always done, and will find creative ways to respond to emerging and changing legal needs in our communities. Importantly, as our communities become increasingly diverse, this fact will inform how CLCs practise.

It is my hope that CLCs will continue to employ their multidisciplinary framework for the delivery of services. In my dream world, CLCs would be collocated with social work support and psychology services, medical clinics, financial counsellors, tenancy advice workers, relationship counsellors, mediation services, respite and neighbourhood centres. There would also be more rural CLCs providing face-to-face services. They would all be located at accessible transport hubs and would have sufficient technological capacity to provide greater outreach to people in rural and remote centres by high quality outreach and well supported IT services.

AN INTERVIEW WITH MATILDA ALEXANDER*

Asha Varghese and Nickolas Sofios

PB: What services does Queensland Advocacy for Inclusion (**QAI**) provide and what problems or gaps does the organisation seek to address?

MA: We have a number of different programs run by different departments. We shift our service delivery aspect depending on what we're funded to do. But for over 30 years, Queensland Advocacy for Inclusion has worked and advocated for people with disability and in particular, people facing the greatest barriers to inclusion. We were there pushing for the de-institutionalisation of people with disability around the time of the closure of major institutions, and since then, we have continued to strongly advocate for human rights and for the freedom of people with disability.

PB: How has the work of QAI evolved in the time you have been CEO?

* Matilda Alexander is a human rights lawyer with a background working in community legal services, including the Prisoners' Legal Service and the LGBTI Legal Service. In 2021, Matilda commenced as Chief Executive Officer of Queensland Advocacy for Inclusion.

MA: I think that it's really clear that, while the issues we've focused on and the details have changed according to contemporary issues for people with disability and threats to the rights of people with disability, our core values and our core principles have stayed the same. They're largely enshrined now in the *Convention on the Rights of Persons with Disabilities* (***CRPD***).[1] We take that broader human rights lens everywhere, whether it's individual casework or the systemic advocacy that we do.

More specifically, we've got an NDIS appeals service where we represent people in the AAT with disputes regarding the NDIS. We've undertaken mental health tribunal work. Last year, we provided 733 court and tribunal representations.[2] Our lawyers are in courts and tribunals daily, representing people with disability, advocating for them to have less restrictive conditions, for forensic orders to be reduced and for supports to be built up, advocating against their institutionalisation; and advocating against electroconvulsive therapies and other human rights issues.

We also have a human rights advocacy practice that provides legal help on matters including disability . We have a justice support program for people in the criminal justice system. We do a lot of guardianship administration matters as well, to

[1] *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008).
[2] Queensland Advocacy for Inclusion, *Annual Report 2022-2023* (Report, 2023) 7.

get people's legal capacity restored to them. And we have a young people's advocacy program.

We're a community legal centre (**CLC**). About half of what we do is legal, and the other half of what we do comes under the banner of disability advocacy, and we're funded as the provider for young people's disability advocacy in Queensland, as well as running a statewide hotline for disability advocacy and coordinating a statewide network of disability advocates.

We're also funded by the Department of Education to help kids who are at risk of suspension and exclusion get the reasonable adjustments they need to stay in school.

And, of course, a big part of what we do is systemic advocacy or law reform activities. We're really interested in not just putting band-aid solutions on and fixing individual problems, but drawing the links between those individual problems and taking a bigger picture human rights approach to systemic advocacy.

PB: Is QAI's sort of broader advocacy work common across community legal centres?

MA: I think that each community legal centre is unique. We all have our own histories and our own cultures. The work that we do at QAI – yeah, I don't think it's being done the same

way in other community legal centres, the combination of disability advocacy and legal representation. But community legal centres around Queensland are adopting different models of health justice partnerships and holistic approaches to client work, each in their own areas of specialty or their own geographic areas.

We all do these wonderfully unique and creative practices to achieve access to justice. So nobody's quite like QAI, but also, I don't think any CLC is quite like any other CLC, either.

We have a strong emphasis on the international human rights processes. We regularly participate in United Nations work, such as the United Nations *Convention on the Rights of Persons with Disabilities*, helping draft the UN Guidelines on Deinstitutionalization[3] and going to the UN in New York – most years, we go there to participate in the Conference of State Parties for the Rights of People with Disability.[4]

Next week, I'm going to be in Korea because the Korean government are flying me over to be a keynote speaker for the Asia-Pacific Disability People's Assembly. So, Monday

[3] See Committee on the Rights of Persons with Disabilities, *Guidelines on Deinstitutionalization, including in Emergencies*, 27th sess, CPRD/C/5 (10 October 2022).

[4] See generally Australian Federation of Disability Organisations, 'Conference of State Parties' (Web Page, 2019) <https://afdo.org.au/conference-of-states-parties-cosp/#:~:text=The%20Conference%20of%20States%20Parties,with%20Disabilities%20(UNCRPD)%20progress.>.

next week, I'm going to be in Cleveland Youth Detention Centre, and then, Monday the following week, I'm going to be in Korea.

So, we work on that granular level of human rights advocacy on the ground, as well as in international, and national and state advocacy.

PB: With QAI and your own involvement in law reform, what are the most important reforms in the disability advocacy space that you would like to see and address in these upcoming presentations?

MA: I guess one of the big things everybody's worried about in the disability community at the moment is the National Disability Insurance Scheme (**NDIS**) [5] and the Disability Royal Commission.[6] We're at a time of great attention and great change in the community. For more than a decade, people, including QAI, campaigned for a royal commission. Now, we've had one. We've had the recommendations come from that. And we really want to make sure that the stories of people with disability have maximum impact, and translate to the realisation of their human rights.

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[5] See generally Australian Government Department of Social Services, 'National Disability Insurance Scheme' (Web Page, 13 September 2024) <https://www.dss.gov.au/disability-and-carers/programmes-services/for-people-with-disability/national-disability-insurance-scheme>.

[6] *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, 29 September 2023).

One of the big themes that QAI has been working on for a number of years is the deinstitutionalisation of people with disability. I mentioned before that 30 years ago, we were there, calling for the closure of the major disability institutions. We are constantly working – I think deinstitutionalisation is not a one-off process that happens when you close down those institutions.

What we're doing now is working on deinstitutionalisation on a daily basis, whether it's with kids with disabilities and adults with disabilities in detention or prison or in secure disability-specific detention; or things like, how do we structure the NDIS so that it becomes a tool for deinstitutionalisation, and what should we be watching out for to make sure that the NDIS itself is not – because of the way the market works – re-institutionalising people in group homes under a different name?

We often have to watch out for words like 'supported accommodation', 'specialist', or 'disability accommodation'. That could be really good, or it could be yet another institution for people with disability. So it's about looking beyond the name of a reform or a funding scheme to go, 'Is this forcing congregate care of people with disability? Is this combining services and supports with accommodation in a way that leaves people with no choice and no ability to complain without losing the roof over their heads?'

Deinstitutionalisation is, I think, one of the biggest overall themes that we're very focused on at the moment, and how that plays out through things like the Disability Royal Commission and the NDIS. With that broader theme, we're always coming back to the *Convention on the Rights of Persons with Disabilities* – that's a guiding document for us to ask, 'What should we be saying here?' 'What does the *CRPD* say to help guide us?'

PB: You teach a course called Prison Law at Griffith University. What's this course about and how does it enhance law students' understanding of human rights?

MA: Debbie Kilroy and I invented this course together. Deb has been a very influential person in my career. Deb has spent time in prison herself and has devoted her life to working with women in prison. We created this course and Griffith University were interested in the idea, which described a new area of law. So just as environmental law might look at administrative law provisions that relate to the environment or tax law, for example, we wanted to look, specifically, at administrative law as it applies to the administration of prisons – not solely administrative law, but kind of a Venn diagram of administrative law with a number of different other areas of law – how do they touch on people's lives in prison?

Essentially, the course focuses on the question of, 'How far does the rule of law extend beyond prison walls?' It's about looking not at the criminal law question – why somebody's gone to prison – but instead asking how does the prison system law work, how does the *Corrective Services Act*[7] work, how does the employment system work inside? If you're working in a prison kitchen compared to working in a commercial café, what happens if you aren't provided with safe working conditions? If you need a sick day, how do you get a sick day without being penalised? How far does the rule of law – that normal understanding of law as we have it – extend beyond bars?

PB: What inspired you to pursue a career in human rights, focusing on the rights, particularly, of vulnerable people in Queensland?

MA: I think it was a combination of my professional and personal experience. One of my first jobs in 2001 was going out to the women's prison and starting a bail assistance program with Sisters Inside.[8] Going out to the women's prison, hearing the stories of the women in there, and realising how people's lives can be taken off track by a variety of circumstances. It's not that there's good and bad people and bad people are in prison – there's no 'bad guys', as the kind of popular narrative goes.

[7] *Corrective Services Act 2006* (Qld).
[8] See generally Sisters Inside, 'About Sisters Inside' (Web Page, 2020) <https://sistersinside.com.au/about-sisters-inside/>.

My experience encouraged me to look at and understand people's lives in more depth.

Also, a lot of my professional career has been around the rights of LGBTI people. Coming out in the late 90s and seeing the pace of change for LGBTI people in Queensland, the legal change, and being part of that, has also really been a big focus of my work.

Now, coming into the disability space, and seeing a lot of this grounding in human rights, means that you've got the framework to understand what's important in advocating for somebody, and it translates across. My children are Aboriginal, and one of them is on the NDIS. So I see, day-to-day, some of the mechanics of how those systems work.

I think that human rights has long been the overall driver in my career, shaped by working with a number of different populations of people who are facing barriers to justice. I like that phrasing of 'barriers' more than 'vulnerability', because it's not that these people are vulnerable – it's often incredibly resilient people with incredible strengths. It's that the situation that their lives have put them in, or that racism has put them in, or that ableism has put them in, has meant that they are facing incredible barriers to being able to access justice and human rights.

PB: During your time in the profession, have there been any specific cases you've been involved in that have had a lasting impact on you?

MA: I think working with kids in prison, working on a class action in Don Dale, was very influential – seeing the way that people's lives can be so ruined by a system that is meant to be about protection or community safety, and what a fallacy that can be when you actually dig down into individual lives.

I think, similarly, with disability, you have a system that's meant to help people, but can end up institutionalising them; when you really dig down into individual people's lives, and see that human aspect, it has a real impact. Last year, we did a Four Corners story on a person in the Forensic Disability Service, who they called Adrian.[9] I think that was really influential, watching that Four Corners report. People were detained in that facility – for more than a decade, some of the long-term people – in seclusion, in solitary confinement.[10] The impact of that Four Corners report was that none of

[9] See Queensland Advocacy for Inclusion, 'Indefinite Detention and Solitary Confinement: The Awful Reality of Queensland's Forensic Disability Service' (Media Release, 22 August 2024) <https://qai.org.au/indefinite-detention-and-solitary-confinement-the-awful-reality-of-queenslands-forensic-disability-service/> ('Indefinite Detention'), discussing 'Trapped', *Four Corners* (Australian Broadcasting Corporation, 2023) <https://iview.abc.net.au/video/NC2303H038S00>.
[10] Ibid.

those people are left, the long-term detainees.[11] Often, the things that have really stuck with me are the matters that have combined legal advocacy with systemic advocacy and campaigning for change.

Also, community legal education can play a really important role. Another impactful case was in the marriage equality postal vote. There was a lot of homophobia around about that, and we did a kind of reverse class action where we got the worst of the worst comments and brought hate speech complaints against them. We did a lot of media around that so people knew their rights.

Regarding the cases themselves, there were some interesting conciliations, but it was more that we got really widespread press that hate speech is unlawful, that you don't have to put up with vilification even though we're in the midst of debating minority rights in a majority population. It turned out that our community legal education resources ended up getting shared more broadly on the internet, and particularly, were popular with Muslim communities, who reached out to us to work with them on a similar vilification complaint about the hate speech that they were facing. We provided them with legal assistance, and went out and had a community meeting

[11] Indefinite Detention (n 9), citing Office of the Queensland Ombudsman, *Forensic Disability Service – Second Report: A Review of the Implementation of the Recommendations Made in the 2019 Forensic Disability Service Report* (Report No 2, August 2024) 21 <https://qai.org.au/wp-content/uploads/2024/08/2024-Ombudsman-report.pdf>.

about how had we had used the Act, the *Anti-Discrimination Act*,[12] and how it could be more broadly used.

That kind of level of solidarity – especially where people often posit LGBTI rights as being the antithesis of the rights of religious people – was a really good example, I think, of how we're actually all on the same page because we're all advocating for human rights, and we can all work together towards human rights. It's not a 'your rights versus our rights' – we all want human rights. I'm equally supportive of a push for religious discrimination to be unlawful as I am for rights that are to do with the LGBTI community. It's not a compromise of one right for another.

PB: What developments do you see occurring, and what would you like to see, in the human rights sector in Queensland and Australia over the next 5-10 years?

MA: Well, assuming the *Human Rights Act 2019*[13] isn't repealed at any point, I think we are guaranteed to see an increase in cultural shift. The *Human Rights Act* itself is not the strongest law, but what it has done is require public decision-makers to turn their minds to human rights when making decisions, which is a cultural shift in and of itself, and one that I think will just be ongoing. The longer that they do that, the better

[12] *Anti-Discrimination Act 1991* (Qld) ('*Anti-Discrimination Act*').
[13] *Human Rights Act 2019* (Qld).

decisions we're going to have, the more ingrained thinking about human rights will become.

If you think about something like workplace health and safety: before, there were laws around it, and some people probably thought about it sometimes, but now, it's become real and commonplace. Everybody talks about 'WHS'. Everybody knows what that means, everybody thinks about it. If you see a puddle on the supermarket floor, you think, 'Oh, workplace health and safety!' It's at the forefront of everyone's mind.

Human rights is still a relatively new process, relatively new protection that we have in Queensland, and the longer that we have it, the more culturally ingrained it will be in our public service, and also for people who live in Queensland and their expectations of how they're treated by government. I think that's a guaranteed change, as long as it's not repealed.

I'm also hoping a likely change will be a Commonwealth Human Rights Act. That certainly looks like it's being taken very seriously and considered.[14] I think that would be a

[14] See Parliamentary Joint Committee on Human Rights, *Inquiry into Australia's Human Rights Framework* (Report, May 2024) 299 [9.7], discussed in Bruce Chen, Julie Debeljak and Pamela Tate, 'Report Finds "Clear Need for an Australian Human Rights Act. What Difference Would It Make?', *The Conversation* (online, 31 May 2024) <https://theconversation.com/report-finds-clear-need-for-an-australian-human-rights-act-what-difference-would-it-make-231376#:~:text=What%20did%20the%20parliamentary%20inquiry,an%20Australian%20Human%20Rights%20Act.>.

wonderful thing to have, and we've been strongly advocating for that.

I'm also hopeful that, if things go in the right direction, we'll have increased protections for our Human Rights Act, such that the soft law that it is now may become increasingly more protective of human rights. A really clear example of that would be the introduction of remedies for breaches of human rights and the ability to bring human rights complaints to courts and tribunals without needing to piggy-back them on other claims, which can be quite an awkward, and not necessarily the best fitting, process.

PB: How might a federal Human Rights Act interact with the existing Queensland Act?

MA: There's quite a few examples of where we have a federal and a state Act that already protects human rights. There are models of how they could interact. It really comes down to the drafting, but, for example, the federal *Racial Discrimination Act*[15] enacts the *UN Declaration on the Rights of Indigenous Peoples*.[16] We still have a state protection on discrimination against people on the basis of race, and also vilification on the basis of race.[17] We have an established example of how those

[15] *Racial Discrimination Act 1975* (Cth).
[16] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007).
[17] *Anti-Discrimination Act* (n) ss 7–11, 124A.

two Acts interact. For example, if you bring a complaint under the state Act, you can't then bring the same complaint under the federal Act. And case law relating to federal court decisions influences, but is not binding on, the state tribunal in making their decisions.

It's yet another kind of dialogue between federal and state decision-makers and depends on how those Acts interact. Obviously, there's the *Constitution*[18] behind it all, as well, that would set out how those Acts could be drafted and how complaints might work under there.

PB: I know that we, and many of our readers, upon graduation, would like to use what we've learned to benefit society at large and help the kinds of people we've been talking about overcome barriers to justice. Is there any advice you have for young law students in this position about the path they should take?

MA: I think that if you're wanting a career in human rights, volunteering at community legal centres is a really good way to start. Human rights are very broad, they're applicable in every area of law. You might be a criminal defence lawyer but you still use human rights because of the right to a fair trial and there are a lot of criminal rights in the *Human Rights Act 2019*. You can be a human rights lawyer and be any kind of

[18] *Constitution of the Commonwealth of Australia*.

lawyer - it's about making sure that you're centring the law in those broader principles, finding what you're passionate about and immersing yourself in that.

Many people who are studying law are also already immersed in communities. People have disabilities and are studying law, people are part of the LGBTQIA community and are studying law. Build on the communities that you have. There are so many opportunities to talk about human rights, and to practice human rights. You might see something somebody has posted on Facebook, and it might make you think, 'Well, that's actually a human rights issue'. There are unlimited opportunities to practice human rights no matter where you end up in law.

AN INTERVIEW WITH SCOTT MCDOUGALL*

Asha Varghese and Nickolas Sofios

PB: In 2024 what do we mean by human rights and how does the recognition of these rights impact our everyday lives?

SM: Well, the technical response to "What are human rights in Queensland" is the rights that Queensland Parliament has decided to protect through the human rights.[1] I think it is important that the Queensland public understand that every individual in Queensland now has the rights that are identified in the Act, protected, and there are remedies that they can access, including making a complaint to the human rights Commission if those rights are unjustifiably limited. The rights that the Queensland Parliament back in 2019 decided to protect, include most of the rights in the ICCPR,[2] and also importantly, two economic, social, and cultural rights, being the right to education,[3] and to access health services.[4] We are still yet to see those rights, and also Aboriginal and Torres

* Scott McDougall commenced as Queensland's Human Rights Commissioner in 2018. Prior to his appointment, he was the Director and Principal Solicitor at Caxton Legal Centre in Brisbane.

1 *Human Rights Act 2019* (Qld).

2 *International Covenant on Civil and Political rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

3 *Human Rights Act 2019* (Qld) s 36.

4 *Human Rights Act 2019* (Qld) s 37.

Strait Islander rights fully explored, but I'm sure that in coming years we will start to see litigation where those rights can have real meaning and life breathed into them by the Courts.

PB: Throughout your career, what are the most significant developments you have seen in the human rights sphere in Queensland?

SM: Well, unquestionably, the biggest development was the introduction of the *Human Rights Act 2019* in Queensland. Back in 1998, there was an attempt to introduce human rights legislation in Queensland that was based on an entrenched model, so constitutionally enshrined rights. That attempt was unsuccessful, and it took another 20 years for a campaign of grassroots organisations right across Queensland, to lobby for the introduction of a *Human Rights Act*. But, of course, Queensland has a rich history of advocacy and litigation, which has been grounded on human rights arguments. I guess the most notable example of that is the *Mabo* decision,[5] where Chief Justice Brennan really based his judgment on fundamental human rights. His honour observed that it was just unacceptable to continue to deny those rights, and that was the basis for his deciding that the doctrine of *terra nullius* needed to be overturned. Human rights were a big part of the *Mabo* decision, and of course, the *Racial Discrimination Act*

[5] *Mabo v Queensland (No 2)* [1992] HCA 23; (1992) 175 CLR 1.

1975,[6] which came into force in Australia in 1975, I think formed the basis for a great many of the really important leading judgments in the area of human rights in Australia. I think in terms of the litigation that we've seen in the human rights area, the *Racial Discrimination Act 1975* has been a key focal point but there is other legislation, such as the *Disability Discrimination Act 1992*[7] which has had some profound impacts as well.

I was involved in a case in the early 2000s on behalf of two school children who were hearing impaired; they brought a case against the Queensland Department of Education for the failure of the Department to provide them with Auslan interpreters which would enable them to fully access an education.[8] That case was ultimately successful, and led to the Queensland Government significantly increasing its budget, I think in the order of about $32 million to provide Auslan interpreters to hearing impaired school children. There have been a number of significant cases in the last 20-30 years that are founded on the protection of human rights principles, and the Human Rights Act really should be the catalyst for ensuring that we continue to develop a healthy human rights jurisprudence.

6 *Racial Discrimination Act 1975* (Cth).
7 *Disability Discrimination Act 1992* (Cth).
8 *Hurst v Queensland* [2006] FCAFC 100.

PB: In your time as an advocate, have there been any cases you've been involved in that have had a lasting impact on you?

SM: For me, a fairly life-changing event was that I had an opportunity as a law student to work with the Aboriginal Council Injinoo, Injinoo Community Council as it was known then, on the Cape York peninsula. That was very much a life-changing experience for me. Following that, I ended up being involved in a native title claim for the Quandamooka people of Stradbroke Island. We worked for quite a few years on that claim, which was ultimately successful. In terms of notable cases that I'm really proud of, one would be acting for two Aboriginal workers who rejected the offer of $7000 that was made to unpaid wages litigants. Between the period of the *Racial Discrimination Act 1975* coming into effect and up until 1986, there was an 11-year window where the Queensland government was not paying Aboriginal workers correct wages and ultimately a compensation scheme was set up to offer $7000 to any Indigenous employee that worked between that window regardless of how long they worked.[9] You would be entitled to $7000 if you worked one day, or if you worked for that entire 11-year period.

[9] In response to the Palm Island wages case (*Bligh and Ors v State of Queensland* [1996] HREOCA 28), the Queensland Government introduced the Underpayment of Award Wages Process in 1999. This process made a single payment of $7000 to Aboriginal and Torres Strait Islander people employed by the government on Aboriginal reserves between 31 October 1975 (the commencement date of the Racial Discrimination Act) and 29 October 1986 (from which point Award wages were paid to all workers).

I was the lawyer who was asked to travel to remote communities throughout Queensland to sign deeds of agreement as part of that settlement scheme. I recall flying up to Kowanyama and reading Commissioner Carter's decision[10] that initially awarded $7000 to the Palm Island litigants and thinking; this can't be right, that someone is entitled to $7000 if you've worked for one day or 11 years. When I landed, I rang a barrister in Brisbane and ran my argument past them, and they said when you get back, we'll have a look. Then, I had to front a meeting in the community of 200 people at Kowanyama who were understandably very keen to access the compensation. I was approached by two people at the end of that meeting who said they would like to challenge the decision. One of them had worked in the store at Kowanyama for that entire 11-year period, and the other had worked in another community for a considerable period and we ultimately were able to take that right through to a mediation process, which produced an outcome that they were happy with. I think, to this day, it was probably my most satisfying day at work.

[10] *Bligh and Ors v State of Queensland* [1996] HREOCA 28.

PB: Placing that success in a broader context, how effective has the development of human rights law in Australia been in protecting vulnerable Australians?

SM: There is a review of the *Human Rights Act 2019* that is currently underway with Professor Susan Harris Rimmer,[11] and that review is looking at the effectiveness of the Act. I think it's fair to say that you only have to look at Queensland's watchhouses at the moment to see the absolutely disgraceful situation of children as young as ten years of age being held in watchhouses for, in some cases, weeks on end, which is of course a completely unjustifiable limitation of their human rights. You only have to look at that to see that there are limitations on the effectiveness of the Human Rights Act as it is currently drafted and the powers of my office. There are a litany of human rights issues confronting Australia and Queensland. The Human Rights Act can certainly assist, but to be realistic, the enforceability of the legislation is critical in terms of achieving the objects of the Act, which are to promote a strong culture of human rights protection within the Queensland public sector. I think that the Courts have a critical role to play in the enforcement of the Act. The review of the Act may hopefully lead to stronger enforceability through the creation of a direct cause of action when a person

[11] 'Human Rights Act 2019 Review', *Department of Justice and Attorney-General* (Web Page, 20 May 2024) <https://www.justice.qld.gov.au/initiatives/human-rights-act-2019review#:~:text=On%2027%20February%202024%2C%20Professor,Act%202019%20(HR%20Act).>

considers that their rights have been unjustifiably limited. I'm hopeful that in the future, we will see the Act mature and a stronger human rights jurisprudence develop in Queensland. That will, in turn, lead to a stronger human rights culture within our public sector.

PB: You mention that direct cause of action; I remember from my human rights studies that the way it currently works is through the operation of a 'piggy-back' provision; is that right?

SM: Yes, that's right. It's a very clunky provision and in practical terms it really means that people who feel that their human rights have been impeached are really limited to attaching their human rights arguments to a complaint of discrimination. Or, attaching it to a judicial review application. Whilst administrative law is a very important area of law and does offer a degree of protection the remedies that are typically available for judicial review proceedings are typically limited, and the grounds can be quite narrow. Going back to the children in watchhouse issue, I think that issue has really demonstrated the ineffectiveness of the 'piggy-back' provision because the children and their legal representatives have been unable to assert a direct cause of action just based on their inhumane detention.

PB: This leads us to our next question, and to the extent you can expand on this point, what would you say are the most pressing challenges endangering human rights in Queensland and Australia, and how should we go about tackling those challenges?

SM: I think you need to start with First Nations People and the rights of First Nations communities that are still not recognised or meaningfully protected. You cannot get a more tangible representation of that than by visiting a youth detention centre. In the case of the Cleveland Youth Detention Centre in Townsville, approximately 95% of the population of that centre are First Nations children. To go there and see that graphically represented on a wall in that detention centre with photos of the children who are admitted in the centre, to stand before that wall and see that, is to see the manifestation of the colonisation of First Nations People. I think that unquestionably, this is the biggest human rights issue in Australia.

Closing the Gap is something that needs to be prioritised to address those human rights issues. I think the failure of last year's referendum is another human rights issue that needs to be addressed and the right to self-determination of Indigenous people, which is recognised in the *United Nations*

Declaration on the rights of Indigenous Peoples,[12] and also appears in the preamble of the *Human Rights Act 2019,* but is not a protected right as such. That is a right that will continue to be asserted by First Nations communities right across Australia. Despite what some people think in Australia, Aboriginal and Torres Strait Islander people are not going anywhere, nor are their claims for justice.

Beyond that, there is just a whole plethora of human rights issues, including disability. We had a Royal Commission come down last year with a huge number of recommendations,[13] a response from the Commonwealth government that has been criticised, quite fairly I think, for being fairly incomprehensive. Then we also had, not that long ago, a Royal Commission into Aged Care.[14] The rights of older people is something that is gaining more traction within the United Nations and there is a concerted effort that's been going on for more than a decade now for a Convention on the rights of older people to be adopted by the United Nations. I think that's an area in the future that we'll see greater recognition. Whilst there's a view that older people's rights are protected by the *Convention on the rights of Persons with Disabilities*,[15] I think what advocates and

[12] *United Nations Declaration on the rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007).
[13] *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, 29 September 2023).
[14] *Royal Commission into Aged Care Quality and Safety* (Final Report, 1 March 2021).
[15] *Convention on the rights of Persons with Disabilities,* GA Res 61/106, UN Doc A/RES/61/106 (24 January 2007, adopted 13 December 2006).

civil society have been able to demonstrate is that there is a normative gap in the protections that are available to older people and there is a need for a particular Convention. I think that's an emerging area of human rights. Particularly, with the ageing demographic in Australia and the risk of elder abuse increasing daily, if only because of the pressure on the housing market. It means you've got a lot of older people sitting on high-end assets, and a generation below feeling aggrieved about not being able to access a house. That does raise another issue about the right to housing. I think that will feature in the review of the *Human Rights Act 2019*. I know at a national level, there is a Bill before the Commonwealth Parliament currently to seek to recognise a right to housing.[16] When we have really distressing levels of homelessness, very visible on the streets of Brisbane at the moment, and a whole generation of people locked out of home ownership – that recognition of the right to housing is becoming increasingly important. I think when bureaucrats are formulating polices that impact on housing affordability, it would be beneficial if they were bound to take into account, and give public consideration to the right of people to adequate housing.

[16] National Housing and Homelessness Plan Bill 2024 (Cth).

PB: On the subject of a better future for human rights, you mentioned earlier that one of the objects of the *Human Rights Act 2019* is to create a culture of human rights protection. Where do you think that comes from? Is that a top-down approach? Is there some way that we, as law students, can help be a part of that change?

SM: Great question. If you go to our human rights reports online, you will find that we developed very early on, what we call a cascading model of human rights leadership. Recognising that to build that culture, it's not something that is going to be created just by having a Human Rights Commissioner that talks about it publicly. We need leadership in human rights from the ground up. Those who are at the front line of service delivery showing human rights leadership by properly taking into account people's human rights when they are providing services to 5 million Queenslanders. It is a challenge to communicate the complexity of the Human Rights Act to those front line service providers, but the way I've approached that is to just remind people that at the heart of every human right is the dignity of an individual. It's about those decision makers and service providers putting themselves in the position of the individual at the receiving end. It's an empathetic decision-making model, effectively by asking: 'Are there any less restrictive reasonably available ways of achieving what I want to achieve?'. In essence, that's the real value of the Act. Making those decision-makers ask themselves that question. 'Is there a less restrictive way of

doing this?' So we need leadership from the front line, leadership above them, at the policy level, and leadership in Parliament when they're designing and making new laws.

PB: Considering all the challenges you've discussed that endanger the preservation of human rights, what advice would you have for law students or young lawyers who are interested in pursuing human rights law but may feel disheartened by the lack of progress in that area?

SM: I think get active, get involved in your community. There is a lot of advocacy you can do within your family and within your community. To do it in a more organised way, you can apply your legal skills that you've developed through volunteering at a community legal centre. As the former director of Caxton Legal Centre, I understand that it can be difficult to break into a community legal centre to even volunteer, but my message to students is perseverance. All the volunteer coordinators and directors of community legal centres will probably hate me for saying this, but making yourself annoying until they relent and say, "ok we'll put this student on." While I was at Caxton, the students we brought on always really impressed me, and many of them ended up becoming lawyers at Caxton and went on to have really rich and rewarding careers. Maybe not financially rich, but nonetheless rewarding.

PB: You spoke about an increasing focus in the future on the rights of older Australians; what sort of other developments do you see occurring in the human rights sector in the next 5 to 10 years, domestically and abroad?

SM: In terms of Conventions by the United Nations, I think the rights of older people would be the first in the queue. Human rights don't stay static; they are constantly evolving, you see that particularly with the rights of the LGBTQIA community. I think in the next 5 or 10 years, we're going to see another round of societal change occasioned by geopolitical forces, but also technology. The challenge that AI presents, including the benefits that AI offers, is going to be, I think, at the forefront of human rights advocacy. It's easy to become pessimistic about the future, but it's equally really important that we don't fall into a malaise of pessimism. Instead, see the human rights protections proposed by the United Nations as a vehicle for global world order. They offer a framework for principled decision-making that will ultimately protect the dignity of all people. We just have to stay firmly committed to supporting the work of the United Nations and supporting the foundational principles of human rights protections.

UNIVERSAL HUMAN RIGHTS: OLD AND NEW

The Hon Michael Kirby AC CMG[*]

I Law Students Must Become Joiners

I'm very glad to have the chance to make another contribution to the famous *Pandora's Box*. It is a very important publication because it represents the minds, aspirations and concerns of young Australian lawyers who are studying to enter the great profession of law – law, in its many aspects, including international law.

When I was at law school, international law was a compulsory subject throughout Australia. Everyone had to study it if you were to get a degree as a qualified lawyer. That is not now universally so. But that is ironic because in the meantime – the years between 1962, when I was admitted as a lawyer, and today – the role, importance, and challenges of international law have greatly expanded. In my life, I became involved in a number of international issues, which included questions of international law. I therefore became very interested in international law, and especially the international law of human rights.

When I was a schoolboy in Sydney, Australia, in the public school system of New South Wales, my teacher gave all of the students in the class a copy of

[*] The Honourable Michael Kirby AC GMC was a Justice of the High Court of Australia from 1996 to 2009. He was also the Special Representative of the UN Secretary-General for Human Rights in Cambodia from 1993 to 1996, and Chair of the Commission of Inquiry on Human Rights in North Korea from 2013 to 2014.

the *Universal Declaration of Human Rights* (**UDHR**).[1] In the year that's just closed, 2023, we have celebrated the 75th anniversary of the adoption of the *Universal Declaration of Human Rights*. In my life, I've had the privilege to know some of those who worked with Eleanor Roosevelt in the development of the *Universal Declaration of Human Rights*. I also met, at my school, an alumnus of the school: Dr HV Evatt, who had been the President of the General Assembly of the United Nations when the UDHR was adopted.

In the result, I've always felt that I have a personal link to the beginning of the global effort to secure enforceable and respected principles of human rights, especially as expressed in international law; and that having treaties and statements of principle is important and is good,
but it's not enough. Therefore, the puzzle that I have faced over my life has included the puzzle of how we can translate the great principles of the UDHR into enforceable and respected principles of the law of nations and of the way we human beings live together on this small and relatively insignificant planet in the solar system.

Justice Deane once said, when a law student told him that it must be a glorious thing to be a Justice of the High Court of Australia, 'Well, it's a good thing to be that. But you've got to stop and think of our planet, of its small size. Of the other planets in our solar system. Of the Milky Way and our galaxy. Of the universe. Of the enormity of space and the infinity of time. When you look at it that way, being a Justice of the High Court of Australia is not such

[1] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) ('UDHR').

a big deal.'[2] But in our legal system, in our little part of this blue planet, it is a big deal.

The challenge that I want to address in these remarks for *Pandora's Box* is how we translate the knowledge we have gained from science about the enormity of the universe, of the relative insignificance of planet Earth, of humanity and its conflicts and disagreements and successes; and how we uphold an international legal order that protects us against the very great risks of destruction and suffering that exist in the world today.

During my time at law school, I joined various bodies that were connected with human rights issues. Most of the issues in those days were local issues. That's the way of the law – it tends to concentrate the mind by focusing on the concrete and on the small and on the solvable problems. But often I worked in 'pro bono' work, as we call it now, for people who went to the Council for Civil Liberties for assistance and people who sought help through the various other civil society organisations. This work got me noticed, and ultimately, that was of assistance to me in my professional career. However, it's not why I joined those bodies. Still, it carries a lesson for law students and young lawyers today. You've got to be a joiner. You've got to join in civil society as it is concerned with the improvement of the law in our country, the region, and the world.

[2] See Michelle Castle (ed), 'An Interview with Sir William Deane, AC, KBE' in Michelle Castle (ed), *Blackacre* (The Law Book Company, 1990) 15, 15.

II Commission of Inquiry of the United Nations on Human Rights in North Korea

As a result of my work as a lawyer and my engagement with civil society, I came to be involved – including during times when I was serving as a judge – in international human rights issues. I became the UN Australian member, and later, the Chairman of the Executive Board, and later still, the President, of the International Commission of Jurists (**ICJ**). It is based in Geneva, Switzerland. It still exists. It contains some of the leading lawyers and human rights experts in the world.

Subsequently, and I think *because* of that involvement with the ICJ, I was appointed to become the Special Representative of the Secretary-General in respect of Cambodia. That appointment followed the shocking deprivations of human rights at the end of the Khmer Rouge regime in that country. I was serving in the role as the Special Representative of Secretary-General Boutros-Ghali for human rights in Cambodia when I was appointed to the High Court of Australia in 1996. Because of conventions that were binding me, I then resigned from my role as Special Representative of the Secretary General.

However, of course, I remained very interested in issues of international human rights. I got some of the flavour of things that could be done, positive things, to defend international human rights. These included, in particular, the building up of the principles of international human rights treaties, of protective organisations, and of the agencies of the United Nations: the special rapporteurs and the specialised investigatory bodies that looked into complaints about breaches of international human rights law. These were

bodies that exposed wrongdoing to the world.

When, in 1996, I was ultimately appointed to the High Court of Australia, I didn't take an active part during my judicial years in the activities of the United Nations. That was because there was a concern that such duties might not be compatible with the separation of powers and the non-political nature of the judiciary as we have evolved it in Australia. Still, when my term on the High Court concluded in 2009, I found that I received many inquiries and some invitations to take on particular activities that concerned international human rights law. There isn't time in this article to detail them all. However, probably the most important was the appointment in 2013 to be the Chair of the Commission of Inquiry of the United Nations on Human Rights in North Korea.[3] You will see that I went from a very easy task to a slightly harder task: from Cambodia to North Korea. But that was a big responsibility because of the dangers that were then on the horizon concerning the possession of nuclear weapons by the government of the DPRK.[4]

The inquiry was set up including myself as Chair; Marzuki Darusman, the former Attorney-General of Indonesia, as Commissioner; and Sonja Biserko, a human rights expert from Serbia, as the third member of the Commission. We received a mandate from the United Nations Human Rights Council. We addressed nine major headings.[5] We had one year in which to deliver our

[3] See generally United Nations Human Rights Council, 'Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea', *United Nations Human Rights Council* (Web Page, 2024) <https://www.ohchr.org/en/hr-bodies/hrc/co-idprk/commission-inquiryon-h-rin-dprk>.
[4] The Democratic People's Republic of Korea – the official name of North Korea.
[5] *Human Rights Council*, *Report of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea*, 25th sess, Agenda Item 4, UN Doc A/HRC/25/63 (7 February 2014) 3 [3]–[4] ('*Report of the Commission of Inquiry*').

report, so we set about gathering the material on which to base our report and our recommendations.

When we concluded our report, we produced it. I delivered it to the Human Rights Council of the United Nations in March of 2014. At the time of writing this article for *Pandora's Box*, we are now approaching the 10th anniversary of the completion of the Report of the Commission of Inquiry on Human Rights in the DPRK.

The report dealt with many issues that are extremely important to peace and security and to human rights in the region. They include the issues of the political rights of the people of North Korea, the food supply to the people of North Korea, the access to information, the access to education and contact outside North Korea, the right to travel, and all the other rights that are expressed in the *Universal Declaration of Human Rights*.[6]

We considered, but we did not discuss as such, the issue of nuclear weapons. At the time of our inquiry, North Korea had withdrawn from the *Treaty on the Non-Proliferation of Nuclear Weapons* (***Non-Proliferation Treaty***).[7] The result of that was that North Korea had removed itself from the stimulus, examination, and scrutiny of the United Nations as to its nuclear weapons program. This presented new and more dangerous challenges for humanity.

[6] See generally *Report of the Commission of Inquiry* (n 5).
[7] *Treaty on the Non-Proliferation of Nuclear Weapons*, opened for signature 1 July 1968, 729 UNTS 161 (entered into force 5 March 1970) ('*Non-Proliferation Treaty*').

III Nuclear Weapons and International Law

When the Commission of Inquiry occasionally turned its attention to the issue of nuclear weapons, we saw, at once, the relevance of the fact that North Korea had adopted the posture of a nuclear weapons state. It had developed nuclear weapons and it was fast developing a missile delivery system by which the nuclear weapons could be delivered to cause terrible destruction in South Korea and elsewhere. At special risk were the neighbouring states, such as China and the Russian Federation. Ultimately, the system could deliver the weapons to the mainland of the United States of America and Canada, and down here to us in Australia. Therefore, the significance of the nuclear weapons program of North Korea became more evident, more apparent. In fact, it became more urgent after the Report of the Commission of Inquiry was delivered.

When I was chairing the Commission of Inquiry on North Korea, I was conscious of the fact that, at the end of the Second World War, the world's new machinery for governance was being devised and developed. The *Charter of the United Nations* was adopted. The *Universal Declaration of Human Rights* was endorsed by the General Assembly. The global treaties such as the ICCPR[8] and the ICESCR[9] and other important treaties were negotiated. They were signed and brought into force. Machinery of the United Nations was established to provide for complaint to be made to treaty bodies, to investigate alleged abuses of human rights. All of these have been valuable

[8] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR').
[9] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('ICESCR').

steps. But in Australia, we have tended to lag behind other countries, at least on paper, in complying with the findings of the UN machinery. This was also true of North Korea.

In Australia, we don't have a national constitutional statement of fundamental human rights as most countries have in their constitutions.[10] We don't even have a national statute, or Act of Parliament, for that purpose – most countries do have that.[11] We don't have, in all of the states and territories of Australia, local statutes for expressing fundamental human rights and providing for their enforcement. We don't always ourselves conform to the recommendations made by the treaty bodies of human rights. This is true, including in relation to communications that concern alleged abuses of human rights by our own country, Australia.[12]

As I discovered in the work of the Commission of Inquiry on North Korea, sometimes, although the machinery is there, it cannot be put into operation. For example, the Commission of Inquiry found convincing evidence that a number of crimes against humanity had been perpetrated by North Korea.[13] When the notion of a crime against humanity was adopted in 1945, at the

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[10] See, eg, *Canada Act 1982* (UK) c 11, sch B pt I ('*Canadian Charter of Rights and Freedoms*'); *Constitution of the Republic of South Africa Act 1996* (South Africa) ch 2; *United States Constitution* amends I–X.

[11] See, eg, *Human Rights Act 1998* (UK); *Human Rights Act 1993* (NZ).

[12] See, eg, Australian Government, 'Response of the Australian Government to the Views of the Human Rights Committee in Communication No 2005/2010 (*Hicks v Australia*)', Communication to the Human Rights Committee in *Hicks v Australia*, January 2017; Australian Government, 'Response of Australia to the Views of the Committee on the Rights of Persons with Disabilities in Communication No 7/2012 (*Noble v Australia*)', Communication to the Committee on the Rights of Persons with Disabilities in *Noble v Australia*, 21 June 2017.
Noble v Australia, UN Doc CRPD/C/16/D/7/2012.

[13] See *Report of the Commission of Inquiry* (n 5) 14 [87], 18 [89], 20 [94].

time of the Nuremberg trials in Germany, there was a commitment by the international community[14] – since re-endorsed by resolutions of the General Assembly of the United Nations[15] – that where a crime against humanity was established, the world community would not turn its back. It would not look away. That was what the world community had done in the 1930s, to the terrible oppression of many minority groups by the Third Reich in Germany.

This commitment was there in the United Nations, reaffirmed in the 21st century by the General Assembly[16] on the 'R2P' principle: that where a crime against humanity exists and the country concerned will not address it, it will be the obligation of other countries to do so.[17] Unfortunately, that is not what always happens in fact. For example, the Commission of Inquiry on North Korea made recommendations that the United Nations General Assembly and the Security Council should refer the human rights violations by North Korea, where they amounted to crimes against humanity, to the International Criminal Court (**ICC**).[18] If the Security Council refers such a matter, or a person who is to be charged before the International Criminal Court, that court gains jurisdiction under the *Rome Statute*[19] setting up the ICC.[20] That is

[14] See *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, 82 UNTS 279 (signed and entered into force 8 August 1945) annex ('*Charter of the International Military Tribunal at Nuremberg*') ('*Charter of the Nürnberg Tribunal*').
[15] See, eg, *Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal*, GA Res 95(I), UN Doc A/64/Add.1 (11 December 1946).
[16] *2005 World Summit Outcome*, GA Res 60/1, UN Doc A/RES/60/1 (24 October 2005) paras 138–9.
[17] See generally International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Report, December 2001).
[18] *Report of the Commission of Inquiry* (n 5) 16–20.
[19] *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002).
[20] Ibid art 13(b).

so, even though the country concerned is not itself a party to the *Rome Statute*.[21]

Yet, although the Commission of Inquiry recommended that steps should be taken by the Security Council to refer specified instances of serious crimes against humanity to the International Criminal Court, that has not happened. This remains one of the chief impediments to the effectiveness of international law. We have the treaties. We have the machinery. We have the guardians. We have the principles. However, the politics sometimes prevents redress being enforced and transparency being achieved.

IV Nuclear Non-Proliferation and Human Rights Law

The nuclear weapons program of North Korea is not in the same league as the nuclear weapons program of the United States of America or the Russian Federation. Both of those nations, which were in the forefront of the Cold War and the development of weapons of mass destruction for the purposes of the Cold War, have thousands of nuclear weapons in their arsenals.[22] Now, there are other states which have developed nuclear weapons: the United Kingdom, France, the People's Republic of China[23] – in that sense, the five permanent members of the Security Council all have nuclear weapons and are parties to the *Non-Proliferation Treaty*.

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[21] Ibid.

[22] See, eg, Hans Kristensen et al, 'Russian Nuclear Weapons, 2024' (2024) 80(2) *Bulletin of the Atomic Scientists* 118, 118–119; Hans Kristensen et al, 'United States Nuclear Weapons, 2024' (2024) *Bulletin of the Atomic Scientists* 182, 182–3. See generally Hans Kristensen et al, 'Status of World Nuclear Forces', *Federation of American Scientists* (Blog Post, 29 March 2024) <https://fas.org/initiative/status-world-nuclear-forces/> ('Status of World Nuclear Forces').

[23] See, eg, Status of Nuclear World Forces (n 22).

The other countries that have developed nuclear weapons now include India, Pakistan, reportedly Israel, and North Korea.[24] This small number of countries have weapons of huge potential, not only to destroy those who are in the vicinity of the detonation, as happened in Hiroshima and Nagasaki in August of 1945 at the end of the Second World War; there is also the effect on the wider world. The destruction is not just the immediate physical destruction – it's the destruction of the water supply, the food chain; of institutions of education, of culture, of music, and all the other features of civilised human existence.[25] This is a major challenge for humanity. It is extremely dangerous and urgent.

The consequence of this challenge has been that, since the 1990s, there have been efforts on the part of civil society in now nuclear states, to develop a more effective and more radical approach to nuclear weapons.[26] Why should we have these weapons at all, given that there will always be a risk, if they exist, that they might be used? Not all leaders, at all times, are rational. Many of them fall under the power or influence of their generals and what President Eisenhower called the 'military-industrial complex'.[27] Therefore, the development of nuclear weapons – and in particular, the spread of nuclear

[24] See, eg, ibid.
[25] See generally Congress of the United States Office of Technology Assessment, *The Effects of Nuclear War* (Report, May 1979); Hal Cochrane and Dennis Mileti, 'The Consequences of Nuclear War: An Economic and Social Perspective' in Lewis Thomas and Fred Solomon (eds), *The Medical Implications of Nuclear War* (National Academies Press, 1986).
[26] See, eg, *Non-Proliferation Treaty* (n 7); *Treaty on the Prohibition of Nuclear Weapons*, opened for signature 20 September 2017, 3370 UNTS (entered into force 22 January 2021) ('Ban Treaty').
[27] See Dwight D Eisenhower, 'Farewell Address' (Speech, Washington, DC, 17 January 1961).

weapons to more states – presents a very significant risk of accidental and unintentional, but also irrational and ill-considered, decisions to utilise nuclear weapons. Without doubt, these have the potential to inflict tremendous destruction and to kill enormous numbers of people.

V International Campaign to Abolish Nuclear Weapons

As one grows older, one tends to see, more clearly, the significance of the broader picture, the picture of our entire planet: of human rights affecting the mass of humanity, such as global poverty, global climate change, and global migration; and issues of enormous danger and threats to humanity, such as the possession, use, and threat of use of nuclear weapons.[28]

This realisation eventually led a number of people in Melbourne, Australia, to establish a community organisation called ICAN: the International Campaign to Abolish Nuclear Weapons.[29] That body set up a meeting and discussion[30] that ultimately led to the drafting of a new treaty for a ban on nuclear weapons: the *Treaty on the Prohibition of Nuclear Weapons* (**Ban Treaty**).[31]

That treaty – providing for a comprehensive international ban on nuclear weapons – addresses three dangerous aspects of such weapons. It forbids the

[28] See generally Global Challenges Foundation, *Global Catastrophic Risks 2024* (Annual Report, 10 January 2024) ('*Global Catastrophic Risks 2024*').
[29] See generally Dimity Hawkins, Dave Sweeney and Tilman Ruff, 'ICAN's Origins – From Little Things, Big Things Grow', *International Campaign to Abolish Nuclear Weapons* (Web Page, October 2019) <https://www.icanw.org/ican_origins> ('ICAN's Origins').
[30] See generally ibid.
[31] Ban Treaty (n 26).

possession, the use, and the threat of use of nuclear weapons.[32] These are the three activities that are inherently most dangerous. They have persuaded the international community to adopt a new treaty.

ICAN started in Melbourne.[33] It quickly grew too big for Australia.[34] It moved to Geneva.[35] It quickly gathered the number of nation states that were required in order to bring the treaty into operation: 50.[36] Since then, it has gathered 73 states parties in all, and 21 states have signed but not yet ratified it.[37] This means that half of the states of the United Nations have joined the system of the Ban Treaty. Unquestionably, this is a major achievement for peace, security and human rights in our planet. And it began in civil society in Australia.

What began as a struggle to get the 50 nation states to sign – not even ratify – the Ban Treaty,[38] has now expanded into the situation that such a large number of the states of the United Nations have signalled a commitment to the goals of the Ban Treaty. Therefore, what is now necessary is to take the Ban Treaty further, so as to afford a strong and enforceable means to protect

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[32] See ibid art 1.
[33] ICAN's Origins (n 29).
[34] Ibid.
[35] Ibid.
[36] See, eg, Gail Lythgoe, 'Nuclear Weapons and International Law: The Impact of the Treaty on the Prohibition of Nuclear Weapons', *Blog of the European Journal of International Law* (Blog Post, 2 December 2020) <https://www.ejiltalk.org/nuclear-weapons-and-international-law-the-impact-of-the-treaty-on-the-prohibition-of-nuclear-weapons/>.
[37] United Nations Office for Disarmament Affairs, 'Treaty on the Prohibition of Nuclear Weapons – Participants', *United Nations Office for Disarmament Affairs Treaty Database* (Web Page, 7 October 2024) <https://treaties.unoda.org/t/tpnw/participants> ('TPNW Participants').
[38] Ban Treaty (n 26).

the most basic of human rights: the right to live. This is a very practical issue. It is also urgent.

A small number of states – five of the eight nuclear states – have joined and ratified the *Non-Proliferation Treaty*.[39] However, no nuclear weapon states have signed the Ban Treaty.[40] The United States of America has not.[41] The Russian Federation and China have not.[42] And North Korea has not.[43] Therefore, until it is both universal, comprehensive, enforceable, and accepted as the way in which we should deal with the stockpiles of nuclear weapons, it is an imperfect treaty. But it is a beginning. The fact that many states have signed on to the Ban Treaty, and a number of nuclear weapon states have signed on to the *Non-Proliferation Treaty*, is an indication that there is a growing realisation that we are at an extremely perilous moment in terms of the human rights of the people of our planet: to live, to work, and to enjoy the blessings of civilised and rational life, of culture, of family, of children. Tragically, our planet continues to be living under a constant threat of nuclear destruction.

Australia has not ratified the Ban Treaty.[44] New Zealand has, as well as other countries in our region, such as Thailand and the Philippines.[45] However,

[39] United Nations Office for Disarmament Affairs, 'Treaty on the Non-Proliferation of Nuclear Weapons – Participants', *United Nations Office for Disarmament Affairs Treaty Database* (Web Page, 7 October 2024) < https://treaties.unoda.org/t/npt/participants>.
[40] TPNW Participants (n 37).
[41] Ibid.
[42] Ibid.
[43] Ibid.
[44] Ibid.
[45] Ibid.

Australia is still considering its position.[46] This is the quandary we face.

Defenders of the 'nuclear umbrella', as it's called, say that the Ban Treaty is so defective that it's better to hang on to the protections that are afforded by the 'nuclear umbrella' of the United States of America.[47] They argue that it would be 'incompatible' with our obligations to the United States of America for Australia to ratify and affirm the Ban Treaty.[48] For example, Australia permits the United States to use facilities that exist on the Australian mainland at Pine Gap, for the purpose of monitoring developments, in turn for the purpose of ensuring the 'effectiveness', as it is put, of United States nuclear weapons.[49] Defenders of this positive point to the fact that the world has got through the years since 1945 without a nuclear catastrophe.[50] So, it is argued, deterrence has proved effective.[51] It is so overwhelming and disproportionate that use of such weapons won't happen. However, students of history,

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[46] See Penny Wong, 'Second Meeting of States Parties to the Treaty on the Prohibition of Nuclear Weapons' (Media Release, Office of the Minister for Foreign Affairs, 26 November 2023) <https://www.foreignminister.gov.au/minister/penny-wong/media-release/second-meeting-states-parties-treaty-prohibition-nuclear-weapons>.

[47] See generally Cat Woods, 'Australia's Nuclear Future and the Legal Ramifications of Ratifying TPNW', *Law Society Journal Online* (Blog Post, 15 February 2024) <https://lsj.com.au/articles/australias-nuclear-future-and-the-legal-ramifications-of-ratifying-tpnw/>; International Campaign to Abolish Nuclear Weapons, 'Australia's Reassessment of the Treaty on the Prohibition of Nuclear Weapons', *International Campaign to Abolish Nuclear Weapons* (Blog Post, 15 November 2022) <https://www.icanw.org/australia_tpnw>.

[48] See Woods (n 47).

[49] See ibid.

[50] See John Tilemann, 'Banning Nuclear Weapons: Don't Be Deceived', *Australian Institute of International Affairs* (Blog Post, 22 January 2021) <https://www.internationalaffairs.org.au/australianoutlook/banning-nuclear-weapons-dont-be-deceived/>.

[51] But see Peter J Dean, Stephan Fruehling and Andrew O'Neil, 'Australia and the US Nuclear Umbrella: From Deterrence Taker to Deterrence Maker' (2024) 78(1) *Australian Journal of International Affairs* 22, 35; Woods (n 47).

studying the way, for example, that the First World War or the Second World War and several other conflicts began, will affirm that what everyone assumes could not happen because of its enormity sometimes does happen.

If today, we ask, 'What are the most important issues of human rights that should be of concern to the human family?', they certainly now go beyond specific issues of minority groups, important though those issues are. Those issues have been debated at length in the past in *Pandora's Box*; I have contributed to that debate.[52] I remain committed to attention to the specific and particular issues. The specific and the particular are often more solvable. You can make progress. You can see progress. This is certainly the case with many of the issues that have been discussed in the earlier editions of *Pandora's Box*. However, that fact doesn't excuse us from our obligation, as human beings, to look also at the broader picture. To consider at the larger challenges. To look at the existential dangers.[53] Many of them are pretty clear. They include global climate change, global population movements, and nuclear weapons.[54] But the greatest of these is the danger and risks presented by nuclear weapons.

This is therefore why, on this occasion, I have chosen to call attention to this challenge to our species: nuclear weapons, as a human rights challenge. Clearly, it is the obligation of all rational people, including in Australia, to address this issue, and to consider and act upon the steps that will be necessary if we are to remove the existential peril of mass destruction.

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[52] See, eg, Samuel Volling and Joshua Underwood (eds), 'Interview with The Hon. Michael Kirby AC CMG, "Pride and Prejudice Exhibition", State Library of Queensland' (2010) 17 *Pandora's Box* 1, 1–4.
[53] See generally *Global Catastrophic Risks 2024* (n 28).
[54] See generally ibid.

Incontestably, the greatest danger for the continued existence of the human species on our planet is the possession, use, and threat of use of nuclear weapons. To secure survival, we need effective international human rights. Lawyers have a large and growing responsibility to help build effective institutions and international law. Nothing less than the future of life on our planet is at stake.[55]

[55] See United Nations Security Council, 'Nuclear Warfare Risk at Highest Point in Decades, Secretary-General Warns Security Council, Urging Largest Arsenal Holders to Find Way Back to Negotiating Table' (Media Release, SC/15630, 18 March 2024).

FIGHTING THE DEATH PENALTY FROM AUSTRALIA

Stephen Keim SC[*]

I Why Oppose the Death Penalty?

On 27 June 2024, the Minister for Foreign Affairs, the Hon Penny Wong, referred an inquiry[1] to the Commonwealth Parliament's Joint Standing Committee on Foreign Affairs, Defence and Trade (**Joint Committee**). The inquiry is directed to Australia's efforts to advocate for the worldwide abolition of the death penalty.

The terms of reference for the inquiry include consideration of progress against the recommendations[2] of the 2016 report[3] of the same Joint Committee called *A world without the death penalty: Australia's Advocacy for the Abolition of the Death Penalty*.[4]

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[1] Parliament of Australia, 'Committee to inquire into Australia's global efforts to abolish the death penalty' (Media Release, 3 July 2024).

[2] Australian Government, *Australian Government response to the Joint Standing Committee on Foreign Affairs, Defence and Trade report: A world without the death penalty: Australia's Advocacy for the Abolition of the Death Penalty* (Report, March 2017) ('*Australian Government response*').

[3] Joint Standing Committee on Foreign Affairs, Defence and Trade, *A world without the death penalty: Australia's Advocacy for the Abolition of the Death Penalty* (Report, 5 May 2016) ('*A world without the death penalty*').

[4] The terms of reference in full read:

The existence of two references to an important joint committee of the federal Parliament raises, for some people, questions about the significance for Australians of an active concern about the death penalty in other parts of the world. This may be, and is, frequently, framed as: 'We don't have the death penalty in Australia. Why is the death penalty relevant to me?'

For me, the answer is personal and straightforward. I came from an Irish Roman Catholic background with an emphasis on social justice, so I opposed the death penalty, unreservedly, for its cruelty, as long as I can remember. My strong views, in that regard, have never faltered. In addition, events have, in recent years, caused me to be involved in some of the actions taken by Australians to oppose the death penalty overseas. I do not need a reason to be involved in such actions.

A number of good reasons can, however, be formulated.

An inquiry into Australia's efforts to advocate for the worldwide abolition of the death penalty. The inquiry will:

1. Progress against the recommendations in the 2017 Joint Standing Committee on Foreign Affairs, Defence and Trade report: *A world without the death penalty: Australia's Advocacy for the Abolition of the Death Penalty*;
2. Australia's international engagement to promote abolition of the death penalty;
3. Opportunities and risks for Australia to advocate for the abolition of the death penalty internationally, including:
   Engagement with international institutions and likeminded countries;
   a) Advocacy for Australians subject to or potentially subject to the death penalty;
   b) Addressing heightened risk of the death penalty based on sexual orientation and gender identity, ethnicity, religion and political beliefs;
   c) Cooperation with civil society and non-government organisations; and
4. Any related matters.

One answer to the question is that Australians travel overseas. Australians can do silly things including when they are overseas. One day, someone you know may be faced with the death penalty. If you are a lawyer, you may face a request from a friend of a friend for a basic level of legal assistance in respect of the capital charge which has been brought against them. You never know when the death penalty is going to intrude into your life.

Another answer to the question has a touch of John Donne about it. No man is an island.[5] Don't send to ask for whom the bell tolls. It tolls for thee.[6] While the death penalty is being exercised against anyone in the world, it is an affront to us as human beings. Especially, it is an affront to us as human rights lawyers. It is relevant to each and every one of us.

II The Background to the 2024 Joint Committee Reference

The actions of the Australian government in seeking to prevent the executions of Myuran Sukumaran and Andrew Chan in 2015[7] was marked by excellent cooperation between Australia's foreign minister, Julie Bishop, and Australia's shadow spokesperson on foreign affairs, Tanya Plibersek.

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[5] See John Donne, *No Man Is an Island* (1624).

[6] The text of the last stanza of *No Man Is an Island* (See above n 5) reads as follows:

> Each man's death diminishes me,
> For I am involved in mankind.
> Therefore, sent not to know
> For whom the bell tolls,
> It tolls for thee.

[7] See Capital Justice Punishment Project, 'Remembering Andrew Chan and Myuran Sukumaran', *Newsletter* (online, 29 April 2024) <https://www.cpjp.org.au/news/cpjp-remembering-andrew-and-myuran>.

In the wake of that impressive display of bipartisanship, Ms Bishop, on 21 July 2015, referred to the Joint Committee an inquiry into *Australia's Advocacy for the Abolition of the Death Penalty*. As mentioned above, the Committee reported in 2016. Recommendation 8 of that report was that the Department of Foreign Affairs and Trade (**DFAT**) coordinate the development of a whole-of-government strategy which has as its focus countries of the Indo-Pacific and the United States of America.[8] The government, in its formal response to the report, adopted[9] recommendation 8.

Australia's Strategy for Abolition of the Death Penalty[10] (**Strategy**) was adopted in June 2018 and launched in October 2018.

The Strategy notes that the death penalty had been abolished in all Australian jurisdictions by 1985 and that the Commonwealth Parliament had passed legislation in 2010,[11] using the external affairs power, to prohibit any state or territory from reintroducing capital punishment.

The Strategy places opposition to the death penalty into the context of human rights and includes in the reasons for opposition the penalty's irrevocability and the potential for error; its denial of the possibility of rehabilitation; the lack of evidence supporting deterrent value; and its unfairness arising from its disproportionate use against the poor, people with intellectual and mental disabilities, and minority groups.[12]

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[8] *A world without the death penalty* (n 3) 163 [Recommendation 8].
[9] *Australian Government response* (n 2) 7.
[10] Department of Foreign Affairs and Trade, *Australia's Strategy for Abolition of the Death Penalty* (June 2018) ('*Australia's Strategy*').
[11] Ibid 2.
[12] Ibid.

The Strategy notes that other countries' movements to abolition are likely to be gradual and that interim goals must be incremental involving reducing, in some countries, the number of offences that attract capital punishment; removing mandatory sentences of death;[13] reducing the use of the death penalty; and requiring fair trial processes and transparency about the use of the penalty.[14]

The Strategy places obligations on consular staff in overseas posts to report on use of the death penalty and to collect information by liaising with local human rights institutions and anti-death penalty activists.[15]

The Strategy also places obligations on ministers and officials travelling overseas to raise the death penalty as a priority human rights issue in official meetings and communications.[16]

The Strategy also supports the funding of national human rights institutions and civil society organisations that further global abolition including

[13] Malaysia is a country which followed this anticipated pattern in that, in April 2023, it changed the nature of the sentence of death from mandatory to that of a discretion to be exercised by the sentencing judge. The law also provides for a resentencing process for persons held on death row as a result of the previous state of the law. See Tarrance Tan, Rahimy Rahim and Martin Carvalho, 'Dewan passes amendment to abolish mandatory death penalty', *The Star* (online, April 2023) <https://www.thestar.com.my/news/nation/2023/04/03/dewan-passes-amendments-to-abolish-mandatory-death-penalty>.
[14] *Australia's Strategy* (n 10) 3.
[15] Ibid 7.
[16] Ibid 8.

awareness raising of politicians and policy makers and projects aimed at public opinion.[17]

The 2024 reference to the Joint Committee, through its focus on progress against the recommendations of the earlier report of the Joint Committee will, necessarily, consider the effectiveness of the Strategy, the way in which it has been followed on a whole-of-government basis, and any need for revision or strengthening of the Strategy.

III The Parliamentary Committee

Another institution of importance is the Commonwealth Parliament's bipartisan Parliamentarians Against the Death Penalty (**Committee**). This committee is an informal committee in that members of the Parliament join it of their own volition, and it is not assigned tasks by the Houses of the Parliament.

Phillip Ruddock, when he was a member of Parliament but not a minister, was a high-profile co-chair of the Committee. The Committee operates on the basis that one co-chair is from the governing parties and one co-chair is from the opposition parties in order to ensure bipartisanship. In the current Parliament, the co-chairs are Graham Perrett, member for Moreton in Queensland of the Labor Party and Senator Dean Smith, a Liberal Senator from Western Australia.

[17] Ibid 9.

The Committee has supported the Strategy and worked to ensure that the Strategy's objectives are achieved. The Committee has worked with and supported non-governmental organisations (**NGO**) working to advocate against the death penalty, and, as a whole, has been generally supportive of Capital Punishment Justice Project's[18] (**CPJP**) work.

IV Getting Involved: A Personal Story

Despite my personal views against the death penalty, my active involvement in that cause occurred despite myself. Specific events have guided me into a more active engagement with death penalty issues.

Towards the end of the first decade of the 21st century, a barrister and friend of mine, Julian Wagner, approached me and suggested that I agree to be the patron of Australians Against Capital Punishment[19] (**AACP**). Despite protesting that I was much too young to be patron of anything, I eventually agreed.

AACP was and is a loosely structured organisation created by friends of Lee and Christine Rush, the parents of Scott Rush, a member of the Bali Nine who was then on death row in Indonesia.

AACP engaged in this advocacy against the death penalty as well as raising money to assist Lee and Chris in a small way with the costs of travelling back and forth to Indonesia to visit their son on death row.

[18] See *Capital Punishment Justice Project* (Web Page) <https://www.cpjp.org.au/>.
[19] See *Australians Against Capital Punishment* (Web Page) <https://aacp.online/>.

Scott Rush had been arrested on 17 April 2005. At his trial, Scott was sentenced, on 13 February 2006, to life imprisonment. However, an appeal against this sentence was lodged and, as a result of that appeal, perversely, on 6 September 2006, Scott's sentence of life imprisonment was increased to a sentence of death. That was the situation affecting the Rush family when I first became involved with AACP.

It was a great relief, of course, when, on 10 May 2011, an appeal to the Supreme Court of Indonesia resulted in the overturning of the penalty of death and the re-imposition of the sentence of life imprisonment. Efforts to convince Indonesian authorities to reduce the life imprisonment sentence to a fixed term and to achieve the eventual release of Scott and the other members of the Bali Nine will continue.

In 2014, my friend, Julian Wagner, who had got me into all of this, died an untimely death. Julian had been an enthusiastic opponent of capital punishment. At his memorial service, I had the idea that an appropriate memorial to Julian would be an organisation that continued his work.

The idea lay dormant for some time but, in 2016, with great help from a number of Julian's close friends including former Queensland District Court judges Marshall Irwin and Sarah Bradley AO, and barristers Richard Galloway and Karen Garner, the registered charity, the Julian Wagner Memorial Fund[20] (**JWMF**), became a reality. For my sins, Marshall and the others persuaded me to become a patron of a second anti-death penalty organisation.

[20] See *Julian Wagner Memorial Fund* (Web Page) <https://www.jwmf.com.au/>.

Between Julian's death and the commencement of the JWMF, many Australians were galvanised into opposing the death penalty and then traumatised, on 29 April 2015, by the execution of Andrew Chan and Myuran Sukumaran by firing squad on Nusa Kambangan Island in Indonesia. Andrew and Myuran had been arrested at the same time and in respect of the same incident as Scott Rush.

Over the years, AACP and the JWMF have carried on a tradition started by AACP of having an annual dinner and other events both to raise money and to raise consciousness about the issues associated with the death penalty. One of our guest speakers was Julian McMahon AC SC[21] who, with Lex Lasry AM QC,[22] had represented Van Tuong Nguyen[23] who was executed in Singapore in 2005 and had represented Andrew Chan and Myuran Sukumaran (originally, with Lasry before he was appointed a judge of the Supreme Court of Victoria).

The contact made with Julian McMahon led to various other interactions with the organisation of which Julian had become chair, namely, Capital

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[21] Julian McMahon AC SC is an Australian barrister. His principal focus is on criminal law, and has worked on matters including homicide; terrorism; corruption; and, outside Australia, the death penalty. See 'Against the death penalty: barrister Julian McMahon', *ABC Conversations* (Sarah Kanowski, 25 July 2019) <https://www.abc.net.au/listen/programs/conversations/julian-mcmahon-against-capital-punishment/11323694>.

[22] Lex Lasry AM QC is an Australian lawyer, and a former Justice of the Supreme Court of Victoria from 2007 to 2018. See 'Lex Lasry', *Wikipedia* (Web Page) <https://en.wikipedia.org/wiki/Lex_Lasry>.

[23] Van Tuong Nguyen was an Australian citizen convicted of drug tracking in Singapore. Despite numerous pleas for clemency, he was executed on 2 December 2005. See 'Van Tuong Nguyen', *Wikipedia* (Web Page) <https://en.wikipedia.org/wiki/Van_Tuong_Nguyen>.

Punishment Justice Project.[24] In October 2019, I was invited to join the board of CPJP. Then, in December 2020, Julian chose to step down as chair and I became chair of CPJP.

V Capital Punishment Justice Project (Formerly Reprieve Australia): An Introduction

In 2001, two relatively new barristers at the Melbourne Bar, Nick Harrington and Richard Bourke,[25] had the idea to start an Australian body that would assist in opposing the death penalty and assist people at risk of suffering the death penalty. The name they chose for the organisation was Reprieve Australia and the organisation was modelled on the UK organisation, Reprieve.[26] Reprieve was founded in 1999 by British lawyer who worked on capital defence cases in the United States, Clive Stafford Smith[27] and the film-maker Paul Hamann,[28] who had made the highly influential film, *14 Days in*

[24] See above n 18.

[25] Richard Bourke is an Australian barrister. In 1998, he visited New Orleans to volunteer at the Louisiana Capital Assistance Centre, before returning to work there full time in 2002. See also Stephen Keim SC and Daniel Caruana, 'On The Coal Face: The Inspiring Richard Bourke On A Life Against Death Row', *newmatilda* (Web Page, 29 November 2018) <https://newmatilda.com/2018/11/29/coal-face-inspiring-richard-bourke-life-death-row/>.

[26] See 'History', *Reprieve* (Web Page) <https://reprieve.org/uk/our-history/>.

[27] Clive Stafford Smith is the co-founder of Reprieve. He attended Columbia Law School in New York, before spending nine years as a lawyer with the Southern Center for Human Rights, working in death penalty cases and on other civil rights issues. See 'Clive Stafford Smith', *Reprieve* (Web Page) <https://reprieve.org/uk/person/clive-stafford-smith/>.

[28] Paul Hamman is the patron and co-founder of Reprieve. A filmmaker, he has made over 50 documentaries himself, many winning awards. He runs his own independent production company, and was previously the BBC's Head of Documentaries and History. See 'Paul Hamman', *Reprieve* (Web Page) <https://reprieve.org/uk/person/paul-hamann/>.

May,[29] about Stafford Smith's desperate attempts to save Edward Earl Johnson from dying in the gas chamber in Mississippi.

Richard Bourke is an extraordinary person with an extraordinary life story. In 1998, Richard went to Louisiana as a volunteer intern and worked for a few months on death penalty cases in the Louisiana criminal justice system. His experience led him, with Harrington, to establish Reprieve Australia in 2001. One of the main tasks of the organisation has been and remains the recruitment of and support of volunteers to work as volunteers in much the same way as Richard did back in 1998.

In 2002, Richard returned to Louisiana. Albeit, with short holiday visits back to Australia, Richard has lived permanently in New Orleans and has worked on capital cases, trials and appeals, since that time. He is now director of the Louisiana Capital Assistance Center[30] (**LCAC**).

Since 2001, CPJP has, apart from a recent gap because of COVID-19, continuously sent volunteer interns to work at capital assistance centers in the United States, including the LCAC. CPJP calculates that, over that time, over 70,000 hours of volunteer services have been provided. The intern program resumed when international travel again became available, and continues at the time of writing.

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[29] (British Broadcasting Corporation, 1987). See also 'Fourteen Days in May', *BBC* (Web Page) <https://www.bbc.co.uk/programmes/p05m5xb9>.

[30] See *Louisiana Capital Assistance Center* (Web Page) <https://www.thejusticecenter.org/>.

Placements are, generally, for about three months. The positions are unpaid and a volunteer has to meet their own expenses including travel and accommodation. Because this requirement can exclude excellent candidates for lack of means, one of the projects for which JWMF was brought into existence was to raise funds to provide modest bursaries for successful applicants for intern positions to help meet some of those expenses.

Capital assistance centers are under-resourced and have to struggle to meet the demand for their services. The intern program is to provide centers with additional resources so that the lawyers can get on with their more lawyerly work. Interns do not work as lawyers. They do the things that make the lives of busy lawyers a little easier. As an intern, you may be asked to drive several hours to pick up a death row occupant's family to assist them to visit the prison. That might involve a further long drive to the prison, a lengthy wait in the car park and further hours of driving, taking the distressed family back to their home.

Another task might involve a visit to a remote courthouse to inspect and copy documents which might turn out to be important in an appeal. Similar tasks await the volunteer intern in the office. Notwithstanding the lack of glamour and the low level of work required in terms of intellectual input, CPJP interns have made enormous contributions to the work of opposing the death penalty in the United States. This work and these opportunities to contribute will be ongoing while the death penalty, itself, continues.

In recent years, CPJP has come to the view that assisting capital defence lawyers in the United States should not be the only focus of an Australian-based anti-death penalty NGO. Australia is part of a region where the death

penalty forms part of the legal system in many of the countries in that region. Countries which retain the death penalty in Asia include Bangladesh, China, India, Indonesia, Japan, Malaysia (subject to a moratorium), North Korea, Pakistan, Singapore, Taiwan, Thailand and Vietnam. It was in this context that the decision was made to change the organisation's name from Reprieve Australia to CPJP.

CPJP does not yet have a volunteer intern program equivalent to its US program where Australian volunteers serve as interns at law offices in Asian countries for a period of time. However, CPJP does do an enormous amount of work opposing the death penalty in Asia. Such work takes a number of forms and requires a significant amount of resources. The work provides opportunities for volunteer input and CPJP also offers a domestic volunteer program which provides opportunities to contribute to such work.

CPJP supports campaigns against the death penalty, generally, in particular countries and in individual cases. CPJP is often contacted, particularly, in the case of Australians threatened with the death penalty to assist local lawyers acting for the person involved. This can involve many different levels of assistance, including obtaining information only available in Australia and having it translated into the local language; having court documents in the local language translated into English so that Australian volunteers can understand the issues involved in the case; by researching international law and international precedents as they relate to the death penalty; preparing drafts of affidavits or submissions by way of assistance to local lawyers in applications and proceedings in the local court; and liaising with the Australian government to ensure that consular support being provided is both apt and effective.

In 2021, drawing on information provided by local lawyers, consular officials and its own research, CPJP prepared its own amicus brief for filing in an appeal then pending in the Thailand Supreme Court. The amicus brief was also signed by Senator Dean Smith and Chris Hayes, the then co-chairs of the above-mentioned Commonwealth Parliament's non-partisan Committee, thereby obtaining a degree of Australian Parliamentary official imprimatur for the brief.

The appeal by Australian, Luke Cook, and his two co-defendants was successful, not only in getting Cook and his co-defendants off death row, but in obtaining their acquittal as the appeal court recognised the thoroughly discreditable nature of the evidence on which the court at first instance had relied to convict the appellants.

There are many ways in which CPJP seeks, at a systemic level, to promote abolition or reduce the extent to which countries apply the death penalty or engage in other forms of state-sanctioned killing. CPJP has applied for and received grants from DFAT in Australia; human rights agencies of the European Union; and disparate other agencies empowering CPJP to conduct programs in a number of different Asian countries in which the death penalty still operates directed to lessening the likelihood of its use. These include the development of training programs for defence lawyers, prosecutors and judges which place emphasis, for example, on the importance of mental health issues in criminal conduct and their impact on the degree of culpability of an accused person for their criminal actions.

CPJP also assists local human rights defenders in their work opposing the death penalty. This can include providing training programs to upskill local activists and it can include campaigns to mobilise international support for local human rights defenders where they are attacked or targeted for their work as human rights defenders and in opposing the death penalty.

As well as supporting local lawyers in their work in defending clients threatened by the death penalty, CPJP has also mobilised international opposition to use of the death penalty by particular governments. For example, CPJP played a significant role in mobilising opposition to Singapore's eventually successful attempt to execute Nagaenthran Dharmalingam,[31] a Malaysian who suffered from severe mental disabilities and whose ability to know that the illegal drug activity in which he had been involved was wrong was very much in doubt. CPJP works closely with DFAT officials, including consular staff, passing on information derived from CPJP's local contacts, thereby assisting consular officials' effectiveness in protesting and opposing foreign governments' use of the death penalty.

VI Concluding Thoughts

At the time of writing, CPJP is actively preparing its submission for the Joint Committee's inquiry.

CPJP has a number of ideas on ways in which Australia's advocacy against the death penalty can be improved. While that is a story for another day, the

[31] See 'Singapore executes mentally disabled man despite worldwide outcry', *CBS News* (online, 27 April 2022) <https://www.cbsnews.com/news/singapore-execution-nagaenthran-dharmalingam-mentally-disabled-worldwide-outcry/>.

submission will urge close cooperation between government officials and civil society organisations working in the area. There is plenty of room for synergy as NGOs often have local knowledge obtained from the local groups whose work they support while consular officials often have official access to governments denied to NGOs.

This synergy also supports a view that the Australian government should provide financial support to organisations like CPJP to ensure their continued existence and effectiveness.

While opposing executions and the death penalty has moments that are frustrating and traumatic when particular efforts are not successful, the work also provides great satisfaction. In Donne's words, we are all diminished by the deaths of others, particularly when those deaths are inflicted in cold blood by the state. Those of us involved in opposing the death penalty feel very fortunate that we have been given the opportunity to oppose such a cruel and inhuman[32] and degrading punishment.

Stephen Keim SC
Chambers
23 July 2024

[32] *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 7.

THEN AND NOW: A PERSONAL REFLECTION UPON THE EXPERIENCE OF INDIGENOUS PEOPLE WITHIN THE CRIMINAL JUSTICE SYSTEM IN AUSTRALIA

Andrew Boe[*]

I Introduction

There can be little doubt that many non-Indigenous Australians[1] have good intentions when they view the plight of Indigenous Australians in our criminal justice system. Within this cohort there are polarised views about how those intentions might manifest in effective change. Yet many non-Indigenous Australians, and some vocal and prominent Indigenous Australians,[2] are reluctant to acknowledge the connection between white colonial settlement and the current disadvantage experienced by many Indigenous communities and individuals, especially within the criminal justice system. The fundamental failing which exists is that many non-Indigenous Australians still view Indigenous people as 'them,' the 'other' and 'not one of us.'

There is clear evidence of chronic over-representation of Indigenous people in gaols in nations where Indigenous communities have been subjected to

[*] Andrew Boe is an Australian barrister.
[1] The use of this term it is intended to include white people descended from British settlers as well as more recent immigrants and refugees including people 'of colour'.
[2] Eg, Jacinta Yangapi Nampijinpa Price and Warren Mundine.

colonial laws.[3] Some argue that '... the objective of settlers was primarily to remove the rich resources of these countries to Europe to enrich the reigning powers."[4] Others have '... addressed the devastating impacts of the Stolen Generations policy and the Northern Territory Emergency Response, acknowledging the role of the police in enforcing these policies and the resultant intergenerational trauma."[5] The consequent theft of Indigenous lands and the systemic destruction of Indigenous language,[6] culture and lore has resulted in a living environment for many Indigenous people which is, using first world metrics, substantially disadvantaged in terms of educational opportunities and outcomes, access to safe housing, and participation in meaningful vocational opportunities when viewed against the rest of the population.

As of 2023, the United States had the highest rates of incarceration in the G20 countries, with around 531 people per 100,000 people. Australia was ninth in the G20 at around 158 people per 100,000 people. Yet when viewed as numbers within their own ethnicity, Indigenous Australians were

[3] See, eg, Greenland (Inuit), North America (Native Indian), Australia (Indigenous), New Zealand (Māori).

[4] Marianne O Nielsen and Linda Robyn, 'Colonialism and Criminal Justice for Indigenous Peoples in Australia, Canada, New Zealand and the United States of America' (2003) 4(1) *Indigenous Nations Studies Journal* 29, 30.

[5] NT Police, Fire & Emergency Services, 'Northern Territory Police Commissioner Delivers Apology Speech at Garma Festival' (Media Release, 3 August 2024).

[6] Noting however that in some places where a treaty was negotiated, Indigenous language has remained intact. Eg, the Māori in New Zealand, and cf the work of Jagera and Dulingbara woman Jeanie Bell who spent a lifetime seeking to preserve Indigenous language: Jeanie Bell, 'Why we do what we do! Reflections of an Aboriginal linguist working on the maintenance and revival of ancestral languages' (2022) 36(1) *Ngoonjook: Australian First Nations' Journal* 84.

incarcerated at the rate of 1,617 people per 100,000 people,[7] which is more than any other country. In the Northern Territory, 'Aboriginal and Torres Strait Islander people are [even more] overrepresented in the prison population at 85%, though they make up [only] 26% of the Territory's population. The children detained are almost exclusively Aboriginal.'[8]

It cannot be rationally suggested that Indigenous people, in Australia or elsewhere, are more genetically criminogenic, so there must be another explanation for the disproportion in the statistics referred to above. One explanation is that colonial laws were framed to focus on the fears and aspirations of the colonial settlers, to protect their sense of security by enabling the ministerially forced acquisition and occupation of traditional lands; so these laws targeted indigenous people.[9] Another is that punishments such as fines with default prison terms meant that very minor offences invariably resulted in the incarceration of the poor.

But perhaps more fundamentally, if criminality reflects structural disadvantage in economic, health and educational systems, there will always be this level of disproportion of the poor and the marginalised in any society being policed, prosecuted and incarcerated.

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[7] Research statistics compiled by the Sentencing Advisory Council of Victoria in 2023. See <https://sentencingcouncil.vic.gov.au/sentencing-statistics/international-imprisonment-rates>.

[8] Justice Reform Initiative, 'New report shows jailing is failing Territorians' (Media Release, 16 September 2022).

[9] See, eg, *Vagrants, Gaming and Other Offences Act 1931* (Qld) s 7 (repealed in 2000). See generally mandatory detention for minor property offences, move on powers and exclusionary zones, curfews, etc.

This paper briefly examines an issue that has troubled if not bewildered non-Indigenous Australians and those at the helm of Australian institutions: how to engage with Indigenous people in a legal context which recognises the racist impact of colonial laws and how to bring meaningful change to the dire statistics of the criminal justice system.

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

Before these matters are examined the author makes it clear that this paper does not attempt to canvass the plethora of scholarly articles on race theory, colonialism, Indigenous culture and practice or for that matter descend to detailed analysis of the relevant judgements. Rather this paper is intended to provoke further discussion through opinions and commentary from the author's experience as a legal practitioner.

Another broad underlying premise is that it is not yet sufficiently recognised that most tenets of the rule of law, as recognised in Australia, are philosophical constructs, which were devised as a means of bringing about social order in largely homogenous societies. This topic has been examined by the author in a recent *Griffith Law Review* paper which is imminently due

for release.[10] It is argued in that paper that the concept of the 'rule of law' is ill-fitting if viewed as a rigid superstructure in a post-colonial society where there is a cohort that has been marginalised through the process of colonisation. And that the statistical over-representation of Indigenous prisoners may be an incident of the structural effect of colonisation for which there is no remedy conformable to imported notions of social disorder. Some tenets of the rule of law, such as 'individualised justice' and 'equality before the law,' are interpreted as requiring that the same law be applied to everyone; a premise which has attracted powerful disagreement.

If a reset[11] is warranted in the way in which police interact with Indigenous people, there is also a need to rethink what comprises the common law of Australia. This will require bravely and candidly examining the circumstances in which laws are enacted and how they are interpreted and applied. On that topic, the author commends a recent extra-judicial speech by McCallum CJ (Australian Capital Territory) which bears close attention, in which her Honour suggested:

> ... we are not hidebound [to the rule of law]. The destructive cycle of disproportionate incarceration of Indigenous offenders can be addressed by the judiciary in a principled way. Justice can be done within the rule of law. The idea of legal equality does not mean that taking special measures in

[10] 'Australia, Drive it like you stole it' *Griffith Law Review* (forthcoming). The article has been accepted for publication and is undergoing editing by the *Griffith Law Review* Board to meet its standards. Similar themes are discussed in it and this paper necessarily utilises some of the points argued in it.

[11] See Matt Garrick, 'NT Police Commissioner Michael Murphy's apology to Aboriginal Territorians offers a "reset"', *ABC News* (online, 6 August 2024) <https://www.abc.net.au/news/2024-08-06/nt-police-apology-garma-festival-offers-chance-to-reset/104183564>.

sentencing indigenous offenders amounts to special treatment or is otherwise unfair.[12]

II There Is an Inherent Structural Racist Bias in the Criminal Justice and Policing Framework

The author's experience,[13] which is admittedly peculiar and perhaps narrow, is that few non-Indigenous Australians have Indigenous people as friends, partners or as people with whom they break bread with.[14] Few have had Indigenous people in their homes or thought about learning their languages or embracing their culture. Except of course if they happen to excel in sport[15] or where they are willing to leave their culture and identity 'at the door' or are selected to entertain us. Whether this lack of contact is a function of opportunity or choice, or sheer inability to see Indigenous people as equal may be debated.

This limited contact and connection can have the effect of dehumanising Indigenous people, resulting in their being viewed as different or even inferior; so it is easier to be unconcerned about their entitlement to enjoy the same rights and protections non-Indigenous Australians assume for

[12] Lucy McCallum, 'The Rule of Law in Modern Australia' (Paul Byrne Memorial Lecture, The University of Sydney, 28 February 2024).
[13] The author has six Indigenous children, the youngest of whom is presently 23 years old and has been *locus parentis* to two non-Indigenous children, now aged 16 and 19 years old.
[14] This is the author's personal experience but see observations made in: Reconciliation Australia, *Australian Reconciliation Barometer 2012* (Report, 2012).
[15] See, eg, when Cathy Freeman won the 400m athletics final at the Sydney Olympics in 2000 after lighting the flame in the Opening Ceremony. The same athlete was officially rebuked by Australian chef de mission Arthur Tunstall for carrying the Indigenous flag after winning the same event at the 1994 Commonwealth Games.

ourselves. It leads to an acceptance of structural unfairness, whether that acceptance is conscious or merely incidental to our sense of sophistication and cultural superiority.

Many of us pay lip service to Indigenous music, art and culture at sporting events or international functions where we want to be seen in a favourable light and often only where 'they' show a sufficient semblance of assimilation so as not to cause us offence. Again, there are exceptions, for example the work of Richard Bell,[16] whose work adorns several Australian galleries as well as the Tate Modern in London, and includes word art such as: 'White People are Lazy', 'Genocide is not Illegal', and 'We don't own our Poverty'.

If any of us slip in our language when speaking about 'them,' we are reluctant to accept that it reflects any inherent racism, and make excuses with responses like: 'this is not who I am;'[17] 'it was just a joke;' and 'it was just a slip of the tongue.'[18] Yet, in almost every state or territory, for many decades, many Indigenous people were charged with using 'offensive' or 'insulting' words during arrest situations with police, taken into custody, convicted and fined.[19] These were fines which most could not pay, and which led to default terms

[16] A visual artist, and a member of the Kamilaroi, Jiman, and Gurang Gurang communities.
[17] Eg, several police officers at the inquest of Kumanjayi Walker in the Northern Territory in 2024, when presented with racist text messages exchanged with constable Rolfe, the constable who had been acquitted of the murder of Kumanjayi Walker after killing him by shooting him three times in the space of seconds at point blank range.
[18] Eg, Eddie McGuire, TV presenter and then president of the Collingwood Football Club, after saying that Indigenous AFL player Adam Goodes might be used to promote the musical 'King Kong,' a reference to a giant fictional ape.
[19] Christine Feerick, 'Policing Indigenous Australians: Arrest as a method of oppression' (2004) 29(4) *Alternative Law Journal* 188.

of incarceration. Some, with a history of these sorts of offences, were even sentenced to imprisonment.[20]

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

Individual racism undoubtedly leads to institutional dysfunction. See for example the Child Death Review Board's 2022-2023 Annual Report from Queensland concerning the reported suicides of two Indigenous boys held in youth detention.[21] One reportedly spent 376 days in a youth detention centre, confined to his cell for more than 22 hours a day on 55 separate days. On 22 days he was in his cell for more than 23 hours. Three times he spent 24 hours in his cell without a break. The other was detained for 319 days, of which he was confined to his cell for 78% of the time.

[20] See, eg, *Vagrants, Gaming and Other Offences Act 1931* (Qld) s 7 (repealed in 2000). See also *Del Vecchio v Couch* [2002] QCA 9, where a young woman was sent to gaol by a magistrate for 3 weeks for saying to a police officer: 'you fucking cunt,' a conviction upheld by the Court of Appeal after the intermediate appeal court reduced the sentence to the seven days she had served. See also Mary S Williams and Robyn Gilbert, *Reducing the unintended impacts of fines* (Indigenous Justice Clearinghouse Current Initiatives Paper 2, January 2011).

[21] The report identified that 47% of youths who died in youth detention centres in Queensland in 2022-2023 were Indigenous.

The report raised concern that the youth detention system – particularly the practice of placing children in separation, isolation or solitary confinement – can affect their health and wellbeing in 'severe, long-term and irreversible ways.'[22] 'Many of the children and young people in detention have experienced a life of significant disadvantage and marginalisation, with many being the victims of abuse and neglect,' it said.[23]

> Being confined in a cell for extended periods of time, without interaction with peers, family, culture and support networks creates an environment of re-traumatisation. Research has shown pre-existing mental health problems are likely exacerbated by experiences during incarceration, such as isolation, boredom and victimisation.[24]

Most of the recorded separations were explained as due to staff shortages.[25]

Try imagining this: that Australia was invaded by the Burmese and they changed the legal landscape under which we were all required to live.[26] We were prevented from speaking English and faced systemic bigotry about the food we ate, how we ate, the values we held and the culture we wished to preserve. The playing of rugby and cricket were banned and replaced with *Chinlone* (a game a bit like volleyball but with a cane ball, using your feet) and

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[22] Queensland Family & Child Commission Child Death Review Board, *Annual Report 2022-23* (Report, 31 October 2023) 38.
[23] Ibid.
[24] Ibid.
[25] Ibid. See also Ibid 41. See also Ben Smee, 'Concerns raised over solitary confinement in Queensland youth detention after deaths of two First Nations boys', *The Guardian* (online, 15 March 2024) <https://www.theguardian.com/australia-news/2024/mar/15/queensland-youth-detention-solitary-confinement-first-nations>.
[26] The author was born in Burma and is ethnically Burmese.

table tennis as the national sports. The Melbourne Cricket Ground was razed to the ground to make way for a Buddhist temple surrounded by *Chinlone* courts, with no regard to hundreds of years of cricketing and AFL heroics.

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

How would we feel? How might we be affected by their common law?

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

The apology from the NT Police Commissioner referenced above[27] must not be the coda of the effort to eradicate racism in the police force like too many earlier apologies to Indigenous people by politicians and government officials when their actions have been exposed. Words are cheap. The commissioner's

[27] See above n 5: 'Today, as commissioner of the Northern Territory police, I unequivocally say: I am deeply sorry to all Aboriginal Territorians for the past harms and the injustices caused by members of the Northern Territory police.' See also Karen Middleton, 'NT police commissioner's apology means nothing without sacking racist officers, top lawyer says', *The Guardian* (online, 5 August 2024) <https://www.theguardian.com/australia-news/article/2024/aug/05/garma-2024-nt-police-commissioner-apology-racist-officers-northern-territory-ntwnfb>.

apology and words of reset must be matched with decisive action driven by those who embody, or fully embrace the need for, Indigenous led solutions. This may prove to be especially difficult given that the Northern Territory Police Association[28] criticised the making of this apology and some aspects of it which led to the commissioner resigning from that association a few days later.

III Sentencing and Bail Options Disfavour Those Who Live in Poverty or Are Homeless[29] (A High Proportion of Whom Are Indigenous)

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

First, it must not come as any surprise that the systemic racism recently exposed in some police services[30] will affect the police discretion when it

[28] The Northern Territory Police Association represents most members of the police in the Territory.

[29] The author commends a scholarly article by Philip Lynch and Jacqueline Cole published in Volume 4 of the *Melbourne Journal of International Law*, 2003: 'Homelessness and human rights: Regarding and responding to homelessness as a human rights violation'.

[30] See, eg, the 2022 comments of then-Commissioner of the Queensland Police Service, Katarina Carroll: 'The inquiry did uncover instances of racism and sexism

comes to policing, charging and the release on bail of an alleged offender who is Indigenous.[31]

An example of policing practice which has an unintended consequence is one that was utilised by the New South Wales Police Force (**NSW Police**): the Suspect Targeting Management Plan (**STMP**). The STMP was a bit like the system used in the sci-fi movie *Minority Report*.[32] It sought to prevent future offending by targeting repeat offenders and people police believed were likely to commit future crimes. The STMP was both a police intelligence tool that used risk assessment to identify suspects and a policing program that guided police interaction with individuals who were subject to the program. However, a detailed study of its use unsurprisingly revealed that it resulted in unduly targeting Indigenous youth in urban settings. After many years of

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and misogyny and for an organisation that is so important to the community that we serve that is unacceptable' after a Commission of Inquiry found 'ample evidence of sexism and racism in the QPS'. See also Lillian Rangiah, 'Former UN and military advisor hired to clean up Queensland police culture', *ABC News* (online, 19 November 2022) <https://www.abc.net.au/news/2022-11-19/qld-police-service-sexism-racism-commission-inquiry-report-mckay/101674794>. See also the August 2024 apology from Commissioner Murphy to Territorians (See above n 5).

[31] Eg, Yoorrook commissioner Travis Lovett acknowledged that 'systemic racism and discriminatory action in the Victorian police force had gone undetected, unchecked and unpunished,' prompting the Police Commissioner Shane Patton to 'formally and unreservedly apologise for police actions that have caused or contributed to the trauma experienced by so many Aboriginal families in our jurisdiction.' See Adeshola Ore, 'Victoria's police chief apologises for systemic racism and discrimination against Indigenous Australians', *The Guardian* (online, 8 May 2023) <https://www.theguardian.com/australia-news/2023/may/08/victoria-police-force-apology-first-nations-chief-shane-patton-apologises-systemic-racism-discrimination-indigenous-australians>.

[32] (20th Century Fox et al, 2002). The film takes place in Washington, D.C. and Northern Virginia in the year 2054, where 'Precrime,' a specialized police department, apprehends criminals by the use of foreknowledge provided by three psychics called 'precogs.'

advocacy by the Public Interest Advocacy Centre,[33] the NSW Police abandoned the STMP.[34]

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

Finally, even where there is an acceptance that an offender's Indigeneity warrants specific attention in an individual case, there is little if any guidance in the authorities as to how that might be practically used to determine the appropriate sentence. Merely leaving it to the particular judge to determine is fraught with problems, even accepting that the sentencing discretion is regarded as a wide discretion. Not providing that a discernible allowance should be made also makes the exercise almost impossible to review. This is a big discussion, not just about the reduction of the term of imprisonment but also about what revision should be made of the modes of punishment that are available. It is a discussion in which many of us will disagree, but it is a discussion that has not yet been had.

IV The Co-Existence with Indigenous People in Australian Society Remains Systematically Unfair

There have been points in Australia's recent history where the treatment of Indigenous people has attracted political and public attention. On 27 May

[33] Now the Justice and Equity Centre.
[34] See Vicki Sentas and Camilla Pandolfini, *Policing Young People in NSW: A Study of the Suspect Targeting Management Plan* (Report, 25 October 2017).

1967, Australians voted to change the *Constitution* so that, like all other Australians, Aboriginal and Torres Strait Islander peoples would be counted as part of the population and the Commonwealth would be able to make laws for them. A resounding 90.77 per cent said 'Yes' and every single state and territory had a majority result for the 'Yes' vote. It was one of the most successful national campaigns in Australia's history. It highlighted the racist political and legal framework within which Australia operated since the Australian *Constitution* was enacted in 1901, a document largely written by jurists and politicians who are still generally revered. Such frameworks allowed racist legislation which dehumanised Indigenous people such as the *Vagrants, Gaming and Other Offences Act*[35] to be enacted,[36] albeit by a state Parliament in 1931.

In 2000, at the time of the Sydney Olympics when Australia was again under the international gaze, in a monumental display of support for reconciliation, around 250,000 Australians walked across the Sydney Harbour Bridge. It raised significant hope. Professor Henry Reynolds[37] noted at the time: 'It was one of the most significant political mobilisations in the country's history.' It followed on from landmark inquiries such as the *Royal Commission into Aboriginal Deaths in Custody* in 1991 and the *National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* in 1997.

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35 *1931* (Qld) (repealed in 2000).

36 The Second Reading speech bears close examination. It includes references to Indigenous women as 'gins' and decries white men who chose to partner with them.

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

On 13 February 2008, Prime Minister Kevin Rudd offered a formal apology to Australia's Indigenous peoples, particularly the Stolen Generations, on behalf of the nation. It included a 'reflection on their past mistreatment' and 'apologised for the laws and policies of successive Parliaments and governments that have inflicted profound grief, suffering and loss.'[38]

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

And of course, the Voice referendum in 2023 failed to pass a modest reform that would have required the Australian Parliament to listen to an Indigenous panel as to the effect of laws which would likely affect them.[39] It is not intended to canvass here the obvious complexities and political machinations that may explain the vote at this referendum; however, it does exemplify how difficult it is to persuade the non-Indigenous Australians to adjust their thinking about Indigenous Australians.

This difficulty might explain the announcements by Prime Minister Albanese stepping back from his pre-election commitment to a federally funded Makarrata. 'Makarrata' is a Yolgnu word meaning 'a coming together after a

[38] The Opposition leader at the time of writing, Peter Dutton MP left the parliamentary chamber as a personal protest against the Australian Parliament providing such an apology. Mr Dutton was later successful in leading the 'No' vote against the Voice referendum.

[39] On 14 October 2023, Australians voted in a referendum about whether to change the *Constitution* to recognise the First Peoples of Australia by establishing a body called the Aboriginal and Torres Strait Islander Voice. The question that was put to the Australian people: 'A Proposed Law: to alter the *Constitution* to recognise the First Peoples of Australia by establishing an Aboriginal and Torres Strait Islander Voice. Do you approve this proposed alteration?' The referendum did not pass.

struggle.' A Makarrata Commission would have two roles: supervising a process of agreement-making and overseeing a process of truth-telling.[40] Perhaps it is too harsh to view Albanese's earlier commitment as a mere platitude within an election cycle, rather than his getting cold feet following the rejection of the Voice referendum, yet that is how many must feel.

The symbolism associated with some of the positive events is of course important, but has little value unless matched with a structured commitment to change. The makeup of our courts is one aspect that bears examination. The intentional redress of the gender imbalance on our courts has only improved their capacity and function,[41] not just in the case of the High Court but, and importantly, courts lower in the hierarchy, which have to exercise judicial discretion far more frequently. The absence of Indigenous judges might be explained by percentages of Indigenous people in the community. However, given the disproportionate number of Indigenous people who are sentenced in our criminal courts there is a need for an intentional redress. The fact that there has literally been fewer than a handful of Indigenous judges appointed to 'superior courts,'[42] and none ever to the High Court, must be the subject of a concerted effort by the executive, just as the gender issue has been addressed.[43]

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[40] *Uluru Statement from the Heart* (26 May 2017).

[41] The author is unable to find statistical support for this assertion. It is his perception.

[42] The exceptions of which the author is aware are Warramunga man, Crowley J in Queensland (2022) and Kamilaroi woman, Taylor J in the Australian Capital Territory (2023).

[43] It is self-evident that more judges of 'colour' and from non-English speaking countries should also be appointed.

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

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

As has often been said, good intentions by good people can still lead to unintended consequences.

V Conclusion

Until recently, white men have been over-represented in all state and federal Parliaments. The same cohort has, until recently, also been over-represented in the judiciary across the nation. Those who police the laws are, still, mostly white men, many of whom likely bring in their skills and prejudices after serving in the military.[44] Most if not all of the police forces in which they

[44] This paper will not examine the impact of military experience upon those who become police officers, however the author commends the work of Dr Dobos, Senior Lecturer, International and Political studies at UNSW Canberra (located at the ADF Academy) on the subject which includes this chilling view: '… military conditioning can potentially cause so-called "moral injury." Ethicists use this term to describe the loss of goodness or virtue or human decency. It has been variously defined as "character deterioration;" "damage to a person's moral foundation" and "corrosion of moral foundation;" an unseen wound that "reduces the functioning or impairs the performance of the moral self,'" in his evidence admitted in the inquest into the death of Kumanjayi Walker, where an Indigenous teenager was shot and killed at point blank range by a police constable who had served in the ADF.

operate remain bastions of racism towards Indigenous people. Yet, as a cohort, they are much more likely to interact with Indigenous people than any other group in Australian society.

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

But more fundamentally, despite the hopes and aspirations of the Australian people, most of us remain largely ignorant of Indigenous lore, language and culture; too many of us are distracted by our own desire to acquire and maintain material wealth and by our vested lifestyle pursuits. Politicians do not blink at spending millions on infrastructure such as a new sport stadium, refurbishing a North Sydney swimming pool or renovating the national war memorial,[45] yet remain miserly when faced with the cost of reforming a system to address what Chief Justice McCallum described as a 'chronic failing in the administration of justice.'

Perhaps a significant part of the answer lies in re-examining the utility of imprisonment as the singular form of condign punishment and asking what may be a more effective means of deterrence for most members of the

[45] The cost of the renovation of the Brisbane Cricket Ground is estimated to be $2.7 billion. The current estimate for the refurbishment of the iconic North Sydney swimming pool is now reportedly in excess of $100 million. In 2018 the latest renovation to the Australian War Memorial in Canberra was estimated at $500 million.

Indigenous community, given what we now know about what was effective for millennia before this place was shrouded with colonial concepts of the rule of law.

In decades to come, the lack of recognition of the post-colonial devastation wreaked upon Indigenous people as relevant and compelling, amounting to a form of mitigation that requires particular focus, will be a matter of considerable regret and shame. Nevertheless, until our Parliaments recognise their power to reframe aspects of the rule of law, and despite several significant declarations of good intentions and the valiant efforts of individuals in the justice system, there will be no discernible change in the statistics.

Perhaps it is too harsh to quote from Martin Luther King Jr's *Letter from a Birmingham Jail*:[46]

> First, I must confess that over the past few years I have been gravely disappointed with the white moderate. I have almost reached the regrettable conclusion that the Negro's great stumbling block in his stride toward freedom is not the White Citizen's Counciler or the Ku Klux Klanner, but the white moderate, who is more devoted to 'order' than to justice; who prefers a negative peace which is the absence of tension to a positive peace which is the presence of justice; who constantly says: 'I agree with you in the goal you seek, but I cannot agree with your methods of direct action;' who paternalistically believes he can set the timetable for another man's freedom; who lives by a mythical concept of time and who constantly advises the Negro to wait for a 'more convenient season.' Shallow

[46] 16 April 1963.

> understanding from people of good will is more frustrating than absolute misunderstanding from people of ill will.
>
> Lukewarm acceptance is much more bewildering than outright rejection.

Perhaps not. The status quo in respect of Indigenous disadvantages in the Australian criminal justice system remains our collective shame as a nation: 'our [children] will not [and should not] forgive in us what we forgave.'[47]

[47] Paraphrasing of Yevgeny Yevtushenko, *Lies* (1952).

PROMISE AND PAIN: THE HISTORICAL AND SOCIAL CONTEXT BEHIND AUSTRALIA'S FIRST NATIONS MASS INCARCERATION CRISIS[1]

Dr Russell Marks[*]

Thirty years ago, the relationship between Settler Australia and the First Nations appeared to be on the cusp of a significant rebalancing. In April 1991, one of Australia's longest and most high-profile royal commissions – that into the reasons why so many Aboriginal and Torres Strait Islander people were dying in custody – had delivered its five-volume national report.[2] In June 1992, the High Court had at long last found that Australia's common law recognised a limited form of 'native title',[3] more than 150 years after courts

[1] Portions of this paper were originally published in earlier forms in *Black Lives, White Law: Locked Up and Locked Out in Australia* (La Trobe University Press in association with Black Inc, 2022); 'Review – Behrouz Boochani's Freedom, Only Freedom: The Prison Writings of Behrouz Boochani', *The Saturday Paper* (online, 25 March 2023) <https://www.thesaturdaypaper.com.au/culture/books/2023/03/31/freedom-only-freedom-the-prison-writings-behrouz-boochani> ('Review – Freedom, Only Freedom'); and *Island Magazine* (2024) No 169.

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[2] Elliott Johnston, *Royal Commission into Aboriginal Deaths in Custody* (Final Report, April 1991).

[3] *Mabo and Others and the State of Queensland [No. 2]* (1992) 175 CLR 1 ('*Mabo v Queensland (No 2)*').

in North America[4] and New Zealand[5] had reached similar conclusions. In December that same year, during an iconic speech at Redfern Park, Paul Keating acknowledged that it was 'we' – the settlers – 'who did the dispossessing', who 'took the traditional lands and smashed the traditional way of life':[6] these facts had been denied by settler governments for two centuries.[7] The following year, Keating's Labor government won an impossible election[8] and then – after Nicky Winmar made his defiant and inspirational response to spectators' racist abuse at Victoria Park in Melbourne[9] – shepherded the *Native Title Act*[10] through Parliament.

If they didn't quite promise an optimistic future in Australian race relations, the 1990s at least allowed for its possibility, not least among believers in social progress. In the two centuries since Britons, and then others, had come across the seas to stay, massacres[11] and land thefts[12] had made way for the arguably

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4 See, eg, *Johnson v McIntosh* 21 US (8 Wheat) 543. But see Frank Pommersheim, *Broken Landscape: Indians, Indian Tribes, and the Constitution* (Oxford University Press, 1st ed, 2009) 105.

5 See, eg, *R v Symonds* (1847) NZPCC 388.

6 Paul Keating, 'Redfern Address' (Speech, Australian Launch of the International Year for the World's Indigenous People, Redfern Park, 10 December 1992) 3.

7 See generally Bain Attwood, 'Denial in a Settler Society: The Australian Case' (2017) *History Workshop Journal* 24, 24.

8 See, eg, Bruce Jones, 'The Keating Miracle', *The Sun-Herald* (Sydney, 14 March 1993).

9 See Nick Place and Gary Linnell, 'Nicky Winmar's Stand Against Racism', *The Age* (Melbourne, 18 April 1993).

10 *Native Title Act 1993* (Cth) ('*Native Title Act*').

11 See generally Lyndall Ryan et al, 'Colonial Frontier Massacres, Australia, 1788 to 1930 – Map', *University of Newcastle* (Web Page, 2022) <https://c21ch.newcastle.edu.au/colonialmassacres/map.php>.

12 See, eg, *Mabo v Queensland (No 2)* 69 (Brennan J). See also Marks, *Black Lives, White Law* (n 1) 72; Gary Foley and Tim Anderson, 'Land Rights and Aboriginal Voices' (2006) 12(1) *Australian Journal of Human Rights* 83.

milder terrors of legalised discrimination and race-based child removal.[13] Then even these terrors ended with a series of state-based wage equalisation[14] and other decisions, and the passage of the *Racial Discrimination Act*[15] in June 1975. Since then, treating people differently on the basis of their 'race' or ethnicity has been unlawful,[16] and people who have experienced such unlawful treatment have had recourse to civil remedies, as long as they've been able to access them.[17] The first generation raised in the era of equal civil rights came of age during the late 1980s and 1990s.

So why is it the case, in 2024, when a mere 3.5 per cent of Australia's population identifies as Indigenous,[18] that Aboriginal and Torres Strait Islander people account for a full third of all prisoners in Australia's jails,[19] half of all children in Australia's detention centres,[20] and frequently all

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[13] See Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Report, 26 May 1997) ('*Bringing Them Home*').
[14] See, eg, *In the matter of the Conciliation and Arbitration Act 1904-1965, and of the Cattle Station (Northern Territory) Award 1951* (Award, Commonwealth Conciliation and Arbitration Commission, Case No 830 of 1965) reported in (1966) 113 CAR 651. But see Thalia Anthony, 'Reconciliation and Conciliation: The Irreconcilable Dilemma of the 1965 "Equal" Wage Cases for Aboriginal Station Workers' (2007) 93 *Labour History* 15, 15–16.
[15] *Racial Discrimination Act 1975* (Cth).
[16] See ibid s 9.
[17] See generally Fiona Allison and Jodie Luck, 'Rethinking Access to Racial Justice: Race Discrimination and First Nations People' [2020] 159 *Precedent (Sydney, NSW)* 8, 9–10.
[18] See Australian Bureau of Statistics, *Estimates of Aboriginal and Torres Strait Islander Australians* (previously Catalogue No 3238.0.55.001, 30 June 2021).
[19] See Australian Bureau of Statistics, *Corrective Services, Australia* (previously Catalogue No 4512.0, 19 September 2024).
[20] See Australian Institute of Health and Welfare, *Youth Detention Population in Australia 2023* (Web Report, 13 December 2023) 8, 11, 24 <https://www.aihw.gov.au/reports/youth-justice/youth-detention-population-in-australia-2023/contents/first-nations-young-people>.

children in Darwin's notorious Don Dale Youth Detention Centre?[21] And at a time when we have never been more conscious of the ways in which women are mis-identified as perpetrators of domestic violence,[22] why is it that Indigenous women are now the fastest-growing cohort in Australian prisons?[23]

I'm a criminal defence lawyer, so I'm focusing on these statistical 'markers of disadvantage' – but there are plenty of others, as the annual *Closing the Gap* reports identify.[24] Of course, there are various ways of thinking about statistics like these. By far the most common – to the extent that doing so has achieved a hegemonic status among the armies of researchers and policy workers deployed in the interests of the settler state – is that many Indigenous people are disadvantaged by their birth into families blighted by poverty, ignorance, violence, mental illness or intoxicants, and frequently by a combination of all five.[25] The solution, then, is to tackle each of these markers, and to gradually 'close the gap' between the statistics generated by Indigenous families and those generated by Australians generally.

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[21] See, eg, Lorena Allam, '"System is Broken": All Children in NT Detention are Aboriginal, Officials Say', *The Guardian* (online, 31 May 2019) <https://www.theguardian.com/australia-news/2019/may/31/system-is-broken-all-children-in-nt-detention-are-aboriginal-officials-say?CMP=share_btn_url>.

[22] See, eg, Legal and Social Issues Committee, Legislative Council of Victoria, *Inquiry into Victoria's Criminal Justice System* (Final Report, 24 March 2022) 232–44, 335–6.

[23] Deirdre Howard-Wagner and Chay Brown, 'Increased Incarceration of First Nations Women is Interwoven with the Experience of Violence and Trauma', *The Conversation* (online, 6 August 2021) <https://theconversation.com/increased-incarceration-of-first-nations-women-is-interwoven-with-the-experience-of-violence-and-trauma-164773>, discussing Australian Bureau of Statistics, *Corrective Services, Australia* (previously Catalogue No 4512.0, 3 June 2021).

[24] See, eg, Australian Government, *Commonwealth Closing the Gap Annual Report 2022* (Report, 30 November 2022).

[25] See generally ibid.

Imprisonment and, indeed, participation in the kinds of criminal behaviour that gets you locked up is much more likely if you're dealing with disadvantages.[26] So, says the policy view which dominates governments, close the gap and the incarceration rate will take care of itself.

Unhappily, of course, this line of thinking also supports – and excuses – some of the terrors Settler Australia prefers to believe don't happen anymore. Among the most terrible is child removal, which continues to occur[27] much for the same reasons it did during the 'protection' and discrimination eras – namely, to prevent the removed child from being abused and/or neglected[28] – though our definitions of what constitutes 'abuse' and 'neglect' are no longer discriminatory.[29] (At least, not overtly: it's common for child protection workers to compare their subjects' living conditions with their own and declare them substandard.)[30] The settler state's child 'protection' departments convince themselves (and, routinely, courts) that it is sometimes

[26] See Johnston (n 2) vol 1 ch 1 [1.7.1].
[27] See Heather Douglas and Tamara Walsh, 'Continuing the Stolen Generations: Child Protection Interventions and Indigenous People' (2013) 21(1) *The International Journal of Children's Rights* 21(1).
[28] See generally *Bringing Them Home* (n 13) 25–8. See also Ingrid Matthews and Lynda Holden, 'The Colonial Logic of Child Removal' (2023) 29(3) *Australian Journal of Human Rights* 551.
[29] Cf *State Children Act 1895* (SA) s 4 (definitions of 'destitute child' and 'neglected child'), discussed in *Bringing Them Home* (n 13) 104.
[30] See, eg, Adeshola Ore, 'Racism is Contributing to Unsubstantiated Child Protection Reports, Victorian Commission Hears', *The Guardian* (online, 11 May 2023) <https://www.theguardian.com/australia-news/2023/may/11/racism-is-contributing-to-unsubstantiated-child-protection-reports-victorian-commission-hears?CMP=share_btn_url>; Stephanie Richards, 'Aboriginal Children "Unnecessarily" Removed from Families, Communities in SA, Report Finds' *ABC News* (online, 5 June 2024) <https://www.abc.net.au/news/2024-06-05/aboriginal-children-and-young-people-report-south-australia/103936806>, discussing April Lawrie, *Inquiry into the Application of the Aboriginal and Torres Strait Islander Child Placement Principle in the Removal and Placement of Aboriginal Children in South Australia* (Final Report, May 2024).

necessary to remove children from their parents. But it is by no means a sure thing that the places they get removed to are much better.[31] And even if they are, very little is done to address the trauma of being removed.[32] Revelations of children being abused and neglected in the so-called 'care' of the state are now depressingly routine,[33] and children who have survived 'care' very often graduate into detention centres and then prisons.[34]

What, one might ask, is the point of all this removing and incarcerating? Statistical gaps aren't closing; indeed, being removed and then locked up seems, if anything, to augment the chances that you'll commit a serious crime.[35] It's a very expensive exercise.[36] Lawyers do very well out of it, but they're among the select few who do. The answer, I suspect, lies in the historical story that's been expunged by the modern commitment to formal equality.[37]

The record says Arthur Phillip arrived with his instructions to 'endeavour by every possible means to open an intercourse with the natives, and to conciliate

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[31] See, eg, Secretariat of National Aboriginal and Islander Child Care, *Family Matters Report 2022: Measuring Trends to Turn the Tide on the Over-representation of Aboriginal and Torres Strait Islander Children in Out-of-Home Care in Australia* (Report, 22 November 2022) 29–30 ('*Family Matters Report 2022*'). See generally Australian Institute of Family Studies, 'Child Protection and Aboriginal and Torres Strait Islander Children', *Child Family Community Australia* (Resource Sheet, January 2020) <https://aifs.gov.au/sites/default/files/publication-documents/2001_child_protection_and_atsi_children_0.pdf>.

[32] See, eg, *Bringing Them Home* (n 13) 168.

[33] *Family Matters Report 2022* (n 31) 29–30.

[34] See Australian Law Reform Commission, *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Final Report No 133, 2017) 74–7 [2.74]–[2.84] ('*Pathways to Justice*').

[35] See Johnston (n 2); *Pathways to Justice* (n 34).

[36] *Pathways to Justice* (n 34) 125 [4.1].

[37] Ibid 23.

their affections', and indeed to punish convicts or settlers who killed or hurt them.[38] But the truth is that Phillip, the Colonial Office and the British government they were part of were most interested in colonising the Australian continent, heedful of Adam Smith's recent promise that 'the colony of a civilised nation which takes possession either of a waste country, or of one so thinly inhabited that the natives easily give place to the new settlers, advances more rapidly to wealth and greatness than any other human society'.[39] On the strength of the full week he'd spent in Botany Bay a mere 18 years before Phillip arrived, the now-famous botanist Joseph Banks had ensured that nobody was anticipating much resistance from the 'naked' and 'extremely cowardly' natives he'd described to all and sundry.[40] So when the settlers encountered resistance there were initially confused by it.[41] Then they obliterated it, in act after genocidal act, for nearly 150 years.[42]

Very little of this was lawful, according to the law the colonists brought with them from Britain. Even in British law of the late eighteenth century, warfare required an initiating declaration of war.[43] None was ever made on the Australian mainland, because the colonial authorities chose to declare that the

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38 Instructions from George III to Arthur Phillip, 27 April 1787, 15.
39 Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (9 March 1776) bk IV ch VII pt 2.
40 See *Journals of the House of Commons*, House of Commons, vol 31 (1 April 1779) 311.
41 See Marks, *Black Lives, White Law* (n 1) 39.
42 See generally Lyndall Ryan, 'Frontier Massacres in Australia, 1788–1928' in Ned Blackhawk et al, *The Cambridge World History of Genocide* (Cambridge University Press, 2023) 461, 461–80.
43 See William Blackstone, *Commentaries on the Laws of England* (17th ed, 1830) bk 2 ch 4, 106–8 ('*Blackstone's Commentaries*'); Elizabeth Evatt, 'The Acquisition of Territory in Australia and New Zealand' in Charles Henry Alexandrowicz (ed), *Grotian Society Papers 1968: Studies in the History of the Law of Nations* (1st ed, 1970) 16. See generally Frederic J Baumgartner, *Declaring War in Early Modern Europe* (Palgrave Macmillan, 1st ed, 2011) 1, 115.

'natives' were magically British subjects, who were entitled to the same rights and privileges, and subject to the same demands, as the colonists themselves.[44] Rarely has a more preposterous fiction been dreamed up, of course: those rights and privileges remained elusive to the First Nations until the 1970s,[45] by which time they'd been well and truly dispossessed of their primary economic resource, and most of their cultural and spiritual ones.[46] But the magical transformation of First Nations into British subjects with rights they couldn't prosecute allowed Australian authorities (and textbooks) to claim, even as late as the 1990s, that the Australian colonisation was unique in that it was peaceful.[47]

In much the same way that British progressives in the half-century to 1865 felt morally superior to Americans because they'd abolished the slave-trade first,[48] twenty-first century Settler Australians feel superior to our forebears because we no longer massacre or discriminate. We do, however, continue to enjoy the fruits of those who did, at the continuing expense of those whose

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[44] See Johnston (n 2) vol 2 ch 10 [10.3.4]–[10.3.18].
[45] See, eg, *Aboriginal Land Rights (Northern Territory) Act 1976*.
[46] See Linda Archibald, *Decolonization and Healing: Indigenous Experiences in the United States, New Zealand, Australia and Greenland* (Report, 2006) 49, cited in Chris Cunneen, 'Sentencing, Punishment and Indigenous People in Australia' (2018) 3(1) *Journal of Global Indigeneity* 15. See generally Public Defenders NSW, 'Cultural Dispossession Experienced by Aboriginal and Torres Strait Islander Peoples', *Bugmy Bar Book* (Online Resource, November 2020) <https://www.publicdefenders.nsw.gov.au/Pages/public_defenders_research/bar-book/pdf/BBP_CulturalDispossession_chapter-Nov2020.pdf>.
[47] See Henry Reynolds, *Truth-Telling: History, Sovereignty and the Uluru Statement* (NewSouth Publishing, 2021), cited in Marks, *Black Lives, White Law* (n 1) 71. See also Evatt (n 43) 18, cited in Marks, *Black Lives, White Law* (n 1) 71; Attwood (n 7) 33–5.
[48] See Padraic Scanlan, 'The Emancipated Empire', *Aeon* (Blog Post, 22 October 2021) <https://aeon.co/essays/the-british-empire-was-built-on-slavery-then-grew-by-antislavery>.

ancestors survived. John Howard's formula – we do not need to apologise for the acts of our forebears[49] – is convenient for a settler population that prefers not to think about the illegal and genocidal basis of our property rights, or indeed our entitlement to this continent. But it's no more than that.

In 1836, the New South Wales Supreme Court was asked – by Sidney Stephen, the nephew and cousin of prominent abolitionists – to dismiss a murder charge which had been brought against an Aboriginal man.[50] Stephen's argument – which was that the criminal law of New South Wales could not possibly apply to Aboriginal people, because they hadn't been conquered and there hadn't been a treaty – was legally spot-on, but politically unviable, and was dismissed by the court's judges on the basis that the continent had been 'settled'.[51] The same fiction arose two generations later when a judge of London's Privy Council held – without citing any evidence – that the Australian continent had been 'practically unoccupied, without settled inhabitants or settled law' when it had been annexed by Britain.[52] That 1889 decision, *Cooper v Stuart*,[53] has never been overturned, and nods to its continuing status as a fundamental precedent can be found even in the High Court's allegedly revolutionary decision in *Mabo v Queensland (No 2)*[54] more than a century later.[55]

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[49] Anne Davies, 'Nothing to Say Sorry For: Howard', *The Sydney Morning Herald* (online, 12 March 2008) <https://www.smh.com.au/national/nothing-to-say-sorry-for-howard-20080312-gds4t6.html>.
[50] See *R v Jack Congo Murrell* (1836) 1 Legge 72, discussed in Marks, *Black Lives, White Law* (n 1) 61–3.
[51] Ibid.
[52] *Cooper v Stuart* (1889) 14 App Cas 286.
[53] Ibid.
[54] *Mabo v Queensland (No 2)* (n 3).
[55] See, eg, ibid 36–8 (Brennan J), 103 (Deane and Gaudron JJ). But see ibid 38–40 (Brennan J), 180–1 (Toohey J).

What is the utility of dredging up this legal history? To make the uncomfortable point that the source of the sovereign law-making power – the Crown – has no legally legitimate presence on the Australian continent. The continent was never 'settled' in the sense intended by William Blackstone in his *Commentaries on the Laws of England*,[56] and there was neither declaration of war nor voluntary cession by treaty (or treaties).[57] This is not a claim that belongs in online communities of paranoid YouTubers. Yet the power of the Australian settler state is so overwhelming that the only practical way to prosecute it is to appeal to the state's democratic self-image and to the moral conscience of its subjects.

It's not enough that the Australian settler state, and Australian law, is now non-discriminatory. Buried beneath the settler state's modern legal liberalism is a history of genocidal violence, which only stopped when the settler state no longer had any need for it, because it had done its job.[58] The only way of participating in the modern liberal settler-state is as a law-abiding economic citizen. Since they were allowed to, beginning in the 1960s, many Indigenous people have become that citizen. But many have continued to struggle to do so. It's not an easy thing to simply shrug off the trauma of successive generations of systemic state violence.[59]

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[56] *Blackstone's Commentaries* (n 43).
[57] See generally Rowan Nicholson, 'Was the Colonisation of Australia an Invasion of Sovereign Territory?' (2019) 20(2) *Melbourne Journal of International Law* 493.
[58] See Robert van Krieken, 'The Barbarism of Civilization: Cultural Genocide and the "Stolen Generations"' (1999) 50(2) *The British Journal of Sociology* 297.
[59] See Karen Menzies, 'Understanding the Australian Aboriginal Experience of Collective, Historical and Intergenerational Trauma' (2019) 62(6) *International Social Work* 1522; David McCallum, 'Law, Justice and Indigenous Intergenerational Trauma—A Genealogy' (2022) 11(3) *Journal for Crime, Justice and Social Democracy* 165.

Imprisonment and child removal are the present forms that this violence takes. Despite what we collectively know about how damaging these policies are to individuals and families,[60] and how futile they are in promoting individual reform and social progress,[61] and how expensive they are,[62] governments continue to devote enormous portions of their annual budgets to them.[63] It is depressingly common for government child protection departments to apply for court orders removing children into their 'care', and then to systematically neglect those children.[64] I've lost count of the number of children I've represented who, despite being in the 'care' of child protection departments, are never even enrolled in a school. One child who was removed from his family spent much of his childhood and adolescence in custody, mostly on property-related charges. Despite being in the 'care' of child protection, no effort was ever made to ensure that he had enough food to eat. A community member recently helped him to apply for a Youth Allowance payment (which is something else the department could have done, but did not). He has now stopped offending, and says that because he now has enough money to buy food, he doesn't need to steal it.

Students are solemnly told that freedom is among the highest of our values, that everyone is innocent until proven guilty, that imprisonment is the gravest of all punishments. These are platitudes, largely, just as when earlier generations of settlers told themselves that the First Nations enjoyed all the

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[60] See, eg, *Pathways to Justice* (n 34) ch 2 55–85.
[61] See, eg, Holland et al, 'Resisting the Incarceration of Aboriginal and Torres Strait Islander Children: A Scoping Review to Determine the Cultural Responsiveness of Diversion Programs (2024) *First Nations Health and Wellbeing – The Lowitja Journal.*
[62] *Pathways to Justice* (n 34) 125 [4.1], 127–8 [4.9]–[4.13].
[63] See, eg, Mia Schlicht, *The Cost of Prisons in Australia: 2023* (Report, June 2024) 5–8.
[64] See *Family Matters Report 2022* (n 31) 29–30.

rights and freedoms of British subjects. The current platitudes are belied by the ever-expanding remand population in prisons,[65] and by the ever-lengthening periods of time people spend in the purgatory of remand,[66] neither guilty and punished nor innocent and free. People merely accused of crimes are now routinely waiting longer for summary hearings in local and magistrates' courts than they waited mere decades ago for Supreme Court trials.[67] When people are acquitted after spending as much as a year or even two on remand – as happened to a recent client of ours, whose home was ten hours' drive from Darwin – the state simply shrugs, pushes him out the prison gates, and doesn't offer even so much as a bus ticket back home.

The bail application, conducted on vague balances of probabilities and risk, has become the de facto trial: when bail is denied, punishment commences in a form that is remarkably similar to – and often worse than – imprisonment as punishment.[68] It would not cost governments much more than they're currently spending on 'criminal justice' to appoint a few more judges and prosecutors, and to demand that prosecutors comply with their statutory obligations to disclose evidence to defendants, to clear court lists so that summary hearings can again be heard within days or weeks (rather than months) of the charge or arrest, and so that trials can be heard within weeks or months (rather than years). But no government is all that much interested in freedom, or even efficiency, despite what they claim.

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[65] *Pathways to Justice* (n 34) 102–6 [3.35]–[3.43].
[66] See, eg, Stephanie Ramsey and Jackie Fitzgerald, *Offenders Sentenced to Time Already Served in Custody* (Issue Paper No 140, May 2019) 1–4.
[67] See Queensland Government, *Criminal Procedure Review – Magistrates Courts* (Summary Report, 2023) vol 1, 28–32 [2.29]–[2.36].
[68] See 'Australia's Shame', *Four Corners* (Australian Broadcasting Corporation, 2016) <https://www.abc.net.au/news/2016-07-25/australias-shame-promo/7649462>.

Why? Democracy provides one straightforward reason: criminal justice reform is difficult, given the apparent will of the majority of voters to stick with tried and failed approaches which prioritise punishment over rehabilitation and prevention. We collectively claim that we want fewer crimes being committed, but what we seem to want even more than that is for people who commit the kinds of crimes associated with the trauma of being raised in traumatic environments to be punished in futile ways which only compound their trauma. Of course, in our age politics is entirely mediated, and the popular will is largely a construct. It is impossible to know how that will might be expressed apart from the insidious influence of Meta, X, 21st Century Fox and News Corporation.

In the thought of Behrouz Boochani is a more complicated reason. The Kurdish-Iranian journalist was locked in Australia's 'detention centre' – a prison, though he had not been convicted of, or even charged with, any crime – on Papua New Guinea's Manus Island for four years until it closed in 2017,[69] and had both more time and motivation than most to wonder why the Australian state was committed to spending such obscene amounts of money to keep a handful of refugees locked away in a Pacific hell. Boochani came to understand that the deaths, the queues, the heat and the horror were all part of what he called a *system-e hākem*, which has been translated by Omid

[69] See Behrouz Boochani and Ben Doherty, 'Behrouz Boochani, the Refugee Writer who Exposed the Cruelty of Australia's Island Jail', *The Guardian* (online, 22 May 2023) <https://www.theguardian.com/media/2023/may/22/behrouz-boochani-the-refugee-writer-who-exposed-the-cruelty-of-australias-island-jail?CMP=share_btn_url>; Russell Marks, 'Review – Behrouz Boochani's Freedom, Only Freedom: The Prison Writings of Behrouz Boochani', *The Saturday Paper* (online, 25 March 2023) <https://www.thesaturdaypaper.com.au/culture/books/2023/03/31/freedom-only-freedom-the-prison-writings-behrouz-boochani> ('Review – Freedom, Only Freedom').

Tofighian as 'kyriarchy', defined by the feminist scholar Elisabeth Schüssler Fiorenza as 'interlocking and mutually reinforcing structures of violence obsessed with oppression, domination and submission'.[70] The Australian state's hierarchical order, so this argument goes, depends on the continuing oppression of an 'other', which includes small groups of stateless refugees, and small numbers of First Nations prisoners. To maintain this hierarchical order, the state is prepared to spend enormous – and wildly disproportionate – resources, apparently quite irrationally.[71]

Despite the Deaths in Custody royal commissioners' pleas to find and fund alternatives to prison in their 1991 report,[72] governments and courts have conspired since then to send the Indigenous incarceration rate stratospheric. Just in the last few years, and just in the Northern Territory (where I practice), we've seen: no action taken against a judge (Greg Borchers) who repeatedly expressed racist views even after he was warned with dismissal;[73] a royal commission's recommendations to close the Don Dale Youth Detention Centre[74] morph into government plans to maintain and even expand it;[75] an

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[70] Marks, 'Review – Freedom, Only Freedom' (n 69).
[71] See, eg, *Pathways to Justice* (n 34) [4.1], 127–8 [4.9]–[4.14].
[72] See, eg, Johnston (n 2) vol 3 ch 21.
[73] See Jacqueline Breen, 'NT Chief Judge Elizabeth Morris Finalises Investigation into Complaint Against Judge Greg Borchers', *ABC News* (online, 11 December 2019) <https://www.abc.net.au/news/2019-12-11/nt-chief-judges-investigates-complaint-against-greg-borchers/11784300>.
[74] *Royal Commission into Detention and Protection of Children in the Northern Territory* (Final Report, November 2017) vol 2A ch 10, 102.
[75] See Jesse Thompson, 'Don Dale to Expand, Years After Its Closure was Recommended, as NT Youth Detainee Numbers Rise', *ABC News* (online, 9 June 2021) <https://www.abc.net.au/news/2021-06-09/nt-don-dale-detention-youth-detention-centre-to-expand/100199848>; Thomas Morgan, 'Years After the NT Royal Commission into Youth Detention, Why Has Don Dale Not Yet Been Replaced?', *ABC News* (online, 4 October 2023)

all-settler jury acquit a white police constable (Zachary Rolfe) of all charges after he shot and killed a 19-year-old Warlpiri man in Yuendumu, after a judge excluded evidence of a pattern of excessive force the officer had used against other Aboriginal men;[76] evidence of racist attitudes held by serving police officers, which led to an apology by the police commissioner (but no substantive action);[77] the Territory's highest court dismiss a lawsuit brought by four teenage detainees at Don Dale,[78] before their decision was unanimously overturned by the High Court.[79]

Order is, of course, central to any society, and the value of maintaining existing order can and often does trump other stated values, like efficiency, efficacy, reason, justice and compassion. During the last three decades, despite the hope that was evident in the early 1990s, the status quo has prevailed.

<https://www.abc.net.au/news/2023-10-04/nt-don-dale-youth-detention-centre-replacement-facility-delays/102929238>.

[76] See Nino Bucci, 'Zachary Rolfe Found Not Guilty of Murder over Kumanjayi Walker Fatal Shooting', *The Guardian* (online, 11 March 2022) <https://www.theguardian.com/australia-news/2022/mar/11/zachary-rolfe-found-not-guilty-of-over-kumanjayi-walker-fatal-shooting>; *The Queen v Rolfe (No 7)* [2022] NTSC 1 57–60 [108]–[114].

[77] See Karen Middleton, 'NT Police Commissioner Apologises to Indigenous Community at Garma Festival', *The Guardian* (online, 3 August 2024) <https://www.theguardian.com/australia-news/article/2024/aug/03/nt-police-commissioner-to-apologise-to-indigenous-community-at-garma-festival>.

[78] *JB v Northern Territory of Australia* (2019) 170 NTR 11.

[79] *Binsaris v Northern Territory* (2020) 270 CLR 549.

ENVIRONMENTAL LAW REFORM: THE CASE FOR THE 'REFORMING CENTRE'

The Hon Dr Kevin Rudd AC[*]

I Introduction

Democracy is an untidy business. Citizens cobble together political movements, feud over how to translate their shared values into policies, and then head out to convince others. Laws are debated, enacted, amended and repealed in an unceasing cycle of give and take. Society usually copes with this untidiness, but the natural world has no tolerance for human politics or the excuses we might make for inertia. And, in my experience, enduring change usually happens from what I call the 'reforming centre,' rather than the extremes. This article makes the case for the 'reforming centre' by reflecting on four major environmental questions of my prime ministership: how to drive down greenhouse emissions; how to drive up investment in renewables; how to stop commercial whaling in the Antarctic; and how to advance climate action under international law.

There were, of course, other debates. We launched a 20-year biodiversity strategy designed to measure and protect the health of our precious ecosystems.[1] We achieved world heritage status for Ningaloo Reef – Western

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[1] See Natural Resource Management Ministerial Council, *Australia's Biodiversity Conservation Strategy 2010 – 2030* (Report, 2010).

Australia's largest and most accessible coral reef.[2] And we ploughed through a backlog of contentious environmental applications described by one minister as 'an in-tray stuffed with explosive devices and hospital passes.'[3] I won't elaborate on these, or the many more besides, but each had similar dynamics.

II Defining the 'Reforming Centre'

In my experience, enduring reforms often have three features: progressiveness; effectiveness; and legitimacy.

By 'progressive,' I do not necessarily mean 'left.' In fact, among the most useful progressive reforms in our history – the expansion of Australia's universities – was led by Liberal Party founder Robert Menzies. In this essay, a 'progressive' outlook is characterised by optimism and ambition to craft our national future, rather than kneejerk fear or yearning for a glorified, often mythical, past.

Nor does 'effective' mean 'ideal.' There are no silver-bullet policies that solve every problem and foresee every challenge. But we should strive to 'effect' the best available outcome and, importantly, entrench it as a platform for future progress. This can involve bittersweet compromise, but practically every great reform was built on a less-than-perfect foundation. If a reform is never implemented in the first place, its ineffectiveness is practically guaranteed.

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[2] See 'Ningaloo Coast', *UNESCO World Heritage Convention* (Web Page) <https://whc.unesco.org/en/list/1369/>.
[3] Peter Garrett, *Big Blue Sky* (Allen & Unwin, 2017) 241.

'Legitimacy' – meaning sufficient support across the political centre-ground – serves two important purposes: first, governments must win elections to enact reforms and; second, reforms must outlast the governments that introduce them. For instance, Gough Whitlam won office by animating the progressive instinct of middle Australia, rewriting some 80% of Labor's platform in the process, and negotiating his most enduring reforms through a hostile senate.[4] Bob Hawke and Paul Keating were lashed as not 'real Labor' for harnessing the dynamism of economic markets as an engine of social progress, but they entrenched these gains by winning five consecutive election victories from the centre.[5] Even John Howard, hardly a progressive icon, worked across the centre to implement enduring gun control over howls from his traditional allies.[6]

While there are always exceptions to the rule, reforms with these three elements are more likely to withstand the test of time. And in environmental reform, where the stakes can be existential, it is essential that reforms endure.

III Historical Context

This article is not intended to be partisan. Nor does it in any way reflect the views of the current Australian government. Its analysis may, however, be helpful to environmental reformers of any political stripe. As these are personal reflections on a certain time and place, it is necessary to sketch out

[4] Peter Kennedy, 'A view of Labor', *The West Australian* (Perth, 9 November 1974).
[5] Bob Hawke, 'Our Fourth Anniversary' (Speech, Bathurst, 8 March 1987).
[6] See Australasian Police Ministers' Council, *Special Firearms Meeting – Resolutions* (10 May 1996).

the four major political groupings relevant to these debates between 2007 and 2013:

- The *social-democratic centre-left* – led by my new Labor government which, after 11 years in the wilderness, was elected to advance major environmental reform;

- The *regressive right* – half the opposition Liberal Party led by Tony Abbott, a consummate tactician, but whose mistrust of environmental science caused him to approach reform with suspicion;

- The *liberal centre-right* – the other half, led by Malcolm Turnbull, whose pursuit of reform was tempered by the risk of inflaming his regressive partners; and

- The *contrarian left* – led by Bob Brown, a veteran protestor who elevated the Green party's profile by attacking all others' reforms for not being radical enough.

IV The Carbon Pollution Reduction Scheme (CPRS)

At the 2007 election, Australia's mechanism for reducing greenhouse emissions appeared settled. We had pledged to ratify the Kyoto Protocol[7] (the first legally binding climate treaty) and begin decarbonising the economy through an Emissions Trading Scheme (**ETS**). The ETS would set an annual

[7] *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 16 March 1998, 2303 UNTS 162 (entered into force 16 February 2005).

limit for greenhouse pollution, then let businesses decide how to make it happen. If a company found cutting emissions too costly, they could buy excess permits produced by businesses that exceeded their responsibilities – thus setting a market 'price' on carbon. As our national targets were updated, the annual emissions cap would progressively tighten and the carbon price would respond to supply and demand. This would steadily decarbonise the economy at the lowest possible cost while creating incentives to invest in cleaner practices.

I ratified the Kyoto Protocol as my first prime ministerial act. Many expected the ETS to come easily too, given every parliamentary party had campaigned for it. Even the regressive right accepted that, whatever the election outcome, carbon pricing was 'inevitable.'[8] We followed a traditional policy process involving a green paper, white paper, draft legislation, a parliamentary inquiry, and high-level negotiations with all parties. In December 2009, when the final Bills were voted on, the CPRS was supported by two-thirds of voters (including 57% of opposition supporters),[9] corporate leaders at the Australian Industry Group and Business Council,[10] and environmentalists at the World Wildlife Fund, Climate Institute and Conservation Council.[11] Yet the fringes united against the centre to sabotage climate action. Why?

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[8] Eric Abetz, 'The Future of Forestry' (Speech, Brisbane, 28 June 2007).
[9] Parliament of Australia, *Journals of the Senate* (2 December 2009) 3048; 'Newspoll', *The Australian* (Sydney, 22 September 2009).
[10] Nicola Berkovic, 'Business begs Abbot to rethink opposition to market-based emissions trading scheme', *The Australian* (Sydney, 3 December 2009).
[11] 'Restyled emissions scheme wins broad support', *ABC PM* (Emma Griffiths, 4 May 2009) <https://www.abc.net.au/listen/programs/pm/restyled-emissions-scheme-wins-broad-support/1672686>.

We agreed a list of amendments with Turnbull, then the opposition leader, who believed he could hold his party together. But Abbott, despite arguing to pass the CPRS only months earlier,[12] challenged for the party's leadership and won by a single vote (in a cruel twist, a close ally of Turnbull was at home sick). Nonetheless, a group of centre-right MPs, led by Turnbull, were willing to cross the floor. These conscientious objectors were crucial because, with their backing, the legislation could still pass.

However, the Green party lacked effectiveness. Instead of entrenching the pricing mechanism as a starting point, they claimed its initial emissions reduction target (5-25% by 2020) was a 'complete fraud'[13] and publicly savaged scientists who argued otherwise.[14] These tactics paid off politically – Brown's party achieved a record 12% of the vote in 2010 – but backfired for the environment. Without the CPRS, Australia emitted over 200 million extra tonnes of carbon dioxide over a decade.[15] And, instead of discussing what our targets should be, the next decade was wasted debating the virtues of different mechanisms – or worse still, whether the climate was changing at all. Brown expected his actions would spur demands for more radical action; instead, the public's enthusiasm waned and progress became more distant.

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12 Tony Abbott, 'Turnbull is right, the Coalition can't win this fight', *The Australian* (Sydney, 24 July 2009); Malcolm Turnbull, 'Abbott's climate change policy is bullshit', *The Sydney Morning Herald* (online, 7 December 2009) <https://www.smh.com.au/politics/federal/abbotts-climate-change-policy-is-bullshit-20091207-kdmb.html>.

13 Commonwealth, *Parliamentary Debates*, Senate, 24 November 2009, 8736 (Christine Milne).

14 Ross Peake, 'Greens scold Flanner over emissions remark', *The Canberra Times* (Canberra, 1 July 2009).

15 Pat Conroy, 'Climate Policy Impasse Has Cost Us Dearly', *Newcastle Herald* (Newcastle, 3 December 2019).

not survive the Abbott government. Although worthy elements of that legislation remain – notably the Clean Energy Finance Corporation, which leverages private-sector investment – effective carbon pricing was dead. So began Australia's lost decade for climate action.

V The Renewable Energy Target (RET)

Another plank of our election platform was the five-fold expansion of renewable energy, to provide for at least 20% of electricity generation by 2020 by requiring the biggest purchasers of electricity to buy a certain amount from renewable sources each year. Despite repeated assaults from hardliners, this policy became an enduring success.

The RET's latter-day critics often forget that this was not a leftist revolutionary idea; it built on a scheme introduced in 2000[21] by centre-right Environment Minister Robert Hill, who convinced his regressive colleagues to permit a modest 2% target. While initially doing little, Hill hoped to build a 'strong base' for the industry to build on.[22] The contrarian left condemned the legislation as an 'environmental monstrosity'[23] and insisted on higher targets that would have splintered Hill's delicate coalition.[24] But, working across the centre, it passed.

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[21] *Renewable Energy (Electricity) Act 2000* (Cth).
[22] Robert Hill, 'Renewable Energy Targets a Step Closer' (Statement, 9 May 2000); See also Robert Hill, 'Investing in Our Natural and Cultural Heritage: The Commonwealth's Environmental Expenditure 2000-01' (Statement, 9 May 2000) 12.
[23] Commonwealth, *Parliamentary Debates*, Senate, 7 December 2000, 21198 (Bob Brown).
[24] Bob Brown, 'Greens challenge Democrats on the environment' (Statement, 28 October 2000).

After 2007, this history provided a permission structure for both wings of the opposition to support our 20% target. As one regressive senator told Parliament: 'The amendment Bill we are discussing today is in fact building on that legacy of the Howard government – a legacy, I might say, which was very good and very strong in the environmental area.'[25] However modest, Hill's legislation laid the groundwork to kickstart the renewables transformation.

The scheme's legitimacy also helped defend the RET from attack. In 2014, Abbott broke an election promise[26] by hiring a self-described 'sceptic'[27] of climate science to conduct a snap review that sent a chill through investor circles and froze $10 billion in investments.[28] His government demanded the centre-left agree to slash the RET's headline target by 40% – or else they would petrify investors further by inviting various crossbench senators to propose their own amendments.[29] Despite initially claiming he wanted 'certainty'[30] for the sector, Abbott later admitted he wanted to 'reduce the growth rate of this particular sector as much as possible.'[31] The contrarian left's refusal to entertain any compromise looked tough, but it aligned them

[25] Commonwealth, *Parliamentary Debates*, Senate, 19 August 2009, 5351 (Eric Abetz).
[26] See Liberal-National Coalition, *The Coalition's Policy to Boost the Competitiveness of Australian Manufacturing* (August 2013) 11.
[27] J Heath, 'Sceptic Warburton to lead energy review', *Australian Financial Review* (Sydney, 18 February 2014).
[28] Phil Coorey, 'Industry proffers RET compromise', *Australian Financial Review* (Sydney, 26 March 2015).
[29] See L Cox, 'Renewable energy deal possible', *The Age* (Melbourne, 28 March 2015). See also Interview with Mark Butler (ABC News 24, 19 March 2015).
[30] Joint Doorstop Interview with Tony Abbott, Eric Hutchinson and Will Hodgman (Launceston, Tasmania, 19 February 2015).
[31] Phil Coorey and Angela Macdonald-Smith, 'PM admits plan to sink RET', *Australian Financial Review* (Sydney, 12 June 2015).

with the fringe right (who themselves wanted the investment strike to continue indefinitely).

In May 2015, after months of hard-fought negotiation between people of goodwill, an agreement was struck. The gigawatt hour target enumerated in legislation would be reduced, but the percentage target remained on track for 20-25% due to gains in energy efficiency.[32] This bipartisan signal unclogged the flow of capital and stability, restored by repealing periodic reviews of the legislation. I am grateful for the reforming centre's defence of my government's 20% RET which, by building on Hill's legislation, built up a sector that now supplies about 40% of Australia's electricity.[33]

VI The Whaling Case

Our new government also promised to take legal action, if necessary, to halt Japan's annual commercial whale hunt in the Southern Ocean, which was killing almost 1000 whales each summer.

Australian law was not especially helpful. Commercial whaling was already prohibited in the economic waters of Australia's Antarctic waters.[34] But when a wildlife charity asked the Federal Court to enforce the sanctuary in 2004, the Howard government intervened against it, fearing diplomatic fallout from Japan – then our largest trading partner. Our government withdrew this objection in 2008, after which the court ruled against the whalers.[35] Even so,

[32] See *Renewable Energy (Electricity) Amendment Act 2009* (Cth).
[33] Clean Energy Council, *Clean Energy Australia 2024* (Report, 2024) 11.
[34] *Whale Protection Act 1980* (Cth); *Environmental Protection and Biodiversity Conservation Act* (1999) s 225.
[35] *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA 36.

Japan rejected our territorial claim, along with the court's jurisdiction, and the whaling company had no onshore assets to restrain.

We therefore relied on Japan's obligations to the International Whaling Commission (**IWC**) established under the Whaling Convention.[36] The IWC had declared a Southern Ocean Whale Sanctuary in 1994, but Japan lodged an objection and was not bound by it. However, Tokyo had agreed to an older global moratorium on commercial whaling, which it was evading by insisting its hunters were undertaking genuine 'scientific' research. Australians' dwindling tolerance for this gruesome 'science' evaporated in 2005 when Japan doubled its whaling quota and broadened it to include threatened humpback and fin whales.

The Japanese tactics exposed fault lines in Canberra, which had been united against whaling for decades. The Howard government insisted there was 'no legal theory available'[37] to challenge the hunt and, despite being 'very unhappy' with the whalers, 'short of going to war with them, it's hard to see how you can actually stop it.'[38] The contrarian left, on the other hand, wanted to detonate a diplomatic bomb by militarising the whale sanctuary,[39] seizing Japanese ships,[40] cancelling trade talks, blocking cultural exchanges and even recalling Australian troops protecting Japanese humanitarian efforts in the

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[36] *International Convention for the Regulation of Whaling*, opened for signature 2 December 1946, 161 UNTS 72 (entered into force 10 November 1948).
[37] Commonwealth, *Parliamentary Debates*, Senate, 9 February 2006, 88 (Ian Campbell).
[38] Doorstop Interview with Alexander Downer (Adelaide, South Australia, 19 November 2007).
[39] See C Johnson, 'Japan asks navy to protect whalers', *The West Australian* (Perth, 13 November 2007).
[40] Bob Brown, 'Campbell should put whale killers out of action' (Statement, 22 December 2005).

Middle East.[41] Australians further polarised over the tactics of Sea Shepherd – a group that splintered from Greenpeace over the use of violence – whose altercations with the hunters were leading to dangerous collisions, exchanges with water-cannons, sprays of nauseating rotten food, boarding parties, arrests, and prosecutions. Some on the right joined Japan in branding them 'pirates,' while the contrarian left wanted to provide them with intelligence on Japanese ship locations.

Our new government hoped the shadow of legal action, paired with tougher diplomatic pressure, could persuade Japan to phase-out commercial whaling over a few years. If not, we would head to the International Court of Justice (**ICJ**). We immediately sent a customs ship to gather evidence on the whalers' activities, and appointed a special diplomatic envoy to prosecute the diplomacy. This included direct lobbying, instigating a joint demarche of sympathetic diplomats in Tokyo, releasing images of whale killings to the public, and pushing the IWC to properly define 'scientific purposes.' In May 2010, we filed our case.

While our lawyers prepared their briefs, our responsibility was to shore up legitimacy at home. International lawsuits often take years, and it was vital that the reforming centre be prepared to defend it. The initial signs were good: the contrarian left supported it – despite demanding criminal charges against individual Japanese sailors as well[42] – while the centre-right shadow

[41] Bob Brown, 'Howard should tell whaler Koizumi "the Iraq deal is off"' (Statement, 16 May 2005).
[42] Bob Brown, 'Whaling court case won't stop harpoons' (Statement, 28 May 2010).

minister had long been taunting us to 'stand up for Australian interests' and file the lawsuit.[43]

But the opposition was split. Abbott, who had opposed legal action as 'needlessly antagonis[ing] our most important trading partner,'[44] was noncommittal.[45] Some of his allies condemned the lawsuit as premature, suggesting we consider Japan's proposed 'solution' of lifting the moratorium.[46] Meanwhile the shadow minister, who had previously backed legal action as a negotiating tactic,[47] suddenly insisted we rule out any out-of-court agreement.[48] Amid this confusion, our government shone a spotlight on the centre-right's record of supporting legal action, limiting Abbott's room to manoeuvre.[49] On the eve of the 2010 election, buried deep within a coalition policy statement, they announced support for the case.[50]

Four years later, on 31 March 2014, the ICJ handed down its ruling. In a 12-4 decision, the judges found 'the evidence does not establish that the programme's design and implementation are reasonable in relation to

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[43] See Penny Wong, 'No international legal action on whaling: Abbott' (Statement, 11 January 2009).
[44] See Michelle Grattan and Andrew Darby, 'Abbott rejects whaling legal bid', *The Age* (Melbourne, 12 January 2010).
[45] Doorstop Interview with Tony Abbott (Canberra, Australian Capital Territory, 26 May 2010).
[46] Russell Trood, 'Rudd all at sea on whaling' (Statement, 3 June 2010).
[47] Greg Hunt, 'The time has come on whaling action' (Statement, 4 January 2010).
[48] Greg Hunt, 'Peter, just say "no" to commercial whaling' (Statement, 22 June 2010).
[49] Peter Garrett, 'Phoney Tony's whaling flip flops continue' (Statement, 28 May 2010).
[50] Greg Hunt, 'Coalition's whale and dolphin protection plan' (Statement, 11 August 2010).

achieving its stated objectives' of scientific research.[51] Japan accepted the judgment and, after flirting with a pared-back 'scientific' hunt, admitted its interest was indeed commercial and declared the Antarctic off-limits.[52]

I cannot say what finally motivated the Australian opposition to fall into line. A decisive factor may have been the response of Japan which, despite all the predictions of diplomatic mayhem, wisely downplayed the matter. Both governments left the whaling dispute to the lawyers,[53] and focused on areas of cooperation, such as trade negotiations and international arms control.[54] Nor can I say whether a 2010 Abbott government would have held firm. But, by the time he won office in 2013, it had been his position at consecutive elections.[55]

The result is that Antarctic minke whale populations, after collapsing by 30% over a decade, are on the rise.[56] Fin whales – previously hunted to 2% of their original numbers – are returning in large numbers to their ancestral feeding

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51 *Whaling in the Antarctic (Australia v Japan: New Zealand intervening) (Judgment)* [2014] ICJ Rep 226, 293 [227].

52 Yoshihide Suga, 'Statement by Chief Cabinet Secretary, the Government of Japan, on International Court of Justice "Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)"' (Press Release, 31 March 2014).

53 See Rosslyn Beeby, 'Whaling case just politics: Japan', *The Canberra Times* (Canberra, 29 May 2010).

54 See Hidenobu Sobashima, 'Press Conference by the Deputy Press Secretary', *Ministry of Foreign Affairs of Japan* (Web Page, 25 November 2010) [2. Visit to Australia by Foreign Minister Maehara] <https://www.mofa.go.jp/announce/press/2010/11/1125_01.html>.

55 Greg Hunt, 'Coalition announces whale & dolphin protection plan' (Statement, 23 August 2013).

56 Helena Herr et al, 'Aerial surveys for Antarctic minke whales (*Balaenoptera bonaerensis*) reveal sea ice dependent distribution patterns' (2019) 9(1) *Ecology and Evolution* 5664.

grounds.[57] And humpbacks[58] are no longer a threatened species, doubling in population over a decade, and expected to fully recover by 2050.[59]

VII The Copenhagen Accord

By 2007, Canberra's global reputation on climate action was battered. As the highest per-capita emitter, Australia won huge concessions at Kyoto in 1997. But Howard, despite governing the driest inhabited continent and 80% of Australians supporting the treaty, refused to ratify it.[60] The election of our climate-progressive government re-legitimised Australia's voice in the international community (where action was critical to achieve real outcomes for our climate-challenged land) and, furthermore, Australia secured a seat at the 25-member negotiating table as a 'friend of the chair' at the 2009 United Nations Climate Change Conference (**COP15**).

The major questions before the COP15 conference were: first, the maximum average global temperature the world was prepared to accept; second, whether only developed economies needed to decarbonise (or, as the science required, rapidly developing countries needed to act as well); third, whether there would be international measurement, reporting and verification (**MRV**)

[57] Helena Herr et al, 'Return of large fin whale feeding aggregations to historical whaling grounds in the Southern Ocean' (2022) 12(1) *Scientific Reports* 9458:1-15.
[58] Australian Government, 'Humpback whale', *Australian Antarctic Program* (Web Page, 22 August 2022) <https://www.antarctica.gov.au/about-antarctica/animals/whales/humpback-whale/>.
[59] Commonwealth Scientific and Industrial Research Organisation, 'Post-whaling recovery of southern hemisphere' (News Release, 22 August 2017).
[60] C Miller et al, 'Climate deal offers windfall for Australia', *The Sydney Morning Herald* (Sydney, 25 June 2001); C Martin, 'Polls shows 80pc back Kyoto deal', *Australian Financial Review* (Sydney, 20 April 2001).

of each national effort; fourth, the creation of a global 'green climate fund' to support poor countries' adaptation and mitigation and; finally, but not least, how national undertakings would be registered and honoured under international law.

The alliance for progress on these questions was impressive. It comprised the developing countries most susceptible to climate change[61] and the developed countries, who would pledge massive cuts under a global deal.[62] But the coalition of obstruction was also fierce, led by India and China, who rejected low-lying countries' calls to keep average temperature rises below 1.5°C of pre-industrial levels – beyond which some polar ice sheets reach their 'tipping points'[63] – and argued that even 2°C was too restrictive. They also wanted free rein to pollute, branding me an 'ayatollah' on climate action for highlighting the obvious flaw in this approach.[64] They rebuked 'intrusive' MRV and opposed linking such accountability to any 'green fund.' And they opposed a mid-century global emissions target of 50% below 1990 levels (which, we were advised, would keep warming below 2°C) – even when developed countries were willing to carry the load of an 80% cut.[65]

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[61] See 'Tactical manoeuvring on climate change must end, South Pacific leaders tell UN debate', *United Nations News* (online, 26 September 2009) <https://news.un.org/en/story/2009/09/314772>.

[62] See David Adam, 'G8 Action without China and India would be pointless', *The Guardian* (online, 10 July 2009) <https://www.theguardian.com/environment/cif-green/2009/jul/09/copenhagen-g8>.

[63] Timothy M Lenton et al, 'Climate tipping points – too risky to bet against' (2019) 575(1) *Nature* 592.

[64] 'India says Aus acting as "ayatollah" in climate talks', *The Indian Express* (Mumbai, 16 December 2009).

[65] United Kingdom Department of Energy and Climate Change, *The Road to Copenhagen: The UK Government's case for an ambitious international agreement on climate change* (Policy Paper, 26 June 2009) 5. See also 'China stands as constructive player in Copenhagen', *Xinhua News Agency* (Beijing, 26 December 2009); E Reguly and S

The Copenhagen negotiations themselves were gruelling.[66] As the obstructions became clear, so too did our mission: we could not walk away in abject defeat. Instead, we would grasp opportunities for progress wherever we could, and erect a platform for the next round of negotiations.

From these efforts, the Copenhagen Accord[67] extracted major policy concessions. First, we agreed a maximum ceiling of keeping global warming 'below 2°C' – Australian language designed to break the impasse while keeping 1.5°C in scope. Second, emissions needed to 'peak' in every country as soon as possible, not just in the most developed ones – no longer would China and India wriggle off the hook. Third, developed countries would mobilise USD100 billion annually to assist developing countries – significantly through a 'Green Climate Fund' – with all assisted projects subject to MRV. And finally, having realised the difficulty of striking a 'top down' treaty for the entire world, the Copenhagen Accord invited countries to nominate their own targets – also an Australian response to Chinese and American reluctance toward binding, mandatory and enforceable targets.

But, despite real progress, the COP15 conference entered the public consciousness as an unmitigated catastrophe that sapped enthusiasm around the world. In Australia, between 2007 and 2012, public support for urgent

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McCarthy, 'US makes last-minute push', *The Globe and Mail* (Toronto, 17 December 2009); Björn Conrad, 'China in Copenhagen: Reconciling the "Beijing Climate Revolution" and the "Copenhagen Climate Obstinacy"' (2012) 210(1) *The China Quarterly* 435.

[66] Masochistic readers can find my first-hand account in *The PM Years* (n 16) 203-229.

[67] See United Nations Framework Convention on Climate Change, *Copenhagen Accord*, UN Doc FCCC/CP/2009/L.7 (18 December 2009).

climate action collapsed from 68% to 36%,[68] while climate scepticism rose from 7% to 18%.[69] What drove this?

First, the Copenhagen Accord was not formally adopted as international law. Although China and India signed up in the negotiating room, they joined Brazil and South Africa to prevent the Accord being gavelled into law. But this was a temporary setback – the provisions were enacted at COP16 the next year, after China and India recognised that momentum across the global south was turning against them.

Second, the obstructionists – led by the biggest economies of the global south – successfully presented themselves as speaking for the developing world, despite actually resisting the demands of the most vulnerable poorer countries. This framed the dispute as being between rich countries, who emitted the most carbon historically, and poor ones, who deserved the same privilege. As Mark Lynas, an environmental activist attached to the Maldives delegation, recounted:

> China's strategy was simple: block the open negotiations for two weeks, and then ensure that the closed-door deal made it look as if the west had failed the world's poor once again. And sure enough, the aid agencies, civil society movements and environmental groups all took the bait.[70]

[68] Allan Gyngell, *The Lowy Institute Poll 2007: Australia and the World – Public opinion and foreign policy* (Lowy Institute for International Policy Report, 30 August 2007) 9.
[69] 'Newspoll', *The Australian* (Sydney, 16 February 2010).
[70] Mark Lynas, 'How China gutted Copenhagen and avoided the blame', *The Sydney Morning Herald* (Sydney, 26 December 2009).

Back in Australia, both ends of the political spectrum leapt to this same conclusion. The contrarian left, who predicted the Copenhagen talks would shame Australia's lack of ambition, blamed 'the complete failure of developed world leaders' who supposedly 'demanded compromises from the developing world but offered none itself.'[71] Meanwhile, the regressive right endorsed the obstructionists' refusal to 'compromise their economic progress,'[72] arguing that climate action was an 'economic and environmental own goal,'[73] and stoked the fires of scepticism by insisting 'the so-called "settled science" of climate change is not so settled as the climate catastrophists would have us believe.'[74]

The Copenhagen Accord might not have met the high expectations that were set for it, but it was a solid 7-out-of-10 outcome against the core policy objectives of the moment. Against all the political, media and NGO background noise, who could blame the public for being disappointed that there was no Hollywood-style grand finale? But a closer look at the history shows the breakthroughs of the Copenhagen Accord laid the foundations upon which the *Paris Agreement*[75] was struck in 2015 – notably the 'well below 2°C' ceiling, developed *and* developing country responsibility, 'nationally determined contributions' and MRV. Absent Copenhagen, there could have been no Paris, with most of the core policy thresholds crafted and crossed back in 2009.

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[71] Christine Milne, 'Meaningless Copenhagen declaration highlights global inaction' (Statement, 19 December 2009).
[72] Interview with Tony Abbott (2GB, 11 January 2010).
[73] Tony Abbott, 'Address to the Young Liberal Convention, Adelaide' (Speech, 30 January 2010).
[74] Interview with Tony Abbott (2GB 27 January 2010).
[75] *Paris Agreement*, opened for signature 22 April 2016, 3156 UNTS 79 (entered into force 4 November 2016).

VIII Conclusion

Reforming from the centre can be difficult. It requires the willingness to grapple with challenges in all their policy *and* political complexity – not just offering simplistic solutions. It takes creativity to imagine how we might convince others, and humility to open our own minds to their viewpoints. Rarely can we celebrate 'absolute victory,' since there is always more to do. Meanwhile, critics with their own motives revel in exaggerating or minimising those achievements – often aided and abetted by an analytically thin commentariat that depends on the simple binary narrative of 'winners' and 'losers.' No wonder that some find the clarity of uncompromising activism so appealing.

I urge readers to take a wider and deeper view. While many great reforms are prematurely snuffed out by shortsightedness or extinguished by the winds of political misfortune, lasting reform is still possible. We can draw on our society's strong foundations, such as the rule of law, the separation of powers, the professional public service, parliamentary democracy, and freedom of the press.

We also have a body of national experience from which to draw. Without commenting on the merits of particular reforms, I am pleased when others try to build on our legacy in government: that the *Climate Change Act*[76] reflects Australia's nationally determined contribution as envisioned by the Copenhagen Accord; that the RET has put Australia within reach of 82%

[76] *2022* (Cth).

renewable energy by 2030; that when political elders urge more obstruction, their successors will more often pause to consider the long-term consequences; and that, when Australians stand up for threatened species, the world knows we won't easily back down. And agencies like the Clean Energy Finance Corporation — which has unlocked $70 billion of investments, mobilising five dollars of private capital for every public dollar it invests, while turning a profit for taxpayers — can be defended and improved.

Our government, for all our efforts, and all our shortcomings, was simply one link in the chain of environmental and climate policy reform to support our planet and all its environmental peoples. And real and enduring change, after all, is what it is all about.

Kevin Rudd writes in his capacity as the 26th Prime Minister of Australia.

RAYS OF HOPE FOR ENVIRONMENTAL LAW

Dr Chris McGrath[*]

Environmental law in Queensland, Australia and globally over the past 30 years experienced areas of both outstanding success and tragic failure, as well as areas of mediocrity. Its future trajectory is complex and uncertain as the global community grapples with the unfolding climate crisis, which appears certain to spill into global conflict and force mass migrations in a world already straining to cope with conflict-driven and economic migration. But rays of hope exist for a brighter future.

I Introduction

"Environmental law" is a complex field that defies neat categorisation but, for present purposes, let's define it as laws that regulate human impacts on the natural and human-made world.[1]

The central goal of environmental law is sustainable development[2] and, over the past 30 years, it has achieved both outstanding success in some areas and tragic failure in others in pursuit of this never-ending goal, as well as many areas of mediocre success.

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1 See Chris McGrath, *Does environmental law work: how to evaluate the effectiveness of an environmental legal system* (Lambert Academic Publishing, Saarbrücken, 2010), <http://envlaw.com.au/wp-content/uploads/delw.pdf>.

2 Ibid 55-60 and literature cited there.

The many areas of mediocre success include arenas in which the law has changed enormously over the past 30 years, such as Commonwealth and State planning and development laws and procedural issues like standing to sue to protect the environment. The enactment and seemingly unending reviews of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) fall into this category – a mediocre success. In my view, the EPBC Act is simply one part of a much larger legal and political system facilitating the failure to address dangerous climate change and biodiversity loss. I don't want to get bogged down in these areas of mediocre success and risk "not seeing the forest through the trees" (i.e. getting so involved in the details we miss the bigger picture). Though issues like changes in Commonwealth and State planning laws absorb an enormous amount of legal and judicial effort, what do they mean for the bigger picture of sustainable development? In my view, not very much in isolation from the bigger picture painted by climate change.

In this article, instead of wallowing in the mediocre successes and relatively minor details, I will explore the outstanding success story – ozone protection – and a major area of failure – climate change – then grapple with what we can learn from them. At present, despite success in some areas, we expect loss and damage of critical ecosystems such as coral reefs and major changes in globally critical parameters such as sea-level in coming decades and centuries.[3] We have already crossed multiple planetary boundaries[4] and we are

[3] Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2022 – Impacts, Adaptation and Vulnerability: Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2023) ('*IPCC Report*').

[4] Katherine Richardson et al, 'Earth beyond six of nine planetary boundaries' (2023) 9(37) *Science Advances* 16; See also 'Planetary boundaries', *Stockholm Resilience Centre* (Web Page, 2023) <https://www.stockholmresilience.org/research/planetary-boundaries.html>.

failing to "preserve a planet similar to that on which civilization developed and on which life on Earth is adapted."[5] The profound changes we are making to planetary systems are likely to spill into global conflict and mass migrations in coming decades in a world already straining to cope with conflict-driven and economic migration.[6] Even so, there are rays of hope for the future and we should work to protect what we can.

II A Success Story: Ozone Protection

Over the past 30 years, the outstanding success in environmental law has undoubtedly been the protection of the ozone layer through comprehensive international agreement and action. That I say, "undoubtedly" might surprise you. You might not have realised it in the past, but every time you walk outside in the sun, you benefit from the global success in dramatically reducing ozone-depleting substances. If the global community had not taken effective action starting in the 1980s, the world as we know it would be dramatically worse as the ecosystem teetered towards collapse.

The success story of ozone protection began in the 1970s when chemistry professor Sherwood "Sherry" Rowland and his postdoctoral student Mario Molina (who went on to win the Nobel Prize for Chemistry with Paul Crutzen in 1995 for their work saving humanity and our planet) identified how

[5] James Hansen et al, 'Target Atmospheric CO_2: where should humanity aim?' (2008) *The Open Atmospheric Journal* 2, 217-231.
[6] 'Ecological Threat Report 2023', *Institute for Economics & Peace* (Web Page, 2023) <https://www.visionofhumanity.org/resources/ecological-threat-report-2023/> ('*Institute for Economics & Peace*'); See also World Economic Forum, *The Global Risks Report 2024* (Report 19th Edition, 10 January 2024); Australian Security Leaders Climate Group, *Too Hot to Handle: the scorching reality of Australia's climate-security failure* (Report, May 2024).

chlorine byproducts from manufactured gases could destroy ozone when they reached the stratosphere.[7] Ozone (O_3) is a pollutant and serious health risk at ground level but it forms a concentrated layer in the stratosphere – around 15-30 km above the Earth's surface – known as the "ozone layer".[8] The ozone layer acts like a "sunscreen" stopping destructive, cancer-causing radiation from the sun reaching the surface of the Earth. It is a crucial component of the atmosphere for life on Earth.

In the 1970s, the human-manufactured chemicals that destroyed atmospheric ozone were widely used in everyday products such as the propellant in aerosol cans, as well as foams, refrigerators and air-conditioners. Their chemistry was complex, and collectively, they became known as "ozone-depleting substances".

Recognition that human-manufactured chemicals destroyed atmospheric ozone was gravely concerning and the United Nations Environment Program (**UNEP**) adopted a "World Plan of Action on the Ozone Layer" that called for intensive international research and monitoring.[9] Concern over these findings changed to outright alarm, virtually overnight, when research in the 1980s discovered a "hole in the ozone layer" over Antarctica and linked it to

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[7] Mario J Molina and FS Rowland, 'Stratospheric sink for chlorofluoromethanes: chlorine atomcatalysed destruction of ozone' (1974) 249(5460) *Nature*, 810-812; For a brief background story of their work, see Janet Wilson and Tom Vasich, 'How UCl saved the ozone layer' (Web Page 2023) <https://news.uci.edu/2023/01/11/how-uci-saved-the-ozone-layer/> ('*Wilson and Vasich*').

[8] See 'What is the current state of the ozone layer', *European Environment Agency* (Web Page, 2024) <https://www.eea.europa.eu/en/topics/in-depth/climate-change-mitigation-reducing-emissions/current-state-of-the-ozone-layer>.

[9] See 'Timeline', *UNEP* (Web Page) <https://ozone.unep.org/ozone-timeline>.

complex chemical reactions on the surface of stratospheric clouds that formed in the extreme cold of winter in the Southern Hemisphere.[10]

The discovery of the hole in the ozone layer spurred urgent action internationally. The discovery was published in the leading scientific journal, *Nature*, in May 1985 shortly after the *Vienna Convention for the Protection of the Ozone Layer* was opened for signatures (***Vienna Convention***).[11] The *Vienna Convention* was the first treaty to achieve universal participation by all nations. It created a broad framework for international action, which was fleshed-out in detail two years later – urged on by public alarm – by the *Montreal Protocol on Substances that Deplete the Ozone Layer*, signed in 1987 (***Montreal Protocol***).

Global implementation of the *Vienna Convention* and the *Montreal Protocol* in the decades that followed led to the rise in ozone-depleting substances being halted and then, slowly, their levels started to decrease[12] and the hole in the ozone layer started to heal.[13]

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[10] Joseph C Farman, Brian G Gardiner and Jonathan D Shanklin, 'Large losses of total ozone in Antarctica reveal seasonal ClO_x / NO_x interaction' (1985) 315 *Nature,* 207-210.
[11] See *UNEP* (Web Page) <http://ozone.unep.org/>.
[12] World Meteorological Organization and United Nations Environment Programme, *Assessment for Decision-Makers – Scientific Assessment of Ozone Depletion: 2014* (WMO Global Ozone Research and Monitoring Project Report No 56, 2014) <http://www.esrl.noaa.gov/csd/assessments/ozone/2014/assessment_for_decision-makers.pdf>.
[13] Susan Solomon, Diane Ivy, Doug Kinnison, Michael Mills, Ryan Neely III, and Anja Schmidt, 'Emergence of hearing in the Antarctic ozone layer' (2016) 353 (6296) *Science,* 269-274.

The success story of the protection of the ozone layer was not a simple one and it has not been without serious challenges and opposition from industries that profited from the chemicals producing ozone-depleting substances. For instance, in 2018 an unexpected and persistent increase in a major ozone-depleting gas was discovered[14] and attributed to widespread illegal production of insulation foam for buildings in eastern China.[15] In response, the Chinese Government committed to stamp out the widespread illegal production.[16] Assuming future compliance is achieved, recovery of the ozone layer will not be significantly delayed by the illegal emissions.[17]

While ongoing work is required by the global community, the story of the protection of the ozone layer stands as *the* most outstanding success story in environmental law and a testament to the power of international research and cooperation.

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[14] Stephen A Montzka, Geoff S Dutton, Pengfei Yu et al, 'An unexpected and persistent increase in global emissions of ozone depleting CFC-11' (2018) 557 *Nature*, 413-417.

[15] 'Blowing it: illegal production and use of banned CFC-11 in China's foam blowing industry', *Environmental Investigation Agency* (Web Page, 2018) <https://eia-international.org/trace-massive-emissions-banned-ozone-destroying-chemical-china/>; Matt Rigby, S Park, T Saito et al, 'Increase in CFC-11 emissions from eastern China based on atmospheric observations' (2019) 569(7757) *Nature*, 546-549.

[16] Environmental Investigation Agency, *Unexpected CFC-11 Emissions: briefing to the 43rd meeting of the open-ended working group of the parties to the Montreal Protocol* (Report, July 2021).

[17] Martyn Chipperfield, Michaela Hegglin, Stephen Montzka et al*, Report on the Unexpected Emissions of CFC-11* (World Meteorological Organization Report No 1268, 2021); World Meteorological Organization, *Scientific Assessment of Ozone Depletion: 2022: Executive Summary* (GAW Report No 278, 2022).

III An Unfolding, Tragic Failure: Dangerous Climate Change

In stark contrast to the success story of the protection of the ozone layer, stands the story of dangerous climate change. The international community recognised the threat of dangerous climate change in the late 1980s and agreed to the *United Nations Framework Convention on Climate Change*, which was opened for signature in 1992 (**UNFCCC**).[18]

Following a torturous path, in 2015 the global community agreed in the *Paris Agreement to the UNFCCC* (***Paris Agreement***)[19] to a goal of:

> *Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change.*

The *Paris Agreement* was an enormous milestone that was hailed as a "major diplomatic success"[20] and it certainly was in the context of the history, difficulty and complexity of the negotiations. It crossed political and legal canyons that had divided the global community and prevented progress in responding to the threat of dangerous climate change for over a decade. Its goals, and the impacts we expect to occur even if they are achieved, are far better than unmitigated climate change where mean global temperatures

[18] See *UNFCCC* (Web Page) <https://unfccc.int/>.
[19] See 'The Paris Agreement', *United Nations Climate Change* (Web Page) <https://unfccc.int/process-and-meetings/the-paris-agreement>.
[20] Peter Christoff, 'The Promissory Note: COP 21 and the Paris Climate Agreement' (2016) 25 *Environmental Politics* 765, 766.

increase by 4°C or more – a future that would imperil humanity's continued existence.[21]

However, so far at least, the UNFCCC and *Paris Agreement* have slowed but failed to stop dangerous climate change occurring and the rise in its key driver – emissions of carbon dioxide from burning fossil fuels such as coal, gas and petroleum.[22] Even at current levels of warming, severe impacts are being felt in Australia and globally. In Australia, multiple ecosystems are collapsing.[23] Globally, the Intergovernmental Panel on Climate Change (**IPCC**) found it its latest synthesis report in 2022:[24]

> *Widespread, pervasive impacts to ecosystems, people, settlements, and infrastructure have resulted from observed increases in the frequency and intensity of climate and weather extremes, including hot extremes on land and in the ocean, heavy precipitation events, drought and fire weather (high confidence). … Climate change has caused substantial damages, and increasingly irreversible losses, in terrestrial, freshwater and coastal and open ocean marine ecosystems (high confidence).*

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[21] See Mark New et al, 'Four Degrees and Beyond: The Potential for a Global Temperature Increase of Four Degrees and Its Implications' (2011) 369 *Philosophical Transactions of Royal Society Series A* 6; Will Steffan et al, 'Trajectories of the Earth System in the Anthropocene' (2018) 115 *Proceedings of the National Academy of Sciences of the United States of America* 8252; Connor Nolan et al, 'Past and Future Global Transformation of Terrestrial Ecosystems under Climate Change' (2018) 361 *Science* 920; Luke Kemp et al, 'Climate Endgame: Exploring catastrophic climate change scenarios' (2022) 119 *Proceedings of the National Academy of Sciences of the United States of America* e2108146119.

[22] 'Broken Record: Temperatures hit new highs, yet world fails to cut emissions (again): Emissions Gap Report 2023', *UNEP* (Web Page, 2023) <https://www.unep.org/resources/emissions-gap-report-2023>.

[23] Dana M. Bergstrom et al, 'Combating ecosystem collapse from the tropics to the Antarctic' (2021) 27(9) *Global Change Biology* 1.

[24] *IPCC Report* (n 3) 9.

Mean global temperatures are likely to exceed 1.5°C above pre-industrial levels in the next 5 years.[25] This represents a profound and dangerous shift for life on Earth – a climate crisis – but we struggle to understand how profound and dangerous it is. One reason we struggle to understand is because advances in technology and increases in current standards of living in rich countries such as Australia mask the impacts in our lives. Another reason we struggle to understand is because of the complex, non-linear systems with multiple feedbacks and time delays involved.[26]

A major misconception in the general public is that a rise of 1.5°C or 2°C in mean global temperature is a small change. We commonly experience daily temperature changes of 10°C, so a rise of 1.5°C or 2°C in mean global temperatures seems deceptively small by comparison. But that confuses *daily* temperature changes with a change in the *global mean* temperature. A rise of rise of 1.5°C or 2°C in mean global temperature shifts the entire distribution of global temperature, resulting in much greater extreme temperatures in many regions, including across Australia and in polar regions. These represent *enormous* changes to the global climate.

One of the other major things we struggle to understand about the climate crisis is the enormous losses expected even if the goals of the *Paris Agreement* are achieved. For instance, if mean global temperatures rise to 1.5°C above pre-industrial levels, most coral reefs are expected to be lost around the globe,

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[25] 'Global temperature is likely to exceed 1.5°C above pre-industrial level temporarily in next 5 years', *World Meteorological Organization* (Web Page, 5 June 2024 <https://wmo.int/news/media-centre/global-temperature-likely-exceed-15degc-above-pre-industrial-level-temporarily-next-5-years>.

[26] John Sterman, 'Communicating climate change risks in a skeptical world' (2011) 108 *Climatic Change*, 811-826.

including Australia's iconic Great Barrier Reef (**GBR**), while at 2°C virtually all coral reefs are expected to be lost, severely impacting hundreds of millions of people who depend on them for food.[27] The *Paris Agreement* represents a paradox – even if we succeed in achieving the goals set by it, we still lose critical and irreplaceable ecosystems such as the GBR.[28]

In Australia, the toxic politics of climate change and industry capture of the major political parties by the fossil fuel sectors – coal and gas – have led to profound policy failure in the past 30 years.[29] As Joëlle Gergis observes:[30]

> *Although superficially the 2022 federal election ushered in a new era of progressive politics in Australia … the federal government's actions still don't reflect the urgency of the planetary-scale crisis we are in. Australia's greenhouse gas emissions are rising and enormous fossil fuel projects continue to be approved to meet domestic and international demand.*

I said earlier that we struggle to understand how profound and dangerous current and expected climate change is but that is, in an important way, too kind. We are drowning in information on climate change ranging from highly technical, like the IPCC reports, to documentaries for public audiences like David Attenborough's 2021 *Breaking Boundaries: The Science of Our Planet.*[31] Attenborough's documentary explains the critical importance for humanity

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[27] Intergovernmental Panel on Climate Change (IPCC), *Global Warming of 1.5°C: An IPCC Special Report on the Impacts of Global Warming of 1.5°C above Pre-industrial Levels and Related Global Greenhouse Gas Emission Pathways* (Report, 2018) 10, 226, 229–230, 235, 254; *IPCC Report* (n 3) 410-414, 1602-1606.

[28] Chris McGrath, 'Paris agreement goals slipping away & with them Australia's chance to save the Great Barrier Reef' (2019) 36(1) *Environmental and Planning Law Journal* 3.

[29] See Joëlle Gergis, 'Highway to Hell: climate change and Australia's future' *Quarterly Essay 1: 2024* ('*Gergis*').

[30] Ibid 6.

[31] *Breaking Boundaries: The Science of Our Planet* (All3 Media, 2021).

of the past 12,000 years of stable climate (known in geology as the Holocene), during which human civilization flourished, which we have now left behind and entered the Anthropocene due to burning fossil fuels.

For many politicians and ordinary people, we are willing to take steps such as installing solar panels if they save money but we choose to look away, switch off and ignore the harder conversations around the urgency of shutting down the fossil fuel industries.[32]

IV Lessons from Success and Failure

What lessons can we learn from the successes and failures of environmental law over the past 30 years and what might they mean for our future? Again, let's ignore the mediocre successes like the EPBC Act and focus on the bigger picture.

There are at least three important lessons we can learn from the success of protecting the ozone layer in particular.

First, despite all of the conflicts and things that divide us internationally, we can solve global problems through international cooperation, research and action. We might look back with hindsight and assume the protection of the ozone layer was easy but that is far from the case. It took enormous global efforts against powerful industries profiting from the status quo to change the course of history. Accepting responsibility and demonstrating leadership by taking action were crucial to this. As Sherry Rowland, one of the scientists

[32] *Gergis* (n 29) 9-10.

who discovered the threat to the ozone layer and then successfully campaigned for a ban on consumer products using ozone-depleting substances that were earning billions of dollars annually, said in 1997:[33]

> *Is it enough for a scientist simply to publish a paper? Isn't it a responsibility of scientists, if you believe that you have found something that can affect the environment, isn't it your responsibility to actually do something about it, enough so that action actually takes place? … If not us, who? If not now, when?*

Second, progress can seem painstakingly slow and inadequate, then rapid progress can occur in the face of a crisis that drives public demand for change. While scientists recognised the threat from human-manufactured chemicals in widespread use in the 1970s, the world was initially slow to respond to this threat. However, the discovery of the hole in the ozone layer in 1985 catalysed a rapid global response driven by public demand for change.

Third, maintaining hope and taking action are essential (with emphasis on *taking action*). This is a particularly important lesson to bear in mind for climate change. As Joanna Macy and Chris Johnstone write, it is rational to feel despair in the face of the crises facing the Earth such as climate change and collapse of biodiversity; however, we need to move beyond that to work for positive change despite the potential for failure.[34]

This is such an important and powerful insight in the context of the tsunami of science showing the unfolding climate crisis that we face now and the political gridlock stopping emergency action to solve this crisis. It is easy (and

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[33] *Wilson and Vasich* (n 7).
[34] Joanna Macy and Chris Johnstone, *Active Hope: How to Face the Mess We're in without Going Crazy* (New World Library, 2012).

perfectly logical) to despair looking at this present reality and be crushed by it. Maintaining hope and taking action are crucial.

We all need hope and taking action is the best way to keep it alive. The story of the success in protecting the ozone layer gives us a ray of hope that we can write a similar story in the future protecting Earth's climate. For lawyers working to protect the climate, there is much we can do, such as acting for clients as "climate litigators".[35]

Looking at the trajectory for environmental law in the future, we can expect that the climate crisis will worsen and this will drive change in the law and policy. Some changes will be expected and welcome, such as increasing use of renewable energy. But many crisis-driven changes will be unpredicted and rapid, especially given their likelihood to spill into global conflict and mass migrations in coming decades in a world already straining to cope with conflict-driven and economic migration.[36]

One of the major changes we should expect to see for environmental law and policy in Australia in the future is that the current political and public acceptance of the fossil fuel sector will change dramatically. There is a simple reason for this: reality. The current political and public acceptance of mass exploitation of fossil fuels – the belief we must mine and burn all available fossil fuels to enrich the Australian economy – is colliding with the scientific reality that, to avoid even more catastrophic impacts than we are currently

[35] See Chris McGrath, 'Survival strategies for climate litigators' (2021) 27 *Pandoras Box,* 39-51.
[36] *Institute for Economics & Peace* (n 6).

experiencing, we must leave most fossil fuels in the ground and unexploited.[37] The current expansions of the coal and gas sectors in Australia are billion-dollar bets that the global community will continue to fail to take effective action to slow or halt dangerous climate change. That is a bet against humanity's self-interest in survival.

Predicting a future environmental legal system in Australia that closes the fossil fuel sector might seem impossible at present but, as Nelson Mandela said, "Every important change in history was impossible until it happened."

[37] Dan Welsby, James Price, Steve Pye and Paul Ekins, 'Unextractable fossil fuels in a 1.5°C world' (2021) 597 *Nature,* 230-234.

ABOUT THE CONTRIBUTORS

Matilda Alexander

Matilda Alexander is the Chief Executive Officer of the Queensland Advocacy for Inclusion, a role she assumed in March 2021. A human rights lawyer with a wealth of experience in the community legal sector, Alexander has also worked at the Prisoners' Legal Service and the LGBTI Legal Service.

In addition to her legal practice, Alexander is also a course convenor at Griffith University, where she teaches Prison Law. Her previous roles include positions at the Queensland Human Rights Commission and Legal Aid Queensland, where she gained valuable insights into the challenges faced by marginalized communities. Alexander is also a member of the Queensland Government Independent Ministerial Advisory Council, and the National Strategy Advisory Group of the National Office for Child Safety.

Throughout her career, Alexander has received multiple awards recognizing both her dedication and the impact of her work with vulnerable populations. Her enduring passion for justice drives her to advocate tirelessly for the rights of those who are often overlooked, and she continues to make significant contributions to the field of human rights law.

Andrew Boe

Andrew Boe is an Australian barrister, with a national practice spanning Sydney, Brisbane and Melbourne. First admitted as a solicitor in 1989, Boe was called to the Queensland and New South Wales Bars in 2009, and signed the Victorian Bar Roll in 2022.

Boe has extensive experience in criminal litigation, having appeared in various trial and appellate matters across Australia, including in the High Court. His expertise spans a broad range of areas, including serious criminal offences, coronial inquiries, judicial reviews, and professional misconduct allegations. He has represented clients in high-profile cases involving charges of unlawful killing, fraud, corruption, and defamation.

Before going to the Bar, Boe was the principal of a leading criminal law firm in Queensland for nearly two decades, where he was recognized as an Accredited Specialist in criminal law. His notable cases include representing Ivan Milat during his serial killings trial and David Ettridge (the co-accused of Pauline Hanson) in the successful appeal against political corruption charges.

Jilly Field

Jilly Field is Pro Bono Principal at Gilchrist Connell. With an extensive background working in pro bono practices, Field has worked as a front-line lawyer in areas such as poverty law, animal rights, domestic and family violence, systemic reform, and advocacy for children within the criminal justice system.

Her interest and focus on this field has led her to speak frequently on working with communities facing disadvantage, ethics in pro bono practice, conscious lawyering, the ethics of advocacy writing and the nuance of power and responding to unfairness.

Field's law reform programs have also received nominations for the Asia Pacific Innovative Law Awards in the categories of Rule of Law and Access to Justice over four years, and have served as a basis for strategic pro bono support across various law firms. In 2018, she was a finalist for Pro Bono Lawyer of the Year at the Women in Law Awards. Field is also currently a board member of Community Legal Centres NSW, Women's Legal Service NSW, and Transcend Australia. She also serves as an advocacy advisor to Wear It Purple. In 2023, Field received the Lawyers Weekly Pro Bono Partner of the Year award.

The Honourable Catherine Holmes AC SC

The Honourable Catherine Holmes AC SC was the Chief Justice of the Supreme Court of Queensland from 2015 to 2022. Prior to her role as Chief Justice, Holmes was appointed as a Judge of the Supreme Court in 2000, and joined the Queensland Court of Appeal in 2006. She was the first woman to hold the role of Chief Justice in Queensland's history.

Throughout her judicial career, she worked across various legal areas, including criminal, administrative, and mental health law, and presided over numerous cases shaping Queensland's legal landscape. After being admitted to practice as a solicitor in 1982 and as a barrister in 1984, Holmes worked as

a Crown prosecutor and later focused on criminal and administrative law in private practice. She has also held roles in the public service, including serving as a member of the Queensland Anti-Discrimination Tribunal and as deputy president of the Queensland Community Corrections Board.

Holmes has also led a number of high-profile inquiries. She was appointed to chair the Queensland Floods Commission of Inquiry in 2011, investigating the causes and responses to the flooding events that impacted the State. From 2022 to 2023, she also served as head of the Royal Commission into the Robodebt Scheme, examining the administration and impacts of the Australian Government's controversial debt recovery program.

In 2020, Holmes was appointed a Companion of the Order of Australia for eminent service to the judiciary, notably to criminal, administrative, and mental health law, and to the community of Queensland.

The Honourable Patrick Keane AC KC

The Honourable Patrick Keane AC KC served as a Justice of the High Court of Australia from 2013 to 2022. At the time of his appointment to the High Court, he was Chief Justice of the Federal Court of Australia, a role he assumed in 2010. Before that, Keane sat as a Judge of the Court of Appeal of the Supreme Court of Queensland from 2005 to 2010, and held the position of Solicitor-General of Queensland from 1992 to 2005.

Keane graduated from the University of Queensland with a Bachelor of Arts in 1973, and a Bachelor of Laws in 1976 – with first-class honours and a University Medal. He went on to read for a Bachelor of Civil Law at Magdalen

College of the University of Oxford, where he was awarded the Vinerian Scholarship and the JHC Morris Prize. In 1976, Keane was admitted as a solicitor of the Supreme Court of Queensland, before going to the Bar in 1977, and taking silk in 1988.

In 2015, Keane was named a Companion of the Order of Australia for his service to the law and to the judiciary, his contributions to improved legal and public administration, and for his advocacy for increased access to justice, ethical standards, and a range of professional organisations.

Stephen Keim SC

Stephen Keim SC is an Australian barrister. He was a founding member of Higgins Chambers in Brisbane, where he currently serves as head of chambers. Keim was called to the Bar in July 1985, and appointed Senior Counsel in 2004. He holds a Bachelor of Laws (Honours) and a Bachelor of Arts from the University of Queensland.

Keim's practice encompasses many areas of law, including administrative law, criminal law, planning and environmental law, and appellate matters. He is perhaps most well-known for his representation of Dr Muhamed Haneef in his application for judicial review of the decision to revoke his Australian visa on suspicion of terror-related activities.

Prior to joining the Bar, Keim was partner at O'Mara, Patterson and Perrier. He has also served as a member of the Queensland Anti-Discrimination Tribunal and the Queensland Land Court, and previously held leadership

positions such as president of Caxton Legal Centre Inc, Australian Lawyers for Human Rights, and the Legal Aid Commission (Queensland).

Keim also currently serves as patron of Australians Against Capital Punishment, and the Julian Wagner Memorial Fund. He remains actively involved in the legal community as a member of the Criminal Law Committee of the Bar Association of Queensland, and the Human Rights Committee of the Law Council of Australia.

The Honourable Michael Kirby AC CMG

The Honourable Michael Kirby AC CMG served as a Justice of the High Court of Australia from 1996 to 2009. Before that, he was the inaugural chairman of the Australian Law Reform Commission and served as a Judge of the Federal Court of Australia. From 1984 until 1996, he was President of the New South Wales Court of Appeal, during which time he also served as President of the Court of Appeal of the Solomon Islands.

In addition to his judicial roles, Kirby was elected Chancellor of Macquarie University, and has held positions in various national and international organizations, including the World Health Organisation's Global Commission on AIDS and the International Commission of Jurists. He also served as UN Special Representative for Human Rights in Cambodia and participated in multiple UN advisory roles, including the Commission of Inquiry on Human Rights Violations in North Korea.

After his retirement from the judiciary, Kirby served as president of the Institute of Arbitrators & Mediators Australia and was a board member of

the Australian Centre for International Commercial Arbitration. The honours he has received are too numerous to list in full, but include the Gruber Justice Prize in 2010 and the insignia of the Order of the Rising Sun from Japan in 2017. Currently, he is patron of the Kirby Institute at UNSW Sydney, where he continues to engage with issues related to health and law.

Dr Russell Marks

Dr Russell Marks is a criminal defence lawyer with extensive experience in both legal practice and academic research. He is an Adjunct Research Fellow at La Trobe University, where he completed a PhD on Australian political history. In addition to his academic work, Marks is an established author, having written *Crime and Punishment: Offenders and Victims in a Broken Justice System* (Black Inc., 2015), which critically examines the failings of the Australian criminal justice system, and *Black Lives, White Law: Locked Up and Locked Out in Australia* (Black Inc., 2022), which explores the impact of legal systems on Indigenous Australians. Marks also regularly writes for *The Monthly* magazine, drawing on his legal practice and research background to provide nuanced insights into law, politics, and social issues, with a particular focus on criminal justice and Indigenous rights.

Throughout his career, Marks has held a variety of roles, including working for Aboriginal legal services in both the Northern Territory and Victoria, where he advocated on behalf of Indigenous clients and gained a deeper understanding of the systemic issues affecting these communities. His work in these regions informed much of his research and writing, giving him a practical perspective on the intersections between law, policy, and social justice.

Scott McDougall

Scott McDougall is the Commissioner of the Queensland Human Rights Commission. He commenced this role in 2018, when the organisation was known as the Anti-Discrimination Commission Queensland. Before this, he served as director and principal solicitor at Caxton Legal Centre Inc.

Admitted to practice in 1993, McDougall has advocated for various communities, focusing on litigation in areas such as discrimination, native title, criminal law, guardianship, and coronial inquiries. He has played a critical role in designing and implementing several legal and social work service programs, and he served as president of the Queensland Association of Independent Legal Services from 2009 to 2013.

Throughout his career, McDougall has facilitated engagement between governments and numerous communities, notably working with the Palm Island Aboriginal Shire Council on the Palm Island Future Direction Report in 2006, and overseeing the G20 Independent Legal Observers Project in 2014. He holds a Bachelor of Laws from the Queensland University of Technology.

Dr Chris McGrath

Dr Chris McGrath is an Australian barrister, with a practice focusing on climate litigation, planning and environmental law, resources and mining law in Queensland, as well as logging and resources law in Papua New Guinea. After graduating from the University of Queensland with a Bachelor of Laws and a Bachelor of Science, he was admitted to practice in 2000.

Alongside his legal practice, McGrath serves as an Adjunct Associate Professor at the University of Queensland's School of Earth & Environmental Sciences, where he contributes to academic research and teaches in environmental law.

McGrath has also acted as counsel in a number of significant environmental cases, including *Adani Mining Pty Ltd v Land Services of Coast and Country Inc*, which involved complex disputes over groundwater, threatened species, and climate change. He also acted in *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd*, seeking injunctions against Japanese whaling in the Australian Whale Sanctuary, and *Minister for the Environment and Heritage v Queensland Conservation Council Inc*, a judicial review challenging the assessment of the impacts of the Nathan Dam in Queensland under federal environmental law.

The Honourable Dr Kevin Rudd AC

The Honourable Dr Kevin Rudd AC is the ambassador of Australia to the United States. From 2007 to 2010, he served as Australia's 26th Prime Minister, with a second term in 2013. Rudd began his career in 1981 as a diplomat, with postings to Beijing and Stockholm, and later served as Chief of Staff to Queensland Premier Wayne Goss, where he helped implement significant state-level reforms.

Rudd's achievements while Prime Minister include initiating Australia's first national apology to the Stolen Generations of Indigenous Australians, introducing health reforms, and implementing policies for expanding broadband infrastructure. He was also involved in advancing Australia's

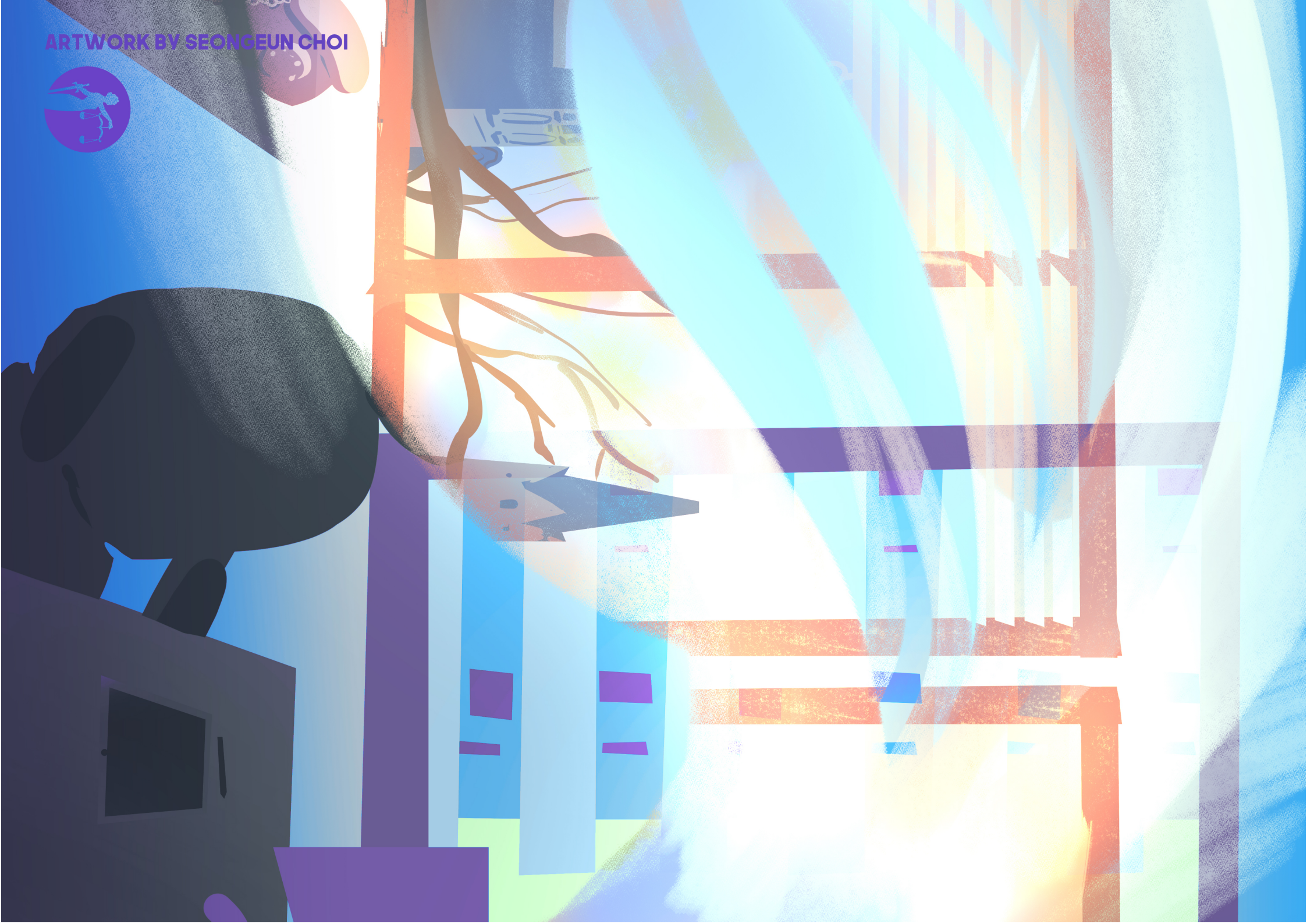
participation in the G20, which became a key platform for international economic discussions. During his second term, his administration addressed climate policy and asylum seeker issues. In 2019, Rudd was appointed a Companion of the Order of Australia in recognition of his contribution to Indigenous reconciliation, innovative economic initiatives, significant policy reforms, and his leadership in senior advisory roles with international organisations.

Rosalind Williams OAM

Rosalind Williams OAM is the 2024 Practitioner-in-Residence at the University of Queensland's Pro Bono Centre. Alongside her work at the Pro Bono Centre, Williams is a solicitor at Caxton Legal Centre Inc, where she has worked since 1991. In addition to her casework responsibilities, she has also been involved in the supervision of clinical legal education, as well as drafting law reform submissions, and delivering community legal education.

Outside of her involvement with the law, Williams is deeply engaged in the arts. She currently serves as a Voice (and Text) teacher at the Queensland University of Technology, where she has participated in various productions since August 2016. She also teaches Voice and Theatre History as a tutor at TAFE Queensland. From 2007 to 2014, Williams was a tutor at the National Institute of Dramatic Art, where she not only conducted voice training for the young actors' studio but also worked as the dedicated voice coach on numerous productions.

In 2021, Williams was awarded a Medal in the General Division of the Order of Australia for service to the law, and to the performing arts.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