Dissent.

RECOVERY

The Social Justice Journal

Sydney University Law Society

August 2016

S U
L S

Dissent.
Recovery
Sydney University Law Society
Social Justice Journal 2016

ISSN: 1839-1508

Design
Jennifer Jiang | *Design Officer*
Kieran Hoyle | *Publications Officer*

Special Thanks
Lorraine Walsh | *SULS VP (Social Justice)*

Editor-in-Chief
Danny Noonan

Editorial Board
Harry Stratton
Anja Ellwood
Nicholas Hay
Gabriella Sulfaro
Florence Fermanis
Ajay Sivanathan
Sophie Fletcher Watson
Lamya Rahman
Sharon Yin

Printing
Megacolour

Special Thanks to our Sponsor

Acknowledgement of Country
We acknowledge the Cadigal people of the Eora Nation, upon whose stolen land the University of Sydney stands. As law students, we acknowledge that the colonisation of this land was legitimated in law by a white supremacist legal system that continues to condone the theft. We acknowledge that the law continues to be deployed as a technology of colonial power, and that the legal regime of this country continues to enact a dispossessing violence that represents a daily threat to the lives and liberties of First Nations peoples.

*D*issent.

RECOVERY

The Social Justice Journal
of the Sydney University Law Society
August 2016

Editor's Foreword

Danny Noonan

In the legal world, "recovery" is typically spoken of in a strictly monetary sense: expressing how much one party hopes to recover from another. As I hope you will find as you read this year's edition of *Dissent*, the theme of "Recovery" has inspired members of our student community to think much more deeply, broadly and critically about the interaction between recovery, the law, and social justice.

This year's edition begins at home, with a timely piece by Mike Butler on the need to advance reconciliation beyond the moment white 'settlers' first landed and to the frontier wars that followed and continued for many years.

The following articles then explore Recovery in many forms, including the symbolic (Harry Stitt's study of Berlin's Holocaust memorial), theoretical (Penina Su's comparison of transitional justice initiatives in Sri Lanka and Northern Ireland), statutory (Elizabeth Pearson's reflection on the legacy of the *Native Title Act 1993* (Cth); Rachel Irwin's critique of limitation periods in child sexual abuse cases; and Lucas Moctezuma's critique of the *Motor Accidents Compensation Act 1999* (NSW)), and practical (Jonathan Marlton's prison rehabilitation case study; and Tilini Rajapaska's exploration of post-conflict reconciliation in Sri Lanka).

Each piece in this year's edition is well-written and thought-provoking. It is no small feat to complete an original, long-form piece of writing on top of a rigorous study load. My hope is that the readers of this year's *Dissent* enjoy these articles as much as the authors enjoyed researching and writing them.

This year's edition of *Dissent* would not have been possible without the efforts of many. Above all, my thanks goes to the hard work of this year's editorial team: Harry Stratton, Anja Ellwood, Nicholas Hay, Gabriella Sulfaro, Florence Fermanis, Ajay Sivanathan, Sophie Fletcher Watson, Lamya Rahman and Sharon Yin. Special thanks also goes to SULS VP (Social Justice) Lorraine Walsh, who acted as my personal problem-solver from start to finish. Another thank you goes to Associate Professor Rita Shackel for writing the Academic's Forward. Rita is a tireless advocate for the society's most vulnerable and I cannot think of a more fitting individual to endorse this year's edition. Finally, thanks to Jennifer Jiang and the SULS Design team for bringing the journal to life, and to my friends, family and loved ones for their support and encouragement.

Academic's Foreword

Rita Shackel

I am honoured to write the academic Foreword to the 2016 edition of *Dissent*. The theme for the journal this year is *Recovery*.

The Oxford Dictionary defines recovery as 'a return to a normal state of health, mind, or strength.' It embodies restoration of the physical, mental, spiritual, relational, and financial wellbeing of individuals and communities.

A focus on recovery is particularly timely given some of the current social justice challenges facing Australia. High on our public, political and legal agenda is responding to the needs of survivors of child sexual abuse (Rachel Irwin). A key focus of the *Australian Royal Commission into Responses to Institutional Child Sexual Abuse* is support for healing and redress for survivors. 2016 has also seen ongoing debate in Australia related to offshore detention and treatment of asylum seekers. The Minister for Immigration is currently facing legal action as a result of delays in processing citizen applications from people with refugee backgrounds and for the secrecy surrounding the treatment of refugees in offshore detention and boat turn-backs. Despite Australia's strong record in resettlement of refugees, our polices and treatment of asylum seekers and refugees have been widely condemned, including by the United Nations Human Rights Committee for preventing recovery and 'inflicting serious psychological harm' on detainees. Australia also continues to face harsh criticism for its poor record in redressing the historical injustices suffered by Indigenous peoples (Mike Butler; Elizabeth Pearson). Faced with escalating concerns about potential terrorist related activities, as a nation we are also struggling to strike equilibrium between community protection, on the one hand, and maintenance of fundamental individual freedoms and rights on the other hand.

It is clear that as a society we need to do more to promote recovery of those who have suffered injury and are in need. As the papers in this issue highlight, recovery must start with unequivocal recognition that an injustice or harm has been suffered (Lucas Moctezuma). Further as Rachel Irwin argues in her paper 'to promote recovery, we must have means for recovery'. Recovery requires legal remedies and policies that are respectful, timely and responsive to the needs of those who have suffered injustice and injury. Truth telling and (re)building trust are key elements in recovery that are too often poorly prioritised by legal and justice responses (Tilini Rajapaska). As several of the papers in this issue highlight, recovery is not only often stifled by legal and systemic responses that fail to support and empower those seeking redress, but sadly also, by ill conceived approaches that further traumatise, deprive or cause distress. This issue of *Dissent* reminds us that recovery requires legal and societal responses that are humane, which promote dignity and recognise that recovery is a process often bound by time, identity and culture (Harry Stitt; Penina Su).

The papers in this issue also serve to remind us that we must have courage and resolve to confront and unveil the most hidden and deeply entrenched injustices in our society. We must also ever remain critical of law and policy in our pursuit of social justice and agitate for change and reform through public and social justice advocacy and action (Mike Butler). Jonathan Marlton encourages us too, as advocates for social justice, to push the bounds of existing norms – to embrace innovative, creative and collaborative approaches to promote recovery and the wellbeing of all in society, particularly the most vulnerable.

As I write this Foreword I am inevitably caused to reflect on my recent research conducted in the Great Lakes region in Africa. This research is concerned with the justice priorities and needs of women subjected to violence. Unanimously the women we spoke with throughout this research identified as their main priority the need for justice to deliver them strong, sensitive and holistic pathways to recovery. One woman in the Democratic Republic of Congo pleaded: *"Just detraumatise us because we have wounds, and those wounds, if we know how to cure them, we will be strong again to do anything"*. These words reveal the critical role of recovery in ensuring that individuals and whole communities are strong, productive and at peace. Recovery thus is to be prized as a core rather than peripheral aspect of justice.

Congratulations to all the authors of this issue, to the Editor-in-Chief, Danny Noonan, and the Editorial team for compiling an impressive and informative collection of papers that stimulate, challenge and remind readers of the humanity which social justice seeks to serve, protect and enable to thrive.

Contents

01

Recognising Australia's Frontier Wars: the missing link in Indigenous reconciliation

Mike Butler

Why aren't the Frontier Wars part of ANZAC Day? Because these wars are the most in-your-face reminder that Australia was not settled; it was stolen. While this may be an uncomfortable fact to face, recognising the 150 years of violent conflict as indigenous people were driven off their lands is a missing link in addressing the social justice issues and disadvantage that Australia's First Nations people continue to suffer. And the best way of bringing Australia to face this is recognising it on ANZAC Day. It would be the most noble and significant development in what is known as the "ANZAC tradition" of defence of country and create a national day that both indigenous and non-indigenous can mark together.

It is understandable if you do not know much about the Frontier Wars, because up until a few decades ago nobody did. Australia's 20th Century version of history said they did not happen. Although modern Australian society acknowledged Aboriginals' deep spiritual connection with the land, Australians were taught indigenous people gave it up and faded away because of disease and deprivation. Educational curriculums across the country said that while there were occasional incidents between blacks and white settlers, they were mere isolated incidents. Regardless, it was all in the past and was to be kept in the past.

We now know that more indigenous Australians were violently killed on home soil than Australians who died in the Gallipoli campaign (8,141), most likely more than all deaths in WWI (61,527) and perhaps all of this nation's conflicts put together (102,820).[1]

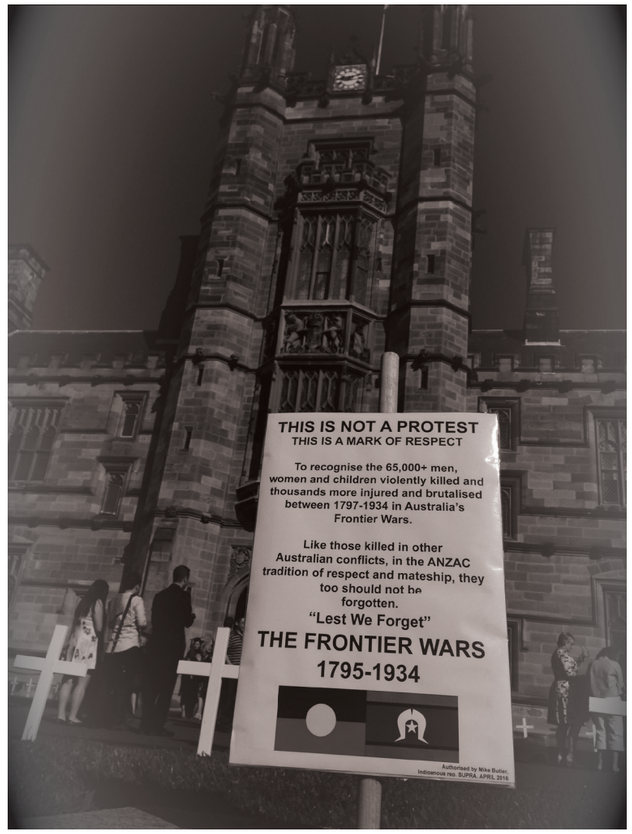
While initial estimates of violent deaths along the Australian frontier ran at around 20,000,[2] new modelling indicates that this has been wildly underestimated and that at least 65,000 were killed in Queensland alone.[3] It is those violent deaths across thousands of incidents through Australia is what is now collectively known as the Frontier Wars.

It was not until the 1970s that historians, including Henry Reynolds and John Conner, began researching official letters and newspaper reports of the times to establish that the land had not being peacefully settled at all. What they revealed was violence and conflict on the Australian frontier was well known and accepted in 19th and early 20th Century Australia.

1 Australian War Memorial, *Deaths as a result of service*, <https://www.awm.gov.au/encyclopedia/war_casualties/>

2 N Loos, *Invasion and Resistance, Aboriginal European Relations on the North Queensland Frontier* (Canberra: Australian National University Press, 1982) pp. 1,8,95,248; Henry Reynolds *The Other Side of the Frontier* (Townsville: James Cook University, 1981) pp. 9, 95, 100.

3 Raymond Evans and Robert Ørsted–Jensen, 'I Cannot Say the Numbers that Were Killed': Assessing Violent Mortality on the Queensland Frontier, University of Queensland 2014, 6.



"...since then it has been whitewashed from Australia's modern consciousness"

However, since then it has been whitewashed from Australia's modern consciousness.[45]

Today it is acknowledged that first frontier war began in 1795 and lasted until 1928. The first war was for the control of the Hawkesbury north of Sydney that saw the creation of the NSW Mounted Police who raided aboriginal campsites at night on horseback. This continued as the invading forces' main strategy throughout the wars.[6]

The last frontier war occurred at the hands of a Gallipoli veteran who became a policeman after the war. Ten years after surviving the landings at ANZAC Cove, Constable William Murray led raids against the people of the area on the premise of rounding up the murderers of a white dingo hunter. The horseback raids killed between 70 and 170 aboriginal men, women and children in much the same way as the invaders fought the first frontier war. An inquiry, established due to public outcry, exonerated Murray. Parts of the Australian public even lauded him as a frontier hero.[7]

Aboriginal forces on the other hand would attack with guerrilla-style,[8] hit-and-run tactics on foot. Similarities can be drawn between their style and Australia's fighting retreat against the Japanese along the Kokoda Trail in 1942. New research from Queensland shows that there was coordinated resistance through inter-tribal gatherings and sophisticated signalling. While the white responses were to kill, aboriginals relied heavily on economic sabotage through driving off or spearing stock and targeted payback killings.[9]

In 1801, Governor King authorised civilians to shoot Aborigines on site in response to resistance led by aboriginal warrior Pemulwuy[10] who for a decade had led raids on settlers at Prospect, Toongabbie, Georges River, Parramatta, Brickfield Hill and the Hawkesbury River. His style was typical of indigenous leaders, who were "self-depreciating 'loner-leaders' much more wily and reticent than their equivalents in other parts of the world."[11] John Collins, one of the officers assigned to catch Pemulwuy thought him "a most active enemy to the settlers, plundering them of their property, and endangering their personal safety".[12]

Pemulwuy was shot and his head sent to London, but his death merely set the tone for the continuation of the conflict. In 1816, Governor Macquarie issued orders to "rid the land of troublesome blacks" and to take any aboriginal as a "Prisoner of War." Those who refused were to be shot and hung in trees.[13]

And so it continued across the country. When First Nations resisted, they were met with overwhelming and disproportionate retaliations by armed men on horseback who would mount kill raids or set booby traps of poisoned food that could wipe out a tribe at a time.[14] It was an insidious form of warfare far removed from the battlefields of WWI. Instead of mass movements it relied on small-scale terror, more akin to multiple Port Arthur massacres or the ethnic cleansing at the hands of the Sudan's mounted Janjaweed in recent decades.[15]

Realising the violence was out of control, the colonial governments forbade settlers taking the law into their own hands. This only served to drive the violence underground which is one of the reasons for the difficulty in determining the magnitude of the violence against aboriginals.

This letter from Gippsland, Victoria, by Henry Meyrick on the 30th April, 1846 shows the mindset of the settlers.

> "... The blacks are very quiet here now, poor wretches. No wild beast of the forest was ever hunted down with such unsparing perseverance as they are. Men, women and children are shot whenever they can be met with ...
>
> I have protested against it at every station I have been in Gippsland, in the strongest language, but these things are kept very secret as the penalty would certainly be hanging.
>
> ... For myself, if I caught a black actually killing my sheep, I would shoot him with as little remorse as I would a wild dog, but no consideration on earth would induce me to ride into a camp and fire on them indiscriminately, as is the custom whenever the smoke is seen. They [the Aborigines] will very shortly be extinct. It is impossible to say how many have been shot, but I am convinced that not less than 450 have been murdered altogether..."[16]

And while the numbers killed were overwhelmingly aboriginal, the white people killed (approximately 3,000 killed and 3,000 injured)[17] should not be forgotten either. In Queensland in particular, settlers lived in fear of attack because of tribes collaborating against the expansion.

One woman wrote in 1902,

> "Often I heard father describe how each evening coming in from the run, the cold fear to mount the hill overlooking the humpy (home), and draw free breath when he saw it lying quiet and unharmed."[18]

In what was known as the "Black War" throughout the 1840s around Brisbane, roughly one-in-ten colonisers were killed by tribes that had banded together in an intertribal declaration of war.[19] In early 1842, during the Bunya festival that bought tribes as far as Dubbo and Bundaberg together, a gathering of 1,000 men from across 14-15 tribes declared a united front against the unwanted colony.

Yet much of Australian society today is deeply uncomfortable with the concept of the Frontier Wars. While the High Court in *Mabo (No.2)*[20] accepted the adoption of terra nullius was absolute fiction, we still struggle with the following fiction that Australia was not peacefully settled but invaded.

Transgenerational Trauma and the missing link in Indigenous recovery

Earlier this year the University of NSW was accused of political correctness gone mad when it was found that one of its non-compulsory teaching aids[21] referred to the colonisation of Australia as an "invasion" and not a settlement. *The Daily Telegraph* ran an outraged front page slamming the guide as "political correctness gone mad" and that "Nutty professors want to Cook the record books."[22]

In response to the public reaction and debate over whether Australia was "discovered", "settled", "invaded" or all three, the Dean of the UNSW Law School Professor David Dixon caustically wrote:

> "A mature Australia should be able to understand and deal with these shameful aspects of our history. Other advanced democracies have been able to do so in coming to terms with their own histories of colonisation and slavery, and rightly regard Australia's refusal to acknowledge its own history as a rather contemptible expression of national immaturity."[23]

However, it is clear there is deep resistance with this reality, most significantly by the Australian War Memorial[24] and the custodians of the ANZAC Day Marches, the Returned Services Leagues who refuse

4 Henry Reynolds *The Other Side of the Frontier: Aboriginal Resistance to the European Invasion of Australia* (Ringwood: Penguin Books Australia, 1982).

5 John Connor *The Australian frontier wars, 1788–1838*, (Sydney: UNSW Press 2002).

6 Peter Dennis, Jeffrey Grey, Ewan Morris, Robin Prior. *The Oxford Companion to Australian Military History* (Melbourne: Oxford University Press, 2008, 2nd ed), 220.

7 Broome, Richard, '*The Struggle for Australia: Aboriginal-European Warfare, 1770–1930*'. In Michael McKernan, Margaret Browne *Australia, Two Centuries of War & Peace* (Canberra: Allen and Unwin, Australia, 1982) 109.

8 Ray Kerkhove, Aboriginal 'guerilla tactics' in defining the 'Black War' of Southern Queensland 1843-1855, AHA Conference, University of Queensland, Brisbane, July 2014, 1.

9 Ibid, 1.

10 J L Kohen, Pemulwuy (1750–1802), *Australian Dictionary of Biography*, Supplementary Volume, (MUP), 2005.

11 Kerkhove, Above n8, 1.

12 Kohen, Above n10.

13 Michael Organ, 'Secret Service: Governor Macquarie's Aboriginal War of 1816', Proceedings of the National Conference of the Royal Australian Historical Society, Mittagong 25-26 October 2014.

14 J Bracewell, 'Statement of Bracewell & Davis as to the supposed administration of poison to some blacks by white men', in *Simpson Letterbook*, G Langevad, Anthropology Museum, University of Queensland, 1979.

15 Alex de Waal, Alex. "Counter-Insurgency on the Cheap" 2004 26 (15) *London Review of Books* 25-27.

16 Ian D. Clark, 'Squatters' Journals', (1989) 43 *The LaTrobe Journal* 19.

17 Henry Reynolds, *Frontier* (Allen and Unwin, Sydney, 1987) 29-30. 53.

18 R Campbell-Praed. [1902], My Australian girlhood; sketches and impressions of bush life – Extract autobiography in *The Penguin Anthology of Australian Women's Writing* (Penguin Australia 1988), pp. 309-373.

19 Kerkhove, Above n 8, 10.

20 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

21 Diversity Toolkit, UNSW (10 September 2015) https://teaching.unsw.edu.au/diversity-toolkit.

22 "WHITEWASH: UNSW rewrites the history books to state Cook 'invaded' Australia", The Daily Telegraph (Sydney), 30 Mar 2016, 1.

23 Prof David Dixon, 'Invasion of discovery? Political Correctness and Australian History", UNSW (8 April 2016) <http://www.law.unsw.edu.au/news/2016/04/invasion-or-discovery-political-correctness-and-australian-history>.

24 Dr Brendan Nelson, Director of the Australian War Memorial, National Press Club Canberra 18 September 2013.

to recognise the Frontier Wars as part of our national history of conflict.

The reason for this former Federal parliamentarian Michael Organ rhetorically asks:

> "Is it because the colonisers – the victors – were the enemy, responsible for the atrocities, the massacres, the dispossession and the death of a significant section of the local indigenous population? The obvious answer is yes. The Australian War Memorial symbolically leads the nation in denial, backed by the RSL and government."[25]

However ANZAC Day doesn't belong to either the War Memorial or the RSLs. When ANZAC Day began, well back before it got the rancid tang of chest-beating jingoism that is present today,[26] there were no cheering crowds. And while government and society draped its returning veterans in glory, the first marches organised by the soldiers themselves were veteran-only affairs.

While they ostensibly marched to remember the dead, one did not have to scratch too deep to also see it was a way of acknowledging that the ones who made it out were the real casualties. The dead were dead, but the living carried the mental trauma of war now recognised as PTSD which spread into their lives, their families and the Australian society they returned to face.

Similarly, indigenous survivors of the frontier conflicts carried scars which, compounded with loss of land, identity, family and customary law, set up a cycle of psychological and social neglect that is almost unimaginable even compared to the trauma of the WWI veterans. While this has not been explicitly researched, it follows that trauma of those survivors is intrinsically attached to indigenous life in Australia today.

Transgenerational trauma was first identified in the Canadian grandchildren of Jewish survivors of the Holocaust who carried the experiences of their grandparents into their own lives.[27] It is now recognised as the contagion which created a cycle spanning multiple generations in indigenous communities in both Australia and the Americas.[28] [29] Instead of diminishing over time and "getting over it" or "moving on", dysfunction becomes embedded into the social fabric, expressing itself through the disturbing rates of: Indigenous imprisonment, violence, drug dependence, substance abuse, suicide and a sense of helplessness.[30]

While *Mabo (No. 2)* overturned terra nullius[31] in 1992 and more recently the trauma committed to the Stolen Generations have been officially recognised, along with other wrongs committed on Australia's first peoples, the recognition of the violent taking of the land remains the elephant in reconciliation's living room. For Aboriginal and Torres Straight Islanders this political and official intransigence is both confounding and an impediment to the government's current Constitutional Recognition campaign.[32]

It begs the question: how can Constitutional recognition be taken in good faith when the government pushing for it will not face up to how this nation was formed?

Perhaps more importantly, it is also hamstringing the effectiveness of existing programs and interventions. While governments continue to implement education, employment, health, housing and criminal justice initiatives, they continue to fail. Australia continues to have appalling rates of indigenous incarceration[33] and mortality[34] rates. These initiatives will only continue to fail without first addressing the deep grief of these historical realities.

Why ANZAC Day?

In 2011, leaders of Canberra's Aboriginal Tent Embassy began commemorating the deaths of Indigenous people during the expansion of what has become Australia at the approaches of the Australian War Memorial each ANZAC Day. The goal is not to protest but to have a procession and a proper place in the march[35] and to have descendants lay wreaths in memory of the their ancestors, the same as relatives of war veterans do each year across the country.

Each time their passage has been blocked by the Australian Federal Police with the message "this is not for you."[36] Similarly, attempts to have the Frontier Wars commemorated on the national day of mourning in other parts of the country have been denied.[37]

This sends a clear and unambiguous message to Indigenous communities that the deaths of their ancestors do not count in the collective consciousness of the nation. It is an unspoken thorn in the side of indigenous relations that needs to be pulled if Australia wants to make meaningful changes.

As stated earlier, the origins of ANZAC Day were not rooted not in celebration but commemoration and respect. That is why the meaning of ANZAC Day is a far more powerful way to send the message of respect to indigenous Australians than alternative methods. ANZAC Day is a way of seeing war for what is it – hell – and allowing the survivors of all wars, especially the Frontier Wars fought on this soil, to deal with truthfulness and dignity. It has always been a day of healing and is one of the reasons why it recognises the people who Australians fought against; including the Turks that killed our soldiers at Gallipoli.

The RSLs who commandeer ownership of the ANZAC Day marches could never be called progressive. But they do have a recent history of indigenous reconciliation. Today the RSLs celebrate indigenous involvement in war, a far cry from the institution that did have the attitude of "if you're black stand back, if you're white you're alright" until a few decades ago.[38]

This proves that this conservative institution can change of its own accord and be a positive agent of social change. It is exactly for these reasons that recognising the Frontier Wars on ANZAC Day would not only be the correct day to do it, but would be a psychic shift in indigenous relations. For the ANZAC tradition and the society that lauds it, it would bring new levels of truthfulness, maturity and relevance.

If the landings at Gallipoli were the birthplace of this nation, Australia's Frontier Wars was the rape that led to it. It is something that white Australia has consciously chosen to forget. However, when the day comes that it can face up to it, both Australia's indigenous and non-indigenous people will be better for it. And that day should be ANZAC Day.

---

25 Organ, Above n 13, 10.

26 'Gallipoli – remembering and learning ', (2008) Vol. 3, No. 1, *The University of Melbourne Voice* .

27 P Fossion, M Rejas, L Servais, I Pelc, & S Hirsch 'Family approach with grandchildren of Holocaust survivors ' 2003 57(4) *American Journal of Psychotherapy* 519-527.

28 Blanco in P Levine, M Kline *Trauma through a child's eyes*. (Berkeley, CA: North Atlantic Books 2007).

29 J Atkinson, *Trauma trails, recreating song lines: The transgenerational effects of trauma in Indigenous Australia* (Spinifex Press, North Melbourne, 2002).

30 Australian Bureau of Statistics, *The health and welfare of Australia's Aboriginal and Torres Strait Islander peoples* (4704.0) (Australian Government Press Canberra 2003) 34.
E Hunter, 'Freedom's just another word: Aboriginal youth and mental health', (1995) 28 *Australian and New Zealand Journal of Psychiatry* 374; J J Perkins, R W Sanson-Fisher, S Blunden & D Lunnay, 'The prevalence of drug use in urban Aboriginal communities' (1994) 89 *Addiction* 1319; R Trudgen *Why warriors lie down and die* (Aboriginal Resource and Development Services, Darwin, 2000).

31 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

32 Katie Burgess, Call for national day of remembrance for Australian frontier wars *The Standard* (March 7, 2016 < www.standard.net.au/story/3772609/call-for-national-day-of-remembrance-for-australian-frontier-wars/?cs=7>); Lest We Forget the Frontier Wars – Anzac Day 25th April 2012 Sovereign Union <www.sovereignunion.mobi/node/66>.

33 *Prisoners in Australia, 2015*, ABS, 4517.0.

34 Australian Institute of Health and Welfare 2011. *Life expectancy and mortality of Aboriginal and Torres Strait Islander people*. Cat. no. IHW 51. Canberra: AIHW.

35 Myles 'Morgan Petition calls for official Frontier Wars Remembrance Day' *SBS News* (18 MAR 2016) < www.sbs.com.au/nitv/article/2016/03/17/petition-calls-official-frontier-wars-remembrance-day>.

36 In 2015 this culminated in a police taser being drawn and pointed at the marchers, 'This day is not for you': Police shut down Frontier Wars Anzac Day march, NITV News, 29 APRIL 2015 http://www.sbs.com.au/nitv/video/436184643666/This-day-is-not-for-you-Police-shut-down-Frontier>.

37 Mike Butler 'Remembering this country's first war' *Honi Soit* April 28 2016 < http://honisoit.com/2016/04/remembering-this-countrys-first-war/>.

38 Monica Tan, 'Freedom Ride returns to Walgett, the town where the RSL banned black diggers', *The Guardian* 20 February 2015.

02

Beyond Ethnicity: The Separatist Conflict in Sri Lanka

Eilini Rajapaksa

"Those who search for the root causes of global conflicts, as well as terrorism, attribute them overwhelmingly to ethnicity."[1]

Introduction

The separatist conflict in Sri Lanka between the Sri Lankan government and the Liberation Tamil Tigers Eelam (LTTE) has been one of the world's most intractable wars in recent years and the most protracted conflict in Asia, lasting almost three decades until the LTTE's defeat in 2009.

The dominant narrative in the media coverage and attention given to the final stages of the Sri Lankan conflict has portrayed it as a primordial ethnic war[2], attributing the conflict to tensions produced by essential and palpable differences between the Sinhala majority and Tamil minority. However, this bipolar analysis of the conflict neglects the multifaceted nature of Sri Lankan society by characterising Tamils and Sinhalese as two homogenous groups. It fails to account for the broader context of the independence of Sri Lanka, namely, the changing power and economic structures during the democratisation of postcolonial Sri Lanka[3], and for important geopolitical factors that contributed to the persistence of the conflict.

Since the end of the war in 2009, international media outlets have reinforced this limited ethnic conceptualisation of the conflict. The overwhelming support of the civilian population towards government action in ending the war has been characterised as racism and indifference of the Sinhala population towards the concerns of Tamil civilians. However, little attention has been paid to understanding the horrific state of terror in which Sri Lanka's inhabitants – Sinhala, Tamils and Moors (Sri Lankan Muslims) alike – lived in for almost thirty years.

The LTTE, which terrorised the nation for decades, has been described as one of the most sophisticated, deadly and well-organised terrorist insurgencies in the world[4]. It is the only terrorist insurgency in the world known to have assassinated two world leaders (former Indian Premier Rajiv Gandhi and Sri Lankan President Ranasinghe Premadhasa) and to have its own army, navy and air force[5]. It is also known for being the first terrorist group to obtain air power[6], inventing the suicide belt[7] and perfecting the use of suicide attacks[8]. Its attack on Colombo airport in 2001 has been described as the worst terrorist act in aviation history, destroying 26 aircrafts that made up half of the national airline's commercial planes and a quarter of the air-force fleet[9]. The LTTE is also notorious for its substantial dependence on the forced conscription of child soldiers and female suicide bombers[10].

The LTTE's ultimate goal was to establish 'Tamil Eelam'; an ethnically separate, independent Tamil state in the Northeastern provinces of Sri Lanka, and it retained effective control over the Northeastern territory until 2009[11]. The LTTE's strategic use of a variety of modes of warfare, including conventional military capabilities, irregular tactics, terrorist acts and guerrilla forces have lead some scholars to label the Sri Lankan conflict as a "hybrid war"[12]. Academic scholar and counter-insurgency specialist Dr. Ahmed S. Hashim, who helped craft the U.S. counterinsurgency campaign in Iraq, has described the LTTE as "the most advanced hybrid war entity in existence… capable of waging terrorism, insurgency and conventional war." [13]

Faced by such a monumental challenge, the victory of the Sri Lankan state in 2009 was a shock to a wide range of international observers. While the way in which the Sri Lankan government ended the conflict has been the source of contentious discussion, it is not the focus of this article. This article seeks to explore the colonial policies underlying the foundation for conflict and the rise of the LTTE by going beyond a bipolar ethnic framework. It is essential to understand the origins of the conflict and the geopolitical factors that contributed to the prolonged nature of the war to properly discuss recovery for the people of Sri Lanka as a whole, and facilitate reconciliation and development in Sri Lanka.

Beyond the Iron Law of Ethnicity: Understanding the Origins of the Separatist Conflict

There is a tendency by both conservatives and liberals to postulate ethnicity and identity politics as the foundational starting point when searching for the root causes of conflicts, including terrorism[14]. Events such as 9/11 and the protracted conflict in Sri Lanka have been used to reinforce what has been labelled the "iron law of ethnicity"[15]. This discourse is based on the primordialist tendency to view ethnic identity as inborn and immutable, rather than a product of construction, human action, choices and history[16]. The most common framework used to explain the origins of the Sri Lankan conflict exploits this ethnic polarisation, with the Sinhala (mostly Buddhist) majority depicted as a "monolithic aggressor" and the Tamil (mostly Hindu) minority as the aggrieved "monolithic victim"[17].

This limited analysis problematically paints the Sinhala (anglicised as 'Sinhalese') and Tamil people as two homogenous communities. It discounts the voices of several important groups: Tamil dissidents opposed to the LTTE, Muslim Sri Lankans, and the Sinhalese in the North-Eastern provinces (occupied by the LTTE for the duration of the war)[18]. Important distinctions within communities are also neglected when this framework is employed. Within the Tamil population itself, variances in religions and caste have created distinct Tamil communities. To consider the Jaffna Tamils of the Northeastern province and Estate/Indian Tamils of the South and Central Sri Lanka as a homogenous community would be to discount the vastly different experiences and histories of the two groups[19]. Sinhalese society also has firmly embedded class divisions, in addition to regional differences. The Muslim community, most of whom speak Tamil but consider themselves a distinct community[20], are overlooked in

1 Asoka Bandarage, *The Separatist Conflict in Sri Lanka: Terrorism, Ethnicity, Political Economy* (Routledge, 2008) 10.
2 Ibid 6.
3 Ibid.
4 Peter Chalk, 'The Tigers Abroad: How the LTTE Diaspora Supports the Conflict in Sri Lanka' (2008) 9(2) *Journal of International Affairs* 97.
5 Ryan Clarke, 'Conventionally Defeated but Not Eradicated: Asian Arms Network and the Potential for the Return of Tamil Militancy in Sri Lanka' (2011) 13(2) *Civil Wars* 157.
6 Bandarage, above n 1, 1.
7 Bruce Hoffman, *Inside Terrorism* (New York: Columbia University Press, 2006) 145.
8 Bandarage, above n 1, 1.
9 Ravinatha Aryasinha, 'Terrorism, the LTTE and the Conflict in Sri Lanka' (2001) 1(2) *Security and Development* 30.
10 Bandarage, above n 1, 1.
11 Ibid.
12 Ahmed S. Hashim, *When Counterinsurgency Wins: Sri Lanka's Defeat of the Tamil Tigers* (University of Pennsylvania Press, 2013) 32.
13 Ibid.
14 Bandarage, above n 1, 10.
15 Ibid.
16 Mohamed Imtiyaz Abdul Razak and Ben Stavis, 'Ethno-Political in Sri Lanka' (2008) 25(2) *Journal of Third World Studies* 135.
17 Bandarage, above n 1, 27.
18 Ibid, 4.
19 Nira Wickramasinghe, *Sri Lanka in the Modern Age: A History of Contested Identities* (University of Hawaii Press, 2006) 254.
20 Ibid.

mainstream discussion of the conflict, despite being a significant island-wide community that makes up approximately 7.9% of the population[21].

Importantly, this bipolar framework neglects the indisputable influence of colonialism on Sri Lanka, and the pluralist nature of pre-colonial Sri Lanka. As academic Asoka Bandarage explains, "Much of the long pre-colonial history of Sri Lanka was characterised by ethno-religious pluralism and co-existence over antagonism and conflict."[22] Despite distinct religious differences, inter-marriage between Tamils and Sinhalese was not uncommon and there were periods of cooperation and conflict[23].

In contrast to the inter-mixed and fluid ethnic binaries that existed in ancient Sri Lanka, colonial rulers perceived ethnic groups as fundamentally distinct, and strategically manipulated and aggravated ethnic tensions between the Tamils and Sinhalese in a classic strategy of "divide and rule"[24].

The British brought great numbers of Tamils from South India to Sri Lanka in the 1800s as permanent wage labourers on coffee and tea plantations (an estimated one million in the 1840s and 1850s alone) when they failed to turn the Sinhalese peasantry into labourers. Unlike earlier waves of immigrants, Tamil immigrants were not integrated into the Sinhala caste system and culture[25]. As a means of social control, the British relied on apartheid and prevented as much as possible "their" "'coolies' from interacting with the neighbouring [Sinhala] villagers"[26].

Generally, as minorities could be more trusted to ally with outside powers, they are favoured by colonial administrations and given preferential education in exchange for a share in political and economic power[27]. Ceylon Tamils of the 'Vellala caste' in the North were given such special privileges under the British colonial administration, such as exclusive English education comparable to university education, and were procured to help in colonial administration[28]. The educational advantage given to Sri Lankan Tamils, especially the Vellala caste, gave them an inherent advantage over other minorities and the Sinhala majority in higher education, colonial employment and modern professions[29].

Sri Lanka's political independence in 1948 and subsequent democratisation resulted in a significant shift in power and economic structures. Democratisation meant a power shift from Tamil minority groups, privileged under the British administration, to the majority Sinhala, which was marginalised under colonial rule[30]. The loss of specific privileges that Tamils benefited from under colonial rule motivated the beginning of the movement for Tamil rights in the 1950s and 1960s[31]. These were exacerbated when S.W.R.D Bandaranayake's government passed the "Official Language Act" in 1956, replacing English, which had been enforced under British colonial rule, creating divisions along ethnic and linguistic lines. These policies have since been abandoned.

Later policies also contributed to disharmony. A strong knowledge of English continued to be necessary to enter prestigious professions, difficult university fields, the private sector and the upper echelons of the government sector, and Sinhala youth continued to be disadvantaged due to their significantly inferior access to English[32]. This led the government to introduce language-based affirmative action to admit more Sinhala students in 1970 (a policy which was discarded 7 years later)[33]. Similar policies were enacted with regards to government hiring and attaining professional qualifications[34].

Although this period in Sri lanka's history is well-known for ethnic-based hostility attributed to these post-independence policies, it was also a climactic point of class struggles in Sri Lanka. Riots also broke out amongst Sinhala youths who felt disenfranchised and disillusioned by the state and the elite class, eventually leading to the rise of the Sinhala youth Janatha Vimukthi Peramuna (JVP) insurrection in 1971[35]. However, the JVP's hostility towards Indian expansionism, including foreign control of the commercial sector and Indian estate workers, prevented class solidarity between Sinhala and Tamil youths[36].

In addition to the tensions emerging from changing power structures in postcolonial Sri Lanka, Sri Lankan elites who constituted the dominant polity in the 1980s were responsible for exacerbating and manipulating tension along ethnic and class lines by mobilising amongst these cleavages to win votes and gain power[37]. The July 1983 anti-Tamil violence which followed an LTTE ambush of a bus of Sinhala soldiers is a significant example of a 'state sponsored pogrom', which has been incorrectly depicted as an extemporaneous outburst of primordial Sinhala hatred towards Tamils[38]. Even Saumiyamoorthy Thondaman, leader of the hill country Tamils and a sympathiser of the LTTE, has argued that "the vast majority of the Sinhala people condemn these atrocities on these innocent Tamil people and have shown sympathy and understanding… In those circumstances, to say that this is a Sinhala uprising against the Tamils is absurd."[39] The July riots of 1983 were not driven by Sinhala Buddhist ideology, but were systematic and pre-planned events, sponsored by the right-wing UNP government at the time. This is evidenced by the inaction of then-President Jayawardena who justified the violence and did not introduce a curfew until the worst of the violence was over, the fact that much of the violence was conducted by the agents of government ministers and prominent UNP members[40], and the absence of organised aggression towards Tamils in the South after July 1983.

Geopolitical Implications: Sri Lanka's Conflict Within the Context of India's Regional Hegemony

Although often characterised as a largely internal struggle, to attribute the Sri Lankan conflict solely to domestic factors would be to neglect the geopolitical context in which it took place. Since its origins, Sri Lanka's conflict has played an important role in India's strategy in South Asia and it cannot be analysed adequately apart from India's aspirations to impose its hegemony throughout the region.

Since Sri Lanka's independence, India sought to restrict Sri Lanka's external relationships, deterring Sri Lanka from joining the US-sponsored SEATO pact in the early 1950s and effectively preventing Sri Lanka from forming security relationships with states that India perceived as a threat to its interests[41]. The July 1983 riots proved to be an opportunity for India to establish its predominance in Sri Lanka while outwardly presenting itself as a peacemaker, intervening to support its "Tamil ethnic brothers" in Sri Lanka[42]. However, the conflict was more important to the Indian government due to fears the creation of an autonomous Tamil state in Sri Lanka could lead to secession of the Tamil Nadu state from India, and due to concerns that the United States was likely to use the conflict as an window to obtain a strategic footing in South Asia[43].

Accordingly, India's Prime Minister Indira Gandhi advanced what was effectively a policy of "strategic coercion" against the Sri Lankan government by threatening invasion, supporting the LTTE and presenting itself as a mediator between the LTTE and the government[44]. From mid-1983, RAW (India's central intelligence agency, the Research and Analysis Wing) funded, armed and trained more than 1200 Tamil insurgents whilst also permitting Sri Lankan Tamil insurgent groups to operate their own training camps in South India[45]. In 1986, Sri Lankan Tamil militants were running a massive 49 training camps which were training thousands of cadres, and the number of Tamil insurgents was equal to or greater than the numerical strength of the Sri Lankan army[46].

New Delhi's coercive tactics eventually forced the Sri Lankan government and the LTTE to accept the 1987 "Peace" Accord, the principal purpose of which was to formalise India's security interests in Sri Lanka. In addition to setting the legal foundation

21 Jayashree Bajoria, 'The Sri Lankan Conflict', Council on Foreign Relations (Online), May 18, 2009 <http://www.cfr.org/terrorist-organizations-and-networks/sri-lankan-conflict/p11407>.
22 Bandarage, above n 1, 4.
23 Hashim, above n 13, 21.
24 Bandarage, above n 1, 30.
25 Ibid.
26 Ibid.
27 Imtiyaz and Stavis, above n 17, 135
28 Bandarage, above n 1, 31.
29 Ibid, 131.
30 Ibid, 11.
31 Wickramasinghe, above n 20, 254.
32 Bandarage, above n 1, 54.
33 Ibid.
34 Hoffman, above n 7 137.
35 Bandarage, above n 1, 54.
36 Ibid, 56.
37 Imtiyaz and Stavis, above n 17, 138.
38 Bandarage, above n 1, 27.
39 L. Piyadasa, *Sri Lanka: The Holocaust and After* (London: Marram Books, 1986) 98.
40 Bandarage, above n 1,106.
41 David Brewster, *India's Ocean: The Story of India's Bid for Regional Leadership* (Routledge, 2014) 47.
42 Ibid.
43 Ibid.
44 Ibid, 49
45 Ibid.
46 Ibid, 50

for the placement of Indian Peace Keeping Forces (IPKF) in Sri Lanka, the agreement provided that Sri Lanka's sea and air ports would not be made available for use "by any other countries in a manner prejudicial to India's interests"[47], that India would have an opportunity to operate the Trincomalee oil tank facilities and that Sri Lanka would not allow foreign broadcasting stations like Voice of America to be used for military or intelligence purposes by the US or Germany[48]. The agreement also required Sri Lanka to rearrange its foreign and defence policies, and reduce its engagement with the US, China, Pakistan, Israel and South Africa[49]. The Indo-Lanka accord was a clear strategic campaign to capture Sri Lanka under its orbit. The LTTE's notorious leader himself, Velipullai Prabhakaran, stated, "This agreement did not concern the problem of the Tamils. This is primarily concerned with Indo–Sri Lankan relations. It also contains within itself the principles, the requirements for making Sri Lanka accede to India's strategic sphere of influence."[50]

The agreement, signed on 29th of July 1987, triggered riots all over Sri Lanka and induced a near-anarchic state in Sri Lanka by generating greater support for the JVP insurrection (which was extremely antagonistic towards Indian expansionism)[51]. The Government declared a nationwide curfew while the JVP, the Sri Lanka Freedom Party and other opposition parties protested through the night[52]. Due to the JVP's insurrection, in 1987, schools, universities and banks were closed, and public transport, hospitals and utilities operated dubiously[53]. By 1989, an estimated 50,000 people had been killed due to the insurgency[54].

The Indo-Lanka peace accord not only failed but deteriorated into a bitter war between the Indian Peace Keeping Forces (IPKF) and the LTTE [55]. The LTTE refused to disarm and the IPKF found themselves involved in a counterinsurgency campaign that resulted in an estimated 1,500 deaths and more than 5,000 injuries[56] before the new Indian Prime Minister finally withdrew troops in March 1990[57]. The notorious intervention, which has been coined "India's Vietnam", left a legacy of mistrust and affirmed the suspicions of Sri Lankans about India's hegemonistic goals in Sri Lanka[58].

47 Ibid, 51

48 Palitha Senanayake, *Sri Lanka: The War Fuelled by Peace* (Lakehouse, 2009) 62.

49 Ibid.

50 Rajesh Kadian, *India's Sri Lanka Fiasco: Peace Keepers at War* (South Asia Books, 1990) 51.

51 Senanayake, above n 49, 65.

52 Ibid, 64.

53 Ibid, 67.

54 Ibid, 67.

55 Brewster, above n 42, 51.

Post-Conflict Recovery

Since the Sri Lankan government conventionally eradicated the LTTE through arms in 2009 there has been a lot of discussion in the international and domestic arena about reconciliation and progress. There are those who argue that the end of the conflict does not signify the end of Tamil grievances, and foreign media has been hasty to correlate the persistence of the separatist conflict until 2009 with the continuing marginalisation of minorities[59].

Notably, the integral institutional and political issues that provoked Sinhala-Tamil relations have been addressed in the last few decades. Tamil was declared an official language in 1987, a status it does not enjoy in India, which is home to over 60 million Tamil speakers, or Malaysia, where 7.3% of its population is made up of predominantly Tamil-speaking Malaysian Indians[60]. Policies controlling Tamil (and urban Sinhala) entry into university science faculties were abandoned a long time ago[61]. The Sri Lankan constitution enshrines the right to religious freedom and four departments exist under the Ministry of Religious to manage Buddhist, Hindu, Christian and Islamic affairs, with official national holidays for the major religious festivals of these four groups[62].

International reports on the Sri Lankan conflict echo vague sentiments about the need to ensure a reasonable political package is worked out for Sri Lanka's minority groups in Colombo[63]. However, the increasingly important role minority groups have played in the administration in recent decades must not be brushed aside and forgotten. Sri Lankan Tamil, Indian and Muslim political parties have played significant roles in coalition governments[64]. The Rajapaksa-led Sri Lanka Freedom Party (SLFP) which came to power in 2005 and eradicated the LTTE in 2009, succeeded in doing so through an alliance with Muslim Parliamentarians, alongside the Janatha Vimukthi Peramuna party and the Jathika Hela Urumaya party[65]. The Tamil Makkal Viduthalia Pulikal also partnered with the Sri Lankan government during this time[66]. For most of its history since independence in 1948, the Chief Justice of the Supreme Court of Sri Lanka has been a Tamil citizen[67]. Since 2011, the Mayor of the capital, Colombo, has been A.J. Muzammil, a Muslim Sri Lankan, which is not an uncommon occurrence.

Sri Lanka's position at the heart of the Indian Ocean, bordering major shipping routes within the Indo-Pacific (the "world's most strategically and economically dynamic region" [68]) means the end of the conflict was also of significant geopolitical importance. Since the end of the war, China and India have competed to gain a foothold on the island nation. China played an important role in Sri Lanka's development subsequent to the conflict, collaborating closely with the Rajapaksa government and investing significantly in projects and infrastructure, such as the Hambantota Port and the airport[69]. China's has invested an estimated US $4 billion in Sri Lanka since 2009[70].

However, China's growing influence over Sri Lanka has not gone unnoticed by India. Although it removed several roadblocks in India and Sri Lanka's relationship, the end of the LTTE also meant a considerable loss of India's leverage over Sri Lanka[71]. India's concern about Beijing's influence escalated when Rajapaksa allowed two Chinese submarines to dock in Sri Lanka[72]. Several reports suggest that India was closely involved with the regime change in Sri Lanka in 2015 that saw Mahinda Rajapaksa lose to Maithripala Sirisena[73]. A Colombo station chief alleged to be from India's spy agency was expelled by the Sri Lankan government in the month prior to the election following accusations that he was helping the opposition to oust Rajapaksa[74]. Whether these allegations are true or not, following its election in January 2015, Sirisena's government widely publicised that it would be strengthening Sri Lanka's relationship with India and did not make any efforts to hide its move away from China, halting and curbing several major Chinese-funded infrastructure projects[75].

The Sri Lankan people have legitimate reasons to be wary of India's attempts to be involved in their domestic affairs given the notoriety of the Indo-Lanka Accord and India's role in training the LTTE. In contrast, China provided the military and diplomatic support to Sri Lanka that made the LTTE's defeat possible when no other major power would, and contributed largely to Sri Lanka's post-war economic development by investing in projects that India declined[76]. With economic growth strongly correlated to a lesser likelihood of civil war, Sri Lanka's economic development is important not only to ensure progress but also to prevent another insurgency[77]. India's reluctance after the end of the conflict to invest in Sri Lanka suggests that India is not interested in Sri Lanka's economic development but in continuing its hegemonic sphere of influence. Sri Lankan author Palitha M. Senanayake goes as far as to say that if the conflict is truly to be settled, one would have to "physically drag the Island of Sri Lanka away from its present location and locate it in

56 Senanayake, above n 49, 68.

57 Brewster, above n 42, 52.

58 Ibid.

59 Insight on Conflict, Sri Lanka: Conflict Profile (August 2009) < https://www.insightonconflict.org/conflicts/sri-lanka/conflict-profile/>

60 Karmveer Singh, 'Challenges to the Rights of Malaysians of Indian Descent', E-International Relations, 6 February 2013 < http://www.e-ir.info/2013/02/06/challenges-to-the-rights-of-malaysians-of-indian-descent/>.

61 Bandarage, above n 1, 23.

62 Unethical Conversion Watch, Religious Freedom in Sri Lanka < http://unethicalconversionwatch.org/religious-freedom-3/>.

63 Bajoria, above n 22, 2.

64 Bandarage, above n 1, 23.

65 Bajoria, above n 22, 2.

66 Ibid.

67 Senanayake, above n 49, 119.

68 Kadira Pethiyagoda, 'India v. China in Sri Lanka: Lessons for Rising Powers', The Diplomat (online), 11 May 2015 < http://thediplomat.com/2015/05/india-v-china-in-sri-lanka-lessons-for-rising-powers/>.

69 Ibid.

70 Debasish Roy Chowdhury, 'Sri Lanka Should Thank China, Not Attack It, Ex-President Rajapaksa Says', South China Morning Post (online), 12 March 2015 (updated 30 December 2015) <http://www.scmp.com/news/asia/diplomacy/article/1735379/sri-lanka-should-thank-china-not-attack-it-ex-president>.

71 Brewster, above n 42, 55.

72 Ibid.

73 R John Chalmers and Sanjeev Miglani, 'Indian Spy's Role Alleged in Sri Lankan President's Election Defeat', Reuters (online), 17 January 2015 < http://www.reuters.com/article/us-sri-lanka-election-india-insight-idUSKBN0KR03020150118>.

74 Ibid.

75 Pethiyagoda, above n 69.

76 Ibid.

77 Clarke, above n 5, 158.

a place away from the ambit of India."[78] While this is not possible, it is likely that future prospects of peace in Sri Lanka will depend more on engagement with these two growing super powers than on any internal factor.

78 Senanayake, above n 49, 514.

Corrections have been made to the online version of this article.

03

Eisenman in Berlin

Harry Stitt

Bachelor of Design (Architecture)/Engineering (Civil) (Structures)

"Only a very small part of architecture belongs to art: the tomb and the monument."

— Adolf Loos[1]

In 2005, architect Peter Eisenman completed his only built memorial project to date, *The Memorial to the Murdered Jews of Europe* in the heart of Berlin, Germany. The memorial sits on a 19,000m^2 site, and consists of a gridded field of concrete *stelae* which enclose the visitor upon entry.[2] Eisenman's project concluded twenty years of heavily contested discussion regarding adequate memorialisation of the holocaust within Germany's capital.

Within the suite of monuments and memorials produced following the Second World War, Eisenman's stands with only a few that have sought to radically re-figure the modes by which history and memory are operated on architecturally.[3] Operating through a logic coincidental with that of the French Post-Structuralist school of philosophy, Eisenman performs an archaeology of architecture's politically complicit past, criticising its enabling of abhorrent governmental regimes and actions. Understanding the methods by which the ostensibly neutral domain of architecture has constructed images and icons for several of the more abhorrent political systems of the twentieth century, Eisenman situates his architecture elsewhere, in a non-allegorical, non-representative space. His memorial produces a multiplicity of meanings, devoid of any particular ideological affiliation.

This aspect of Eisenman's work recognises several problems inherent in any attempt at representation. The first, as discussed above, is the uneasy relationship that architecture has to authoritarian power systems, and the ethical difficulty of excusing this situation. Building in Berlin especially requires engagement with this issue, given the extent to which the city's landscape has been shaped by consecutive power regimes. The Reichstag building, which houses Germany's parliament, stands as one notable example of this legacy. Built in 1884, its Neo-Classical style was intended to enforce discipline, providing a strong face for government. As political entities themselves cannot have an identifiable physical form, they employ more concrete means by which they can generate one; through party iconography and architecture. Eisenman's first difficulty lies in this context. Nazism was one of several political ideologies operating in the first half of the twentieth century that mobilised architecture and design in its service, producing impressive monuments and iconography to project a particular

1 From Adolf Loos' "Architecture" (1910), a copy of which can be found at < http://www.mom.arq.ufmg.br/mom/arq_interface/2a_aula/loos_architecture.pdf>.

2 Eisenman Architects, *Holocaust Memorial Berlin* (Baden: Lars Muller Publishing, 2005).

3 Maya Lin's *Vietnam Veterans Memorial* (1982) and Kenzo Tange's *Hiroshima Peace Center and Memorial Park* (1955) are two other stand-outs.

image of itself towards both its citizens and Europe in general.

However, a further complication comes with a consciousness of the artificiality involved in any attempt at singular meaning in memorialising works, for this would suggest that the past is experienced equally by all who come into contact with it. History is not simply the factual recollection of past events. Rather, it is a socially conditioned and culturally determined process effected by contextual relations between involved individuals: academics, politicians, survivors, amongst others. Eisenman's identification of this fact and its incorporation into his project comes from his close reading of philosopher Jacques Derrida, who did much to question the logic of empiricism in humanist and scientific fields of study.

Eisenman responds to the issues involved in representation, as discussed above, by removing any allegorical elements from the work, thus removing any possibility of *reading* the work so as to produce meaning. Eisenman's objects, vertically oriented concrete blocks of varying vertical dimension, have no relation to a symbolic order. The objects cannot be substituted out for other objects they are meant to illustrate. No narrative can slip into the gaps between the elements, and produce any sort of transcendental signified common to most monuments or memorial sites. The objects are relieved from any representative role. Gilles Deleuze, in reference to the painting of Francis bacon, has called this "escaping the figurative", where the figurative is understood as any element that stands in for or references something else, so as to tell a story through its interplay with other figurative elements.[4] Eisenman instead employs what might be termed the figural. His objects exist as pure presence through an abstracted formalism, unidentifiable with any semantic system, rather than gaining its presence through the subscription of meaning via understood cultural references. In any case, this technique disallows the generation of meaning from the work itself, cleverly subverting one's expectations of their engagement with the memorial. Notably, it also produces a consciousness regarding the conditioning of one's cultural engagement with history and memory.

The refusal to provide decipherable content in built form forces the memorial to be recognised as an environment in which one is temporarily subsumed, rather than as an interface between the public and a particular political reading of history. The work's neutral landscape requires one to engage critically with their understanding of the events to which the memorial is dedicated, with the concrete field providing the particular atmosphere for where this is to occur. The responsibility for answering the common questions one approaches a memorial with is deferred from the work, and is posed back to the visitor.

In addition to this subversion of the figurative in favour of the figural, Eisenman also makes a disciplinary argument regarding the politicisation of the ground, in terms of its capacity to establish and disestablish one's connection to place. Architectural theorist Jeffrey Kipnis has long spoken on this issue, distinguishing between *ground* as the physical, topographical surface upon and in which objects are placed, and *land* as the politico-economic framing of this landscape as something which can be owned and policed.[5] This articulation suggests that through this politicisation of ground, particular groups can gain control over an area through territorialising activities (including building), producing or obstructing one's sense of place. Nazism enforced a particularly cruel ideology of place, whereby one's ancestral heritage allows one to claim ownership of a region based only on the supposed supremacy of their ethnic group. This understanding of land, titled *blut und boden* (blood and soil), was instrumental in enforcing the displacement of Jews from land which, prior to Nazism, they both identified with and owned.

Eisenman himself has spoken of the difficulty of the ground in architecture, as it inscribes a primary datum from which things are measured. Writing that, "architecture has always been conceptualised through Cartesian coordinates", he contends that the countering of this singular point of reference becomes important within the Berlin project as an act of political disestablishment.[6] In affecting this critique, Eisenman establishes two secondary planes which undulate with individual rhythms, both of which can be read as ground. The lowermost plane is interrupted by the bases of the large concrete blocks, whilst the topmost plane forms only through a Gestalt[7] relationship between adjacent blocks. Neither can be read as whole, nor as primary. Both are accessible, but not without difficulties or constraints. This relationship disestablishes the relation of subject to ground conventional to architecture, a phenomenon heightened through the exclusionary practices of the Nazi party in Germany during the 1930s and early- to mid-1940s.

The uncertain borders of the work, controlled with the dissipation and breaking of the grid towards the site's extremities, furthers this reading of ground in the project as it allows for the city and its messiness to be brought into the urban field. The space of the work is not privileged ground, as no break or transitional space is given between the space of the street and that enclosed by and on top of the *stalae*. Eisenman has pushed this as an important aspect of the project, saying in an interview that, "people are going to picnic in the field; children will play tag in the field; there will be fashion models modelling there and films will be shot there".[8] By failing to distinguish architecturally the site of memorial from the space of the city, Eisenman suggests that the events the memorial refers to are not distinct or privileged within the German cultural conscious, but rather ingrained within it and are constantly present.

Eisenman's memorial signifies a new treatment of memory within architecture. It shows a post-modern intuition regarding the constructs of history and experience, and a concern for architecture's complicity in political manoeuvring. It's recovery of a past condition for a present audience respects the events and people involved in the persecution of the Jews by the Nazi Party prior to and during the Second World War, and allows these subjects to be contemplated in a contemporary situation.

4 Gilles Deleuze, "Notes on Figuration in Past Painting" in *Francis Bacon: The Logic of Sensation*, trans. Daniel W. Smith (Minneapolis: University of Minnesota Press, 2003), 10-12.

5 See Jeffrey Kipnis' lecture, "Discrimination", given at the Harvard Graduate School of Design in 2013, for a summary of these ideas. <http://www.gsd.harvard.edu/#/media/discrimination-by-jeffrey-kipnis.html>.

6 Peter Eisenman, "The Silence of Excess", in Eisenman Architects, *Holocaust Memorial Berlin* (Baden: Lars Muller Publishing, 2005).

7 Gestalt relationships produce a perception of an organised whole from a group of separate parts. In the case of Eisenman's memorial, an upper surface is perceived as continuous across the field, composed from thousands of discrete, planar surfaces which combine in one's mind.

8 Peter Eisenman, Charles Hawley & Natalie Tenberg, "How long does one feel guilty?", *Spiegel*, May 9, 2005.

04

Harm in "The Hole": The denial of medical treatment in NSW's "secret" prison

Mike Butler

Introduction

Underneath the edifice of Sydney Police Centre, just off Oxford St in Surry Hills, lies a largely unknown prison facility run by the NSW Department of Corrective Services (DCS). Comprising around 23 cells, each with a 3-person occupancy and designed for freshly remanded or convicted men, this windowless subterranean facility is colloquially known as the "The Hole" by prisoners because of its particularly unpleasant conditions.[1]

Despite the Department of Corrective Services purporting to list "all NSW Corrective Services Centres" on its webpage, The Hole is conspicuously absent.[2] It is, in effect, a secret prison with some of the worst conditions in the state including the denial of necessary medication and health care.

The reason for its harsh conditions is that The Hole is only intended as a temporary-accommodation facility, with the Inspector of Custodial Services deeming stays longer than 72 hours "unacceptable."[3] However, chronic lack of capacity across the prison system means that The Hole has been transformed into an overflow prison.[4] It has neither the facilities nor staffing to provide appropriate medical care while prisoners wait for space to become available at the Metropolitan Remand and Reception Centre in Silverwater (which is the correct entry point into the prison system and where each prisoner's health care plans are established).

Given that overcrowding is expected to worsen in both the short and long term,[5] and that an estimated 3,700 men pass through the Hole each year,[6] the use of The Hole for longer-term incarceration represents a significant injustice that will only worsen if left unaddressed.

People like Aboriginal elder Merriman are now speaking out at what he calls the "shameful treatment of suffering men."[7] At a public meeting at Ultimo Community Centre in March he detailed how "people are getting jailed for minor bail infringements and crimes and getting stuck in a place that has some of the worst prison conditions in the state," explaining that all prisoners are on 24-lockdown within the windowless cells:[8]

> "If one of your family or a friend ends up there, forget about seeing them because that's flat-out denied. If they want to leave a book for you to read that will be denied too. If you want to write a letter you can't because writing materials are banned. It's intimidating, harsh and there is no segregation of prisoners so anyone of you could end up in a cell with a violent and dangerous person with mental health issues.
>
> "It's particularly bad for people who've never been jailed before. They don't know the rules and are vulnerable to being targeted and even attacked." [9]

The issue that is becoming even more dangerous is that people are being denied their medications for up to weeks at a time:

> "People used to stay days there; now days are weeks and if you need daily medication for pain, gout, their hearts, epilepsy or mental health, anything really, they will consciously deny it from you. There are men going through unnecessary pain, epileptic fits, panic attacks and true suffering because of it. Old men, young men, sick men, all men, and the [*prison's*] nurses and warders know it. That's wrong enough but refusing to do anything about is criminal."[10]

While official figures relating to Surry Hills are near non-existent – unsurprising considering the Department of Justice's reluctance to recognise it – official prison performance statistics help confirm problems at Surry Hills. The national average for nurses/prisoners is 1 nurse per 20 prisoners,[11] more than three times the reported one nurse for its 72.[12]

There are also significant official indicators of men spending increasingly unacceptable amounts of time in The Hole. When the Prisons Inspectorate examined The Hole's books in the first half of 2014, it found that 1-in-8 people were spending more than the "unacceptable" period of 72 hours.[13] Since then the situation will have worsened with NSW's justice system jailing more men than ever before.

According to Merriman, whose family has lived in Pyrmont for seven generations:[14]

> "this doesn't just affect Aboriginal people but all of us. … it's just that we know about it more because the police are so keen to lock us up. You tell the average person that arguably the worst prison in the state is just off Oxford Street, they wouldn't believe you. But it is."[15]

While indigenous men continue to be jailed at unprecedented levels, which continue to increase (between July 2015 and June 2016 the indigenous prison population grew 10% to a record 3,000 prisoners),[16] the denial of necessary medication at Surry Hills naturally has a strong indigenous dimension. However, the oppression impacts anybody unfortunate to fall under the prison's and justice system's control.

Other considerations that increase the vulnerability of prisoners at The Hole include:

1. Prisoners suffering significantly higher rates of health issues, particularly mental health, than the general population;[17]
2. High numbers of people being unable to afford the protection of legal representation,[18] and
3. The majority of prisoners at The Hole being there on remand.

This third issue deserves further consideration. Inmates at The Hole who are on remand have not been found guilty of their accused crimes and are presumed innocent under the law. The presence of such inmates therefore flies in the face of the idea that "[t]he conditions of custody and treatment of

1 Mark Merriman, untitled speech, (speech delivered at Ultimo Community Centre), 3 March 2016.

2 NSW Department of Justice, *Security Classification* (July 2016) < www.correctiveservices.justice.nsw.gov.au/Pages/CorrectiveServices/custodial-corrections/correctional-centres-homepage.aspx >.

3 Inspector of Custodial Services, *Full House: The growth of the inmate population in NSW Report*, April 2015, [4.41]–[4.44].

4 P Bibby, 'Overflowing prisons see people locked for days in harsh, threatening temporary cells', *Sydney Morning Herald*, 23 May 2015.

5 NSW Bureau of Crime Statistics and Research, *The 2015 NSW prison population forecast, Issue paper no.105* (April 2015), 1-2.

6 Based on a one-week turnaround of prisoners and 72-man capacity.

7 Merriman, Above n 1.

8 Ibid.

9 Ibid.

10 Ibid.

11 Australian Institute of Health and Welfare 2013. *The health of Australia's prisoners (2012)*. Cat. no. PHE 170. Canberra: AIHW, 17.1.

12 Merriman, Above n 1.

13 Ibid.

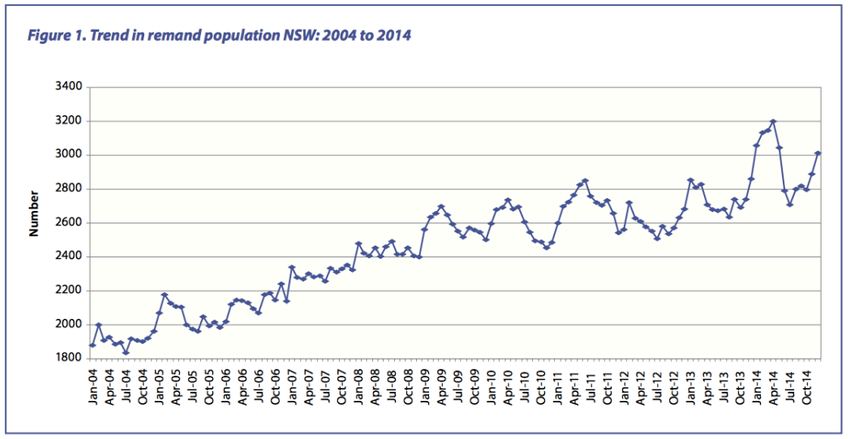
14 After timber cutters and farmers forced the Merriman's from their traditional Yuin country on the NSW South Coast.

15 Merriman, Above n 1.

16 NSW Bureau of Crime Statistics and Research, *NSW Custody Statistics Quarterly Update June 2016*, June 2016.

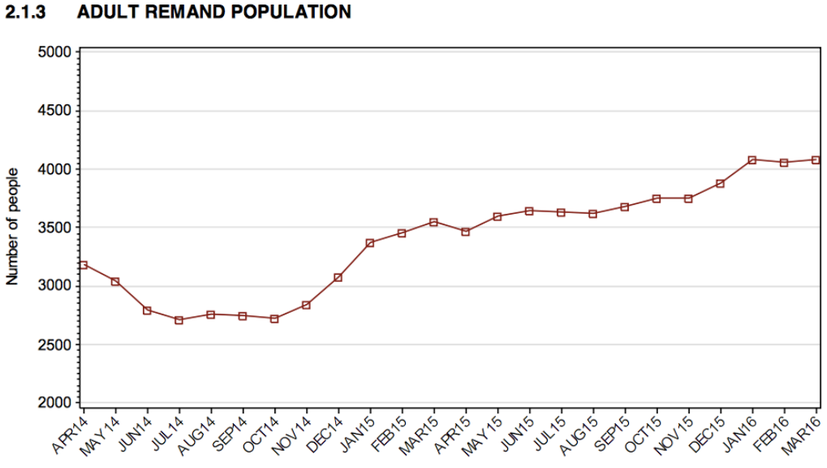
17 Justice Health, *Year In Review 2014-2015* (2015), 12.

18 'Unaffordable and out of reach", Community Law Australia, 10.



"In 2010 NSW had more than double the remand rates of Victoria…"

"…this comparison will have likely blown out further"



remand inmates should reflect this presumption of innocence."[19]

There is also the overriding issue of NSW's skyrocketing remand and imprisonment rates compared to other states. For example, in 2010 NSW had more than double the remand rates of Victoria (47.3 per 100,000 population vs. 19.3 per 100,000 population),[20] and this comparison will have likely blown out further. Between April 2015 and March 2016 alone, the intake of newly remanded prisoners jumped by 37% taking NSW's remand population to a historic high of 4,090 adults.[21]

Furthermore, many prisoners are additionally vulnerable as this is their first time in a prison environment. As a result, they are naïve to their rights and procedures for exercising them. Compounding this issue is the fact that prisoners at The Hole are denied the normal avenues of complaint available in NSW prisons, such as writing to the Ombudsman or relaying information to visitors.

The rise of "Penal Harm Medicine" at Surry Hills?

Penal harm medicine is an American legal concept that has not been referred to in the Australian jurisdiction but this issue both fits the circumstances at The Hole and may provide a useful basis for developing a strategy to redressing them.

Vaughn wrote: "Penal harm medicine involves a mixture of gross incompetence to alleviate prisoners' suffering and deliberate infliction of pain."[22]

> "The penal harm movement recognises that the prison establishment is an organisation for the delivery of pain. Contemporary penal policy ascribes to prisoners attributes that make them initially less deserving of the most basic amenities and civilities, and ultimately less than human."[23]

19 NSW Bureau of Crime Statistics and Research, Above n 9, 8.

20 Don Weatherburn, Katrina Grech and Jessie Holmes, 'Why does NSW have a higher imprisonment rate than Victoria?', (2010) 45 *Contemporary Issues in Crime and Justice* 1.

21 NSW Bureau of Crime Statistics and Research, *NSW Custody Statistics: Quarterly Update March 2016* (2016), 28.

22 Michael Vaughn, 'Penal harm medicine: State Tort remedies for delaying and denying health care to prisoners', (1999) 31(4) *Crime, Law & Social Change* 273–302.

23 Ibid, 297.

In its Inspection Standards Manual the NSW prisons inspector says: "Imprisonment does not imply, entail or empower any other punishment, humiliation, or cruel or unusual treatment of a person other than the deprivation of freedom itself."[24] This begs the question: if the denial of medication to prisoners at The Hole is not an additional form of punishment, what is it?

Is it legal?

The state has a duty of care to provide medical care and its denial can become a form of punishment that is well outside of the scope of both the Common Law and statute.

While there are significant risks, costs and barriers against all litigation it is the only way rights can be directly enforced and, if successful, it would establish that the state is acting unlawfully, would expose the issue to the public, apply direct pressure for change and address the damage caused to prisoners.

Common law duties of care to prisoners were set out in 1953 by Singleton LJ in *Ellis v Home Office*:

> "The duty on prisons is to take reasonable care for the safety of those who are within... If it is proved that supervision is lacking… and that an incident occurs of a kind such as might be anticipated… those who are responsible for the good government of the prison have failed to take reasonable care for the safety of those under their care." [25]

The High Court followed in 2005 with *NSW v Bujdoso* which found the State fails in its duty of care when: "There was more than a mere foreseeable risk of injury to the respondent. Such risk, once known, called for the adoption of measures to prevent it. All of this is well established. No effective measures were adopted." [26]

The statutory duty of medical care to NSW prisoners is set out in the following:

24 Inspector of Custodial Services, *Inspection standards for adult custodial services in New South Wales* (August 2014), 8.

25 *Ellis v. Home Office* [1953] 2 All ER 149, 154.

26 *New South Wales v Bujdoso* [2005] HCA 76.

1. Section 72A of the *Crimes (Administration Of Sentences) Act 1999* (NSW) which provides: "An inmate must be supplied with such medical attendance, treatment and medicine as in the opinion of a medical officer is necessary for the preservation of the health of the inmate…" and,
2. Prisoners must be examined as soon as practicable after being received into a jail (*Crimes (Administration of Sentences) Regulation*, cl 284.

Legal analysis should therefore focus on s 72A, particularly the limits of whether the preservation of health of an inmate extends to acute pain and suffering (noting that permanent psychiatric harm may also be occurring), as this is where the bulk of the harm is being done.

As there is no legal precedent establishing this in either NSW or Australia,[27] a test case would be required. If successful this will be a major victory and agent of change. However, a high degree of caution must be applied. If unsuccessful, an unfavourable precedent would prove counterproductive for years and effectively give tacit approval to the existing medical care regime.

There are strong indications however that breaches in both tort and statute are occurring. Prisoners are within the complete control of a system that has failed to provide medication despite the reasonable foreseeability and actual knowledge that this will cause pain and suffering as well as increasing their risk of harm (for instance, by reducing the capacity of prisoners to defend themselves from other inmates).

The courts are already aware that these breaches are systemic and have begun to respond accordingly. In an unreported case on 9 November 2015, District Court Judge Paul Conlon was not only scathing of the medical regime in The Hole but also said it forced him to grant bail to an alleged offender of a serious crime on the grounds of the known lack of medical facilities at Surry Hills (it was known that the prisoner in question suffered from mental health issues).[28]

In response to Conlon J's criticism, Corrective Services claimed that there were 20 spare beds at Surry Hills. This is unlikely to be correct, and indicates Corrective Services' resistance to even acknowledging the issue of overcrowding, let alone taking steps to address it.[29]

Irrespective of whether legal liability can be established, the potential of litigation to help redress ongoing issues at The Hole has to be tempered with the largely unsuccessful history of such actions in NSW. Goodwin surmised:

> "There are major limitations on the enforcement of duties of care arising from prisons legislation or under common law principles. *There are very few cases in which prisoners have litigated on the basis of rights derived from prisons legislation...* [emphasis added] The courts are reluctant to interpret such duties as enforceable duties. Statements of duties found in prison legislation or regulations have been described in one New South Wales case as 'mere directions' bearing on prison administration which do not give rise to a right of civil action (*Smith v. Commissioner of Corrective Services* [1978] 1 NSWLR 317 at 328 per Hutley J)."[30]

Additionally, there are practical limitations to court actions. Negligence liability in NSW is statutorily governed by the *Civil Liability Act 2002* (NSW). Section 26BA, which contains a particularly restrictive limitation period, providing that a prisoner must give the Crown notice of the relevant incident "…within 6 months after the relevant date for the claim." This strictly enforced by the courts as shown in *Allan Petit v NSW*,[31] where Mahony J dismissed an otherwise valid claim on this alone.

While the most likely cause of action is in negligence, there is also a possibility that an action of misfeasance in public office could be brought**.** This common law tort is not restricted by the *Civil Liability Act 2002* (NSW); however, it is rarely used due to the high evidentiary burdens of proving malicious intent.[32]However, given the willing and possibly deliberate culture of prisoner oppression at Surry Hills and the totally vulnerability of prisoners, such an action should not be immediately discounted. While it would ordinarily seem absurd that this level of cruelty could occur, "research has shown that some prisons and jails are staffed by incompetent health workers with malevolent motives,"[33] and this may be the case here. For example, it was reported that both warders and nurses either taunt or show disregard to prisoner pleas for medication to address the pain and suffering of both themselves and fellow inmates.[34] Furthermore, because misfeasance is not limited by the *Civil Liability Act*, aggravated, punitive and/or exemplary damages (that would otherwise be barred by s 21 of the Act) could apply.

Because the denial of medication is occurring to, as far as is known, all prisoners, consideration could also be given to a class action under Part 10 of the *Civil Procedure Act 2005* (NSW). If successful it would bring weight to any judgement and, importantly, give significant impetus for a change in the system.

Judicial review could also be considered. It is usually the option of last resort for an applicant, and is undertaken when all other options for challenge are not available.[35] This is for reasons including expense and the Supreme Court's broad discretion to hear a case. The leading NSW judicial review case is *Bruce v Cole*.[36]

Judicial review's purpose is to ensure and enforce the legality of administrative decisions, in this case the denial of medicine. A prerogative writ of mandamus could be sought to force the state to provide medication as per s 72A of the *Crimes (Administration Of Sentences) Act 1999* (NSW). While this would not provide a remedy for past damage inflicted on prisoners, it would create immediate systemic change, which is ultimately what needs to done to prevent further harm. Although judicial review seems like a viable avenue, as what is occurring appears unlawful, this has to be tempered by historically low levels of success for prisoners pursuing this legal avenue.[37]

Engaging the Prison's Watchdogs: the Inspectorate and Ombudsman.

Proceeding with litigation prior to engaging with the two bodies that monitor NSW's prisons however would be placing the cart before the horse. Both the Inspector of Custodial Services and the NSW Ombudsman have extremely strong powers of physical and informational access into all NSW prisons, including The Hole. Due to the highly regulated and closed nature of the system, any involvement they have will be of great benefit in applying pressure to prison authorities to address the problem.

The Inspector of Custodial Services' primary statutory purpose[38] is to report to the NSW Parliament on prison performance and make recommendations where necessary. Importantly, its powers include access with or without notice to prisoners, staff, information and documents.[39] While the Inspector does not typically investigate individual complaints, it can when it relates to systemic issues such as this.

The Ombudsman typically investigates individual complaints but will also investigate instances of maladministration such as appear to be occurring at The Hole.[40] While it cannot make binding decisions, it is influential and government usually accepts its recommendations.[41] Significantly its statutory powers under the *Ombudsman Act 1977* (NSW) are inquisitorial and therefore are not restricted by the rules of evidence.[42]

Another strength is that while the courts are

27 From searches of online legal databases.

28 S Woodhill 'Judge lashes out at prison department over bursting jails' (2015) *Australasian Lawyer*, 11 November, < http://www.australasianlawyer.com.au/news/judge-lashes-out-at-prison-department-over-bursting-jails-208189.aspx >.

29 Ibid.

30 Alix Godwin, *Proceedings of Australian Institute of Criminology Conference* (1990) 19-21 November, 171.

31 *Allan Petit v State of New South Wales & Anor* [2012] NSWDC 105 (27 July 2012).

32 *Northern Territory v Mengel* (1995), (1995) 185 CLR 307, 554 (Deane J).

33 Vaughn, Above n 19, 297.

34 Merriman, Above n 1.

35 Robinson Mark SC 'The Legal Framework of Challenges to Administrative Decision Making in NSW - A NSW Administrative Law Refresher' (delivered to a Learned Friends conference held at Lord Howe Island) 1 April 2012, 2.

36 *Bruce v Cole* (1998) 45 NSWLR 163.

37 Ibid.

38 Set out in *Inspector of Custodial Services Act 2012 (NSW).*

39 NSW Department of Justice, *What We Do* (April 2016) < www.custodialinspector.justice.nsw.gov.au/inspector-of-custodial-services/about-us/what-we-do >.

40 NSW Ombudsman, *Corrective Services* (April 2016) < http://ombo.nsw.gov.au/what-we-do/our-work/custodial-services/corrective-services >.

41 Robinson Mark SC 'The Legal Framework of Challenges to Administrative Decision Making in NSW - A NSW Administrative Law Refresher' (Paper delivered to a Learned Friends conference held at Lord Howe Island on 1 April 2012).

42 Crane P, McDonald L, *Principles of Administrative Law* (Oxford University Press, 1st ed, 2008) 264.

limited to addressing unlawful conduct (noting that there is a significant risk that the current situation at Surry Hills could be successfully defended in court), the Ombudsman can intervene even when the conduct is legal but still unreasonable, unjust or oppressive. This may be appropriate with respect to The Hole. Given the transient nature of the issue, as prisoners turn over at Surry Hills every few weeks and there is no way of them contacting the Ombudsman while inside, there is a strong likelihood the Ombudsman is not currently aware of the issue.[43]

Mention should also be made of the NSW Coroner. While its investigatory power is only invoked when there is a death in custody, it should be noted the last reported death at The Hole, of indigenous 31-year-old Adam Le Marsney in 2011, occurred after he was denied a medical assessment because there were no overnight medical staff in the complex.[44]

The Coroner recommended a six-month trial of a 24-hour nursing presence for the safety of prisoners.[45] While it is not known whether this was implemented, prisoners report there is currently no overnight presence.

Conclusions and forcing change

> "Correctional systems tend to be self-referential, which means that root-and-branch reform is rarely generated internally, but is rather the product of external intervention... In the history of NSW corrections, this has usually been a product of some crisis or manifest failure."[46]

While more information is required to establish the scope of and pinpoint the nature of the problem, what is currently known of the denial of medical care to prisoners at this secret facility constitutes a medical crisis. At best it's tolerated and at worst it is actively encouraged by a culture within The Hole that humiliates, causes pain and is designed to break prisoners down.

Redressing this crisis is worth the effort. While NSW's prison and justice system is currently beset by manifold problems, due to a government seemingly intent on locking more people up under the rubric of being 'Tough On Crime,' the penal harm caused by the deprivation of inmate medication at The Hole is difficult to justify. It is also a problem that is entirely fixable, and would only require relatively small operational changes to have a big effect on men – many of whom will be found to be innocent – from suffering unnecessary pain, suffering, injury and possible death.[47]

In The Hole, denial of medicine has become the new normal. It is a situation that has not and seemingly cannot be changed from within. It is for this reason that public and social justice advocacy will have to bring about reform by force.

43 While the ombudsman is not obliged to publish findings, there has been nothing relevant to prison health published since 2011 (sourced via http://ombo.nsw.gov.au/news-and-publications).

44 NSW Office of the State Coroner, *Report by NSW State Coroner in deaths in police/state custody for 2013*, 62-66.

45 Ibid.

46 Inspector of Custodial Services, Above n 21, 5.

47 Robinson, Above n 41.

The glacial pace of justice along a national road to recovery: Reconciliation and the *Native Title Act 1993*

Elizabeth Pearson

Introduction

When the *Native Title Act 1993 (Cth)* ('NTA') came into force on 1 January 1994, it was lauded as a national step towards reconciliation. The Preamble spoke of the promise of rectifying generations of injustice wrought by Australia's past. Then Prime Minister Paul Keating described it as a 'major step towards a new and better relationship between Aboriginal and non-Aboriginal Australians'.[1] Yet, the national road to recovery has been painfully long. Disconnect from Country continues to exacerbate Indigenous disadvantage in a post-apology Australia.[2] The 'glacial pace'[3] of native title determinations continues to prolong the dispossession of Aboriginal communities by denying them timely recognition as the custodians of their traditional land. In NSW, the state home to the highest population of Aboriginal Australians, securing a successful determination that native title exists takes on average 10.8 years.[4] Jagot J slammed these delays as 'shameful' in the 2015 Yaegl People determination.[5] By contrast, the Federal Court of Australia resolves more than 90 percent of its caseload in less than eighteen months.[6]

This article critically examines the NTA's potential to secure outstanding justice for Australia's First Nation by considering the significance of the Act, evidential challenges to recognition and the tangible ramifications of the 'Future Act' regime outlined in Part 2 Division 3. Much of the promise of the NTA remains underutilised and unrealised.

1 Commonwealth, 'Native Title Bill Second Reading Speech', *Parliamentary Debates*, House of Representatives, 1993, vol 190, 2883 (Prime Minister Keating), cited in Graeme Neate, *Using native title to increase Indigenous economic opportunities* (Speech to the 5th Indigenous Recruitment and Training Summit, Brisbane, 6 December 2010) 3.

2 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, 'New South Wales, Victoria and Tasmania – the Significance of Land Rights' and 'A Continuing Sense of Place', *Regional Report of Inquiry in New South Wales, Victoria and Tasmania* (1991) Chapter 26; NTSCORP Ltd, Submission No 25 to NSW Legislative Council Standing Committee on State Development, *Inquiry into economic development in Aboriginal communities*, 15 February 2016, 5.

3 *Barkandji Traditional Owners #8 v Attorney-General of New South Wales* [2015] FCA 604 (16 June 2015), [12] (Jagot J) ('*Barkandji*').

4 National Native Title Tribunal, *Average time between native title claim and determination by outcome*, cited in Monica Tan and Nick Evershed, 'Native Title Review finds process slow, resource intensive and inflexible', *The Guardian* (online), 29 June 2015 <http://www.theguardian.com/australia-news/2015/jun/29/native-title-review-finds-process-slow-resource-intensive-and-inflexible>.

5 *Yaegl People #1 v Attorney-General of New South Wales* [2015] FCA 647 (25 June 2015), [5] (Jagot J) ('*Yaegl*').

6 Australian Federal Court, *Annual Report 2014*-15, 16 September 2015, 16; Australian Federal Court, *Annual Report 2013-14*, 12 September 2014, 13.

Nevertheless, this article concludes that native title is still an important vehicle to promote social justice.

The Significance of the Native Title Act

The NTA aspires to right historic wrongs by recognising the importance of the relationship between Aboriginal Traditional Owners and the land from which colonial settlers drove their ancestors. Practically, the Act fulfils a dual purpose: to recognise valuable proprietary native title rights and interests in traditional country and secure a voice for Indigenous Australians in how those lands and waters are managed in the twenty first century.[7]

Connection to Country: The Importance of Land

At its heart, native title concerns individual connections to Country.[8] As recognised in the Constitution of NSW, 'Aboriginal people, as the traditional custodians and occupants of the land in NSW have a spiritual, social, cultural and economic relationship with their traditional lands and waters'.[9] The cultural identity of Aboriginal people, their custom and spirituality is derived from the Dreaming, which comes in turn from their connection to land.[10] Berndt stated that:

> Traditionally, from an Aboriginal viewpoint, all land was, and is, sacred – sacred because the deities shaped it, humanised and put within it the resources it now contains. Moreover, the presence of deities in the land is symbolised by the sites; sites which are spiritually alive; a constant source of protection and reassurance for the future – no matter how difficult the present may appear to be.[11]

As explained by Yunupingu:

> The land is my backbone. I only stand straight, happy, proud and not ashamed about my black colour because I still have land… I think of the land as the history of my nation. It tells us how we came into being and what system we must live… Without land I am nothing.[12]

Native title rights and interests are not common law rights or statutory creations. Rather, they derive their authority from Aboriginal law and custom pre-dating colonial settlement.[13] In the groundbreaking case of *Mabo v Queensland (No 2)*, the High Court held that Australian common law recognised 'a form of native title which, in the cases where it has not been extinguished, reflects the entitlements of the indigenous inhabitants, in accordance with their laws and customs, to their traditional lands'.[14] The Keating government introduced the NTA the following year to provide a statutory framework for that recognition.

What is Native Title?

The term 'native title' is defined as communal, group or individual rights and interests of Aboriginal peoples in relation to land or waters under traditional laws and customs.[15] The NTA enables Aboriginal people to approach the Court to seek a determination that native title exists in relation to their traditional country where they can satisfy two criteria: first, an ongoing connection to land under traditional law; and second, that native title has not been extinguished over that land.[16] Proving Aboriginal communities have maintained the requisite 'connection' with their land since colonisation can be extremely difficult because of the significant disruption wrought by more than 200 years of colonial settlement, [17] especially along the eastern coast of NSW. Native title may be wholly or partly extinguished 'where the Crown has validly alienated land by granting an interest that is wholly or partially inconsistent with a continuing right to enjoy native title', such as by granting freehold estates.[18] However, native title may still exist on vacant crown land, state forests or national parks, inland waters and seas or on land subject to a non-exclusive lease or licence.[19]

President of the Australian Law Reform Commission, Rosalind Croucher, described the statute as 'a legal construct [which] tries to put into "white man's law" concepts which are very significant for Indigenous people'.[20] In recognition of this unique interplay, the Preamble acknowledges that:

> A special procedure needs to be available for the just and proper ascertainment of native title rights and interests which will ensure that, if possible, this is done by conciliation and, if not, in a manner that has due regard to their unique character. Governments should, where appropriate, facilitate negotiation on a regional basis between the parties concerned in relation to: (a) claims to land, or aspirations in relation to land, by Aboriginal peoples and Torres Strait Islanders; and (b) proposals for the use of such land for economic purposes.

The adversarial nature of litigation is diametrically opposed to the reconciliatory goals of the NTA. Consequently, the statute encourages mediation[21] to resolve these claims by 'consent determination' wherever possible – that is, by decision of the Federal Court formally giving effect to an agreement reached between the parties.[22] In *North Ganalanja Aboriginal Corporation v Queensland*, the Court reasoned that:

> …if the persons interested in the determination of those issues negotiate and reach an agreement, they are enabled thereby to establish an amicable relationship between future neighbouring occupiers.[23]

The success of the NTA turns therefore on the pivot of good faith engagement. Paradoxically, the law seeks to drive collective change across the nation one case at a time by relying on the endeavours of individual stakeholders. Historically, this has proven problematic. While mediation appears theoretically sound, the evidential burdens required to establish an Aboriginal claim group's traditional connection to Country[24] have proven to be difficult to meet and costly, both in time and resources,[25] involving extensive anthropological, historical and genealogical reports in addition to detailed mapping, land tenure and title searching.

The Cost of Justice Delayed

Delay has long been the enemy of the just resolution of native title claims. Some of the longest cases have been fought and won in NSW. Only eight native title claims have succeeded in this State in the

7 See Preamble, *Native Title Act 1993* (Cth).
8 See *NTA* s 223(1)(b).
9 *Constitution Act 1902* (NSW) s 2(2).
10 AE Woodward, *Aboriginal Land Rights Commission - Second Report 1974*, Commonwealth, Parliamentary Paper No. 69 (17 July 1974) 37 [292], Australian Museum, *Indigenous Australia Spirituality* (2009) <http://australianmuseum.net.au/Indigenous-australia-spirituality>; see also *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 29 (Brennan J) ('*Mabo*'); *Dempsey on behalf of the Bularnu, Waluwarra and Wangkayujuru People v State of Queensland (No 2)* [2014] FCA 528 (23 May 2014), [32]-[33], [753]-[754] (Mortimer J).
11 'Traditional Concepts of Aboriginal Land' in Berndt, *Aboriginal Sites, Rites and Resource Development* (University of Western Australian Press, Perth, 1982) 9, quoted in Greg Tolhurst, 'A Comment on the Return of Indigenous Artifacts' (1998) 3(1) *Art Antiquity Law* 15, 17.
12 JG Yunupingu, 'Letter from Black to White' (1976) 2(6) *Land Rights News* 8, 9, quoted in Greg Tolhurst, 'A Comment on the Return of Indigenous Artifacts' (1998) 3(1) *Art Antiquity Law* 15, 17.
13 *Mabo* (1992) 175 CLR 1, 15 (Mason CJ and McHugh J), 58 (Brennan J); see also NTA s 223(1)(c).
14 *Mabo* (1992) 175 CLR 1, 15 (Mason CJ and McHugh J).
15 *NTA* s 223(1).
16 *NTA* s 223(1)(b).
17 Lee Godden, *Launch of Connection to Country: Review of the Native Title Act 1993 ALRC Report 126* (Address to the Australian Law Reform Commission, Sydney, 29 June 2015) <https://www.alrc.gov.au/news-media/speech-presentation-article/launch-Godden>.
18 *Mabo* (1992) 175 CLR 1, 69 (Brennan J).
19 NTSCORP Ltd, *About Native Title* <http://www.ntscorp.com.au/about-native-title/>.
20 Monica Tan and Nick Evershed, 'Native Title Review finds process slow, resource intensive and inflexible', *The Guardian* (online), 29 June 2015, <http://www.theguardian.com/australia-news/2015/jun/29/native-title-review-finds-process-slow-resource-intensive-and-inflexible>.
21 *NTA* ss 86A, 86B.
22 Explanatory Memorandum Part B, Native Title Bill 1993 (Cth), cited in The Hon Justice Michael Barker, *Innovation and management of native title claims: What have the last 20 years taught us?* (Speech to the Australian Institute of Aboriginal and Torres Strait Islander Studies 2013, National Native Title Conference Alice Springs, 3-5 June 2013) <http://www.fedcourt.gov.au/publications/judges-speeches/justice-barker/barker-j-20130603#_ftnref22>.
23 *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595, 617 (Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ).
24 *NTA* s 223(1)(b).
25 Lee Godden, *Launch of Connection to Country: Review of the Native Title Act 1993* (Address to the Australian Law Reform Commission, Sydney, 29 June 2015) <https://www.alrc.gov.au/news-media/speech-presentation-article/launch-Godden>.

last 23 years.[26] Five of these claims took more than ten years to conclude.[27]

The Federal Court handed down two historic consent determinations in June 2015, recognising the native title rights of the Barkandji People[28] and the Yaegl People in NSW.[29] Concluded nine days apart, these cases are a sobering testament to the cost of the staggering delays experienced in native title law. The Barkandji Traditional Owners lodged their claim on 8 October 1997 and waited eighteen years for justice. *Yaegl #1* was the oldest matter that existed in the Federal Court of Australia, commenced in 1996.[30] Jagot J delivered a stern reminder in her *Barkandji* judgment that justice delayed is justice denied.[31] The length of native title proceedings is not merely inconvenient and expensive. Proceedings drawn out over decades have had devastating impacts in Indigenous communities, as outlined by Her Honour:

> The kind of delays which have been experienced in native title matters entrench injustice over generations. How sad, indeed how shameful it is, that in many of these matters the people who started the claim often become too aged or infirm to see the matter through or pass away, never having seen their labours bear fruit. Delay of this kind saps away any sense of justice or fairness in the process. It erodes confidence in the institutions which are meant to serve our common interests. It can instil a sense of despair and incapacity in those who should be actively engaged in and empowered by the process.[32]

The NTA does not impose any statutory time limit upon the mediation of native title applications.[33] The corollary of this is that the burden falls solely on legal practitioners, whether representing native title applicants or other parties such as State governments, to assume responsibility for ensuring the timely resolution of claims. That obligation is owed primarily to the claimants in the matter but it extends well beyond. Lawyers are inevitably placed at the vanguard of delivering social justice and policy if, as the framers of the NTA intended, the statute assumes a broader role in promoting national recovery. Their efforts alone may not be enough to achieve widespread political change envisioned by the Act. As warned by Dowsett J in 2010, 'the Court cannot properly leave the matter to the parties, or anybody else, to resolve in their own time. The public, as well as the parties, have a clear interest in the speedy resolution of all litigation, including Native Title litigation'.[34]

Challenges to Recognition

Onerous evidential burdens and case management strategies can sabotage the timely resolution of native title matters. During consent determinations, native title claimants put forward evidence including historical tenure records, anthropological reports and affidavits to substantiate their ongoing connection with their traditional land pre-dating sovereignty.[35] It is not the role of the Federal Court to review this material.[36] Instead, the Court is simply concerned with determining whether agreement has been reached through the parties' mediation and 'freely entered into on an informed basis'.[37]

The State bears the burden to satisfy itself that the claimants possess the requisite connection.[38] While legal counsel for the State bear a responsibility to test the claim, they also bear an obligation to mediate in good faith. This includes not being heavy-handed or imposing an unreasonable evidential burden on the claimants. Jagot J's recent judgements confirm that the test applied in native title matters is whether there is a 'credible basis' for the claimant's application.[39] A 'credible basis' is a distinct and different threshold from the balance of probabilities.[40] Moreover, it does not necessarily require admissible evidence.[41] Her Honour explained that this effectively amounts to 'material which provides a foundation for the application which is believable and rational'.[42]

An unreasonable and inflexible approach to evidence can create significant delay while generating great cost. In the case of *Yaegl #1*, the claimants were required to provide 39 witness affidavits and statements, seven anthropological reports, two historical reports, genealogical reports and provide evidence in an on country hearing.[43] Jagot J described this process as 'onerous'[44] since it was not contended that the land had been unoccupied since settlement or that another traditional owner claimed the same land.[45] It is incumbent upon legal counsel acting on both sides to approach issues of proving 'connection' in a spirit of goodwill to reach a swift and just resolution to these matters.

Lawyers already labour under the responsibility imposed by Section 37M(1)(b) of the *Federal Court of Australia Act 1976* (Cth) to facilitate the just resolution of all disputes as quickly, inexpensively and efficiently as possible.[46] Increasingly, judges in the Federal Court have assumed responsibility for improving the pace of native title matters by adopting a more hands on approach to case management. Section 86E of the NTA allows the Federal Court to request update reports on the parties' progress in mediation and make orders to assist in moving matters forward. Jagot J has indicated that if lawyers continue to fail to meet their obligations to resolve these matters efficiently and justly, judges will have to play an increasingly interventionist role in directing mediation.[47]

Importantly, native title determinations in NSW have not been without progress. In *Yaegl*, Jagot J paid tribute to the work of the parties in resolving the *Yaegl #2* claim, which was handed down simultaneously and resolved within just four years of registration. Her Honour said it was testament to the potential achievements of parties when they come together to negotiate with focus in good faith.[48] Meaningful change has been realised through native title but this success remains contingent on actors engaging in the spirit of the Act's intendment.

Future Acts

Native title law is not simply concerned with symbolic recognition of retrospective rights. Perhaps the NTA's greatest legacy is its 'Future Act' regime, which, ironically, is seldom discussed and often wilfully misunderstood. Part 2 Division 3 provides Indigenous claimants with a voice in how their lands are used and the opportunity to negotiate about 'Future Acts'- conduct which may affect their native title rights and interests.[49] A Future Act may include the granting of a petroleum exploration or water licence, mining or resource extraction activity, building of public infrastructure and could extend to lease renewals or legislative change.[50]

26 National Native Title Register, last accessed 7 July 2016 <http://www.nntt.gov.au/searchRegApps/NativeTitleRegisters/Pages/Search-National-Native-Title-Register.aspx>; see also *Phyball on behalf of the Gumbaynggirr People v Attorney-General of New South Wales* [2014] FCA 851 (15 August 2014), [1] (Jagot J); *Barkandji* [2015] FCA 604 (16 June 2015); *Yaegl* [2015] FCA 647 (25 June 2015); Monica Tan, 'Largest native title claim in NSW history finalised after 18-year legal struggle', *The Guardian* (online), 16 June 2015.

27 Monica Tan, 'We've got to tell them all our secrets' – how the Barkandji won a landmark battle for Indigenous Australians, *The Guardian* (online), 23 June 2015 <http://www.theguardian.com/australia-news/2015/jun/23/weve-got-to-tell-them-all-our-secrets-how-the-barkandji-won-a-landmark-battle-for-Indigenous-australians>.

28 *Barkandji* [2015] FCA 604 (16 June 2015).

29 *Yaegl* [2015] FCA 647 (25 June 2015).

30 *Yaegl* [2015] FCA 647 (25 June 2015), [2] (Jagot J).

31 *Barkandji* [2015] FCA 604 (16 June 2015), [12] (Jagot J); see also *Phyball on behalf of the Gumbaynggirr People v Attorney-General of New South Wales* [2014] FCA 951 (15 August 2014), [2] (Jagot J).

32 *Yaegl* [2015] FCA 647, [5] (Jagot J).

33 Graeme Neate, Daniel O'Dea and National Native Title Tribunal, 'Timetables and case management' in *The functions of the National Native Title Tribunal - Native Title Seminar* (2010), 37, <http://www.nntt.gov.au/Information%20Publications/The%20functions%20of%20the%20National%20Native%20Title%20Tribunal.pdf>.

34 JA Dowsett, '*Beyond Mabo: Understanding Native Title Litigation Through Decisions in the Federal Court'*, quoted in Neate, O'Dea and National Native Title Tribunal, ibid.

35 See, eg, *Barkandji* [2015] FCA 604 (16 June 2015), [16] (Jagot J).

36 *Yaegl* [2015] FCA 647 (25 June 2015), [8] (Jagot J).

37 *Barkandji* [2015] FCA 604 (16 June 2015), [14] (Jagot J), citing *Nangkiriny v State of Western Australia* (2002) 117 FCR 6; *Ward v State of Western Australia* [2006] FCA 1848 (24 November 2006).

38 *Yaegl* [2015] FCA 647 (25 June 2015), [9] (Jagot J).

39 *Barkandji* [2015] FCA 604 (16 June 2015), [14]-[16] (Jagot J); *Yaegl* [2015] FCA 647 (25 June 2015), [9] (Jagot J), citing *Lander v South Australia* [2012] FCA 427, [11] (Mansfield J), citing *Munn v Queensland* (2001) 115 FCA 109.

40 *Yaegl* [2015] FCA 647 (25 June 2015), [9].

41 Ibid.

42 *Yaegl* [2015] FCA 647 (25 June 2015), [9].

43 *Yaegl* [2015] FCA 647 (25 June 2015), [6]-[7],

44 *Yaegl* [2015] FCA 647 (25 June 2015), [11].

45 *Yaegl* [2015] FCA 647 (25 June 2015), [9].

46 *Phyball on behalf of the Gumbaynggirr People v Attorney-General of New South Wales* [2014] FCA 951 (15 August 2014), [1] (Jagot J).

47 See generally *Yaegl* [2015] FCA 647 (25 June 2015), [10].

48 *Yaegl* [2015] FCA 647 (25 June 2015), [5].

49 *NTA* s 233(1); NTSCORP Ltd, Submission No 25 to NSW Legislative Council Standing Committee on State Development, *Inquiry into Economic development in Aboriginal communities*, 15 February 2016, 9.

50 See generally NTSCORP Ltd, *What is a future act* < http://www.ntscorp.com.au/about-native-title/what-is-a-future-act/>.

The Future Acts regime essentially creates procedural rights, not only for those Traditional Owners whose claim has been successful but also for native title applicants awaiting a determination. The nature of these procedural rights varies according to the type of Future Act concerned but could include the right to be consulted, to comment or the 'right to negotiate'[51] with the proponent of the act, including regarding compensation.[52] In this way, the regime holds the potential to facilitate the collaboration and conciliation envisaged by the NTA. Pragmatically, however, the regime was 'premised on the continued ability of industry to access and utilise land subject to claims'.[53]

The Act falls short of empowering Traditional Owners to prevent a Future Act from being committed altogether. Sarah Burnside observed that 'from a critical legal standpoint, the NTA's future acts regime can be characterised as a means of subverting a post-colonial movement for "land justice" within a bureaucratic process designed to give "certainty" to those who profit from Indigenous land.'[54]

Under the NTA, Traditional Owners must be notified of Future Acts that may affect their interests.[55] Thus, the NTA imposes statutory responsibilities on the proponents seeking to carry out Future Acts to notify claimants and in some cases negotiate to reach a mutual agreement as to how the act can proceed and on what conditions. Unfortunately, there are no clear consequences for failing to provide meaningful notification or supply Traditional Owners with sufficient information to make instructive comments about proposed future acts. This poses a significant challenge to the regime's success. The NTA deems some Future Acts invalid to the extent that they affect native title unless the proponent has complied with the requisite notification and negotiation procedures.[56] Conversely, other Future Acts, such as acts relating to management of water or airspace under section 24HA, are deemed valid even if the duty to notify is not fulfilled.[57]

Furthermore, statutory notification requirements are vague and easily got around. For instance, Section 24HA notifications are simply required to include a 'clear description' of the 'general location' and 'approximate boundaries' of the area affected and a 'description of the general nature of the act'.[58] This low bar enables proponents to provide generic information to Traditional Owners that may be difficult to interpret in a useful fashion. Without specific details of the location and the proposed act, Traditional Owners are limited in the comments they can provide. This is especially problematic if a site exists in close geographic proximity to sacred or burial sites or areas of cultural heritage significance to the Aboriginal community. Although proponents should provide Traditional Owners with 'sufficient material to enable that person or persons to make an informed decision',[59] some still favour bare minimum compliance.[60]

The right to negotiate has been criticised as 'mere window-dressing on the procedure for the granting of mining tenements'[61] and a tokenistic tick a box exercise that promotes 'negotiations which are inherently one-sided in favour of proponents and do not allow native title parties to participate in the negotiations in an informed and on an equal basis'.[62] Although the NTA requires negotiation in 'good faith', the statute is silent on what this entails.[63] Lee J in *Brownley v Western Australia* explained that:

> …if a State purports to engage in negotiation, but, in truth, its conduct serves an ulterior and undisclosed purpose antithetical to the making of an agreement with a native title claimant, it will not be negotiating in good faith. Delay, obfuscation, intransigence and pettifoggery would be indicia of such conduct.[64]

Additionally, the Courts have held that a common law right to procedural fairness does not exist under the NTA because of the specificity of the statute.[65] Even though the Federal Court observed in *Harris v Great Barrier Reef Marine Park Authority* that the Future Act notification in question was deficient and failed to contain the requisite information, their Honours held that the Traditional Owners had not been denied the opportunity to comment and the Future Act was not invalid.[66]

Although the Future Act regime has the potential to continue the reconciliatory work envisioned by the Parliament in 1993, unless the informational asymmetry and power imbalance between proponents and Traditional Owners are overcome, it will continue to fall victim to these shortcomings. As more native title claims are determined, the focus on the Act and associated workloads will shift from determinations to Future Act negotiations. According to the National Native Tribunal, at the time of writing there were almost 330 native title applications pending across the country, compared with approximate 750 Future Act applications.[67]

Noel Pearson observed that 'we're moving from a land rights claim phase to a land rights use phase where people are grappling with how we make our land contribute to our development'.[68] Native Title Service Provider NTSCORP estimates that Future Act activity will continue to increase in NSW in coming years, especially with the spike in coal and gas extraction.[69] Collaboration under the auspices of native title, including the Future Acts regime, can generate valuable opportunities for economic development and sustainability in Aboriginal communities.[70] Native title rights are not precluded from use for commercial purposes.[71] The Minerals Council of Australia estimates that Indigenous communities own as much as $40 billion in assets from agreement making related to native title.[72] In 2011-12, the value of native title related payments totalled $3 billion.[73] Ultimately, the NTA's long-term success will turn on the effective implementation of

51 *NTA* ss 24AA(5), 31(1)(b), Subdivision P.

52 NSW Department of Industry, Resources and Energy, *Industry Guideline for Mineral (non coal) Explorers – a guide to applying for exploration licences for Groups 1-8,10,11 (Non-coal minerals)*, NSW Government, July 2015, 11.

53 Sarah Burnside, 'Negotiation in Good Faith under the Native Title Act: A Critical Analysis' (2009) 4(3) *Land, Rights, Laws: Issues of Native Title*, 5.

54 Sarah Burnside, 'Negotiation in Good Faith under the Native Title Act: A Critical Analysis' (2009) 4(3) *Land, Rights, Laws: Issues of Native Title*, 3.

55 See *NTA* s 29.

56 See *NTA* ss 24OA, 24AA(2), 25(4).

57 See *NTA* 24AA(4); *Lardil, Kaiadilt, Yangkaal & Gangalidda Peoples v State of Queensland* [2001] FCA 414 (11 April 2001), [52] (French CJ), quoting Explanatory Memorandum to the Native Title Amendment Bill 1997 (Cth) [10.20]; [72] (Merkel), [117]-[120] (Dowsett J).

58 *Native Title (Notices) Determination 2011 (No 1)* ss 4, 8(3).

59 *Jabiru Metals Ltd/State of Victoria/Sandra Middleton Patten, Olive Tregonning, Albert Mullett and Graham John (Bootsie) Thorpe on behalf of the Gunai/Kurnai People* [2010] NNTTA 138 (30 August 2010), [5], citing *Dann and Others (Amangu People) v Western Australia* [2006] NNTA 126 (25 August 2006), [37], [65], [82]; see also *Harris v Great Barrier Reef Marine Park Authority* [2000] FCA 603 (11 May 2011), [44] (Heerey, Drummond and Emmett JJ); Francis Angaddi, 'The Ambit and Nature of Claimant Rights Under s 24HA of the Native Title Act: Harris v Great Barrier Reef Marine Park Authority' (2000) 5(2) *Indigenous Law Bulletin* 18.

60 Australian Government, *Native Title Payments Report*, Native Title Payments Working Group, Canberra, 2008, cited in Sarah Burnside, 'Negotiation in Good Faith under the Native Title Act: A Critical Analysis' (2009) 4(3) *Land, Rights, Laws: Issues of Native Title*, 6.

61 R Bartlett and A Sheehan, 'The Duty to Negotiate' (1996) 3(78) *Aboriginal Law Bulletin*, quoted in Sarah Burnside, 'Negotiation in Good Faith under the Native Title Act: A Critical Analysis' (2009) 4(3) *Land, Rights, Laws: Issues of Native Title*, 8.

62 NTSCORP Ltd, submission on the Draft Terms of Reference to the Review of the Native Title Act 1993 by the Australian Law Reform Commission, July 2013.

63 Sarah Burnside, 'Negotiation in Good Faith under the Native Title Act: A Critical Analysis' (2009) 4(3) *Land, Rights, Laws: Issues of Native Title*, 4.

64 *Brownley v Western Australia* [1999] FCA 1139 (19 August 1999), [25], quoted in Sarah Burnside, 'Negotiation in Good Faith under the Native Title Act: A Critical Analysis' (2009) 4(3) *Land, Rights*, 9.

65 Francis Angaddi, 'The Ambit and Nature of Claimant Rights Under s 24HA of the Native Title Act: Harris v Great Barrier Reef Marine Park Authority' [2000] 5(2) *Indigenous Law Bulletin* 18.

66 *Harris v Great Barrier Reef Marine Park Authority* [2000] FCA 603 (11 May 2011), [18] (Heerey, Drummond and Emmett JJ).

67 National Native Title Tribunal, last accessed 7 July 2016 <http://www.nntt.gov.au/Pages/Statistics.aspx>.

68 Noel Pearson, 'Property rights will help economic development of Indigenous Australians', *The Australian* (online), 22 May 2015, quoted in Mick Gooda, 'Native title – Years in review', *Social Justice and Native Title Report 2015*, Australian Human Rights Commission (2015), 69.

69 NTSCORP Ltd, *Submission to Deloitte Review of the Roles and Functions of Native Title Organisations*, 4 October 2013.

70 NTSCORP Ltd, Submission No 25 to NSW Legislative Council Standing Committee on State Development, *Inquiry into Economic development in Aboriginal communities*, 15 February 2016, 3.

71 *Akiba v Commonwealth* (2013) 250 CLR 290, [21] (French CJ and Crennan J); see also Mick Gooda, 'Native title – Years in review', *Social Justice and Native Title Report 2015*, Australian Human Rights Commission (2015) 85, citing Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act (Cth) Final Report*, Report No 126 (2015) 30.

72 Minerals Council of Australia, *Indigenous Economic Development* <http://www.minerals.org.au/policy_focus/Indigenous_economic_development/>, citing S Rose, 'Indigenous Groups' Assets Opportunity for Wealth Advisers', *Australian Financial Review*, June 2013.

73 Minerals Council of Australia, *Indigenous Economic Development* <http://www.minerals.org.au/policy_focus/Indigenous_economic_development/>, citing Banarra, *The Value of Community Contributions in the Australian Minerals Industry: A Report to the Minerals Council of Australia*.

the Future Act regime and its capacity to leverage economic as well as social and cultural benefits. There is a pressing need for regulatory reform if the regime is to live up to its reconciliatory potential.

Conclusion

The *Native Title Act* is a well-intentioned piece of legislation whose promise is yet to be fully realised. Evidentiary burdens and a general lack of awareness have historically held back progress while new challenges constrain the usability of native title rights to drive economic development. There is widespread frustration with the limited practical returns that native title has delivered for Indigenous communities thus far.[74] That may be the current reality but it does not have to be the future legacy. Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Gooda, stated in 2015 that 'It is clear that our rights in this space are starting to evolve and that we have come a long way since the *Mabo (No 2)* decision was first handed down'.[75] Although change has been disheartenningly slow, with six determinations in NSW in just two years it seems native title is finally starting to gain traction. Across the country, there have been almost 300 successful native title determinations.[76] In 2013, Native Title Representative Bodies estimated there could be as many as 177 more claims to be lodged in Australia.[77] Twenty-three years after the passage of the NTA, there are calls for a 'new conversation' about the potential for the 'Indigenous Estate' to better promote the rights of Indigenous communities to economic self-determination.[78] This is not the death knell of legislation that carried the hopes of a nation. Rather, this is a resounding testament to the NTA's continued relevance in achieving social justice long overdue for Traditional Owners.

74 Mick Gooda, 'Native title – Years in review', *Social Justice and Native Title Report 2015*, Australian Human Rights Commission (2015) 95.

75 Ibid.

76 National Native Title Tribunal.

77 Deloitte Access Economics, *Review of the Roles and Functions of Native Title Organisations – Discussion Paper*, March 2014, 58 <http://www.deloitteaccesseconomics.com.au/uploads/File/DAE%20Review%20of%20Native%20Title%20Organisations%20-%20Final%20Report%20reissued.pdf>.

78 Mick Gooda, 'Native title – Years in review', *Social Justice and Native Title Report 2015*, Australian Human Rights Commission (2015) 69, 72-3.

06

Damages

Civil litigation in historical child sexual abuse claims: how recovery is barred by archaic limitation periods

Rachel Irwin
B.A. (Monash University)/JD II

In the Australian criminal justice system, no timeframe applies to restrict the period in which sexual assault against a minor may be prosecuted. A defendant may be found guilty for abusing a child 30 or 40 years after the fact. However in the civil system, limitation laws apply to bar claimants for claims brought outside statutory time limits. Thus, even where the criminal system has recognised that a claim is authentic, the civil system denies its validity by barring late action.

While NSW and Victoria have recently introduced legislative reform to abolish limitation periods for sexual abuse claims,[1] other Australian states have failed to follow suit. In turn, inconsistency across jurisdictions has created the incongruous scenario in which survivors[2] in one state are barred from pursuing civil litigation for the same incident of abuse as survivors in another. Therefore, in states where limitation periods continue to exist, the law denies damages and promotes damage. As applicants typically take years to disclose their abuse through fear of reprisal, shame, or psychological suppression of trauma,[3] the justifications behind limitation periods for personal injury claims do not support cases of this nature.

This article critically analyses the current rationale for the imposition of limitation periods on sexual abuse survivors seeking justice through civil recovery and, following the recommendations of the Royal Commission into Institutional Responses to Child Abuse, [4] calls for their abolition.

Limitation periods barring recovery

Concerns regarding the abolition of limitation periods

Limitation laws exist to preclude claimants from "sitting on their rights" and ensure claims are

1 *Limitation Amendment (Child Abuse) Act 2016* (NSW); *Limitation of Actions Amendment (Child Abuse) Act 2015* (Vic).

2 In undertaking this study, I have maintained a constant awareness of the need to employ respectful and appropriate language in referencing those individuals that have suffered abuse in the domestic and institutional context. Such individuals are *survivors* and thus I have adopted this term over 'victims'.

3 Patrick O'Leary and James Barber, 'Gender differences in silencing following childhood sexual abuse' (2008) 17 *Journal of Child Sexual Abuse* 2, 133; Queensland Crime Commission and Queensland Police Station, *Project AXIS – Child Sexual Abuse in Queensland: The Nature and Extent*, (2000) 28.

4 Commonwealth, Royal Commission into Institutional Responses to Child Abuse, *Redress and Civil Litigation Report* (2015).

brought within a "reasonable" period.[5] This rationale is reinforced by policy considerations, such as the need to preserve existing evidence[6] and to ensure defendants can live without fear of actions arising later in life.[7]

Yet in relation to childhood sexual abuse claims, proponents of limitation laws further claim that their abolition would open a "floodgate" of litigation. While it is difficult to anticipate what the consequences of legal amendments may be (given changes in Victoria and NSW are only recent), it is unlikely that this fear will eventuate. For those survivors who remain unprepared to pursue a civil suit, removing limitation periods will not provoke immediate action but will instead permit them access to justice at a time when they are ready.

Further, there is a concern that limitation provisions in this context would prejudice defendants[8] for whom it is difficult to compile appropriate and effective evidence to use in their defence of adverse claims. However, this argument applies equally to plaintiffs, who would also be compelled to locate and recover past evidence that may have been buried for many years. Accordingly, it is highly unlikely that any legislative amendments permitting claims brought significantly after the fact would operate discriminatorily against defendants.

A national review of limitation periods affecting claims for sexual abuse

As mentioned, limitation periods now no longer operate in NSW and Victoria to prevent delayed action for child sexual abuse claims. The retrospective effect of these legislative amendments empowers the courts in both states to set aside and re-hear previous judgments determined on the basis of the actions being time-barred.[9]

Outside of NSW and Victoria however, each state in Australia maintains different limitation laws for civil litigation in child sexual abuse cases. In the ACT[10] and Western Australia[11] a tortious claim must be brought within 6 years. In the Northern Territory[12] and South Australia respectively,[13] tortious actions and actions for personal injuries must be commenced within 3 years. In Queensland, survivors of abuse must bring an action within 3 years or by their 21st birthday if the abuse occurred when they were under the age of 18,[14] while under Tasmanian law, an action must be brought within 3 years of the manifestation of the injury or 12 years from the act or omission which allegedly caused it.[15]

Not only is there disparity in terms of the standard timeframes for which limitation periods run in each state, but there is also disparity in terms of the date of accrual for personal injury. In some jurisdictions the limitation period commences from the date an injury becomes apparent to the plaintiff,[16] whereas in others, the period runs from the date of the act or omission that allegedly caused the injury.[17] This further creates inconsistency for survivors bringing claims for the same action in different jurisdictions.

How limitation periods frustrate the judicial process

"The passage of time should never diminish our responsibility to fully respond to allegations of abuse and neglect. The passage of time does not of itself provide healing, recovery and restorative justice for childhood victims of abuse or neglect. What can is the willingness to confront failures in caring for and protecting children, to place the interests of the victims ahead of organisational interests and to fully commit to reparations."[18]

As discussed above, limitation periods are inherently rational in other contexts. However, given the special nature of child sexual abuse, the same reasons invoked for the application of limitation periods above do not apply to justify their application in this context. In child sexual abuse cases, the expiry provisions operate as a bar to the pursuit of justice as survivors are often unaware of the linkage between their injury and their past abuse, or do not disclose their abuse until long after the fact.

By allowing defendants to invoke the defence that an action is time barred, existing limitation laws exacerbate the length of trials, amplify legal costs and increase the emotional turmoil of survivors.[19] Indeed Roop Sandhu, who led a Slater and Gordon class action for victims of child sexual abuse in 2015, condemned the relevant limitation period as redirecting the true issues at play in litigation. [20] He lamented that over the six years of hearings, a large proportion of the trial was wasted on administrative issues, neglecting consideration of the survivor's abuse.

Discretionary power of the courts

The court has the power to make exceptions to limitation laws and extend the time for claims where it considers that doing so would not prejudice the defendant and still ensure a fair trial.[21]

Statutory provisions in each state dictate factors that a court may take into account in granting an extension of time for a plaintiff bringing a late claim. Relevant considerations include the length of and reasons for the delay,[22] the extent to which a defendant may be prejudiced by a late claim[23] and whether or not the court considers it just and reasonable to lift the time bar.[24] However, the high threshold required to establish an exception means they are rarely invoked. In Queensland for example, an applicant is eligible for an extension of time if they can establish "that a material fact of a decisive character relating to the right of action was not within the means of knowledge of the applicant" during the limitation period.[25] This provision has been interpreted as mandating that the plaintiff show they were unaware of the injury or its extent and that they adopted all reasonable steps to determine that fact prior to its late discovery.[26] Accordingly, if an applicant is aware that they have developed a mental illness subsequent to an incident of abuse, and that the illness is grave enough to warrant a civil claim, the court will hold that the claim should have been brought within the limitation period.[27]

This was the case in *Carter v Corporation of the Sisters of Mercy of the Diocese of Rockhampton*,[28] in which the applicant, who was sexually abused over a period of 11 years by nuns and caseworkers at a Rockhampton orphanage, brought a claim for damages 17 years after the expiry of the relevant Queensland limitation period. In refusing to award damages, the Queensland Supreme Court reasoned that as the applicant could have discovered the connection between her psychiatric injury and the sexual abuse by seeing a medical specialist within the prescribed time frame, her failure to do so barred her claim.[29]

Understanding delayed disclosure

In order to formulate a more cohesive picture as to why the removal of limitation periods is particularly important in the context of historical sexual abuse claims, a consideration of the rationale behind delayed disclosure is imperative. Clinical research

5 Dr Ben Matthews, 'Limitation periods in child sex abuse cases in Queensland: Recent cases provide both hope and caution' (2013) 57 *Plaintiff: Journal of the Australian Plaintiff Lawyers Association* 12.

6 *Brisbane South Regional Health Authority v Taylor* [1996] HCA 25 (McHugh J).

7 Dr Ben Matthews, 'Limitation periods and child sexual abuse cases: Law, psychology, time and justice' (2013) 11 *Torts Journal* 3, 218.

8 Shine Lawyers, Submission No. 120 to the Royal Commission, *Inquiry into Institutional Responses to Child Abuse: Redress and Civil Litigation*, March 2015.

9 Amanda Ryding and Laura Reisz, 'Statutory limitation periods in child abuse cases removed in NSW' on *Collin Biggers & Paisley Publications* (21 April 2016) <http://cbp.com.au/publications/2016/april/statutory-limitation-periods-in-child-abuse-cases>.

10 *Limitation Act 1985* (ACT) s 16B(2)(b).

11 *Limitation Act 2005* (WA) s 13.

12 *Limitation Act 1971* (NT) s 12(1).

13 *Limitation of Actions Act 1936* (SA) s 36(1).

14 *Limitation of Actions Act 1974* (Qld) s 11.

15 *Limitation Act 1974* (Tas) s 5A(3).

16 *Limitation Act 2005* (WA) s 55(1).

17 *Limitation Act* 1974 (Tas) s 5A(3)(b).

18 Berry Street, Submission No. 135 to the Royal Commission, *Inquiry into Institutional Responses to Child Abuse*: Redress and Civil Litigation, March 2015, 2.

19 Commonwealth, Royal Commission into Institutional Responses to Child Abuse, *Redress and Civil Litigation Report* (2015), 432.

20 Janice Harris, 'Fairbridge Farm lawyer welcomes justice for child abuse victims', *Central Western Daily* (online), 18 February 2016, < http://www.centralwesterndaily.com.au/story/3734134/fairbridge-farm-lawyer-welcomes-justice-for-child-sexual-abuse-victims/?src=rss>

21 Quote from psychiatric testimony in *Tiernan v Tiernan* [1993] QSC unreported, Supreme Ct of Qld, Byrne J 22 April 1993 cited in Matthews, above n 7, 218.

22 *Limitation Act* 1985 (ACT) s 36(3)(a).

23 *Limitation Act* 1985 (ACT) s 36(3)(b).

24 *Limitation Act 1974* (Tas) s 5(3).

25 *Limitation of Actions Act 1974* (Qld) s 31(2)(a).

26 *Woodhead v Elbourne* [2000] QSC 42.

27 *Carter v Corporation of the Sisters of Mercy and the Diocese of Rockhampton* [2000] QSC 306 ("*Carter*"); *Hopkins v Queensland* [2004] QDC 21.

28 *Carter* [2000] QSC 306.

29 Ibid 306 [5].

reveals that on average, adult survivors wait 20 years before disclosing abuse to anyone.[30] In many cases, delay is due to the length of time associated with coming to terms with the abuse a survivor has suffered. Julia Werren suggests that individuals who have been abused at a young age often have repressed memories of their past.[31] According to Werren, the psychological consequences of repressed memory syndrome may take a triggering event to uncover how one's mental health has been subsequently affected. This concept was reiterated in one of the live hearings I watched before the Royal Commission. The survivor recalled in her testimony, "I was too young to understand what was 'normal' behaviour at the time, and therefore too young to defend myself…it has taken a long time to come to terms with what has happened to me." The delay of any "trigger" coupled with the shame, fear and young age at which abuse often occurs can lead to a significant interval before a survivor speaks out. This reality was recognised by Atkinson J in his dissent in *Carter,*[32] in which His Honour rightly contended that the long-term consequences of childhood sexual abuse makes it difficult for survivors to meet the temporal requirements for civil litigation. Given the special considerations regarding delayed disclosure in cases of childhood sexual abuse it seems unreasonable to enforce the same time limitations on survivors as other plaintiffs.[33]

Why access to civil litigation is important to recovery

"It is a fundamental tenet of a liberal democracy that people who suffer injury should be able to obtain access to the justice system to seek compensation for their injury and hold offenders accountable."[34]

In the Royal Commission's 2015 report, *Redress and Civil Litigation,*[35] the Commission stated that the current framework, which prevents survivors in some states accessing justice and permits civil redress in others, creates inequity and unequal treatment of survivors. The Royal Commission recommended that all survivors should be able to pursue civil litigation years after their abuse.

In advocating the abolition of limitation periods in this context I recognise that the recovery of damages can never in itself suffice to equate to *recovery.* In their submissions to the Commission's Inquiry, many survivors questioned whether there could ever be a monetary value of damages sufficient to "repair years of torment and pain."[36] However, despite conceding that compensation can never reverse past events, I believe that compensation nevertheless serves an important symbolic purpose. Giving survivors the opportunity to seek civil redress acknowledges past wrongdoing.[37] This inherent value of access to civil litigation is encapsulated in Chris Pianto's testimony before the "Family and Development Committee" at the Victorian "Betrayal of Trust Inquiry,"[38] in which Mr Pianto expressed that he "desperately needed a judgment to prove [he]… was telling the truth."[39]

Such validation of past abuse means that survivors have legal redress for the wrongdoing inflicted upon them and ensures that individuals and institutions are held accountable for their actions no matter the delay in the plaintiff bringing the claim. If our justice system is to be truly "just," it must adopt a uniform approach to limitation periods in historical sexual abuse cases so that victims are granted equal access to justice without discrimination between states.[40]

30 Patrick O'Leary and James Barber, 'Gender differences in silencing following childhood sexual abuse' (2008) 17 *Journal of Child Sexual Abuse* 2, 133; Queensland Crime Commission and Queensland Police Station, *Project AXIS – Child Sexual Abuse in Queensland: The Nature and Extent* (2000) Brisbane, 28.

31 Julia Werren, 'Civil Litigation and Repressed Memory Syndrome: How does Forgetting Impact on Child Sexual Abuse Cases' (2007) 15 *Tort Law Review* 43.

32 *Carter v Corporation of the Sisters of Mercy of the Diocese of Rockhampton* [2000] QSC 306 (Atkinson J).

33 Matthews, above n 7.

34 Ben Matthews, 'Child abuse and access to justice for civil claims: time to reform the Limitation of Actions Act 1974 (Qld)' (Paper presented at Seeking Justice Forum, Queensland, 10 May 2016).

35 Commonwealth, Royal Commission into Institutional Responses to Child Abuse, *Redress and Civil Litigation Report* (2015), 4.

36 Name withheld 50, Submission No. 65 to the Royal Commission, *Inquiry into Institutional Responses to Child Abuse: Redress and Civil Litigation*, March 2015.

37 Family and Development Committee, Victoria, *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations,* (2013).

38 Ibid 523.

39 Ibid.

40 Kate McKenna, 'Push to end legal agony of abuse', *The Courier-Mail* (online), 10 May 2016 < http://www.couriermail.com.au/news/queensland/push-to-end-legal-agony-of-abuse/news-story/ff85fcca2d8c6d3451520686ee8b9bd5>.

Need for Reform

Legislative reform is required to bring non-conforming states in line with Victoria and NSW. As of 1 July 2016, the Royal Commission reported it had received 18,238 letters and emails with regards to its investigation into institutional reports of child abuse, and handled 1,829 calls.[41] This coupled with the sheer number of submissions from state governments, NGOs and individuals is indicative of the need and extent of community support for change.

In NSW, the passing of the *Limitation Amendment (Child Abuse) Act 2016* (NSW) in March 2016 amended the *Limitations Act 1969* (NSW) and abolished limitation periods for sexual abuse claims with retrospective effect. Similarly, in Victoria, the insertion of Part II Division 5 into the *Limitation of Actions Amendment (Child Abuse) Act 2015* (Vic) removed temporal limitations for actions for personal injury or death in relation to physical, sexual or psychological abuse against the plaintiff as a minor. In both NSW and Victoria, the bipartisan support to the bills reinforced a "growing Australian consensus for reform".[42] In November 2015, Western Australia introduced the *Limitation Amendment (Child Sexual Abuse Actions) Bill* to amend the *Limitation Act 2005* (WA) however, in other states around Australia, no action has been taken to promote legal change. And yet, the call for reform is echoed throughout the legal community, policy makers, academics and the Royal Commission, in addition to survivors and their families.[43]

To promote recovery, we must have *means* for recovery. Barring civil action removes a survivor's right to compensatory recovery and ostracises survivors. Increased awareness of historical sexual abuse and legal changes made in NSW and Victoria should prompt national reform. We owe it to survivors to make retrospective changes to remaining limitation periods that currently bar late claims. No claim should be considered "too late." The State owes it to survivors to facilitate access to justice.

41 Royal Commission into Institutional Responses to Child Abuse (2016) http://www.childabuseroyalcommission.gov.au/.

42 Ben Matthews, 'Child abuse and access to justice for civil claims: time to reform the Limitation of Actions Act 1974 (Qld)' (Paper presented at Seeking Justice Forum, Queensland, 10 May 2016), 5.

43 McKenna, above n 40.

07

Motor Vehicle Mayhem: Barriers To Justice For Victims Of Motor Vehicle Accidents In NSW

Lucas Moctezuma

The recovery that people receive for injuries sustained in motor vehicle accidents, and the recovery needed to continue living decently, do not correspond in New South Wales. Since 1999, the state's system of motor accident compensation has been governed by the *Motor Accidents Compensation Act 1999* (NSW) ("*MAC Act*"). Passed in response to rising insurance premiums and a large number of claims for personal injuries under Compulsory Third Party ("CTP") insurance policies, the *MAC Act* aimed to encourage early treatment and rehabilitation for victims. Unfortunately, the system has instead added to the distress of suffering an accident.

This article will expand on the argument in four stages. First, the *MAC Act*'s foundations are unusual. A victim's injury is assessed by imposing an arbitrary impairment percentage, in which pain is not considered a factor. Second, the Act requires victims to attend an independent medical assessor to evaluate these injuries, a particularly rigid form of evaluation that bases impairment on a victim's impairment the day of their assessment. Third, the Act establishes a compulsory non-judicial alternative dispute resolution system called the Claims Assessment and Resolution Service ("CARS"). Whilst this system has worked well, there are elements within it that favour the interests of insurance companies over those of victims. Finally, the Act has generally been very favourable to insurers, who have consequently enjoyed significant profits.

In motor accident claims, the compensation to which an injured victim is entitled is determined is based on their Whole Person Impairment ("WPI"). This is a percentage figure determined by medical assessors when observing the injuries an individual sustains after an accident. It is supposed to be representative of how "impaired" a victim's body has become. The system used to calculate the WPI are guidelines developed by the American Medical Association ("AMA Guidelines"), an organisation of physicians based in Chicago, United States. Whilst these guidelines are useful in determining what a disability is, their ability to provide complete answers is limited. The AMA Guidelines state very clearly that the criteria "should not be used to make direct financial awards or direct estimates of disabilities."[1] It is not entirely clear to many lawyers in the industry exactly why the AMA Guidelines were chosen for this purpose. It seemed to arise out of nowhere and it has had unfortunate consequences.

In fact, in the same year that the *MAC Act* was introduced, the AMA Guidelines' limitations were stressed by Judge Rothenberg in a U.S. case:

> The calculation of permanent benefits [using the AMA Guidelines] no longer takes into consideration the individual worker's abilities, education, and experience. It therefore does not measure the actual impact on earning capacity... The result is that [the] detrimental financial impact of the new system falls most greatly on those whose earning capacities are most compromised – those most in need of permanent disability benefits.[2]

This was a potential warning to NSW, and the statistics after 1999 were not surprising. From 1999 to 2005, the number of injured people eligible for fair compensation dropped by 64%.[3]

Section 131 of the *MAC Act* prescribes that damages may only be awarded for non-economic loss ("NEL"), that is, non-monetary loss commonly referred to "pain and suffering", if the degree of permanent impairment is greater than 10%. A victim therefore cannot be awarded damages for NEL unless their WPI is 11% or higher. This is extremely significant, as a claim for NEL can add hundreds and thousands of dollars to a claim. Section 134(1) prescribes that the maximum amount a court may award in NEL is $284,000. If victims do not reach 11%, they will only be able to claim other heads of damage such as future economic loss and medical expenses. One Special Counsel I interviewed commented that the WPI system, in his experience, has tended to be more conservative with figures generally being scaled down.

What is striking about this system is that "pain" is not assessed by the AMA Guidelines. It is irrelevant to the amount of compensation awarded as it is not included in the determination of a WPI. Consequently, victims are unable to claim for their lost quality of life due to ongoing pain and its constant medication requirements. Instead, the procedures within the guidelines largely evaluate WPI on the basis of the range of movement that an individual is able to exercise; for example, the movement of their neck, or the extent to which they can lift their arm or can rotate their foot. If there is evidence that there is some restriction in neck movements, for example, a patient might be assessed at 5% WPI (Level 2). If a patient has a fracture in their neck, they may be assessed at 10% WPI (Level 3), which is still not enough to claim for any NEL. A patient would need to have a *displacement* in their neck to reach 11% or higher, despite the fact that a patient with a fractured neck may have a dramatically decreased quality of life from suffering neck pain every day. The WPI percentage is supposed to be an objective figure – indeed, the legislation completely avoids the subjective term "pain and suffering". As was well put by the Law Society of NSW in 2011:

> The 10% whole person impairment threshold is harsh and arbitrary in nature. It excludes many seriously injured claimants from accessing damages for non-economic loss. Eligibility for compensation for non-economic loss should be based upon subjective indicia such as pain, depression, changes in lifestyle and future deterioration, and not just deterioration.[4]

As this passage makes clear, it is a draconian system whereby an individual's health, which has obvious implications for their subjective quality of life, is evaluated by reference to an objective number that determines whether or not they are allowed to claim damages for NEL.

The percentage is determined by medical assessors of the Medical Assessment Service ("MAS"), an independent government body provided for by the State Insurance Regulatory Authority ("SIRA"), formerly the Motor Accidents Authority ("MAA"). Whilst MAS assessments only arise when there is a dispute between claimants and their insurers as to the WPI percentage, about 95% of assessments are disputed. This has contributed to what Mark Robinson calls the "explosion in administrative law" at the state level, as the decisions of MAS, including challenges to them, now play an important role in the NSW compensation legal framework.[5] MAS assessments deserve particular attention in this analysis, particularly because the *MAC Act* does not prescribe for an internal or external review mechanism, save for *de novo* reviews

1 Law Council of Australia, 'Personal Injury Compensation' (Background briefing paper, Law Counsil of Australia, September 2006) 1.

2 *McLane Western Inc v The Industrial Claims Appeals Office* 996 P.2s 263 (Colo. Ct. App. 1999).

3 Law Council of Australia, above n 1, 2.

4 Stuart Westgarth, Submission to NSW Legislative Council Standing Committee on Law and Justice, *Eleventh Review of the exercise of the functions of the Motor Accidents Authority and the Motor Accidents Council*, 22 August 2011, 3.

5 Mark Robinson, 'The Explosion in Administrative Law at the State Level' [2007] AlAdminLawF 16, 16.

of medical assessments.[6] The only real way to set aside a MAS assessment is by judicial review in the Supreme Court, a review protected by s 73 of the Commonwealth Constitution.[7] In particular, the decisions of MAS assessors determine whether or not an injured victim can reach the NEL threshold.

When victims attend an MAS assessment, they are asked numerous questions by doctors without the presence of a lawyer. The system is supposed to be an inquisitorial process as the claimants' legal representative nor the insurers' representatives are present.[8] However, the Special Counsel I interviewed mentioned that, in practice, the system seems adversarial to patients. Many MAS assessors thoroughly quiz and cross-examine the patients without the presence of their lawyer, and victims may often mention things which are against their interests and have the effect of scaling their WPI downwards.

One bizarre element of MAS assessments is that they only take into account the medical condition of the claimant *on the day* of their assessment. Assessors do not take into account the possibility of injuries getting worse over time, which is common.[9] The drafting of the *MAC Act* appears to look unfavourably on further MAS assessments. Under s 62, a matter may be referred for a second assessment either by a court or claims assessor, or by any other party to the dispute "but only on the grounds of the deterioration of the injury or additional relevant information about the injury". Victims have to suffer quite a large deterioration, and will also have to go to considerable lengths to prove that a piece of medical information was not known, or could not have possibly been known, at any time prior to the first assessment. Under cl 14.9 of the MAA Guidelines, Proper Officers, when deciding to refer a matter for further assessment, should have regard to all injuries assessed by the original Assessor and the nature of the deterioration. Section 62(1A) then provides that a matter cannot be referred again for assessment by a party on the grounds of deterioration or additional relevant information "unless the deterioration or additional information is such as to be capable of having a *material effect* on the outcome of the previous assessment" (emphasis added). To complement this, cl 14.7 of the MAA Guidelines says:

> If the Proper Officer is not satisfied that the deterioration of the injury or the additional relevant information about the injury would have a material effect on the outcome of the application, the Proper Officer may dismiss the application.

The inconsistency between the Act and the MAA Guidelines as to the required test has caused some judicial confusion. On the one hand, the Act requires a positive test – the Proper Officer is to reach an opinion that the additional information is capable of having a material effect, and if that opinion is not reached then the matter cannot be referred for a further assessment. However, the Guidelines prescribe a negative test; that if the Proper Officer is not satisfied with the additional relevant information, there is a *discretion* to dismiss the application. Justice Davies expressed a frustration with the Guidelines, saying:

> I can see nothing in s 62(1A) which would allow the Proper Officer not to dismiss the application if [they form] the view that the additional information was not capable of having a material effect on the outcome of the previous assessment. The MAA accepts that the word "may" in clause 14.7 ought to read "must"… the MAA says that there is an objective circumstance that must be established to overcome the prohibition and where the objective circumstance does not exist the matter must not be referred for further assessment… For this reason… it seems to me that cl 14.7 of the Guidelines requires amendment to comply with the Act.[10]

Despite the MAA Guidelines saying otherwise, there is not going to be any scope for a Proper Officer not to dismiss an application lacking the objective circumstance because the legislation curtails this discretion.

6 Mark Robinson, 'Challenging Awards of Claims Assessors and Decisions of MAS Assessors, Review Panels and Proper Officers of the Motor Accidents Authority' (Paper presented at NSW Bar Association Personal Injury Conference, 2 March 2013) 6.

7 *Kirk v Industrial Court of NSW* (2010) 239 CLR 531.

8 *Goodman v Motor Accidents Authority of NSW* (2009) 53 MVR 420

9 *Walpole v Insurance Australia Ltd T/as NRMA Insurance* [2016] NSWSC 702; *Mitrovic v Venuto* (2013) 64 MVR 306; *Insurance Australia Ltd t/as NRMA Insurance v Falco* (2012) 60 MVR 175.

10 *De Gelder v Motor Accidents Authority of NSW* [2009] NSWSC 1173 [33]-[34] (Davies J).

Consequently, the difficulties in attaining this further assessment affects the integrity of the system itself. Anybody who has ever broken an arm knows that pain fluctuates over time. Often, on the day of their MAS assessment, claimants will find that their pain is lower than normal and their flexibility might be better than normal. If they are asked "How are you feeling today?" by a MAS assessor, and their replies are positive, this will ultimately reduce their WPI. This might be so even if the pain has significant negative effects on their daily life. It inevitably becomes in the claimants' best interests to make themselves "appear sicker;" that is, more incapacitated and affected by the accident. The Special Counsel I interviewed commented that solicitors who have clients with arm injuries, for example, sometimes encourage them to exercise heavily the day before their MAS assessments so that their arms are sore the next day. This has obvious effects on their arm movement and might increase their WPI. This "manipulation" of the system is a necessary element of how injured victims can attain justice from medical assessments, and is conceivably a consequence of the strong legislative prescriptions against further assessments.

Since 1999, significantly fewer motor accident claims go to court because of the establishment of the Claims Assessment and Resolution Service ("CARS"). CARS was proposed to reduce the use of court resources and public funds to address an overwhelming amount of claims. When a claimant and an insurer cannot settle informally, claimants make an application to CARS for a hearing. A CARS assessor then considers the evidence and determines an appropriate sum for settlement. CARS assessors are experienced legal practitioners and have significant understanding in assessing motor vehicle claims. Hearing dates can be granted within 3-6 months of filing applications, whereas in the District Court it is more likely that a date will be 9-12 months. Case management is efficient and generally fulfils the overriding purpose in s 56 of the *Civil Procedure Act 2005* (NSW) to achieve just, quick and cheap resolutions of the real issues.[11]

However, one cannot look past the fact that some rules of CARS are skewed in the favour of insurers. Section 95(2) of the *MAC Act* provides:

> A [CARS] assessment … of the amount of damages for liability under a claim is binding on the insurer, and the insurer must pay to the claimant the amount of damages specified in the certificate as to the assessment if:
>
> a) the *insurer accepts that liability under the claim*, and
> b) the claimant accepts that amount of damages in settlement of the claim within 21 days after the certificate of assessment is issued.

This gives the insurer significant power. First, s 95(1) prescribes that a CARS assessment on the issue of liability for a claim is not binding on any party. As such, even if CARS determines that an insurer is liable based on sound legal reasoning, insurers are still able to argue that they are not liable. Further, an insurer will not be bound by a CARS assessment of damages unless it has *accepted* liability. Where an insurer denies liability, and avoids any conduct inconsistent with the denial, it may invoke its right under s 95(2)(a) and decline to pay out on a CARS assessment. If this happens, this will give a claimant no other option than to commence court proceedings. One former CARS assessor I interviewed commented that this provision has been abused numerous times by insurers.

Victims can go straight to court by becoming exempt from CARS under s 92 of the *MAC Act*, but the common law has affirmed that exemptions are going to be "in the minority and be the exception."[12] There are numerous reasons why CARS exemptions can be made, such as when liability is denied by an insurer under s 81(3) or if the injured person is a 'person under a legal incapacity'.[13] However, before May 2014, clause 8.11.2 of the Guidelines read that CARS exemptions could be made if "the Insurer ... *makes an allegation* … that the Claimant was at fault or partly at fault and claims a reduction of damages of more than 25%." Once again, the future of the victim's case is beholden to the discretion of the insurer whose interests may be to attain a post-CARS hearing. As the Bar Association bluntly submitted to the MAA, "insurers are effectively encouraged by the *MAC Act* to allege contributory negligence and maintain liability disputes in order to create a right

11 *Aon Risk Services Australia v Australian National University* (2009) 258 ALR 14.

12 *Zurich Australian Insurance Ltd v Motor Accidents Authority of NSW* [2006] NSWSC 845.

13 Clause 8.11, MAA Guidelines.

of re-hearing post-CARS assessment."[14] Clause 8.11.2 was amended in 1 May 2014 and now provides that exemptions are no longer available if the insurer alleges that contributory negligence is greater than 25%.[15] However, as has been affirmed by the NSW Bar Association, amendments to the Guidelines do not remedy the problem caused by s 95. There is still an incentive for the insurer to make an allegation of contributory negligence because they will not bound by a CARS assessment where there is a dispute about liability.

From a bigger picture, the *MAC Act* has conceivably favoured insurers. Insurers set premiums based upon the amount of revenue they need to cover the cost of expected claims. The difference between the amounts an insurer charges, and the estimated cost of providing the policy, represents the policy's profitability. Prior to 1999, an insurer's profit margin on CTP premiums was 12%. From 1999-2005, NSW insurers collected profits in excess of 27%. SIRA had previously said that "a profit margin in the range of 4% to 6% of premium might be reasonable" and from the statistics, we can see that insurers have made about 6 times what SIRA considers to be a reasonable profit. From 1999-2005, CTP insurers collected more than $10 billion in premium revenue, paying only $1.7 billion in compensation payments to injured motorists. In 2005, QBE alone made profits of $1.098 billion, a 27% increase from $864 million in 2004.[16] This may have recently lowered, with a 2015 SIRA report finding that in the year ending 30 September 2014, the NSW CTP Scheme collected $2.11 billion in premiums and $1.42 billion was paid out in benefits.[17] However insurer profits are still on the rise, with Suncorp reporting a net profit of $1,133 million in 2015, up from $730 million in 2014.[18]

From the above analysis, it is clear that the scheme for recovery after a motor vehicle accident has significant flaws. The process of determining injuries is based on guidelines that were not created for compensation purposes. The independent medical assessment and the alternative dispute settlement procedures also have their defects which negatively impact on already injured victims. The entire Act, as it has been argued, has largely benefited the insurance industry, arguably at the expense of people who require compensation to continue living with dignity. Victims often do not recover what they need after a motor vehicle accident, and a good government should be motivated to act.

14 Westgarth, above n 4, 16.

15 Emma Mead, 'New CARS Claims Assessment Guidelines commencing on 1 May 2014', *Burke &* Mead (online), 5 May 2014 <www.burkemeadlawyers.com.au/compensation-law/new-cars-claims-assessment-guidelines-commencing-1-may-2014/>.

16 Law Council of Australia, above n 1, 4-5.

17 Trevor Matthews, 'Report of the Independent Review of Insurer Profit within the NSW Compulsory Third Party Scheme' (Final Report, State Insurance Regulatory Authority, 15 October 2015) 1.

18 Stephen Lettes, 'Suncorp profit jumps despite 'worst year' for natural disasters', *ABC News* (online), 4 August 2015 www.abc.net.au/news/2015-08-04/suncorp-profit-jumps-despite-disaster-year/6670842.

Prisoners, Acting, and Transformation

Jonathan Marlton

Introduction

Shortly after the British established the New South Wales penal colony in Australia in 1788, the convict settlers put on a production of *The Recruiting Officer* by George Farquhar.[1] The 1788 production "transform[ed]...a group of individuals into a civic community in which respect, trust, and affection are possible [for] convicts and officers alike."[2] In a 1988 play imagining this poorly-documented production and its process, Timberlake Wertenbaker explores the reconstructive effects of theatre that allowed inmate-actors to develop "a more positive image of themselves."[3] Through the re-examination of these themes, Wertenbaker entered a debate concerning the utility of the dramatic arts in the rehabilitation of prisoners. In the United States, this discourse is joined by organizations like Rehabilitation Through the Arts.

Rehabilitation Through the Arts (RTA) is a New York based non-profit organization, started in 1996 in Sing Sing maximum-security prison in Westchester, NY, that now offers arts programs to prisoners in five state prisons.[4] I am particularly interested in its theatre program, which attempts to bring about "social and cognitive transformation behind prison walls" through acting.[5] This report examines the utility of acting in rehabilitating prisoners, as well as the applicability of cognitive theory in order to explain how prison actors shift identities in ways that are potentially transformative. I offer an introduction to the RTA program, followed by a brief sketch of the progression of the criminological approach to incarceration and rehabilitation. I then explore how acting functions to promote the transformation and rehabilitation of prisoners.

Katherine Vockins started RTA in 1996 after following her husband to Sing Sing Prison, who was teaching prisoners at the facility.[6] Her privately funded, volunteer-reliant organization is designed "to change the behaviour and better the lives of prisoners through the teaching approach of theatre."[7] The RTA theatre program produces both popular plays and original works that have been written by inmates with the assistance of the RTA

1 Naomi Rokotnitz, *Trusting Performance: A Cognitive Approach to Embodiment in Drama* (Palgrave MacMillan, 2011) 67.

2 Ibid68.

3 Ibid 68-70.

4 Prison Communities International Inc., *Rehabilitation Through the Arts*, <http://www.rta-arts.org>.

5 Ibid.

6 Peter D. Kramer, 'Rehabilitation Through The Arts Presents 'Of Mice and Men,' Behind Bars at Sing Sing', *The Journal News* (Westchester), 21 December 2007.

7 Susan Hodara, 'Couple's Love of Theater Translates to Local Stage', *The New York Times*, 10 December 2000, 12; Kramer, above n 7.

volunteers.[8] Through the performance of plays like August Wilson's "Jitney," which deals with issues of re-entry into society after incarceration, and *Twelve Angry Men,* a tense drama concerning the criminal justice system, the prisoner actors are forced to face themselves in order to take on another character.[9] Even though the inmates and their RTA mentors are producing theatre that is "stripped to its essentials," inmates still get the opportunity to wear costumes that would usually not be allowed in a prison setting.[10] They are also provided the unusual opportunity to perform and emote in front of outsiders and even other prisoners.[11]

Openness, ease-of-access, and self-reflection are often not priorities of the prison system. RTA's theatre project is inherently paradoxical because it is cultivating an art form "of creative expression [that] takes place within the quite literal confines of prison walls."[12] The introduction of the arts, specifically theatre, in seeking rehabilitation for inmates involves a process that arguably undermines the commonly employed criminological approach applied to governing prisons today.[13] As Michael Balfour explains, "[p]rison is the business of containment, observation, categorisation, restriction, separation, and on occasion rehabilitation." He portrays rehabilitation as a pragmatically positioned secondary priority.[14] To characterise the tension between rehabilitation and incarceration, I move to a discussion of the correctional system in the United States.

8 Katherine Vockins, 'RTA: The Impact of Art Behind Prison Walls' (Paper sent from author, Rehabilitation Through the Arts, 19 November 2013).

9 Hodara, above n 8; Kate Stone Lombardi, 'An Exercise in Maximum Insecurity', *The New York Times* (New York), 28 November 2004, WC1; Jesse McKinley, 'Two Once-Angry Men Revisit a Prison Triumph', *The New York Times* (New York), 13 November 2004, A1.

10 Kate Taylor, 'A Rising Director's Medium-Security Side Project,' *The New York Times* (New York) 14 February 2010, AR. 4; Lombardi, above n 10.

11 Prison Communities International Inc., above n 5.

12 Kate Stone Lombardi, 'Behind Walls of Sing Sing, Inmates Find Freedom Onstage,' *The New York Times* (New York), 1 December 2007, 6.

13 Michael Balfour, *Theatre in Prison: Theory and Practice* (Intellect, 2004) 2-3.

14 Ibid 3.

RTA and the Corrections Debate in the United States

The RTA program volunteers that come into the prisons are faced with the reality that "the theatre practitioner is often forced into a duplicitous position, caught on 'a knife's edge between resistance to, and incorporation into, the status quo' of the criminal justice system."[15] The three employees and thirty volunteers at RTA occupy a delicate and difficult position as they attempt to strike a balance between promoting a prisoner's emotional development without undercutting the retributive system already in place, and upholding the justice system without dehumanising the inmates.[16] In pursuing its mission to "rehabilitate" inmates by promoting and honing artistic expression, RTA places itself in the middle of a long, large-scale debate that has plagued the American prison system and motivated criminological and legal scholars to research and develop effective methods of incarceration.[17]

Since its inception with the Walnut Street Jail in 1790, "known as the first 'true' correctional institution in America," debates about ideology and their associated systems have been widespread.[18] In the first half of the 1800s, debates raged over whether or not to force "idleness" onto inmates or to force inmates to work.[19] Since then, the United States prison governance has been influenced by three chief correctional ideologies: punishment, treatment, and prevention.[20] Punishment has three purposes. The first, retribution, is complemented by the other two: deterrence and incapacitation. Retribution provides the measured consequence for an unlawful action that has already been perpetrated, while deterrence prevents future crimes after release and incapacitation forces obedience as the inmate is imprisoned and guarded.[21] Treatment relies on pathology for answers, taking an assumedly individualistic approach towards the committing of crimes and looking towards therapy to reduce criminal behaviour.[22] The prevention ideology targets younger citizens, identifying high-risk behaviours and often intervening at the secondary school level.[23]

15 Ibid 16.

16 Ibid 10.

17 Richard L Lippke, *Rethinking Imprisonment: Oxford Monographs on Criminal Law and Criminal Justice* (Oxford University Press, 2007) 2.

18 Harry E. Allen, *Corrections in America: An Introduction*, (Pearson Prentice Hall, 10th ed 2004) 20.

19 Ibid 25.

20 Ibid 44-49.

21 Ibid.

The discourse surrounding correctional ideologies in America began with a focus on punishment that later made way for more preventative and treatment-based options. The 1950s saw a move towards the "medical model," a subset of the treatment ideology.[24] For about thirty years, this model was the main approach adopted by legislatures and backed by the public. Professionals in the correctional industry had a hard time adjusting, especially the wardens who saw their "absolute power" diminishing significantly by the 1970s.[25] With the importance placed on the medical model came an increased interest in rehabilitation that was fuelled by President Kennedy and his successor, President Johnson's, domestic social agendas designed to "improve the lives of those less fortunate."[26] As the correctional system began incorporating these "war on poverty" ideals, more attention was paid to the social skills, education, and career preparation of the incarcerated.[27] The late 1970s marked a pivotal moment in American corrections when, after a decrease in crime, correctional facilities became overloaded with increasingly violent criminals.[28] Denis Brian, author of a popular history of Sing Sing prison from 1821-2005, explains that "[i]n 1970 euphemisms were being adopted for many jobs in an attempt to increase prestige without increased compensation…Prisons now became correctional facilities (also to emphasise rehabilitation rather than punishment), wardens became superintendents, and guards, correctional officers."[29] Brian goes on to describe the violence of the 1983 Sing Sing Riot, which unlike the famous Attica Prison riot of 1971 did not result in any deaths.[30] The riot had been fuelled by disputes over who controlled the illegal drug trade within the prison and, despite the lack of casualties, had caused a public stir as inmates of Cellblock B took nineteen guards hostage and perpetrated acts of sexual violence against other inmates.[31] Subsequently, the riot sparked reform debates resulting in the establishment of a special HIV ward in 1985 and the implementation of a new work and educational program in 1991.[32] The 1996 inception of the RTA program was not far behind.

22 Ibid 50.

23 Ibid 51.

24 Allen, above n 19, 50; *Corrections in America,* 50; Peter M. Carlson and Judith Simon Garrett, *Prison and Jail Administration: Practice and Theory*, (Aspen Publishers, 2nd ed, 2008) 1, 15.

25 Carlson and Garrett, above n 30, 15-6.

26 Ibid 293.

27 Ibid.

28 Ibid 52.

29 Denis Brian, *Sing Sing: The Inside Story of a Notorious Prison* (Prometheus, 2005) 187.

30 Ibid 194.

The concept of rehabilitation is complex because it comes in many forms, with some efforts being arguably more effective than others. Typically, the measure of effectiveness for these programs is whether or not they reduce the rate of recidivism. Carson and Garrett analyse key studies examining incarceration and its effects on crime rate reduction.

> *"Unlikely to reduce recidivism are programs that are simply for drug treatment or cognitive learning-based interventions that do not enhance the offenders' ability to perform basic tasks essential for any form of employment. Further, the private and public sector must recognize the need to provide employment opportunities for this segment of the population."*[33]

Reliable data is not available on the effectiveness of most rehabilitative programs because they have not been evaluated. Most of these programs are inhibited by their small size, errors made in regard to target population, and poor administration strategies that render them ineffective. They are further hampered by the prevalence of violence, drug use, and unemployment that increase the likelihood of incarceration.[34] The ambiguity surrounding the lack of data provokes the debate about the effectiveness of rehabilitation.

What is known is that "[s]ocial control of inmate behavior is critical to the successful governance of a correctional institution."[35] While there is not a uniform way of disciplining inmates, there are the benefits of a legal system that requires due process and an adherence to the law on the part of both the inmates and correctional officers.[36] Section 250.2 of the New York Codes, Rules, and Regulations, which applies to Sing Sing as a state institution, also points

31 Ibid 199.

32 Ibid 201-2.

33 Ibid 290-1.

34 Ibid 291.

35 Carlson and Garrett, above n 30, 301.

36 Ibid 304.

for the need for discipline.[37] According to the statute, proper and fair disciplinary practices promote the "rehabilitation" and "morale" of prisoners. In New York State, disciplinary actions are to be impartially administered in a manner that responds to the magnitude of the offense. The regulation is designed to ensure a safer, more orderly prison environment.[38]

Prison Researcher Lila Rucker, quoted in Moller's study, asserts that "[a]ffirmative environments facilitate positive adaptive strategies because affirmation enhances one's sense of self-worth, inspires hope and encourages positive engagement with one's surroundings."[39] Of course, this positive emotional growth is a slow process. While programs like RTA are uplifting, they do occur in prison environments, which, despite rhetoric, are oppressive and retributive institutions. Nevertheless, RTA navigates the existing system in Sing Sing and four other state prisons in order to promote "cognitive transformation."[40]

The Cognitive Approach to Acting

What does the cognitive approach mean for a prison actor? Cognitive theory allows explanation of how prison actors shift identities in ways that are potentially transformative. Because "[a]ll acting is embodied," the acting inmate reclaims his body while performing.[41] He or she has temporarily regained access to a tool that has been taken over by the State. We have progressed in our knowledge of cognitive science; we now know that where there is body, there is mind. As Rick Kemp points out, "[t]he concept of the embodied mind is one that fundamentally alters the mind/body split on which twentieth century approaches to actor training are based."[42] The significance of this relationship for RTA is that engaging in physical theatrical activities, before even considering the more expressly emotional components, is connecting with the mind of the inmate, which would in turn suggest that the process of transformation precedes the adoption of a character.[43]

Understanding the integration of the mind and body is not solely the concern of the rehabilitator working in a prison. Prison administrators, guards, and employees also interact, knowingly or not, with the embodied minds of inmates. Because mind and body are inextricably connected, the suppression of bodies is the suppression of mind. It follows that the (temporary) liberation of the prisoner's body that occurs during acting can lead to the opening up of the mind. Acting is both a physical and emotional undertaking. A prison actor simultaneously engages his or her body and emotions through acting. The physical process can lead an inmate to mental state primed for beginning the process of rehabilitation.

Different actors have different methods for adopting a character. Some begin with a physical approach while others turn to the psychological as a starting point. Either way, there occurs a process of combining actor with character.[44] Fauconnier and Turner's idea of "conceptual blending," offers a helpful image of the relationship between self and character and is described further by Kemp as the following.[45]

> *"Briefly, a cognitive blend is a mental construction, initially composed of at least three mental spaces, that occurs at the level of short-term or "working" memory. Each of these contain aspects of meaning that, when integrated with the others, creates a fourth mental space and new conceptual material. The process starts when two concepts, or domains of experience, are framed together in linguistic or imagistic ways, making the mind scan automatically for underlying similarities. This is the process that occurs when an actor thinks of "self" and "character."*[46]

As such, integrating the concepts of self and character may function in the restructuring of identity. In particular, the scanning for similarities process outlined above is meaningful in viewing prison theatre as rehabilitation. RTA produces plays with thematic elements relevant to the incarcerated actors involved in the play. For example, in August Wilson's "Jitney," an inmate plays the part of the father of a convict. Finding similarities within himself between him as an actor and the character results in a merging of the two, so for that moment, the actor's identity has changed with the cognitive blend that is incorporating the second concept of character.[47] While some actors—"transformational" actors—bring a different personality to the role each time and others—"persona" actors—seem to keep a perpetually similar personality, the process of conceptual blending exists in either case.[48]

In addition to benefiting from conceptual blending, adopting a character requires a certain level of empathy. Empathy has been used by researchers to describe "a cognitive mechanism that is involved in unconsciously 'mirroring' others' actions and emotions."[49] The discovery of mirror neurons, "neurons that fire in the premotor cortex when one executes a goal-directed action, and also when one observes a similar action executed by someone else" and subsequent research have changed the conversation about empathy, informing scholars that "to a certain degree, we are actually experiencing the actions and emotions of others as we watch them."[50] This process occurs on an subconscious level. An actor performs a conceptual blend, incorporating a fictitious character into his or her reality and a spectator experiences, simultaneously through empathy, the actions of a performed fictitious character on stage.[51]

Cognitive scientists assert that not only does an empathetic reaction—that is, a lower-intensity version of what one would feel if *actually* engaging in that action—occur by witnessing, but empathy is also triggered by imagination.[52] Therefore, the actor empathises with other actors, other characters, and his or her own character because empathy is triggered across all three of these levels. As Naomi Rokotnitz explains in her chapter about the production of *The Recruiting Officer* in the Australian penal colony, "[i]t is entirely possible that the convict-actors learn from Farquhar's characters, not by attempting to impersonate them convincingly for some performance but through their necessarily embodied interaction with these characters."[53] She is responding to the idea that imitating and mirroring actions can lead to embodied knowledge, an occurrence not brought about by merely witnessing. Rokotnitz clarifies her example by explaining that "[t]he fact that they know perfectly well that they are not gentry makes little difference in this respect. The body learns its own lessons."[54] The strength of the actor's imagination is also an integral variable in the process of empathizing.[55] In the case of a Sing Sing inmate involved in the RTA program, he assumes aspects of a differently conceived identity by merely imagining the circumstances of his character. And, as he develops the character and interacts with other actors and their characters, the intensity of his empathetic response increases, resulting in an increased potential for lasting change.

Conclusion

Can RTA rehabilitate prisoners through theatre? Borrowing from Kemp, I assert that empathy and conceptual blending hold some of the answer to our question. The act of theatre promotes empathy in a way that other forms of group therapy cannot because of the physical and collaborative nature of theatre. Building something together promotes solidarity, and we know from mirror neurons that the act of engaging each other on stage leads to the emotional reaction to someone else's actions, which are a direct result of their experiences. While we know that an actor does not actually become someone else, we gain a better understanding of the shared conceptual spaces in the mind of an actor. A Sing Sing prison-actor adopting a character maintains his physical existence, but he learns and evolves through the blend, responding both physically and emotionally.[56]

37 *Department of Corrections and Community Supervision,* Title 7 New York Codes Rules and Regulations, NY Reg 250.2<http://government.westlaw.com/linkedslice/default.asp?SP=nycrr-1000>.
38 Ibid.
39 Lorraine Moller, 'Project Slam: Rehabilitation through Theatre at Sing Sing Correctional Facility' (2011) 5(5) *The International Journal of Arts in Society* 9, 26.
40 Prison Communities International Inc., above n 5.
41 Rick Kemp, *Embodied Acting: What Neuroscience Tells Us about Performance* (Taylor and Francis, 2012) xvi.
42 Kemp, above n 45, 17.
43 Ibid 18.
44 Ibid 93.
45 Gilles Fauconnier and Mark Turner, *The Way We Think: Conceptual Blending and the Mind's Hidden Complexities* (Basic, 2002).
46 Ibid 119.
47 Ibid.
48 Kemp, above n 46, 130-1.
49 Ibid 140.
50 Ibid 141.
51 Ibid 142.
52 Ibid 173.
53 Rokotnitz, above n 1, 83.
54 Ibid.
55 Ibid 142.
56 John Harry Lutterbie, *Toward a General Theory of Acting* (Palgrave Macmillan, 1st ed, 2011) 148.

08

Truth-Seeking in Deeply Divided Societies

Benina Su

The past three decades have seen the disintegration of many repressive regimes, from Ex-Communist States in Eastern Europe to apartheid South Africa, and dictatorships in South America and Central Africa. In light of that, the field of transitional justice has gained significant momentum. Transitional justice is based on the belief that to achieve reconciliation between divided communities, societies must engage with a past perforated with 'holes of oblivion' created by political violence.[1] But does the process of truth-seeking actually facilitate its oft-stated goal of societal reconciliation?

This paper answers that question in three ways. The first section canvasses and critiques the theoretical relationship between truth recovery and post-conflict reconciliation. The second section examines the case studies of Sri Lanka and Northern Ireland respectively. It concludes that one key truth-seeking initiative in Sri Lanka, the 2010 Lessons Learnt and Reconciliation Commission, has failed to heal ethnic divisions between the Sinhalese and Tamil people. It then assesses the piecemeal approach adopted in Northern Ireland to conclude that the Saville Inquiry and the Ardoyne Commemoration Project has not fostered reconciliation between loyalist and republican communities. The third section concludes that truth-seeking initiatives do not necessarily unify deeply divided societies. Political elites often hijack truth-seeking initiatives to consolidate their power and victims are often inadequately recognised and silenced. When societies emerge out of conflict, it may not necessarily be their last time.

You Want The Truth: Truth Recovery and Reconciliation

According to adherents of transitional justice, societies can only prevent reoccurrences of conflict when they "see precisely what the past was, and endure this knowledge".[2] This claim is underpinned by the interrelated concepts of collective memory and trauma.

First, the process of truth seeking can influence the collective memory of opposing groups, which can defuse future conflict. This paper refers to Halbwachs's concept of collective memory, which suggests that memory is socially constructed.[3] This collective memory is often shaped by community elites to serve contemporary concerns;[4] particular narratives of the collective past are promoted in socially produced artefacts and practice,[5] such as monuments and murals.[6] This affects the identity of individuals, who often refer to a shared past when they identify as members of a national or ethnic "imagined community".[7]

This collective memory is critical to the continuation of conflict; the experience of trauma facilitates each group's identification as the "true victim",[8] which obstructs peacemaking.[9] Collective memory can also involve the suppression of past wrongs,[10] which is problematic as it fails to eliminate the adversarial relationship between groups that initially facilitated conflict.[11] The process of truth seeking can engender societal reconciliation in two ways. Truth-seeking initiatives can challenge groups' narratives of collective victimhood by forcing them to admit liability for past misdeeds.[12] Moreover, a public recognition of an official account of past crimes can provide a narrative that can act as the basis for national consensus.[13]

Second, the process of truth seeking can expedite reconciliation by recognising individual and societal trauma. Although all parties claim to be the 'true' victims of the conflict,[14] prolonged violence affects every member of wartime societies.[15] As illustrated by the example of child soldiers,[16] the traditional perpetrators/victim dichotomy is flawed as many victims often commit violence and perpetrators self-identify as victims.[17] Hence, war can contribute to individual symptoms such as emotional distress and social strains, such as diminished confidence in government.[18]

It is in this context of individual and collective trauma that truth recovery can lead to reconciliation. By respectfully providing victims with a platform to have their testimony publicly acknowledged, truth seeking treats victims with the dignity previously denied to them.[19] This can heal individual survivors, by recognising that their suffering was facilitated by a context of political oppression.[20] As it is "concerned not so much with punishment as with correcting imbalances,"[21] truth recovery can heal societal trauma by letting the guilty 'repent' rather than imposing harm on them through retributive justice. When this heals the relationship between the perpetuator and the community,[22] truth recovery can facilitate societal reconciliation.

1 H. Arendt 1963, *Eichmann in Jerusalem*, Penguin Press, New York, p. 232.

2 Arendt, op. cit., p. 20; L.E. Fletcher and H.W Weinstein 2002, 'Violence and Social Repair: Rethinking the Contribution to Justice of Reconciliation', *Human Rights Quarterly*, vol. 24, no. 3, p. 586.

3 M. Halbwachs 1992, *On Collective Memory*, University of Chicago Press, Chicago

4 C. Teeger 2014, 'Collective Memory and Collective Fear: How South Africans Use the Past to Explain Crime', *Qualitative Sociology*, vol. 37, no. 1, p. 3

5 P. Devine-Wright, 'A Theoretical Overview of Memory and Conflict', p. 12.

6 B. Rolston 2010, 'Trying to reach the future through the past: Murals and memory in Northern Ireland', *Crime Media Culture*, vol. 6, no. 3, p. 190.

7 B. Anderson 1983, *Imagined Communities*, Verso, London, p. 9.

8 D. Bar-Tal and S. Cehajic-Clancy 2014, 'From collective victimhood to social reconciliation: outlining a conceptual framework,' in D. Spini, G. Elcheroth, and D.C. Biruski (eds), *War, Community and Social Change: Collective Experiences in the Former Yugoslavia*, Springer, New York, p. 126.

9 D. Bar-Tal 2007, 'Sociopsychological Foundations of Intractable Conflicts', *American Behavioural Scientist*, vol. 50, no. 11, p. 1431.

10 R. Bargava 2000, 'Restoring Decency to Barbaric Societies' in R. I. Rotberg and D. Thompson (eds), *Truth v Justice: The Morality of Truth Commissions*, Princeton University Press, Princeton, p. 53.

11 N. Biggar 2007 'Concluding Remarks' in N. Biggar (ed), *Burying the Past: Making Peace and Doing Justice After Civil Conflict*, Georgetown University Press, Washington D.C., p. 271.

12 D. Mendeloff 2004, 'Truth-Seeking, Truth-Telling and Postconflict Peacebuilding: Curb the Enthusiasm?', *International Studies Review*, vol. 6, no. 1, p. 359.

13 M. Minow 2000, 'The Hope for Healing: What can Truth Commissions Do?' in R. I. Rotberg and D. Thompson (eds), *Truth v Justice: The Morality of Truth Commissions*, Princeton University Press, Princeton, p. 359.

14 D. Bar-Tal, 'Sociopsychological Foundations of Intractable Conflicts', p. 1432.

15 M. Smyth 2007, 'Putting the Past in Its Place: Issues of Victimhood and Reconciliation in Northern Ireland's Peace Process' in N. Biggar (ed), *Burying the Past: Making Peace and Doing Justice After Civil Conflict*, Georgetown University Press, Washington D.C., p. 108.

16 T.A Jacoby 2015, 'A Theory of Victimhood: Politics, Conflict and the Construction of Victim-based Identity', *Millennium: Journal of International Studies*, vol. 43, no. 2, p. 515.

17 T. Gover 2006, *Taking Wrongs Seriously: Acknowledgement, Reconciliation and the Politics of Sustainable Peace*, Humanity Books, New York, p. 29.

18 E. Martz 2010, 'Introduction to Trauma Rehabilitation After War and Conflict' in E. Martz (ed), *Trauma Rehabilitation After War and Conflict: Community and Individual Responses*, Springer, London, p. 12.

19 D.A. Crocker 2000, 'Truth Commissions, Transitional Justice, and Civil Society' in R. I. Rotberg and D. Thompson (eds), *Truth v Justice: The Morality of Truth Commissions*, Princeton University Press, Princeton, p. 102.

20 M. R. Amstutz 2005, *The Healing of Nations: The Promise and Limits of Political Forgiveness*, Bowman and Littlefield Publishers, New York, p. 9.

21 R. Bharvaga, 'Restoring Decency to Barbaric Societies', p. 60.

22 E. Kiss, 'Moral Ambition Within and Beyond Political Constraints: Reflections on Restorative Justice', p. 79.

The literature canvassed has been premised on the assumption that seeking an authoritative truth of the past is achievable. This is untrue as it is not possible to re-live the past.[23] "Facts" about the past are never neutral as the memories used to substantiate them are subjective interpretations.[24] It is thus difficult to conclude that societal reconciliation is the inevitable result of truth seeking processes.

Sri Lanka: State-Sponsored Truth and Reconciliation

On 19 May 2009, the government of Sri Lanka declared victory over the Liberation Tigers of Tamil Eelam (LTTE), marking the end to a thirty-year civil war.[25] The Sri Lankan Civil War was rooted in the historical tensions between the Buddhist Sinhalese majority and Hindu Tamil minority communities. As the Tamil people could not effectively combat institutionalised discrimination through conventional politics, the LTTE formed in the 1970s as a militant group that fought for an independent Tamil state.[26] Full-fledged war broke out in the 1980s, with government repression of Tamil aspirations matched by ruthless LTTE tactics such as suicide bombings of civilian targets and high-profile assassinations.[27] The military campaign against the LTTE escalated in 2008 under President Mahinda Rajapaska,[28] during which over 40, 000 civilians lost their lives and 300, 000 people became displaced from their homes.[29]

One key truth-seeking initiative was established following the end of the Civil War. President Rajapaska appointed the eight-member Lessons Learnt and Reconciliation Commission ("LLRC") in May 2010 to report on "the lessons to be learnt from" the events of the last seven years of the war, any findings of responsibility and the measures necessary to prevent the recurrence of conflict.[30] In December 2011, the LLRC concluded that the Sri Lankan military gave "the protection of the civilian population the highest priority"[31] although "civilian casualties had occurred in the course of the crossfire".[32] It found that the LTTE had disregarded international humanitarian law, through the use of suicide attacks and the deliberate targeting of civilian populations.[33] Finally, the LLRC concluded that the responsibility for the Civil War lay upon both Sinhalese politicians, who "failed to offer an acceptable solution to the Tamil people", and Tamil leaders, who should have refrained from "promoting an armed campaign towards secession."[34]

However, the LLRC has failed to achieve its goal of furthering "national unity and reconciliation"[35] between the Sinhalese and Tamil communities. Several thousand people who were arrested on suspicion of supporting the LTTE remain in detention without charge.[36] Tamil areas in northern Sri Lankan are still heavily militarised;[37] over 160, 000 soldiers remain under the objective of "controlling and monitoring" the civilian population.[38]

The failure of the LLRC in uniting the Sinhalese and Tamil communities is due to two reasons. First, the institutional methodology of the LLRC was subject to elite manipulation, creating an environment that dissuaded Tamil engagement. The LLRC's mandate of inquiry "into the facts and circumstances which led to the failure of the [21 February 2002] ceasefire agreement and the sequence of events that followed thereafter"[39] was problematic as it erased the structural causes of the conflict, such as historic Tamil oppression. Moreover, of the eight members of the LLRC appointed by President Rajapaksa, six served as senior officials in his government during the end of the Civil War.[40] In particular, one appointee, H.M.G.S Palihakkara had defended the actions of the Sri Lankan military in his capacity as Sri Lanka's Permanent Representative to the United Nations.[41] Only one commissioner came from the Tamil community.[42]

As a result, although truth recovery processes are supposed to be participatory avenues for victimised minorities,[43] the LLRC appeared to prioritise Sinhala interests. The LLRC hosted public hearings in Tamil-majority areas for 22 days, as opposed to 56 days in Colombo,[44] which meant that many Tamil victims were not given adequate opportunities to testify. The absence of a witness protection program deterred potential Tamil witnesses, who would have faced reprisal as LTTE sympathisers, [45] but also "re-traumatised"witnesses by creating a culture of fear. This is evident in a witness's statement that asserted "I am afraid to attend [the LLRC] alone as I am fearful of my security."[46]

Second, the LLRC failed to comprehensively deal with victimhood arising from the conflict. This stemmed from its unclear mandate; rather than explicitly instructing officials to investigate human rights violations, its objective was to "inquire and report" on the "facts and circumstances" between 2002 and 2009.[47] The absence of an investigation into allegations of human rights violations committed by the Sri Lankan military meant that the Tamil community felt the LLRC erased their experiences. [48]

Tamil anger at the LLRC was also rooted in the fact that they agitated for an independent international inquiry,[49] which the Rajapaksa government rejected in favour of the LLRC. This failure to consult the Tamil community, compounded by the failure to investigate Tamil mistreatment, reinforced the Tamils' collective memory of victimisation under Sinhalese discrimination.[50] The findings of the LLRC allowed both communities to engage in collective amnesia regarding past wrongdoings. The Sinhalese community did not confront the possibility that the Army had committed human rights violations while the Tamil community rejected the LLRC entirely, including the finding that the LTTE repeatedly breached international humanitarian law. This hindered reconciliation in Sri Lanka.

The truth-seeking initiative of the LLRC has failed to deliver the promised goal of reconciliation between the Sinhala and Tamil communities. In fact, it has only entrenched ethnic divisions in Sri Lanka.

Northern Ireland: A Piecemeal Approach

While post-conflict authorities in Sri Lanka have undertaken a singular process of truth recovery, an ad hoc approach has been adopted in Northern Ireland. This section will evaluate the effectiveness of truth recovery in post-conflict Northern Ireland, focussing on the Saville Inquiry and the Ardoyne

23 S. Buckley-Zistel 2013, 'Narrative truths: On the construction of the past in truth commissions' in S. Buckley-Zistel, T. Koloma Beck, C. Braun and F. Mieth, *Transitional Justice Theories*, New York, Taylor and Francis, p. 145.

24 J. Brewer 2010, *Peace Processes: A Sociological Approach*, Cambridge, Polity Press, p. 50.

25 L. Bopage 2010, 'Sri Lanka: Is there a way forward for peace and reconciliation', *Global Change, Peace and Security*, vol. 22, no. 3, p. 356. (Bopage)

26 Bopage, above n 25, p. 357.

27 T. K. Burki 2014, 'Sri Lanka: 5 Years On', *World Report: www.thelancet.com*, vol. 383, no. 1, p. 1623.

28 S. R. Ratner 2012, 'Accountability and the Sri Lankan Civil War', *The American Journal of International Law*, vol. 106, no. 4, p. 795.

29 B. Kapferer, *Legends of people, myths of state*, p. 86.

30 Sri Lankan Ministry of Defence 30 December 2010, 'President appoints Lessons Learnt and Reconciliation Commission', http://www.defence.lk/new.asp?fname=20100517_07 (accessed 1 June 2015). (Ministry of Defence)

31 Lessons Learnt and Reconciliation Commission, *Report on the Commission of Inquiry on Lessons Learnt and Reconciliation*, p. 328. (LLRC Report)

32 Ibid, p. 335.

33 Ibid, p. 333.

34 Ibid, p. 323.

35 Ministry of Defence, above n 30.

36 J G. Stone, 'Sri Lanka's Post-War Descent', p. 140.

37 The Colombo Telegraph 20 January 2014, 'President Rajapaksa's Lies: Claims 12 000 soldiers left in the North but reality is more than 150 000', https://www.colombotelegraph.com/index.php/president-rajapaksas-lies-claims-12000-soldiers-left-in-the-north-but-reality-is-more-than-150000/ (accessed 1 June 2015).

38 Security Force – Kilinochchi, date unknown, '661 Brigade', http://220.247.214.182/sfkilinochchi/661_bde.php (accessed 1 June 2015).

39 LLRC Report, above n 31, p. 6.

40 Human Rights Watch 27 May 2010, 'Sri Lanka: New Panel Doesn't Satisfy US Concerns', http://www.hrw.org/news/2010/05/27/sri-lanka-new-panel-doesn-t-satisfy-us-concerns (accessed 1 June 2015).

41 Ibid.

42 US Department of State 4 April 2012, 'Factual Supplement to the Report to Congress on Measures Taken by the Government of Sri Lanka and International Bodies to Investigate and Hold Accountable Violators of International Humanitarian and Human Rights Law', http://www.state.gov/j/gcj/srilanka/releases/187409.htm (accessed 1 June 2015).

43 Bhargawa, 'Restoring Decency to Barbaric Societies', p. 57.

44 Human Rights Watch, 'Sri Lanka: New Panel Doesn't Satisfy US Concerns'

45 Groundviews 1 November 2012, 'The Final Report on the Lessons Learnt and Reconciliation Commission: A Response' http://groundviews.org/2012/01/11/the-final-report-of-the-lessons-learnt-and-reconciliation-commission-a-response/ (accessed 1 June 2015).

46 Tamil Guardian 14 November 2011, 'LLRC witness summoned by Sri Lankan CID,' http://www.tamilguardian.com/article.asp?articleid=3901 (accessed 1 June 2015).

47 LLRC Report, above n 31, p. 5.

48 Tamil National Alliance, *Response of the Lessons Learnt and Reconciliation Commission Report*, Colombo, Sri Lanka, http://www.sangam.org/2012/01/TNA_LLRC_Response.pdf (accessed 1 June 2015).

49 R. K. Radhakrishnan 9 December 2011, 'TNA wants accountability mechanism for Sri Lanka, *The Hindu*, http://www.thehindu.com/news/international/article2729067.ece (accessed 1 June 2015).

50 D. Bar-Tal, 'Sociopsychological Foundations of Intractable Conflicts, ' p. 1444.

Commemoration Project.

The Troubles was rooted in the historical discrimination of Protestant loyalists, who dominated the government and the Royal Ulster Constabulary (RUC), towards the Catholic republican minority. Beginning in the mid-1960s, the Troubles was fought between the Provisional Irish Republican Army (IRA), which fought to create a united Ireland,[51] against loyalist paramilitary groups dedicated to the United Kingdom[52] and British security forces like the British Army and RUC.[53] As a result of sectarian violence, which included bombings in England and Northern Ireland, forced disappearances, assassinations and street fights,[54] over 3, 000 people were killed[55] and over 500, 000 people were directly adversely affected.[56] After a protracted negotiation process, the conflict ended in 1998 with the Good Friday Agreement (GFA).

A piecemeal approach to truth seeking has been adopted in Northern Ireland,[57] which involves community-led initiatives, public inquiries, police ombudsman inquiries and victim-centred initiatives.[58] One such example is the Saville Inquiry, which was established in 1998 to reinvestigate the events of 'Bloody Sunday,'[59] in which British soldiers shot dead fourteen civilians during a civil rights demonstration in Derry.[60] It was established to "seek the truth"[61] and supersede the findings of the Widgery Inquiry, which exonerated the British Army.[62] In 2010, the Inquiry found that the British Army had acted unjustifiably by shooting civilians without provocation,[63] and was responsible for the deaths and injuries on Bloody Sunday.[64]

Another example of Northern Ireland's piecemeal approach to truth seeking is the Ardoyne Commemoration Project (ACP), which was a community-based initiative that documented victims from the community of Ardoyne.[65] It was established in 1998 by an Ardoyne group of victims' relatives and community activists, who wanted to "tell their story" and "set the record straight" by acknowledging those who had been killed.[66] In 2002, the ACP published a book that contained the personal histories of all 99 victims, supplemented with oral testimonies from their relatives and friends.[67] It highlighted that British security forces were active participants in the Troubles, acting in collusion with loyalist paramilitary organisations.[68]

Yet, despite these efforts, Northern Ireland remains a deeply divided society. Sectarian divisions still run deep in Northern Irish society; peace walls separating loyalist and republican neighbours remain standing[69] and over 90% of children attend segregated schools.[70] This is evident with the 2012 Belfast City Hall flag incident, when loyalist protests broke out as a result of a republican-backed council decision to limit the days that the Union Flag was flown from the City Hall.[71]

There are two reasons why truth recovery has not facilitated reconciliation in Northern Ireland. First, truth-seeking initiatives in Northern Ireland have failed to address victims' desire for justice. Although 66% of respondents in a survey stated that investigations aimed at possible future prosecutions are very important for the future,[72] very few people have been prosecuted since the GFA for crimes committed during the Troubles.[73] Anger between the loyalist and republican communities has thus solidified, as exemplified by a comment made by a victim's relative that they "just think it's totally disgusting" to "airbrush the innocent people who were murdered by terrorists to move things forward."[74]

The Saville Inquiry illustrates this failing to address victims' demands. While it found that British soldiers had murdered 14 civilians on Bloody Sunday,[75] none of the soldiers have faced criminal prosecution. Due to a belief that justice has not yet been served,[76] an annual commemorative march of Bloody Sunday has continued since the release of the Saville report. Through demonstration signage, the March constructs a conception of Irish republicanism that rejects the GFA for accepting the "British murder machine."[77] As it utilises extreme republican rhetoric to commemorate the Bloody Sunday victims who have not received justice, the March exacerbates the ethnic divide between loyalist and republican communities in Derry.

Second, processes of truth recovery in Northern Ireland have been shaped by institutional manipulation, which hinders reconciliation. This is evident with the ACP, which found that loyalist groups were responsible for over half of the 99 victims' deaths.[78] The ACP utilised an "insider-led" methodology that discovered information through local social networks.[79] However, due to social divisions based on ethnic identity, the ACP was unable to verify whether a substantial number of loyalist ex-residents of Ardoyne became victims of the Troubles.[80] Thus, the neighbouring loyalist communities to Ardoyne believed that the ACP lacked legitimacy.[81]

A similar conclusion can be made of the Saville Inquiry. Although public inquiries are designed as inquisitorial bodies,[82] lawyers undertook an adversarial approach by engaging in hostile cross-examination.[83] This created a difficult environment for relatives of victims and eyewitnesses to testify,[84] which was compounded by their unfamiliarity with legal procedures.[85] The Saville Inquiry thus failed to bridge the divide between communities as republican victims became "re-traumatised" by the experience of testifying, as they were not treated with dignity. This is evident through a witness' statement that the "army legal team went at [another witness] like vultures, trying to make him out to be

51 C. Kenndy-Pipe 2014 , *The Origins of the Present Troubles in Northern Ireland*, Routledge, London, p. 60.
52 Ibid, p. 33.
53 Ibid, p. 47.
54 Ibid, p. 100.
55 Ibid, p. 5.
56 Commission for Victims and Survivors 17 April 2013, 'OFDMFM Committee – 17 April 2013', http://www.cvsni.org/index.php/media-centre/committee-appearances/209-ofmdfm-committee-17-april-2013 (accessed 1 June 2015).
57 C. Bell 2002, 'Dealing with the Past in Northern Ireland', *Fordham International Law Journal*, vol. 26, no. 1, p. 1099.
58 Lawther, *Truth, Denial and Transition*, p. 6.
59 Bloody Sunday Inquiry, date unknown, 'The Bloody Sunday Inquiry', http://www.bloody-sunday-inquiry.org.uk/ (accessed 1 June 2015).
60 G. Dawson 2005, 'Trauma, Place and the Politics of Memory; Bloody Sunday, Derry, 1972-2004', *History Workshop Journal*, vol. 49, p. 152.
61 Bloody Sunday Inquiry, date unknown, 'The Bloody Sunday Inquiry', http://www.bloody-sunday-inquiry.org.uk/qa.html (accessed 1 June 2015).
62 CAIN Web Service, date unknown, 'Report of the Tribunal appointed to inquire into the events on Sunday, 30th January 1972 [Widgery Report], http://cain.ulst.ac.uk/hmso/widgery.htm (accessed 1 June 2015).
63 House of Commons 15 June 2010, *Principal Conclusions and Overall Assessment of the Bloody Sunday Inquiry*, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/279167/0030.pdf (accessed 1 June 2015)
64 Ibid.
65 P. Lundy and M. McGovern 2006, 'Participation, Truth and Partiality: Participatory Action Research, Community-based Truth-telling and Post-conflict Transition in Northern Ireland', *Sociology* vol, 40, no. 1, p. 74.
66 CAIN Web Service, date unknown, 'Ardoyne: The Untold Truth – Introduction', http://cain.ulster.ac.uk/issues/victims/ardoyne/ardoyne02a.htm (accessed 1 June 2015).
67 CAIN Web Service, date unknown, 'Ardoyne: The Untold Truth – Testimonies, http://cain.ulst.ac.uk/issues/victims/ardoyne/ardoyne02b.htm (accessed 1 June 2015).
68 British Government 1 December 2004, 'Memorandum submitted by the Ardoyne Commemoration Project', http://www.parliament.the-stationery-office.co.uk/pa/cm200405/cmselect/cmniaf/303/5020908.htm (accessed 1 June 2015).
69 G. Moriarty, 10 May 2013 'Robinson and McGuiness want 'peace walls' down within 10 years', *The Irish Times*, http://www.irishtimes.com/news/robinson-and-mcguinness-want-peace-walls-down-within-10-years-1.1388183 (accessed 1 June 2015).
70 Lawther, *Truth, Denial and Transition*, p. 6.
71 Ibid.
72 P. Lundy and M. McGovern, 'Participation, Truth and Partiality', p. 75
73 C. Bell, 'Dealing with the past in Northern Ireland', p. 1139.
74 BBC News 20 November 2013, 'Victims react to NI attorney general's calls to end Troubles prosecutions', http://www.bbc.com/news/uk-northern-ireland-25013762 (accessed 1 June 2015).
75 M. Smyth, 'Putting the Past In Its Place', p. 126.
76 Bloody Sunday March 29 January 2014, 'Press Release: Justice… it concerns us all', http://bloodysundaymarch.org/for_justice/wp-content/uploads/2014/01/10_BS14TheMarchPR.pdf (accessed 1 June 2015).
77 Bloody Sunday March 20 May 2015, 'Not in my Name…', https://www.facebook.com/BloodySundayMarch/posts/1010563878961311 (accessed 10 June 2015).
78 British Government 1 December 2004, 'Memorandum submitted by the Ardoyne Commemoration Project', http://www.parliament.the-stationery-office.co.uk/pa/cm200405/cmselect/cmniaf/303/5020908.htm (accessed 1 June 2015).
79 P. Lundy and M. McGovern 2008, 'Whose Justice? Rethinking Transitional Justice from the Bottoms Up', *Journal of Law and Society*, vol. 35, no. 2, p. 269.
80 P. Lundy and M. McGovern, 'Participation, Truth and Partiality', p. 81.
81 Ibid.
82 A. Hegarty 2004, 'Truth, Law and Official Denial: The Case of Bloody Sunday' in W.A. Schabas and S. Darcy (eds), *Truth Commissions and Courts: The Tension between Criminal Justice and the Search for Truth*, Kluwer Academic Publishers, The Netherlands, p. 200.
83 A. Hegarty 2002, 'The Government of Memory: Public Inquiries and the Limits of Justice in Norhtern Ireland', *Fordham International Law Journal*, vol. 26, no. 1, p. 1173. (Hegarty 2002)
84 G. Dawson, Trauma, Place and the Politics of Memory, p. 173.
85 Hegarty 2002, above n 83, p. 1170.

a liar."[86]

The piecemeal approach to truth recovery has failed to unite the loyalist and republican communities in Northern Ireland. Through an examination of the Saville Inquiry and the APC, it has been shown that truth-seeking initiatives have entrenched the deeply divided nature of Northern Ireland.

You Can't Handle The Truth: Failure in Deeply Divided Societies

Truth recovery in both Sri Lanka and Northern Ireland has failed to bridge the gap between deeply divided groups. Despite its widely diverging institutional structures, the LLRC in Sri Lanka and the Saville Inquiry and the APC in Northern Ireland suggest that truth recovery does not empirically achieve its policy goal of societal reconciliation. This section will canvass the reasoning for this finding: the fallibility of institutional design and the inability to address victims' demands.

First, a key assumption in the theoretical relationship between truth and reconciliation is that it is possible to create an objective narrative of the past. This essay proves that it is not; the institutional design of truth-seeking initiatives significantly influences the narrative that is constructed. As illustrated by the treatment of the Sinhala community by the LLRC, the methodology of truth recovery can inadvertently prioritise the experiences of a particular group.[87] Although truth recovery is intended as a participatory mechanism,[88] its institutional design can also dissuade the engagement of particular groups by creating a difficult environment in which to testify. This is evident through the experiences of the republican community in the Saville Inquiry.

This hinders the achievement of societal reconciliation by failing to alleviate individual and social trauma. This is evident through the LLRC, in which institutional flaws such as the absence of a witness protection program dissuaded Tamil victims from giving testimony. Hence, these victims were unable to psychologically heal from the conflict through the act of giving public testimony of their trauma.[89] Moreover, those who did testify before the LLRC became "re-traumatised" by their experience, as they did so at immense personal danger. As it empirically fails to address and sometimes furthers victims' trauma, truth recovery does not engender reconciliation.

Second, truth recovery fails to adequately address victims' demands for accountability. There is seemingly a paradox between truth and reconciliation. While the acknowledgement of culpability is the stepping-stone to retributive justice, such actions are seen as a hindrance to the achievement of reconciliation.[90] Hence, as evident with the LLRC and the Saville Inquiry, truth recovery advocates restorative justice,[91] in which the explicit goal of reconciliation is achieved through public exposure of the truth and an assignment of blame for the crimes committed.[92] Yet as illustrated by Tamil and republican grievances, this is often not enough for victims who demand accountability beyond the acknowledgement of their suffering.

Post-conflict states hence balance competing demands between addressing victims' desire for justice and pursuing reconciliation. As indicated by the LLRC and the Saville Inquiry, they sometimes choose to pursue reconciliation. Yet ignoring victims' demands for accountability paradoxically prevents the achievement of reconciliation. As the Saville Inquiry highlights, ignoring victims' demands for justice can also lead to the development of a more extreme ethnic identity, which exacerbates the divide between communities.

Conclusion

This paper has considered whether mechanisms of truth recovery have been successful in bridging the gap between deeply divided groups. Through a comparative study of Sri Lanka and Northern Ireland, it is clear that truth-seeking initiatives in those instances have not facilitated the promised goal of reconciliation. This is due to two reasons: the fallibility of institutional design and its inability to address victim's demands.

86 E. McCann 12 June 2010, 'Bloody Sunday inquiry: Still waiting for justice after all these years', *The Guardian*, http://www.theguardian.com/uk/2010/jun/12/bloody-sunday-those-affected-speak (accessed 15 June 2010).

87 D. Bar-Tal, 'Sociopsychological Foundations of Intractable Conflicts', p. 1432.

88 Bhargawa, 'Restoring Decency to Barbaric Societies', p. 57.

89 M. R. Amstutz, *The Healing of Nations*, p. 6. (Amstutz)

90 E. Kiss, 'Moral Ambition Within and Beyond Political Constraints: Reflections on Restorative Justice', p. 79.

91 Ibid.

92 Amstutz, above n 89, p. 6.

SYDNEY
UNIVERSITY
LAW SOCIETY

PROVIDED BY
UNIVERSITY OF
SYDNEY UNION