MAKING THE PAST VISIBLE: THE FALLACY OF PROTECTIONISM[1]

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Introduction

1. I acknowledge the traditional custodians of the land on which we meet and pay my respects to their elders, past, present and emerging. I acknowledge the strength and resilience of First Nations peoples and confirm my commitment to sharing the truth about past wrongs done to them in the name of the rule of law and working with them towards a society that is inclusive, respectful and fair.

2. It is an honour and a privilege to have been asked to present this paper this evening. I have been greatly assisted in its preparation by Helena Smith, who has just completed a degree in political science at ANU.

3. This is the third annual presentation jointly convened by the Ngara Yura Committee of the Judicial Commission of NSW and the Francis Forbes Society for Australian Legal History.

4. The first, in 2020, was a presentation of the extraordinary work of Professor Lyndall Ryan of the University of Newcastle, who developed the Colonial Frontier Massacre Map. The map displays the sites of massacres the occurrence of which has been confirmed through the careful examination of primary sources. It provides cogent evidence of the fact that thousands upon thousands of Aboriginal people were massacred during the colonial occupation of Aboriginal land throughout the 19th century. The current version of the map displays 424 colonial frontier massacres between 1788 and 1930 of which 411 were massacres of Aboriginal and Torres Strait Islander people by colonists and 12 were the other way around. The remaining 1 is described as "other".

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[1] A joint presentation for the Ngara Yura Committee of the Judicial Commission of NSW and the Francis Forbes Society for Australian Legal History delivered on 10 November 2022
[2] Chief Justice of the Supreme Court of the Australian Capital Territory

5. The Colonial Frontier Massacre Map provides an important base of knowledge about the events of the 19th century but the direct impact of the massacres is only part of the picture. Callum Clayton-Dixon, an Ambeyang man, has written about the experience of the Anaiwan people of the Northern Tableland of New South Wales during that time when their country was invaded by settlers and sheep in the 1830s.[3] In an interview with Gamilaraay and Kooma man, Boe Spearim, on the podcast "Frontier War Stories", Clayton-Dixon explained the more insidious impacts of the invasion in the destruction of country and the consequent loss of sources of food relied upon by the Anaiwan people. With 1000s of sheep occupying what was once their home, the Anaiwan faced a choice between starving, moving on to higher land or taking what paid work they were offered by the settlers. After many chose work and began living primarily alongside the English-speaking settlers, the first language of the Anaiwan people was all but lost.

6. The second presentation of this series considered the so-called protectionist policies of the 20th century and the legacies of that era, with particular focus on the devastating impact of the legislation that authorised the removal of Aboriginal children from their families.

7. That paper was presented by Mr Richard Weston, the inaugural Deputy Children's Guardian for Aboriginal Children and Young People in NSW, together with members of Kinchela Boys Home Aboriginal Corporation, which was established to support survivors of the notorious Kinchela Boys Home. Mr Weston discussed the significance of the findings of the "Bringing Them Home" report concerning the hundreds of Aboriginal children forcibly removed from their families between 1910 and 1970. Unsurprisingly, the laws, policies and practices which separated Indigenous children from their families were found to have "contributed directly to the alienation of Indigenous societies today". The report concluded that, while child removal policies were often concerned to protect and "preserve" individual children, a principal aim was to eliminate Indigenous cultures as distinct entities."[4]

8. In hindsight, it seems unfathomable that, after over a century of violent dispossession of Aboriginal people from country, a policy of forced removal of their children was even conceived, let alone given a statutory foundation. In today's paper, I will explore the circumstances in which Australian lawmakers shortly after the dawn of Federation

[3] Callum Clayton-Dixon, 'Surviving New England: A history of Aboriginal resistance and resilience through the first forty years of the colonial apocalypse', 2020.
[4] *Australian Human Rights and Equal Opportunity Commission* 'Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal Children from Their Families', April 1997, pgs. 4, 31 & 273.

permitted themselves to give legislative expression to the fallacy that the removal of Aboriginal children from their families was for their protection.

Historical background

9. It is not possible in a paper of this kind to present a comprehensive narrative of the historical background to the era of protectionist legislation in Australia. What follows is a relatively random selection of interesting insights into the circumstances that informed the notion of protective governance - a tasting plate, if you will, for further research.

10. A convenient starting point is the consternation expressed by right-thinking men (and they were all men) in Britain in the 1830s as to the impact of British settlements, not only in Australia but throughout the colonies. An article published in *The Times* on 14 July 1835 reported that a British politician, Mr F Buxton, had raised the matter in parliament:

> Aborigines in British Settlements
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> "Mr F. Buxton rose, pursuant to his notice, to call the attention of the house to the treatment of aboriginal inhabitants of British settlements…"
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> "The condition of the aborigines in most of the countries where British colonists had settled was one of great hardship. We first took possession of their land, and then they received such treatment as to be almost expatriated. In some places the slightest appearance of resistance to our will by any of the natives was visited by the application of military force, and with punishment even more severe than was in general use among civilised nations."
>
> "…he had it on evidence of Dr Laing that the native population was rapidly decreasing. At the Cape of Good Hope the decrease was going on still more rapidly. Indeed, it was generally observed that wherever European colonization was carried on the native inhabitants soon dwindled away. There was a case strongly illustrative of this – that of Van Deiman's Land, of which we took possession in1803, and since then nearly all the natives had become extinct."

11. Mr Buxton was successful in obtaining the appointment of a Parliamentary Select Committee, which in due course he chaired, to report on the situation of Aboriginal peoples across its colonies around the world including Australia, Canada, New Zealand, Pacific Island Countries, South America and Africa.

12. The Report of the Parliamentary Select Committee on Aboriginal Tribes (British Settlements), published in 1837 and referred to in shorthand as the "Aborigines report", documented widespread frontier violence and is described as having had "a major impact on the debates about how Aboriginal peoples were to be treated in British colonies".

13. The Aborigines Report made 9 "suggestions":

> Suggestions of Report
>
> 1. Protection of the Natives to devolve on the Executive.

"…should be considered as a duty peculiarly belonging and appropriate to the executive government, as administrated either in this country or by the governors of the respective colonies. This is not a trust which could conveniently be confided to the local legislatures." (117)

"In the formation of any new colonial constitution, or in the amendment of any which now exist, we think that the initiative of all enactments affecting the Aborigines should be vested in the officer administrating the government; that no such law should take effect until it had been expressly sanctioned by the Queen, except in cases of evident and extreme emergency…" (117)

2. Contracts for service to be limited.

"All contracts for service into which any of the Aborigines may enter with any of the colonists, should be expressly limited in their duration… At the expiration of that time, the servant should be, in the fullest sense of the term, free…" (118)

3. Sale of ardent Spirits to be prevented.

4. Regulation as to Lands within British Dominions.

5. New Territories not to be acquired without Sanction of Home Government.

6. Religious Instruction and Education to be provided.

"Although it be true that the land in our colonies has derived the greater part of its exchangeable value from the capital and the labour employed in the cultivation of it, yet, even in its most rude and wild state, that land is demonstrably worth a very large amount of money… yet for this important acquisition the ancient occupiers of the soil have not received so much as a nominal equivalent." (119-120)

7. Punishment of Crime.

8. Treaties with Native inexpedient.

"As a general rule, however, it is inexpedient that treaties should be frequently entered into between local governments and the tribes in their vicinity." (121)

"The safety and welfare of an uncivilised race require that the relations with their more cultivated neighbours should be diminished rather than multiplied" (121)

9. Missionaries to be encouraged.

14. The prevalence of frontier violence recorded in the Report appears to have been public knowledge in England at that time. An article published in *The Times* on 12 August 1841 stated:

"That the aborigines have been losers instead of gainers by the settlement of the whites amongst them is beyond dispute; they have contracted, If not all the vices of the Europeans, at least many of them, and none of their virtues…. Instead of being partially civilised, the only advantages bestowed on them by their brethren of the white skin, is the rendering of hunting-grounds useless to them, and of having taught them habits of lying, pilfering, swearing, drinking, and smoking… Where the blacks have had little or no intercourse with whites, you will find them more robust in their persons, more independent in their bearing, and altogether free from those detestable practices that have enfeebled and brutalised their brethren."

"They have been accused of murder and the destruction of the property of the settlers, but it is not of that alarming character as made out – that in fact the contrary is the case; for it is well known that ten blacks are murdered for one white."

15. Two Australian historians, Penny Edmonds and Zoë Laidlaw, have written that the report:

> "ushered in a new era of Aboriginal protectorates across the Australian colonies and New Zealand that would have far reaching consequences for Indigenous peoples, and its regulations and effects under the rubric of "protective governance" resonate still today.[5]

16. Edmonds and Laidlaw have researched the "curious colonial afterlife" of the Aborigines Report, including the fact that three different versions of the Report were brought into existence and evidently distributed in different ways. One was a copy of the report with annotations made by the Aborigines Protection Society, (1837-1909) an organisation established in England "to ensure the health and well-being and the sovereign, legal and religious rights of the indigenous peoples while also promoting the civilization of the indigenous people who were subjected under colonial powers".

17. A senior Quaker in Cape Town, James Backhouse, sent copies of that version to "twenty-five men and one woman of influence across the Australian colonies". Edmonds and Laidlaw report:

> "The precious package, wrapped in sturdy paper, addressed in purple-black iron gall ink and secured with string, was posted across oceans by ship, and later by road, into the hands of a multi-denominational network of humanitarians, religious figures, colonial officials, police magistrates and powerful settlers. Backhouse attached the highest import to the report as a means of bringing moral reform and humane colonization to violent frontiers, where Aboriginal people fought settlers for their lands."

18. However, if the report was perceived as a clarion call for moral reform, in practice the response to the call in Australia was underwhelming. Edmonds and Laidlaw describe the protective governance that followed from the 1830s until the end of the nineteenth century as "an inherently ambivalent mode of colonial practice". They state:

> "The [1837] report was never a single defining narrative or a fixed blueprint for protection; rather, it was a constitutionally unstable and politically contingent text."

19. In short, the hope for moral reform did not materialise; the frontier violence continued throughout the 19th century and Aboriginal people were pushed off country and forced to live on "missions" or "reserves" in what has been described as a form of apartheid. The missionaries, no doubt well-meaning, were instrumental in the establishment of the reserves, as described in the Bringing Them Home Report:

> Early missionary activity similarly failed to attract the support of Aboriginal people to whom a settled agricultural lifestyle and study of the Bible had little relevance. In the meantime, as the non-Indigenous occupation extended throughout New South Wales, Indigenous people were forced from their lands to the fringes of European settlements. In the 1870s the destitution and vulnerability of Aboriginal people moved the missionaries to renewed efforts. They successfully lobbied the government to reserve

[5] Penny Edmonds and Zoë Laidlaw, 'The curious colonial afterlife of the 1837 Select Committee Report on Aborigines', 3 September 2019, *CIGH Exeter*.

> lands for their use and appealed for public support resulting in the establishment of missions at Maloga and Warangesda. In 1881 a Protector of Aborigines was appointed. He recommended that reserves be set aside throughout the State to which Aboriginal people should be encouraged to move.

20. In 1883 the Aborigines Protection Board was established in NSW. Before turning to the operation of that Board, let me take a brief side trip to Western Australia.

21. The position there was described by historian Amanda Nettleback in "A Halo of Protection: Colonial Protectors and the Principles of Aboriginal Protection through Punishment":

> "Through the 1840s, Western Australia's Protector of Aborigines Charles Symmons repeatedly wrote of his satisfaction with the perceived relationship between settlers and Aboriginal people in most settled districts of the colony. Aboriginal people's 'usefulness to the settler' was a point of particular gratification, given the dearth of white labour across the settled districts, and was one which would continue to form a vital thread of a much broader 'system of native management'": (396)
>
> "Although protectors were advocates for Aboriginal people in the legal system, they also worked to bring Aboriginal people within the legal ambit of police, courts and prisons. The interlaced nature of this network of governance meant that Aboriginal people's legal protection was often conceived less in terms of preventing injury against them than in terms of ensuring their legal subjugation." (398)

22. In 1905, a Royal Commission on the Condition of Natives in West Australia reported:

> "Your Commissioner visited the gaols at Carnarvon, Broome, Roebourne, and Wyndham, and is able to place on record his high appreciation of the human supervision and considerate treatment exercised by the gaolers over their aboriginal prisoners… Two very degrading yet remediable features of the prison system are the neck-chains, and their continuous use – morning, noon, and night – usually through the entire period of sentence." (18)

23. Today in Western Australia, Aboriginal people make up less than 4 percent of the state population but a staggering 40 percent of the prison population. At least they are no longer kept in neck-chains.

24. Since the Royal Commission into Aboriginal Deaths in Custody in 1991, over 500 First Nations people have died while imprisoned in Australia. In 2020-2021 alone, 13 prisoners died in custody in WA – five of them Aboriginal.

25. Returning the NSW Aborigines Protection Board, as I have said, the Board was established in 1883. In the process of researching its origin, I found an interesting example of the importance of words in the process of truth-telling.

26. The Bringing Them Home Report (published in 1997) described the purpose of the Board as follows:

> In 1883 the Aborigines Protection Board was established to manage the reserves and **control the lives of** the estimated 9,000 Aboriginal people in NSW at that time. The

> Board took over the reserves at Maloga and Warangesda. After the Australian Capital Territory was established in 1911 the Board compelled all Aboriginal people in the Territory (including those who had been granted land for farming) to move to the Egerton Mission Station at Yass. When that mission closed two years later the residents became fringe-dwellers on the outskirts of Yass until another forced move to Hollywood Mission in 1934. The few Aboriginal children who lived in the ACT came under the control of the NSW Protection Board.

27. However, Find and Connect, an Australian Government website establish in 2011 as part of a "project of the Commonwealth to collect resources about former child migrants and history of child welfare", revealed a subtle change in language:

> The Aborigines Protection Board was established to manage reserves and **the welfare** of the estimated 9000 Aboriginal people living in New South Wales in the 1880s. It was part of the Department of Police and was chaired by the Commissioner of Police. It met weekly in Phillip Street in Sydney. Board members, including George Edward Ardill of the Sydney Rescue Work Society, developed legislation in the period 1909 to 1935 that restricted the capacity of Aboriginal people to choose where they lived, enjoy education at the same standard offered to the rest of the community, set their own employment contracts, drink alcohol or receive family endowment in cash. After considerable controversy, the Aborigines Protection Board was replaced by the Aborigines Welfare Board in 1940.

28. One reason the objects of the Board may elude consistent description is the fact that it was established without legislative authority. That was the position until 1909, when the Aborigines Protection Bill was introduced. The Bill was read for a second time in the Legislative Assembly on Tuesday 14 December commencing at 11.50pm. The member who introduced the Bill, Wood said:

> I understand that hon. members on either side regard this as essentially a non-contentious measure, as far as principle is concerned. I am going to ask the House to give me the second reading of the bill to-night.

29. Wood continued:

> The main provisions of this bill do not institute anything new. They simply give the board greater powers in certain directions, which, I am sure, hon. Members will admit are highly proper and legitimate ones. In the first place, for the purpose of better providing for the care of aborigines, the board have vested in them greater powers than exist at present in relation to dealing with reserves that is, areas specially set apart for aborigines' camps…
>
> The bill does not propose to amend the constitution of the board, but it proposes to affect their powers to some extent, not by conferring absolutely new powers on them, but by extending the powers they already possess-that is to say, they have general powers to control reserves which are considered sufficient and necessary, but are not as good as they

might be in some respects. As to the supply of liquor to aborigines, I am sure that every hon. member is anxious to see it restricted as much as possible, and there are provisions in the bill dealing with that.

30. He mentioned in passing that the Bill had been drafted by the Aborigines Protection Board which, it will be recalled, was part of the Department of Police and chaired by the Commissioner of Police. How times have changed: shout out to retired deputy parliamentary counsel, John Ledda who is here tonight.

31. The debate took just seven minutes. The Bill was committed *pro forma*.

32. The second reading in the Legislative Council was to like effect:

> J Hughes: I do not think hon. members will require a very long explanation of this bill. It is a very simple one for the protection of what is left of the aborigines of Australia, and under the heading of "Aborigines" comes that unfortunate class who have aboriginal blood in them. Difficulties arise in connection with these people, as hon. members who know the country understand better than I do, and at the present time, though there is an Aborigines Protection Board, they have not sufficient power to deal with the position as they find it in many places. For instance, near towns there is no power to move these people on, and keep them out of the reach of temptation. Also in regard to rations and blankets issued to them, there is no power for the board to follow these things and see that they are not misused. As hon. members know, there is a good deal of trouble in these respects, and this bill simply proposes to give full power to the board to regulate the whole matter.

33. Only one person spoke to the Bill in the Legislative Council, one EW Fosbery:

> The condition of the aborigines in the old times is a standing historical disgrace to the whole community. I found them wandering about like pariah dogs, seeking for scraps and bones. They had no clothing, nothing to shelter them from the weather, and worst of all, the women and the children were infected with a loathsome disease in very large numbers. This state of affairs, fortunately for the community, has been in a great measure remedied, and before very long I fear that the Aborigines Board will have to administer a state of affairs which, as it exists at the present time, is not likely to continue very much longer. There is no question about it that **many of the people who are now living on the valuable reserves that have been granted** are respectable hardworking men, and to my knowledge a good many of them, strange to say, are total abstainers. But there are a number of intruders who come on these camps and they will not remove, and there is a feeling of affinity, almost of affection, which exists between the aborigines of a tribe which prevents them from parting from any one of their blood, even if they are only quadroons.

34. There was, however, extensive discussion of the Bill in Committee. Highlights include

    (a) Rejection of a proposed amendment to make it clear that the Board's funds could be expended on seeking medical assistance for Aborigines. Why was

that necessary, members asked? Well, said the proponent of the amendment, because 50% of Aborigines on the reserves have consumption, a disease unknown to them before they came to live on the reserves.

(b) Rejection of a clause that guaranteed annual funding to the Board of £20,000. It was considered undesirable to fix the amount because it was expected that, over time, the current amount might be excessive because the numbers of Aboriginal people were dwindling.

(c) One member sought reassurance that the parents of Aboriginal children taken into apprenticeships would not be able to get their hands on the apprentices' income. It was emphasised that the children's income must be controlled by the Board and spent for their protection (at 4549).

(d) the reason for fixing the age at which an apprenticeship ended at 21 and not 18 was to "afford protection in the matter of recovery of wages" for an extended period (at 4550).

(e) An attempt to introduce a removal power similar to that ultimately enacted in 1915 failed because it was considered unnecessary, there being a power to remove a child who could be proved in court to be "neglected".

35. In January 1915, the Legislative Assembly debated the amendments proposed in the Aborigines Protection Amending Bill including the removal power in clause 13A:

> "The Board may assume full control and custody of the child of any aborigine, if after due inquiry it is satisfied that such a course is in the interest of the moral or physical welfare of such child.
>
> The Board may thereupon remove such child to such control and care as it thinks best.
>
> The parents of any such child so removed may appeal against any such action on the part of the Board to a Court as defined in the Neglected Children and Juvenile Offender Act 1905, in a manner to be prescribed by regulations"

36. The Bill had bipartisan support. A small number of members spoke against the proposed clause 13A amendment. The Bill was passed 28 to 3.

37. The principal opponent of the Bill was Patrick McGarry, a longstanding politician in NSW as the member for Murrumbidgee. Born in Ireland, he arrived in NSW in 1880 to assist in organising seamen on ships between Melbourne and Sydney during the maritime strike. He then went to Gundagai goldfields and worked for a time in the northern sugar district. He was a member of the Australian Labor Party until 1905 when he left the ALP because, contrary to the ALP, he supported military conscription.

38. During the debate, McGarry told the house that, 25 years ago, he had travelled "the interiors" (the bush) and met with Aboriginal people, was "among them", and found them "charitable and kind enough to divide a meal when they could not spare it".

39. McGarry was evidently a man of courage. A few years later, on 8 March 1918, the Northern Star Newspaper reported on proceedings in the Legislative Assembly the

previous evening after a member moved at 9:49pm to adjourn the House until Tuesday.

The Newspaper said:

> "Mr McGarry, speaking on the motion, objected to the rising of the House at such an early hour when so much private members' business was waiting to be discussed. He appeared to be in a very excited frame of mind, and at one stage he turned to the Minister in charge of the House and shouted "Move that I no longer be heard. If you do, you'll be wanting me for a quorum one night, and I won't be here" (A voice: "We don't want you here). Mr McGarry continued his explaining why the House should continue sitting, during which there was a general exodus of Government members from the Chamber until only one member was left, who called attention to the state of the House. The quorum bells were rung, but no one appeared, and at expiration of the three minutes the House was counted out. It will meet again on Tuesday."

40. The debate included the following quotes:

Those in favour of the amendment:

"I am sorry to say that, generally speaking, the rising generation of these people are mostly half-castes; very few pure bloods are left; and the half-castes remain in the camp to be brought down to the same standards as the aborigines" (J H Cann (pg 1951))

"If we give the board the powers I am seeking to bestow under this amending bill…aboriginal people will soon become a negligible quantity and the young people will merge into the present civilisation and become worthy citizens" (J H Cann (ph 1951)

"In the first place, before we enter seriously upon the consideration of legislation of this character, we should bear in mind the predominant characteristics of the aborigines, who are a difficult race to deal with

"On the North Coast, some of the aborigines need a good deal of looking after; they are about the lowest type of human creature it is possible to meet" (Storey, pg 1961)

"They are very slow to learn, but they learn a little under the tuition of white people. Left to themselves, however, they would sit down and do nothing but revert to their old practices of catching possums and kangaroos" (Burgess, pg 1961)

Those against:

"There is something much more serious to be considered, and that is the question of separating the child from its parent. To me the separating of a swallow from its parents is a cruelty." (McGarry, pg 1952)

"These people are unfortunate because, in the interest of so-called civilisation, we have over-run their country and taken away their domain." (McGarry, pg 1953)

"We are told that the parent have an appeal. What does the appeal mean? Suppose a poor aboriginal woman goes into court, who will listen to her? Who will defend her and submit her case?" (McGarry, pg 1953)

"It is the mean settler who wants to get absolute control over these children to make them work for him. He is assisted by the mean policeman, who depends for promotion on the mean settler and the mean squatter" (McGarry, pg 1953)

"You can never improve the child by taking it away from the parent. Would honourable members advocate that with the white race?" (McGarry pg 1954)

"I have been amongst these aboriginals and have found them charitable and kind enough even to divide a meal when hey could not spare it. The manner in which we treat them is no credit to us" (McGarry pg 1955)

"I have always felt that we have never done our duty to the aboriginal owners of this country; and that we have neglected our manifold duties to them in many directions" (Black, pg 1957)

> "If the aborigines of this country had been treated as they ought to have been there would not now be so many half-castes, the scum of the community, so many cases of drunkenness among the aborigines, and the race would not rapidly be becoming extinct" (Black, page 1957)
>
> "It is all very well for hon. Members to say that the aborigine is a creature of weak intellect. We are making him weak and keeping him weak, and if we continue the practices of the past, we shall keep him weak" (Fern pg 1962)
>
> "[The bill] means nothing more nor less than the absolute despoiling of the black people of this country of their progeny after we have taken their lands. (Scobie, 1964)

Abject failure in achieving their stated goals of protecting First Nations peoples

41. The unheeded voice of Patrick McGarry, who spoke so passionately against the Bill, was entirely vindicated by the findings of the Bringing Them Home Report. Even the term "Stolen Generation" echoed his interjection at the outset of the debate that to place the Board in loco parentis was to steal the child away from the parents.

42. The Bringing Them Home Report said:

> Governments and missionaries also targeted Indigenous children for removal from their families. Their motives were to 'inculcate European values and work habits in children, who would then be employed in service to the colonial settlers' (22)
>
> By the late nineteenth century it had become apparent that although the full descent Indigenous population was declining, the mixed descent population was increasing. 'Most colonists saw them as being in a state of racial and cultural limbo' (23)
>
> The ultimate purpose of removal was to control the reproduction of Indigenous people with a view to 'merging' or 'absorbing' them into the non-Indigenous population, Indigenous girls were targeted for removal and sent to work as domestics (25)

43. A century after the policies of the protection era were enacted, and even after the publication of the Bringing Them Home Report which so carefully exposed the negative impact of those policies, we would see the suspension of the *Racial Discrimination Act* to permit the implementation of an "emergency intervention" in First Nations communities in the Northern Territory. The intervention was the government's response to the report of a Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse titled "Ampe Akelyernemane Meke Mekarle: Little Children Are Sacred".

44. The message of the "Little Children Are Sacred" report was that First Nations communities in the Northern Territory had broken down to a point of widespread violence, substance and alcohol abuse, suicide and child abuse. As I have endeavoured to explain, this was not a new situation and government intervention was not a new response.

45. The government was criticised for weaponising the Little Children Are Sacred report and the views of community members as a Trojan horse to resume control of First Nations rural communities. The intervention gave effect to policies that eerily echoed

those of the protectionist era. The operation of those policies did not end until just over a month ago with the discontinuance of income management via cashless welfare.

46. Today, First Nations peoples comprise 3% of the Australian population but 29% of the Australia's adult prison population and 48% of Australia's youth prison population. A First Nations teenage boy is more likely to go to gaol than to go to university. The statistics are getting worse. In the 2020/21 financial year, there was an 8% increase in the rate of imprisonment of First Nations people nationally. The rate of children in out-of-home care has tripled in the last 15 years. The rate of suicide among First Nations people is twice that of non-Indigenous people. Suicide is the leading cause of death for First Nations children between the ages of 5 and 17.

The reckoning to be done to avoid such mistakes in the future.

47. The human tragedy of the history of child removal is too large and too distressing to describe. I will confine myself in concluding to a legal point which is no less distressing but easier for me, as a lawyer, to articulate.

48. "Equal justice" embodies the norm expressed in the term "equality before the law"[6] and is an aspect of the rule of law.[7] It is a principle that requires courts, so far as the law permits, to treat like cases alike and different cases differently according to their differences.

49. In *R v Green and Quinn* [2010] NSWCCA 313, applying the notion of equal justice, Allsop P and I said, at [4]:

> The source of the principle elevates its consideration to one of importance, not only as part of the operation of the legal system to bring about just punishment to the individual, but also as part of the operation of the administration of justice as a whole as a consideration conformable with the avoidance of bringing about unjust results. These individual and community aspects of the importance of this attribute of equal justice must also be recognised to take their place alongside other important considerations in the administration of justice.

50. The issue in that case was whether a Crown appeal against two manifestly inadequate sentences should be allowed in circumstances where a third offender had also received a very lenient sentence, but the Crown had not appealed in the third case. In other

[6] *Green v The Queen; Quinn v The Queen* [2011] HCA 49 at [28] and fn: "A norm said to be traceable to Solon's "isonomia" transported to England in the 16th century as "isonomy" and displaced in the 17th century by "equality before the law", "government of laws" and "rule of law": Hayek, The Constitution of Liberty: The Definitive Edition, (2011) at 238"

[7] *Green v The Queen; Quinn v The Queen* [2011] HCA 49 at [28] citing Dicey, Introduction to the Study of the Law of the Constitution, 7th ed (1908) at 198; Holdsworth, A History of English Law, (1938), vol X at 649.

words, the success of the appeal would result in unequal treatment of the three offenders. Allsop P and I said at [28]:

> To intervene, in our view, would create unacceptable disparity between the sentences passed by this Court on the respondents and the sentence that stands in respect of [the third offender], and so would suffer the Court to become the instrument of unequal justice.

51. It is not as if the notion of equal justice was not well-understood in Australia at the time the removal policy was introduced. This is reflected in the early decisions of the High Court. In the same year the *Aborigines Protection Act* came into force in NSW, the High Court sat for 9 days to determine a case stated by the President of the Commonwealth Court of Conciliation and Arbitration arising out of an industrial dispute in the timber trade. The dispute arose out of an attempt to establish a common "log" or schedule of wages that would apply throughout the five States but which provided that in Western Australia the rates of wages paid should be higher by 15 per cent than elsewhere: *Federated Saw Mill v James Moore & Sons Pty Ltd* [1909] HCA 43; (1909) 8 CLR 465.

52. While the timber trade was stripping country bare across the nation, the High Court had no difficulty recognising the importance to workers of equal treatment before the law. Higgins J said: “Inequality in money payments may be the best means of producing equality in living conditions; and inequality in living conditions, as between workers doing the same kind of work, is one of the most fertile sources of industrial discontent and unrest.”

53. The entitlement of Aboriginal people to equal treatment before the law barely entered the debate surrounding the removal power, save in the remarks of the excitable Mr McGarry.

54. The simple fact is that statutory law reflects the voices heard by the law-makers. The men who passed the Bill that authorised what Patrick McGarry rightly termed the stealing of an Aboriginal child from its parents heard the voices of police and settlers. Whether with ill-will or misguided goodwill, the NSW parliament that day suffered the rule of law to become an instrument of oppression under the guise of protection. Today, we must recognise the need for parliaments to hear a different voice.