IGNITE

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IGNITE

The Blackstone's Society Equity, Diversity and Social Justice Publication

The Blackstone Society acknowledges that the UWA Law School is situated on the land of the Whadjuk Noongar people, and that Noongar people remain the spiritual and cultural custodians of their land, and continue to practice their values, languages, beliefs and knowledge.

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Editors' Preface

Welcome to the fourth volume of Ignite! Ignite looks at the intersection of law and social justice. For many of us, wanting to improve society was the key reason we chose to study law in the first place. From the nature of society as a whole and from the boardroom to the bedroom, its impact on our lives is as profound as the effects changes in it can have. These changes can be as simple as changing the language of a statute or they can be a clear and sweeping judgement that eloquently defends human dignity. Few other fields of knowledge have such potential to make society better for all its members.

It is therefore both right and important to explore the nexus of scholarship and practice in areas that daily impact people's lives. Ignite is the forum for that exploration. Its contents this year span the full spectrum of issues, from the role of nature and diverse cultural viewpoints in law, to deeply intimate issues of whether and how law can help members of the stolen generations and victims of sexual assault. From theory in practice, to the urgent issue of racial injustice, to how we can give back to the profession, the fourth edition's contents provide valuable insights into legal scholarship from the students and faculty of the UWA Law School.

We would like to thank Aidan Ricciardo, Roshni Kaila, Julia Symons, Lara Miller, Professor Robyn Carroll and Dr Marilyn Bromberg, Adehlia Ebert, and Jing Zhi (Benjamin) Wong for their contributions and hard work. We would also like to thank the Blackstone Committee for the opportunity to help put the publication together.

We hope you will enjoy reading it as much as we did and that you find it an accessible way to help inform your studies and your future legal practice.

Norman Jacka & Christie Oey

Crawley, 16 October 2020

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Foreword

Aidan Ricciardo

2020 has been *a year*. I don't need to explain why (and I'm sure you're sick of hearing and thinking about the reasons why). We've all lived it and felt it and tried to find the silver linings in what has been a difficult time for many of us.

Before you roll your eyes – don't worry – I'm not going to barrage you with messages about #inthistogether (I'm sure you're sick of hearing that too). But 2020 *has* given us some perspective on the importance of community, compassion, and caring for others. These are values central to social justice and the advancement of equity and diversity – the matters to which the articles in this (and every) issue of *Ignite* relate.

Roshni Kaila's article grapples with the complexity of intersectionality, which is something that 2020 has made me think about a lot. One reason why I feel conflicted when I hear or see something about us all being 'in this together' is because we are all experiencing 'this' in different ways. Our lives are shaped not only by the individual communities we belong to, but also by the uniqueness of the intersections between these communities.

Kaila concludes by noting the importance of appropriately addressing injustices. This is the very thing that Julia Symons then argues the law of negligence is presently incapable of doing for the intergenerational trauma experienced by Stolen Generations survivors. Symons' analysis reminds us of the limitations of the 'law' we typically focus on in Australian law schools. It also reminds us why it is important for the law to adapt or develop novel solutions to address injustices as best it can.

The emergence and evolution of human rights frameworks provide examples of the law developing in this way. As Lara Miller discusses in her article, there are different perspectives about the universality of human rights. In a year which has seen many of our rights and freedoms (temporarily) curtailed, Miller's discussion had me thinking of wider questions about whether these present limitations are properly regarded as universal or relative to particular cultures.

Whilst the law can uphold and protect rights, many people are unable assert and enforce their rights because they encounter barriers to accessing justice. As Professor Robyn Carroll and

Dr Marilyn Bromberg note, there are opportunities for both practitioners and law students to address these barriers by helping to provide pro bono legal services. Working towards improving access to justice by engaging in pro bono work has become a core goal of the legal community.

But not all barriers to justice arise from an inability to access legal services. The law itself can act as a barrier to obtaining *real* justice when it does not accord with community standards. This is an issue identified by Adehlia Ebert in the context of the Western Australian law on sexual penetration without consent (and related law). Ebert's article also explains how aspects of this law fail to effectively guide human behaviour.

The final articles in this volume of *Ignite* relate to matters of enduring priority, but which have been of particular focus in 2020.

Benjamin Wong's article explores novel legal approaches to tackling environmental abuse. These conversations have gained momentum as we continue to experience a climate crisis and witness its many consequences, including the unusually intense and devastating bushfires experienced in Australia over the 2019-20 period.

Christie Oey concludes this volume with a call to action. Oey's article encourages readers to act – even in small ways – to advance the Black Lives Matter message and movement. She reminds us that whilst the law and law enforcement are often responsible for grave injustices, reform to address and alleviate those injustices is possible. This being the case, in Australia there is a particular obligation to listen to and amplify the voices of First Nations peoples.

It has been a pleasure to read and provide the foreword for this (very topical) issue of *Ignite.* In a year which has changed our lives and challenged us as much as 2020 has, it is reassuring to see that diverse and informed perspectives on social justice issues are alive and well in the UWA Law School community.

Is intersectionality helpful or harmful in addressing inequality?

Roshni Kaila

Introduction

The struggle for equal rights is an experience shared by an innumerable amount of marginalised identity groups globally. Feminists, civil rights advocates and the LGBTQI+ community are all examples of people united to overcome a form of inequality that they are subject to. However, in recent decades there has been a shift to look away from singular identity groups and start observing how experiences differ for people identifying with multiple oppressed groups. This led to the theory of intersectionality, spearheaded by academic and critical race theorist Kimberlé Williams Crenshaw in her work 'Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Color'. Crenshaw's work specifically focuses on how feminist and antiracist movements rarely coexist, but intersectionality has since been used to understand different experiences based on intersections of race, gender, sexuality, ability, class and so on.

This essay will discuss how intersectionality is helpful overall to address inequality by meaningfully recognising a plurality of experiences, predominantly through the relationship of gender with minority status. Firstly, it will discuss how an intersectional lens is instrumental in addressing legal and institutionalised inequality. Secondly, this essay will address the intersectionality of economic inequalities, in both the workforce and exploitative economic practices. This essay will then also discuss how intersectionality and identity politics can be harmful in addressing various other forms of inequalities by only engaging with certain groups of society.

Legal and institutional inequality

Understanding and adopting intersectionality is fundamental in order to meaningfully address inequality perpetuated by legal frameworks and institutions. This is predominantly as laws and policies introduced for marginalised groups are designed to tackle them independently, not concurrently. This can be demonstrated with the way that policies address sexual assault for women in minority groups. For example, instances of sexual assault are disproportionately high for women with disabilities. It is well known that an overwhelming majority (approximately 80%) of sexual assault victims are women,

however in Australia, it is reported that 'women with disabilities are 40% more likely to be the victims of domestic violence', and 'more than 70% of women with disabilities have been victims of violent sexual encounters' (Frohmader 2014). This is because there are serious barriers to reporting of sexual assault and violence for women with disabilities. This includes dependency, as the perpetrator of assault is generally someone the victim is financially or physically dependent on such as a service provider (Howland & Nosek 1998). Additionally, there remains preconceived ideas about the ability of women with disabilities to reliably report cases of sexual assault, notably the ideas that they are sexually promiscuous and that they are unable to be reliable witnesses (Connelly & Keilty 2001).

Australia has a separately implemented a *National Plan to Reduce Violence against Women and their Children 2010-2022* for gender-based violence, and a *National Disability Strategy 2010-2020* to tackle inequalities faced by people with disabilities. However, there is no comprehensive legal framework to address sexual assault with consideration as to the intersection of gender and disability status. This highlights how an intersectional approach is key in addressing legal and institutional inequality, as it demonstrates that there is a unique nature to the crime which is not sensitively addressed.

The 'ban the burqa' movement in France and other European countries is another example of how axes of oppression aside from gender must be considered in addressing institutional inequality. In 2009 President Nicolas Sarkozy stated that the burqa was "contrary to the values of the Republic", and that headscarves 'symbolised the subjugation of women' rather than being a symbol of religious faith (Human Rights Without Frontiers 2015, p. 8). Sarkozy's sentiments are echoed by many liberal feminists, who 'consider it to be a symbol of Muslim women's lack of agency and their subordination to Islamic patriarchal norms' (Côté et al 2015, p. 1888). However, the stance on the issue taken up by politicians and liberal feminists relies on a victimised narrative of a Muslim woman's identity, with 'the assumption of a lack of choice by those who wear the burqa' (Down 2011, p. 378). This representation of Muslim women is not intersectional as these liberal ideas are synonymous with the ideologies that govern Western countries. Instead, feminists opposing the 'ban the burqa' movement view a Muslim woman's veil as the woman's choice, hence supporting both bodily and personal autonomy for all women (Côté et al 2015). What is seen as 'oppressive' in mainstream Western feminism is criticised and seen as a source of autonomy when considering the intersection of gender and religious identity. Conversely, the Western representation of

Muslim women exacerbates this idea of 'oppression'; as critical race theorist and feminist Alia Al-Saji cites, 'the veil itself is not the oppressing force; rather it is Western discourse of the veil that oppresses women' (Bogen n.d., p. 1). The intersectional perspective is hence crucial in addressing legal and institutional inequality, by recognising a plurality of feminist perspectives when shaping laws that require cultural sensitivity.

Economic inequality

Economic inequality can be empirically linked to identity based on gender, race, ethnicity, disability status, etc.; this alters when a person identifies with more than one marginalised identity group. This is exemplified through the widely publicised phenomenon of the gender pay gap, in which the 'gender' aspect must be considered as part of a wider matrix of identities to understand various different pay gaps. Research demonstrates the mean pay gap in the US is approximately 21% (Benis & Chapman 2017). Reasons for this gap can include women more being more likely to have part time jobs due to impermanence in the labour force, female dominated industries (such as child care) having an average lower pay than male dominated industries (e.g. STEM jobs) and job inflexibility

which is incompatible with women as the primary caregivers in households. However, pay gaps are more pervasive when race is considered; the pay gap between white, non-Hispanic men and African American women is 33%, as compared to the 24% for white women. As of 2016, African American men earned on average 30% less than a white man, a gap 6% greater than the gap between white men and white women (Jacobs 2017). This demonstrates that the racial pay gap is in fact worse than that of gender. Reasons cited for racial pay gaps include there being persistently minimal increases in university educated African Americans and both conscious and unconscious bias in hiring practices. African American women will however experience both the racial and gender barriers that inhibit higher pay, and advocating for these cannot be captured independently by feminist or civil rights movements. It is the coexistence of these two identity groups that is essential in explaining the larger degree of pay inequality they experience. Therefore, an intersectional framework is crucial to extend beyond gender economic differences, as well as meaningfully understand the intersection of gender and racial pay disparity.

The commodification of feminism in 21st century fashion demonstrates how an intersectional framework is necessary to address various forms of economic inequality beyond gender

exclusively. Major fashion labels worldwide have created statement feminist clothing to distinguish their brand as socially progressive and 'help break down the stigma surrounding the political movement' (Dazed 2016). Examples include the Christian Dior shirt printed with the quote 'We should all be feminists' and ASOS' Missguided Feminism T-shirt (see Appendix A). However, the production of feminist apparel perpetuates a much more dangerous system of the oppression of women than is evident. This is largely ignored due to 'commodity fetishism', the idea that 'the economic forms of capitalism conceal social relations because the products of human labor appear independent from those who created them' (Riordan 2001). It is estimated that three quarters of garment workers worldwide are female (Spinks 2017), with a large proportion of these factories present in Third World countries. The various harmful conditions of this clothing production includes low wages, working in contact with dangerous chemicals and exploiting the labor of young girls (Mellicker 2016). For women, there are limited gender-specific work rights such as maternity leave or workplace sexual harassment (Dazed 2016). Within Western countries alone, the empowerment of women through feminist apparel demonstrates that 'fights for justice and equal rights are becoming mainstream' (Dazed 2016). However this comes at

the cost of the women in lower socioeconomic conditions or Third World countries who are disproportionately affected by harmful working conditions. This demonstrates how the intersection of gender and global class structures must be used to critically assess these exploitative trends, and hence meaningfully address both gender and class inequality.

Intersectionality and identity politics

The identity politics that is inherent in intersectionality theory can have a harmful effect on the groups who experience oppression and how inequality is addressed. An issue is that intersectionality 'aims to liberate identity groups (or members thereof) qua identity groups (or individuals), rather than aiming to liberate them from identity itself' (Rectenwald 2013). In recognising the different types of oppression, identity becomes the foundation of a collectivist political narrative and exacerbates the "us" (oppressed minority groups) and "them" (oppressors who are privileged). This has 'hampered [its] ability to think about the nature of freedom and action beyond the assertion of identity' (McNay 2010). This makes intersectionality harmful in addressing inequality as recognising intersectional marginalised groups does not necessarily lead to the inequality being tackled; rather, the

intersectional identities are employed to perpetuate identity as a point of division.

In communities which attempt to mainstream intersectionality, the problem of 'entitlement victimhood' is created; this is where the opinions and voices of those various oppressed groups are actively preferenced above those whose opinions from those who hold privilege. This is helpful in understanding intersectional experiences, however this can create an 'inverse hierarchy' of people who now gain social capital based on their minority status. The more minority groups a person identifies with, the more social capital gained. For example, a lesbian African American woman would have more capital than a gay white man. This results in 'attempts to silence anyone who is not in the privileged categories...on the grounds that they're unqualified to discuss oppression if they're not from the appropriate victim category' (Amesley 2017). When intersectional identities are recognised and given this capital, those born with privileges are often completely locked out from the inequality conversation instead of engaging with it. By not being able to effectively dismantle privilege or oppression through engagement, the entitlement victimhood complex makes intersectionality harmful in addressing inequality.

In progressive popular culture and media, the 'inverse hierarchy' issue often applies to prominent oppressed groups based on race, gender and sexuality, but less for other axes of oppression such as class or socioeconomic status; this makes it more difficult to address inequality under the guise of intersectionality. For example, a rural working class white man may have face more difficult experiences than a upper class African American female academic (Amesley 2017), however as most intersectional judgements are based on race and gender alone the class inequality would not be recognised in a meaningful way. This phenomenon was prevalent in the 2016 US election; the rhetoric of the Clinton campaign appealed to marginalised identity groups such as African American, Latino, LGBTQI+ and women voters and disenfranchised white working class voters (Illing 2017). The "middle America" voters were demonised by Democrats by being conservatives, but those voters also experienced different forms of marginalisation based on class, socioeconomic status and geography. In particular, rural Americans experienced political disenchantment due to a crippling decline in public infrastructure, as well as lack of economic opportunities due to industries being urbanised or outsourced (Leonard 2017). Intersectional discourse in the media can hence lead to particular oppressed groups given preferential treatment; this

makes it harmful in attempting to address various forms of inequality if some marginalised groups do not fit the paradigm of what these groups look like.

Conclusion

This essay has discussed how intersectionality is overall helpful in addressing inequality as an extension of gender identity and feminist discourse; this has been demonstrated with institutional inequality and global and domestic economic inequality. However, the relationship between intersectionality and identity politics can be harmful in addressing inequality in a way that can effectively mitigate it. Intersectionality theory has been overwhelmingly constructive in giving a framework to recognise people who identify with more than one marginalised social group. However, it is imperative that going forward a nuanced perspective of issues faced by oppressed groups is employed to ensure that inequality is addressed in a way that sets out to solve it.

Can Negligence Law Contribute to the Healing of Intergenerational Trauma for Stolen Generations Survivors?

Julia Symons

I. INTRODUCTION

The law of negligence cannot substantially contribute to healing of intergenerational trauma for Stolen Generations survivors ('**survivors**') or the broader Indigenous community.

'Stolen generations' refers to the Indigenous children who were forcibly removed from their families and cultural groups by Australian governments between the late 1800s and the 1970s, for racial reasons.[1] The trauma that survivors endured from being removed from their families, communities and cultures -- and from being systematically abused in foster homes and institutions -- broke down family and social structures.[2] The devastation from these removals radiated beyond the immediate survivors: immediate families and descendants of

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[1]Human Rights and Equality Opportunity Commission, *Bringing Them Home*: *Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (report, 1997) passim ('*Bringing them Home'*); Randall Kune, 'The Stolen Generations in Court: Explaining the Lack of Widespread Successful Litigation by Members of the Stolen Generations' (2011) 30(1) *University of Tasmania Law Review* 33, 33.

[2]Aboriginal and Torres Strait Islander Healing Foundation, *Bringing Them Home 20 years on: an action plan for healing* (report, 2017), 21 ('*Bringing them home: 20 years on'*).

survivors remain disadvantaged according to key social, economic and health indicators such as life expectancy, employment rates and incarceration.[3] This is known as 'intergenerational trauma'.[4]

In this essay I firstly examine *Trevorrow v South Australia*[5] (*'Trevorrow'*) and its appeal, *South Australia v Lampard-Trevorrow*[6] (*'Lampard-Trevorrow'*), to explore why claims in negligence are unlikely to succeed for most survivors. Secondly, I contend that the tort of negligence, as a private law concept, is unsuitable to healing 'intergenerational trauma' as a form of collective suffering. Tort law cannot be expected to fill the vacuum of political leadership that has thus far denied survivors and the broader Indigenous community an adequate response to their trauma. However, a detailed consideration of more appropriate responses, such as reparations, is beyond the scope of this article.[7]

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[3]Ibid; Chris Cunneen and Julia Grix, *The Limitations of Litigation in Stolen Generations* Cases (Research Discussion Paper No 15, Australian Institute of Aboriginal and Torres Strait Islander Studies, 2004), 3 ('Cunneen and Grix').
[4]*Bringing them Home: 20 years on* 21.
[5]*Trevorrow v State of South Australia (No 5)* (2007) 98 SASR 136 ('*Trevorrow*').
[6]*South Australia v Lampard Trevorrow* (2010) 106 SASR 331 ('*Lampard Trevorrow*').
[7] For discussion of other solutions see generally Public Interest Advocacy Centre, *Restoring Identity: Final report of the* Moving Forward *Consultation Project* (report, 2009); *Bringing Them Home* (n 1) appendix 9; *Bringing them Home: 20 years on* (n 1) passim; Cunneen and Grix (n 3) 41-43.

II. *TREVORROW* AND *LAMPARD-TREVORROW*.

Trevorrow was the first instance of a survivor succeeding in a claim against the state on the basis of, inter alia, negligence. The negligence claim was upheld on appeal.[8] *Trevorrow* raised the question of whether the tort of negligence could be an effective route to redress for Stolen Generations survivors, and the intergenerational trauma experienced by the broader Indigenous community.[9]

Grix and Cunneen suggested that a successful litigation outcome for Stolen Generations survivors could have 'significant consequences' for survivors in general, and not just individual plaintiffs, through the creation of a binding precedent which would allow other similar claims to be successfully resolved.[10] However, *Trevorrow* and *Lampard-Trevorrow* are likely to be of limited precedential value.[11] As a

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[8]*Lampard-Trevorrow* (n 6) 407 [372], 413 [409], 414 [412], 417 [423], although nb 1) the finding of fact that that the Aboriginal Protection Board was in breach of a duty of care in relation to its selection of a foster mother was set aside: 371, [190]; 2) not all of Gray J's findings were upheld e.g. the finding of fiduciary duty was reversed: 401 [337], 402 [342].

[9]See generally Julian Burnside, 'Stolen Generation: Time for a Change' (2007) 32(3) *Alternative Law Journal* 131, 131 ('*Burnside*'); Saima Bangash, 'Stolen Generation's first successful claim for damages: *Trevorrow v State of South Australia (No. 5)* [2007] SASC 285' (2007) 45(11) *Law Society Journal: Official Journal of the Law Society of New South Wales* 50, 51.

[10]Cunneen and Grix (n 3) 4.

[11]Antonio Buti 'The Stolen Generations and Litigation Revisited' (2008) 32 *Melbourne University Law Review* 382, 412-414 ('Buti'). See also Honni van Riswijk and Thalia Anthony, 'Can the Common Law Adjudicate Historical Suffering' (2012) 36 *Melbourne University Law Review* 618, 619 ('Riswijk and Anthony').

decision of a State Supreme court, *Lampard-Trevorrow* does not bind courts in other Australian jurisdictions. To my knowledge, there has not been any Stolen Generations claims in negligence since *Lampard-Trevorrow*: its precedential value remains untested,[12] and would presumably be diminished by that case's 'distinctive' factual and legal basis.[13]

Below, I examine some of the circumstances of the *Trevorrow/Lampard-Trevorrow* cases that distinguish Bruce Trevorrow from other survivor-claimants, to contend that negligence can only offer restitution to specific individual claimants, rather than all survivors. It follows that its ability to heal intergenerational trauma is extremely limited. I do not consider issues which pertain to litigation in general, such as statutory limitation periods and the traumas inherent to the litigation process.[14]

A *Statutory duties*

Courts are in general reluctant to impose duties of care on public bodies.[15] There is a particular reluctance in the case of

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[12]Of the cases that cite *Trevorrow* and/or *Lampard Trevorrow,* none relate to negligence. I base this claim on a search of both WestLaw and LexisAdvance, correct as of 10/09/19.

[13]Riswijk and Anthony (n 11) 620.

[14]For a discussion of statutory limitation periods see generally Buti (n 11) 397-399; Cunneen and Grix (n 3) 32-35; Kune (n 1) 46-47. For a discussion of the traumatising nature of litigation, see generally Cunneen and Grix (n 3) 38-32; Kune (n 1) 47-49.

[15]*Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 459-460.

Institution-child relationships.[16] In *Williams*[17] it was held that no common care duty of care arose for fear it would 'cut across the whole statutory system for the protection of Aboriginal children'[18] and open floodgate litigation. It may be seen as significant that the Court in *Trevorrow* rejected the 'floodgates' argument.[19] However, one of the reasons for the court rejecting this argument was that, e.g., religious institutions (who were also complicit in removing children)[20] did not have the statutory powers exercised by APB, and therefore this only applies to a narrow class of plaintiff.[21]

To establish the existence of a duty of care, the court applied the 'salient features' test.[22] Firstly, there was no provision to exclude duty of care in any of the relevant items of legislation,[23] nor were there factors militating against the owing of a duty of care.[24] Secondly, the Aboriginal Protection Board (an

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[16]Riswijk and Antony (n 11) 634.
[17]*Williams v Minister Aboriginal Land Rights Act and State of NSW* [No 3] [2000] NSWCA 255.
[18]Ibid, [160] (Heydon JA).
[19]*Lampard-Trevorrow* (n 6) 407 [371].
[20]Human Rights and Equal Opportunity Commission, *Social Justice Report 1998* (Report, 1999) 48-53.
[21]*Lampard-Trevorrow*, 409 [384].
[22]*Trevorrow* (n 5) 357 [1039], 358-362 [1041]-[1070]. See also Buti (n 11) 391-396 for a useful summary of the statutory background.
[23]*Trevorrow* (n 5) 349, [1015], 358 [1042].
[24]Ibid 358 [1042]. Cf *Sullivan v Moody* (2001) 207 CLR 562 where the duty of care (to children vulnerable to abuse) militated against a duty of care being owed to their parents (who were accused of abuse of children).

emanation of the state[25]) had a statutory power to remove children.[26] This enabled the imposition of a duty: contrast the claim in *Williams* which was struck down as the body that removed the plaintiff in that case had no statutory authority, which precluded the imposition of a duty of care.[27] Thirdly, the court held that, when the Aboriginal Protection Board removed the plaintiff and placed him in foster care it did so 'wilfully' and in full knowledge that it was acting *ultra-vires*.[28] These salient features form part of the 'distinctive' legal and factual background unique to *Trevorrow*, and are not likely to be shared by other potential plaintiffs.[29]

B *Foreseeability*

In *Trevorrow*, Gray J held that, at the time of Trevorrow's removal, it was an established scientific fact that removing children from their parents had adverse developmental consequences.[30] Therefore, it could be established that harm was foreseeable.[31] Trevorrow's counsel viewed this finding as a significant development in negligence law for survivors, as this finding 'applied to all [possible plaintiffs],' not just

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[25]*Trevorrow* (n 5) 155 [250]-[261].
[26]Ibid 230, [393].
[27]Buti (n 11) 403.
[28]*Trevorrow* (n 5) 331 [942].
[29]See discussion in Buti (n11) 391-396.
[30]*Trevorrow* (n 5) 359 [1046].
[31]Ibid.

Trevorrow.[32] However, upon appeal, this finding of fact was questioned.[33] Moreover, given that this practice spanned from 1890s-1970s, many survivors were taken from a time that preceded this knowledge.[34] As foreseeability is judged with reference to what was foreseeable *at the time of the conduct*[35] then this remains a potential barrier to survivors bringing claims in negligence.

C *Causation*

Establishing causation (the final element of the tort of negligence) has proven to be onerous for survivors: firstly, there is often a lack of evidence, which compounds the difficulty in proving that the plaintiff suffered the harm as a direct result of the defendant's conduct.[36] Unlike previous cases, there was a substantial quantity of evidence available.[37] Secondly, Trevorrow's siblings – who remained with their family and had developed into well-adjusted adults – were able to be used as comparators and assist in establishing a causal link between the conduct and the harm.[38] It may be significant

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[32]Burnside (n 9) 131.
[33]*Lampard-Trevorrow* (n 6) 412-413 [402]-[406].
[34]Kune (n 1) 33.
[35]*Roe v Ministry of Health* [1954] 2 All ER 131: "We must not look at the 1947 accident with 1954 spectacles" (Denning LJA).
[36]See generally Cunneen and Grix (n 3), 23-24.
[37]Buti (n 11) 387.
[38]*Trevorrow* (n 5) 373 [1136].

for future claimants that the Full Court was reluctant to view gaps in documentary evidence as automatically favouring the defendant.[39] However, as the case's precedential value remains untested (see above) it is impossible to assess.

For the above reasons, negligence law is likely to offer compensation to a miniscule proportion of survivors and is therefore even less likely to contribute to healing of intergenerational trauma.

III. BROADER ISSUES

A *'Judicial Notice'*

Acknowledgement of past wrongs is an important component of healing intergenerational trauma.[40] *Lampard-Trevorrow* was significant in stating that "judicial notice" can be taken of the policies of assimilation, and of authorities' putting more weight on subjective 'living standards' rather than the importance of keeping children with their natural parents and culture.[4142] This is a marked contrast from previous Stolen Generations litigation: in *Kruger*, the court accepted the notion that the

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[39]Ibid 371, [1125].
[40]See, e.g., *Bringing Them Home: 20 Years On* (n 2) 46.
[41]*Lampard-Trevorrow* (n 6) 356 [98].
[42]See also *Williams v Minister, Aboriginal Land Rights Act 1983* [No 1] (1994) 35 NSWLR 497 at 505-506 which accepts that policies were 'assimilationist' but nevertheless views them as having been made "for the betterment and welfare of the Aboriginal people".

'standards of the time' justified the removal of the child.[43] Such a statement intention "[accepted as inviolable the values and laws of the dominant power at a particular time" and operates "as a defence of colonialist history".[44]

There is a value in having institutions of state recognise the past ills for what they were.[45] *Lampard-Trevorrow* can be read as a conciliatory step. However, this particular remark is obiter in but one case of unclear precedential value and therefore represents a negligible contribution to healing intergenerational trauma.

B *Private law; collective trauma*

The law of negligence is a fundamentally unsuitable mechanism for healing intergenerational trauma. Firstly, the 'neighbourhood'[46] or foreseeable principle which is the first threshold of a claim in negligence plainly excludes the descendants of survivors who, by virtue of not existing at the time of the conduct, cannot feasibly or reasonably have been within contemplation of the tortfeasor. Secondly, the aim of damages is to restore a plaintiff to the position they were in

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[43] *Kruger v The Commonwealth of Australia* (1997) 190 CLR 1, 53-54.
[44] Cunneen and Grix (n 3) 25-26.
[45] Riswijk and Antony (n 11) 645.
[46] *Donoghue v Stevenson* (1932) AC 562, 580.

before the negligent act.[47][48] Such a concept is plainly of no use to the *descendants* of survivors of the stolen generations.

A further incompatibility comes from applying a private law concept to complex collective suffering. Intergenerational trauma effects Indigenous people collectively: it is estimated that most Indigenous families are affected in one or more generations by removals.[49] In view of the collective nature of this suffering, the *Bringing Them Home* report recommends that reparation be made available not just to survivors but to their family members, descendants and communities.[50] However, torts disputes are understood as private disputes.[51] Accordingly, damages are individually focused.[52] As Llewellyn observes, "as a result of this private conception of disputes, no provision is made for those with a stake or an interest… who do not fit within the traditional conception of

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[47] *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25.
[48] Although, damages can also have a vindicatory effect: see, eg, Robyn Carroll and Norman Witzleb, ''It's not just about the money' - enhancing the vindicatory effect of private law remedies' (2011) 37 *Monash University Law Review* 216.
[49] Cunneen and Grix (n 3) 3.
[50] *Bringing Them Home* (n 1) appendix 9, accessed from <https://bth.humanrights.gov.au/the-report/report-recommendations?_ga=2.112677319.2112772191.1567700643-762573940.1565416641>.
[51] Jennifer Llewellyn, 'Dealing with the legacy of Native Residential School Abuse in Canada: Litigation, ADR and restorative justice' (2001) 52 *University of Toronto Law Journal* 253, 270.
[52] Cunneen and Grix (n 3) 36.

parties."[53] Therefore it is ineffective for addressing collective suffering.

IV. CONCLUSION

Negligence cannot meaningfully contribute to healing intergenerational trauma. Firstly, the pool of survivors to whom claims in negligence would be available is a miniscule proportion of those who were affected by forced removals. Secondly, a private law concept has only limited ability to heal collective suffer.

[53] Llewellyn (n 51) 270-271.

Universalism and Cultural Relativism of Human Rights with Reference to Apostasy

Lara Miller

Human rights are rights that all people are entitled to simply because they are human.[1] The intention of basic human rights is to protect the dignity and freedom of each human being.[2] It is logical to presume that human rights are universal in nature as they apply to all human beings. However, to imply that all rights must be upheld in the same way internationally is not only unrealistic, but intolerant towards varying cultural perspectives. Herein lies a fundamental issue concerning human rights; should human rights apply universally, or should rights mainly derive from the culture in which they function? Jack Donnelly explains this issue using a spectrum of the universality of human rights, with 'radical cultural relativism' and 'radical universalism' at opposite ends.[3] Both of these viewpoints are extremes. On the one hand, radical cultural relativists argue that rights should derive only from cultural beliefs and morals, and should therefore vary significantly

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[1] Jack Donnelly, 'Cultural Relativism and Universal Human Rights' (1984) 6(4) *Human Rights Quarterly* 400, 400.
[2] Nhina Le, 'Are Human Rights Universal or Culturally Relative?' (2016) 28(2) *Peace Review: A Journal of Social Justice* 203, 203.
[3] Donnelly, above n 1.

between countries.[4] On the other hand, radical universalists argue that human rights are universal in nature and should not vary in any capacity between countries.[5] To the radical universalist, culture is irrelevant.[6] In the modern world, neither universalism nor cultural relativism are feasible in their most radical forms.[7]

Jack Donnelly has argued that 'we can justifiably insist upon some form of weak cultural relativism; that is, on a fundamental universality of basic human rights, tempered by a recognition of the possible need for limited cultural variations.'[8] This stance prioritises the universalism of fundamental rights, while acknowledging that cultural variations should be considered in limited cases. This viewpoint is beneficial as it recognises cultural differences, while ensuring that culture is not used to defend human rights violations.[9] The right to freedom of religion is widely regarded as a fundamental and non-derogable right,[10] therefore it should be implemented the same way across cultures. However,

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[4] Ibid, 401.
[5] Ibid.
[6] Ibid.
[7] Ibid.
[8] Ibid.
[9] Catherine Polisi, 'Universal Rights and Cultural Relativism' (2004) 167(1) *World Affairs* 41, 42.
[10] Michael Kirby, 'Fundamental Human Rights and Religious Apostasy' (2008) 17(1) *Griffith Law Review* 151, 151.

certain countries do not adequately uphold freedom of religion, and culture should not be a justifiable excuse. Cultural variations in human rights implementation should be allowed, but not in the cases of non-derogable rights. Donnelly's proposal is an appropriate approach to the issue of international human rights in the modern world. Weak cultural relativism acknowledges the advantages and flaws of both universalism and cultural relativism, and combines both concepts in a practical and beneficial way.

A *The Rise of International Human Rights*

Human rights became an international issue in the 20th century, shortly following World War Two.[11] It was universally acknowledged that a system was required to prevent the recurrence of such horrifying events.[12] In 1945, the United Nations (UN) was established with the intention of maintaining international peace, protecting human rights and regulating the relationships between States.[13] There are currently 193 member

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[11] United Nations, *History of the United Nations* <http://www.un.org/en/sections/history/history-united-nations/index.html>.
[12] Australian Human Rights Commission, *What is the Universal Declaration of Human Rights?* <https://www.humanrights.gov.au/publications/what-universal-declaration-human-rights>.
[13] United Nations, above n 11.

states of the UN,[14] which demonstrates a widespread acceptance of the legitimacy of the establishment. In a sense, this shows that the concept of human rights is universal.[15] The Universal Declaration of Human Rights (UDHR) was created by the General Assembly of the UN in 1948 and outlines rights to which all people are entitled.[16] Within its preamble, the declaration is referred to as "a common standard of achievement for all peoples and all nations."[17] While the UDHR is not legally binding, it is extremely influential on international human rights law and some argue that it constitutes as customary international law.[18] Later, in 1966, the General Assembly adopted the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[19] The UDHR, ICCPR, ICESCR and the Optional Protocols to both Covenants constitute the International Bill of Rights.[20] Article

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[14] United Nations, *Growth in United Nations Membership, 1945-present* <http://www.un.org/en/sections/member-states/growth-united-nations-membership-1945-present/index.html>.
[15] Donnelly, above n 1.
[16] Australian Human Rights Commission, above n 12.
[17] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).
[18] Australian Human Rights Commission, above n 12.
[19] Australian Human Rights Commission, *Human Rights Explained: The International Bill of Rights* (2009) <https://www.humanrights.gov.au/human-rights-explained-fact-sheet-5the-international-bill-rights>.
[20] Ibid.

4 of the ICCPR states that most rights can be breached in certain circumstances, such as during public emergencies, with the exception of 'non-derogable' rights.[21] Non-derogable rights in the ICCPR include: the right to life, freedom from torture or degrading treatment, freedom from involuntary medical or scientific experimentation, freedom from slavery, freedom from imprisonment due to inability to fulfil a contract, right to recognition under the law, and freedom of thought, conscience and religion.[22] These rights are expected to be upheld by parties who have ratified the treaty under all circumstances.[23] Therefore, each of these non-derogable rights should be implemented universally, regardless of cultural beliefs. However, this is not always the case in reality.

B *Universalism*

Universalism is logical. By definition, human rights apply to all human beings, therefore human rights are universal.[24] The implementation of human rights is not as straightforward as that statement implies, but it is argued that there is at least a

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[21] *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
[22] Australian Government, Attorney General's Department, *Absolute Rights* <https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Absoluterights.aspx>.
[23] Ibid.
[24] Donnelly, above n 1, 401.

universal acceptance of the notion of human rights.[25] This is beneficial, as it creates an international standard of human rights for each State to be held accountable to. While most States agree with the universality of fundamental rights, disagreements exist over which rights are indeed 'fundamental'. As well as this, the interpretation of what each right means differs based on cultural context. In order to decide upon a universal set of rights, certain cultural viewpoints must be prioritised over others, particularly in cases where cultural values conflict with one another.[26] The inclusion of clashing viewpoints from different cultures in the same set of rights would be contradictory and impractical. In such cases, the cultures whose viewpoints were excluded due to contradiction would be expected to implement rights that clash with their own culture. While the argument has been made that the UDHR includes a range of individualistic and collectivist viewpoints,[27] universal human rights are often criticised for prioritising Western values.[28] Jamil Baroody, the delegate to the UN from

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[25] Ibid.
[26] Ibid 411.
[27] Le, above n 2, 205.
[28] Le, above n 2, 203.

Saudi Arabia, made such criticisms about the UDHR.[29] He stated that:

> the authors of the draft declaration had, for the most part, taken into consideration only the standards recognised by Western civilisation and had ignored more ancient civilisations...It was not for the Committee to proclaim the superiority of one civilisation over all others or to establish uniform standards for all the countries of the world.[30]

A balance between universalism and cultural relativism is the most advantageous solution.[31] In order to ensure that all human beings are granted their fundamental rights, such rights must be guaranteed at a universal level. There are certain basic rights, such as the non-derogable rights outlined in the ICCPR, that should be upheld in all States, as they are instrumental in maintaining human dignity.[32] However, universalism with the prohibition of any cultural interpretation is problematic, intolerant and unrealistic. To remedy this, there must be room for limited cultural variations. Therefore, Donnelly's proposal of relative universality is useful as it ensures that fundamental

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[29] Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (University of Pennsylvania Press, 1999), 24.
[30] Ibid.
[31] Ulf Johansson Dahre, 'Searching for a Middle Ground: Anthropologists and the Debate on the Universalism and the Cultural Relativism of Human Rights' (2017) 21(4) *The International Journal of Human Rights* 1, 16.
[32] Donnelly, above n 1, 410.

rights are upheld universally, while allowing cultural interpretations for few, less crucial rights.[33]

C *Cultural Relativism*

To assert that all rights must be upheld in the same way universally is not only unrealistic, but ignorant concerning cultural perspectives. While human rights apply to all humans, not all humans are the same, therefore the application of human rights can be expected to differ around the world.[34] In a world with various cultures and beliefs, differing viewpoints must be acknowledged and respected. As well as this, States can only be expected to uphold human rights to the extent that their resources allow.[35] When a country does not have sufficient resources to uphold all rights to an adequate standard, they must decide which rights take priority, and that decision may depend on their cultural beliefs.[36]

A clear advantage of cultural relativism is its tolerance of different cultural beliefs. It does not aim to impose the values of one particular culture onto all States for the sake of universalism. Cultural relativism allows for States to

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[33] Ibid.
[34] Donnelly, above n 1, 411.
[35] Ibid, 408.
[36] Ibid.

implement rights in accordance with their morals and values, regardless of other States' viewpoints. However, basing rights solely on the culture in which they derive is problematic, because what is seen as outrageous to one culture, may be seen as common practice for another. How are human rights to be monitored if each culture is tolerated in its entirety and allowed to interpret human rights in whatever way they see fit? Cultural relativism allows for States to ignore human rights that they deem unimportant or irrelevant. Similarly, cultural relativism allows for States to use culture as a justification for human rights abuses.[37] This is a serious weakness to the cultural relativism ideology. Without universal accountability, States could commit human rights abuses with no repercussions.[38] Culture is often used as a justification for human rights breaches, even in cases where the practice holds little to no cultural basis.[39] Examples of such practices include arbitrary arrest and torture.[40] This is why cultural variations must be 'limited,' as Donnelly stated, and the main source of human rights law must be universal. Cultural variation is not a sufficient justification for States to ignore serious human rights breaches of other States, such a justification would be cowardly

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[37] Polisi, above n 9, 41.
[38] Ibid.
[39] Donnelly, above n 1, 413.
[40] Ibid.

and immoral.[41] If one culture considers a practice to be in accordance with human rights, while the majority of other cultures deem the practice to be inappropriate, at a certain point international human rights bodies must intervene. Otherwise, the concept of human rights is rendered useless.

The purpose of international human rights is to protect the rights of all people by preventing States from violating these rights. If a government was allowed to violate the rights of their citizens without consequences, then why would the existence of international human rights matter? The difficulty lies in determining when a cultural variation is appropriate, as opposed to when it is an inexcusable human rights violation. Violations of fundamental human rights, such as the non-derogable rights in the ICCPR, should never be considered appropriate, regardless of culture. The fact that a practice is rooted in tradition does not necessarily mean it is justifiable.[42] Global consensus must also be considered, if a practice is regarded as a serious human rights violation from an external standpoint, then cultural reasons are not an adequate justification.[43] Cultural variations should only be allowed in cases regarding less crucial human rights, such as freedom of

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[41] Ibid, 404.
[42] Ibid.
[43] Ibid.

speech and association.[44] It must also be acknowledged that States with limited resources will not have the ability to uphold all human rights to a high standard.[45] In such cases, less crucial rights, such as the right to free education, must be neglected in order for resources to be allocated to more fundamental rights.

D *Apostasy Laws and Freedom of Religion*

Freedom of religion and conscience was arguably one of the first human rights to be acknowledged internationally.[46] However, there is certainly not unanimity between States as to what this freedom should entail, and the ways in which this freedom is upheld varies significantly worldwide.[47] Freedom of religion is controversial, particularly in States with predominantly religious populations.[48] Religions are founded on the principle that people must believe in and be faithful to the teachings of their God.[49] For people who are religious, it can be difficult to understand the desire to deviate from a religion that they view as the correct and truthful way to live.[50] Abandonment of religion is known as apostasy, and in some

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[44] Ibid, 417.
[45] Ibid, 408.
[46] Kirby, above n 10, 151.
[47] Polisi, above n 9, 45.
[48] Kirby, above n 10, 151.
[49] Ibid.
[50] Ibid, 152.

places apostasy is a criminal offence.[51] Under traditional Shari'a law, of which the Islamic faith is based, Muslims who reject their religion are subject to the death penalty.[52] This severe punishment for apostasy is still in practice today,[53] despite freedom of religion being widely recognised as a fundamental right.[54] Countries in which apostasy is a capital offence include Saudi Arabia, Afghanistan, Brunei, Qatar, the United Arab Emirates and Yemen.[55] Similar laws with less serious punishments exist in other countries.[56]

Freedom of religion is a right guaranteed under Article 18 of the UDHR, and Article 18 of the ICCPR.[57] Under the UDHR, freedom of religion includes 'freedom to change his religion or belief,' and 'to manifest his religion or belief in teaching, practice, worship and observance.'[58] In the ICCPR, freedom of religion involves 'freedom to have or to adopt a religion or belief of his choice' and 'freedom to manifest his religion or

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[51] Abdullahi Ahmed An-Na'im, 'Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives' (1990) 3 *Harvard Human Rights Journal* 13, 23.
[52] Ibid.
[53] Library of Congress, *Laws Criminalizing Apostasy* (30 June 2015) <https://www.loc.gov/law/help/apostasy/>.
[54] *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
[55] Ibid.
[56] Ibid.
[57] Kirby, above n 10, 151.
[58] *Universal Declaration of Human Rights*, above n 17.

belief in worship,' both in public and in private.'[59] The ICCPR also states that impairing one's freedom to choose their religion by use of coercion is prohibited.[60] States with apostasy laws are clearly in breach of this right, as they use the threat of persecution to discourage people from making the choice to abandon their faith, or adopting a religion other than Islam.[61] Freedom of expression is also violated by apostasy laws, as they restrict a person's ability to present viewpoints that oppose official Islamic beliefs.[62] Additionally, capital punishment for apostasy violates the right to life, which is often viewed as the most basic and fundamental human right.[63] While the implementation of freedom of religion understandably differs slightly between cultures, it can be argued that apostasy laws violate human rights in an indefensible way. Human rights violations as serious as criminal or capital punishment for abandonment of religion are not justifiable. It is agreed by this author that limited cultural variations should be allowed in human rights, in accordance with Donnelly's proposal of weak cultural relativism. However, human rights violations as serious as apostasy laws are not justifiable under any

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[59] *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
[60] Ibid.
[61] Ahmed An-Na'im, above n 51, 14.
[62] Ibid, 23.
[63] Donnelly, above n 1, 417.

circumstances, including on cultural grounds. Fundamental human rights should be upheld universally with little to no cultural variations, and freedom of religion constitutes as a fundamental human right.[64] In order for States to be held accountable for human rights violations, certain practices must be deemed unacceptable, and apostasy laws are an example of such a practice.

E *Conclusion*

Promoting the universality of basic rights with the allowance for cultural variations may seem contradictory. How can one promote universalism, while simultaneously supporting an allowance for cultural differences? The answer is that human rights can be universal in nature while still allowing for certain cultural variations, as Donnelly suggested.[65] While universalism and cultural relativism are opposing ideologies in their most radical forms, weak cultural relativism and strong universalism are consistent with each other.[66] Jack Donnelly proposed that 'we can justifiably insist upon some form of weak cultural relativism; that is, on a fundamental universality of basic human rights, tempered by a recognition of the

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[64] *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
[65] Donnelly, above n 1, 419.
[66] Ibid.

possible need for limited cultural variations.'[67] This statement implies that cultural variations should only occur in relation to non-fundamental rights, and in limited circumstances. Fundamental rights, therefore, should be upheld to the same standard internationally, with little to no cultural variation. This is not the reality currently, as is apparent through the example of freedom of religion. Severe apostasy laws violate multiple rights such as freedom of religion, freedom of expression and right to life.[68] It is clear from the example of apostasy that there is room for improvement concerning international human rights. In order to improve human rights there must be an ideal framework to work towards. The combination of strong universality and weak cultural relativism provides such an ideal. It is highly recommended that all States consider the issue of human rights in accordance with Donnelly's proposal, in order to ensure that the rights of all human beings are adequately upheld.

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[67] Ibid.
[68] Ahmed An-Na'im, above n 51, 23.

It's Great to Give Back: The Importance of Pro Bono Legal Work

Professor Robyn Carroll and Dr Marilyn Bromberg

A *Introduction*

'[T]he concept of pro bono service is found at the very core of the profession. In fact, it distinguishes the practice of law as a profession,' said John Major, CC, QC, formerly a Justice of the Supreme Court of Canada.[69] Pro bono is a shortened version of the Latin phrase *pro bono publico* which means 'for the public good'; recorded in English from the late 17th century.[70] Pro bono legal work means providing legal assistance without charging money to people who need legal help but cannot access it.[71] There are many barriers to accessing justice, such as: the high cost of legal services, delays in the legal system and the complexity of legal work.[72]

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[69] Francesca Bartlett and Monica Taylor, 'Pro Bono Lawyering: Personal motives and Institutionalised Practice' (2016) 19(2) *Legal Ethics* 260, 268.

[70] Oxford Reference, https://www.oxfordreference.com/view/10.1093/oi/authority.20110803100347360 (accessed 30 September 2020)

[71] Vinny Kennedy, 'Pro Bono Legal Work: the Disconnect between Saying you'll do it and Doing it' *International Journal of Clinical Legal Education* (2019) 26(3) *International Journal of Clinical Legal Education* 25, 26.

[72] Wayne Martin, 'Access to Justice' (2014) 16 *University of Notre Dame Australia Law Review* 1, 2.

Law School staff member Dr Marilyn Bromberg has practiced as a pro bono lawyer at the Fremantle Community Legal Centre for six years. Her commitment to pro bono lawyering and access to justice was demonstrated in May this year when she led the UWA staff and student fundraiser for the Law Access Walk for Justice. Marilyn says 'as a pro bono lawyer I have met some of the nicest, smartest and most determined people, some of whom face great challenges, such as mental illness, physical illness, poverty and isolation. I give them legal advice and sometimes represent them in court. I believe that in a small way, I may have made a difference in their life, because without a pro bono lawyer, these clients may have faced the justice system on their own and found it challenging, overwhelming or worse.'

Many UWA Law students would like to undertake pro bono in the future. Two second year JD students, for example, have this to say. Roshni Kaila, 'being a lawyer is an immense privilege as you have access to knowledge about your basic rights under the law. I believe it will be my duty as a lawyer to make this information accessible to those who need it most through pro bono work. I hope to achieve this as a lawyer in helping to provide free legal advice to domestic violence victims'; and Christie Oey, '[w]hen I practice as a lawyer I hope to undertake

some pro bono work in immigration law. I strongly believe everyone deserves a home that is safe and secure. I hope to achieve this by providing free legal advice to asylum seekers and refugees to ensure their human rights are respected and protected.'

Third year JD student Rachel Moody is a volunteer at Law Access and says 'Everyone deserves access to justice, but it is often the most vulnerable in our society who struggle with this accessibility. This is especially the case in family law - my main passion. Pro bono is an empathetic and efficient way to mitigate that distance and provide legal assistance to those who may otherwise feel disempowered and voiceless in the face of the law.'

B *Unmet Legal Need and Pro Bono in Western Australia*

Funded legal assistance is available in WA predominantly through Legal Aid Western Australia, The Aboriginal Legal Service of Western Australia and community legal centres. Unfortunately funded assistance is not available to meet everyone's need for legal assistance. Law Access is 'a community legal service of last resort' that coordinates the assessment and referral of applications for pro bono assistance

to members of the WA legal profession.[73] In this way Law Access provides a gateway to match individuals and not-for profit organisations with legal practitioners willing to accept clients pro bono. Read more about Law Access at their website.[74] The UWA Law School and the Law Society of WA have been the Principal Supporters of Law Access since the service commenced in 2015. A recent Impact Report identifies activities and strategies to provide access to legal services for some of the most vulnerable people in our community. This Report also has information about volunteering opportunities and how Law Access supports law students and graduates seeking a pro bono experience.

C *Pro Bono Opportunities While You're a Law Student*

There are many other opportunities to undertake pro bono work as a law student at UWA. For example, in the LAWS5174 Legal Internship unit, JD students have the opportunity to work in a legal environment for academic credit over one semester (in semester two) for one day per week or intensively over summer. Students must complete an expression of interest

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[73] 2019 Law Access Impact Report available at https://lawaccess.org.au/lawp/wp-content/uploads/2019/12/Law-Access-Impact-Report-2019.pdf, 1.
[74] https://lawaccess.org.au/.

form and submit a CV to apply.[75] Many of the Legal Internship host organisations provide pro bono services including: Law Access, community legal centres, Citizens Advice Bureau, Consumer Credit Legal Service, Legal Aid, Regional Alliance West (based in Geraldton), the Humanitarian Group, the Mental Health Law Centre, the Employment Law Centre and a union.

There are other opportunities for JD students to obtain academic credit for pro bono placements for example, LAWS5184 Co-operative Education for Enterprise Development (CEED) and LAWS5188 Legal APPtitude. In some cases, students may be able to obtain credit via the Aurora Project and a McCusker Centre internship with a recognised legal host organisation. Outside of these opportunities, students in the JD and other Law School programs can also volunteer at a community legal centre by contacting community legal centres themselves. This webpage has a list of community legal centres in Western Australia:
https://www.cabwa.com.au/images/CLC_Chart.pdf.

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[75] For further information about the Legal Internship unit, see: https://www.student.uwa.edu.au/faculties/faculty-of-arts,-business,-law-and-education/law-students/legal-qualifying-degree/internships/legal-internships. We thank Dr Penny Carruthers for her assistance in preparing this section of the paper.

Whether you plan to practice law after graduation and to offer your services as a legal practitioner pro bono in the future, it is never too early to become involved with organisations that provide this support to people and NFP organisations facing difficulty accessing legal services and representation

Issues that arise in the offence of sexual penetration without consent - s325 of Criminal Code (WA)

Adehlia Ebert

A *Introduction*

I believe that the role of the criminal law is to act as a guide for the behaviour of people and the state, by identifying and punishing behaviour considered criminal by prevalent community standards. For the most part, the offence of sexual penetration without consent under s325 of the *Criminal Code Act Compilation Act 1913* (WA) ('WACC') effectively performs that role.[1] However, there are flaws with the offence in Western Australia ('WA'). These include the definition of fraud vitiating consent and the definition of 'reasonable' in the defence of mistake of fact under WACC s24.[2] I will further identify, explain and evaluate these flaws. The 'test' by which I will evaluate these flaws is their ability to perform the proper function of the criminal law, as defined at the beginning of this paragraph. WA's definition of fraud vitiating consent fails to either guide behaviour or identify criminal behaviour according to community standards. Meanwhile, WA's definition of

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[1] *Criminal Code Act Compilation Act 1913* (WA) s 325 ('*WACC*').
[2] Ibid, s 24.

'reasonable' under s24 does identify criminal behaviour according to community standards, but fails to guide behaviour.

B *Fraud Vitiating Consent*

S319(2)(a) of the WACC states that 'consent is not freely and voluntarily given if it is obtained by… any fraudulent means'.[3] While all Australian jurisdictions prohibit consent obtained by fraud, most establish statutory limits on what constitutes fraudulent behaviour. Many have done so to counteract narrow definitions of fraud from *Papadimitropoulos v The Queen*[4] and *R v Mobilio*.[5] These cases held that only fraud as to the nature of the sexual act or identity of the sexual partner will vitiate consent. Given WA's expansive definition of fraud, there are two possible ways the law will be applied. According to Steytler P in *Michael v Western Australia* ('*Michael*'), there may be limitless frauds vitiating consent.[6] However, EM Heenan AJA suggested that the more likely application was the common law's narrow definition of fraud.[7] I will argue that both applications fail to perform the true function of the criminal law.

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[3] Ibid, s 319(2)(a).
[4] *Papadimitropoulos v The Queen* (1957) 98 CLR 249.
[5] *R v Mobilio* (1990) 50 A Crim R 170, 184.
[6] *Michael v Western Australia* (2008) 183 A Crim R 348, [89].
[7] Ibid, [384].

If the broad definition were applied wherein any fraud vitiates consent, the law would punish behaviour not considered criminal by community standards. Commentators have argued that any deception eliciting consent constitutes fraud.[8] Undeniably, given community attitudes in favour of bodily autonomy, increasing attention should be given to the freedom of consent. However, the consequence of such an expansive definition of fraud would be the serious punishment of behaviour not widely considered criminal. As discussed by EM Heenan in *Michael,* deceit intended to encourage consent, such as lies about personal attributes, is commonplace.[9] While not 'good' behaviour, most would not consider small lies encouraging sexual willingness from a person (who themselves knows all important details of the acts to which they are consenting) as constituting the serious criminal offence under s325. I would argue that this is because, when deceit is regarding one insignificant detail, it is not fundamental to the act to which the person is consenting.

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[8] Deborah Kim, 'Case and Comment: Zaburoni v The Queen [2016] HCA 12' (2017) 41 Criminal Law Journal 50, 58.
[9] *Michael v Western Australia* (2008) 183 A Crim R 348, 373.

A broad definition of fraud would also be a poor guide of behaviour. What can a person legally do to persuade a person to consent to sex? Would exaggerating one's sexual prowess or bra size be fraud? Such a broad definition would not provide clear answers and would engender uncertainty as to how to act and how to prosecute. Arguably, without limitations, a broad definition of fraud could adapt to changing community standards. For example, the equivalent law in Canada and New Zealand is broad and thus has criminalised evolving forms of fraud, including the non-disclosure of HIV status[10] and 'condom sabotage'.[11] However, I would argue that this gives excessive discretionary power to the judiciary over important issues of public policy. Criminalising the non-disclosure of HIV status, for example, has social and medical consequences[12] that should be the responsibility of the popularly elected legislature. Evidently, a broad definition of fraud is seriously flawed.

More likely is a narrow definition restricting fraud to the nature of the activity or identity of the partner. This too fails to

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[10] Joanna Manning 'Legal issues: Criminal responsibility for the non-disclosure of HIV-positive status before sexual activity' (2013) 20 Journal of Law and Medicine 493.
[11] Peter Young 'Recent cases' (2015) 89 Australian Law Journal 151, 154-158.
[12] Joanna Manning 'Legal issues: Criminal responsibility for the non-disclosure of HIV-positive status before sexual activity' (2013) 20 Journal of Law and Medicine 493.

perform the function of the criminal law. WA did not change their legislation after the controversial *Mobilio* case. *Mobilio* held that a radiographer who examined women for his sexual gratification rather than medical purposes did not commit rape.[13] This upheld the 'nature and identity' rule from *Papadimitropoulos*. Consequently, most states amended their legislation to encompass deceit regarding the supposed medical purpose of an act, whilst Queensland included deception as to the purpose of the act.[14] I would argue that the rule from *Papadimitropoulos* does not allow sufficient scope because it excludes fraud regarding the purpose of an act. When individuals consent to an act thinking it necessary, or at least beneficial, for a medical (or other) purpose, their consent is highly specific. They consent to a fundamentally non-sexual act due to the supposed benefit of that act. The narrow definition of fraud also limits its adaptability to new situations and values. 'New' behaviour subject to growing condemnation, such as 'condom sabotage', may not be considered fraud under the 'purpose and identity' rule.

Given increasing community condemnation of any infringements on bodily autonomy, a narrow rule that excludes

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[13] *R v Mobilio* (1990) 50 A Crim R 170.
[14] Jonathan Crowe 'Fraud and consent in Australian rape law' (2014) 38 Criminal Law Journal 236, 242.

clearly fraudulent behaviour and is unable to adapt to evolving values, is inadequate. It fails to identify and punish behaviour considered criminal by prevalent community standards. Arguably, WA does have a separate offence of 'any false pretence' procuring sex from a woman to a man.[15] This sets a much lower threshold than fraud vitiating consent. However, this offence has a lower sentence and is gendered. This is not an adequate alternative to s325, given prevalent community standards. Arguably, the narrow rule provides a clear guide of behaviour by categorising the 'types' of fraud that vitiate consent. However, this is little consolation when the behaviour it guides as being fraudulent excludes behaviour that should be fraudulent. Consequently, the narrow definition of fraud fails to perform the proper function of the criminal law.

C *'Reasonable' Mistake of Fact*

Another issue relating to s325 is the role and definition of 'reasonable' in the defence of mistake of fact. According to s24, a person who has 'an honest and reasonable, but mistaken, belief'[16] that someone has consented to sexual penetration is not liable under s325. *Aubertin v Western Australia* ('*Aubertin*'), has defined 'reasonable' as whether the accused

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[15] *WACC* (n1) s 192(1)(b).
[16] Ibid, s 24.

had reasonable grounds for their belief. *Aubertin* described a 'mixed standard' of both objectivity and subjectivity, which considers whether a person with similar relevant characteristics as the accused would have held the belief.[17] The characteristics considered relevant are anything uncontrolled, such as age, gender and ethnicity, whilst excluding factors over which the accused does have control, such as values and self-induced intoxication.[18] This definition potentially compromises the proper functioning of the criminal law. A problem for the identification and punishment of criminal behaviour according to community standards may be the fact that, under s24, a person with mens rea is equally liable as one without. Meanwhile, the vague distinction between relevant and irrelevant characteristics renders the definition of reasonableness a poor guide of behaviour. I will evaluate both issues, finding the first unconvincing but the second convincing.

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[17] *Aubertin v Western Australia* (2006) 33 WAR 87.
[18] Ibid [44]-[46].

A potential problem with the requirement that a mistaken belief be reasonable is that a person without mens rea is equally liable as a person with mens rea.[19]While this problem was identified regarding NSW legislation, it is still relevant to the WA equivalent. In WA, intent, and thus mens rea, is not an element of sexual penetration without consent. Consequently, all else equal, someone with mens rea is equally guilty under s325 as someone without. A person may genuinely believe that the other is consenting but have unreasonable grounds for doing so. A belief of consent, no matter how unreasonable, precludes mens rea. However, according to s24 and *Aubertin*, an unreasonable belief as to consent is the same as no consent. Arguably, the *Aubertin* test overcomes this by considering the accused's state of mind.[20] However, not all factors affecting an accused's state of mind are considered relevant, according to *Aubertin*. For example, a person's values, shaped by their cultural and developmental past, may hugely impact their state of mind and consequent interpretation of consent. Yet those values would be excluded from consideration.

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[19] Gail Mason James Monaghan, 'Reasonable reform: understanding the knowledge of consent provision in section 61HA(3)(c) of the Crimes Act 1900 (NSW)' (2016) 40 Criminal Law Journal 246, 261.
[20] Ibid 260.

Arguably, the fact that a person without mens rea is equally guilty as one with mens rea contradicts community attitudes towards how behaviour should be criminalised. That a person who had an unreasonable but honest belief of consent is equally guilty as a person who had no belief of consent, may not be 'fair' according to prevalent standards. I do not find this convincing. A person's values may be so fundamentally skewed that they believe that everyone would always consent to their sexual advances. Yet they would still be the subject of community condemnation equally, if not more than, a person who knows their victim is not consenting. If anything, the rule from *Aubertin* better enables behaviour to be judged according to community attitudes. By excluding a person's own values, reasonableness is judged according to prevalent community standards.[21] Besides, equal conviction doesn't necessarily mean equal sentence. Unless the offence is committed during an aggravated home burglary,[22] there is judiciary discretion over sentencing. Consequently, judges can take a variety of factors into account, including the accused's belief of consent. Thus, the role and definition of reasonableness under s24 does not compromise the ability of s325 to identify and punish

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[21] I Weldon '(WA) Criminal Code Act 1913 Chapter V Criminal responsibility [ss 22-36]' (Criminal Law WA, 2012) 48.
[22] *WACC* (n1) S325(2).

behaviour considered criminal by prevalent community standards.

I would argue that the definition of reasonableness offers a poor guide of behaviour for the public and the state. This is because the distinction between relevant and irrelevant personal characteristics, as discussed in *Aubertin*, is ambiguous. *Aubertin* distinguishes between those factors a person cannot control (relevant), such as age, gender and ethnicity, and those that a person can control (irrelevant), such as values and self-induced intoxication. I would argue that this is a vague distinction, because what a person can and cannot control is not always obvious to either themselves or the court. Values are often the result of family, cultural and historical background, and thus are not necessarily controlled by the accused. Likewise, self-induced intoxication may be the result of an addiction, and thus without the accused's control. There would be many factors not listed in *Aubertin* that would be difficult to categorise, such as the accused's socio-economic background, level of education about consent and nature, or lack, of relationship role models. The inability of this test to clearly categorise relevant and irrelevant factors compromises its ability to act as a guide of behaviour. It is a poor guide for courts, and thus a poor guide for society.

In NSW there is a similar provision requiring the belief of consent to have reasonable grounds.[23] A strong motivation for this provision was its ability to educate people about society's acceptable standards of sexual behaviour.[24] Arguably, given that WA has a similar requirement and explicitly states which factors are relevant to a 'reasonable ground', our law is a powerful educative tool. Arguably, by educating the community about reasonable sexual practices, it is an effective guide for behaviour. However, this argument ignores, and does not overcome, the ambiguity of the distinction from *Aubertin*. The lack of clarity as to which factors will be considered relevant in a determination of an accused's reasonable belief undermines the educative value of this law. While I agree that some line must be drawn between relevant and irrelevant factors, the rule from *Aubertin* is problematic. A less ambiguous and more empirically testable distinction is required for the law on reasonable belief of consent to act as an effective guide of behaviour.

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[23] *Crimes Act 1900* (NSW) s 61HA(3)(c).

[24] Gail Mason James Monaghan 'Reasonable reform: understanding the knowledge of consent provision in section 61HA(3)(c) of the Crimes Act 1900 (NSW)' (2016) 40 Criminal Law Journal 246, 250.

D *Conclusion*

The offence of sexual penetration without consent in WA is marred by two flaws. The definition of fraud vitiating consent - whether applied broadly or, more likely, narrowly – fails to identify criminal behaviour according to community standards. The definition of 'reasonable' under s24 does identify criminal behaviour according to community standards, but fails to effectively guide behaviour. Consequently, both issues compromise the ability of s325 to perform the proper function of the criminal law.

Nature's Legal Personality

Jing-Zhi (Benjamin) Wong

I'm about to present a very lofty aspiration for International Law, one on recognising nature as a living person. But is this possible and practical?

Under new legislation,[1] the Whanganui River in New Zealand became the first major river in the world to be recognised as a living entity. The river was afforded legal personality – the legal status of a human being, combining "western legal precedent with Maori [customs]".[2]

In the space of 24 hours, the Indian High Court at Uttarakhand declared the sacred Ganges and Yamuna rivers a legal "person" in a bid to save it from pollution. In light of these events, would recognising nature as a living person having rights and obligations be possible and practical in actualising environmental protection on the international scale?

These recent developments in the law reflect a shift in society's view of nature as a mere resource to an entity that deserves fundamental rights. This view is not at all a new take on environmental protection. In the 1960s and 1970s, environmental groups were facing enormous difficulties in

satisfying the standing requirements of the courts for participating in environmental litigations. In *Sierra Club v Morton*,[3] the Supreme Court refused to recognise the Sierra Club's right to intervene and contest the building of a dam that received government approval for construction. Justice Douglas asserted that natural resources ought to have a standing to sue for their own protection in his famous dissent:

"Inanimate objects are sometimes parties in litigation. A ship has legal personality, a fiction found useful for maritime purposes … So it should be as respects valleys… rivers, lakes… or even air that feels the destructive pressures of modern technology and modern life. … The voice of the existing beneficiaries of these environmental wonders should be heard."

In the recent Indian High Court case of *Salim v State of Uttarakhand* nearly 45 years later,[4] the same sentiment echoes. The ruling in that case was made in response to a writ petition against pollution from industrial waste and mining amidst mounting pressures from the public and international community to clean up the river.

This clearly illustrates that the concepts of legal entity and artificial personality exist to serve the needs of the law and can

be flexible to respond to the changing needs of society. A change in international law to reflect this is very possible.

But, will the governments' recognition of Nature's inherent right be practical in tackling environmental pollution?

My answer is no, unless its undesired legal implications are negated. Affording nature the rights and obligations of humans is fraught with a number of unwitting legal consequences. Also, there are difficulties in the enforcement and recognition of nature having legal personality.

For once, Nature will answer for its actions in Court. This raises the question about who is to be responsible for exercising nature's rights and obligations.

The Indian High Court and NZ Parliament have similar views in that the rivers will possess the legal position similar to that of a church – status of an infant:

"[The government] is declared *in loco parentis* (in place of their parent) as the human face to protect, conserve and preserve [the rivers] … while exercising the *parens patrie* jurisdiction (government's prerogative to protect those

without capacity protect themselves) over [the rivers] declared as a legal person."

But will governments around the world be willing to take the brunt of actions against their rivers, knowing that they would be liable in torts and crime? They would no doubt be able to seek recourse against environmental polluters, but would also be liable to be sued for running dry, freezing, flooding, and causing damage to vessels, etc. Furthermore, victims of environmental pollution, wild weather, landslides and natural disasters would also be able to sue for damages. This would not be the case if the rivers had not been declared as having legal personality, and thus any tort or crime would be taken as having occurred *force majeure* or as an act of god.[5]

That said, would all UN member states have a similar position as India and New Zealand in light of the unwitting legal consequences?

Article 93 of the UN Charter mandates that all UN member states are parties to the ICJ Statute. Article 38(1)(b-c) of the ICJ statute states that the Court will apply 'international customs' and the 'general principles of law'. These include principles of consent and reciprocity. A juridical concept that is not universally recognised and consented to by most if not all

member states would render it useless and unenforceable in international law, no matter what benefits it might bring. Furthermore, the lack of cross-border recognition would only serve to fragment ties between states, especially those with rivers used as international waterways such as the Danube, Amazon and Mekong rivers.

Declaring the rivers (and Nature) a legal person may aid in protecting and preserving the cultural and religious heritage associated with the rivers but would not be a sound environmental protection solution in light of the present legal challenges it brings.

Editor's Note: Jing-Zhi (Benjamin) Wong is a JD candidate at The University of Western Australia. This article was first published in JusT Cogens, blog of the UWA International Law Society, 23 April 2017. Reproduced with the author's permission.

Black Lives Matter Movement in Australia

Christie Oey

The killing of George Floyd has brought the world at a standstill. The intensification of the Black Lives Matter movement in the US had caused radical reform and action. The police officers involved in the killing of George Floyd were charged with serious offences including one of second-degree murder.

In Australia, Black Lives Matter protests are building momentum and individuals have marched the streets in protests calling on our government into ending systemic racism and institutionalised violence. Aside with solidarity with US protestors, the themes resonated in Australia due to alarming similarities concerning Aboriginal deaths in custody and wider social issues faced by Indigenous Australians. More than 430 Aboriginal and Torres Strait islanders are known to have died in police custody since 1991.[1]

The Black Lives Matter protests in 2020 has led to smaller victories in Australia regarding judicial reform. First, South

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[1] Australian Rights Commission, *Indigenous Deaths in Custody: Arrest, Imprisonment and Most Serious Offence* (Web page, 25 June 2019) <https://humanrights.gov.au/our-work/indigenous-deaths-custody-arrest-imprisonment-and-most-serious-offence#top>

Australia government committed to ensure all Aboriginal people who enter police custody have access to call to Aboriginal Legal services under a custody notification service.[2] Secondly, there has also been an initiation of NSW parliamentary inquiry into how First Nations death in custody are investigated.[3] Thirdly, the federal Indigenous affairs minister, Ken Wyatt, has met with Aboriginal organisations to discuss integrating justice targets in Closing the Gap initiative.[4]

However, there are still bigger changes needed in judicial and police reform to make a long-lasting impact. One of the problems that needs to be addressed are high rate of incarceration rate of Indigenous people in Australia.

According to recent studies, Indigenous people are 17.3 times more likely to be arrested than non-Indigenous people.[5]

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[2] Government of South Australia, 'Custody Notification Service to be established in SA' (Media Release, 1st July 2020) <https://www.agd.sa.gov.au/newsroom/custody-notification-service-be-established-sa>.
[3] National Indigenous Times, *NSW Parliament opens inquiry into deaths in custody investigation process* (Web page, 25th June 2020) <https://nit.com.au/nsw-parliament-opens-inquiry-into-deaths-in-custody-investigation-processes/>.
[4] Prime Minister, Minister for Indigenous Australians 'National Agreement on Closing the Gap' (Media Release, 30th July 2020) <https://www.pm.gov.au/media/national-agreement-closing-gap>.
[5] Above n1.

One way to address this problem is have an alternative to the District Court. Justice NSW has proposed the introduction of Walama Court which offers is an alternative court to District Court and reduce the number of people custodial sentences. This new court will save 22 million over 5 years on reduced prison beds, lower recidivism and Indigenous men and women to remain in their community.[6]

There should be also be a visitation of recommendations by the Royal Commission to implement them in Australia's judicial system. It has been almost 30 years ago since the publication of Royal Commission into Aboriginal Deaths in Custody that gave over 330 recommendations.[7] The recommendations are valid today, but many are yet to be implemented by state, territory and Commonwealth government.

All of us can take part in small actions that can result in a massive impact on the Black Lives Matter movement. The fight is not over by a long shot and there is no simple solution but

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[6] The Sydney Morning Herald, *Indigenous Walama Court would deliver millions in savings, costing show* (Web page, 24th June 2020) *<https://www.smh.com.au/national/indigenous-walama-court-would-deliver-millions-in-savings-costings-show-20200622-p554yy>.*

[7] Creative Spirits, *Royal Commission into Aboriginals deaths in custody* (Web page, 27th September 2020) <https://www.creativespirits.info/aboriginalculture/law/royal-commission-into-aboriginal-deaths-in-custody>.

there is still hope and we are taking small steps in the right direction.

Ways you can support Black Lives Matter movement

Donate

Here are some campaigns and organisations that are providing support to Indigenous Australians and the families who have died in police custody.

Bridging the Gap Foundation for Indigenous Health and Education: The Foundation aims to bridge the gap between Indigenous and non-Indigenous Australians when it comes to health and education.

The National Justice Project: The National Justice Project advocates for the development of a law and justice system that is fair, just and equitable. You can contribute to the Project, which also provides legal support to people who would otherwise not have access.

ANTaR: ANTaR is a national advocacy organisation dedicated specifically to the rights of Aboriginal and Torres Strait Islander people through lobbying, public campaigns and advocacy.

Aboriginal Legal Service: The ALS was founded 50 years ago in Redfern, and fights for the rights of Aboriginal and Torres Strait Islander Peoples in the areas of criminal law, children's care and protection law and family law.

Listen

Blood on the Tracks: A true crime podcast from journalist Allan Clarke that delves into the unsolved murder of Gomeroi teenager, Mark Haines.

Speaking Out: A politics, arts and culture radio segment from a range of different Indigenous perspectives.

Watch

My stolen childhood, and a life to rebuild: In this TEDxPerth talk, Sheila Humphries details how, as a child, she was taken away from her parents and placed in an orphanage by authorities who thought they knew best.

The myth of Aboriginal stories being myths: In this TEDxAdelaide talk, Adnyamathanha and Ngarrindjeri woman Jacinta Koolmarie explores who holds the knowledge passed down by Australia's Indigenous groups, and if it is respected in our society.

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Nature's Legal Personality

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[3] *Sierra Club v Morton*, 405 US 727 (1972); For legal fictions, see Lon Fuller, *Legal Fictions* (Stanford University Press, 1967).

[4] *Salim v State of Uttarakhand,* WP PIL 126-2014 (High Court of Uttarakhand, Mar. 20, 2017).

[5] Phillip Blumberg, *The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality* (Oxford University Press, 1993) 209, 214.

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