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The dehumanising violence of racism: the role of law

Shelley Bielefeld

Southern Cross University

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The Dehumanising Violence of Racism – The Role of Law

Brooke Shelley Bielefeld
BLJS (SCU) LLB(Hons) (SCU)

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Doctorate of Law award within the
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DECLARATION

I, Shelley Bielefeld, certify that the work presented in this thesis is, to the best of my knowledge and belief, original, except as acknowledged in the text, and that the material has not been submitted, either in whole or in part, for a degree at this or at any other university.

I acknowledge that I have read and understood the University’s rules, requirements, procedures and policy relating to my higher degree research award and to my thesis. I certify that I have complied with the rules, requirements, procedures and policy of the University.
ABSTRACT

My thesis explores numerous issues ranging from justice, ethics, law, truth telling and responsibility. These issues are significant in light of the illegitimate foundations of the Australian nation and the subsequent genocide perpetrated against Indigenous peoples. The colonial quest for white supremacy, racial purity and accumulation of property has been facilitated by oppressive exercises of parliamentary power. This thesis analyses several legislative examples of this type, highlighting the trauma that has arisen from past oppressive exercises of parliamentary power and continues due to contemporary legislation. I also critique a selection of cases which have challenged this contemporary legislation, examining the manner in which legal positivism and formalist methodology ensure that white privilege continues to be maintained at the expense of Indigenous Australians. These cases demonstrate the inherent racism of law and the lack of effective checks on oppressive exercises of parliamentary power. Where governments engage in abuses of power the courts are often looked to in the hope that justice will flow from on high. Yet courts are also part of the structure of government and consequently have been instrumental in upholding and justifying the colonial status quo. Along with the parliament and the executive the courts have been instrumental in carrying on the tradition of Australia’s racist colonial legacy. This has resulted in ongoing injustice and trauma for Indigenous Australians. The legacy of white sovereignty in Australia has brought colonialism, parliamentary sovereignty, Social Darwinism, white supremacy, capitalism, legal positivism and the propaganda needed to reinforce this dominant discourse. The consequences of this legacy disadvantage Indigenous Australians to this day, and maintain the status quo of oppressive colonial power relations that first began with the planting of the British flag, and the myth of terra nullius, the fiction that the land belonged to no-one. My thesis explores the racist laws and policies detrimentally affecting Jews under Nazi Germany and Aborigines in Queensland, highlighting parallels between them and the way they reveal an intersection between law and trauma. I investigate the role that law plays in facilitating violence to groups who are targeted as undesirable by government on the basis of race, and the manner in which the past continues to permeate the present. The racist foundations of the Australian nation remain in place, ensuring that Aboriginality sovereignty is ignored by colonial governments and that self-determination for Aboriginal peoples remains elusive. Indigenous perspectives require the development of a different legacy, one
that acknowledges Indigenous sovereignty, their right to self-determination and their right to freedom from oppressive exercises of parliamentary power.
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Lastly, but not least, I wish to acknowledge the Indigenous peoples of Australia who have
miraculously survived the onslaught of colonial oppression since 1788. Their persistence and
endurance through the very worst of life experiences is an inspiration and a testament to their
strength of spirit.
Remnants of the past ...

Remnants of the past linger here
But the worst of Australian racism isn’t over yet I fear
I read recently of an Aboriginal boy
Who’d had a noose tied around his neck
And was dragged along a riverbank
Certainly not an account of racist violence held in check
His friend was tied to a tree
And forced to watch the awful brutality
So horribly telling of our colonial legacy
The echoes of a not so distant past
I wonder how long this racial hatred will last
I wonder about how far we’ve come
And what we can do about the serious trauma
All the damage done
I also wonder about complicity
In an ongoing colonial mentality
When our neighbour or friend tells us a racist joke
Do we laugh and smile
Or do we challenge the so-called ‘humour’
Of the typical Aussie bloke
I wonder about the connection
Between racist words and racist violence
There seems to be a link, I think
Yes I wonder about how far we’ve come
And I feel deep concern over the damage done
How can we overcome our colonial legacy?
And interrupt the ongoing colonial mentality
And learn to treat all humans respectfully
Acknowledging the precious essence of human dignity
That resides in every one of us.
The Perils of Doing a PhD

It’s hard to be doing a PhD
Looking at so much evil in the past century
My research concerns the horrors of humanity
Of murderous insanity
Where extermination by the State
Was described as some natural inevitable fate
The oppressors conveniently forgetting
That they were the ones who had the guns
And there was nothing ‘natural’ about that
Images of Holocaust victims float unbidden to my mind
Images of persecuted Aborigines are not far behind
I consider how Aborigines suffered in Australia
I study what happened in Nazi Germany
And I see much striking similarity
In the way each regime targeted a group
They considered ‘undesirable’ on
The basis of the bogus construct of race
And then sought to remove these people
From every possible public space
I study the law used for persecution
And I wonder at the law’s ability
To attempt to legitimate such oppression
I am struck deeply
By the awfulness of lawfulness
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Chapter 1

INTRODUCTION

‘Law seeks to convince us that ‘what is ought to be’, yet we are not convinced.’

My thesis explores numerous issues ranging from justice, ethics, law, truth telling and responsibility. These issues are significant in light of the illegitimate foundations of the Australian nation and the subsequent genocide perpetrated against Indigenous peoples. The colonial quest for white supremacy, racial purity and accumulation of property has been facilitated by oppressive exercises of parliamentary power. This thesis analyses several legislative examples of this type, highlighting the trauma that has arisen from past oppressive exercises of parliamentary power and continues due to contemporary legislation. I also critique a selection of cases which have challenged this contemporary legislation, examining the manner in which legal positivism and formalist methodology ensure that white privilege continues to be maintained at the expense of Indigenous Australians. These cases demonstrate the inherent racism of law and the lack of effective checks on oppressive

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5 Contemporary legislation will be critiqued in Chapter Four.
exercises of parliamentary power. Where governments engage in abuses of power the courts are often looked to in the hope that justice will flow from on high.\(^7\) Yet courts are also part of the structure of government and consequently have been instrumental in upholding and justifying the colonial status quo.\(^8\) Along with the parliament and the executive\(^9\) the courts have been instrumental in carrying on the tradition of Australia’s racist colonial legacy.\(^10\) This has resulted in ongoing injustice and trauma for Indigenous Australians.\(^11\) Despite the mythical image of Australia as the good white nation\(^12\) there remains much to be done in terms of the nation being accountable for past and present atrocities being carried out against Indigenous Australians. Healing, reparation, acknowledgement of Indigenous sovereignty, the right to self-determination and a treaty continue to be outstanding in terms of the nation addressing the wrongs perpetrated by over two hundred years of colonial violence.\(^13\) The legacy of white sovereignty in Australia has brought colonialism, Social Darwinism, white supremacy, capitalism, legal positivism and the propaganda needed to reinforce this dominant discourse.\(^14\) The consequences of this legacy disadvantage Indigenous Australians to this day, and maintain the status quo of oppressive colonial power relations that first began with the planting of the British flag,\(^15\) and the myth of terra nullius, the fiction that the land belonged

\(^7\) Geoffrey Robertson, above n 3, 20–21, 25 and 42.
\(^9\) Sean Brennan, Larissa Behrendt, Lisa Strelein and George Williams, above n 4, 7–8.
\(^12\) Ghassan Hage, White Nation – Fantasies of White Supremacy in a Multicultural Society (1998) 18 and 78–79.
\(^15\) Geoffrey Robertson, above n 3, 71.
to no-one. The racist foundations of the Australian nation remain in place, ensuring that Aboriginal sovereignty is ignored by colonial governments and that self-determination for Aboriginal peoples remains elusive. Indigenous perspectives require the development of a different legacy, one that acknowledges Indigenous sovereignty, their right to self-determination and their right to freedom from oppressive exercises of parliamentary power.

In my thesis the following research questions are addressed:

1. What impact does discriminatory legislation have on minorities targeted by government on the basis of race?
2. What similarities are there between the persecution of Jews under Nazi Germany and Indigenous peoples in Queensland?
3. What role does the dominant theory of legal positivism play in perpetuating racist oppression?
4. What role does parliamentary sovereignty play in enabling racist discriminatory legislation to be imposed on Indigenous peoples and does this call into question Australia’s claims to be a democracy?
5. How far has Australia evolved in terms of its racist colonial legacy?

Alongside the theme of opposition to oppressive exercises of parliamentary power is an interest in the intersection of law and trauma. I am disturbed by the ways in which racist law facilitates trauma. In each regime I study there are laws facilitating the trauma experienced by members of the target groups. I am also concerned about the way that law endorses trauma. Law has a powerful legitimating role in society. As Geoffrey Leane suggests ‘law determines as well as describes society’. Likewise, Barbara Flagg claims ‘legal doctrines do carry normative messages’. Similarly, Ian Haney Lopez argues ‘[l]aw is one of the most powerful mechanisms by which any society creates, defines, and regulates itself.’

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17 Aileen Moreton-Robinson, above n 13, 3–4.
19 Aileen Moreton-Robinson, above n 13, 4; Irene Watson, ‘Settled and Unsettled Spaces’, above n 2, 40 and 43.
21 Geoffrey Leane, above n 1, 931.
lawful in a society is often perceived to be legitimate.\textsuperscript{24} Even the most heinous immoral behaviour is cloaked in legitimacy once legislation has been passed to lawfully permit such behaviour. As Colin Tatz maintains, ‘law gives legitimacy to prejudice, creates notions of difference and inferiority in the minds of an adult public, [it] ordains and perpetuates racism.’\textsuperscript{25}

The bulk of my research centers on the racist laws and policies detrimentally affecting Jews under Nazi Germany and Indigenous peoples in Queensland. I have chosen to focus on one jurisdiction in Australia in order to be able to examine laws and policies in more specific detail, although it is clear from government records and the testimony of Indigenous peoples that similar laws and policies were in place in all Australian jurisdictions.\textsuperscript{26} I have selected the jurisdictions of Nazi Germany and Queensland because they offer prime examples of the intersection between law and trauma, and the role that law plays in facilitating violence to groups who are targeted as \textit{undesirable} by government. My research is opposed to the lawful oppression of marginalised groups. I believe that this topic remains just as relevant today as it was under the Nazi regime and in Queensland in the early to late 1900s.

In the second chapter of my thesis I will explore the laws and policies detrimentally affecting Jews under Nazi Germany. In the third chapter of my thesis I will examine the laws and policies detrimentally affecting Indigenous peoples in Queensland. In the fourth chapter of my thesis I undertake a comparative analysis of the laws and policies affecting Jews under Nazi Germany and Indigenous peoples in Queensland, highlighting parallels between them. This is not to say that I see each legal and political system as operating in the same way, but rather that I see some similar themes and philosophies influencing the government action taken under each regime. I also consider that each target group has suffered serious trauma which leaves its scars in the present generation, creating a wounded national psyche in both Germany and Australia.\textsuperscript{27} My purpose in choosing to undertake a comparative analysis of these two jurisdictions is that I find that while most people recoil in horror when thinking of Nazi Germany, many Anglo-Australians seem to consider that there is nothing wrong with

\begin{itemize}
\item \textsuperscript{24} Colin Tatz, ‘Racism, Responsibility and Reparation: South Africa, Germany and Australia’ (1985) 31(1) \textit{Australian Journal of Politics and History} 162, 165.
\item \textsuperscript{25} Colin Tatz, above n 14, 51.
\item \textsuperscript{26} Human Rights and Equal Opportunity Commission, above n 3.
\end{itemize}
what has happened to Indigenous peoples through colonisation, or at least, that if some things were wrong they should have ‘gotten over it’ by now.28 Examining the legislation and policies of these jurisdictions will reveal some of the complexities associated with getting over such extreme government discrimination.

A continuous theme running throughout my thesis is concern about oppressive acts of parliamentary power. When I speak of ‘oppression’ here it is with reference to the perspectives of members of those groups targeted by the government for discriminatory treatment.”29 It is my opinion that it is their perspective rather than that of government which determines whether treatment warrants the label ‘oppressive’. As Anthony Cook states, ‘one must consider carefully the view from the bottom – not simply what oppressors say but how the oppressed respond to what they say.’30 For it is easy for governments to deny that they are engaged in oppressive conduct. Furthermore, governments have the power and the resources to publish their denials very effectively.


28 This type of thinking is reflected in the politics of Pauline Hanson and her ‘One Nation’ political party. Hanson was very forthright about opposing affirmative action policies and land rights to redress historical injustices for Aboriginal peoples. She considered these policies to be ‘reverse racism’ against non-Indigenous people. See Commonwealth, Parliamentary Debates, House of Representatives, 10 September 1996, 3860 (Ms Pauline Hanson, Member for Oxley). These attitudes influenced the policy making of the Howard government when it came to abolishing ATSIC and amending the Native Title legislation to reduce rights of Aboriginal peoples, see Aileen Moreton-Robinson, ‘The House that Jack Built: Britishness and White Possession’ (2005) 1 Australian Critical Race and Whiteness Studies Association Journal 21, 21–22; Mike Steketee, ‘And the beat goes on’, The Australian, 8 September 2006, <http://kooriweb.org/foley/news/2006/september/aust8sep06.html> at 26 November 2009. This type of thinking was also reflected in Donovan’s 1991 public opinion poll, Murray Goot and Tim Rowse, Divided Nation? Indigenous Affairs and the Imagined Public (2007) 154. For a counter position see Irene Watson, ‘Illusionists and Hunters: Being Aboriginal in this occupied space’ (2005) 22 Australian Feminist Law Journal 15, 21.


One of the similar features of each regime under study is the way in which governments cloaked their legislation in benevolent sounding language. George Lakoff refers to this tendency as ‘Orwellian language’ which is ‘language that means the opposite of what it says’. Thus for Nazi Germany their legalized murders of millions were cloaked in the language of ‘racial hygiene’ and portrayed as necessary for the ‘protection’ of national security. Similarly, in Queensland there were numerous pieces of ‘protection’ legislation which authorised appalling treatment of Aboriginal peoples, involuntary incarceration on reserves, slave labour and forcible removal of Aboriginal children.

In the fifth chapter of my thesis I explore some recent examples of what has happened when oppressive legislation detrimentally affecting Indigenous peoples enacted during the regime of the Howard government was challenged in Federal Courts in Australia. The general thrust of the case law examined reveals a pattern of oppression which is detrimental to the interests of Aboriginal peoples. I examine in detail the judicial reasoning in three cases, *Kartinyeri v Commonwealth*, *Nulyarimma v Thompson* and *Wurridjal v Commonwealth*. I also critique the legislation which was challenged in each of these cases and argue that such legislation constitutes oppressive exercises of parliamentary power. Thus my research is part historical and part contemporary. My aim is to reveal that past colonial legislation and policy has a definite link to contemporary legislation and policy put in place under the Howard government and to illustrate the dangers of continuing in this vein. There are indications of some positive changes under the Labor government with the apology to members of the Stolen Generations and their review of the Intervention, yet as I argue in Chapter Six, there is clearly a long path to travel if non-Indigenous Australia is serious about healing the wounds inflicted by over two hundred years of racial oppression.

31 George Lakoff, *Don’t Think of an Elephant – know your values and frame the debate* (2005) 22.
33 *The Aboriginal Protection and Restriction of the Sale of Opium Act 1897* (Qld); *The Aboriginals Preservation and Protection Acts 1939 to 1946* (Qld); *The Aborigines and Torres Strait Islanders Affairs Act 1965* (Qld); *The Aborigines Affairs Act 1967* (Qld); *The Aborigines Act 1971* (Qld).
My research is also about the racial privilege of law, the ways in which law in Australia typically privileges white Anglo-Australian concerns at the expense of the concerns of Indigenous peoples.\textsuperscript{37} The election of the Howard government in 1996 reinvigorated the racism of successive Australian governments.\textsuperscript{38} It is likely that it will take some time to undo the damage done under the Howard years. One of the chief characteristics of race relations under the Howard regime was a complete inability to acknowledge the link between Australia’s historical past legislation and policy and the contemporary situation of disadvantage faced by Aboriginal peoples. Colin Tatz points out that much of Australia’s past history in interacting with Aboriginal Australians is linked with present day disadvantage. Writing in 2003 Tatz states:

A major underpinning, almost an article of faith, of Australia race relations history has been a Social Darwinist notion that the unfittest don’t survive: thus Aborigines, or especially those known by the term “full blood”, were destined to disappear in the face of white civilisation. That they were succumbing to disease was all too evident. That they were perishing through the premeditated actions of settlers was less so, but was part of a mindset that beheld extinction as inevitable. We need to open our eyes to just how much premeditation has been at work in the 215 years since the British arrived, to set the present predicament of Aborigines and [Torres Strait] Islanders into context, and to recognise just how much of the past underlies, even suffuses, the present-day Aboriginal life and the responses of Aborigines to today’s circumstances.\textsuperscript{39}

Although ‘racism is often easier to see in terms of our past that our present,’\textsuperscript{40} in this research I argue that clear links exist between past racist policy and contemporary policy.

A. The Nature of Racism and the Role of Law in its Construction

My research is also largely about the devastating impact of racism. Gitta Sereny, a journalist who has undertaken much significant work on the Holocaust, has stated that ‘[i]n any discussion of the problems in our world today, racism must rank high.’\textsuperscript{41} Racism certainly has

\begin{itemize}
\item \textsuperscript{38} Andrew Markus, \textit{Race – John Howard and the remaking of Australia} (2001).
\item \textsuperscript{39} Colin Tatz, above n 3, 105.
\item \textsuperscript{40} David Hollinsworth, above n 3, 14.
\item \textsuperscript{41} Gitta Sereny, above n 27, 363.
\end{itemize}
had and continues to have practical consequences of extreme disadvantage for those
denigrated by negative racial stereotypes.42

David Hollinsworth notes ‘the expression and manifestations of racism vary markedly over
time’.43 Thus while this generation may look back at past generations and consider their
behaviours to be blatantly racist, future generations may well make a similar assessment
regarding this present generation.44 Bearing this in mind, I will consider some of the racial
policies under former Prime Minister Howard and reflect on their continuation under the
Labor government.

Racism has a long history in Western societies, although ‘the idea of biological racial
difference lost much of its legitimacy in the aftermath of the Holocaust.’45 Unfortunately the
effects of this type of thinking live on in Australia. As recently as 2005, an academic at
Macquarie University, Associate Professor Andrew Fraser, engaged in racist commentary on
the biological inferiority of Aborigines and Africans, espousing principles tantamount to
white supremacy.46 Fraser claimed that “an expanding black population is a sure-fire recipe
for increases in crime, violence and a wide range of other social problems”.47 When told that

Watson, ‘Settled and Unsettled Spaces’, above n 2; Irene Watson, ‘From a Hard Place’, above n 3; Aileen
Moreton-Robinson, above n 28; Rosalind Kidd, The Way We Civilise (1997); Garth Nettheim, Out Lawed:
Queensland’s Aborigines and Islanders and the Rule of Law (1973); Garth Nettheim, Victims of the Law –
Black Queenslanders Today (1981); Henry Reynolds, Dispossession – Black Australians and White Invaders
(1989); Kevin Gilbert, ‘Australian Racism’ in Irene Moores (ed), Voices of Aboriginal Australia: Past
43 David Hollinsworth, above n 3, 16.
44 Ibid.
45 Andrew Markus, above n 38, 6; and see Gillian Cowlishaw, ‘Racial positioning, privilege and public debate’
news/national/academic-stirs-fight-over-race/2005/07/15/1121429359329.html> at 26 November 2009;
talks/counterpoint/stories/s1424337.htm> at 26 November 2009; Alex Miller, ‘Unions, free speech and
November 2009.
47 Andrew Fraser cited in Tim Dick, above n 46. Despite the claims of criminality being linked to people of a
particular race (such as were made by Andrew Fraser) there seems to be little proof that suggests levels of
criminality have more to do with race than with poverty, Rob White and Fiona Haines, Crime and
Criminology – An Introduction (1996) 96–97. The emerging literature on whiteness reveals that much
cultural capital has been given to those with white skin where the members of a white group are seen to take
on all of the virtues of other members of that group, whereas for people of colour the opposite is true. This
constructs a positive identity for whites and a negative identity for people of colour – see Ian Haney Lopez,
above n 23, 28.
his statements were racist Fraser said he was engaging in ‘racial realism’ rather than racism.\textsuperscript{48} When faced with disciplinary action by the University\textsuperscript{49} and pressure from groups opposed to racism Fraser lodged a complaint with HREOC ‘alleging political discrimination and anti-white racial vilification’, revealing just how inadequate a grasp he has on these concepts.\textsuperscript{50}

Throughout the eleven years of the Howard government there was a reactivation of racism,\textsuperscript{51} which can be seen in the policies encouraged by ‘One Nation’ and adopted by the Howard government,\textsuperscript{52} sparking much public debate on race relations. Racism is quite obviously not a dead issue in the land of the ‘fair go’, despite the view expressed by ‘politicians, media academics and religious leaders … that racism either only exists in small pockets of society or not at all.’\textsuperscript{53} However in Australia there seems to be an impression that something is only racist if it is blatant, conscious, and intentionally offensive. In his thought provoking work \textit{Race – John Howard and the remaking of Australia}\textsuperscript{54} Andrew Markus explains that:

\begin{quote}
 Racism continues to be understood in terms of acts of violence and hatred, in large part its meaning derived from historical association. The racists in history are identified, enumerated. The prime example is Hitler’s policy of genocide, followed by the hooded Ku Klux Klan and the apartheid regime of South Africa. The imagery of racism is of the concentration camp, of lynchings and burning crosses, of segregated park benches bearing the inscription ‘Whites Only’, of snarling dogs and shotgun-wielding police. As such, meaning is anchored in acts of physical violence – beatings, random killings, genocide – motivated by bigotry and hatred. Given this frame of reference, there is resistance to the idea that a person adopting a moderate tone, disclaiming any pretence to superiority and bigotry, and defending ‘common sense’ propositions, can reasonably be labelled racist, irrespective of the substance of the position adopted. Such understanding confuses demeanour with meaning, tone with substance, and avoids consideration of essential elements at the heart of the racial value system …\textsuperscript{55}
\end{quote}


\textsuperscript{49} Alex Miller, above n 46, 3.


\textsuperscript{51} Sarah Maddison, above n 13, 38. This can be contrasted with the type of attitude the previous Federal Government had been trying to foster in relation to Indigenous Australians, see for example former Prime Minister Paul Keating’s Redfern speech, which spoke strongly of Australia’s enormous responsibility for ‘failure to bring much more than devastation and demoralisation to Aboriginal Australia’ – ‘Paul Keating’s Redfern Speech’, 10 December 1992, \texttt{<http://www.australianpolitics.com/executive/keating/92-12-10redfern-speech.shtml>} at 26 November 2009.

\textsuperscript{52} Andrew Markus, above n 38, 103–104.


\textsuperscript{54} Andrew Markus, above n 38.
The latter portion of this quote is an apt description of much of the racism that exists in everyday Australia. For racism can be conscious and unconscious. As Richard Delgado and Jean Stefancic point out:

Racism is not a mistake, not a matter of episodic, irrational behavior carried out by vicious-willed individuals, not a throwback to a long-gone era. It is a ritual assertion of supremacy, like animals sneering and posturing to maintain their places in the hierarchy of the colony. It is performed largely unconsciously, just as the animals’ behavior is. Racism seems right, customary, and inoffensive to those engaged in it, while bringing psychic and pecuniary advantages.

Malicious or specific intent is not necessary for racism to occur. It occurs through ‘[c]ommonplace assumptions and everyday practices that have emerged over time’. Such assumptions and practices ‘maintain inequality and reproduce racially based disadvantages.’

Anglo-Australian society is so used to insidious forms of subtle racism that such forms of racism are no longer recognised as extreme. Racism, with its attendant white privilege, has become ‘normal’ within our culture.

Ghassan Hage defines the substance of racism as considering ‘a group of people as less “human” in one way or another than you are’. This type of attitude was held towards members of the target groups in both Nazi Germany and Australia. The consequences of racism for members of the target groups under each regime were ghastly. Race was used as a basis to deny rights of citizenship, access to wealth, fair terms of employment and rights to participate in family life. Specific consequences are considered to flow ‘naturally’ from racial classifications. Thus ‘[o]utward features’ become considered ‘signs of inner characteristics and capacities’.

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57 Ibid.
58 David Hollinsworth, above n 3, 14.
59 Ibid.
60 Ibid.
61 Aileen Moreton-Robinson, above n 53, 85.
62 Henry Reynolds, above n 45, 222.
64 This will be elaborated upon in Chapters Two and Three.
65 David Goldberg, cited in David Hollinsworth, above n 3, 25.
of power within a society. Racism naturalises power imbalances, it “establishes and rationalises the order of difference as a law of nature.”67

The concept of racial groups is both longstanding and widespread. As David Hollinsworth explains:

The idea that there are distinct groupings of humans according to inherited biological characteristics is widely accepted. The assumption that particular visible signs of genetic inheritance such as skin or hair colour or the shape of faces and eyes allow us to recognise the “race” category to which others belong remains strong. So too does the belief that there are predictable linkages between such physical features and particular moral, intellectual, cultural or behavioural characteristics.68

However increasingly scholars consider race to be something socially and culturally constructed rather than scientifically based.69 Hollinsworth states:

While immensely important, beliefs in the biological existence of discrete races are false and deluded. There are virtually no direct connections between genetics and social practices or cultural beliefs. There is no meaningful genetic differentiation that corresponds directly to accepted racial typologies. … races are social constructions that have no reality outside of the beliefs that people hold about them. Despite being false, such beliefs have been strongly held and generate powerful emotions and horrendous conflicts.70

Another scholar who has written persuasively on the constructed nature of race is Ian Haney Lopez, who works in the recently developing field of critical whiteness studies. Haney Lopez argues that ‘races are socially constructed.’71 He also describes the central part played by law in this process of construction.72 Haney Lopez maintains that law is instrumental in the construction of racial identity: ‘to say race is socially constructed is to conclude that race is at least partially legally produced. Put most starkly, law constructs race.’73 Haney Lopez considers that ‘legislatures and courts have served not only to fix the boundaries of race in the forms we recognize today, but also to define the content of racial identities and to specify their relative privilege or disadvantage’.74 He points out that ‘law … defines … the spectrum of domination and subordination that constitutes race relations.’75 These comments have a

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67  David Goldberg, cited in David Hollinsworth, above n 3, 25.
68  David Hollinsworth, above n 3, 25.
70  David Hollinsworth, above n 3, 38, emphasis removed.
71  Ian Haney Lopez, above n 3, 38, emphasis removed.
72  Ibid 9–10.
73  Ibid 10.
74  Ibid.
75  Ibid.
direct bearing on the research undertaken in this thesis, where their accuracy will be demonstrated with numerous legal examples.

Whilst it may be said that race is legally and socially constructed, the ‘constant legal usage’ of racial categorisation has serious adverse consequences for many people.76 ‘[R]acial discourses establish and legitimate real oppression.’77 Haney Lopez argues that bringing about discriminatory outcomes based on race has been the driving agenda behind several laws, thus ‘the very purpose of some laws was to create and maintain material differences between races, to structure racial dominance and subordination into the socioeconomic relations of … society.’78

It is crucial to examine the place of law in the construction of race because law has been the channel through which racist policies have been legitimised and enforced in each of the regimes under study. As Colin Tatz rightly observes:

Race policies and philosophies mean little unless acted upon. The avenue to practice has been through law. Law becomes the vehicle by which the policy achieves procedural validity and political-social legitimacy. Policy becomes enshrined, achieving a kind of holy-writness, one suggesting that the law has magical qualities beyond those of the men who enacted it.79

It seems that once racist policy attains the privileged status of law it is extremely difficult to mount a successful challenge to such law. The repeal of racist laws enacted by parliament seems to be a very lengthy and difficult process, requiring many years of lobbying, and goodwill on the part of parliamentarians to change oppressive laws.80 Repeal is less likely to occur in a colonial legal system such as Australia where ‘there is significant reluctance to disturb the colonial inheritance of 200 years of denial of the rights of Indigenous peoples.’81 Essentially, repeal is unlikely where colonial power relations are threatened.

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76 Ibid 17.
77 David Hollinsworth, above n 3, 27.
78 Ian Haney Lopez, above n 23, 17.
79 Colin Tatz, above n 24, 165.
80 The following are examples of the elaborate research undertaken to try to persuade the Queensland government to repeal its oppressive legislation detrimentally affecting Aboriginal peoples: Foundation for Aboriginal and Islander Research Action Ltd (FAIRA), Beyond the Act (1979); Garth Nettheim, Out Lawed, above n 42; Garth Nettheim, Victims of the Law, above n 42.
81 Lisa Strelein, Compromised Jurisprudence – Native Title cases since Mabo (2006) 1. Note some racist legislation (such as the removal legislation that will be discussed in Chapter Three) has been repealed by Australian parliaments, however much current legislation continues in a similar racist vein (as I will explain further in Chapter Five) and it is difficult to get parliament to change the tenor of such legislation.
There is a long proud Australian tradition of racism, one that runs counter to the popular rhetoric about ‘tolerance’, ‘equality’, and the land of the ‘fair go’. The Federal government’s tradition of racism commenced with the development and implementation of the White Australia Policy. Cassi Plate explains that ‘[f]ear of invasion was sold as the principal reason for the creation of the nation.’ As such, the first major legislative acts were focused on implementing the White Australia Policy. The Commonwealth Immigration Restriction Act 1901 (Cth) required certain people to pass a dictation test when asked to do so. The Pacific Island Labourers Act 1901 (Cth) was enacted to address the issue of South Sea Islanders who worked as slaves in Queensland’s agricultural industry. The Commonwealth Franchise Act 1902 (Cth) prevented Aboriginal peoples, Asians, Africans and Pacific Islanders from being entitled to vote. The Naturalisation Act 1903 (Cth) had similar provisions to the above act. Together these acts constituted the means by which the White Australia Policy was enforced. The White Australia Policy was prominent until the 1960s and remained in place until 1973.

Gwenda Tavan observes that the Commonwealth Immigration Restriction Act 1901 (Cth) was ‘hailed’ by members of Parliament as a means to protect Australia from racial pollution and competition from cheap labour. Then Prime Minister Edmund Barton made a point that this Act was aimed at “the preservation of the purity of the race”. Similarly,

Labour Leader J.C. Watson remarked: “The objection I have to the mixing of the coloured people with the white people of Australia – although … to a large extent tinged with considerations of an industrial nature – lies in the main in the possibility and probability of racial contamination.”

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82 The mythology about these attitudes characterising Australians was greatly emphasised under the years of Prime Minister John Howard.
86 Section 3(a); Greta Bird, above n 85, 128.
87 Cassi Plate, above n 84, 3; Gwenda Tavan, above n 83, 8.
88 Gwenda Tavan, above n 83, 8.
89 Ibid.
90 Ibid.
91 David Hollinsworth, above n 3, 92. It was rescinded by the Whitlam Labour government.
92 Gwenda Tavan, above n 83, 8.
93 Ibid 8–9.
94 Ibid 9.
Thus marks the illustrious beginnings of the Australian nation. One wonders how far we have progressed. Recently, David Hollinsworth recounted an incident which reveals that racism is still as serious an issue as ever in Australia:

In November 2004 David Tomkins, 44, and his son Clint, 23, tied a noose around the neck of a 16 year-old Aboriginal youth and dragged him along a riverbank near Goondiwindi, southern Queensland while his younger companion was tied to a tree and forced to watch. The victim suffered rope burns, head injuries and bruising to his body in the incident, and required hospital treatment.95

The fact that this event occurred in 2004 and not in the distant past shows how racist attitudes remain in rural Australia. Reading this account one could be forgiven for thinking that they were reading about the colonial frontier rather than the modern age. There has been so much done in recent years to raise awareness of racial discrimination in Australia, and yet this horrendous behaviour happened after the enactment of the Racial Discrimination Act 1975 (Cth), after Australia’s ratification of numerous human rights treaties declaring discrimination on the grounds of race to be a violation of fundamental human rights to be treated with dignity,96 after the Royal Commission into Aboriginal Deaths in Custody,97 and after the release of the Bringing them home report.98 This happened in the very recent past, indicating that much remains to be done if we are to learn to live together harmoniously in a society where there are many cultures, where there has and continues to be much injustice suffered on the basis of race, and where there has not been any meaningful compensation for the theft of land and the disruption of family life of Indigenous Australians.99

In Australia there is a dominant colonial ideology that continues to normalise the oppression of Indigenous peoples.100 David Hollinsworth explains, ‘[i]deologies construct and impart meaning and their authority comes from their being taken-for-granted, unquestionable.

96 Such as the Convention on the Elimination of all Forms of Racial Discrimination and the International Covenant on Economic, Social and Cultural Rights.
99 This will be covered in more detail in Chapters Three, Five and Six.
Ideologies are built up over time as accumulated social or shared knowledge.\textsuperscript{101} Associate Professor Irene Watson, an Indigenous academic and activist, has written at length of the dominant colonial ideology still operating within Australia.\textsuperscript{102} Her writing is a vivid example of resistance to this ideology. She argues that colonial violence continues to detrimentally affect Aboriginal peoples\textsuperscript{103} and maintain white privilege.\textsuperscript{104} Watson asserts that Australia’s politico-legal system is largely engaged in the process of ‘the laundering of its own colonial history’ whilst creating the illusion of rights for Aboriginal peoples.\textsuperscript{105} She refers to the practice of ‘nigger hunts’\textsuperscript{106} in Australia and maintains that these are still being carried out in the Australian politico-legal climate:

The practice of \textit{nigger hunts}, in the colonial history of frontier contact involved white men riding out on hunting expeditions to hunt and exterminate Nungas, as an exercise in land clearing. It is this practice which continues to underlie contemporary relationships between Aboriginal and non-Aboriginal people and in my way of looking I see the contemporary nigger hunt as occurring on a number of different fronts. An example of this was in the recent history wars debate, which occurred over whether the nigger hunts actually happened, disputing also the numbers of Aboriginal people who had died as a result of these massacres. … One contemporary example of the hunt is found in the so-called fabrication of women’s business, where it was alleged Aboriginal women had lied about their laws and culture for the purpose of preventing development. In that instance Aboriginal women were hunted down by the media and found by the Hindmarsh Island Bridge Royal Commission inquiry that they had fabricated their story. The women involved were cornered, captured and forever rendered as liars, the hunt was re-affirmed and white privilege secured.\textsuperscript{107}

\textsuperscript{101} David Hollinsworth, above n 3, 36. Hollinsworth further elaborates (at 26–27):

\textbf{The concept of ideology is central to an understanding of the forces that produce and organise racial identities.} Ideology refers to the social processes by which meanings are produced, reproduced, disseminated, resisted and transformed. Ideology shapes the meanings we place on things including ourselves, and others, and how we locate ourselves within meaningful worlds. Most of these meanings are taken for granted and assumed to be commonsense or universal while in fact they are historically and culturally specific. Over time the ideas, values and interests of the dominant groups tend to become prevailing (hegemonic) in that they are embedded in structures and institutions, and are reproduced and disseminated in the media and schools. … However, ideologies are never completely dominant or unitary. Other ideologies co-exist, often resisting dominant images and meanings among diverse populations. Making meaning is never a passive or automatic process. People have their own subjectivities and are actively engaged in making and performing their identities while those identities are being constructed and negotiated culturally and socially. (emphasis removed and internal references omitted)


\textsuperscript{103} Irene Watson, ‘Buried Alive’, above n 2, 264–265.

\textsuperscript{104} Irene Watson, ‘Settled and Unsettled Spaces’, above n 2, 46.


\textsuperscript{106} Irene Watson, above n 28, 27.

\textsuperscript{107} Ibid, above n 28, 26–27.
The racism inherent in Australia’s colonial culture which is reinforced through the politico-legal system has a destructive influence on society.\textsuperscript{108} As Hollinsworth states, ‘racism damages everyone by distorting our understanding of ourselves and others’.\textsuperscript{109} Indeed racism relies on overly simplistic and distorted perceptions of human beings based upon artificial constructions of racial identity.\textsuperscript{110} Several scholars have identified the artificial constructions of racial identity at work within the dynamic of racism.\textsuperscript{111} Power relations are central to this issue.\textsuperscript{112} As Hollinsworth points out, ‘[r]acism is about power: about the ability to construct others as different in order to exclude or ignore or exploit them.’\textsuperscript{113} Similarly, Michel Foucault argues that ‘racism … is a way of separating out the groups that exist within a population. It is … a way of establishing a biological-type caesura within a population that appears to be a biological domain.’\textsuperscript{114}

In Australia racial qualities have typically been stereotyped so that characteristics associated with whiteness or Anglo-Australian colonial heritage have been upheld as ‘good’, ‘clean’, ‘pure’ and so forth, whilst qualities associated with Aboriginality have been denigrated as ‘bad’, ‘unclean’, and ‘impure’.\textsuperscript{115} For example, ‘The Lone Hand’, an early colonial magazine, declared its commitment to ‘“an Honest, Clean, White Australia”’.\textsuperscript{116} A negative implication derived from this is that ‘the non-white was dishonest and dirty at the least’.\textsuperscript{117} This correlates

\begin{footnotesize}
\begin{enumerate}
\item[108] David Hollinsworth, above n 3, 249.
\item[109] Ibid.

There are no genetic characteristics possessed by all Blacks but not by non-Blacks; similarly, there is no gene or cluster of genes common to all Whites but not to non-Whites. One’s race is not determined by a single gene or gene cluster … Nor are races marked by important differences in gene frequencies, the rates of appearance of certain gene types. The data compiled by various scientists demonstrate, contrary to popular opinion, that intra-group differences exceed inter-group differences. That is, greater genetic variation exists \textit{within} populations typically labeled Black and White than \textit{between} these populations. This finding refutes the supposition that racial divisions reflect fundamental genetic differences. Rather, the notion that humankind can be divided along White, Black, and Yellow lines reveals the social rather than the scientific origin of race.


\item[113] David Hollinsworth, above n 3, 252, (emphasis removed).

\item[114] Michel Foucault, above n 112, 254–255.

\item[115] Cassi Plate, above n 84, 2.

\item[116] Ibid.

\item[117] Ibid.
\end{enumerate}
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with what Ian Haney Lopez has to say about the hierarchical distinctions made between Whites and non-Whites. He argues that:

Whiteness exists not only as the opposite of non-Whiteness, but as the superior opposite. Witness the close connection between the negative characteristics imputed to Blacks and the reverse, positive traits attributed to Whites. Blacks have been constructed as lazy, ignorant, lascivious, and criminal; Whites as industrious, knowledgeable, virtuous, and law-abiding. For each negative characteristic ascribed to people of color, an equal but opposite and positive characteristic is attributed to Whites.  

Ian Haney Lopez suggests that ‘[w]hites fashion an identity for themselves that is the positive mirror image of the negative identity imposed on people of color.’ Indeed the positive identity constructed for those who are white depends to some extent upon the negative identity constructed for those who are non-white. This position is made clear by Abdul JanMohamed, a postcolonial theorist. He explains the tendency of white colonisers to define themselves as the opposite of the non-white colonised people:

The colonialis’s military superiority ensures a complete projection of his self on the Other: exercising his assumed superiority, he destroys without any significant qualms the effectiveness of [I]ndigenous economic, social, political, legal, and moral systems and imposes his own versions of these structures on the Other. By thus subjugating the native, the European settler is able to compel the Other’s recognition of him and, in the process, allow his own identity to become deeply dependent on his position as a master. This enforced recognition from the Other in fact amounts to the European’s narcissistic self-recognition since the native, who is considered too degraded and inhuman to be credited with any specific subjectivity, is cast as no more than a recipient of the negative elements of the self that the European projects on to him.

This extract by JanMohamed is intriguing, for it alludes to the way in which the coloniser is dependent upon the constructed identity of the colonised in order to create a colonial identity that is virtuously opposite to that of the colonised. It shows how colonial identity is intricately connected to the construction of a negative identity for colonised people. This bears some relationship to postmodern critiques of binary oppositions, which feature so prominently in enlightenment thought. It is also linked to the notion of there being a trace within each concept of that from which it is differentiated. Jacques Derrida, one of the foremost thinkers

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118 Ian Haney Lopez, above n 23, 28. See also Gayatri Chakravorty Spivak, A Critique of Postcolonial Reason (1999) 37; Aileen Moreton-Robinson, above n 28, 24–25. Aileen Moreton-Robinson maintains: ‘Binary oppositions and metaphors had, by the eighteenth century, represented blackness within the structure of the English language as a symbol of negation and lack. Indigenous people were categorised as nomads as opposed to owners of land, uncivilised as opposed to being civilised, relegated to nature as opposed to culture.’ (at 24–25)

119 Ian Haney Lopez, above n 23, 28.

120 Abdul JanMohamed, above n 111, 20.

of postmodernism, has argued that within every concept used in western philosophy lies ‘the trace of otherness’. 122 ‘Derrida points out that since concepts are constituted within a philosophical system, they can never be pure: they will always contain within them the trace of otherness – the exclusion of which is necessary to their formation.’ 123 Thus in Positions, Derrida claims that:

> Whether in the order of spoken or written discourse, no element can function as a sign without referring to another element which itself is not simply present. This interweaving results in each “element” … being constituted on the basis of the trace within it of the other elements of the chain or system. 124

Therefore within every positive stereotype colonising whites have used to describe themselves there is ‘the trace’ of the ‘other’, that is, the negative stereotype that they have chosen to attribute to Indigenous people. Derrida notes that binary oppositions (such as coloniser/colonised, and white/non-white) are not neutral, but rather represent a ‘subordinating structure’ where one term ‘governs the other’. 125 Derrida explains that binary oppositions depend for their meaning upon ‘a violent hierarchy’ 126 where ‘one term is philosophically regarded as superior, while the other term is marginal, a lesser version, or simply a negative.’ 127 There is violence in this opposition ‘because of the lack of equality, and because the dominant term is formed by the exclusion and repression of the subordinate term.’ 128 The violence of this type of subordination is apparent in the discourse of propaganda perpetuated in both Nazi Germany and Australia about the groups these governments chose to target as undesirable. In each jurisdiction the oppressive group were described (and constructed) in terms that were virtuous and opposite to the disparaging language used to describe (and construct) members of the target groups. These artificial constructions based on race were crucial for the justification of oppressive laws enacted to enforce and extend the power relations of domination present in each jurisdiction.

122 Margaret Davies, above n 121, 366.
123 Ibid.
125 Ibid 41.
126 Ibid.
127 Margaret Davies, above n 121, 369.
128 Ibid.
Chapter 1 – Introduction

B. The Role of Law in Legitimising Oppression

One of the issues I explore is the relationship between oppression and lawfulness, or more specifically, what happens when oppression becomes lawful because the government of the day is interested in using the law to legitimate oppression on the basis of ‘race’. History shows that it is possible for the oppression to be seen as ‘legitimate’ or ‘valid’ in the sense that it is lawful; however I argue that such laws are not legitimate in an ethical sense.

The two predominant schools of thought relating to the validity or legitimacy of law within legal theory are natural law and legal positivism. I do not subscribe to the school of thought which states that there are ‘natural laws’ which are innate and that any law of humans which violates such natural laws is not actually law. Yet neither do I find the arguments of the positivist school of thought convincing. Positivism claims that laws are valid because they are made by persons in authority. They are the ‘commands’ of a ‘sovereign’, according to John Austin. Legal positivists like Austin claimed that law ‘strictly so called’ was divorced from matters external to law such as morality and politics. However, positivist theory, with its focus on obedience to the commands of a sovereign, effectively ensures that existing power hierarchies are maintained. It does nothing to redress the issue of sovereign powers who act oppressively towards disempowered groups, such as Jews in Nazi Germany and Aborigines in Australia. Such a conception of law purports to separate law from concerns of ethics and morality, whilst effectively privileging the ‘morality’ of those with the greatest political and legal power.

It is remarkable what a willing handmaiden the law becomes when a government decides to pursue a path of targeting those it deems ‘undesirable’. This is particularly so in places where legal positivism has ascendancy, where law is viewed as valid and legitimate so long as it is

129 Each of these theories is preoccupied with finding a justifying explanation for law, Ibid 75.
130 Such as was suggested by St Thomas Aquinas in Summa Theologica, see Margaret Davies, above n 121, 85–87.
132 John Austin, above n 131, 27; Margaret Davies, above n 121, 103.
133 Margaret Davies, above n 121, 108–109.
134 Ibid 101.
handed down from those possessing power to make it, regardless of whether such law is an oppressive exercise of parliamentary power.

Legal positivism was influential in the rise to power of Nazi Germany. The presumption that laws were valid because they were issued by a supreme power paved the way for escalating oppression through the law under the Nazi regime. Legal positivism has also been highly instrumental in Australia’s legal landscape. However legal positivism does not allow for the possibility of substantive justice. Substantive justice requires the consideration of the context of a law when determining its validity or legitimacy. In this sense it is highly desirable for the character and consequences of a law to be taken into consideration when determining its validity. A contextual approach to determining the validity of law would address the issues of oppression which legal positivism deems irrelevant. Law needs to be ‘sufficiently flexible to allow justice to be done’ otherwise it ‘is oppressive to those whose interests are not protected.’

I am deeply concerned about the use of law to legitimise oppression of groups targeted as ‘undesirable’ by those possessing significant political power. The law has power to normalise. It has power to justify. It has power to authorise what may be considered questionable from an ethical standpoint. For this reason the interrogation of law is crucial. Law must be subjected to rigorous scrutiny if it is to have any claim to integrity. As Ben Mathews explains:

Critical evaluation of laws is necessary because laws exert a direct impact on our lives. Laws define rights, responsibilities and permissible conduct against a background of legal consequences. Laws influence individuals’ conduct and their perceptions of conduct. Critical evaluation of laws is also essential because laws are not created in a political or ethical vacuum. Society does not retrieve or create laws that are neutral, complete and incontestably legitimate. Laws are created and enforced by individuals and by institutions made up of individuals. Laws reflect the values held or promoted by those individuals. … Critical assessment of laws measures the justifiability of their origin, development and

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138 John Austin, above n 131, 27; Margaret Davies, above n 121, 103.
141 Margaret Davies, above n 121, 101.
142 Geoffrey Leane, above n 1, 926, 928 and 944.
143 Ibid. 926.
144 I will elaborate more on the notion of a contextual approach to law in Chapter Five.
145 Margaret Davies, above n 121, 122.
146 Colin Tatz, above n 24, 165.
147 Ibid.
impact. Laws’ contingent character, dependence on force in origin and development, and impact on human existence justify the continual investigation of their legitimacy.  

C. Change of Political Climate

It is worthwhile considering how a series of gradual changes in the political climate can change the face of a nation, leading to a range of oppressive laws and policies. One of the keys to the Nazis implementing such radical measures with a minimum of citizen protest was carrying out the changes incrementally. Holocaust scholar Richard Miller explains ‘[e]scalation of the war on Jews was so gradual, each additional measure seemed so reasonable in its context, that few persons who accepted the war’s premise felt any doubt about wisdom in the next harsher step.’ The process of increasingly discriminatory treatment can eventually lead to full blown persecution. Government processes and practices can gradually change the face of a nation. I contend that this occurred in Australia under the Howard government, but his were not the first steps taken down the path of dehumanisation. He built upon a racist foundation, where extreme discrimination became such a common occurrence that it no longer seemed exceptional – how else could we end up with a system of ‘native title’ rather than ‘ownership’ for a group of people subject to arbitrary government extinguishment of their rights to land. It is rather unexceptional in light of Australia’s historical treatment of Aboriginal people.

Andrew Markus maintains that Howard ‘re-shaped [the] political landscape’ and allowed ‘chauvinist forms of nationalism to assume a major political role.’ The Howard government implemented several significant changes in Anglo-Australian and Aboriginal relations. From adopting the watered down notion of reconciliation to abolishing ATSIC and insisting that the process of ‘service delivery’ now be one of ‘mainstreaming’ (implicitly suggesting that Aborigines can only access government services if they assimilate themselves into the

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148 Ben Mathews, above n 121, 105.
149 Richard Miller, above n 139, 168.
150 Ibid 166.
152 Andrew Markus, above n 38, 200.
154 David Hollinsworth, above n 3, 167.
mainstream)\textsuperscript{155} to introducing a range of ‘mutual obligations’ where Aboriginal people living in remote communities have to agree effectively to certain levels of assimilation in order to access basic amenities,\textsuperscript{156} to the invasion of Aboriginal lands in the Northern Territory in 2007.\textsuperscript{157} Some of these things would have seemed unthinkable before 1996, but Prime Minister Howard successfully changed the face of Australian race relations during his time in office.\textsuperscript{158}

Pauline Hanson and her ‘One Nation’ political party acted as a catalyst for some of these changes. Hanson rose to power claiming that Aborigines get special benefits and how this was unfair, a form of ‘reverse racism’ against white Anglo-Australians.\textsuperscript{159} Despite the racially inflammatory maiden speech of Pauline Hanson,\textsuperscript{160} Howard ‘could see no pressing need in 1996 to take a leading role in combating the public outpouring of bigotry’.\textsuperscript{161} Indeed, it seemed to serve his political purposes to let it pass without reproach. In some respects she made him look moderate.\textsuperscript{162} She also made him aware of a potential pocket of voters who could be wooed through racist policies.\textsuperscript{163} Andrew Markus explains that the politics of Hanson suited Howard: ‘The extreme statements of Hanson – and her popularity – served to maximise damage to their common opponents, without the need for the prime minister himself to adopt an overtly extremist stance.’\textsuperscript{164} Markus states:

Like Hanson, Howard presented a vision of ‘one nation’ and ‘one truth’, albeit with less jarring notes. While attacking the intolerance of Keating, he introduced a new intolerance of his own. There was now freedom of speech and expression, but no legitimacy was accorded to advocacy of Aboriginal rights and ‘divisive’ multiculturalism, nor to views of history and national character fundamentally different from the values of the ‘mainstream’, as defined by the prime minister. This involved a move away from pluralism towards the reassertion of a unitary value system. The pendulum had been reset, balance had been re-established. This process was presented as ‘natural’, the product of ‘common sense’, ‘non-ideological’, with a total unwillingness to recognise the partisanship involved in the definition of ‘centre’ and ‘balance’.\textsuperscript{165}

\textsuperscript{155} Ibid.
\textsuperscript{156} Irene Watson, above n 28, 18 and 22; Irene Watson, ‘Settled and Unsettled Spaces’, above n 2, 42.
\textsuperscript{158} Andrew Markus, above n 38.
\textsuperscript{159} See Pauline Hanson’s maiden speech, Commonwealth, Parliamentary Debates, House of Representatives, 10 September 1996, 3860 (Ms Pauline Hanson, Member for Oxley).
\textsuperscript{160} Andrew Markus, above n 38, 101.
\textsuperscript{161} Mike Stetete, above n 28, 4.
\textsuperscript{162} ‘One Nation’ won a large proportion of the Queensland vote in 1998, Ibid 2.
\textsuperscript{163} Andrew Markus, above n 38, 104.
\textsuperscript{164} Ibid.
Howard soon saw that votes could be gained by adopting many of the racist ‘One Nation’ policies.166 Thus the Howard government developed ‘policies on refugees, welfare and [I]ndigenous affairs that effectively mirrored those regarded as extreme and unworkable when Hanson proposed them in 1996–8’.167 This gradually saw an erosion of Indigenous rights throughout Howard’s term. A wide array of hard won rights were swept away under the Howard regime.168 The election of the Howard government in 1996 saw increasing opposition to the notion of affirmative action to try to remedy disadvantage suffered by Aboriginal Australians. Those opposed to affirmative action have claimed ‘that advantages cannot be offered to Aborigines that are not offered to all.’169 However, as Colin Tatz states, ‘this is to deny, negate, forget and forgive all past treatment of the Aboriginal minority: worse, perhaps, it is to imply that nothing ever happened.’170 Yet the push towards denialism was strong under Howard’s Australia.171

Adopting a position consistent with denialism fitted nicely with an ongoing colonial mentality.172 An ongoing colonial mentality under the Howard regime can be seen in a series of legislative enactments purporting to ‘balance’ the various political interests. In reality these changes have benefited a select few and have discriminated against a politically unpopular minority.173 These legislative enactments are frequently presented in a form with a legislativae title which is quite misleading as to the actual effects of the legislation. They are described in classic ‘Orwellian language – language that means the opposite of what it says’.174 In dealing with Australian race relations the Australian government specialises in this use of Orwellian language. For the purpose of my research I will confine my use of examples to those that have

166  David Hollinsworth, above n 3, 11; Mike Steketee, above n 28, 2–4.
167  David Hollinsworth, above n 3, 231.
168  Such as protection of Aboriginal heritage in South Australia with the enactment of the Hindmarsh Island Bridge Act 1997 (Cth) which authorised the destruction of Aboriginal cultural heritage to privilege developers, and the reduction of rights in relation to native title with the enactment of the Native Title Amendment Act 1998 (Cth) which has operated to the detriment of Aboriginal peoples. Irene Watson argues ‘the native title laws, originally possibly intended benign, have been derailed and subverted from any real possibility of delivering justice.’ Irene Watson, ‘From a Hard Place’, above n 3, 208.
169  Colin Tatz, above n 24, 171.
170  Ibid.
173  The select few include those with mining and pastoral interests who have benefited from the Native Title Amendment Act 1998 (Cth), see Irene Watson, ‘Buried Alive’, above n 2, 265–266; Scott Hannaford, ‘Native-title law legal apartheid’, Canberra Times, 27 March 2002, 2.
174  George Lakoff, above n 31, 22.
negatively impacted on Aboriginal peoples in Australia. One fairly recent example of the use of Orwellian language by the Australian government is the *Native Title Act 1993* (Cth) which allows for the extinguishment of Aboriginal interests in land and operates to validate white title to land, so much so that some consider that the Act should have been called the *White Title Validation Act*. Another fairly recent example of the use of Orwellian language is the *Hindmarsh Island Bridge Act 1997* (Cth), which could more accurately be described as the *Decimation of Aboriginal Sacred Sites Act*. Stretching further back into Australian history there are more examples, the so called ‘Welfare’ legislation operating within each State which tried to render legitimate attempts to destroy Aboriginal peoples as distinct peoples by destroying family and religious networks and force them to assimilate into white society. This legislation has had devastating effects on Aboriginal peoples and it simply is not credible to suggest that the legislation was actually for the benefit of Aborigines. Rather, it is more accurate to say that it fitted with the genocidal colonial agenda of attempting to rid Australia of people with black skin. However the use of Orwellian language by governments has proven to be a remarkably effective political strategy. It has allowed governments to be perceived as possessing benevolent intentions towards Aboriginal peoples even while they actively engage in a process of colonialism and genocide. Orwellian language has turned out to be a highly successful exercise in public relations.

The conservative change of political climate brought about by the commencement of the Howard regime was also characterised by the ‘practice of the politics of paranoia’. This has characterised much of right wing politics in the past decade. The politics of Pauline Hanson provide a classic example of this type of thinking. Hanson had the support of neo Nazi organisations, both domestic and abroad. Her hate speech was likened to Nazi

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175 Personal communication with Greta Bird and Gary (Mick) Martin, academics at Southern Cross University. See also the critique of this legislation in Irene Watson, ‘Buried Alive’, above n 2, 265–266; Aileen Moreton-Robinson, above n 28, 22.
181 Andrew Markus, above n 38, 114.
182 Ibid 190.
propaganda. She successfully tapped into a ‘politics of resentment’ surrounding issues of race. The ‘politics of resentment’ involves ‘[h]istorically privileged groups … complain[ing] that measures to redress disadvantages facing minority groups are themselves unfair and “reverse racism”’. Despite the rhetoric of equality present in Hanson’s speeches, her politics meant some were clearly to be treated as less equal than others. The ‘politics of resentment’ specialises in scapegoating the most marginalised in society as the root of society’s ills, it is the politics of transference, the politics of blame. It diverts attention away from other oppressive structural forces causing hardship.

Howard’s ‘politics of paranoia’ were along somewhat similar lines to those expounded by Hanson. Ghassan Hage argues that the Howard government ‘generate[d] worrying citizens and a paranoid nationalism.’ Part of Howard’s success was the ability to create a climate of fear, using the ‘“indispensable enemy argument”’, the idea ‘that a people’s sense of identity is formed and cohesiveness maintained by a sense of threat from a malevolent enemy.’ This characterised the political climate under Howard, only his government deemed it necessary to focus on several threatening ‘others’ rather than just one. Thus the people of Australia were encouraged to be ‘alert but not alarmed’ in relation to potential terrorist threats. At the same time Indigenous peoples were viewed as draining financial resources, leading to the abolition of ATSIC and massive cuts to funding for Indigenous programs. In addition to this Indigenous people have been seen as the threatening ‘other’ in relation to riots, such as the Redfern riot of 2004. Furthermore Australians were told that refugees pose grave dangers to Australia, leading to a repressive and punitive approach being taken towards asylum seekers.

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185 David Hollinsworth, above n 3, 63–64.
186 Andrew Markus, above n 38, 194.
187 David Hollinsworth, above n 3, 194.
188 Ibid.
189 Andrew Markus, above n 38, 114.
189 Mike Steketee, above n 28, 2–4.
190 Ghassan Hage, above n 63, 3.
191 Andrew Markus, above n 38, 203.
192 For example there were alleged ‘threats’ posed by Aboriginal peoples, refugees and terrorists.
194 Aileen Moreton-Robinson, above n 28, 22.
seekers. The overall impression is, as Hage writes, that Australia travelled down a path of ‘paranoid nationalism’ under the leadership of Howard. Time will tell whether the Labor government has jettisoned these policies.

D. History Wars

In conjunction with the ‘politics of paranoia’ under the Howard government, there have been serious debates taking place regarding the history of the nation. A history war rages within the Australian political sphere and within the hallowed halls of learning. It leaves its marks across our nations newspapers. There have been significant debates over whose version of history is to take ascendancy. The history wars ‘directly concern legal and moral claims to political and economic justice for Aboriginal people.’

Thus the last three or more decades have been punctuated by major debates over land rights, native title, a treaty, the removal of Aboriginal children (the stolen generations) and reconciliation. There has been a struggle over who controls this past, who can influence the interpretation of this past, and who can determine the historical truth about the nature of colonialism.

The debate over the history wars is of central importance in defining national identity. Much controversy has arisen over which version of Australian history should dominate central stage in the Australian national drama. While leftist historians such as Henry Reynolds have played a central role in awakening the public to a different version to the predominant

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198 Ghassan Hage, above n 63, 3.
199 Andrew Markus, above n 38, 114.
202 Bain Attwood, above n 200, 1–2.
204 Bain Attwood, above n 200, 1–2.
view of national history which told stories of heroic pioneering ‘settlers’, this was not without a conservative backlash. Conservative historians such as Geoffrey Blainey and Keith Windschuttle have had much to say about the revisionist versions of Australian history that were being put forward by the left. Blainey described the revisionist forms of history as a ‘black armband’ view. The conservative views promulgated in response to these revisionist accounts were subsequently labelled ‘white blindfold’ versions of Australian history.

Those having a conservative view of history sought to discredit the alternative views of history by suggesting that such histories are politicised. However what we call ‘history’ is constantly being challenged and revised according to political agendas, thus, ‘knowledge of the past is always selective, limited, and mythic, and … what we know as history is always in the process of being disputed and amended according to present concerns.’ In this sense historians are not so ‘objective’ as they care to imagine, and there are dangers in their engaging in the pretence of objectivity. As Christine Choo argues, ‘historians and the opinions they formulate are part of an intensely political process in which a number of different perspectives are pitted against each other’. Gayatri Spivak, a prominent postcolonial theorist, has also written of the way in which the history ‘of the West masquerades as disinterested history’ when really it is inextricably linked with legitimising ‘an alien ideology established as the only truth’.

The history wars engage with the rich mythology that has become a significant part of Australian nationalism. Rosalind Kidd argues that ‘few Australians know the history of their nation as it is told by the colonial files and memoranda. They have had instead a diet of

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206 Through works such as Henry Reynolds, above n 42; Henry Reynolds, *This Whispering in Our Hearts* (1998); Henry Reynolds, above n 45; Henry Reynolds, above n 179.
207 David Hollinsworth, above n 3, 84; Henry Reynolds, *This Whispering in Our Hearts*, above n 206, 245.
209 David Hollinsworth, above n 3, 17; Henry Reynolds, above n 45, 153.
211 Bain Attwood, above n 200, 84.
214 Ibid 273.
215 Gayatri Chakrvorty Spivak, above n 118, 208.
216 Ibid 205.
mythology and jingoistic revisionism.’ 217 There ‘is a seed of … colonisation which has been subtly and richly infused with myth’ and that ‘myth is most difficult to dislodge.’ 218 In relation to Australia this provokes interesting images. There have been so many well entrenched myths about Australian history, for example, those centered on the celebration of the efforts of brave heroic white ‘settlers’ who were trying to ‘civilize’ barbaric ‘savages’. 219 Some of these myths still have considerable power over popular imagination. 220 The history wars highlight the defensiveness in mainstream colonial culture to overturning some of Australia’s mythology. Accounts of history that take Aboriginal perspectives into consideration ‘shed a very critical light upon the ideals of British justice, humanitarianism and egalitarianism that lay at the heart of the Australian national identity constructed by earlier myth-makers.’ 221 The mythology of the nation has been central to the construction of a positive national identity. 222 Australia has embraced its founding myths with relish. Letting go of myth for a more realistic portrayal of Australian history has therefore proven controversial.

In Australia up until the 1970s there had been a deliberate ‘forgetting’ of Aboriginal history, so much so that W.E.H. Stanner referred to this as “the great Australian silence”. 223 In relation to this type of national forgetting ‘we should remember that what is left out or forgotten is not randomly or evenly distributed. In fact, forgetting, like silencing, is embedded in (dominant) discourses and the cultural institutions within which those discourses circulate.’ 224 In Australia the urge to silence the emerging accounts of history that are favourable to Aboriginal perspectives can be seen as an attempt to reinstitute a national ‘forgetting’ of Aboriginal history. 225 Through ‘a constructive forgetting’ conservative historians seek ‘to constitute what is remembered’ 226 – engaging in a very selective

217 Rosalind Kidd, above n 42, x.
219 David Hollinsworth, above n 3, 33 and 84; Henry Reynolds, above n 45, Chapter Ten.
220 It is interesting to explore myth making as part of developing an identifiable national culture. The psychology of nationhood and national imagining is interesting because it fuels political and consequently legal trends. For example the national imagining of Australia as white nation influenced the development of the White Australia Policy and the subsequent legislation implementing it.
221 Bain Attwood, above n 200, 19.
222 Peter Fitzpatrick, above n 66, 65.
224 David Hollinsworth, above n 3, 61.
225 Bain Attwood, above n 200, 105.
226 Peter Fitzpatrick, above n 66, x.
remembering. By privileging ‘(white Australian) history, those such as Windschuttle are deaf to Aboriginal voices. Consequently, they threaten to recreate the great Australian silence.’

Historical narratives are crucial in the development of a country’s ‘sense of nationality’. They create a ‘sense that [people] belong together to the community called the nation’. The ‘sense of nationality’ which has been fostered in Australia has been dependent upon certain historical narratives which silenced Aboriginal histories, denied Aboriginal sovereignty and privileged colonial history. This is significant because the history of a nation plays a part in legitimising the status quo. As Attwood explains ‘[h]istorical narratives are critical to nations because nations are neither ancient nor eternal, but historically novel; they are invented where they once did not exist. The primary role of history has been to lend moral legitimacy to a revolutionary phenomenon.’

Ernest Renan has declared that ‘[f]orgetting’ and ‘historical error’ are central to ‘the creation of a nation’. Much of Australia’s historical narrative since 1788 focuses on privileging Anglo-Australian history and ‘forgetting’ or erroneously describing Aboriginal histories. The privileged version of Australian national history focuses on ‘a heroic tale of the British as the discoverers, explorers and pioneers of the country, of how these white men came to settle a strange country and transform it by their science and technology, capital and labour, thus creating a civilisation out of a wilderness.’ It emphasised the role of ‘the rule of law and parliamentary democracy.’ It ‘also featured the courage, hardship, suffering and battles of white men and sometimes women.’ In this way ‘[l]oss, grief and sacrifice – a narrative in which British Australians were rendered as victims – became as critical to Australian national identity as the story of triumphant progress.’ Attwood explains that:

In this settler history-making, the primary subjects were the British and their white Australian descendants. They were the agents who made the nation what it had become.

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227 Bain Attwood, above n 200, 105.
228 Ibid 13; and see also Edward Said, *Culture and Imperialism* (1994) xiii.
229 Bain Attwood, above n 200, 13.
230 Ibid.
232 Bain Attwood, above n 200, 13.
234 Ibid.
235 Ibid 15.
236 Ibid.
Aborigines were depicted as all the British Australians were not. The British were a
civilised race; the Aborigines a savage one. The British were a populous people; the
Aborigines were few. The British settled the land and created wealth; the Aborigines
wandered over it and created nothing. The British had law; the Aborigines had none. …
Above all else, the right to the country and to rule its peoples was based on a historicist
representation of Aborigines and Aboriginality. This was common to the way in which
Europe imagined itself as modern by inventing a primitive other.238

The dominant narrative of Australian history has been created by a select group of privileged
‘middle – and upper-class men.’239 This history has ‘presented its knowledge as scientific, and
therefore as value-free, neutral and objective’,240 claiming that it represents ‘absolute and
universal truth’.241 However this history has ‘always been intensely subjective and political in
its construction’.242

The history wars are therefore connected to the desire of conservative historians and political
figures with having a ‘white’ history of Australia. The ‘White Australia Policy’ has been a
historical foundation for Australian nationalism from the earliest days of colonisation,243
which as I stated earlier, was implemented via legislation in 1901.244 Through the legislative
privileging of white bodies Australia was able to try to establish itself firmly as a ‘white’
nation. Anyone then who was not white became undesirable to the power holders shaping the
nation.245 Thus Indigenous peoples came to be seen as undesirable within their own country.
They became the degraded and dehumanised ‘other’ within the white nationalist imagination.
As Hage points out, ‘nationalist thought imagines the presence of the other as a virus,
something that weakens the performance of the total communal body, and, by the same token,
threatens the very existence of the nation’.246 Thus Indigenous peoples were the target of
experiments in social engineering, with the ultimate aim being their destruction as a distinct
people.247 They were ‘designated for extinction’.248 This is, as Gwenda Tavan states,
Australia’s ‘proverbial skeleton in the closet’.249

238  Ibid.
239  Ibid 36.
240  Ibid.
241  Ibid.
242  Ibid 37.
243  Gwenda Tavan, above n 83, 7–11.
244  Through the Commonwealth Immigration Restriction Act 1901 (Cth), the Pacific Island Labourers Act 1901
    (Cth), the Commonwealth Franchise Act 1902 (Cth), and the Naturalisation Act 1903 (Cth). Gwenda Tavan,
    above n 83, 7–8.
245  David Hollinsworth, above n 3, 2.
246  Ghassan Hage, above n 63, 40.
247  Colin Tatz, above n 3, 98.
248  Andrew Markus, above n 38, 19.
249  Gwenda Tavan, above n 83, 239.
In relation to the aspirations of a ‘white’ Australia, ‘this national project was only partially achieved’. Nonetheless, ‘for much official Australian history, the national identity has been British, “white” and masculine.’ In recent years as scholarship has increased which has a more sympathetic view of Aboriginal history the predominant ‘white’ view of history has been under challenge. This white version of history, celebrating the ‘pioneering’ spirit of Australia’s first ‘settlers’, is the version with which many, perhaps even the majority, of living Australians are familiar.

One of those most strongly opposed to the development of accounts of Aboriginal history that are sympathetic to Aboriginal perspectives is Keith Windschuttle. In 2002 he published his controversial work, *The Fabrication of Aboriginal History*. Windschuttle disputed the extent of trauma inflicted on Aboriginal people in Tasmania at the hands of Europeans. For Windschuttle ‘it is good enough to demonstrate that colonial authorities had benevolent intentions. The outcomes are less important.’ Windschuttle’s work has been strongly criticised by numerous authors who are concerned about his denialist account of colonial history.

The history wars highlight the tendency of colonising nations to engage in denialism. Denialism involves a concerted effort to sanitise history. Denialism attempts to convince the survivors of trauma that their memories are defective, ‘throwing bitter salt on the memories of the victims’. Denialism asserts that what has happened to the survivors of trauma is not so terrible. This type of attitude can be seen in Keith Windschuttle’s work where he insists that the numbers of Aborigines massacred are far fewer than indicated by

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250 David Hollinsworth, above n 3, 2.
251 Ibid.
252 Larissa Behrendt, Chris Cunneen and Terri Libesman, above n 13; Greta Bird, above n 85; Bruce Elder, above n 3; Rosalind Kidd, above n 42; Raymond Evans, Kay Saunders and Kathryn Cronin, *Race Relations in Colonial Queensland – A History of Exclusion, Exploitation and Extermination* (3rd ed., 1993); Alison Palmer, above n 3; Henry Reynolds, above n 42; Henry Reynolds, above n 179; Colin Tatz, above n 3.
253 Keith Windschuttle, above n 208.
254 Ibid 3.
255 Bain Attwood, above n 200, 134.
257 Colin Tatz, above n 3, 124.
258 Ibid.
259 Israel Charny, above n 172, 294.
260 Keith Windschuttle, above n 208.
contrary histories written by other historians,\textsuperscript{261} as though this actually makes the massacres themselves less appalling.

Of course the most powerful opponent to accounts of history sympathetic to Indigenous perspectives was former Prime Minister John Howard. Instead ‘Howard spoke of his desire to return this country to a more “relaxed and comfortable” temperament untroubled by anxious questions of a racist past.’\textsuperscript{262} In doing so, he failed to acknowledge that only some are capable of feeling ‘relaxed and comfortable’ given the current state of inequality prevalent in Australian society. He did not say who he desired to feel ‘relaxed and comfortable’, but it surely was not the thousands of Indigenous Australians, many of whose lives are marked by gross inequality and deprivation on every social indicator.\textsuperscript{263} He appeared to be primarily concerned about creating a ‘relaxed and comfortable’ atmosphere for Anglo-Australians. Howard was critical towards people who ‘emphasised shameful acts and failed to acknowledge that Australia was a tolerant and liberal society virtually unmatched in its treatment of ethnic minorities.’\textsuperscript{264} Howard considered that any historical wrongs occurred too long ago to warrant political attention now and he ‘specifically refused to entertain any sense of guilt for wrongs he … repeatedly declared were done two hundred years ago.’\textsuperscript{265}

However the wrongs he spoke of are far closer to this generation than Howard cared to acknowledge. ‘The bloody frontier may seem long gone, but there were killings within living memory, and some government policies that are now seen as savage were enacted by people as near to us as our parents.’\textsuperscript{266} Cowlishaw explains why conservative thinkers are opposing the view of history which is more sympathetic to Indigenous concerns – such views have ‘the potential to seriously challenge the moral authority that is built into the nation’s institutions, literature, and the subjectivities of citizens.’\textsuperscript{267} Flowing from that may be a growing sympathy towards Aboriginal calls for justice. Cowlishaw states that ‘the tenacity and fervor of conservative thinkers who dispute the extent of massacres, deny the savagery of colonial rule, and underplay the extent of Aboriginal suffering’ do so ‘to rescue Australia’s reputation from

\textsuperscript{261} Ibid 2–4.
\textsuperscript{262} David Hollinsworth, above n 3, 19.
\textsuperscript{264} David Hollinsworth, above n 3, 20.
\textsuperscript{265} Ibid.
\textsuperscript{266} Gillian Cowlishaw, above n 212, 204.
\textsuperscript{267} Ibid 203.
Howard had a clear preference for a sanitised view of Australian history. He expressed such a preference several times, and was critical of the ““black armband” view of our past’. Howard urged Australians to celebrate Australia’s national history rather than reflect upon that which is shameful, as though the two are mutually exclusive. In Howard’s estimation ‘[t]he balance sheet of our history is one of heroic achievement and … we have achieved much more as a nation of which we can be proud than of which we should be ashamed.’ It is revealing that Howard spoke about a ‘balance sheet’ when Indigenous peoples raised concerns about human suffering caused by colonisation. This view, which seems to be an attempt at some kind of accounting approach, is inappropriate when dealing with issues of grave human suffering. The very language used by Howard attempted to trivialise the sufferings of Indigenous peoples. It is also illogical to presume that we as a nation must either be ashamed or proud of our country’s history. Why can we not be proud of some aspects of our national history and ashamed of others? Intellectual and ethical integrity require that we look at the complexity of Australian history and assess it for what it is – a very mixed record. In looking at the record it should not be denied that Indigenous peoples have experienced extreme suffering at the hands of white Australians, even though much has purportedly been done for their ‘welfare’ or out of a misguided sense of ‘benevolence’.

Howard certainly took an eager interest in history during his time as Prime Minister. The contract of the Director of the National Museum, Dawn Casey, was not renewed after she refused to alter the history display where she presented a view of history sympathetic to Indigenous concerns, but not fitting with the agenda of the Howard government. Howard also declared that changes should be made to how Australian history is being taught in schools, with a focus on ‘European settlement, Gallipoli and why Anzac Day is celebrated’. He wanted the teaching of history to undergo considerable alteration so that it covered what

268  Ibid 203–204.
269  John Howard, cited in David Hollinsworth, above n 3, 17.
270  Ibid.
271  Bain Attwood, above n 200, 195–196.
272  Henry Reynolds, above n 179, 162–163.
273  David Hollinsworth, above n 3, 245.
274  Steve Creedy, above n 201, 1. For the kinds of historical details Prime Minister Howard wanted ousted from the school history curriculum see Henry Reynolds, above n 45, 157.
he defined as ‘key events’, which were very exclusionary of Indigenous perspectives. Howard’s preferred historical narrative required ‘the marginalisation of dissonant or resentful voices.’ His was a view that conveniently covered over the complexity of Australian colonial history.

Howard’s determination to have a denialist version of Australian history remained firm until the very end. In the 2007 Federal Election Debate Howard declared there was a need to ‘restore a proper narrative of Australian history.’ He proclaimed that Australia’s story is ‘a wonderful story … a story of great achievement … a story of heroic endeavour. It’s not a story without blemish, but it’s a story of which all of us should be immensely proud.’ He trivialised the worst aspects of Australian history by simply referring to them as a ‘blemish’. He referred to the history of invasion, genocide, warfare, theft of land and theft of children as a ‘blemish’. A blemish implies that these events were a mere spot, rather than substantial events which have shaped the nation. Of course the word ‘blemish’ is also used to refer to discolouration of the skin. In this sense Howard’s use of the word ‘blemish’ is very loaded indeed. Those with dark skin were indeed a blemish on the nation according to those aspiring towards a white racial purity. Howard quite literally wanted to ‘white out the “black spots” in Australian history’.

Those opposed to accounts of history which are sympathetic towards Indigenous perspectives suggest that to see Australia’s history as anything other than glorious is somehow unpatriotic. ‘For conservative politicians and industry leaders, patriotism requires the rejection of any suggestion that Australians should feel shame or guilt about past injustices towards Aborigines.’ However it does not necessarily follow that acknowledgment of Australia’s racist history means that there is nothing of value within Australian culture.

275 Steve Creedy, above n 201, 1.
276 David Hollinsworth, above n 3, 246.
278 Ibid.
280 Transcript of the Leaders Debate, above n 277. For a counter position to then Prime Minister Howard’s sanitised version of Australian history see Henry Reynolds, above n 45, Chapters Ten and Eleven.
281 ‘Howard’s History’, above n 279.
282 Ibid.
283 Anna Clark, above n 210, 6.
284 David Hollinsworth, above n 3, 18.
285 Ibid.
Acknowledging ‘the shameful aspects of the past’ do not need to prevent the nation from ‘identification with the good parts.’

When taking perspectives on Australian history sympathetic to Aboriginal experiences into account British ‘colonisation of the country could be seen more clearly as an act of invasion rather than settlement.’ Although upsetting to those with colonial loyalties, I argue that invasion is a more appropriate term. As Henry Reynolds states, ‘if you arrive without being invited in another country and you bring military force with you with the intention of using that force to impose your will, then “it has to be interpreted by any measure as an invasion”.’ The emerging accounts of colonial history sympathetic to Aboriginal perspectives have highlighted the dubious nature of Britain’s claimed ‘moral legitimacy’. Bain Attwood explains:

Like any nation, but especially a settler one, Australia’s origins lie in the revolutionary overthrow of the sovereignty and order of another people or peoples, namely that of the Aborigines. It had no sanction in any law other than the laws of the conquering nation (and other European powers).

Accounts of colonial history which are sympathetic to Aboriginal perspectives have faced strong resistance because they have the potential to make people feel unsettled and unsure about their place here in Australia. ‘Since most people know their country and understand their place in it through narratives such as a national history, a dramatic change in such stories can make what has long seemed familiar unfamiliar, thus undermining a sense of home or belonging.’ In some ways the conservative backlash against historians like Henry Reynolds represent an attempt to make white Australians feel ‘comfortable’, ‘at home’ and ‘familiar’

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286 Ghassan Hage, above n 63, 5.
287 Bain Attwood, above n 200, 19; see also Julie Cassidy, ‘The Impact of the Conquered/Settled Distinction regarding the Acquisition of Sovereignty in Australia’ (2004) 8 Southern Cross University Law Review 1, 36. Cassidy argues that this has implications for the ongoing sovereignty of Aboriginal nations. She maintains (at 36):
   Conquest implies prior rights, including sovereign rights that have forcefully been displaced. If pre-existing sovereignty resided in the Aboriginal nations of Australia that sovereignty could only be determined by conquest or cession. If sovereignty vested in the Aboriginal peoples of Australia those sovereign rights are capable of survival, resurrection and acknowledgement centuries later. If Australia was not settled and the irruption by British forces in 1788 is seen as an invasion of Aboriginal sovereign rights then, in the absence of any surrender, the Aboriginal peoples may enable the restoration of that sovereignty.
288 Henry Reynolds, above n 45, 166. See also Greta Bird, above n 85, 1.
289 Bain Attwood, above n 200, 19.
290 Ibid 124.
with Australia’s past. This type of thinking is the subject of critical whiteness studies, where the structural nature of white privilege is being explored. Irene Watson interrogates the nature of white privilege in Australia’s colonial society, and claims ‘the “history wars” revise the Australian history of colonising violence.’ She maintains that Aboriginal ways of knowing have ‘threatened white privilege’. Watson argues ‘[s]peaking or telling the black “truth” of Australia’s colonial history is to challenge white supremacist “truths” of history. When Aboriginal people speak in opposition to white truths, we are accused of having a blinkered or “black armband” view of history.’

There is a close connection between the history wars and contemporary political and legal issues concerning Indigenous social justice, including ‘the legal and political debates about land rights and native title, the stolen generations, and [I]ndigenous affairs generally.’ Bain Attwood explains:

history (or memory) is now a commodity believed to be of immense economic, cultural and political value. ... Consequently, the ways in which the past is represented have become the subject of contestation and thus controversy.

Howard was aware of the correlation between the teaching of history and the political awareness of the voting public. If the teaching of history in Australian schools has as its focus colonial ‘settlement’ as opposed to a focus on violent ‘invasion’ then the minds of future generations may consider issues affecting Indigenous peoples through different eyes. The growing awareness of the violence of the frontier and the trauma suffered by numerous

292 Ibid 30.
294 Irene Watson, above n 28, 26.
295 Irene Watson, ‘Settled and Unsettled Spaces’, above n 2, 41.
296 Ibid 40.
297 David Hollinsworth, above n 3, 17.
298 Bain Attwood, above n 200, 12.
299 Bruce Elder, above n 3.
Indigenous families who have been victims of the State’s child removal policies\(^{300}\) has led to an increase in non-Indigenous citizens who are concerned about the situation facing Indigenous peoples. This concern can be seen through the level of public support for events such as ‘Sorry Day’.\(^{301}\)

The debates over national history have significant implications for contemporary legal issues relating to Indigenous peoples. Law and history have a close relationship.\(^{302}\) As Lawrence McNamara observes, ‘[w]hen law encounters history in the courts, it takes an important place in the shaping of memory.’\(^{303}\) The significance of the relationship between history and law was highlighted in \textit{Mabo v Queensland (No 2)}.\(^{304}\) That decision reveals how law ends up privileging certain historical narratives over others.\(^{305}\) In \textit{Mabo}\(^{306}\) it was acknowledged that the history favouring the view that Australia was terra nullius was privileged for many years.\(^{307}\) Yet the case still failed to fully acknowledge Indigenous land rights and in this sense it still privileged European history over Indigenous history.\(^{308}\) The judges were at pains not to fracture the ‘skeleton of principle’\(^{309}\) that was said to be necessary for the Australian legal system, a principle which ‘privileges white versions of history and legality’.\(^{310}\) This was a position which conveniently ignored whose skeletons were actually sacrificed in order to build this precious system. As Margaret Davies argues, ‘the acts of violence which led to the foundation of Australia’s legal system are merely repeated in this decision by the very refusal to question sovereignty, and by the creation of a Westernised version of Indigenous law.’\(^{311}\)

\(^{300}\) Human Rights and Equal Opportunity Commission, above n 3, Chapter 11.
\(^{302}\) Ann Curthoys, Ann Genovese and Alexander Reilly, above n 205, 15–190; Christine Choo, above n 213, 261; Lawrence McNamara, above n 203, 385; Sangeetha Chandra-Shekeran, ‘Challenging the Fiction of the Nation in the “Reconciliation” Texts of \textit{Mabo} and \textit{Bringing Them Home}’ (1998) 11 \textit{Australian Feminist Law Journal} 107, 115.
\(^{303}\) Lawrence McNamara, above n 203, 385.
\(^{304}\) \textit{Mabo v Queensland (No 2)} (1992) 175 CLR 1; 107 ALR 1; Ann Curthoys, Ann Genovese and Alexander Reilly, above n 205, Chapter Two.
\(^{306}\) \textit{Mabo v Queensland (No 2)} (1992) 175 CLR 1; 107 ALR 1.
\(^{309}\) \textit{Mabo v Queensland (No 2)}(1992) 175 CLR 1, at 29.
\(^{311}\) Margaret Davies, above n 121, 304.
There are also other cases that emphasise a relationship between law and history. In *Kruger v Commonwealth*, the history of white benevolence was privileged over the history of Indigenous suffering. Thus the judges spoke of the legislation being enacted for the ‘benefit’ of Indigenous people, regardless of the evidence to the contrary and the recently released *Bringing them home* report pointing out the discrepancy between government words and government actions. In *Nulyarimma v Thompson*, the history denying genocide against Indigenous peoples was privileged. In *Kartinyeri v Commonwealth*, the history of the coloniser was again privileged over that of Aboriginal women seeking to protect sacred sites. Historical narratives are very relevant to all of these cases, and the latter two will be critiqued at length in Chapter Five. History has become a matter which can have current legal ramifications about who can claim protection from the law and who cannot, whose dignity will be respected and whose denied. History has significant legal and political implications. Education about history also influences public perception. It is therefore not surprising that Howard embarked upon a campaign to recapture (or reinvent) the history of the nation, as he saw it, and force the nation’s more undesirable historical episodes to be swept back under the rug.

In my research I explore the interconnectedness of the past and the present. The past continues to shape the present in very real ways. The present day trauma facing Aboriginal communities is intricately connected to colonisation. Bain Attwood notes how this relationship between past and present is often denied or misunderstood:

> The practice of academic historians tends to deny the presence of the past – that is, the way in which the past often continues to be (in the) present; it tends to deny the presence of the historian or that of the present in their representations of the past; and it tends to

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312  For an extensive analysis of these cases see Ann Curthoys, Ann Genovese and Alexander Reilly, above n 205, 15–190.
315  See for example *Kruger v Commonwealth* (1997) 190 CLR 1, per Brennan CJ at 36.
320  Irene Watson, ‘Settled and Unsettled Spaces’, above n 2, 40–41.
321  For an extensive analysis of this issue see Ann Curthoys, Ann Genovese and Alexander Reilly, above n 205.
322  Steve Creedy, above n 201; David Hollinsworth, above n 3, 17 and 19–20.
323  Human Rights and Equal Opportunity Commission, above n 3, Chapter 11; Colin Tatz, above n 3; Judy Atkinson, above n 11, 24.
deny historians’ lived relationship with the subjects we treat and our implication in the ways we represent these.\textsuperscript{324}

What Attwood seems to be mindful of here is the way in which any body of knowledge is inevitably imbued with the perspective of the researcher.\textsuperscript{325} As such it is important to consider the connection that the researcher has with their research. The bulk of dominant historical narratives have been written by those with a vested interest in maintaining the illusion of ‘settlement’. To question the validity of ‘settlement’ and rights to land is to question the position of privileged white Australia, an uncomfortable place.

 Those who are opposed to the denialist accounts of history being put forward in the history wars know that in order for Australia to go forward into an ethical future there must be a full and frank acknowledgment of Australia’s history of colonisation.\textsuperscript{326} For example, Ghassan Hage states ‘there can be no ethical belonging to Australia without an ethical relationship to Australia’s history of colonisation.’\textsuperscript{327} Remembering history is incredibly significant from an ethical perspective. Paul Ricoeur writes about the ethical ‘duty to remember’ historical narratives of marginalised people.\textsuperscript{328} Ricoeur states:

  a basic reason for cherishing the duty to remember is to keep alive the memory of suffering over against the general tendency of history to celebrate the victors. … the whole philosophy of history … is concerned with the culmination of advantage, progress and victory. All that is left behind is lost. We need, therefore, a kind of parallel history of … victimisation, which would counter the history of success and victory. To memorise the victims of history – the sufferers, the humiliated, the forgotten – should be a task for all of us.\textsuperscript{329}

 Thus in Australia I argue that we have an ethical duty of remembering the history of the nation – all of it – even those aspects which are unpleasant. It is especially important to create a place for narratives of history which have been marginalised or suppressed by more dominant narratives, such as Aboriginal histories in Australia. Historical narratives of marginalised groups have a great deal to teach us as a society.\textsuperscript{330} There are very significant lessons humanity can learn from those who have suffered:

\textsuperscript{324} Bain Attwood, above n 200, 165.
\textsuperscript{325} Judy Atkinson, above n 11, 5.
\textsuperscript{326} Ghassan Hage, above n 63, 4.
\textsuperscript{327} Ibid 4.
\textsuperscript{329} Paul Ricoeur, ‘Memory and forgetting’, above n 328, 10–11.
\textsuperscript{330} Jay Winter cited in Bain Attwood, above n 200, 50–51.
“The person who suffered knows about a mystery – the mystery of evil and the miracle of survival – and we who listen may thereby enter the mystery and share the miracle.” Together, trauma, memory and testimony privilege those who ostensibly tell it how it was, especially where they are regarded as victims rather than perpetrators or bystanders.\(^{331}\)

In many respects the history wars show that some have difficulty coping with the complexity of history. The history wars signify a battle\(^{332}\) over whose memory of events will be the predominant narrative of the nation. However in order to obtain integrity as a nation historical ‘remembering must be full memory, not partial memory, not selective memory.’\(^{333}\) As John Roth argues, ‘[m]emory’s edge must be kept sharp, clear, keen, alert, and true.’\(^{334}\) What the conservative commentators are advocating in the history wars is but a very partial and selective remembering.

E. Genocide – A National Legacy

To explore genocide is to plum the depths of human horror – it is not a task for the faint-hearted. I cannot help but touch upon the controversial issue of an Australian genocide in my work;\(^{335}\) and as Jungian psychoanalyst Clarissa Pinkola Estes states, ‘[t]he deepest work is usually the darkest’.\(^{336}\) In considering this issue I will examine several policies and legislative enactments of Nazi Germany and compare them to policies and legislative enactments of the Queensland government. Although Australians seem to be willing to accept that genocides have occurred in other times and in other places there remains a great deal of resistance to the idea that genocide or anything like it could have occurred in this country.\(^{337}\) Bain Attwood points out that:

Many settler Australians … are quite happy to discuss the Nazi German genocide and other genocides. But … they are deeply unhappy when such talk extends to their country. They work very hard to erect boundaries to stop the concept of genocide crossing over the temporal and geographical boundaries they have erected between the Old World and the New, and tampering with their sense of themselves and the settler nation. They patrol their nation’s historical borders vigilantly, ordering any suggestions of a local genocide

\(^{331}\) Ibid.

\(^{332}\) Larissa Behrendt, Chris Cunneen and Terri Libesman, above n 13, 4; Larissa Behrendt in Ann Curthoys, Ann Genovese and Alexander Reilly, above n 205, ix.

\(^{333}\) Colin Tatz, above n 3, 66.

\(^{334}\) John Roth in Eric Sterling (ed), Life in the Ghettos During the Holocaust (2005) xvii.

\(^{335}\) For an examination of acts towards Aboriginal peoples in Australia considered genocidal see Colin Tatz, above n 3, 73.

\(^{336}\) Clarissa Pinkola Estes, Women Who Run With The Wolves (1998) 53. I am very grateful to my dear friend Sue Higginson for directing me to this brilliant and inspiring book.

\(^{337}\) Bain Attwood, above n 200, 103; Colin Tatz, above n 3, 67; Tony Barta, above n 3, 155–156.
out of court. In this political work, a popular and populist account of the Nazi German genocide provides the means of settling down anxieties about the moral status of the Australian nation by creating an impenetrable border between the violence of the Nazi German genocide and the violence of the colonisation of this country. Anything that does not measure up to it ... is treated as “something altogether different” ... and so “nothing that resembled genocide” or a Holocaust ... Genocide happens over there, not here, and is committed by people like “them” (Nazis), not people like “us” (the British). This is to say that a story about the Nazi German genocide comes to be the guarantor of the virtue of Australia’s colonial past.338

When conservatives engage in comparisons between Nazi Germany and Australia they acknowledge the evil of the Nazi German genocide and claim that nothing comparable happened here.339 Historians like Windschuttle seek to ease the collective colonial conscience. They try to make a point that Australian Indigenous peoples have been treated comparatively well.340 They trivialise the trauma suffered by Indigenous peoples since colonisation. They quibble over numbers.341 They declare that government intentions of benevolence existed,342 even in the face of evidence to the contrary.343 Thus they avoid dealing with the national legacy of genocide.

Conservative intellectuals use the Holocaust to try to screen from view the suffering of Indigenous peoples.344 Attwood explains that:

invoking the Nazi German genocide seems to perform the role of a screen memory – a means by which they create a screen or a block between themselves and some other trauma that they refuse to approach directly. By proclaiming the incomparable nature of the Nazi genocide as the real or the ultimate trauma, they can ignore another local, traumatic past that is more difficult ... for settler Australians to face. As a result, they fail to find a proper way of remembering and memorialising historical trauma closer to home ... Furthermore, the focus on the Nazi German genocide works against a consideration among settler Australians of whether they have any historical responsibility for their nation’s past, present and future in reference to Aboriginal people.345

Attwood suggests that by denying genocide conservative ‘intellectuals have refused to accept the point of a good deal of the genocide talk in this country’ which is ‘to listen to what

338 Bain Attwood, above n 200, 102–103.
339 Keith Windschuttle, above n 208, 2–3 and 9. See also Reginald Marsh, “‘Lost’, “Stolen” or “Rescued”?”, (1999) June Quadrant 15, 18 where he referred to such a comparison as ‘an absurdity’.
340 Keith Windschuttle, above n 208, 9.
341 Ibid 3; Martin Krygier and Robert van Krieken, above n 256, 81.
342 For example, Keith Windschuttle declared that the colonial authorities just wanted to ‘civilize and modernize the Aborigines, not exterminate them’, Keith Windschuttle, above n 208, 9.
343 See for example Bruce Elder, above n 3, 29–48.
344 Bain Attwood, above n 200, 104.
345 Ibid.
Aboriginal people … have been saying, and to think about this’.\(^{346}\) By contending that Aboriginal peoples did not experience genocide they ‘overlook the probability that many, perhaps most, of the 500–600 Aboriginal groups in this country prior to 1788 had no survivors within a generation or two of the British occupation of their land.’\(^{347}\) They ‘similarly fail to grasp that many Aboriginal people believe that “genocide” is an appropriate word for remembering their historical experience.’\(^{348}\)

Some might consider that the laws detrimentally affecting Jews and other minorities in Germany were at the extreme end of the scale and that on the whole much of Germany was well ordered. Some might similarly consider that Australia’s laws detrimentally affecting Aboriginal peoples represent such a small proportion of Australia’s lawmaking character that they cannot properly be considered as definitive of the nation. However Agamben has said that ‘a legal institution’s truest character is always defined by the exception and the extreme situation.’\(^{349}\) This is a persuasive point. I choose to examine those outer margins, those extremes in lawmaking power. For, like Agamben, I believe that the extreme laws say a lot about the kind of nation we live in; they speak volumes about our national character.

\(^{346}\) Ibid 105.
\(^{347}\) Ibid.

> Leaving aside for the moment the matter of intent, it is possible to make a case that there has been conduct by non-[I]ndigenous people towards Australian indigenes that falls within at least four of the categories of behaviour mentioned in the Convention definition of “genocide”: killing members of the group; causing serious bodily harm or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; and forcibly transferring children of the group to another group.

However it is the issue of proof of intent to commit genocide that has been so controversial. This issue is discussed in detail in Chapter Three of the thesis. One way that scholars have tried to argue a case for social justice for Indigenous Australians on this issue is to maintain that the definition of genocide should be broadened to include ‘cultural genocide’, which does not feature in the *Convention on the Prevention and Punishment of the Crime of Genocide* – see the Senate Legal and Constitutional Affairs Committee report above, 49.

\(^{349}\) Giorgio Agamben, *State of Exception* (translated by Kevin Attell, 2005) 79. See also Sean Brennan, Larissa Behrendt, Lisa Strelein and George Williams, above n 4, 27.
F. Methodology

The research project will draw upon primary and secondary sources. The secondary sources are academic writings in the form of journal articles, books, newspaper articles and online material. The primary sources are comprised of case law, legislation and government reports. The secondary sources will be obtained through currently available literature. The primary and secondary sources include English translations of Nazi German legislation and policy. These primary and secondary sources will be used to address the research questions posed above.

There are several theoretical paradigms which have influenced my research. In terms of theory, my thesis draws upon elements of what may be termed postmodernist philosophy, in particular critical legal studies, critical race theory, critical whiteness studies and postcolonial theory.

Critical Legal Studies (CLS) scholars have been highly critical of formalist methodology,350 and this is relevant to my critique of case law in Chapter Five. Originally a movement developed by ‘privileged white male academics from elite United States law schools’,351 CLS has more recently been used to refer to critical scholarship generally.352 This theoretical approach rejects ‘the “traditional” notions of legal objectivity and legal neutrality.’353 It is critical of ‘[t]he idea that law can be studied in isolation from its social, moral, and political context’.354 CLS scholars often highlight that legal positivism and formalism disguise a conservative political agenda because it ‘presupposes both the existence of and the legitimacy of existing hierarchical institutions.’355 They are critical of the way that judges use positivist epistemology to ascribe to their judgments the privileged status of truth. They consider that law is ‘a political instrument which not only shapes our perception of “truth”, but which also constructs legal subjects in particular ways.’356 This has relevance to my thesis as I argue that

351  Margaret Davies, above n 121, 187.
352  Ibid 183.
353  Ibid; Duncan Kennedy, above n 350, 559–562.
354  Margaret Davies, above n 121, 183.
356  Margaret Davies, above n 121, 283.
law is intensely political and that it has been the means of entrenching and conserving power hierarchies, regardless of the inequality or unfairness that such hierarchies produce.\footnote{Ibid 101.}

Critical Race Theory (CRT) scholarship is concerned with exploring the constructed nature of racial privilege.\footnote{Ibid 292–293; Richard Delgado and Jean Stefancic, \textit{Critical Race Theory – An Introduction} (2001) 2.} CRT theorists argue ‘the status quo is inherently racist, rather than merely sporadically and accidentally so’.\footnote{Richard Delgado and Jean Stefancic, above n 358, 135.} Such scholars argue that if race ‘is not real or objective, but constructed, racism and prejudice should be capable of deconstruction’.\footnote{Ibid 43.} This movement ‘contains an activist dimension. … it sets out not only to ascertain how society organizes itself along racial lines and hierarchies, but to transform it for the better.’\footnote{Ibid 3; and see also Kimberle Crenshaw, Neil Gotanda, Gary Peller, and Kendall Thomas (eds), \textit{Critical Race Theory – The Key Writings that Formed the Movement} (1995) xiii.} Like CLS, CRT developed in the United States,\footnote{Kimberle Crenshaw, Neil Gotanda, Gary Peller, and Kendall Thomas, above n 361, xiii.} however some aspects of their critique are relevant in the Australian context. In Australia there has been a development of CRT with a specific focus on the context of colonialism. This scholarship is a form of Indigenous Critical Race Theory and is pioneered in the writing of scholars such as Irene Watson and Aileen Moreton-Robinson.\footnote{Kimberle Crenshaw, Neil Gotanda, Gary Peller, and Kendall Thomas, above n 361, xiii.} Such scholarship points to the ongoing violence of the colonial project and the myriad of ways in which this has detrimentally affected Aboriginal peoples in the past and how it continues to do so in the present. The critiques provided in Indigenous CRT are a pivotal influence in my research. CRT scholars highlight the way that law has been and continues to be used to privilege those of European origin and discriminate against people of non-European origin.\footnote{Kimberle Crenshaw, Neil Gotanda, Gary Peller, and Kendall Thomas, above n 361, xiii.} They also consider that legal scholarship ‘is inevitably political.’\footnote{See for example Irene Watson, ‘Buried Alive’, above n 2; Irene Watson, ‘De-Colonisation and Aboriginal Peoples: Past and Future Strategies’ (2007) \textit{26 The Australian Feminist Law Journal} 111; Irene Watson, ‘From a Hard Place’, above n 3; Irene Watson, above n 28; Irene Watson, ‘Indigenous Peoples’ Law Ways’, above n 8; Irene Watson, ‘Law and Indigenous Peoples’, above n 3; Irene Watson, ‘Nungas in the Nineties’, above n 308; Irene Watson, ‘Power of the Muldarbi’, above n 37; Irene Watson, ‘Settled and Unsettled Spaces’, above n 2; Irene Watson, ‘The Aboriginal State of Emergency’, above n 157; Aileen Moreton-Robinson, ‘The House that Jack Built’, above n 28; Aileen Moreton-Robinson, \textit{Whitening Race}, above n 293; Aileen Moreton-Robinson, \textit{Sovereign Subjects}, above n 13.} CRT is a useful analytical tool when examining the construction of race under Nazi Germany and Australia. Both relied heavily upon legal definitions of race to engage in oppressive conduct towards members of the target groups in each jurisdiction.

\footnotetext[357]{Ibid 101.}
\footnotetext[358]{Ibid 292–293; Richard Delgado and Jean Stefancic, \textit{Critical Race Theory – An Introduction} (2001) 2.}
\footnotetext[359]{Richard Delgado and Jean Stefancic, above n 358, 135.}
\footnotetext[360]{Ibid 43.}
\footnotetext[361]{Ibid 3; and see also Kimberle Crenshaw, Neil Gotanda, Gary Peller, and Kendall Thomas (eds), \textit{Critical Race Theory – The Key Writings that Formed the Movement} (1995) xiii.}
\footnotetext[362]{Kimberle Crenshaw, Neil Gotanda, Gary Peller, and Kendall Thomas, above n 361, xiii.}
\footnotetext[363]{Kimberle Crenshaw, Neil Gotanda, Gary Peller, and Kendall Thomas, above n 361, xiii.}
\footnotetext[365]{Kimberle Crenshaw, Neil Gotanda, Gary Peller, and Kendall Thomas, above n 361, xiii; Richard Delgado and Jean Stefancic, above n 358, 7; Margaret Davies, above n 121, 318.}
\footnotetext[366]{Kimberle Crenshaw, Neil Gotanda, Gary Peller, and Kendall Thomas, above n 361, xiii.}
Critical Whiteness Studies is a current theoretical movement concerned with critiquing white privilege.\textsuperscript{366} Scholars working within this field examine the systematic privileging of whiteness within societies where the dominant power holders are of European origin.\textsuperscript{367} They argue that ‘whiteness has come to … [embody] objectivity, normality, truth, knowledge, merit, motivation, achievement, and trustworthiness’.\textsuperscript{368} This has led to what Cheryl Harris argues is a type of ‘property’ in whiteness.\textsuperscript{369} Harris argues that ‘[w]hen the law recognizes, either implicitly or explicitly, the settled expectations of whites built on the privileges and benefits produced by white supremacy, it acknowledges and reinforces a property interest in whiteness that reproduces black subordination.’\textsuperscript{370} Although writing in the context of the United States, it is interesting to consider Harris’s comments in light of the development of Australian law. Aileen Moreton-Robinson, an Aboriginal academic who works within this paradigm, argues that ‘whiteness is constitutive of the epistemology of the West; it is an invisible regime of power that secures hegemony through discourse and has material effects in everyday life.’\textsuperscript{371} Critical Whiteness Studies scholarship points out that all whites are beneficiaries of the oppression of non-white groups.\textsuperscript{372} It also considers the role that law plays in constructing and maintaining white privilege.\textsuperscript{373} This occurs through the reliance ‘on primarily white referents in formulating the norms and expectations that become the criteria used by white decisionmakers.’\textsuperscript{374} Such criteria are then ‘mistakenly identif[ied] as race-
neutral’ when they ‘are in fact closely associated with whiteness.’

Critical Whiteness Studies encourages a closer examination of the ‘social context’ and looks at how ‘language masks privilege and makes the bases of subordination themselves appear linguistically neutral.’ This theoretical perspective is useful when considering the formalist approach to judicial decision making which occurs in Australian courts. I argue that formalism is a peculiarly white mechanism for deciding legal disputes and that it has a tendency to privilege white interests at the expense of Indigenous peoples’ interests in Australia. I will examine *Kartinyeri v Commonwealth*, *Nulyarimma v Thompson* and *Wurridjal v The Commonwealth of Australia* in Chapter Five to illustrate this.

Postcolonial theory critiques the processes of imperial domination prevalent in societies with colonial history, along with the ‘paternalistic arrogance of imperialism.’ It critically evaluates ‘the totality of practices … which characterise the societies of the post-colonial world from the moment of colonisation to the present day’. Scholars working within this field pay close attention to the ‘dominant discursive practices which limit and define the possibility of opposition’, and ‘how an explanation and narrative of reality was established as the normative one’. They examine how colonists have attempted to control ‘the imagination and the aspirations of the colonised’. They highlight how colonial texts are used ‘to articulate and justify the moral authority of the colonizer’ and critique ‘imperialism’s linguistic aggression’. This involves what Gayatri Spivak refers to as ‘epistemic violence’. Postcolonial theory is referred to in a limited sense, for the significance of its critiques regarding the negative impact of colonial powers on the colonised

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375 Ibid.
376 Stephanie Wildman with Adrienne Davis, above n 366, 318.
377 Margaret Davies, above n 121, 298.
382 Edward Said, above n 228, xx.
383 Bill Ashcroft, Gareth Griffiths and Helen Tiffin, above n 381, xv.
384 Ibid 3.
386 Bill Ashcroft, Gareth Griffiths and Helen Tiffin, above n 381, 9.
387 Abdul JanMohamed, above n 111, 23.
world, as it cannot accurately be said that Australia has entered a postcolonial phase.390 Indeed Indigenous writers, such as Irene Watson, point out that Australia is still dominated by a colonial mentality.391 Similarly, Jennifer Nielsen argues that ‘colonialism remains the prevailing force within the Australian political, social and legal landscape.’392

Deconstruction is an analytical tool used in each of these theoretical perspectives.393 Jacques Derrida is the father of deconstruction.394 ‘[D]econstruction involves thinking about the conditions of theory … and unravelling or “desedimenting” the layers of meanings and assumptions upon which theories are built.’395 It is therefore useful for exploring the underlying assumptions inherent in politico-legal systems. Through deconstruction ‘law is revealed as a political artefact that in its creation overcame competing values.’396 Deconstruction is useful because it ‘generates altered understandings of dominant views.’397 It highlights ‘not only what the writer has expressed and privileged, but what has been ignored and marginalised.’398 In this process it opens possibilities ‘to envisage new meanings.’399 Margaret Davies explains that:

The political and ethical element of deconstruction takes several different forms … deconstruction involves an exposure of dogma – not a reckless destruction, but a careful and responsible questioning: it opens the founding assumptions of Western philosophy for critical examination.400

Davies maintains that ‘far from being a-political and nihilistic, deconstruction encourages purposeful and self-reflective intervention’.401 As Derrida states, ‘it is in the name of justice that we deconstruct’.402 The purpose of deconstruction therefore is to allow for a reconstruction which is based on ethical considerations.403 Deconstructive analysis is

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392 Jennifer Nielsen, above n 14, 85.
393 Margaret Davies, above n 121, 370–371.
396 Ben Mathews, above n 121, 115.
397 Margaret Davies, above n 121, 370; Ben Mathews, above n 121, 108.
398 Ben Mathews, above n 121, 112–113.
399 Margaret Davies, above n 121, 371.
400 Margaret Davies, above n 121, 370–371.
401 Margaret Davies, above n 6, 339.
402 Jacques Derrida, above n 394, 88.
403 Margaret Davies, above n 121, 370–371; Ben Mathews, above n 121, 120, 122 and 125.
characterised by ‘an ethic of responsibility and justice.’ As such I find deconstructive analysis highly useful in undertaking my research, as it gestures towards the creation of an intellectual climate conducive to positive change.

Throughout my research I have also drawn upon the work of Michel Foucault. Like Foucault, I am interested in examining ‘the violence that functions despite the order of laws, beneath the order of laws, and through and because of the order of laws.’ I have been influenced by his concept that there is a close connection between power and knowledge, indeed how those possessing power have historically influenced the nature of what is classed as knowledge. Foucault claims that ‘knowledge functions as a form of power and disseminates the effects of power.’ This is particularly the case with governments who have immense power and therefore an immense capacity to engage in the dissemination of particular types of knowledge. Foucault explains that ‘[t]he exercise of power perpetually creates knowledge and, conversely, knowledge constantly induces effects of power.’ This phenomenon is very clearly illustrated through a study of the racist propaganda promulgated by the Nazi regime. I believe that it is also apparent in the study of propaganda used against Aboriginal peoples in Australia.

It is also interesting to consider this relationship between power and knowledge in the recent history wars. There a dominant narrative, or ‘history of power’, has been produced since 1788, coinciding with Howard’s ‘proper narrative of Australian history’, by those having power to produce it. This dominant narrative has been resisted by more ‘subjugated knowledges’ regarding colonial history. Foucault explains that ‘subjugated knowledges’ are those which have been considered inferior in the West. These are ‘a whole series of knowledges that have been disqualified as nonconceptual knowledges, as insufficiently elaborated knowledges: naive knowledges, hierarchically inferior knowledges, knowledges

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404 Ben Mathews, above n 121, 116.
405 Michel Foucault, above n 112, 79.
407 Ibid 59.
408 Ibid 69.
409 Ibid 52.
410 Transcript of the Leaders Debate, above n 277.
411 Foucault explains how much of history has ‘never been anything more than the history of power as told by power itself, or the history of power that power had made people tell … the history of power, as recounted by power.’ – Michel Foucault, above n 112, 133.
412 Michel Foucault, above n 406, emphasis removed.
that are below the required level of erudition or scientifi city. \(^{414}\) Colonial countries such as Australia have typically placed Indigenous knowledges in this category, along with scholarship which is concerned with supporting Indigenous perspectives of history. Thus the versions of Australian history which support Indigenous perspectives can be seen somewhat as an ‘insurrection of subjugated knowledges’. \(^{415}\) These challenge the dominant knowledges which have been privileged in colonial culture and therefore, to some extent, they challenge colonial claims to power. This occurs through their challenge of the ‘colonial discourse’ \(^{416}\) which has worked to oppress Indigenous peoples.

My thesis is unashamedly political. In my view law and politics are inextricably linked. \(^{417}\) As Vivian Grosswald Curran asserts:

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\text{it is misleading to discuss law as being ‘politicized’ inasmuch as this implies a prior ‘un-politicized’ concept of law. Such a concept is both inaccurate and incoherent. Additionally, to focus on the politicization of law is to dichotomize law and politics, and consequently to examine only one aspect of a dynamic that is of mutually interactive influence.}^{418}
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I have felt compelled to undertake this research because so many Anglo-Australians seem to adopt an attitude of “hostile indifference” to the plight of Indigenous peoples. \(^{419}\) This is evident in the support for Pauline Hanson’s racist policies and for those racist policies which were implemented by the Howard government. \(^{420}\) Australian history shows that there has been apathy on the part of many Anglo-Australians towards Aboriginal suffering and disadvantage. Colin Tatz has written about the place of bystanders in genocidal processes. \(^{421}\) In Australia genocide has occurred in part because there are many bystanders who have had an unsympathetic attitude towards the plight of victims. \(^{422}\) Many have watched silently and passively whilst the government engages in further acts of discrimination leading to ever more disadvantage. Tatz considers that this involves complicity in oppression. \(^{423}\) Many

\(^{413}\) Ibid 81.
\(^{414}\) Michel Foucault, above n 112, 7.
\(^{415}\) Ibid.
\(^{418}\) Vivian Grosswald Curran, above n 417, 309.
\(^{419}\) Professor Yehuda Bauer cited in Colin Tatz, above n 3, 60.
\(^{420}\) David Hollinsworth, above n 3, 11; Mike Steketee, above n 28, 2–4.
\(^{421}\) Colin Tatz, above n 3, 69–70.
\(^{422}\) Ibid 69–70 and 73.
\(^{423}\) Ibid 70.
Anglo-Australians are indifferent to the suffering of a people so long dehumanised through government policy that their suffering no longer seems extraordinary. It has become ordinary. It has become unexceptional. So some Anglo-Australians are weary of the issue of social justice for Aboriginal peoples. Whether this is a result of what has been called ‘compassion fatigue’ or whether it is symbolic of a broader degree of indifference towards suffering of ‘non-white others’ is uncertain. However the acquiescence to the suffering of Indigenous Australians says something about the Australian nation. As a nation we are infinitely worse for it. There is something dehumanising for Anglo-Australians too in not crying out against human suffering. We diminish our humanity. We revert to a mere shell of what we might otherwise be. As stated by Justices Deane and Gaudron in *Mabo v Queensland (No 2)*, ‘[t]he nation as a whole must remain diminished unless and until there is an acknowledgement of, and retreat from, those past injustices.’ As a lawyer I have an ethical responsibility to document law’s complicity in Australian structural racism and to argue for a legal framework that does not embed white privilege. This thesis embodies that ethical responsibility.

424 Murray Goot and Tim Rowse, above n 28, 131–132.
425 Greta Bird, above n 197, 110 and fn 135.
Chapter 2

THE HORRORS OF THE HOLOCAUST – NAZI PERSECUTION AND DEHUMANISATION OF JEWS

A. Introduction

Founded in fascism and anti-Semitism, 1 Hitler rose to power promising to liberate the masses from their economic hardship created in the aftermath of World War I. 2 Drawing on the anti-Semitism which had long flourished in Europe 3 and the global eugenics movement, 4 the Nazis tapped into a pre-existing racial hatred that had been festering for centuries. 5 The Nazi regime was impeccably legalistic, 6 and Hitler ensured that his officials were meticulous in documenting all manner of tasks undertaken in the name of the State. Thus there are documents recording a broad range of activities by government officials which furthered the objectives of the Nazi regime. 7 The Nazi war machine was carefully constructed through ever increasing legislation and applied zealously by judges who were ordered to abide by Nazi ideology. 8 Although an ethical perspective required lawyers to critique the laws of the Nazi regime such criticism was a perilous enterprise. 9 Propaganda was used to justify oppressive laws. Public opinion was molded through outlandish

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1 Andrew Heywood, Political Ideologies – An Introduction (3rd ed, 2003) 221.
propaganda which was disseminated through political speeches, the printed media and film. Looking back one wonders how people so readily believed what they were told about Jewish people. How could people have been so gullible, I wonder, as I read extracts from Der Stürmer, a Nazi propaganda newspaper. These extracts from Der Stürmer spread hideous lies about Jews and blamed them for all manner of evils, from the poor economic state of Germany after the First World War to continued contemporary economic hardship and overcrowding in various professions. Jews were described as ‘pests’, a ‘plague’, a ‘disease’, ‘pigs’, ‘communists’ and as utterly responsible for any and all manner of problems faced by the German people.

The Nazi regime targeted Jews and other minorities as a scapegoat for all of the difficulties confronting Germany. Jews, Gypsies, repeat criminals, homosexuals, blacks and the disabled all bore the brunt of German dissatisfaction and disillusionment. Special laws were designed to target members of the groups considered to be ‘undesirable’. The laws stripped people of the rights of citizenship. They gradually encompassed every area of Jewish life. What began as a gradual stripping away of basic rights common to those dwelling in a Western European country soon escalated into full blown persecution.

Richard Miller states that the Holocaust is an example of ‘how decent and reasonable persons of high intelligence can cooperate to produce stupidity, brutality, and madness – yet be oblivious to what they are doing.’ This might seem to be a rather benevolent reading of the Holocaust. In my view, what the Holocaust has shown is that a nation claiming to have superior intelligence and virtue can be just as brutal as any group they choose to define as savages. In relation to Nazi Germany Israel Charny eloquently states:

10 Richard Miller, above n 6, 14–15 and 27–35; Andrew Heywood, above n 1, 228.
11 Richard Miller, above n 6, 28.
12 Ibid 27–30 and 33; Saul Friedländer, above n 3, 77; Jeremy Noakes and Geoffrey Pridham, above n 2, 89.
16 Saul Friedländer, above n 3, 149.
17 Richard Miller, above n 6, 1.
Never was there a society so totally committed to an ideology of the total destruction of another people; never were the near-total resources and organizational genius of a modern society devoted toward creating an actual “industry of death”; never were the tools of science and engineering harnessed so extensively for making more efficient deaths of civilians in assembly-line machinery that transformed people into disposable refuse to be burned in ovens; and never were a people persecuted so relentlessly as subhuman, degraded, and tortured cruelly and systematically for long periods of time on the way to their tormented “appointments” with death.18

Thousands of Germans participated in the bureaucracy of the Holocaust by completing necessary administrative roles.19 Under the Nazi regime ‘each person’ had ‘only a single, highly specialized function, often not particularly significant in itself.’20 As each individual person fulfilled their role ‘[t]heir participation made possible the bureaucratic organization of modern technology for mass extermination’.21 Tragically many bureaucrats considered that they were just doing their jobs and did not consider the cumulative effects of their actions. Donald Niewyk observes how German police and government bureaucrats who defined, identified, assembled, and deported the Jews to the east were rarely fanatical Nazis or anti-Semites. They were careerists and efficient professionals, dedicated to following instructions and improvising solutions to problems in the spirit of their superiors. Amorality was encouraged by specialization; each department and individual was accountable for only one small segment of the program, diffusing personal responsibility.22

Similarly, Miller explains that bureaucracy was an important feature in continuing the momentum of the Holocaust:

As more and more persons obtain a stake in a project, a bureaucratic thrust moves it along. The war on Jews made money for Aryan merchants. It provided jobs for Aryan unemployed. It provided good housing. It funded scientists’ research grant proposals. It provided construction jobs. It increased railroad revenue. It created new government agencies. It justified budget increases for old agencies. It distracted citizens from problems that Nazi leaders wanted to hide. A continuing need to expand the war effort was obvious to fighters who depended on it.23

This ‘bureaucratic thrust’24 gradually brought about drastic changes. One of the keys to the Nazis implementing such radical measures with a minimum of citizen protest was carrying

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20 Donald Niewyk, above n 2, 149.
21 Ibid.
22 Ibid 142.
23 Richard Miller, above n 6, 165–166.
24 Ibid 165.
out the changes incrementally. ‘Escalation of the war on Jews was so gradual, each additional measure seemed so reasonable in its context, that few persons who accepted the war’s premise felt any doubt about wisdom in the next harsher step.’ Miller explains how the process of gradually increasing discriminatory treatment can eventually lead to extreme persecution:

Mass killings may forever be the image of the Nazi regime, but although they were an inevitable result of the destruction process, the inevitability was unapparent to participants and observers who focused on shortcomings of current efforts and on proposals to improve inadequate measures. At first the regime called on job applicants to provide genealogical affidavits to demonstrate whether they were Jews. When that requirement proved too cumbersome, Jews had to have their identity documents stamped. When displaying a document proved inadequate for oral interactions, Jews were required to identify themselves as such when speaking to officials. When all those steps still allowed Jews to patronize stores and ride streetcars without detection, in 1941 identifying badges had to be sewn on their clothing. A badge decree seemed so absurd in 1933 that no responsible official even proposed such a thing. Eight subsequent years of bureaucratic thrust created a climate in which a badge decree became reasonable.

This shows how bureaucratic processes can gradually change the face of a nation. It is something like placing a frog in water and then slowly bringing it to the boil. A gradual desensitisation was taking place which allowed the persecution, oppression, and genocide of Jewish people. The Holocaust is ‘a paradigm … instance of genocide’. The genocidal laws and policies formulated and implemented by the Nazis are truly horrific. Research conducted on the Holocaust has certainly been extensive. In this chapter, however, I will attempt to confine my research primarily to Nazi German legislation and policy which detrimentally affected Jewish people. This will enable examination of a sample of legislation and policy with a greater level of specificity.

25 Ibid 168.
26 Ibid 166.
28 For example (and this certainly is not an exhaustive list), Richard Miller, above n 6; Jeremy Noakes and Geoffrey Pridham, above n 2; Yitzhak Arad, Yisrael Gutman and Abrahm Margaliot, above n 7; Saul Friedländer, above n 3; Colin Tatz, Peter Arnold and Sandra Tatz (eds), Genocide Perspectives III – Essays on the Holocaust and Other Genocides (2006); Rowan Savage, above n 13, 17; Colin Tatz, With Intent to Destroy – Reflecting on Genocide (2003); Michael Stolleis, above n 8; David Bankier, The Germans and the Final Solution – Public Opinion under Nazism (1996); Gitta Sereny, The Healing Wound – Experiences and Reflections on Germany, 1938–2001 (2001); Israel Charny, above n 18.
B. The Foundations of Fascist Germany

The seeds of anti-Semitism were sown in Germany long before Hitler took power in 1933. Indeed anti-Semitism flourished in various parts of the western world long before Hitler invented the gas chambers, it was, for example, quite prominent amongst American eugenicists in the early twentieth century. Yet in Germany it took a diabolical form. Eugenics can be defined as a ‘theory or practice of selective breeding, achieved by promoting procreation amongst “fit” members of a species or preventing procreation by the “unfit”.’ German anti-Semitism was interlinked with economic factors. Post World War I economic hardship had created a climate where German people readily despised their more prosperous Jewish neighbours. There was a growing level of intense jealousy of the material success enjoyed by Jews in Germany in the lead up to the war. Even before the Nazi regime, there were calls to expel Jews from the public domain and calls to rob them of their citizenship. There were anti-Semitic bodies in existence in Germany before the rise of Nazism, such as the ‘Association Against Jewish Arrogance’ formed in 1912. Although Jews represented a small percentage of Germany’s population, they stood out in terms of visibility by being clustered in certain prestigious professions. They were therefore thrust into contact with other Germans in their day to day vocations. As a result resentment developed on the part of some Germans who were less able to enter the professions where Jews were employed. Saul Friedländer states that:

Jews never represented more than approximately 1 percent of Germany’s overall population in the late nineteenth and early twentieth centuries. Between the beginning of the century and 1933, that percentage slightly declined. The Jewish community, however, gained in visibility by gradually concentrating in the large cities, keeping to certain professions, and absorbing an increasing number of easily identifiable East European Jews. The general visibility of Jews in Germany was enhanced by their relative importance in the “sensitive” areas of business and finance, journalism and cultural activities, medicine and the law, and, finally, by their involvement in liberal and left-wing politics.

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30 Edwin Black, above n 4, xvi; Michael Silver, above n 4, 862–866; Paul Lombardo, above n 4, 747–749.
31 Andrew Heywood, above n 1, 331.
32 Jeremy Noakes and Geoffrey Pridham, above n 2, 89.
33 Saul Friedländer, above n 3, 74.
34 Ibid 76.
36 Ibid 77.
37 Ibid.
38 Ibid.
Similarly Donald Niewyk claims ‘Jews were … concentrated in a few highly visible economic sectors such as banking, publishing, and the metal and clothing trades. This made them convenient targets for the victims of industrialization, some of whom blamed the Jews for depressions, bankruptcies, and unemployment.’

Thus in many ways Hitler was tapping into an already existing phenomenon in the form of virulent anti-Semitism. The foundations of fascist Germany had been carefully laid and the political, economic and social conditions were ripe for Hitler to institute legalised persecution and oppression of Jews. Hitler rose to power through the vehicle of the National Socialist German Workers’ Party, the Nazi party, which formed in 1919 under Hitler’s leadership. Hitler came to power by pledging to assist those who were suffering from economic hardship, which was rampant after the First World War. Unemployment was a serious problem and ‘peasants, artisans and small shopkeepers’ were suffering severe financial difficulties. To those in situations of financial desperation, Hitler seemed like a type of Messiah, promising to ease their burdens. Indeed, Hitler’s political ideology had an almost religious quality, and required ‘commitment and faith … rather than … reasoned analysis and debate’.

The fascist regime of Nazi Germany embraced certain elements of Social Darwinism which emphasised ‘struggle’, ‘competition’ and the survival of those who were the ‘fittest and strongest’. War was seen by the Nazis as fundamentally necessary for the biological viability of the German people. The biological functions of this form of racism have been explained by Michel Foucault, who states this type of racism makes it possible to establish a relationship between my life and the death of the other that is not a military or warlike relationship of confrontation, but a biological-type relationship: ‘The more inferior species die out, the more abnormal individuals are eliminated, the fewer degenerates there will be in the species as a whole, and the more I – as species rather than individual – can live, the stronger I will be, the more vigorous I will be. I will be able to proliferate.’ The fact that the other dies does not mean simply that I live in the sense that his death guarantees my safety; the death of

39 Donald Niewyk, above n 2, 143.
40 Andrew Heywood, above n 1, 215.
41 Jeremy Noakes and Geoffrey Pridham, above n 2, 89.
42 Ibid 89 and 96.
43 Ibid 104.
44 Andrew Heywood, above n 1, 217.
46 Ibid.
the other, the death of the bad race, of the inferior race (or the degenerate, or the
abnormal) is something that will make life in general healthier: healthier and purer. 47

An important element of fascist Germany under Hitler was the elimination of Jews and all
who were considered to be weak, such as the ill and disabled, 48 and a celebration of the
strength of the allegedly superior Aryan race. 49 Consistent with this belief were the
government policies which urged those who were considered desirable breeders to have
children. 50 This ‘selective breeding’ was actively endorsed and promoted by government. 51
Andrew Heywood states ‘the explicitly racial nationalism of Nazism … was reflected in
the ideas of Aryanism, the belief that the German people are a “master race”.’ 52 Contrary
to current scientific research, Hitler considered ‘race’ to be a biological fact rather than a
social construct. 53 He considered that ‘race is the fundamental characteristic of human
beings.’ 54 He had rigid ideas about ‘blood’ and ‘race’ which had terrifying implications for
millions of innocent people. He defined the Jews as a ‘pest race’ and sought to annihilate
them just as a farmer would a plague of rats. 55 Indeed, one of the first propaganda films
created by Nazi Germany, The Eternal Jew, tried to imply that Jews were like a plague that
had to be eliminated. 56 Jews were viewed as ‘a biologically determined race, whose
characteristics were both immutable and dangerous.’ 57

Racist theory was central to Nazi Germany. 58 Heywood notes that under Nazi Germany
‘official ideology at times amounted to little more than hysterical, pseudo-scientific anti-
Semitism.’ 59 Heywood explains that:

In Nazi Germany … racism was rooted in biological and therefore quasi-scientific
assumptions. Biologically based racial theories, as opposed to those that are linked to
culture or religion, are particular[ly] militant and radical because they make claims

47 Michel Foucault, “Society Must Be Defended” – Lectures at the Collège de France, 1975–76 (eds Mauro
48 Nazi Germany sought to exterminate all those considered to be disabled through their T-4 Program,
系统性地杀害那些被认为是“生命不值得生活”的人，以便不消耗国家资源来照顾这些人。Berel Lang, above n 27, 6.
49 Andrew Heywood, above n 1, 220–221.
50 Richard Miller, above n 6, 143.
51 Andrew Heywood, above n 1, 221.
52 Ibid 225.
53 Ian Haney Lopez, White by Law: The Legal Construction of Race (1996) 9; David Hollinsworth, Race
and Racism in Australia (3rd ed, 2006) 38; Andrew Heywood, above n 1, 231.
54 Terence Ball and Richard Dagger, Political Ideologies and the Democratic Ideal (3rd ed, 1999) 204.
55 Richard Miller, above n 6, 34–35.
56 Ibid 30–33.
57 Colin Tatz, above n 28, 28.
58 Andrew Heywood, above n 1, 231.
59 Ibid.
about the essential and inescapable nature of a people that … supposedly back up the certainty and objectivity of scientific belief.60

However the pseudo-scientific nature of Nazi racism had some claim to privilege, because scientific knowledge has been privileged tremendously since the Enlightenment era.61

Nazi ideology developed from ‘a combination of racial anti-Semitism and social Darwinism.’62 Hitler was ‘a racial anti-Semite and social Darwinist’ before 1914.63 Once Hitler came to power he was able to enact laws to advance his philosophical and ideological perspectives. However anti-Semitism was prominent in Europe long before Hitler rose to power.64 ‘Long before the birth of the Nazi Party, generation after generation of Germans were indoctrinated into antisemitic ideas by their churches, their parents, and their education’.65 Hatred of Jewish people was not a novel concept on the part of Hitler. Heywood points out that anti-Semitism’s origins were largely theological: the Jews were responsible for the death of Christ, and in refusing to convert to Christianity they were both denying the divinity of Jesus and endangering their own immortal souls. The association between the Jews and evil was therefore not a creation of the Nazis, but dated back to the Christian Middle Ages … However, anti-Semitism intensified in the late nineteenth century. As nationalism and imperialism spread throughout Europe, Jews were subject to increasing persecution in many countries.66

Anti-Semitism was supported by various strains of theology which ‘saw the Jews as bearing the curse of being Christ’s murderers.’67 Jews were thus demonized as a result of their involvement in the murder of Jesus.68 Anti-Semitism was also deeply connected with the idea that Jews should be punished for rejecting Christ as their messiah. ‘Traditional

60  Ibid 232.
62  Andrew Heywood, above n 1, 233.
63  Donald Niewyk, above n 2, 144.
64  Saul Friedländer, above n 3, 76–77; Andrew Heywood, above n 1, 233.
65  Robert Michael, above n 5, 9.
66  Andrew Heywood, above n 1, 233.
67  Hans Mommsen, Alternatives to Hitler – German Resistance under the Third Reich (translated by Angus McGeoch, 2000) 262; and see Robert Michael, above n 5, 1.
68  This strikes me as a curious basis upon which to persecute the Jews, because according to traditional Christian theology, the death of Jesus is the means of atonement for sin and the basis of eternal salvation. Alan Richardson and John Bowden (eds), A New Dictionary of Christian Theology (1983) 50–51. ‘To punish those who facilitated the atonement seems to rather miss the point of this element of Christian doctrine.
anti-Semitism arose out of Christian rejection of the Jews as ... deliberate misbelievers.'\textsuperscript{69} Nazis also believed that Jews were ‘“irredeemably evil”’.\textsuperscript{70} This perception was influenced by historical views of Jews within the Church, where ‘Jews were demonised and depicted in church art as tailed, horned, beastly and Satanic.’\textsuperscript{71} There were ‘medieval theologians and popes’ who argued that ‘Jews … should be … permanent slaves to Christians.’\textsuperscript{72} In the nineteenth century Jews were ‘depicted in German literature as being without soul, without the traditional humble German virtues, uprooted, troublesome, malevolent, [and] shiftless.’\textsuperscript{73} As Robert Michael states, “[t]he church fathers provided a consecrated attack-language that political leaders ... used to attack Jews, Judaism, and Jewishness. They reified anti-Jewish language.”\textsuperscript{74} As a result of this Jews were vilified by many Christians, even before Nazism.\textsuperscript{75}

One theologian who was particularly influential in Germany was the Protestant reformer Martin Luther. Robert Michael explains that Martin Luther’s poisonous anti-Semitism had a massive influence on the German people.\textsuperscript{76} He states that ‘Martin Luther helped establish the groundwork and vocabulary for Nazi Jew policy.’\textsuperscript{77} Luther’s writing suggested that there were links between Jews and the Devil and Jews and ritual murder.\textsuperscript{78} Luther referred to Jews as a ‘plague’ and a ‘pestilence’.\textsuperscript{79} He likened them to ‘gangrene’ which had to be cut away from the nation.\textsuperscript{80} Significantly, ‘both Luther and Hitler advocated the sequential destruction of Jewish religious culture, the abrogation of legal protection, expropriation, forced labour, expulsion, and mass murder.’\textsuperscript{81} Luther was looked upon as a national hero in Germany.\textsuperscript{82} He left a terrifying legacy of hateful anti-Semitism that ‘profoundly influenced the attitudes and ideas of the generations that followed’.\textsuperscript{83}

\begin{itemize}
\item \textsuperscript{69} Donald Niewyk, above n 2, 143.
\item \textsuperscript{70} Saul Friedländer cited in Colin Tatz, above n 28, 20.
\item \textsuperscript{71} Colin Tatz, above n 28, 27; Robert Michael, above n 5, 1.
\item \textsuperscript{72} Robert Michael, above n 5, 2.
\item \textsuperscript{73} Colin Tatz, above n 28, 44.
\item \textsuperscript{74} Robert Michael, above n 5, 2.
\item \textsuperscript{75} Ibid.
\item \textsuperscript{76} Ibid 3.
\item \textsuperscript{77} Ibid.
\item \textsuperscript{78} Ibid 4.
\item \textsuperscript{79} Martin Luther, \textit{Jews}, cited in Robert Michael, above n 5, 4.
\item \textsuperscript{80} Ibid 5.
\item \textsuperscript{81} Robert Michael, above n 5, 4.
\item \textsuperscript{82} Arlie Hoover, ‘German Christian Nationalism: It’s Contribution to the Holocaust’ (1989) 4(3) \textit{Holocaust and Genocide Studies} 311, 314; Robert Michael, above n 5, 5.
\item \textsuperscript{83} Robert Michael, above n 5, 6.
\end{itemize}
The negative stereotypes attributed to Jews via anti-Semitism led to oppressive conduct being seen as justifiable, and indeed, as possessing some ‘redemptive’ qualities.\textsuperscript{84} The persecution of the Jews was intertwined with Hitler’s ideas about ‘redemptive anti-Semitism’.\textsuperscript{85} Saul Friedländer explains that:

Redemptive anti-Semitism was born from the fear of racial degeneration and the religious belief in redemption. The main cause of degeneration was the penetration of the Jews into the German body politic, into German society, and into the German bloodstream. Germanhood and the Aryan world were on the path to perdition if the struggle against the Jews was not joined; this was to be a struggle to the death. Redemption would come as liberation from the Jews – as their expulsion, possibly their annihilation.\textsuperscript{86}

In this way Nazi ideology constructed the persecution and murder of Jewish people as ethical.\textsuperscript{87} In order to construct Nazism as fundamentally good they had to pit it against a construction of Jewishness that was fundamentally bad.\textsuperscript{88} Hitler proclaimed that he was acting in accordance with God’s will in carrying out the persecution of the Jews.\textsuperscript{89} Hitler claimed in \textit{Mein Kampf} that ‘the personification of the devil as the symbol of evil assumes the living shape of the Jew.’\textsuperscript{90} According to Hitler’s version of Christianity, Jesus had fought the established Jewish order and he was just continuing this work of opposition ‘against the Jewish world enemy’.\textsuperscript{91} As Saul Friedländer explains, ‘[a]t the end of the second chapter of \textit{Mein Kampf} comes the notorious statement of faith: “Today I believe that I am acting in accordance with the will of the Almighty Creator: by defending myself against the Jew, I am fighting for the work of the Lord.”’\textsuperscript{92} Thus it can be seen that Hitler claimed to be inspired with religious fervor in orchestrating the oppression and annihilation of the Jews. Indeed, it has been suggested by Arlie Hoover that ‘romantic-Christian nationalism’ played a significant role in the Holocaust.\textsuperscript{93} This was fuelled by zealous preaching about the destiny of Germany to become a great and powerful nation supposedly

\begin{itemize}
\item[84] Saul Friedländer, above n 3, 87.
\item[85] Ibid.
\item[86] Ibid.
\item[88] Robert Michael, above n 5, 15.
\item[89] Saul Friedländer, above n 3, 98.
\item[90] ‘Extracts from Mein Kampf by Hitler’ in Yitzhak Arad, Yisrael Gutman and Abraham Margaliot, above n 7, 23.
\item[91] Saul Friedländer, above n 3, 102; ‘The Program of the National-Socialist (Nazi) German Worker’s Party’ in Yitzhak Arad, Yisrael Gutman and Abraham Margaliot, above n 7, 18.
\item[92] Adolf Hitler, \textit{Mein Kampf} cited in Saul Friedländer, above n 3, 98.
\item[93] Arlie Hoover, above n 82, 313.
\end{itemize}
as part of God’s plan. Research shows that Nazis ‘were disproportionately from Protestant backgrounds.’ In large part the churches circulated the message that ‘Jews were evil and doing evil to them was authorized, approved, justified, reasonable, indeed a religiously good work.’ As Israel Charny points out, religion and genocide are often tragically intermingled. The Holocaust demonstrates that misguided religious fervor can have dire consequences.

Andrew Heywood explains how the nature of anti-Semitism changed to a pseudo-scientifically based racial hatred under Hitler. As nineteenth century ideas of ‘a “science of race”’ emerged Jews were regarded ‘as a race rather than a religious, economic or cultural group.’ This led to Jews being ‘defined inescapably by biological factors such as hair colour, facial characteristics and blood. Anti-Semitism was therefore elaborated into a racial theory, which assigned to the Jews a pernicious and degrading racial stereotype.’

Contrary to the degraded stereotype forced upon Jews under Nazism, certain noble physical characteristics were considered by racial scientists to typify ‘Aryans.’ Ironically, despite Hitler’s obsession with ‘race’ he certainly did not fit the stereotype which he sought to identify as Aryan, that is, ‘tall, broad-shouldered, blond-haired, [and] blue-eyed’.

The Nazi regime also depended ideologically on the groundwork prepared by anti-Semitic philosophers ‘who condemned the Jewish peoples as fundamentally evil and destructive.’ It is important to realise that without the creation of an intellectual climate conducive to anti-Semitism the Holocaust may never have occurred. Colin Tatz has written powerfully of the responsibility academic writers must bear in relation to the Holocaust. Tatz argues that ‘[b]iologists, eugenicists, anthropologists, psychiatrists, and lawyers

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94 Ibid 314. It is interesting to observe how often God gets blamed for human greed and grasps for power.
95 Michael Mann, above n 15, 335.
96 Robert Michael, above n 5, 15.
97 Israel Charny, above n 18, xv–xvii.
98 Andrew Heywood, above n 1, 233.
99 Ibid.
100 Ibid.
101 Ibid 225.
102 Ibid 232.
103 Ibid 233.
104 Colin Tatz, above n 28, 24 and 45.
Chapter 2 – The Horrors of the Holocaust – Nazi Persecution and Dehumanisation of Jews

provided the building blocks, or the engine parts, of the genocidal apparatus. He points out that ‘journals and university departments of “racial hygiene” flourished – well before Hitler. Tatz takes the view that social and political conditions were ripe for the Holocaust to occur, stating ‘the antisemitic fuel tanks were full enough, historical enough, institutionalised enough to make the genocidal engine ready for its radical driver.' In his view there were

a series of building blocks being assembled, aggregated and accepted: from the days of völkisch antisemitism, church contempt and Christian antisemitism, to the rise of “scientific” racism, the anthropology of race, the attractions of fascism and the revolt against modernity, the emphatic insistence on an ethnic nationalism, the eugenics movements, the beginnings of rassenhygiene (racial hygiene), the attempts in 1895 to prevent further Jewish migration to Germany, the antisemitism rampant in the German universities in the 1910s and 1920s, and so on.

Tatz claims there was

an engine that had been assembled by the ideas and actions of various designers, engineers, fuel makers and lubricant manufacturers, one that needed only a driver to switch it on. In short, the Holocaust was not inevitable; but all the ingredients needed to make it happen, to allow it to happen, to enable it to happen, were already in place.

One such ingredient was the work of Joseph Arthur Gobineau, who wrote an ‘Essay on the Inequality of the Human Races’ which proved to be very influential in Nazism. This essay ‘postulated that mixed and mongrel man had finally come together in a “pure blood type” and that Jews, as “baneful germ plasms”, were the omnipresent danger to that purity.’ Heywood states that:

The doctrine of racial anti-Semitism entered Germany through Gobineau’s writing and took the form of Aryanism, a belief in the biological superiority of the Aryan peoples. These ideas were taken up by the composer Richard Wagner and his British-born son-in-law, H.S. Chamberlain … whose Foundations of the Nineteenth Century … had an enormous impact upon Hitler and the Nazis.

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105 Ibid 24.
106 Ibid 45.
108 Ibid 23.
109 Ibid 23.
111 Colin Tatz, above n 28, 45.
112 Andrew Heywood, above n 1, 234.
Chamberlain’s work ‘prepared the ground for Nazi race theory, which portrayed the Jews as a universal scapegoat for all of Germany’s misfortunes.’ Another influence on Nazism was Ludwig Woltmann who considered that ‘the greatest achievements in art, music, literature, philosophy, and industry [have] been concentrated in Western Europe’ and that this could be explained by the presence of the Aryan ‘race’ in that vicinity. Curiously he did not consider the possibility that Europe’s luxurious advances in ‘civilisation’ could be attributed to the phenomenon of colonisation whereby the European nations acquired wealth and leisure to pursue ‘civilised’ endeavours through robbing other nations of their wealth and enslaving their people.

For Hitler the history of the world could be understood as ‘a struggle for dominance between the Germans and the Jews, representing respectively the forces of “good” and “evil”.’ To Hitler the nature of this struggle was such that it ‘could only end in either Aryan world domination or the final victory of the Jews.’ Hitler saw himself as orchestrating a racial revolution. Hitler considered Aryans to be a ‘master race’ who were destined to rule because of their racial superiority. This belief formed the basis of Nazi policies which celebrated Aryanism and promoted selective breeding so as to ensure the dominance of Aryan people. It also informed the policies and legislation which sought to dehumanise and eventually annihilate Jews. Hitler was deeply concerned about racial purity and implemented legislation designed to prevent what he saw as inter-racial sexual relations. These laws are known as the Nuremburg Laws. Heywood explains ‘[t]he Nuremburg Laws, passed in 1935, prohibited both marriage and sexual relations between Germans and Jews, supposedly preventing Jewish people from undermining Germany biologically by “polluting” the racial stock and threatening what Hitler called the “vital sap”.

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113 Ibid.
114 Terence Ball and Richard Dagger, above n 54, 205.
115 Andrew Heywood, above n 1, 234.
116 Ibid 234.
118 Andrew Heywood, above n 1, 234–235.
119 Richard Miller, above n 6, 143.
120 Andrew Heywood, above n 1, 235.
121 Ibid 235.
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Hitler’s regime was totalitarian in that it engaged in ‘the politicization of every aspect of social and personal existence’.122 Nothing was beyond the realm of state interference. The notion of a ‘private’ sphere was non-existent in Hitler’s Germany.123 Hitler extended his power over every facet of life within the German nation. His regime was based on the principle of ‘absolute obedience to authority’.124 Nazi Germany ‘was brutally effective in suppressing political opposition and succeeded in extending political control over the media, art and culture, education and youth organizations.’125

Hitler also managed to tap into an ‘extreme nationalism’.126 Donald Niewyk points out that ‘[a]nti-Semitism became entwined in the outraged nationalism of defeated Germany and in the quest for national identity’.127 A significant aspect of acquiring popular support for Nazism was the attempt to convince the masses that the policies of Nazism were synonymous with nationalism.128 Hitler was incredibly successful in this.

C. The Use of Law to Legitimise Oppression

1. Hitler’s Use of Law in the Grab for Power

Hitler ensured that his ascension to power followed certain ‘legal’ channels so that his government was ‘legal’ in a narrow sense.129 He was ‘appointed Chancellor by the President acting under Article 48 of the Weimar Constitution’.130 However once he was Chancellor ‘he used the power to issue emergency decrees vested in the Reich President under Article 48 to strip the Constitution of its guarantees for civil liberties.’131 He effectively dismantled the system of civil rights that had operated before his rise to power. Giorgio Agamben states that:

No sooner did Hitler take power (or … no sooner was power given to him) than, on February 28, he proclaimed the Decree for the Protection of the People and the State, which suspended the articles of the Weimar Constitution concerning personal liberties.

122 Ibid 227.
123 Ibid.
124 Donald Niewyk, above n 2, 144.
125 Andrew Heywood, above n 1, 228.
126 Donald Niewyk, above n 2, 143.
127 Ibid 144.
128 Jeremy Noakes and Geoffrey Pridham, above n 2, 104.
129 Ibid 156.
130 Ibid.
131 Ibid.
The decree was never repealed, so that from a juridical standpoint the entire Third Reich can be considered a state of exception that lasted twelve years.\footnote{Giorgio Agamben, *State of Exception* (translated by Kevin Attell, 2005) 2. Agamben likens the modern reliance on ‘a permanent state of emergency’ justifying the exercise of extraordinary state powers with this ‘state of exception’ that existed under the Nazi regime.}

Agamben claims that ‘Hitler could probably not have taken power had the country not been under a regime of presidential dictatorship for nearly three years and had parliament been functioning.’\footnote{Ibid 15.} In Agamben’s view Germany ‘ceased to be a parliamentary republic’ in 1930 before Hitler actually rose to power in 1933.\footnote{Ibid.} According to Agamben, the seeds were sown for dictatorship prior to the election of Hitler. However Hitler was very effective at using law to consolidate political power.

One of the vital foundational laws upon which the Nazi regime depended is the ‘Presidential Decree for the Protection of People and State’ passed on 28 February 1933.\footnote{Jeremy Noakes and Geoffrey Pridham, above n 2, 173.} This act has been described as ‘the most important single legislative act of the Third Reich.’\footnote{Ibid.} It was fundamental to giving Hitler power to make laws by personal decree rather than via Parliamentary process. Article 1 of this decree effectively suspended all civil liberties which had been acknowledged under the Constitution. Article 2 of this decree ‘was to be of crucial importance in the seizure of power in the states’.\footnote{Ibid 174.} The ‘Presidential Decree for the Protection of People and State’ provides:

> By the authority of Section 48 (2) of the German Constitution the following is decreed as a defensive measure against Communist acts of violence endangering the State:

1. Sections 114, 115, 117, 118, 123, 124 and 153 of the Constitution of the German Reich are suspended until further notice. Thus restrictions on personal liberty, on the right of free expression of opinion, including freedom of the press, on the right of assembly and association, and violations of the privacy of postal, telegraphic and telephonic communications, and warrants for house-searches, orders for confiscations as well as restrictions on property rights are permissible beyond the legal limits otherwise prescribed.

2. If in any German state the measure necessary for the restoration of public security and order are not taken, the Reich government may temporarily take over the powers of the supreme authority in such a state in order to restore security.

3. States and local authorities have to comply to the limits of their responsibilities with the orders issued by the Government of the Reich under the powers conferred on it by Paragraph 2.\footnote{Presidential Decree for the Protection of People and State, cited in Jeremy Noakes and Geoffrey Pridham, above n 2, 174.}
It is interesting to note that the threat of alleged communist violence was the justification for this expansive legislation.\(^{139}\) In reality it seems that people had far more to fear from Hitler than the minority of communists in their midst. Nazi violence was a common occurrence.\(^{140}\) Key instruments of Nazi violence were the SA and the SS who acted ‘as independent powers with complete disregard for the police.’\(^ {141}\) Jeremy Noakes and Geoffrey Pridham state that ‘violence was directed primarily against the Left and mostly took place behind closed doors’ which ‘enabled the middle class to overlook it or rationalize it.’\(^ {142}\) Yet allegedly the ‘Presidential Decree for the Protection of People and State’ was meant to ‘protect’ the German people.

Although the ‘Presidential Decree for the Protection of People and State’ was expansive, it did not give Hitler as much power as he desired. Once Hitler was Chancellor he sought to eliminate the effectiveness of the Reichstag, the German Parliament.\(^ {143}\) He sought to cripple the ‘Reichstag as an effective organ either of legislation or of opposition.’\(^ {144}\) To do this he needed a two-thirds majority in the Reichstag allowing him to pass an Enabling Act.\(^ {145}\) Hitler had difficulty obtaining this support.\(^ {146}\) While some of the populace considered Hitler to be a rescuer of the masses (due to the effectiveness of Nazi propaganda),\(^ {147}\) there were others, conservatives amongst them, who were more skeptical about some of his more extreme political positions.\(^ {148}\) Some conservatives appear to have held hope that Hitler could be educated about what being German truly meant.\(^ {149}\) Noakes and Pridham refer to ‘the fatal delusion of the German upper classes that Hitler could be tamed.’\(^ {150}\)

Hitler eventually passed a decree under the guise of emergency powers which gave him the power he had been grasping at via the Parliament, but had been unable to obtain because of

\(^{139}\) Jeremy Noakes and Geoffrey Pridham, above n 2, 173.
\(^{140}\) Ibid 183.
\(^{141}\) Ibid 184.
\(^{142}\) Ibid 186.
\(^{143}\) Ibid 158.
\(^{144}\) Ibid.
\(^{145}\) Ibid.
\(^{146}\) Ibid 175.
\(^{147}\) Ibid 104.
\(^{148}\) Ibid 165–165.
\(^{149}\) Ibid 166.
\(^{150}\) Ibid.
the requirement of a two-third majority.\textsuperscript{151} The ‘Enabling Law’ passed on 24 March 1933 effectively gave Hitler the power to make laws and decrees, bypassing any need to obtain the approval of Parliament.\textsuperscript{152} Germany had some history of Enabling Laws before Hitler came to power, in that sense he was not engaging in a process which was completely unprecedented.\textsuperscript{153} Noakes and Pridham explain that:

Initially, the Enabling Law planned by the new regime was drawn up along the lines of the Weimar laws … it was intended to permit the issuing of Government decrees with the force of law without the need for prior approval from the Reichstag or the Reich President. Some time between 15 and 20 March, however, the draft was modified to empower the Government to issue not merely “decrees” … but also “laws” … and even laws which deviated from the 1919 Constitution and had therefore hitherto required a two-thirds Reichstag majority. The distinction between a “law” and a “decree” was not clear-cut, but the Weimar Constitution had imputed somewhat greater significance to laws than to decrees by restricting certain legislation … to laws. In the final draft of the Enabling Law the Reichstag surrendered its powers over the budget and over the taking up of loans.\textsuperscript{154}

Thus eventually the Reichstag capitulated to Hitler’s demands to hand over power, fearing that a bloody revolution would ensue if they did not.\textsuperscript{155} The Social Democrats were the only ones to oppose Hitler’s Enabling legislation when it came to the vote.\textsuperscript{156} ‘The Enabling Law was passed by 444 votes to the 94 votes of the Social Democrats.’\textsuperscript{157} Those present commented that the place ‘was crawling with armed SA and SS’ troops.\textsuperscript{158} Opposition in the face of such a foreboding presence took immense courage.\textsuperscript{159} The Enabling law was necessary from the perspective of legally legitimizing the Nazi regime. As Noakes and Pridham point out, ‘[i]ts passage gave the destruction of parliamentary democracy an appearance of legality which was important for the prestige of the regime not only abroad but also among the middle class, and particularly the Civil Service, at home.’\textsuperscript{160}

\begin{flushleft}
\textsuperscript{151} Ibid 188.
\textsuperscript{152} Ibid.
\textsuperscript{153} Ibid.
\textsuperscript{154} Previously legislation had been required where the subject matter concerned loans and budgetary issues – Ibid 188.
\textsuperscript{155} Ibid 193.
\textsuperscript{156} Ibid.
\textsuperscript{157} Ibid 194.
\textsuperscript{158} A Bavarian SPD deputy, cited in Jeremy Noakes and Geoffrey Pridham, above n 2, 193.
\textsuperscript{159} Jeremy Noakes and Geoffrey Pridham, above n 2, 193.
\textsuperscript{160} Ibid 194.
\end{flushleft}
Once the Enabling legislation had been passed the Reichstag was virtually redundant, only passing seven more laws during the Nazi regime.\(^\text{161}\) Richard Miller explains ‘[i]n practical effect the Reichstag repealed the constitution on March 24, and made Hitler’s cabinet decrees supreme law of the land. … The cabinet was so irrelevant that it stopped meeting in 1937, and … Hitler acquired power to issue decrees on his own authority.’\(^\text{162}\) The role of the Reich President was similarly redundant as his signature was no longer a legal requirement for valid legislation with the passage of the ‘Enabling Law’.\(^\text{163}\) This was despite the fact that Hitler had passed a law saying that the powers of the Reich President were not to be affected.\(^\text{164}\) In practice it was a whole different scenario. Hitler’s grab for power was complete when in 1934 the ‘Succession Act … combined the offices of president and chancellor, making Hitler head of government and head of state, with all power of both offices to rule by decree.’\(^\text{165}\)

In August of 1934 Hitler was voted in as president of Germany, ‘by a 90 percent majority.’\(^\text{166}\) From a legal perspective, this made it appear as though Hitler was the popularly elected leader rather than a tyrannical fascist seizing power. Of course there were other explanations for the favourable 90 percent vote. Chief amongst them was the fact that ‘[w]orkers could be fired for failure to vote’.\(^\text{167}\) Also, if a person voted but did so without the desired level of enthusiasm for Nazi policies they could be seriously victimised.\(^\text{168}\)

The collective result of this legislation was that Hitler became the supreme dictator. There were no more legal impediments in his path. He was, disturbingly, the law. A fact reiterated by Eichmann who stated ‘“the words of the Führer have the force of law”’.\(^\text{169}\)

2. The Function of Law under Nazi Germany

The law was used to give the Nazi regime an appearance of legitimacy. ‘Nazis were fastidious about following legal requirements.’\(^\text{170}\) Law was central to the Nazi regime’s claims to power. Vivian Grosswald Curran writes that:

\(^{161}\) Ibid 194.
\(^{162}\) Richard Miller, above n 6, 46.
\(^{163}\) Jeremy Noakes and Geoffrey Pridham, above n 2, 194.
\(^{164}\) Ibid 195.
\(^{165}\) Richard Miller, above n 6, 46.
\(^{166}\) Ibid 47.
\(^{167}\) Ibid 47.
\(^{168}\) Ibid.
The convergence of law with political ideology was extreme in Nazi Germany and
Nazi-occupied states. Equally extreme was the degree of legalism of Nazism, the
degree to which Hitler Germany’s self-description, self-representation, and to a
significant extent also self-understanding, was as a nation under law, governed by law.
… Fascist terror was visited upon people in the name of law, pursuant to apparently
legal mechanisms, channels and structures, and not in an overt shunning or repudiation
of law.\textsuperscript{171}

The law was used to justify the official program of hatred. ‘The regime’s obedience to
legal forms strengthened its power. Upstanding citizens felt a moral obligation to submit to
law’s authority.’\textsuperscript{172} Miller explains how the law was used to ease the consciences of any
who felt uncomfortable about the Nazi regime’s brutality: ‘[i]f any citizens felt unease
about a particular policy, their pained consciences were salved via a display of a suitably
stamped document in pursuance of a decree.’\textsuperscript{173}

Nazi law was also designed to fulfill an educational function.\textsuperscript{174} Citizens were educated
about what was and was not acceptable under the new regime by the pronouncements of its
courts. In this sense courts became ‘the moral guardian[s] of society.’\textsuperscript{175} Punishments
meted out under the Nazi regime were extremely harsh. ‘Under the Nazi regime men were
sentenced by courts for criticism of the regime.’\textsuperscript{176} Special legislation was enacted to
silence any political opposition to Nazi policy; the ‘\textit{Law against the Establishment of
Parties, 14 July 1933}’.\textsuperscript{177} Article I of this law stated ‘[t]he National Socialist German
Workers’ Party constitutes the only political party in Germany.’\textsuperscript{178} Article II states:

\begin{quote}
Whoever undertakes to maintain the organization of another political party or to form a
new political party shall be punished with penal servitude of up to three years or with
imprisonment of between six months and three years, unless the act is subject to a
heavier penalty under other regulations.\textsuperscript{179}
\end{quote}

\begin{footnotes}
\item[169] Eichmann cited in Giorgio Agamben, above n 132, 38.
\item[170] Richard Miller, above n 6, 1.
\item[171] Vivian Grosswald Curran, above n 6, 310.
\item[172] Richard Miller, above n 6, 1.
\item[173] Ibid.
\item[174] Ibid 50.
\item[175] Ibid.
\item[176] H.L.A. Hart, ‘Positivism and the Separation of Law and Morals’ in Joel Feinburg and Hyman Goss (eds)
\textit{Philosophy of Law} (4\textsuperscript{th} ed, 1991) 71.
\item[177] Jeremy Noakes and Geoffrey Pridham, above n 2, 200.
\item[178] Ibid.
\item[179] Ibid.
\end{footnotes}
Political opposition was outlawed via this legislation, making the totalitarian dictatorship complete. Within a few short months, Hitler had very effectively abolished Germany’s parliamentary democracy and established a complete dictatorship. Any form of resistance to Hitler as the existing power holder became punishable under this law. This powerfully reinforced the lesson that Hitler was to be obeyed as the supreme authority.

Hitler also enacted another significant law designed to prevent political opposition, the ‘Decree of the Reich President for the protection of the Nationalist movement against malicious attacks upon the Government’ which was passed on 21 March 1933. This legislation essentially made it unlawful for people to criticize the Nazi Government. Paragraph 3(1) of this legislation states:

> Whoever purposely makes or circulates a statement of a factual nature which is untrue or grossly exaggerated or which may seriously harm the welfare of the Reich or of a state, or the reputation of the National Government or of a state government or of the parties or organizations supporting these governments, is to be punished, provided that no more severe punishment is decreed in other regulations, with imprisonment of up to two years and, if he makes or spreads the statement publicly, with imprisonment of not less than three months.

Under Paragraph 3(3) this offence could be committed negligently and still be punishable by up to three months imprisonment or a fine. This law preventing criticism of the Nazis was used extensively by the Gestapo to legally legitimate their activities. This provided another powerful lesson about the futility of resistance.

The law was also used to extend power to citizens in relation to Jewish matters. Ordinary citizens were authorised to arrest Jews for violations of law. This facilitated ‘vigilante violence’. However, eventually the harshness of the judicial system was sufficient to accommodate the desires of vigilante mobs: ‘Nazi legal officials replaced vigilantes with a system that efficiently accomplished what vigilantes wanted.’

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180 Ibid.
181 Ibid.
182 Ibid 268.
183 Ibid 269.
184 Ibid.
185 Ibid.
186 Richard Miller, above n 6, 51.
187 Ibid.
188 Ibid.
189 Ibid.
3. The Role of the Legal Profession under Nazi Germany

Part of the ability of the Nazi regime to further its murderous objectives lay in assigning various tasks to separate individuals so that no person or group considered themselves to be solely responsible for the entirety of events. Germans ‘saw each measure as a discrete event and failed to understand that each step prepared the way for the next.’ Lawyers and judges were no exception. The judges upheld Nazi laws and lawyers made legal arguments based on the laws of the new regime, both in a fairly punitive fashion.

Lawyers adapted to the new regime by adopting the approach that rights to be treated respectfully did not exist if they were not acknowledged by the legal system and enshrined in law. The dominant theory of legal positivism facilitated this transition. Lawyers and judges were steeped in legal positivism, as ‘positivistic legal thinking … dominated legal theory in Germany for many decades.’ German judges were ‘“unaffected by intellectual doubts as to the intrinsic justice of the legal rule … provided it [was] enacted by the authority of the state”’ and would ‘“not question whether the authority [was] legitimate or not.”’ This approach embodied legal positivism. It essentially maintained that ‘a law is a law’ if the law says it is a law.

During the nineteenth century German jurisprudence had come to be dominated by … the theory of legal positivism. The legal positivists conceived of law as a manifestation of the authority of the State. It was law because the State had decreed it to be so. In their view the sovereign State could not be bound by any prior moral order against which the justice or otherwise of the laws could be measured. … It is important to note that, so far as the legal positivists were concerned, the nature of the regime which controlled the State or the methods by which that regime had been established were immaterial. The important fact was that it was the sovereign State. It was this fact which conferred authority on the laws which it issued.

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189 Ibid 53.
190 Ibid 3.
191 Ibid 49.
192 Ibid 53.
194 Loewenstein cited in Richard Miller, above n 6, 53.
The German legal profession considered there was no necessity for thought beyond ensuring that a law had been enacted by state authority. Any perceived unfairness was deemed to be an irrelevant consideration. It is for this reason that German courts have been criticised for ‘their systematic complicity with the Nazis.’ As Noakes and Pridham state:

The dominance of legal positivism in German jurisprudence during this period and the fact that the Civil Service received a predominantly legal training greatly facilitated the Nazi take-over of power. It reinforced the emphasis on conformity inherent in any bureaucracy by enabling the Civil Service to rationalize almost any action, however immoral, provided it took the form of a law or decree. It is clear that without the assistance of the Civil Service the Nazis could never have consolidated their power.

Lawyers were also pressured by the knowledge that they were being monitored. The legal profession was carefully scrutinized and controlled when Hitler came to power. Strict restrictions were enforced to ensure that members of the legal profession were kindly disposed towards upholding Nazi laws. In 1933 they were forced ‘to form a massive new organization, the National Socialist League for the Maintenance of the Law’ and restrictive procedures were put in place ‘to ensure a tight control over the appointment of judges and the admission of lawyers’.

In addition to this, the Nazi regime created ‘special courts’ to deal with ‘sensitive areas of particular concern to the regime such as political offences, the Party and its various offshoot organizations, various occupations … and hereditary disabilities’. On 24 April 1934 a law was passed ‘establishing a so-called “People’s Court” to try all cases of treason. It consisted of two professional judges, carefully selected for their loyalty to the regime, and five Party officials as lay judges.’ This was the ‘Law to change the rules of criminal law and criminal procedure’. There was no right of appeal from a conviction of a political crime from these special courts.

197 This aspect of legal positivism, obedience to the ‘commands of a sovereign’, was formulated by John Austin. See John Austin, ‘A Positivist Conception of Law’ in Joel Feinburg and Hyman Goss (eds) Philosophy of Law (4th ed, 1991) 28.
199 Jeremy Noakes and Geoffrey Pridham, above n 2, 227.
200 Ibid 265–266.
201 Ibid 265.
202 Ibid 265–266.
203 Ibid 270.
204 Ibid.
205 Ibid 269.
As civil servants, judges could be forced to retire if they did not give absolute support to the Nazi government. All judges had compulsory training in Nazi ideology. Eventually judges were keen to go above and beyond what the ‘letter of the law’ required in terms of punishing Jewish ‘offenders’ or those who were to be punished for assisting or liaising with Jews. As time went on under the Nazi regime judges seemed to go to great lengths in order to interpret legislation in as oppressive a manner as possible, so eager were they to uphold Nazi policy. Indeed, they considered it their duty. It seems that career advancement demanded extraordinary displays of devotion to Nazi ideology. The same ideological indoctrination into Nazism was obligatory for lawyers if they wanted to be able to practice their profession. The ‘Ministry of Justice’ was given ‘authority over the admission of lawyers to practise’. Lawyers ‘were required to swear an oath of loyalty to Hitler’. Far from placing obstacles in the path of the Nazi government, the legal profession actually smoothed the way and willingly worked with the oppressive laws that were handed down from on high. In this way the law became ‘an instrument of terror’.

4. The Role of Legal Positivism in Justifying Nazi Laws

Legal positivism was a crucial aspect of Germany’s legal landscape before the war. Lon Fuller writes that ‘in the seventy-five years before the Nazi regime the positivistic philosophy had achieved in Germany a standing such as it enjoyed in no other country.’ In this sense it could be said that legal positivist theory reached its zenith in Germany. This type of thinking was very instrumental in lawyers adhering to the commands of Hitler with unquestioning obedience. That is what legal positivist theory encourages, strict obedience to the ‘commands’ of a sovereign coupled with a clear separation between law and morality. This ensured that members of the legal profession effectively brooked no
opposition when the Nazi regime gradually enacted laws which were increasingly oppressive to Jews and other minorities in Germany. Lon Fuller explains that:

German legal positivism … banned from legal science any consideration of the moral ends of law … The German lawyer was … peculiarly prepared to accept as “law” anything that called itself by that name [and] was printed at government expense … the attitudes prevailing in the German legal profession were helpful to the Nazis. Hitler did not come to power by a violent revolution. He was Chancellor before he became the Leader. The exploitation of legal forms started cautiously and became bolder as power was consolidated. The first attacks on the established order were on ramparts which, if they were manned by anyone, were manned by lawyers and judges. These ramparts fell almost without a struggle.218

A German legal theorist, Gustav Radbruch, who had been more inclined towards legal positivism before World War II, altered his position considerably as a result of the atrocities committed by the unjust Nazi legal system during the war.219 To his mind the training of lawyers in legal positivism and the strict separation of law and morality, the distinction between what law ‘is’ and what law ‘ought to be’, had contributed to the problem.220 Radbruch stated that legal positivism effectively renders ‘the jurist as well as the people defenceless against laws, however arbitrary, cruel, or criminal they may be. In the end, the positivistic theory equates the law with power; [so that] there is law only where there is power.’221 Heather Leawoods explains why the ‘overwhelming embrace of legal positivism in Germany was disturbing’,222 citing Radbruch:

Legal positivism, with its principle that “a law is a law”, has in fact rendered the German legal profession defenseless against statutes that are arbitrary and criminal. Legal positivism is, moreover, in and of itself wholly incapable of justifying or explaining the validity of statutes. The positivist believes he [she] has proved the validity of a statute simply by showing that it had sufficient power behind it to prevail. But although compulsion may be based on power, obligation and validity never are. Obligation and validity must be based, rather, on a value that inheres in the statute.223

Clearly Radbruch, as a legal philosopher who experienced Nazi Germany, considered that legal positivism was a large part of the problem because it encouraged unquestioning

218 Lon Fuller, above n 215, 95–96.
221 Gustav Radbruch, ‘Five Minutes of Legal Philosophy’ in Joel Feinburg and Hyman Goss (eds), Philosophy of Law (4th ed, 1991) 103.
222 Heather Leawoods, above n 193, 497–498.
Chapter 2 – The Horrors of the Holocaust – Nazi Persecution and Dehumanisation of Jews

obedience to abhorrent legislation and permitted the Nazis to acquire more and more power.224

According to the prominent legal philosopher H.L.A Hart, some ‘German thinkers who lived through the Nazi regime and reflected upon its evil manifestations in the legal system’ were then ‘converted’ to natural law jurisprudence in an attempt to ensure that such evil laws never manifested again.225 The concern of such German legal theorists was ‘the problem posed by the existence of morally evil laws.’226 Gustav Radbruch was amongst the converted. Hart claims that:

Before his conversion Radbruch held that resistance to law was a matter for the personal conscience, to be thought out by the individual as a moral problem, and the validity of a law could not be disproved by showing that the effect of compliance with the law would be more evil than the effect of disobedience.227

However after the Holocaust, Radbruch changed his opinions about the requirements for legal validity rather rapidly:

Radbruch … had concluded from the ease with which the Nazi regime had exploited subservience to mere law – or expressed, as he thought, in the “positivist” slogan “law is law” … and from the failure of the German legal profession to protest against the enormities which they were required to perpetrate in the name of law, that “positivism” (meaning here the insistence on the separation of law as it is from law as it ought to be) had powerfully contributed to the horrors. His considered reflections led him to the doctrine that the fundamental principles of humanitarian morality were part of the very concept of Recht or Legality and that no positive enactment or statute, however clearly it was expressed and however clearly it conformed with the formal criteria of validity of a given legal system, could be valid if it contravened basic principles of morality. This doctrine can be appreciated fully only if the nuances imported by the German word Recht are grasped. But it is clear that the doctrine meant that every lawyer and judge should denounce statutes that transgressed the fundamental principles not as merely immoral or wrong but as having no legal character, and enactments which on this ground lack the quality of law should not be taken into account in working out the legal position of any given individual in particular circumstances.228

Leaving aside the fact that there may be significant difficulties associated with discerning what the ‘fundamental principles of humanitarian morality’ referred to by Radbruch are,229

224 Barend Van Niekerk, above n 220, 243.
226 Ibid.
227 Ibid.
228 Ibid 73.
229 This would require a considered reflection of all of the significant problems in determining standards of ‘universal morality’ according to natural law theory, which space does not permit. Further to this issue see Margaret Davies, above n 61, 89–99; Brian Bix, ‘Natural Law Theory’ in Dennis Patterson (ed), A
it is clear that after the war there was grave concern over the fundamental tenets of legal positivism which accepted laws as valid providing they had passed through particular processes. The German Courts were faced with a dilemma after the war when persons charged with various offences claimed that the acts had not been unlawful at the time when the ‘offences’ were committed.\footnote{Lon Fuller, above n 215, 90–91. One approach taken in response to this argument was to say that Hitler’s laws were so evil that they were not ‘law’. This was the approach taken by natural law theorists. Hart, however, considered that this was confusing ‘law with morality’. Instead he claimed that ‘this was a case where the law was clear (because it had been enacted) but too evil to be obeyed.’ Margaret Davies, above n 61, 120.} Many such accused argued their actions had been lawful according to the laws enacted under the Nazi regime.\footnote{Ibid.} Hart explains ‘[t]his plea was met with the reply that the laws upon which they relied were invalid as contravening the fundamental principles of morality.’\footnote{Lon Fuller, above n 215, 90–91.} Lon Fuller points out that post World War II German Courts were faced with making difficult decisions concerning the legal validity of acts authorised under the Nazi regime:

It was impossible for them to declare the whole dictatorship illegal or to treat as void every decision and legal enactment that had emanated from Hitler’s government. Intolerable dislocations would have resulted from any such wholesale outlawing of all that occurred over a span of twelve years. On the other hand, it was equally impossible to carry forward into the new government the effects of every Nazi perversity that had been committed in the name of law: any such course would have tainted an indefinite future with the poisons of Nazism.\footnote{H.L.A. Hart, above n 176, 73.}

German courts found a solution in the ‘fundamental principles of humanitarian morality’ formulated by Radbruch.\footnote{H.L.A. Hart, above n 176, 73.} It is clear that Radbruch was concerned to engage in some kind of examination of the consequences of law in determining its validity. This involves a very significant deviation from legal positivism. It is an approach which seeks to evaluate law in its context.\footnote{I will come back to the idea of a context based approach to judicial decision-making in Chapter Five.} After the horrors of the Holocaust Radbruch was able to see first hand how blind obedience to unjust laws worked to dehumanise the Jews. As a result he felt compelled to change his own jurisprudence, in an attempt to ensure that such draconian laws did not go unchallenged ever again in the future. He claimed ‘there can be laws that are so unjust, so socially detrimental that their validity, indeed their very character as laws, must be denied.’\footnote{Gustav Radbruch, above n 221, 103.} Radbruch stated ‘[t]here are … principles of law that are stronger than...
any statute, so that a law conflicting with these principles is devoid of validity. One calls these principles the natural law or the law of reason. Radbruch clearly favoured an approach to jurisprudence which took on elements of natural law theory. He considered that some kind of moral evaluation was required in determining the validity of legislation. Although it must be remembered that the claims of natural law are also problematic in some sense because they claim to be representative of a universal reason, and some contemporary legal theorists have suggested that such a thing as universal reason does not exist, the approach taken by Radbruch sees this natural law approach as evidently more likely to prevent the kind of horrors that were legitimated under the Nazi regime. Radbruch claimed that ‘if laws consciously deny the will to justice, if, for example, they grant and deny human rights arbitrarily, then these laws lack validity, the people owe them no obedience, and even the jurists must find the courage to deny their legal character.’

Clearly the Holocaust made an enormous impression on Radbruch. Perhaps he was still conscious of the smell of burning flesh coming from the concentration camp ovens. Yet there is certainly a large level of discretion in his preferred formulation designed to safeguard human dignity. Allowing the dominant power holders in society to determine which laws are deemed to ‘consciously deny the will to justice’ may not offer effective protection for minority groups. History shows that those in positions of power making decisions on the distribution of justice often have a vested interest in oppressing the target group via the law. Therefore this is not an effective safeguard to protect the interests of minorities.

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237 Ibid 103–104.
238 Margaret Davies, above n 61, 90–91.
239 Gustav Radbruch, above n 221, 103.
241 Gustav Radbruch, above n 221, 103.
242 Steven Winter, ‘Human Values in a Postmodern World’ (1994) 6(2) *Yale Journal of Law and the Humanities* 233, 246. As Winter states, ‘Sincere belief in moral sources of the most transcendent kind has never provided the least guarantee against oppression.’ (at 246)
243 It bears some resemblance to the ‘manifest abuse test’ mentioned in *Kartinyeri v the Commonwealth* (1998) 195 CLR 337 at 378 by Gummow and Hayne JJ and can be subject to the same criticisms (which will be touched upon in Chapter Five). In that case Gummow and Hayne JJ held:

A law will only answer the constitutional description in s 51(xxvi) if it (i) is ‘deemed necessary’ (ii) that ‘special laws’ (iii) be made for ‘the people of any race’. The term ‘deem’ may mean ‘to judge or reach a conclusion about something’. Here, the judgment as to what is ‘deemed necessary’ is that of the Parliament. Nevertheless, it may be that the character of a law purportedly based upon s 51(xxvi) will be denied to a law enacted in ‘manifest abuse’ of that power of judgment.
5. Beyond Legal Positivism – The Slippery Slide into Fascism

Although legal positivism was clearly an instrumental aspect of Nazi ascension to power,244 gradually this legal philosophy came to be seen as too limiting to give full expression to Nazi ideology.245 Jeremy Noakes and Geoffrey Pridham explain that:

Although it is true that the legal positivist approach of the judiciary enabled the new Government to implement its will as law, this approach defined the will of the regime far too rigidly and narrowly for the purposes of Hitler and his movement. As a result, the regime increasingly insisted that formal law must no longer be regarded as the sole criterion for judging whether an action was right or wrong. Instead of the strict adherence to the letter of the law characteristic of the legal positivist approach, [it was considered that] more scope [was to] be given to the interpretation of the law in the light of wider values. In place of the principles of natural justice the Nazis substituted “healthy popular feeling”, “the welfare of the national community”, “National Socialist ideology”, or, most crucial of all, “the will of the Führer”, as the criteria which should influence the judiciary in its interpretation of the law.246

As the Nazi regime became more established, judges regularly imposed harsher penalties than what was required under the law.247 They were expected to fill gaps in legislation in such a way that they would promote the ‘spirit’ of the Nazi policies.248 In this sense the judges eventually went beyond the legal positivism which had initially been instrumental in the Nazi regime’s gradual ascension to power.249 Der Stürmer reported cases of alleged judicial leniency, which placed political pressure on members of the judiciary to impose harsher sentences.250 Hitler had power to dismiss ‘judges for any reason.’251 The power to arbitrarily dismiss members of the judiciary according to political preference252 would have ensured that judgments were mostly compliant with Nazi policy.253

In many respects the judiciary in Germany had not been strong or very prestigious before Hitler came to power.254 Miller explains that ‘judges were civil service workers, appointed not because of eminence but because they were bureaucrats on a particular career track.’255

244  Michael Stolleis, above n 8, 99.
245  Jeremy Noakes and Geoffrey Pridham, above n 2, 266.
246  Ibid.
247  Richard Miller, above n 6, 49.
248  Ibid.
249  Gustav Radbruch, above n 221, 103; Gustav Radbruch, Statutory Non-Law and Suprastatutory Law, 13, cited in Heather Leawoods, above n 193, 497–498.
250  Richard Miller, above n 6, 52.
251  Ibid; and see Jeremy Noakes and Geoffrey Pridham, above n 2, 272–273.
253  Richard Miller, above n 6, 52.
254  Jeremy Noakes and Geoffrey Pridham, above n 2, 271.
255  Richard Miller, above n 6, 44.
There were 8,000 to 10,000 judges who were not independent as such. Judicial salaries were modest and ‘the judicial branch of the Civil Service was considered inferior to the administrative branch.’ Noakes and Pridham explain:

the doctrine of legal positivism tended to degrade the judge into a mere agent of the State in the sense that he was reduced to implementing the law with his freedom to interpret it restricted within the very narrow limits of the particular law or body of law. In short, he lacked a creative role and, as far as the general public was concerned, tended to appear as just one more civil servant rather than as the guardian of the rights of the individual and as someone who could be relied upon to interpret the law with a sense of justice.

Thus it can be seen that the notion of judicial independence was not central to the public’s perception of German judges before the war. Consequently there was little public outcry over the increasingly sycophantic judiciary.

Any pre-war judicial independence was rapidly diminished by the enactment of the ‘Law for the Re-establishment of the Professional Civil Service’ on 7 April 1933. This legislation ‘abolished the principle that judges could not be dismissed or demoted for political reasons and thus undermined the principle of the independence of the judiciary.’ It had the effect of ousting Jews from the Civil Service (Article 3), ousting anyone known to oppose the Nazi regime (Article 4) and allowing officials to be compulsorily retired, demoted or transferred (Articles 5 and 6). Article 3(1) states ‘[o]fficials, who are of non-Aryan descent, are to be retired; honorary officials are to be dismissed from office.’ This Article prevented Jews from remaining in service in an honorary capacity. Article 4 states ‘[o]fficials who because of their previous political activity do not offer security that they will act at all times and without reservation in the interests of the national state can be dismissed from the service.’ Article 5(1) states ‘[e]very official must allow himself to be transferred to another office in the same or equivalent career, even to one carrying a lower rank or regular salary.’

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256 Jeremy Noakes and Geoffrey Pridham, above n 2, 272. This situation shows why judicial independence is so important.
257 Ibid.
258 Ibid.
259 Ibid.
260 Ibid 228.
261 Ibid 272.
263 Ibid 229.
264 Ibid 230.
265 Ibid.
“[o]fficials can be retired for the purpose of rationalizing the administration even if they are not yet unfit for service. If officials are retired for this reason, their places may not be filled again.” Article 7 also prohibited any right of appeal against decisions made under this law. In addition to this, another law, ‘Paragraph 71 of the German Civil Service Law of 26 January 1937 laid down that civil servants could be compulsorily retired if they “could not be relied upon to support the National Socialist State at all times.”’ Civil servants included judges. All judges had compulsory training in Nazi ideology. Under such a regime judicial independence was non-existent. Michael Stolleis points out that from 1939 ‘there was no opportunity for the court to distance itself clearly from the Nazi state or to carve out an identity.’ He suggests that the courts of the Nazi regime were ‘in principle positivist’ but this was ‘combined with a willingness to yield in cases of conflict to pressures from the Gestapo and to “political directives” from above.’

Examples of judicial courage were not unheard of, but they were rare, given the extreme penalties likely to be meted out and the insecurity of tenure. There were occasions where Hitler intervened to change sentences he did not like. Between 1939–1942 there were some twenty-five to thirty cases in which Hitler imposed the death sentence in place of some lesser penalty passed by the courts.

In addition, a practice was adopted by the Ministry of Justice of sending ‘Judges Letters’ to all members of the judiciary. ‘Judges Letters’ stated what errors had been made by judges, how such matters should have been dealt with and how they were to be handled in the future. It involved a professional shaming process, although names of judges were not referred to, the court that handled the case was. Pressure was placed upon judges to conform to what the ‘Judges Letters’ ‘recommended’.

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266 Ibid.
267 Ibid.
269 Ibid 273.
270 Michael Stolleis, above n 8, 141.
271 Ibid 142.
273 Ibid 275.
274 Ibid 276.
275 Ibid 277.
276 Ibid.
277 Ibid.
By 1936 judges were told that they had to follow ‘the official line’. Hans Frank, ‘leader of the jurists of the Reich’ said that all law was to be interpreted in light of ‘National Socialist Ideology’. Judges were under a great deal of political pressure to go beyond the letter of the law so as to truly promote the spirit of government policy. ‘In 1936 the Commission for National Socialist Economic Policy declared, “He who sticks to the letter of the law or refuses to go beyond it, because the orders are not given to do so, confirms the fact that he is willing to do only the minimum of what the community asks of him.”’ In this way judges were pressured to adopt the most punitive of available penalties, and failure to do so was considered to reflect poorly on their willingness to provide service to their community.

The desired Nazi changes to judicial interpretation were enacted in the form of the ‘Law to change the Penal Code’ on 28 June 1935. Article 1(2) stated:

Any person who commits an act which the law declares to be punishable or which is deserving of punishment according to the idea of a penal law and healthy popular feeling, shall be punished. If there is no penal law directly covering an act it shall be punished under that law the basic idea of which fits it best.

Thus it can be seen that judges could punish people for things which were not actually set out as crimes in law, so long as these actions were considered to be criminal according to the highly subjective criteria of ‘the idea of a penal law and healthy popular feeling’.

Another example of a law which required legal professionals to embrace a punitive perspective is Article 170a of the Criminal Code of 1935. This article provided:

If an act deserves punishment according to the sound sentiment of the people, but is not declared punishable in the law, the prosecution will examine whether the underlying principle of a penal law can be applied to the act and whether justice can be helped to triumph by the analogous application of this penal law.

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278 Ibid.
279 Michael Stolleis, above n 8, 14.
281 Schleunes cited in Richard Miller, above n 6, 48.
282 Ibid.
283 Jeremy Noakes and Geoffrey Pridham, above n 2, 270.
284 Ibid 271.
285 Ibid.
286 Richard Miller, above n 6, 49.
Interestingly, this article mentions the notion of ‘justice’. It appears that ‘Nazi justice’ is an oxymoron. A similar provision to Article 170a which encouraged judges to go beyond the letter of the law was Article 267a of the 1935 Criminal Code. This article provided:

> If the trial shows that the defendant committed an act which deserves punishment according to the sound sentiment of the people, but is not declared punishable by the law, then the court will examine whether the underlying principle of a penal law applies to the act and whether justice can be helped to triumph by the proper application of that penal law.287

The difference with Article 267a is that it was directed towards encouraging judges to embrace a more punitive perspective when deciding cases. Together the two provisions encouraged both the prosecution and the judiciary to adopt a punitive approach which went well beyond the letter of the law. It is interesting that both of these provisions mention acts deserving ‘punishment according to the sound sentiment of the people’. This undoubtedly gave effect to the promotion of outcomes consistent with Nazi policies. The ‘sound sentiment of the people’ was taken to coincide coincidently with the dictates of Hitler. It is another example of what George Lakoff refers to as ‘Orwellian language’.288

Some might consider that the law’s detrimentally affecting Jews and other minorities in Germany were at the extreme end of the scale and that on the whole much of Germany was well ordered. However Agamben has said that ‘a legal institution’s truest character is always defined by the exception and the extreme situation.’289 Bearing this in mind it appears that the character of Nazi legal institutions was horrifically unjust.

Clearly there was a place, from an ethical perspective, for legal academics to critique the laws of the Nazi regime. However such criticism was no doubt considered a perilous enterprise. The outlawing of criticism of Nazi laws and policies was a particularly effective mechanism for stifling dissent.290 However it has been suggested that legal academics actually embraced the new laws with some measure of enthusiasm.291 Christian Joerges suggests that ‘legal academia identified in significant numbers with the Nazi regime.’292 Joerges claims ‘Germany’s academics adapted to the new “order” created by the Nazi

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287 Ibid.
288 George Lakoff, Don’t Think of an Elephant – know your values and frame the debate (2005) 22.
289 Giorgio Agamben, above n 132, 79.
290 Jeremy Noakes and Geoffrey Pridham, above n 2, 200.
state. In significant numbers, they sought to define a new “völkisch” legal culture. Joerges refers to the zealous embrace of Nazi laws by many legal academics evidenced by the legal literature of the time. The removal of Jewish academics from Universities was a real turning point as far as legal scholarship was concerned. Joerges states:

When the Nazis removed Jewish academics from the German universities, this also meant an anti-liberal and anti-socialist Gleischaltung in legal thought and the extinction of disciplines such as the sociology of law. The “fight against the Jewish spirit” was after all not just a process of racial selection, but also impacted upon methodical, legal and social-critical approaches to legal science overall.

Although law was clearly critical in Hitler’s rise to power, as the regime continued Hitler relied very much on the SS, showing a preference for utilising the SS rather than adhering to legal forms. The SS were used more than the police as the regime developed a tighter stranglehold on power. The concentration camps were run by the SS and were an independent prison system from that which was operated by the police. Eventually the SS ‘began to interfere in the judicial process itself, ignoring verdicts or intervening to have them changed.’ However it is very clear that legal forms were an essential element to Hitler acquiring the necessary power to start with.

6. Defined by Law

Definition has been used as a crucial tool to exercise power over oppressed peoples. The Nazis targeted Jews and used the law as a means to ensure that persecution was the norm. In order to do this they had to engage in a process of definition so they could determine who was considered ‘Jewish’ for the purposes of the law. The necessity for definition has been explained by Miller:

If a group is to be eliminated from society, members of the group must be detected. To detect them we must have a way to identify the characteristics possessed by members and not possessed by the rest of us. And we must use these characteristics to define membership in the targeted group.

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292 Ibid.
293 Ibid 298–299.
294 Ibid 299.
295 Ibid 304–305.
296 Jeremy Noakes and Geoffrey Pridham, above n 2, 267.
297 Ibid.
298 Ibid.
299 Ibid.
300 Richard Miller, above n 6, 9.
He goes on to say that ‘[p]recise legal definition of a target group is crucial to the destruction process.’

301 Without such definition differentiated treatment would not have been possible. The Nazis definition process was based on artificial constructions of race.

302 Miller points out that:

   Nazis defined Jews by genealogy rather than religion, using the bogus concept of a Jewish race. … In Nazi Germany a person did not have to practice Judaism to be a Jew; lifelong Christians could be Jews, be forced to wear the yellow star, be transported “to the east”. Practitioners of Judaism were the primary victims, but Nazis classified as Jews many persons who were not considered such before or after the Third Reich.

303 The ability to define was crucial to the Nazi regime achieving its objectives. The process of definition carried out by Nazi lawmakers illustrates the actuality of what Foucault wrote about power constructing knowledge. 

304 Foucault claimed that ‘[t]he exercise of power perpetually creates knowledge’. The Nazi lawmakers had the power to define and in their process of definition they created new understandings of who was and was not to be considered Jewish.

305 The ‘First Regulation for Administration of the Law for the Restoration of the Professional Civil Service on April 11, 1933’ defined Jews by their non-Aryan status. This regulation provided:

   A person is to be regarded as non-Aryan, who is descended from non-Aryans, especially Jewish parents or grandparents. This holds true even if only one parent or grandparent is of non-Aryan descent. This premise especially obtains if one parent or grandparent was of Jewish faith.

307 A grandparent could be considered a ‘full-blooded’ Jew if they ‘belonged to the Jewish religious community.’ Great-grandparents could be referred to in situations where there was any doubt as to a person’s Jewish status.

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301 Ibid.
303 Ibid.
304 Michel Foucault, above n 61, 52.
305 Ibid.
306 Richard Miller, above n 6, 13.
307 Ibid.
309 Richard Miller, above n 6, 13.
The unreasonable foundation for laws defining Jews can be seen in the ‘Homestead Law’ of 29 September 1933. This provision stated:

1. Only a person of German or cognate blood may be a peasant.
2. A person is not considered German or as having cognate blood, if his paternal or maternal ancestors have Jewish or colored blood in their veins.
3. The first of January, 1800, is the day that decides whether the premises of Section I obtain. …

In effect this provision ensured that ‘[e]veryone start[ed] with a clean slate on January 1, 1800, and [was] assumed to be Aryan. … What some ancestor had done in 1799 or earlier was irrelevant.’ This definition reveals that the line between who was and was not Aryan was somewhat arbitrary. It seems a somewhat precarious basis for a regime dedicated to ‘racial purity’.

To be defined as Jewish under Nazi Germany had dire consequences. Jews were stripped of their citizenship rights, their right to vote, their right to carry on their professions or to carry on trade, they had their property confiscated and millions of Jews ultimately lost their lives. The ‘Nuremberg Laws on Reich Citizenship’ passed on September 15 1935 effectively removed citizenship rights for Jews and supplementary decrees were made under this law. One of the supplementary decrees was the ‘First Regulation to the Reich Citizenship Law’ passed on November 14 1935. Article 4(1) of the ‘First Regulation to the Reich Citizenship Law’ stated that ‘[a] Jew cannot be a Reich citizen. He has no voting rights in political matters; he cannot occupy a public office.’ Article 4(2) forced all Jewish officials to ‘retire’. Effectively this meant that ‘Jewish civil servants who had kept their positions owing to their veteran or veteran-related status were forced into retirement.’ Saul Friedländer observes that ‘[o]n December 21 a second supplementary decree ordered the dismissal of Jewish professors, teachers, physicians, lawyers and notaries who were state employees and had been granted exemptions.’ Article 5(1) of the ‘First Regulation to the Reich Citizenship Law’ declared ‘[a] Jew is a person descended...

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310 Ibid 15.
311 Ibid.
312 Ibid.
313 Saul Friedländer, above n 3, 76 and 149; Richard Miller, above n 6, 97.
314 Yitzhak Arad, Yisrael Gutman and Abraham Margaliot, above n 7, 77 and 80.
315 Ibid 80.
316 Ibid.
317 Ibid.
318 Saul Friedländer, above n 3, 149.
from at least three grandparents who are full Jews by race.\(^{320}\) Article 5(2) provided that ‘A Mischling who is a subject of the state is also considered a Jew if he is descended from two full Jewish grandparents’.\(^{321}\) People who were considered neither full Jews nor full Aryans were described by the Nazis as Mischlinge who were considered to be ‘hybrid or crossbreed or mongrel’.\(^{322}\) There were different categories of Mischlinge and varying rights accompanied the different categories. Miller explains that ‘Mischlinge of the first degree were “half Jews”, persons not of the Jewish faith and not married to a Jew … but who were descended from two Jewish grandparents. Mischlinge of the second degree were “quarter Jews”, descended from one Jewish grandparent.’\(^{323}\) Although Jews were subjected to the harshest penalties, some of these penalties were also applied to the first degree Mischlinge. Miller highlights the difficulties those defined as Mischlinge were subjected to:

Passport restrictions applied against Jews also applied to first-degree Mischlinge, and first-degree Mischlinge might be included when companies were ordered to dismiss Jewish workers. Mischlinge involved in litigation faced judges who had declared their hostility against non-Aryans. Worse yet, Jewish lawyers could represent only Jews, so Mischlinge had to use Aryan attorneys who were formally hostile against non-Aryans. Hitler Youth service was a prerequisite for many careers, but Mischlinge were barred from the Hitler Youth, thereby closing careers theoretically open to them. Mischlinge who lost their jobs could not receive unemployment help from either Nazi or Jewish relief agencies.\(^{324}\)

While these restrictions were no doubt disadvantageous, as Miller points out, ‘although Mischlinge had to live under disabilities, most were allowed to live.’\(^{325}\) The same could not be said for Jews once Hitler started implementing what he saw as the ‘Final Solution’ of ‘the Jewish Problem’,\(^{326}\) a Nazi euphemism for the mass murder of millions of Jews.\(^{327}\)

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\(^{319}\) Ibid.

\(^{320}\) Yitzhak Arad, Yisrael Gutman and Abraham Margaliot, above n 7, 80.

\(^{321}\) Ibid. The full provision is as follows:

Article 5(2)

A Mischling who is a subject of the state is also considered a Jew if he is descended from two full Jewish grandparents

(a) who was a member of the Jewish Religious Community at the time of the promulgation of this Law, or was admitted to it subsequently;

(b) who was married to a Jew at the time of the promulgation of this Law, or subsequently married to a Jew;

(c) who was born from a marriage with a Jew in accordance with paragraph 1 ...

(d) who was born as the result of extramarital intercourse with a Jew in accordance with paragraph 1, and was born illegitimately after July 31, 1936

My apologies for the incorrect tense, it appears as such in the translation.

\(^{322}\) Richard Miller, above n 6, 16.

\(^{323}\) Ibid 16–17.

\(^{324}\) Ibid 17.

\(^{325}\) Ibid.

\(^{326}\) David Bankier, above n 28, 68 and 139. Note there is concern that the use of this Nazi terminology continues to privilege the language of the perpetrators and imply that there was a ‘Jewish problem’ rather
To determine whether a person was or was not a Jew under the Nuremburg laws was not a simple process. Under these laws it was possible for a child with two half-Aryan parents to be considered Jewish based on there being three Jewish grandparents. Religious identification on the part of the individual was considered irrelevant. If a grandparent had converted to Christianity but had been born a Jew then they were deemed to be Jewish for the purposes of the Nuremburg Laws. As the above definitions show, the Nazis were less concerned about religious practice than with genealogy when it came to defining who was and who was not Jewish. ‘Judaism was considered an outward manifestation of inherent biological deficiency, a deficiency hidden within Jews who did not practice Judaism … [which] could be detected only through genealogy.’ However in ‘[d]efining Jews by genealogy rather than religious profession’ the Nazis ‘greatly expanded the pool of victims.’ Jews were considered to carry defiling genes within them which could spread like a disease if the Nazis did not ensure strict compliance with racial purity laws. The Nazis believed that those who had Jewish ancestry would at some point reveal their biologically corrupt nature. As Miller explains:

> by the 1930s Nazi ideology held that a person’s Jewish faith had a biological impact on subsequent generations of offspring. … “Corruption of blood” was transformed from legal principle to ostensible biological fact. “Whoever has Jewish blood in his veins will sooner or later reveal the Jewish part of his character,” said Der Stürmer in March 1936.

Individual Jews were considered to be inevitably tainted by corrupt biological characteristics, regardless of individual behavior which might have suggested otherwise. The philosophy under Nazism was ‘[o]nce a Jew, always a Jew. A victim’s parent who renounce[d] the Jewish religion remain[ed] a Jew. The victim’s own religion [was] irrelevant. One [was] defined as a Jew not by one’s own beliefs or actions, but by those of
one’s parents.’\textsuperscript{338} It was a philosophy which held some accountable for the religious decisions of their ancestors, an utterly unfair system, but seemingly one whose unfairness was lost on its designers.

The process of definition was a precarious thing, and those who enthusiastically supported Nazism could at some point be found to have Jewish ancestry, prematurely ending their careers.\textsuperscript{339} Indeed, the hunt for Jewish ancestry became a somewhat common feature in the lives of those who were trying to oust their opponents for jobs and other political advantages.\textsuperscript{340} The discovery of Jewish ancestry was ‘especially awkward’ if it ‘involved prominent persons.’\textsuperscript{341}

The consequences of an adverse definition were drastic. As a result the process of definition allowed for some degree of flexibility in two situations. ‘Through an official process called Liberation, a full Jew could become a \textit{Mischling} of the first degree, and a first-degree \textit{Mischling} could enter the second degree.’\textsuperscript{342} There were two types of liberation, ‘“Pseudo Liberation”’ and ‘“Real Liberation”’.\textsuperscript{343} Miller explains that:

“Pseudo Liberation” depended on facts or legal interpretations. For example, in theory the status of great-grandparents was irrelevant, but occasionally theory yielded to situations. A grandparent who belonged to the Jewish religious community could be reclassified as Christian if the grandparent was the child of Christian parents. …

“Real Liberation” occurred when a person’s Nazi zeal was so outstanding as to reveal the person’s true Aryan biological makeup that had been unapparent through genealogy. Such an endangered person thereby had motivation to promote the war on the Jews with especial vigor. Hitler personally upgraded thousands of persons whose pedigrees would have made them subject to persecutions they advocated.’\textsuperscript{344}

The malleable nature of ‘Liberation’ shows just how constructed the notion of ‘race’ was under Nazism. The category of ‘Real Liberation’, requiring those with Jewish ancestry to engage in extraordinary levels of persecution of Jewish people, is particularly obnoxious. This idea involved the Nazis turning their Jewish enemy against itself, and there is something quite loathsome about that. It was the employment of a strategy designed to undermine any kind of solidarity amongst Jewish people.

\textsuperscript{338} Ibid 11.
\textsuperscript{339} Ibid.
\textsuperscript{340} Ibid 86.
\textsuperscript{341} Ibid 12.
\textsuperscript{342} Ibid 19.
\textsuperscript{343} Ibid.
\textsuperscript{344} Ibid.
As suggested above, under the Nazi regime definition was malleable depending on the qualities of the person being defined. There were instances of Mischlinges of the first degree being transformed into Mischlinges of the second degree, in the case of medical researchers.\textsuperscript{345} There were thus people with Jewish heritage who were treated as exceptions under the law by Hitler, but usually this was associated with their medical expertise.\textsuperscript{346} This was not commonplace. The majority of those who were unfortunate enough to be defined into an undesirable category under Nazi law were doomed to pay a high price for such categorisation.

Initially, to be placed in the category of Mischlinge rather than ‘full Jew’ was significant in terms of practical consequences.\textsuperscript{347} Earlier on in the Nazi regime some Mischlinge were allowed to study at schools and universities and participate in professions that were closed to those defined as ‘full Jews’.\textsuperscript{348} However as the regime continued those defined as Mischlinge were subject to increasing persecution.\textsuperscript{349}

The Nazis maintained that there were clear distinctions between Jews and Aryans. The Nazis considered Aryans to represent ‘the master race’.\textsuperscript{350} However the process for identifying whether a person belonged to this allegedly superior race was fraught with difficulty as Jews and Aryans often looked fairly similar. ‘Many Aryans had physical features ascribed to Jews, and many Jews looked like Aryans.’\textsuperscript{351} The process of physical identification of ancestry was based upon fairly unscientific criteria such as the ‘colour of hair and eyes, shape of nostrils and skull, and the like.’\textsuperscript{352} Even though ‘Nazis condemned “Jewish mentality” they were unable to find a reliable biological sign to reveal it.’\textsuperscript{353} The difficulty associated with physically identifying a distinguishable Jewish appearance led to the order that all Jews were to wear yellow stars.\textsuperscript{354} The fact that there was such great difficulty in finding any difference in physical appearance between Jews and Aryans shows how absurd Nazi race laws truly were. However despite this absurdity, an economy
developed around these race laws. Miller explains that in many respects the obsessive
genealogical hunts were good for the German economy. ‘The need for genealogical
documents produced new jobs’ and ‘licensed genealogical researchers made a living by
helping citizens prove their pedigrees.’ The church was involved to some extent in this
process because churches possessed numerous genealogical records. Thus ‘Christian
clergy assisted Nazis in identifying who was a Jew.’

Once Jews were defined as ‘legal target[s] … police and courts bec[a]me mechanisms of
destruction rather than protection.’ This is clearly seen in the accounts of police who
vandalised shops and were involved in physical violence against Jewish people, and
ultimately in their participation in rounding up Jewish people for extermination at the
concentration camps. As mentioned earlier, the courts were also very much involved in
furthering the objectives of the Nazi regime.

The process of definition was highly significant for the regime of Nazi persecution.
However as Miller states, ‘[t]hrough definitions, definers can reveal as much about
themselves as about what they define.’ The Nazis’ obsession with definitions of race
reveals their own arrogance and lust for power.

D. Racial Purity and the Concept of ‘Blood’

There was a great deal of obsession over racial purity and the concept of ‘blood’ in Nazi
Germany. Miller comments that ‘[a]lthough researchers of the German Medical
Association were never able to devise a blood test that distinguished Aryans from non-

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355 In addition to benefiting the German economy they were also economically beneficial to the US based
company IBM who profited handsomely from the use of the Hollerith punch card system which was used
to process prisoners in the concentration camps. Edwin Black, IBM and the Holocaust: The Strategic
Alliance between Nazi Germany and America’s Most Powerful Corporation (2001) 22. Black states that
‘Hundreds of thousands of human beings were being identified, sorted, assigned and transported by
means of the Hollerith system. Numbers and punch cards had dehumanized them all …’ (at 22).
356 Richard Miller, above n 6, 12.
357 Ibid.
358 Ibid.
359 Ibid.
360 Ibid 9.
361 Ibid 55 and 139.
362 Saul Friedländer, above n 3, 159.
363 Richard Miller, above n 6, 19.
364 Gerhard Weinberg, above n 19, 119 and 121–122.
Aryans, Nazis nonetheless maintained that a person’s ancestry was carried in the blood.365 The Nazis were obsessed with the notion that Jewish ‘blood’ could defile any who came into contact with it. So much so that when a Jewish Doctor gave a blood transfusion using Jewish blood to an ‘Aryan’ German injured in a car accident that person faced the dilemma of potential expulsion from the SA.366 Under the Nazi regime there were ‘separate blood supplies for Jews and Aryans, so patients would be given blood only from donors of the same race. Many Nazis contended that a blood transfusion could transform an Aryan into a non-Aryan.’367 It was thought that such a contamination was irreversible.

The grave significance of racial purity meant that there was great fear over what could be discovered through genealogical records. If they revealed Jewish ancestry then a person was considered to be contaminated.368 People could lose jobs if it was discovered that they had Jewish ancestry and ambitious Germans conducted genealogical searches of opponents in attempts to further their own economic advancement.369 The discovery of Jewish ancestry could rapidly ruin a family.370 Charges of impure ‘blood’ were often made.371

Those who pursued a career within the ranks of the Nazi regime were subjected to greater requirements for racial purity.372 So while the law only imposed punishments and regulations upon Jewish people by inquiring about genealogy up until the grandparent level, Nazi service requirements involved a much deeper inquiry into an applicant’s genealogy.373 ‘The Nazi party refused membership even to Mischlinge of the fifth degree, although in law they were generally treated as Aryans.’374

There was no biological difference warranting the different treatment meted out to Jewish people, but the notion of ‘blood’ was used to create ‘a legal fiction used to sort persons into different categories that determine[d] who [would] become victims.’375 Legal fictions are necessary in regimes with an illegitimate claim to power. It is remarkable what a willing
handmaiden the law becomes under such circumstances. It seems that this is particularly so in places where legal positivism has ascendency, where law is viewed as valid and legitimate so long as it is handed down from those possessing power to make it,\textsuperscript{376} regardless of whether such law is an oppressive exercise of parliamentary power.

Interestingly, the Nazi laws motivated by desires of racial purity created significant economic problems, even for some German workers. For example, Article 3 of the ‘Nuremberg Law for the Protection of German Blood and German Honor’ passed on 15 September 1935 declared, ‘Jews may not employ in their households female subjects of the state of German or related blood who are under 45 years old.’\textsuperscript{377} Miller explains that:

The decree’s ostensible purpose was to halt the allegedly widespread impregnation of Aryan female servants by lustful Jewish employers. The decree was passed in the super-heated atmosphere of the Nuremberg party rally, but cooler heads soon realized the practical difficulties of implementing such a decree – 60,000 Aryan females would lose their jobs, a prospect relished by Aryan men interested in such employment.\textsuperscript{378}

The implementation of this law effectively ensured the unemployment of most women who had been working in Jewish households, as these workers had few other employment options.\textsuperscript{379} Some of these women who had been working in Jewish households protested at the Labour Exchange in Berlin that the Laws unjustly caused them financial harm, but to no avail.\textsuperscript{380}

**E. Ostracised from Society**

As the Nazi war machine gradually increased its speed Jews were increasingly ostracised from the rest of German society. This ostracism covered every facet of Jewish life. Jews ‘were forbidden to engage in activities inherent to normal life, from driving a car to holding a job.’\textsuperscript{381} By orchestrating the firing of most Jewish employees the Nazi regime ensured that a whole host of difficulties descended on Jews: ‘loss of income, loss of

\textsuperscript{376} This aspect of legal positivism, obedience to the ‘commands of a sovereign’, was formulated by John Austin. See John Austin, above n 197, 28.
\textsuperscript{377} Yitzhak Arad, Yisrael Gutman and Abraham Margaliot, above n 7, 78.
\textsuperscript{378} Richard Miller, above n 6, 91.
\textsuperscript{379} Ibid 92.
\textsuperscript{380} Ibid.
\textsuperscript{381} Ibid 43.
housing, reduced access to health care and even to food.\textsuperscript{382} Jews were ‘excluded … from community life’.\textsuperscript{383} They were also eventually excluded from all German social clubs, organisations and businesses which prevented opportunities for networking. Miller explains:

Throughout Germany all sorts of organizations asked Jewish members to depart: veterans groups, student groups, skat clubs, rabbit breeder societies. Aryan business partners had the right to expel Jewish partners. All prominent Jewish members of Berlin’s Chamber of Commerce were forced out by April 1933. … Jews were excluded from golf courses; even the Wannsee country club, whose members were sophisticated and wealthy, expelled Jewish members. Prohibitions extended to charitable activity.\textsuperscript{384}

‘Aryan’ Germans were subjected to extreme pressure to terminate all contact with Jews.\textsuperscript{385} Those who did not comply with the boycott of ostracizing Jews ensured not only their own victimization but often that of their families as well.\textsuperscript{386} Aryans whose family members associated with Jews could be fired from their jobs.\textsuperscript{387} Anyone who associated with Jews was severely reprimanded.\textsuperscript{388} ‘In 1933 civil servants could be fired if seen in friendly conversation with a Jew or patronizing a Jewish store.’\textsuperscript{389} Economic transactions with Jews could lead to criminal proceedings and also public shaming.\textsuperscript{390} Friendship with Jews was criminalized. Miller explains that ‘[i]n October 1941 friendship became a crime. Aryans and Jews who maintained friendships became subject to protective custody and concentration camp interment.’\textsuperscript{391}

The loss of citizenship facilitated the ostracism of Jewish people. This was assisted by Article 4(1) of the ‘Nuremburg Laws on Reich Citizenship’ passed on September 15 1935,\textsuperscript{392} mentioned earlier, which effectively ostracized Jews from accessing political rights and having any influence in the political realm. It paved the way for persecution. Article 4(2) forced all Jewish officials to ‘retire’.\textsuperscript{393} Under another supplementary decree further dismissals were ordered, thus ‘Jewish professors, teachers, physicians, lawyers and

\textsuperscript{382} Ibid 162.
\textsuperscript{383} Ibid 43.
\textsuperscript{384} Ibid 58.
\textsuperscript{385} Ibid.
\textsuperscript{386} Ibid.
\textsuperscript{387} Ibid.
\textsuperscript{388} Ibid.
\textsuperscript{389} Ibid 75.
\textsuperscript{390} Ibid 63–64.
\textsuperscript{391} Ibid 79.
\textsuperscript{392} Yitzhak Arad, Yisrael Gutman and Abraham Margaliot, above n 7, 77 and 80.
notaries who were state employees and had [formerly] been granted exemptions’ found themselves unemployed.\textsuperscript{394} These laws effectively removed the rights of Jews to obtain paid employment and systematically entrenched financial hardship amongst Jewish people. This in turn created a situation where Jews were unable to pay for suitable accommodation, which, combined with the belief that Jews carried infectious diseases, led to the creation of ghettos.\textsuperscript{395} As the Nazi regime continued Jews lost their nationality as well as their citizenship, ‘a loss that forfeited their property to the government.’\textsuperscript{396}

Jews lost basic citizenship rights. Loss of employment resulted in a reduction of money to purchase food. Jews only had access to limited food supplies, as their presence was forbidden in most shops.\textsuperscript{397} There was also increasing surveillance to prevent Aryans from engaging in any kind of business with Jews which obviously made it harder for Jewish people obtain food. They were prohibited from fishing in 1933 and from hunting in 1937,\textsuperscript{398} which made getting additional food very difficult. The situation was even harder once ghettos were created.\textsuperscript{399} Inside the ghettos food was in short supply.\textsuperscript{400} Hundreds of thousands of Jews died of starvation.\textsuperscript{401} Forced removal to ghettos led to ‘“death by hunger”’.\textsuperscript{402} Jews who went outside the ghettos to try to find food were shot.\textsuperscript{403} Although there were some revolts in the ghettos, any resistance was met with brutality.\textsuperscript{404}

Jews were rapidly banned from popular public spaces once the Nazis attained power in 1933.\textsuperscript{405} They ‘were banned at public bathing beaches in growing numbers of towns.’\textsuperscript{406} They were also banned from bathing in some popular lakes too, such as Wannsee near

\textsuperscript{393} Ibid 80.  
\textsuperscript{394} Saul Friedländer, above n 3, 149.  
\textsuperscript{396} Richard Miller, above n 6, 76.  
\textsuperscript{397} Ibid 162.  
\textsuperscript{398} Ibid 69.  
\textsuperscript{399} Christopher Browning, above n 395, 27. The ghettos were in place ‘from the winter of 1939 ... until August 1944’ – Gustavo Corni, above n 29, 1.  
\textsuperscript{400} Christopher Browning, above n 395, 27; Michael Phayer, ‘The Catholic Resistance Circle in Berlin and German Catholic Bishops during the Holocaust’ (1993) 7(2) Holocaust and Genocide Studies 216, 217.  
\textsuperscript{401} Dr Walbaum cited in Christopher Browning, above n 395, 27.  
\textsuperscript{402} Ibid.  
\textsuperscript{403} Christopher Browning, above n 395, 27.  
\textsuperscript{404} Isaac Trunk, Judenrat – The Jewish Councils in Eastern Europe Under Nazi Occupation (1972) xxx and 452–457.  
\textsuperscript{405} Richard Miller, above n 6, 67.  
\textsuperscript{406} Ibid.
Berlin.407 The Nazis were concerned over the presence of Jews in public spaces which led to the imposition of severe restrictions on Jews. Curfews were imposed which forbade ‘their entry into any specified area at any time.’408 Jews were increasingly denied access to private businesses. ‘Berlin police … ordered Jews to keep out of barber and beauty shops, prohibited purchase of newspapers by Jews, and even made pet ownership illegal for Jews.’409 In terms of prohibition the Nazis were incredibly thorough. The situation grew increasingly grave:

As of September 1939 Jews had to stay indoors every day between 9:00 P.M. and 5:00 A.M. during the summer, with the restriction extended one hour in each direction during winter. They were also forbidden to possess radios. Eventually their telephones were confiscated, and they were forbidden to use public telephones. … Gradually Jews were ordered to give up other amenities of western civilization: typewriters, phonographs, cameras, electric irons, space heaters.410

Ostracism was also in place in the area of education. Numbers of Jewish students were reduced in schools and universities via the ‘the Law Against Overcrowding of German Schools and Higher Institutions’ which was passed on 25 April 1933.411 This law limited ‘the percentage of Jews enrolled in secondary schools and universities … to their percentage in the general population.’412 The aim of this legislation was to limit the number of Jewish professionals which would in turn limit the wealth and power that Jewish people could access.

Discriminatory Nazi policies were also made a feature of school life, influencing children from a young age.413 A significant feature of Nazi influenced schooling was the way that Jews were demonized in the course curriculum.414 For example,

A thirteen-year-old Jewish schoolgirl took these notes in her racial theory class:

1. The Jewish race is much inferior to the Negro race.
2. All Jews have crooked legs, fat bellies, curly hair, and an untrustworthy look.
3. Jews are responsible for the World War.
4. They are to blame for the armistice of 1918 and they made the Peace of Versailles.
5. They were the cause of inflation.

407 Ibid.
408 Ibid 77.
409 Ibid 77–78.
410 Ibid 78.
411 Ibid 69.
412 Ibid.
413 Ibid 70.
414 Ibid.
6. They brought on downfall of the Roman Empire.
7. Marx is a great criminal.
8. All Jews are communists.
9. They are the rulers of Russia.\footnote{Ibid.}

Teaching Jewish children to denigrate their own people and their own culture was a very effective method for attempting to destroy cultural pride. It seems that Jewish children were taught to despise their Jewish heritage in school as well as in the public sphere generally. The psychological impact on Jewish children attending school was tremendously harmful.\footnote{Ibid 72.}

The Nazis restricted the freedom of movement of Jewish people by imposing ‘bans on travel by Jews in 1938’, \footnote{Ibid 66.} although some places had imposed travel bans before this.\footnote{Ibid.} To facilitate this, the Nazis invalidated the passports of Jewish people.\footnote{Ibid 74.} In October 1938 there was a ‘decree invalidating passports held by Jews. The documents could only be restored if authorities stamped them with a red “J” to signify the holder as Jewish. This identification marked the holder for special harassment when trying to leave the country.’\footnote{Ibid.} The Nazis issued ‘distinctive domestic identification cards … for Jews to use in Germany.’\footnote{Ibid.} The issuing of special identification cards assisted the process of state sanctioned discrimination. It made it easier to target Jews for persecution.

Another way in which the Nazis impinged upon the freedom of movement of Jewish people was to prevent them from driving. In December 1938 Jews were prohibited from driving vehicles and their driver’s licenses were revoked.\footnote{Ibid 66–67.} This effectively prohibited most Jews from attaining the means to flee to safety.\footnote{Ibid 67.} It also meant that many who planned to stay could not keep their jobs because they could not travel to work.\footnote{Ibid.} In order
to be able to use public transport Jews had to acquire a ‘police pass’. Such passes were not easy to obtain.

Ostracism also took place in the area of employment. Jews were increasingly ostracised from all of the professions. For example, steps were taken to prevent Jewish lawyers from appearing in court. ‘A decree of September 1938 made disbarment of Jewish lawyers mandatory, although a supplemental decree in October allowed a quota of 175 former Jewish attorneys to represent Jewish clients in legal matters.’ Jews who were permitted to represent Jewish clients had their prestigious titles removed and ‘were called “consultants” rather than lawyers’. In a classic example of the court giving effect to the ‘spirit’ of Nazi policy ‘[e]ven lawyers who merely had Jewish ancestry, but were not classified as Jews, faced harassment. When one complained to the bar association about racial ancestry slurs used by an opposing lawyer in court, the court sentenced the complainer to a month’s imprisonment.’

Civil servants were also ostracised from the workplace with the introduction of ‘the Law for the Restoration of the Professional Civil Service, April 7, 1933.’ This legislation was incredibly broad in its application. Miller states:

Not only did the act stretch the definition of “government official” to the limit of its logic, it also expanded the definition of non-Aryan to sweep up many more victims than the purge had previously been able to touch. All civil servants, from architects to judges, were subjected to the Aryan Paragraph. The paragraph not only covered national employees but those of local government, of public corporations … and public institutions … and social insurance operations … Any private enterprise was covered if the government had a 50 percent ownership. Public utilities in Germany were typically government-owned, so even telephone workers and streetcar conductors were covered.

The Act covered all teachers engaged in public education. It covered university professors, including assistant professors and honorary professors. The Act covered
religious clergy because it was considered that they had an authoritative role in the public domain.437 ‘Eventually the Interior Ministry defined “public official” as anyone with “authoritative or dignified duties to fulfill.”’438

Miller explains that ‘[o]ne occupation after another was closed to Jews.’439 This extended to the operation of businesses with a ‘May 1933 decree outlaw[ing] new retail shops and expansion of old ones by Jews, with the intention of limiting the ability of skilled Jewish professionals to earn a living through entrepreneur-ship.’440 Gradually every money making avenue was closed to Jews and Jewish people were living in conditions of dire poverty. As Miller explains:

Ostracism leads to loss of income; confiscation leads to loss of capital. Victims thus lose means to pay rent or mortgages and thereby lose their living accommodations. Such people have little choice as they are shunted into particular geographical locations. There they can be watched closely by authorities and ignored by citizens who neither want to witness nor contemplate what happens to victims.441

Even those Jews who could still afford to pay for rental accommodation faced problems. Some found that their leases had been cancelled and some were refused rental accommodation on the basis that they were Jews.442 This led to Jews being forced to live in concentrated areas.443

1. Destruction of Jewish livelihood

The initial stages of Nazi persecution of Jews began with creating conditions of economic hardship, which was a significant aspect of ostracism. The Nazi regime imposed harsh measures designed to remove from Jews privileges assigned by right to all other German citizens. ‘In pursuance of a Jew-free economy, Nazis announced a nationwide boycott of Jewish businesses to begin on April 1, 1933.’444 This measure was implemented to make sure that Jews could no longer profit from trade with Aryans. It was instituted to try to reduce Jewish wealth, to prevent Jews from acquiring further wealth, and to force Aryans

436 Ibid.
437 Ibid.
438 Ibid.
439 Ibid 87.
440 Ibid.
441 Ibid 133.
442 Ibid 134–135.
443 Ibid 138.
444 Ibid 55.
to bolster the Aryan rather than the Jewish economy.\footnote{Ibid.} During this boycott Jewish shops and restaurants were vandalized by Nazis and customers patronizing such establishments were threatened.\footnote{Ibid.} However, ‘[t]he action was cancelled after one day due to the number of citizens who made a show of patronizing Jewish businesses in protest of the boycott.’\footnote{Ibid.} This was early on in the regime.

As time went by the punishments for engaging in trade with Jews became more and more extreme and patrons of Jewish businesses were publicly shamed.\footnote{Ibid.} Such patrons risked having their names published in newspapers and posted in public forums.\footnote{Ibid.} \textit{Der Stürmer}, a Nazi propaganda newspaper, ran a series of features listing those who were alleged to continue to patronize Jewish businesses.\footnote{Ibid 61–62.} The longer the Nazi regime was in power the more perilous such patronage became. Eventually patronizing Jewish businesses became unthinkable in Nazi dominated Germany. The economic survival of Jewish businesses became even more difficult when ‘[c]ommercial directories deleted Jewish listings, and Jewish businesses found themselves unable to place ads in telephone directories, in newspapers, on radio, or in the German State Railway system.’\footnote{Ibid 56.} This alteration was brought about by Article 1(2) of the ‘Regulation for the Elimination of the Jews from the Economic Life of Germany’ which was passed on 12 November 1938.\footnote{Yitzhak Arad, Yisrael Gutman and Abraham Margaliot, above n 7, 115.} This provision forbade Jews ‘to offer for sale goods or services, to advertise these, or to accept orders at markets of all sorts, fairs or exhibitions.’\footnote{Ibid.} Under Article 1(1) Jews were ‘forbidden to operate retail stores, mail-order houses, or sale agencies, or to carry on a trade [craft] independently.’\footnote{Ibid.} Article 1(3) stated that any Jewish businesses that violated this law could be closed down.\footnote{Ibid.} Yet in practical terms the provisions were so broadly drafted that they virtually destroyed Jewish businesses and thus the livelihood of many Jewish people.
The destruction of Jewish livelihood also took the form of restricting their access to employment, especially the professions.\(^{456}\) As mentioned earlier, the closing down of employment options with the enactment of the ‘Law for the Restoration of the Professional Civil Service’ meant that those who had once held distinguished positions were reduced to undertaking whatever labour was available, such as digging ditches or becoming street sweepers.\(^{457}\) In a desperate attempt to survive, Jewish families were also forced to sell personal items from their households.\(^{458}\) However there were problems with accessing a wide enough market even with this avenue. ‘Pawnshops, a traditional source of cash for persons who cannot get money from banks, could neither receive property from Jews nor redeem their pawn tickets. That restriction limited the market for Jew-tainted personal goods, driving down the price.’\(^{459}\)

Destruction of the Jewish economy was crucial in the process of dehumanisation. The conditions of forced economic deprivation led to Germans accusing Jews of being ‘disease carriers’.\(^{460}\) In reality the systematically enforced poverty created conditions leading to further demonization.

F. The Economic Rationale for the Holocaust

‘Aryan’ Germans profited vastly from their treatment of Jewish people.\(^{461}\) The Nazis called the process of confiscating Jewish wealth ‘“Aryanization” of the economy’.\(^{462}\) Miller argues that ‘Aryanization was an expression of Nazi greed.’\(^{463}\) ‘Nazi greed’ was certainly extensive.\(^{464}\) When asked why the Nazis exterminated the Jews, Franz Stangl, a managing officer of an extermination center stated “‘[t]hey wanted the Jews’ money.’”\(^{465}\) He had been responsible for dealing with the confiscated Jewish property in Treblinka and claimed to know through his first hand experience “‘of the fantastic sums that were involved’”.\(^{466}\)

\(^{456}\) Richard Miller, above n 6, 85–89.
\(^{457}\) Ibid 85 and 94.
\(^{458}\) Ibid 94.
\(^{459}\) Ibid.
\(^{460}\) Ibid 30.
\(^{461}\) Ibid 165–166.
\(^{462}\) Ibid 97.
\(^{463}\) Ibid 97.
\(^{464}\) Ibid Chapter Three.
\(^{465}\) Franz Stangl cited in Gitta Sereny, above n 28, 129.
\(^{466}\) Ibid.
He considered that the economic imperative for the Holocaust was the strongest motivational factor for the Nazis, believing the racial rationale to be quite secondary.\footnote{467} Marxist critiques of the Holocaust also see the economic rationale as a driving force.\footnote{468} It clearly played a very significant role.

The stripping of citizenship rights paved the way for total confiscation of Jewish property, including houses, businesses, personal items of property, cash, and pensions.\footnote{469} Nazis were concerned to undertake ‘measures to make Jews economically useful to Germans’.\footnote{470} They resorted to a broad range of measures to enhance this economic usefulness. From confiscating property to confiscating physical bodies, the Nazis were driven by a fiscal imperative that deviated sharply from any kind of sound ethical basis. Of course deviation from ethical principles often occurs in the pursuit of economic ambitions. One of the chief criticisms of economic rationalist approaches is the lack of ‘ethical criteria’ used in their formation.\footnote{471}

The Nazi regime engaged in wholesale confiscation of vast volumes of Jewish property.\footnote{472} The practice of confiscating wealth was part of the process of destruction. Richard Miller contends that ‘[p]roperty confiscation is a key element of the destruction process. Via confiscation, victims who survive ostracism can be denied houses to live in, be denied personal property that can be sold for food, and be reduced to wretchedness.’\footnote{473}

Under Nazi ‘Aryanization’ Jewish families could be forced to sell their businesses and houses to Germans, usually at gross undervalue.\footnote{474} Many German businesses and entrepreneurial citizens benefited from this.\footnote{475} ‘Nazi confiscation policy allowed trusts and cartels to make bargain purchases of businesses owned or managed by Jews. Germany’s corporate power structure thus had a strong economic incentive to support the war on Jews. Smaller entrepreneurs had the same incentive.’\footnote{476}

\begin{thebibliography}{99}
\bibitem{467} Ibid.
\bibitem{468} Manfred Henningsen, above n 198, 21.
\bibitem{469} Richard Miller, above n 6, 97, 100, 110–111, 113–114, 116 and 130.
\bibitem{470} Donald Niewyk, above n 2, 148.
\bibitem{471} Jeannie Paterson, Andrew Robertson and Peter Heffey, \textit{Principles of Contract Law} (2\textsuperscript{nd} ed, 2005) 18.
\bibitem{472} Ibid 97.
\bibitem{473} Ibid 100 and 114.
\bibitem{474} Ibid 111.
\bibitem{475} Ibid 97.
\end{thebibliography}
Chapter 2 – The Horrors of the Holocaust – Nazi Persecution and Dehumanisation of Jews

The Nazi regime also eventually required Jews to forfeit their property. They enacted law to facilitate the forfeiture of property by stripping Jews of their nationality in addition to their citizenship.477 The practice of forced sales and forfeiture ‘tended to blur: Government officials might expedite Aryanization, and private individuals might benefit by buying forfeited property from the government.’478 The zealous campaign to facilitate forfeiture or forced sale of property could sometimes accidentally sweep up Aryan business owners in the process. ‘If question arose about a property owner’s ancestry, the questioner did not necessarily have the burden of proof. People who were unable to document Aryan ancestry could be defined as Jews, even though no proof existed that they were Jews.’479

Needless to say there was no government compensation offered for property forfeited to the government.480 The forced sale or confiscation of Jewish property was an integral part of Hitler’s attempt ‘to revitalize Germany’s economy’.481 However rather than actually creating more wealth, more employment opportunities or more housing, Hitler simply confiscated all these from Jews, which improved the level of general wealth in the ‘Aryan’ community.482 Hitler’s solution to any shortage was to ‘take’ from Jews so that more could be freed up for ‘Aryans’. ‘When schools became crowded, instead of constructing more schools the Nazis eased overcrowding by removing Jewish students. When beaches became crowded, Jewish bathers were excluded.’483 Jews were evicted from houses to free up accommodation for Aryans.484 It was a very inadequate solution to population growth and the need for more housing and employment. However it was a solution that was popular with a majority of the German population.

Once the ‘industrial death camps’485 were operating there was further confiscation. All Jewish property was confiscated on death.486 The items confiscated at death camps included intangible property such as contents from bank accounts and ‘any cash value from

477 Ibid 76. See the ‘Nuremberg Laws on Reich Citizenship’ passed on September 15 1935 and the ‘First Regulation to the Reich Citizenship Law’ passed on November 14 1935 above.
478 Richard Miller, above n 6, 100.
479 Ibid 100–101.
480 Ibid 102.
481 Ibid 103.
482 Ibid 139.
483 Ibid.
484 Ibid.
486 Richard Miller, above n 6, 104.
life insurance policies.\textsuperscript{487} Of course even physical aspects of people such as their hair and gold fillings were confiscated at the death camps.\textsuperscript{488} Human hair was greatly desired in industry: ‘[f]elt and carpet industries had long sought men’s hair, and women’s hair was used for making hair nets and cosmetic hair pieces.’\textsuperscript{489}

Jewish people were subjected to restrictions limiting the amount of money they could withdraw from their own bank accounts.\textsuperscript{490} In effect this left more for the Nazi government to later confiscate. Miller states:

> regular banks immediately notified the Gestapo if a Jewish depositor withdrew more than RM 1,500 from an account. The Gestapo quickly ascertained whether the depositor was attempting to protect cash assets by transferring them abroad. Jews faced other limits on access to their bank accounts as well. … By summer 1938 Jews across Germany were limited to withdrawing a weekly allowance from their own funds. … In December 1938 restrictions were so stringent that one Jew had to ask permission to withdraw money to buy new clothes; permission was denied on the grounds that such use of funds was wasteful and for no good purpose.\textsuperscript{491}

The rigid control of what little Jewish wealth remained ensured that their opportunities for emigration were seriously limited. ‘To emigrate, Jews not only had to raise enough cash for travel but enough to satisfy the receiving country that they would not become a welfare burden.’\textsuperscript{492} The Nazis also made it difficult for Jews to emigrate by requiring that they pay tax on any property they were leaving behind in Germany.\textsuperscript{493} The required emigration tax was a very effective way of preventing Jewish people from leaving. Miller points out that:

> Even Jews without plans to emigrate could face a bill for this tax on the excuse that they would emigrate someday. Sudden demand for a tax payment equivalent to 25 percent of their property, payable on a few days’ notice, forced many business people to liquidate their enterprises in order to raise the tax payment…\textsuperscript{494}

After Crystal Night, those Jews who did manage to emigrate were unable to take any of their wealth with them.\textsuperscript{495} The Nazi government effectively confiscated Jewish wealth through the emigration process.\textsuperscript{496}

\textsuperscript{487} Ibid 105.
\textsuperscript{488} Ibid 130.
\textsuperscript{489} Ibid.
\textsuperscript{490} Ibid 109.
\textsuperscript{491} Ibid.
\textsuperscript{492} Ibid 110.
\textsuperscript{493} Ibid.
\textsuperscript{494} Ibid.
\textsuperscript{495} Ibid 111.
\textsuperscript{496} Ibid.
In 1939 Jews were subjected to further deprivation and told they had to relinquish items of personal property.\textsuperscript{497} In 1939 Jews were ordered to relinquish personal property to organizations who then sold them and gave governments the money.\textsuperscript{498} It was all strikingly utilitarian,\textsuperscript{499} promoting the greatest benefit to the greatest number of people,\textsuperscript{500} but grossly unfair to those who were the victims of such decrees.

Nothing that Jews owned was considered beyond the reach of the law. Pension entitlements were lost, confiscated by employers and charities.\textsuperscript{501} Vehicles were considered too luxurious for Jews and steps were taken to confiscate these too.\textsuperscript{502} As of June 1938 ‘police were pulling over Jewish drivers for minor traffic violations and confiscating the cars.’\textsuperscript{503} Eventually the government confiscated all vehicles owned by Jews.\textsuperscript{504} This created an additional hardship for those trying to flee Nazi persecution. Without private transportation it was an even more difficult affair.

Miller asserts that ‘[p]rofits in confiscations were so vast that transactions swirled violently in an atmosphere of wickedness.’\textsuperscript{505} The regime was rife with corruption.\textsuperscript{506} There are accounts of Nazi officials confiscating Jewish properties for their own personal use.\textsuperscript{507} Intimidation and violence were used to facilitate confiscation of property.\textsuperscript{508} ‘Threats of government intervention were a routine bargaining technique to drive down the price in Aryanizations.’\textsuperscript{509} Aryanization was also used to increase the profit margins of those who were able to remain in business. ‘Aryanization was not only intended to transfer successful Jewish businesses to Aryan owners but to reduce competition; many Jewish businesses

\textsuperscript{497} Ibid 113.
\textsuperscript{498} Ibid.
\textsuperscript{499} Michael Stolleis, above n 8, 108.
\textsuperscript{500} This ideology was elaborated upon by Jeremy Bentham, who believed an action would be right if it conformed to the principle of utility. He saw utility as providing ‘the greatest happiness of the greatest number’ – Stephen Bottomley, Neil Gunningham and Stephen Parker, Law in Context (1st ed, 1991) 30. According to Bentham ‘An action … may be said to be conformable to [the] principle of utility … when the tendency it has to augment the happiness of the community is greater than any it has to diminish it’ – Jeremy Bentham, An Introduction to the Principles of Morals and Legislation (1781) 15.
\textsuperscript{501} Richard Miller, above n 6, 116.
\textsuperscript{502} Ibid 113.
\textsuperscript{503} Ibid.
\textsuperscript{504} Ibid.
\textsuperscript{505} Ibid 118.
\textsuperscript{506} Ibid 119.
\textsuperscript{507} Ibid.
\textsuperscript{508} Ibid 121.
\textsuperscript{509} Ibid 122.
were liquidated rather than transferred.\textsuperscript{510} Although various strategies were adopted by Jewish businesses, ultimately their ‘efforts to protect their assets grew increasingly difficult with the radicalization of Nazi tactics.\textsuperscript{511}

The Nazis justified such confiscation by subscribing to the idea that Jews had been engaged in criminal behaviour.\textsuperscript{512} According to this train of thought Jewish property was acquired as a result of profits made via theft.\textsuperscript{513} It was therefore considered to be legitimate to confiscate it. This, at least, was the stated Nazi rationale.

The Nazis confiscation of Jewish property was a very public affair:

Government officials would post a notice at the entrance of a victim’s residence, declaring that the contents were forfeited to the Reich and would be sold at public auction. These auctions were festive occasions where neighbours acquired household furnishings, fine clothing, and assorted personal luxuries at bargain prices.\textsuperscript{514}

While some Aryans were fortunate enough to access these ‘bargains’ others missed out. Despite the vast theft of Jewish wealth, Miller states that ‘[e]ventually Aryans became disgruntled that there were not enough Jewish personal belongings to go around.’\textsuperscript{515} The unbridled greed was astonishing. The Nazi government provided incentives for people to reveal the whereabouts of Jews in hiding by rewarding such informants. ‘Citizens who betrayed a hiding Jew might receive one-third of the Jew’s property.’\textsuperscript{516} There was also bickering between various government departments over how the ‘plunder’ would be portioned.\textsuperscript{517}

1. \textit{Crystal Night}

The Crystal Night fine was another well known measure to confiscate wealth from Jews.\textsuperscript{518} This fine was imposed on all Jewish people as “atonement” for the murder of a German diplomat by a Jew in France, the murder which served as the Nazi’s excuse for Crystal

\begin{itemize}
\item \textsuperscript{510} Ibid 122.
\item \textsuperscript{511} L.M. Stallbaumer, ‘Big Business and the Persecution of the Jews: The Flick Concern and the “Aryanization” of Jewish Property Before the War’ (1999) 13(1) \textit{Holocaust and Genocide Studies} 1, 1.
\item \textsuperscript{512} Richard Miller, above n 6, 123.
\item \textsuperscript{513} Ibid.
\item \textsuperscript{514} Ibid 127.
\item \textsuperscript{515} Ibid 128. Not all Germans were driven by greed, however, and there were some who tried to assist Jews to escape Nazi persecution. This will be touched upon further on in the chapter.
\item \textsuperscript{516} Richard Miller, above n 6, 130.
\item \textsuperscript{517} David Bankier, above n 28 132.
\item \textsuperscript{518} Richard Miller, above n 6, 123.
\end{itemize}
Night. By order of the State Jews were required to pay RM 1 billion to the government. This was facilitated by the ‘Regulation for the Payment of an Expiation Fine by Jews who are German Subjects’ passed on 12 November 1938. As Miller explains:

As punishment for their “hostile attitude” Germany’s Jews were to forfeit RM 1 billion to the government, payable in four installments due December 15, February 15, May 15, and August 15. Using property registration figures, the Finance Ministry imposed a flat 20 percent levy on all property owned by Jews.

Jewish people lost much of their wealth as a result of this fine. The items used to pay this fine varied, from real estate, stocks, jewelry, precious metals, art and insurance policies with cash values. ‘In addition to the Crystal night fine, which all Jews had to pay, some Jews were assessed personal fines on top of the general one.’

The Crystal Night fine effectively allowed Jewish wealth to be plundered. However, even with all that was taken that night the government still was not satisfied. From 1 January 1939, ‘Jews had to turn in “typewriters, adding machines, electric household appliances, binoculars, cameras, radios.” Officials put a valuation on those items and credited that amount to the Jew’s Crystal Night fine account.’ The government also required insurance payments due to Jews for destruction of their property on Crystal Night to be paid to the State. Thus Crystal Night with its accompanying fine proved to be an extremely effective revenue raiser for the Nazis.

Crystal Night was referred to as the “Night of Broken Glass”. On this night ‘Nazi thugs physically attacked thousands of Jews and sent them to concentration camps’ and they were freed ‘only after promising to leave Germany.’ Some consider that the Holocaust commenced with Crystal Night. It was a night of terror and trauma. Unfortunately it was only the precursor of more awful things to come. It also provided an

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519 Ibid 124.
520 Under Article 1, Richard Miller, above n 6, 124; Yitzhak Arad, Yisrael Gutman and Abraham Margaliot, above n 7, 117.
521 Yitzhak Arad, Yisrael Gutman and Abraham Margaliot, above n 7, 117.
522 Richard Miller, above n 6, 124.
523 Ibid 124–125.
524 Ibid 125.
525 Ibid 126.
526 Ibid.
527 Colin Tatz, above n 28, 49.
528 Donald Niewyk, above n 2, 136.
opportunity for a violent public venting of hatred felt towards the Jews. On the 9th and 10th of November in 1938 Jews found their synagogues being decimated, their property being destroyed and their livelihoods being threatened in a manner unlike anything they had experienced before.\textsuperscript{530} The damage done to Jewish businesses was so extensive on Crystal Night that many businesses were forced to close.\textsuperscript{531} Buffum explains:

Jewish buildings were smashed into and contents demolished or looted … Jewish shop windows by the hundreds were systematically and wantonly smashed throughout the entire city at a loss estimated at several millions of marks … Three synagogues in Leipzig were fired simultaneously by incendiary bombs and all sacred objects and records desecrated or destroyed, in most cases hurled through the windows and burned in the streets.\textsuperscript{532}

There was ‘wholesale arrest and transportation to concentration camps of male German Jews between the ages of sixteen and sixty, as well as Jewish men without citizenship.’\textsuperscript{533} About 26,000 healthy wealthy Jewish men were rounded up and taken to concentration camps on Crystal Night.\textsuperscript{534} The instructions to those carrying out the arrests were to particularly target the rich.\textsuperscript{535} This no doubt quickly sent a message that even those considered powerful Jews were not safe from the Nazi regime. Buffum describes the scenes of terror that followed:

Having demolished dwellings and hurled most of the movable effects into the streets, the insatiably sadistic perpetrators threw many of the trembling inmates into the small stream that flows through the Zoological Park, commanding horrified spectators to spit at them, defile them with mud and jeer at their plight … These tactics were carried out the entire morning of 10 November without police intervention and they were applied to men, women and children.\textsuperscript{536}

In many ways this was merely a taste of the state sanctioned violence that was to follow. Crystal Night ‘signalled that the Jews had finally been stigmatised as never before as an unwanted people.’\textsuperscript{537} As Colin Tatz states, ‘Jews were now outside the social network, outside the society of human beings.’\textsuperscript{538} Essentially it was ‘the legal definition of Jew’ which ‘made such persecution possible.’\textsuperscript{539} Definition is of great importance in making

\textsuperscript{529} Richard Miller, above n 6, 76.
\textsuperscript{530} Colin Tatz, above n 28, 56.
\textsuperscript{531} Richard Miller, above n 6, 125.
\textsuperscript{532} Buffum D H, (1946) 1037–41, cited in Colin Tatz, above n 28, 56.
\textsuperscript{533} Ibid.
\textsuperscript{534} Richard Miller, above n 6, 138.
\textsuperscript{535} Yitzhak Arad, Yisrael Gutman and Abraham Margaliot, above n 7, 104.
\textsuperscript{536} Buffum D H, (1946) 1037–41, cited in Colin Tatz, above n 28, 56.
\textsuperscript{537} Colin Tatz, above n 28, 57.
\textsuperscript{538} Ibid.
\textsuperscript{539} Richard Miller, above n 6, 11.
others appear to be so different that they cannot be considered similar enough to warrant ‘fully human’ status.

G. Impact on Family Life and Relationships

The Nazi regime grossly interfered with family and sexual relationships. Under Nazi law any kind of sexualized contact with Jews was frowned upon.\(^{540}\) Article 1(1) of the ‘Nuremberg Law for the Protection of German Blood and German Honor’ passed on 15 September 1935 declared, ‘[m]arriages between Jews and subjects of the state of German or related blood are forbidden. Marriages nevertheless concluded are invalid, even if concluded abroad to circumvent this law.’\(^{541}\) Article 2 stated ‘[e]xtramarital intercourse between Jews and subjects of the state of German or related blood is forbidden.’\(^{542}\) This law effectively ‘criminalized marriage or sexual relations between Jews and non-Jewish Germans.’\(^{543}\) Saul Friedländer explains that:

The various categories of forbidden marriages were spelled out in the first supplementary decree to the Law for the Defense of German Blood and Honor: between a Jew and a \textit{Mischling} with one Jewish grandparent; between a \textit{Mischling} and another, each with one Jewish grandparent; and between a \textit{Mischling} with two Jewish grandparents and a German … \textit{Mischlinge} of the first degree (two Jewish grandparents) could marry Jews – and thereby become Jews – or marry one another, on the assumption that such couples usually chose to remain childless … \(^{544}\)

It can be seen that the Nazi regime placed serious restrictions on marriage in order to try to protect what they saw as the racial purity of Aryan blood. Friedländer notes ‘the first supplementary decree to the Law for the Protection of German Blood and Honor of November 14 … also forbade Germans to marry or have sexual relations with persons of “alien blood” other than Jews.’\(^{545}\) The Ministry of the Interior specified that those with ““alien blood”’ ‘referred to … “Gypsies, Negroes, and their bastards.”’\(^{546}\) Any kind of

\(^{540}\) Articles 1 and 2 of the ‘Nuremberg Law for the Protection of German Blood and German Honor’ – Yitzhak Arad, Yisrael Gutman and Abraham Margaliot, above n 7, 78; Richard Miller, above n 6, 18.
\(^{541}\) Yitzhak Arad, Yisrael Gutman and Abraham Margaliot, above n 7, 78.
\(^{542}\) Ibid.
\(^{543}\) Holocaust Encyclopedia, \textit{The Biological State: Nazi Racial Hygiene, 1933–1939}, <http://www.ushmm.org/wlc/article.php?lang=en&ModuleId=10007057> at 26 November 2009. Despite this law Jewish girls were raped during the war – Hannah Arendt, above n 346, 27. Arendt states that it ‘became a favourite pastime at the front’ (at 27). Similarly, Isaiah Trunk records that Nazi soldiers were willing to have coercive sexual relations with Jewish girls – Isaiah Trunk, above n 404, 396.
\(^{544}\) Saul Friedländer, above n 3, 149–150.
\(^{545}\) Ibid 153.
\(^{546}\) Ibid.
interacial sexual intercourse was deemed ‘“racial pollution”’. Restrictions on SS officers in relation to marriage were even stricter.

However most of the moral outrage over sexualized contact was reserved for those Germans who had liaisons with Jews. All manner of public alarmism was incited through media representations of Jews as non-human life forms, whose association would lead to defilement. Sexual liaisons between Jews and Germans were a prominent theme in the media. The media sensationalised all sexual contact between Jews and Aryans and described Aryans who engaged in sexual relationships with Jews as race-defilers. They engaged in public shaming of those who maintained sexual contact with Jews or who were even suspected of such contact. Miller notes that ‘[a] simple handshake with a Jew of the opposite sex was enough to bring charges of race defilement.’ Sexual liaisons with Jews were said to result in non-human life, such as ‘monkeys’. It was also rumored that if an Aryan woman had sexual relations with a Jewish man her blood would be forever tainted by the relationship and she could never again attain the status of racial purity so prized by the Nazis. This process of defilement was explained by the 1935 New Year’s issue of the Nazi propaganda newspaper Der Stürmer:

> The male sperm in cohabitation is partially or completely absorbed by the female and thus enters her bloodstream. One single cohabitation of a Jew with an Aryan woman is sufficient to poison her blood forever. Together with the alien albumen she has absorbed the alien soul. Never again will she be able to bear purely Aryan children.

In their desire to interpret Nazi legislation in accordance with the ‘spirit’ of Nazism judges took the ‘spirit’ of the laws forbidding sexual intercourse between Aryans and non-Aryans to the extreme. Friedländer comments that:

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547 Clarence Lusane, above n 15, 159.
548 The freedoms of SS officers in relation to marriage were also impinged upon. The aim of racial purity was even more extreme for the SS. ‘When he took over the SS in 1929, Himmler was determined to turn it into the elite order of National Socialism. To achieve this he insisted that even the wives of SS men should be racially pure.’ Jeremy Noakes and Geoffrey Pridham, above n 2, 281. This involved significant restrictions on the availability of marriage certificates. Failure to comply with these restrictions led to dismissal from the SS (at 281–282).
549 Richard Miller, above n 6, 26.
550 Ibid 62.
551 Ibid.
552 Ibid.
553 Ibid 27.
554 Ibid.
555 Der Stürmer (1935) New Year’s issue, cited in Richard Miller, above n 6, 27.
556 Richard Miller, above n 6, 146–147; Saul Friedländer, above n 3, 159–160.
557 Richard Miller, above n 6, 146–147.
The Supreme Court encouraged the local courts to understand the intention of the lawmaker beyond the mere letter of the law … Couples were found guilty even if no mutual sexual activity had been performed. Masturbation in the presence of the partner … became punishable behavior …

Interconnected with this puritan stance on sexuality was the idea that Jews were particularly inclined towards sexual deviancy. In the Nazi imagination … Jews were perceived as the embodiments of sexual potency and lust, somewhat like blacks for white racists. Courts went well beyond what was required by the ‘letter of the law’ to give effect to Nazi policy regarding sexual and racial purity. In a Hamburg court an impotent man who merely kissed another was deemed to have engaged in inappropriate sexual behaviour and was sentenced to two years. Therapeutic massage was also seen as problematic. A Jewish merchant was sentenced by a court for two years for allegedly deriving some level of sexual excitement from a massage. Friedländer states that ‘all aspects of everyday life and all professional activities which the contact between Aryans and Jews could be construed as having some sexual connotation were systematically identified and forbidden.’ This extended to prohibiting Jews from using public swimming amenities and even preventing Jewish medical students from undertaking ‘genital examinations of Aryan women.’

Nazi polices also interfered with family life by having severe effects on birth rates. Their policies were deliberately intended to prevent the birth of more Jewish children. This was confirmed by a Dortmund official in May 1933 who ‘openly stated that marriage rules were intended to control childbearing.’ One of the ways that Nazis reduced the number of Jewish births was to prevent Jews from being able to marry. Legally, by 1938, the right to marry was linked with employability and this meant Jewish couples were effectively prevented from marrying due to the laws banning Jews from vast numbers of

558 Saul Friedländer, above n 3, 159.
559 Ibid.
560 Ibid.
561 Ibid 159–160; Richard Miller, above n 6, 146–147.
562 Saul Friedländer, above n 3, 160.
563 Ibid.
564 Ibid.
565 Ibid 161.
566 Ibid.
567 Richard Miller, above n 6, 139.
568 Ibid 167.
569 Ibid 144.
occupations. The fact that stable housing became unattainable also prevented birthrates amongst Jewish people.

By contrast, the Nazis were very concerned with increasing the number of ‘Aryan’ children. For married Aryans of childbearing age there was an almost mandatory requirement to give birth. Failure to marry and to have babies was a firing offense for many Aryan government workers, and cause for denial of promotion to others. The pressure to have children for the sake of the nation was extreme.

The Nazis had extremely rigid rules relating to marriage, which went beyond Jews and Aryans being prohibited to marry and extended to Mischlinge:

in general Aryans could marry Aryans and Jews could marry Jews, but Jews could not marry Aryans. First-degree Mischlinge were encouraged to marry Jews or other first-degree Mischlinge, and second-degree Mischlinge had to marry Aryans. The idea was to keep “racial” lines pure, absorbing Mischlinge into one race or the other through “scientific” breeding principles.

Still, lovers will do what lovers will do, and some continued to have sexual relationships with the forbidden ‘other’. It was illegal for Aryans and Jews to cohabit, however if such a couple procreated they were ‘subject to especially harsh punishment. … In 1936 a Stuttgart court sentenced a Christian Jew to a year’s imprisonment for a race-defiling relationship with an Aryan woman. Such an extreme punishment no doubt sent a strong message to the Jewish community that such liaisons came at a high price. Those who could not marry due to Nazi laws but continued to have relationships were subjected to public shaming. Aryan Germans were subjected to immense public pressure to cease all relationships with non-Aryans. Miller explains the ‘[m]arriage regulations were the cornerstone of an edifice of criminal offences called “race defilement”. The edifice housed many offences unrelated to marriage, ranging from friendship to sexual harassment, but all were seen as potential contaminants of the Aryan racial line.'

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570 Ibid.
571 Ibid.
572 Ibid 139.
573 Ibid 143.
574 Ibid 144.
575 Ibid 64.
576 Ibid 144.
577 Ibid 64.
A complex bureaucracy was established to protect Nazi ideals of racial purity. Special ‘race offices’ had the task of determining ‘whether a couple’s genealogy permitted marriage.’\textsuperscript{579} There was also a health requirement for permission to marry. It was impossible for couples to marry unless they had ‘certification from a eugenics board that they were free of genetically transmitted disease.’\textsuperscript{580} The race offices were undoubtedly kept very busy.

Despite the growing stigmatisation for offences of race defilement, associations between Jews and Aryans still occurred. However judges engaged in harsh punishments for those sentenced for race defilement, claiming that such measures were necessary for public education. For example,

In 1936 a Frankfurt court imprisoned a Jewish salesman for a year to punish his “aggressive attitude” while chatting up an Aryan woman. No sexual activity was involved, but the court said the educational nature of the Blood and Honor law required the Jew to be convicted for violating its spirit.\textsuperscript{581}

If people tried to avoid the application of the marriage laws by getting married in another country the marriage could be annulled.\textsuperscript{582} Couples who were married before the operation of the marriage laws were urged to divorce.\textsuperscript{583} Under Nazism it became very easy for Aryans to dispose of unwanted spouses by claiming that such spouses had engaged in race-defiling associations with Jews.\textsuperscript{584} There were also several financial advantages for Aryans in divorcing Jewish spouses, namely, secure employment, access to housing and a reduction in ‘property penalties’.\textsuperscript{585}

In addition to interfering with marriage and sexual relationships, the Nazi regime also interfered with parental rights. The Nazi regime’s gross interference with family life caused extreme suffering. Miller explains that courts were able to set aside interracial adoptions, regardless of the wishes of the family members:

By the end of 1933 couples could not adopt children of a different race. Previous interracial adoptions could be voided. In August 1936 a Berlin court removed an

\textsuperscript{578} Ibid 146.
\textsuperscript{579} Ibid 145.
\textsuperscript{580} Ibid.
\textsuperscript{581} Ibid 147.
\textsuperscript{582} Ibid.
\textsuperscript{583} Ibid.
\textsuperscript{584} Ibid.
\textsuperscript{585} Ibid 149.
adopted Aryan child from its Jewish parents. The court noted with disgust that despite the parents’ knowledge of race laws “the father still clung to the child.” The court ordered the father to provide financial maintenance for the child in its new home.\textsuperscript{586}

Nazi notions of race were highly influential when it came to determining custody disputes over children.\textsuperscript{587} Parents who were defined as Jews by the Nazi regime were at a distinct disadvantage when engaging in custody disputes, regardless of how bad the behaviour was on the part of the divorcing Aryan spouse.\textsuperscript{588} The prime emphasis was on removing children from racially polluted homes.\textsuperscript{589}

The rights of Jewish parents were interfered with as a matter of course under Nazism, with children forcibly sent to the extermination and labour camps.\textsuperscript{590} However the rights of Aryan parents were also interfered with.\textsuperscript{591} There was a Nazi decree that Aryans could not give their children Jewish sounding names and vice versa.\textsuperscript{592} This was the ‘Second Regulation for the Implementation of the Law Regarding the Changing of Family Names and Given Names’ enacted on 17 August 1938.\textsuperscript{593} Article 2(1) of this law required male Jews to ‘take the given name Israel’ and ‘females the given name Sara’.\textsuperscript{594} However this was deemed to be insufficient for the purposes of identification.\textsuperscript{595} This insufficiency eventually led to the order that Jews had to wear a yellow star when in public to make identification easier.\textsuperscript{596}

Aryan parents could also have their children removed if those children associated with Jews or failed to enthusiastically embrace Nazi ideals, as the following extract reveals:

\textsuperscript{586} Ibid.
\textsuperscript{587} Ibid 149–150.
\textsuperscript{588} Ibid 150.
\textsuperscript{589} Ibid.
\textsuperscript{590} Gitta Sereny, above n 28, 23 and 28.
\textsuperscript{591} Germans who failed to enthusiastically embrace Nazism could have their children removed from their custody – Jeremy Noakes and Geoffrey Pridham, above n 2, 278. German parents could lose their children if they ‘refused to sign a document of allegiance’ – Gitta Sereny, above n 28, 45. Parents who did not encourage their children to give the Hitler salute and did not force them to join Hitler Youth were classed as undermining the regime and their children could be removed to foster or adoptive care which the regime thought was more appropriate – Jeremy Noakes and Geoffrey Pridham, above n 2, 279. Thus failure to demonstrate wholehearted commitment to Nazi ideology had drastic consequences for Aryans. It was yet another effective measure for ensuring support for the Nazi regime.
\textsuperscript{592} Richard Miller, above n 6, 73.
\textsuperscript{593} Yitzhak Arad, Yisrael Gutman and Abraham Margaliot, above n 7, 98.
\textsuperscript{594} Ibid.
\textsuperscript{595} Richard Miller, above n 6, 74.
\textsuperscript{596} Ibid.
A fifteen-year-old Jewish schoolboy had formed a friendship with a fourteen-year-old “Aryan” girl. On the orders of the ladies of the National Socialist Welfare Organisation, district Prenzlauerberg, the girls of the upper forms organised a “raid”, that is to say, on their way to school the two were systematically watched, followed and molested. One day they could endure this constant shadowing no longer and took refuge in the entrance of a house. The police were called immediately and the two terrified children dragged out. A Stürmer photographer was quickly on the spot and snapped the “depraved juvenile debauchee.” At the instance of the National Socialist Welfare Organisation the parents of the girl were deprived of the custody of their child. Pending her removal to a reformatory, she was “taken care of” by the women officials attached to the Welfare Organisation, and under persistent and suggestive cross-examination, “the girl weepingly admitted” (The Stürmer’s phrase) to having been ravished in an indescribable manner in the home of the fifteen-year-old debauchee.  

This account reveals the talent that writers of Der Stürmer had for sensationalism and the willingness of ordinary schoolchildren to become involved in the hunt for ‘race-defiling’ associations. What was quite evidently a very innocent situation led to loss of parental rights and the girl being sent to a reformatory school. The Nazis certainly were not shy about placing the interests of the regime above the interests of families to engage in family life. “‘If the older generation cannot get accustomed to us,’’ Hitler said in June 1933, ‘‘we shall take their children away from them and rear them as needful for the Fatherland.’”  

Miller states that ‘[s]eizing children because of parental politics was so common that a juvenile court attracted the regime’s attention for failing to seize children from parents who “show[ed] signs of being opposed to the National Socialist State”’. If parents did not sign up their children to join the Hitler Youth then courts could order the children be removed to foster homes. So even Aryans had some reason to fear the regime; ‘parents across the Reich knew that any lapse of civic duty could break up their families.’ Civic duties under Nazism were certainly extensive. A friendship between an Aryan parent and a Jew was considered ‘a failure of civic duty that could be grounds for the regime putting children in a “politically reliable” foster home.’ Nazis were not beyond using family members as informants against other family members. Nazis urged ‘parents and children to denounce each other to authorities’ and this had a destructive impact on family life. It became a requirement under the Civil Service Law of January 26 1937 for ‘civil servants

597 Yellow cited in Richard Miller, above n 6, 150.
598 Adolf Hitler, cited in Richard Miller, above n 6, 150.
599 Richard Miller, above n 6, 150.
600 Ibid 150–151.
601 Ibid 151.
602 Ibid.
603 Ibid.
to report any disloyalty observed among family members, friends or strangers. 604 This culture of mandatory spying must have made even the ‘racially privileged’ Aryans uneasy.

The gross interference with the parental rights of Jews was truly horrific. Jewish parental rights were effectively abolished under Nazism. The Nazis murdered children along with adults in the extermination camps. 605 Nechama Epstein, a Holocaust survivor, explains that in the Majdanek camp ‘[t]he mothers were put separately, the children separately, the men separately’ and ‘[a]ll were burned’. 606 Furthermore the Nazis forced thousands of children to engage in slave labour. 607 The Nazis had no problem with incarcerating children in concentration camps. This process was referred to as ‘[e]xtermination by work’. 608 Gitta Sereny has written about children imprisoned in the Dachau concentration camp. 609 She worked with several survivors after the war. 610 Gitta Sereny states:

Although there were Jewish children in Germany at the end of the war, compared to other groups, they were not many. Historically, no Jewish child is known to have survived the four specific extermination camps of Chelmno, Belzec, Sobibor, and Treblinka. But a considerable number, mostly between twelve and fifteen years old, did, strangely enough, manage to survive the concentration and labour camps to which — caught in their hiding-places in gentile homes, or where they lived, wild, in the forests — they had been sent if they were strong and of working age (ten years old for Jews and Slavs), to work on exhausting and exacting armament and industrial tasks which required good eyes, small hands and nimble fingers. 611

In addition to this there were also thousands of instances of the Nazis engaging in a broader child snatching effort to further Hitler’s fantasy of Aryan world domination. 612 Gitta Sereny explains how the Nazis searched Eastern Europe for children who were considered to be ‘very good racial types’. 613 It is estimated that 200,000 children were taken from Poland alone. 614 These ‘children were picked up off the streets, in playgrounds, in schools and homes’ and forced to undergo ‘the process of Germanization’. 615 In order to be selected a child had to be ‘pretty, healthy and well built’ with ‘blonde or light-brown

604 Ibid.
605 Interview with Nechama Epstein in Donald Niewyk, above n 2, 157; Gitta Sereny, above n 28, 28.
606 Interview with Nechama Epstein in Donald Niewyk, above n 2, 157.
607 Gitta Sereny, above n 28, 28.
608 Ibid.
609 Ibid 23.
610 Ibid.
611 Ibid 28.
613 Himmler cited in Gitta Sereny, above n 28, 38.
614 Gitta Sereny, above n 28, 45.
615 Ibid 45 and 44.
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hair and blue eyes’. 616 Parents were lied to, and told ‘that children would be returned home after physical and IQ examinations which would decide their future schooling’. 617 They were not informed that these examinations could potentially alter their parental rights. Undoubtedly many would have refused to allow their children to go with Nazi officials had they been told the truth. If such children ‘were found to be physically unfit or racially “tainted”, they would end up in what to all intents and purposes was a children’s concentration camp in Lodz’. 618 If children passed the testing phase they were given ‘new birth certificates with German names’. 619 Very young children were in the Lebensborn homes until they could be adopted out. 620 These were institutions designed to facilitate the breeding and raising of good Aryan racial types. 621 Lebensborn homes were set up in Germany, Austria, Norway, France, Belgium, Poland, Luxemburg and the Netherlands. 622

The documentation for the Lebensborn homes ‘was ordered to be destroyed in April 1945.’ 623 The evidence Gitta Sereny relies on for information about the Lebensborn homes are ‘nearly identical descriptions’ given to her personally by childhood victims of the program in 1946. 624 One of these childhood victims remembers being beaten for singing in Polish at a prohibited time. 625 During the day children were ordered to speak in German and could only speak Polish outside the classroom. 626 There were clearly restrictions on their ability to be able to speak their own language. 627 The children remember being subjected to lots of medical examinations by doctors where every part of their bodies was measured. 628 Sereny reports that:

The decisive characteristics for being placed in the top racial categories, aside from the colour of hair and eyes, were the shape of nose and lips, hairline, toes and fingernails, and the condition of genitalia. What counted too were reactions to neurological tests and personal habits: persistent uncleanliness and bedwetting and farting, nailbiting and

616  Ibid 45.
617  Ibid.
618  Ibid.
619  Ibid.
620  Ibid 45–46.
621  Clarence Lusane, above n 15, 138. SS officers were also encouraged to impregnate good Aryan specimens of womanhood at these institutions.
623  Gitta Sereny, above n 28, 46.
624  Ibid.
625  Ibid 47.
626  Ibid.
627  Ibid.
628  Ibid.
masturbation – which older boys were told on arrival was forbidden – were, if repeatedly observed, automatic disqualifications from top classification.\(^{629}\)

These child snatching measures for the purpose of ‘Germanization’ were overseen by ‘the Nazi Office for Race and Resettlement (RuSHA)’.\(^{630}\) Other government departments involved were the ‘Office for Repatriation of Ethnic Germans (VoMi); the Reich Security Office (RSHA), the Reich Commission for the Consolidation of the German Race (RKFDV)’\(^{631}\) and the Ministry of the Interior [who] lent the criminal undertaking legal status by conferring on the Lebensborn society the right of civil registry and of guardianship, thereby enabling them both to issue official birth certificates with (invented) places and dates of birth and (false) names, and – the ultimate control – of acting as the stolen children’s legal guardian.\(^{632}\)

Children who were taken by the Nazis were banned from having any kind of contact with their Polish relations and were given German names and German birth certificates.\(^{633}\), There was a belief that these children who were very good Aryan types would adapt to the process of Germanization. In 1940 Himmler stated “We are convinced that our own philosophy and ideals will reverberate in the spirit of these children who racially belong to us.”\(^{634}\) All Polish children ended up being subjected to a yearly examination where they were categorised as “racially valuable or worthless”.\(^{635}\) Gitta Sereny explains that:

Children found immediately to be racially worthless would either be sent home or, if old enough and capable, be sent to Germany to work. Those with racial potential would be taken to one of three centres … where further tests would be carried out. Children between six and ten found there to be of racial value would be sent to suitable institutions in Germany to be Germanized, a process which was thought to be impracticable for any older than ten; those between two and six, who would eventually be given to childless or deserving German families for adoption, would first be sent for a period of observation to a Lebensborn home.\(^{636}\)

At the Lebensborn homes children were watched closely to see if they developed any behaviour traits which would identify them as being racially inferior.\(^{637}\) These homes were

\(^{629}\) Ibid.
\(^{630}\) Ibid 39.
\(^{631}\) Ibid 44–45.
\(^{632}\) Ibid.
\(^{633}\) Ibid 39.
\(^{634}\) Himmler, cited in Gitta Sereny, above n 28, 39.
\(^{635}\) Gitta Sereny, above n 28, 39.
\(^{636}\) Ibid 39.
\(^{637}\) Ibid 45.
also training centres for the Germanization process. Sixty two body parts were measured to determine whether a child was suitable for ‘Germanization’. Sereny states that:

The role Lebensborn played in the theft and Germanization of possibly a quarter of a million largely Eastern European children is abominable. Conceived in 1935 as arguably the most progressive of the Nazis’ many social organizations, its excellent “homes” dotted around Germany were set up to provide … periods of respite for overburdened mothers, and care for pregnant single girls and illegitimate children. It was no doubt not only because of these existing facilities, but because of the organization’s sterling reputation, that the SS … decided in … 1941 to make Lebensborn … the executant of the Germanization project.

The Nazi regime was particularly careful to ensure that the German public were not made aware of the theft of these children. Instead they told the public that the children were German orphans. Thousands of German families were informed by government officials that the children they adopted were German orphans who had lost their parents in the war. It was part of an elaborate propaganda scheme executed very effectively by the Nazis.

H. Genocide

Berel Lang rightly describes the Holocaust as ‘a paradigm … instance of genocide’. The Convention on the Prevention and Punishment of the Crime of Genocide was formed largely in response to this horrific display of human brutality. Article 2 of this Convention sets out the following definition of genocide:

- genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
  (a) Killing members of the group;
  (b) Causing serious bodily or mental harm to members of the group;
  (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

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638 Ibid 44.  
639 Ibid 40–41.  
640 Ibid 42.  
641 Ibid.  
642 Ibid.  
643 Berel Lang, above n 27, 37.
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group. 644

The Nazis engaged in each of these acts. 645 As this chapter has set out, they engaged in murder (Article 2(a)), torture (Article 2(b)), life conditions designed to lead to the group’s destruction via the destruction of economic livelihood and forced existence in ghettos and concentration camps (Article 2(c)), restrictions on marriage and imposing systematic persecution which prevented births (Article 2(d)), and forcible removal of children from their families both in the concentration camps and in the Germanization process (Article 2(e)). 646

Taking measures to escape the genocidal laws and policies of Nazism became increasingly difficult. While Nazi policy in 1938 had required concerted efforts to force Jews to emigrate from Germany, 647 the situation had grown more dire by 1941 when Jews were forcibly prevented from leaving Germany by virtue of the ‘Order Banning the Emigration of Jews from the Reich’ given in October 1941. 648 This effectively made them a captive population for Nazi aggression.

The culmination of the Nazis oppressive discrimination towards Jewish people was the so-called ‘final solution’. 649 This was the Nazi response to the perceived Jewish ‘problem’, the mass murder of millions of Jews through ‘industrial death camps’. 650 They were quite literally factories of death, especially invented for the extermination of Jewish people. 651 They were places where efficiency in murder was highly developed. The Nazis perfected ‘systematic assembly-line killing’. 652 Transportation to these death camps was grossly

645 Richard Miller, above n 6, Chapters Two, Three, Four and Five.
646 Ibid Chapters Three, Four and Five; Interview with Nechama Epstein in Donald Niewyky, above n 2, 150–170; Gitta Sereny, above n 28, 45.
648 Yitzhak Arad, Yisrael Gutman and Abraham Margaliot, above n 7, 153.
649 Hannah Arendt, above n 346, 80.
650 Colin Tatz, above n 485, 79.
651 Berel Lang, above n 27, 37.
652 Gitta Sereny, above n 28, 88.
inhumane.\textsuperscript{653} There was overcrowding on the trains to the concentration camps where Jews were treated like cattle off to the slaughter yard.\textsuperscript{654} Donald Niewyk states:

six extermination centers, all of them situated on what had been Polish territory, ended the lives of three million Jews. Four of them – Chelmno, Belzec, Sobibor, and Treblinka – were strictly killing centers where victims were gassed immediately following their arrival. … The remaining two extermination centers – Auschwitz and Majdanek – were both killing and slave labor camps. In them the able-bodied were selected for work in various military industries; the rest were consigned to the gas chambers.\textsuperscript{655}

As the above quotation illustrates, many, but not all, perished in the extermination camps. The Nazis made a distinction between useful and expendable Jews. There was a distinction made between ‘those capable of doing slave labor for the Third Reich’ who were ‘worked to death’ and those ‘that could not work or who were not needed’ who were ‘sent to special camps for immediate extermination.’\textsuperscript{656} Those who did live were forced to exist in foul conditions, in ‘overcrowded barracks’ with ‘air [that] smelled fetid and rotten’.\textsuperscript{657} In the labour camps conditions were brutal; ‘tens of thousands were literally worked to death. Others were subjected to grotesque and painful medical experiments.’\textsuperscript{658} Holocaust survivor Nechama Epstein relates her experience of working in a ‘death detail’ where the exacting physical labour combined with poor nutrition and regular beatings led to the deaths of many workers.\textsuperscript{659} Jews in concentration camps were treated brutally.\textsuperscript{660} They were worked hard, fed little and demoralized by Nazi guards.\textsuperscript{661} Their appearance was substantially altered through starvation rations to ensure that they looked less human\textsuperscript{662} and their hair was cut off.\textsuperscript{663} A poor diet ensured that Jewish concentration camp victims looked more like skeletons than people.\textsuperscript{664} Nechama Epstein recalls that Jews looked

\textsuperscript{653} Interview with Nechama Epstein in Donald Niewyk, above n 2, 152.
\textsuperscript{654} Ibid; David Bankier, above n 28, 132; Jean Améry, \textit{At the Mind’s Limits – Contemplations by a Survivor on Auschwitz and its Realities} (translated by Sidney Rosenfeld and Stella Rosenfeld, 1980) 65.
\textsuperscript{655} Donald Niewyk, above n 2, 138.
\textsuperscript{656} Ibid 137.
\textsuperscript{657} Judith Hassan, above n 240, 132.
\textsuperscript{658} Donald Niewyk, above n 2, 138.
\textsuperscript{659} Ibid 159.
\textsuperscript{660} Interview with Nechama Epstein in Donald Niewyk, above n 2, 158.
\textsuperscript{661} Ibid.
\textsuperscript{662} Ibid 164. As Rowan Savage states:

In the later phases of genocidal dehumanisation, victims live under such cruel and harsh conditions that they appear non-human; and their humanity is literally removed by their murder. Dehumanisation thus becomes a self-fulfilling prophecy. But for this cruelty to be acceptable, victims must first be characterised as “other”, even if they look the same as “us”.
\textsuperscript{663} Rowan Savage, above n 13, 19.
\textsuperscript{664} Interview with Nechama Epstein in Donald Niewyk, above n 2, 158–159.
\textsuperscript{664} Ibid 164.
‘completely non-human [i.e. dehumanized].’\textsuperscript{665} She says ‘[w]e looked like skeletons.’\textsuperscript{666} Thus a systematic process of dehumanisation made brutality towards Jews seem more palatable to those involved, it allowed them to see Jews as almost more dead than alive.

Before being forced into camps, many Jews were forced into ghettos.\textsuperscript{667} This was facilitated by the declaration that certain areas were to be Aryan only zones.\textsuperscript{668} Life in the ghettos barely resembled life. In these environments Jews were ‘[o]vercrowded, overworked and underfed.’\textsuperscript{669} They were situated nearby the labour camps where Jews were forced to work.\textsuperscript{670} The ghettos existed until 1944 when ‘their piteous remnants’ were sent ‘to camps in Germany or else to the extermination centers.’\textsuperscript{671}

The concentration camps were for the detention of a broad range of prisoners and were used as a significant slave labour pool for the German war machine.\textsuperscript{672} As Wolf Gruner points out, ‘[f]orced labor shaped – decisively and for years – the everyday life of most victims of Nazi anti-Jewish policies.’\textsuperscript{673} ‘The Jews were purposefully compelled to work in strategic areas where labor shortages were severe’.\textsuperscript{674} However concentration camps were ‘set up at first as SS-controlled detention centres for political, criminal and religious dissidents, and for sexual deviants and Jews, [they] were neither then nor later primarily for the imprisonment of Jews.’\textsuperscript{675} Sereny states that:

Harshness of treatment varied between categories of prisoners. The German criminals were usually at the top of the camp hierarchy. “Politicals” were in the middle, followed by religious and sexual deviants: with the Poles, the Russians and the Jews – in that order – at the bottom. Millions of people died in these concentration-plus-labour camps: some – the most publicized – by torture, brutality or hideous medical experiments. But far more of them died from sickness and disease. These were the camps that all Germans knew about and dreaded. These were the corpses found by the horrified Allied armies as they entered Germany. These made the photos and films we have principally seen. These emaciated skeletons, some still somehow upright, some lying on bunks in stupor, still others piled in naked, tumbled heaps ready for burning – these are the images that haunt us. These people died by the million, but they were not

\textsuperscript{665} Ibid.
\textsuperscript{666} Ibid.
\textsuperscript{667} Richard Miller, above n 6, 137–138.
\textsuperscript{668} Ibid 134 and 138.
\textsuperscript{669} Donald Niewyk, above n 2, 138.
\textsuperscript{670} Ibid.
\textsuperscript{671} Ibid.
\textsuperscript{673} Wolf Gruner, above n 672, xiv.
\textsuperscript{674} Ibid x.
\textsuperscript{675} Gitta Sereny, above n 28, 138.
“exterminated” in the sense that the Nazis made uniquely their own. These camps had gas-oven crematoria, to dispose of the bodies. The chimneys belched out the smell of burning flesh, and the guards, in threat or mockery, told the prisoners: “The only way you’ll get out of here is through the chimneys.”

Jean Améry, a survivor of Auschwitz, recalls how

Death was omnipresent. The selections for the gas chambers took place at regular intervals. For a trifle prisoners were hanged on the roll call grounds, and to the beat of light march music their comrades had to file past the bodies … that dangled from the gallows. Prisoners died by the score, at the work site, at the infirmary, in the bunker, with the block.

Améry remembers climbing ‘heedlessly over piled up corpses’ because those remaining were ‘too weak or indifferent even to drag the dead out of the barracks into the open.’

At the extermination camps ‘[a]lthough millions arrived, no one … lived long enough to eat, wash or sleep. These were meticulously planned killing-plants.’ One of these was Treblinka, which has been described as

an industrial installation for the killing of men, women and children, the counting and freighting of their effects, and the efficient disposal of their bodies. The camp was administered by 35 SS and 120 Ukrainian volunteer personnel, and had a constant prisoner-worker population of 1,000. Treblinka existed for exactly one year and one week. 700,000. They came, handed in their belongings, had their hair cut off, stripped to the skin, stood in line to wait their turn, and then they went. The camp’s commandant, Franz Stangl, [said] that it took two to three hours to process 5,000 people. No one was there longer than that minimal time between early morning and noon. There was never any need for housing nor for food.

Thus the Nazi regime engaged in systematic extermination of Jewish people. The euphemisms employed to camouflage this were extensive including ‘processing’, using the symbol ‘RU’ which meant ‘Rückkehr unerwünscht (return not wanted)’, ‘special treatment’, ‘resettlement action’ and the most famous euphemism – the ‘Final Solution of the Jewish Problem’. Nazi propaganda also ensured that the mass
murder of Jews became medicalised. Miller explains that ‘[o]nce patients can be diagnosed as needing death, no limit exists to the scale on which therapy can be administered – vaccinations can be given to hundreds of patients in a single therapy session; so can gas.’ The Nazis considered that they needed to create “euthanasia therapy” for Jews who were likened to an incurable disease. This alleged disease was considered to be in the very ‘blood’ of Jewish people, according to Nazi rhetoric. The murder of Jews was seen as necessary for the health of the nation. The idea of extermination was sold as ‘part of a gigantic public health campaign.’ Those who administered death were considered to be ‘medical assistants, demonstrating tough love by practicing tough medicine.’ Nazi ideology constructed Jews as biological pollutants in the ‘human gene pool’. The so called ‘solution’ was eradication, and Hitler planned to completely rid Europe of Jewish people. However this was ugly work. Gerhard Weinberg observes that ‘[i]t soon transpired that the endless rounds of mass shootings demoralized the units engaged in that process; frequently drunk, at least some of the men were coming apart under the strain.’ The process of extermination was therefore dehumanising and damaging for the perpetrators too, and left a legacy that continues to affect Germany.

I find it difficult to imagine how those involved in this process of horrific brutality justified their actions. Yet some who were officers in the concentration camps claimed to be unaware of what their tasks would be before taking up their posts. For example, Franz Stangl, who had the responsibility of constructing most of the infrastructure for the Sobibor extermination centre, claimed to have been quite unaware of the purpose for which it was to be used. Later when he participated in the running of Treblinka he claimed to do so under some level of duress and to have had no real choice but to comply with the orders dispensed from above. He feared that his family may have been held as hostages and

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687 Manfred Henningsen, above n 198, 21; Richard Miller, above n 6, 165; Hannah Arendt, above n 346, 64.
688 Richard Miller, above n 6, 165.
689 Ibid 164 and 34.
690 Ibid 16–17.
691 Ibid 165.
692 Ibid.
693 Manfred Henningsen, above n 198, 21.
694 Gerhard Weinberg, above n 19, 127.
695 Ibid 128.
696 Gitta Sereny, above n 28, 111.
697 Ibid.
698 Ibid 116.
that it was a matter of survival for him, that he had to go along with what the Nazis ordered or he would be killed.699

I. Dehumanising propaganda

The dissemination of propaganda under Nazism was a central part of justifying the regime’s program of systematic oppression and it was highly organised.700 Nazi propaganda was extensive, employing a range of media, from political speeches to films to newspapers like Der Stürmer.701 Karin Doerr explains how ‘[t]he Nazi leadership employed efficient propaganda techniques in radio, in the press, and at official functions to promote their ideas and win public support for their long ranging plans.’702 Similarly, Richard Miller maintains that ‘[s]tatements by politicians, bureaucrats, community leaders, and the news media shaped public perception of what Jews were like, and that perception was used to excuse sanctions applied against them.’703 The effect of well chosen words upon the masses was incredibly significant.704 As Lon Fuller states, ‘words have a powerful effect on human attitudes.’705 Words can create all kinds of powerful symbolic imagery, create the image of a threat that desperately needs to be dealt with, and dehumanise a people so effectively that inhumane treatment seems not only justifiable but necessary. Words can create the illusion that destruction of a people is somehow ‘part of a larger good.’706 By extensively using propaganda the Nazis were constructing a discourse where the persecution, oppression and ultimately the murder of Jews was deemed ‘ethical’.707 Of course the foundations of this discourse were laid in centuries of European anti-Semitism.708 As I explained earlier, the foundations of Nazi propaganda were laid by

699 Ibid.
700 Jeremy Noakes and Geoffrey Pridham, above n 2, 102–103. They state (at 102–103):
Nazi propaganda was controlled by a special propaganda department which was represented at all levels of the Party. At the top was the Reich Propaganda Department in the Party headquarters in Munich, headed by Goebbels from 27 April 1930 onwards. Below this level each Gau or Party regional headquarters had its propaganda department with its own chief and then, below that, each branch had an official in charge of propaganda.
701 Richard Miller, above n 6, 14–15 and 27–35.
702 Karin Doerr, above n 326, 28.
703 Richard Miller, above n 6, 20.
704 Ibid 28.
705 Lon Fuller, above n 215, 91.
706 Peter Haas, above n 87, 387.
707 Ibid 385 and 391.
708 For a detailed account of the traditional discourse of anti-Semitism see Robert Michael, above n 5.
Church theologians, such as the Protestant reformer Martin Luther, who’s poisonous anti-Semitism had a massive influence on the German people.\textsuperscript{709}

In order to justify their appalling treatment of Jews, the Nazis likened Jews to a variety of dangerous animals, insects, and threats. The Nazis employed all sorts of hideous labels when defining Jewish people. The references to Jews being like ‘pests’, ‘monkeys’, ‘parasites’, ‘germs’, ‘disease carriers’, ‘lice’ and so forth were designed to aid in the process of dehumanisation.\textsuperscript{710} Jews were also portrayed as ‘swarming rats’ in the Nazi propaganda film ‘Der ewige Jude (The Eternal Jew)’, which was designed to present the Jews as a threat to the well-being of Europe.\textsuperscript{711} The Eternal Jew has been described as ‘one of the most powerful propaganda films ever made.’\textsuperscript{712} It represented Jews as an epidemic problem, a plague population.\textsuperscript{713} Jews were also depicted as dangerous insects. ‘Julius Strecher’s infamous, influential and much-imitated propaganda paper, Der Stürmer, depicted Jews as “insects” and also as “spiders”, not only as vermin, but morally offensive in their use of poison and cunning entrapment.’\textsuperscript{714}

Rowan Savage explains ‘[t]he association was of the Jew as a bloodsucking parasite or leech upon the body of the people … Indeed, the naming of the Jew as a parasite was one of the commonest antisemitic epithets in the Nazi period’.\textsuperscript{715} Jews were also likened to apes in Nazi propaganda,\textsuperscript{716} referred to as ‘swine’, and associated with pigs.\textsuperscript{717}

The Nazis repeatedly referred to the Jews as communists\textsuperscript{718} and blamed them for the conditions of economic hardship Germany was subjected to in relation to the First World War.\textsuperscript{719} ‘Nazi rhetoric not only portrayed Jews as political subversives but also as subversive to public and private morals.’\textsuperscript{720} Indeed the war against the Jews was described

\textsuperscript{709} Ibid 3 and 6.
\textsuperscript{710} Richard Miller, above n 6, 27 and 29–30 and 34–35; Rowan Savage, above n 13, 34.
\textsuperscript{711} Rowan Savage, above n 13, 32 and 28–29.
\textsuperscript{712} Richard Miller, above n 6, 33.
\textsuperscript{713} Rowan Savage, above n 13, 32; Christopher Browning, above n 395, 21.
\textsuperscript{714} Rowan Savage, above n 13, 34.
\textsuperscript{715} Ibid 36.
\textsuperscript{716} Ibid 39.
\textsuperscript{717} Ibid 35.
\textsuperscript{718} Richard Miller, above n 6, 20.
\textsuperscript{719} Ibid 33 and 70.
\textsuperscript{720} Ibid 24.
by Nazi authorities as being entirely justifiable as a self defensive necessity.\textsuperscript{721} Amongst the horrific images conjured by Nazis of the Jews was that of a depraved people who engaged in ‘ritual murder’.\textsuperscript{722} Jews were likened to wild beasts and cannibals.\textsuperscript{723} Indeed it is difficult to think of a derogatory image that was not ascribed to Jews under Nazism. This ‘degrading vocabulary’ was remarkably effective at manipulating the masses.\textsuperscript{724}

The Nazi propaganda newspaper \textit{Der Stürmer} ran a series of hate inflaming features designed to use Jews as a scapegoat for all the problems facing Germany.\textsuperscript{725} \textit{Der Stürmer} also had a series of inflammatory images designed to represent Jews. In an issue in February 1930 (seen left) Jews were portrayed as spiders.\textsuperscript{726} This picture had the caption ‘Sucked dry.’\textsuperscript{727} It was designed to imply that the Jews were ‘sucking the economic life from Gentiles.’\textsuperscript{728} It is a terrifying image, that of a Jewish spider sucking the life out of German people. It was one of the many images designed to portray Jews as horrifying non-human life forms posing a dangerous threat to the German people.

Jews were also demonized very effectively by some in the Christian religious establishment.\textsuperscript{729} The picture below is a copy of the \textit{Der Stürmer} headline in Issue 9 of February 1943 where Jews were portrayed as the ultimate evil.\textsuperscript{730} It shows ‘a photograph of a Jew captioned “Satan.”’\textsuperscript{731} Religious anti-Semitism was frequently used by the editor

\textsuperscript{721} Rowan Savage, above n 13, 22; Andrew Heywood, above n 1, 220–221.
\textsuperscript{722} Richard Miller, above n 6, 34.
\textsuperscript{723} Ibid.
\textsuperscript{724} Karin Doerr, above n 326, 31.
\textsuperscript{725} Richard Miller, above n 6, 33–35.
\textsuperscript{727} Ibid.
\textsuperscript{728} Ibid.
\textsuperscript{729} Robert Michael, above n 5, 1–6, 9 and 15.
\textsuperscript{731} Ibid.
of *Der Stürmer*, Julius Streicher, who argued that ‘the Jews were in league with the Devil.’ He cited Martin Luther as an authority for his anti-Semitism.

Jews were also characterised as vampire bats as in the picture below ‘This anti-Semitic cartoon depicts a Jew-vampire looming over the fleeing German people. It was typical of the racist attacks made upon the Jews by the Nazi press.’

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732 Ibid.
733 Robert Michael, above n 5, 6.
The picture below represents Jewish people as having snakelike hair. ‘This close-up of an anti-Semitic cartoon depicts a Jew with stereotyped physical features: thick lips, large nose and dark eyebrows. The hair of the Jew is drawn of snakes, symbolizing poison and evil.’

These visual images disseminated by *Der Stürmer* played a significant role in Nazi hate propaganda. *Der Stürmer* regularly portrayed Jews in an extremely negative light. There is a saying that ‘a picture paints a thousand words’, and imagery was incredibly significant when it came to stirring up public opinion against Jews and justifying the dehumanising legislation that they were subjected to. Nazi propaganda such as this certainly had an impact on the German people. ‘It was so pervasive that it helped influence the thinking of a nation and had a devastating, irreparable effect on the victims.’

*Der Stürmer* produced large volumes of dehumanising propaganda. In 1938 a September issue of *Der Stürmer* proclaimed: “Jews are pests and disseminators of diseases.” In addition, *Der Stürmer* contended that ‘Jews started World War I in order to exterminate the Aryan people.’ *Der Stürmer* had a wide readership and it was supported from the heights of the Nazi leadership, even by Hitler. It was even used as part of the school curriculum. Children were expected to ‘memorise passages and compose essays about

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736 Karin Doerr, above n 326, 27; Richard Miller, above n 6, 28; David Bankier, above n 28, 130.
737 Karin Doerr, above n 326, 27.
738 Richard Miller, above n 6, 30.
739 Ibid 33.
740 Ibid 28.
741 David Bankier, above n 28, 80; Richard Miller, above n 6, 28.
the subject matter’ contained in Der Stürmer. It was seen as a clear mark of patriotic
duty to buy and digest the Nazi propaganda sold in Der Stürmer on a weekly basis.

The Nazis ‘characterized Jews as causing not only physical but societal disease’. Jews
were likened to ‘germs’ and ‘bacteria’ which ‘needed to be excised from the body of the
German nation.’ Robert Michael states that ‘[i]t was no mistake that the poison gas,
Zyklon, used to murder millions of Jews was an insecticide.’ In several films Jewish
people were likened to a disease which needed to be eradicated:

The 1940 documentary The Eternal Jew emphasized Jews as disease carriers. Other
films dealing with this theme ranged from The Inheritance in 1935 and Hereditary
Defective in 1936 (documentaries about hereditary disease) to The Victim of the Past:
The Sin Against Blood and Race in 1937.

In this way the Nazi agenda was furthered by those in the film industry. However, hatred
of Jews was not just presented in political propaganda films created by Nazi devotees. This
message was also present in ‘lighter entertainment items’. Film makers frequently
adopted anti-Semitic themes. German films ‘promoted attacks on Jews, vividly
dramatizing stereotypes promoted in other communications media.’

The murder of Jews by doctors was justified as being for the health of the body politic
because Jews were seen as a dangerous ‘gangrene’ which had to be cut off from society in
order to save the lives of everyday Germans. One of the key means of justifying the
extermination of Jewish people was to portray Jews not only as a threat to public order but
to present them as a dire threat to public hygiene. Miller explains that ‘the rhetoric of
those who fought the war on the Jews portrayed victims as subversive to the nation’s
political and social order, as engaged in free wheeling sexual conduct, as carriers of
disease, and as sub-humans who degraded neighbourhoods and entire cities.’

742 Richard Miller, above n 6, 28.
743 Ibid.
744 Ibid 30.
745 Karin Doerr, above n 326, 31; Richard Miller, above n 6, 30.
746 Robert Michael, above n 5, 16.
748 Ibid 33.
749 Ibid.
750 Ibid 32.
751 Colin Tatz, above n 485, 89.
752 Christopher Browning, above n 395, 21.
Nazi propaganda created fear in the public domain, fear so intense that drastic measures seemed to be absolutely necessary in order to combat the evil represented by the threat. In this sense words have great power. "Words can kill," Heinrich Boell warns, "and it is solely a question of conscience whether one allows language to slip into fields of thought where it will become murderous." I am not arguing that there should be such a thing as thought control, of the nightmarish Orwellian ‘big brother’ variety represented in the novel *Nineteen Eighty-Four*. However the propaganda which facilitated the Holocaust shows that there is a limit to what should be permitted in the public domain in terms of racial vilification. ‘The Holocaust demonstrates that there is no safe level of racism’, and no safe level of racist language. Language has tremendous power. Language creates imagery which affects our thought processes. The Nazis used language to further their hateful agenda very effectively:

Philologist and Nazi victim Victor Klemperer has noted, “Nazism … crept into the flesh and blood of the masses by means of single words, turns of phrase and stock expressions which, imposed upon the people a million times over in continuous reiteration, were mechanically and unconsciously absorbed by them.”

Klemperer notes that the Nazis use of language was like giving the public incremental amounts of arsenic. He explains “‘[w]ords can act like tiny doses of arsenic: they are swallowed without being noticed, they appear to have no effect, but after a while the poison has done its work.’”

The Nazis poisonous use of language was a critical element in the dehumanisation of Jewish people. The process of dehumanisation involves the representation of the victim group as posing ‘a serious threat to the fabric of the perpetrator society in a way which necessitates their destruction as legitimate, as necessary, and as self-defence.’ Under the Nazi regime Jews were portrayed as ‘two-legged lice, putrid vermin which the good Aryans must squash, as a party manual said, “like roaches on a dirty wall”’. This kind of appalling and violent language was gradually used to strip members of the target groups of their humanity and allow for their extermination to be seen as necessary for the protection
Dehumanisation was essential for the Nazis to carry out their ‘systematic, bureaucratically organized mass murder’. Savage asserts that ‘dehumanisation … allows moral disengagement.’ Cruelty becomes justifiable in the face of dehumanisation. As a result of this ‘moral disengagement’ perpetrators were able to carry out genocide and many German people became willing bystanders. In order for genocide to occur the process of dehumanising must be carried out. Rowan Savage explains:

Genocide is a process of steps in which language precedes action. Language, enunciating ideology and propaganda, creates the conditions in which genocide becomes possible – by defining the victim groups and by ensuring a population of willing perpetrators and bystanders. To serve this purpose, abusive representation must extend beyond typical racial slurs and “bad-mouthing” to identify a specific group and call for its elimination.

The use of Nazi propaganda facilitated a gradual process of desensitization. It acted as an ‘emotional anaesthesia’. The dehumanising speech allowed people to become more and more accustomed to cruelty, and less likely to object to the degradation of their fellow human beings. The effective use of propaganda allowed Germans to become habitually accustomed to violence towards Jews. David Bankier explains that ‘day-to-day contact with a virulent, antisemitic atmosphere progressively dulled people’s sensitivity to the plight of their Jewish neighbours.’ It facilitated ‘collective indifference and apathy.’ For some it even led to complete conversion to Nazism so that they ‘actively participated in injustice and adopted a violent way of life.’

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760 Ibid 23.
761 Ibid.
762 Christopher Browning, above n 395, 24 and 27.
763 Gerhard Weinberg, above n 19, 125.
764 Rowan Savage, above n 13, 27.
765 Ibid.
766 Ibid.
767 Colin Tatz, above n 28, 69–70.
768 Rowan Savage, above n 13, 42.
769 Herbert Strauss, above n 14, 130.
770 David Bankier, above n 28, 129.
771 Ibid 130.
772 Ibid.
773 Ibid.
Interestingly, the propaganda produced by the Nazis said a lot more about them than the Jews. Richard Miller points out that the Nazis engaged to a large measure in projection. He writes ‘[w]ith our historical knowledge of what the Nazis did, a striking aspect of their rhetoric is the similarity between their fantasies about Jewish characteristics and the reality of Nazi characteristics.’

Miller explains that ‘Nazis were projecting what they loathed about themselves on to their victims.’

Despite this however, the careful use of propaganda by the Nazis was incredibly effective. It ensured that Hitler was seen by many people as a rescuer of the masses. German youth proved to be particularly susceptible to being influenced by Nazi propaganda. Noakes and Pridham state that:

With its dynamic and colourful style of politics, its proclaimed aim of breaking down class barriers, its leader-follower relationship, and its remarkably young membership and leadership, the Nazi Party offered young people the type of commitment in politics which they were seeking and which they did not find in the other parties with their traditional parliamentary methods. … Young people, particularly from the middle class, saw the Nazi movement as a national crusade to restore Germany to greatness. The basis of the Nazi appeal to this group was emotional …

Nazis zealously sought recruits from Germany’s youth. Young people in Germany were indoctrinated with Nazi ideology very early on in their lives. There was a junior organisation of Hitler Youth called *Pimpf*, from there people went into the Hitler Youth, for teens. There were also parallel organisations for girls, ‘the Young Maidens’ League for those ten to fourteen and the League of German Maidens (*Jungmaedel*) for those fourteen to eighteen. After joining the Hitler Youth a common career path was to join the Workers Front, then the SS or the SA. Hitler thus ensured a willing worker base by influencing Germany’s youth while they were at an impressionable age. Propaganda was carefully targeted towards the younger generation. Parents who failed to enrol their

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774  Richard Miller, above n 6, 41.
775  Ibid.
776  Jeremy Noakes and Geoffrey Pridham, above n 2, 104.
777  Ibid 108; Clarence Lusane, above n 15, 103.
778  Jeremy Noakes and Geoffrey Pridham, above n 2, 108.
780  Clarence Lusane, above n 15, 110.
781  Gitta Sereny, above n 28, 289.
782  Clarence Lusane, above n 15, 110.
783  Gitta Sereny, above n 28, 289.
children in Hitler Youth could be seen as failing to support the regime. A lack of willingness to embrace Nazi propaganda could have dire consequences.

**J. Public attitudes under Nazi Germany**

Peter Haas asserts that ‘the Holocaust was sustainable only because a significant critical mass of people did not regard it as evil.’ Similarly, Colin Tatz argues that for genocide to occur there must be willing bystanders. Although there were some German citizens who protested about various measures introduced by the Nazi regime, the majority of citizens seem to have followed the government line. This is not to say that they had no reason for doing so, there were very serious ramifications for those who noisily objected to Nazi policies. Those who were caught resisting the Nazi regime were sent to concentration camps. Even those who were not enthusiastic in embracing the ideals of Nazism could be sent to concentration camps. Parents who failed to enthusiastically endorse Nazism could lose custody of their children. They were precarious times, and many citizens no doubt felt that to go against the flow was a perilous exercise.

Still, it appears that not all ‘Aryan’ Germans were passive bystanders watching the genocidal war machine roll on. Some resisted the Nazi agenda. Resistance was both individual and organised. There are many stories of Germans who rendered assistance to Jews who were suffering under the Nazi regime. ‘The German public was not voiceless. The Roman Catholic church organized opposition to the killing of handicapped Aryans, opposition that vexed the regime and crippled its “euthanasia” program.’ Other members of the public also protested over the gassing of the mentally ill. Miller writes that

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784 Richard Miller, above n 6, 150–151.
785 Jeremy Noakes and Geoffrey Pridham, above n 2, 156.
786 Peter Haas, above n 87, 387.
787 Colin Tatz, above n 28, 69–70.
788 Donald Dietrich, ‘Catholic Resistance in the Third Reich’ (1988) 3(2) Holocaust and Genocide Studies 171, 175; David Bankier, above n 28, 81.
789 Michael Phayer, above n 400, 217.
790 David Bankier, above n 28, 127.
791 Richard Miller, above n 6, 150–151.
792 Donald Dietrich, above n 788, 173 and 180; Michael Phayer, above n 400, 217; David Bankier, above n 28, 79.
793 Michael Phayer, above n 400, 217.
794 Donald Dietrich, above n 788, 177.
795 Richard Miller, above n 6, 169.
796 Hannah Arendt, above n 346, 97.
‘crowds did form and protest.’797 For example, in March of 1943 a crowd of Aryan women protested in Berlin because their Jewish husbands had been arrested and deported.798 These women were not negotiating from a position of power, but they were successful in having their demands met, according to Miller ‘not only did they suffer no consequences, the Jews scheduled to “go east” were released.’799

There seems to have been ‘early civilian opposition’ to some of Hitler’s extremes.800 Although the increasingly repressive political climate may have made vocal resistance more perilous, there were some citizens who confided in their journals how dismayed they were at the gradual erosion of the German nation under Hitler.801 Some Germans saw Hitler’s anti-Jewish laws as diminishing the nation.802 They considered that the existence of such laws morally undermined Germany.803

There were some conspiracies to assassinate Hitler and remove the Nazi regime.804 There were several members of the army who were disenchanted with the way that Hitler usurped all power to make military decisions.805 Obviously Hitler did not enjoy unbridled support, even though he made opposition dangerous and deadly. There was also significant Communist opposition to the Nazi regime, but this had to be carried on in an underground fashion.806 Hitler was well attuned to sniffing out political dissent; concentration camps also contained a number of political prisoners who opposed the Nazi regime.807 Direct opposition was definitely dangerous. Yet despite the dangers of opposing Hitler there were ‘illegal underground activities, the infiltration of economic organizations, plans for post-Hitler Germany, open protest, conspiracy, and attempted coups d’etat.’808 However such efforts were not coordinated in a systematic way.809

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797 Richard Miller, above n 6, 169; see also Donald Dietrich, above n 788, 175.
798 Richard Miller, above n 6, 169.
799 Ibid.
800 Hans Mommsen, above n 67, 260.
801 Ibid 261.
802 Ibid.
803 Ibid.
804 Ibid 275.
805 Jeremy Noakes and Geoffrey Pridham, above n 2, 301.
806 Saul Friedländer, above n 3, 163.
807 Gitta Sereny, above n 28, 138.
808 Jeremy Noakes and Geoffrey Pridham, above n 2, 296.
809 Ibid.
There are some members of the German public who claimed to have been quite unaware of the level of harm suffered by the Jews during the war.\(^{810}\) Some thought (rather naively perhaps) that the Jews were simply being transported to the east so that they could relocate there, involving an exercise of national eviction rather than a relentless murderous process with industrialised death factories.\(^{811}\) Hans Mommsen claims that ‘[i]t seems very likely that even in resistance circles the systematic nature of the extermination process was unknown and that they were inclined to believe it was an operation carried out by Himmler on his own initiative.’\(^{812}\) However Donald Dietrich asserts that ‘[i]t seems undeniable that much, although not all, of the terror and destruction inflicted upon the Jews of Europe by the Nazis was partially known among the German people.’\(^{813}\) Similarly, Winton Higgins refers to the fact that ‘the Holocaust was an “open secret” in Germany more or less from the beginning … ordinary Germans knew about it, or at least knew enough about it to decide not to know any more, nor to enquire further.’\(^{814}\) Hannah Arendt also claims that the German public were ‘shielded against reality and factuality’ by a combination of ‘self-deception, lies and stupidity’.\(^{815}\) In any case, as accurate knowledge of these events was obtained public opinion altered to some degree so that some of those who were hostile to the Jews became opposed to the extreme measures adopted by the Nazi regime.\(^{816}\) Hans Mommsen claims that as time went on ‘[t]he reality of the mass murder provoked passionate opposition even among those who had previously sympathized with the regime on Jewish matters.’\(^{817}\)

Initially, however, the acts of Jewish persecution had such strong material payoffs for ‘Aryan’ Germans that they were not unwelcome.\(^{818}\) Studies undertaken of public attitudes in Germany during the war indicate that ‘a majority of Germans were more or less passively satisfied with the laws [under Nazism]. In other words, the bulk of the population

\(^{810}\) Hans Mommsen, above n 67, 264.

\(^{811}\) Ibid.

\(^{812}\) Ibid 265.

\(^{813}\) Donald Dietrich, above n 788, 175.


\(^{815}\) Hannah Arendt, above n 346, 47.

\(^{816}\) David Bankier, above n 28, 68–69.

\(^{817}\) Hans Mommsen, above n 67, 265.

\(^{818}\) David Bankier, above n 28, 69.
disliked acts of violence but did not object to the disenfranchisement and segregation of the Jews. The association of law with order was sufficient comfort for many.

It has been said that a large number of ‘Aryans’ were ‘indifferent’ to the suffering experienced by Jews. ‘Indifference was nurtured by rhetoric portraying Jews as nonhuman.’ The Nazi propaganda machine was very effective at facilitating if not always hatred and fear of Jews, at the very least indifference about their suffering. While there are certainly examples of virulent hatred expressed towards Jews, many citizens simply did not seem to care at all whether Jewish lives were harmed or destroyed. ‘Ordinary Germans who had nothing to do with the Holocaust might hear rumors of crimes against the Jews in Eastern Europe, but they were preoccupied with staying alive and making ends meet in an increasingly disastrous wartime situation.’ Donald Niewyk asserts that Germans were largely ‘apathetic and self-absorbed’. Apathetic attitudes in the face of human suffering must therefore bear some level of responsibility for the horrors under Nazism.

Winton Higgins explains that there were a variety of reasons why the German people did not effectively resist Hitler. These ranged ‘from approval of the killing, through moral indifference, to fear of the personal consequences of intervening, or even fear of breaking the taboo by announcing the secret.’ There was also a large measure of collusion with the Nazis by professionals which would have had a normalising influence on the public. Higgins asserts that those working in numerous professions cooperated with the Nazi German state:

Virtually every German institution, occupational group or profession contributed voluntarily (usually enthusiastically) to the “Final Solution”, turning their own traditional ethical protocols upside down. The regular army, once a byword for adherence to military codes of conduct, slaughtered Jewish and non-Jewish civilians and prisoners-of-war in their millions. The medical profession dedicated itself to the Nazi’s racist utopia and so to massive forced sterilisation, to murdering 200,000 of its own patients in the T4 “euthanasia” program, and finally to the Holocaust death factories. Scientists propagated crackpot theories about race. Lawyers wrote and

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819 Saul Friedländer, above n 3, 164; and see Clarence Lusane, above n 15, 126–127.
821 Clarence Lusane, above n 15, 126–127.
822 Richard Miller, above n 6, 169; David Bankier, above n 28, 81.
823 Richard Miller, above n 6, 169–170.
824 Donald Niewyk, above n 2, 142.
825 Ibid 142.
826 Winton Higgins, above n 814, 64.
827 Ibid.
enforced grossly unjust laws. Without qualm, social workers, school and university teachers, economists, statisticians, geographers, engineers and so forth lent their technical competence to the social engineering of the Nazi’s judenrein utopia. They did so with their professional bodies’ blessings.828

This supports Colin Tatz’s hypothesis that for genocide to occur there has to be a number of factors all working together to bring about that outcome. There needs to be perpetrators, bystanders and also people in the professions who allow or condone genocidal acts.829

1. Obedience to Authority

The Holocaust was possible in large part because of the attitudes that most Germans had towards obeying authority. Herbert Strauss states that the German public engaged in ‘internalization of obedience to authority as a symbol of law and order.’830 Thus the desire to have order in society led to unquestioning obedience. Niewyk suggests that careerism and obedience to authority were encouraged by ‘fears of reprisals.’831 Any ‘opposition to the regime wore the appearance of treason’.832 Dissent was definitely dangerous.833 There was a great deal of pressure to conform to the Nazi norm,834 and obedience was commonplace.

Stanley Milgram, a renowned psychologist, has undertaken experiments to explore the willingness of human beings to engage in cruel and inhumane treatment towards innocent persons when ordered to by an authority figure.835 In his book, Obedience to Authority,

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828 Ibid.
829 Colin Tatz, above n 28, 48 and 69–70.
830 Herbert Strauss, above n 14, 129.
831 Donald Niewyk, above n 2, 142.
832 Jeremy Noakes and Geoffrey Pridham, above n 2, 155.
833 Clarence Lusane, above n 15, 103.
834 Jeremy Noakes and Geoffrey Pridham, above n 2, 156.
835 Stanley Milgram, Obedience to Authority (1974) 7–8. To explore the phenomenon of obedience to authority he conducted the following experiment (at 4–5):

A person comes to a psychological laboratory and is told to carry out a series of acts that come increasingly into conflict with conscience. The main question is how far the participant will comply with the experimenter’s instructions before refusing to carry out the actions required of him. … Two people come to a psychological laboratory to take part in a study of memory and learning. One of them is designated as a “teacher” and the other a “learner”. The experimenter explains that the study is concerned with the effects of punishment on learning. The learner is conducted into a room, seated in a chair, his arms strapped to prevent excessive movement, and an electrode attached to his wrist. He is told that he is to learn a list of word pairs; whenever he makes an error he will receive electric shocks of increasing intensity. The real focus of the experiment is the teacher. After watching the learner being strapped into place, he is taken into the main experimental room and seated before an impressive shock generator. Its main feature is a horizontal line of thirty switches, ranging from 15 volts to 450 volts, in 15-volt increments. There are also verbal designations which range from SLIGHT SHOCK to DANGER – SEVERE SHOCK. The teacher is told that he is to administer the learning test to the man
Milgram records the results of a particularly disturbing experiment conducted to explore how many people would unquestioningly obey an authority figure commanding that an innocent person be harmed.\footnote{Ibid 5–6.} His impetus for conducting such research was the atrocities committed under the Nazi regime where the standard defence was that people were obeying orders.\footnote{Ibid 3.} As Milgram states:

> from 1933 to 1945 millions of innocent people were systematically slaughtered on command. Gas chambers were built, death camps were guarded, daily quotas of corpses were produced with the same efficiency as the manufacture of appliances. These inhumane policies may have originated in the mind of a single person, but they could only have been carried out on a massive scale if a very large number of people obeyed orders.\footnote{Ibid.}

Milgram refers to the way that officers of the Third Reich were trained to obey orders regardless of outcomes.\footnote{William Shirer, \textit{Rise and Fall of the Third Reich}, 24, cited in Stanley Milgram, above n 835, 3–4.} For Milgram this posed a dilemma around the issue of obedience to authority. He wanted to explore whether this trait of unquestioning obedience was a peculiar feature of German trained militia, or whether ordinary citizens could engage in similar unquestioning obedience to authority.\footnote{Stanley Milgram, aboven 835, 7–8.} The study was designed to consider how the average person would respond to an order from an authority figure even when to do so would cause some level of personal discomfort. After conducting the experiment Milgram concluded that:

> ordinary people, simply doing their jobs, and without any particular hostility on their part, can become agents in a terrible destructive process. Moreover, even when the destructive effects of their work become patently clear, and they are asked to carry out actions incompatible with fundamental standards of morality, relatively few people have the resources needed to resist authority. A variety of inhibitions against disobeying authority come into play and successfully keep the person in his place.\footnote{Ibid.}

An important feature in obtaining the unquestioning obedience of the subjects was the creation of an authority figure and the claim to knowledge on the part of that authority figure. Milgram writes that ‘[m]oral factors can be shunted aside with relative ease by a
calculated restructuring of the informational and social field.' Relating this to my research, ‘restructuring the informational and social field’ occurs in large part where a government enacts legitimating legislation which produces a normative effect. This clearly played a very significant part in bringing about the Holocaust.

Milgram records that many of the subjects of the experiment had a tendency to blame the authority figure for their own behaviour in torturing the learner with electric shocks. There was a denial of personal responsibility similar to that which occurred amongst Nazi officers. Milgram concluded that ‘it is psychologically easy to ignore responsibility when one is only an intermediate link in a chain of evil action but is far from the final consequences of the action.’

One of the disturbing features of Milgram’s study is that certain significant differences existed in the Nazi situation that were not present in the experiment, and yet the vast majority of subjects (almost two thirds) still engaged in blind obedience to authority and many were prepared to administer what they thought was the highest level of electric shock. The experiment was different in that it was not conducted under the threats of war, where dissent could lead to detention in a concentration camp or death. There was no grave compelling reason for the subjects of the experiment to obey the authority figure other than the fact that in the institutionalised West we are used to handing over our power to authority figures as a regular part of our day to day existence. Another significant difference is the fact that in Nazi Germany there had been years of dehumanising propaganda directed against Jews to explain, in part, why ordinary people were complicit or instrumental in their suffering. In relation to the Nazi propaganda Milgram writes that there was

842 Ibid 8.
843 Ibid.
846 Ibid 12. I wonder how much this type of thought affects ordinary non-Indigenous Australians in their ongoing complicity and at times instrumentality in the ongoing colonial legacy in Australia – do the majority of people hand over responsibility for unfairness to authority figures without considering the part they play via complicity and the small steps they take which are instrumental in continuing the colonial legacy?
847 Stanley Milgram, aboven 835, 7 and 33.
848 Ibid 176.
849 Ibid 137–140.
850 Ibid 11.
the intense devaluation of the victim prior to action against him. For a decade or more, vehement anti-Jewish propaganda systematically prepared the German population to accept the destruction of the Jews. Step by step the Jews were excluded from the category of citizen and national, and finally were denied the status of human beings.\textsuperscript{851}

In contrast, there was no similarly powerful propaganda directed against the ‘learner’ in the study. Subjects in the experiment cruelly obeyed authority without many of the significant stimuli present in Nazi Germany. It is disturbing to think what this says about human nature.

\textbf{K. Conclusion}

The Holocaust truly is an “overwhelming tragedy”,\textsuperscript{852} representing the very worst characteristics of humanity. The Nazis developed a highly organized system for oppressing and murdering millions of Jews. They carried out ‘systematic killing of Jews by means of hard labor under inhuman conditions and by industrialized mass murder.’\textsuperscript{853} Although there were some signs of their propensity for persecution present in the early life of the regime, they gradually increased their discrimination against Jews so that what would have been unthinkable in 1933 became seen as ‘necessary’ by the early 1940s.\textsuperscript{854}

The Nazi agenda was assisted at every step through the enactment of oppressive legislation which was dutifully upheld through the courts.\textsuperscript{855} As the Nazis obtained a tighter stranglehold on power judges seemed to go to great lengths in order to interpret legislation in as oppressive a manner as possible in order to endorse Nazi policy.\textsuperscript{856} In this way law was used to facilitate and endorse the trauma of those the Nazis chose to target as undesirable. Law and legal positivism served a legitimising function. The use of law by the Nazi regime shows that law is a tool of society which can change the face of a nation. Gerhard Weinberg warns ‘[t]he smouldering ruins of 1945 should warn us never to underestimate the capacity of human beings for evil. The tools of … society can be used

\begin{thebibliography}{9}
\bibitem{851} Ibid.
\bibitem{853} Karin Doerr, above n 326, 27; Richard Miller, above n 6, 40.
\bibitem{854} Richard Miller, above n 6, 166.
\bibitem{855} Ingo Müller, above n 210, 274.
\bibitem{856} Richard Miller, above n 6, 48–49.
\end{thebibliography}
for good or evil purposes, and if they are not directed properly, the costs can be horrendous.857

Karin Doerr observes that ‘[i]n a short period of time, the Nazi government paved the way for legalized persecution, then expulsion, and finally genocide. This process was accompanied by an antisemitic rhetoric that Germans heard on a regular basis as part of the constant public discourse.858 Nazi propaganda carefully packaged political lies for public consumption. The brutal language of Nazi propaganda facilitated the process of dehumanisation of Jewish victims.859 This process was multifaceted. It involved many layers of harmful and hateful treatment, each encouraged to facilitate an ever more disdainful view of Jewish people. Bankier states:

the remarkable success of propaganda in depersonalizing the Jews was a decisive enabling factor in the Nazi regime’s murderous policy. The largest sections of the German population accepted discrimination and expulsion; having internalized the mythical image of the Jew, they were convinced of the need to find a final solution to the Jewish question.860

An idea was set in motion that Jews were unworthy of living amongst the general community.861 Ghettos were created for accommodation, where overcrowding led to unsanitary conditions, starvation and death.862 Eventually this measure was not considered to adequately deal with what the Nazis considered ‘the Jewish problem’,863 and the idea of concentration camps became a horrific reality where Jews were forcibly engaged in compulsory work regimes.864 The ideal of the concentration camps was to structure a regimen where people could be ‘worked to death’.865 Jews were effectively dehumanised by the Nazi brutality.866 This process of dehumanisation made it seem more acceptable to take the lives of Jews who looked almost more dead than alive. Eventually the Nazi ‘final solution’ was devised, their preferred euphemism for systematic mass murder of Jews.867

857 Gerhard Weinberg, above n 19, 131.
858 Karin Doerr, above n 326, 27; Richard Miller, above n 6, 30.
859 Karin Doerr, above n 326, 32.
860 David Bankier, above n 28, 139.
861 Christopher Browning, above n 395, 24.
862 Ibid.
863 David Bankier, above n 28, 68.
864 Jeremy Noakes and Geoffrey Pridham, above n 2, 295.
865 Ibid.
866 Donald Niewyk, above n 2, 164.
867 David Bankier, above n 28, 139; Karin Doerr, above n 326, 32.
In the aftermath of the Holocaust Germany has struggled to come to terms with the evil of the Nazi regime and the complicity of so many in the nation.\textsuperscript{868} Manfred Henningsen explains that for some time this led to a ‘politics of amnesia’ being privileged ‘over the politics of memory’.\textsuperscript{869} He points out that a ‘politics of memory’ can be therapeutic.\textsuperscript{870} Yet Germans originally saw the defeat of Nazi rule as a catastrophe.\textsuperscript{871} For a long time there was a reluctance to engage in research on the Holocaust in Germany. Still the history of the Nazi era has ‘haunted post-Nazi Germany as a history of traumas in the collective subconscious.’\textsuperscript{872} Understandably, a national trauma such as the Holocaust will take a mammoth effort to heal. Part of the healing perhaps may come through learning from the past horrors. It is worthwhile considering the lingering lessons to be learnt from the Holocaust. As Donald Niewyk states ‘[t]he Holocaust demonstrates that there is no safe level of racism. On the contrary, it teaches that any agenda that places economic and political concerns above human rights has the potential to result in disaster.’\textsuperscript{873} It is therefore imperative that law have ethics as a central rather than a peripheral concern.

The next chapter will examine Australian legislation and policy in the jurisdiction of Queensland which detrimentally affected Aboriginal people.

\textsuperscript{868} Manfred Henningsen, above 198, 15.
\textsuperscript{869} Ibid.
\textsuperscript{870} Ibid.
\textsuperscript{871} Ibid.
\textsuperscript{872} Ibid.
\textsuperscript{873} Donald Niewyk, above n 2, 149.
A HAUNTING HISTORY – PERSECUTION
AND DEHUMANISATION OF ABORIGINAL
PEOPLES IN QUEENSLAND

A. Introduction

In every Australian State and Territory Indigenous peoples have suffered greatly at the hands of white Australia. From the earliest days of colonisation Indigenous peoples have experienced massacres, theft of land, theft of their children, enslavement, assaults and imprisonment. Some of this activity was lawless, in the earlier stages of colonisation. However much was done with the knowledge of authorities, and through the laws created by those authorities. As James Cockayne asserts, law has been used to ‘dismempower, dispossess, disenfranchise and colonise [I]ndigenous Australians.’ Much oppressive and discriminatory activity has been carried out through very intentional policy. Little can be excused under some notion of ignorance. If ignorance is to be claimed as a defence to these actions then in many situations it appears that such ignorance was wilful.

Propaganda was used to justify oppressive laws. Indigenous peoples in Australia have been the subject of much racist propaganda. Public opinion was molded through propaganda which portrayed Indigenous peoples as having a range of negative stereotypes. Propaganda

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2 Henry Reynolds, above n 1, 41–44.

3 Ibid 44–52.


played an essential role in the process of dehumanisation and functioned as a justification for discriminatory conduct. Indigenous people were considered to lack the equivalent capacity for feeling ascribed to the colonists. Yet there is cogent evidence that government policies of forcible removal were extremely traumatising for Indigenous peoples. Children cried out and mothers screamed over the distress of forcible separation. Children were not handed over with smiles and laughter and total confidence that such action would be in the best interests of all concerned. It involved emotional trauma so severe that many are still overwhelmed by the effects of this government sanctioned oppression. This is so regardless of the intentions with which such actions were carried out. It is important to focus on effects and remember that ‘harmful effects are harmful regardless of the intent with which they are produced’.

The heart of the matter is that a great number of Indigenous people have been emotionally, and at times physically and sexually, traumatised as a result of government removal policies and facilitating legislation. The fact that some Indigenous people have managed to survive such trauma and still carry on lives that look ‘successful’ according to the Anglo-Australian paradigm seems to turn on a demonstrated willingness of Aboriginal peoples to assimilate, evidenced by the adoption of various features of Anglo-Australian lifestyles, such as achieving according to typical Anglo-Australian education and employment for example. See Human Rights and Equal Opportunity Commission, above n 1, 89. Some members of the stolen generation have managed to carry on lives that look ‘successful’ according to the Anglo-Australian paradigm...

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8 Human Rights and Equal Opportunity Commission, Us Taken-Away Kids – ‘Commemorating the 10th anniversary of the Bringing them home report’ (2007) 32. This report suggests that governments had knowledge of the harmful effects of separating children from their families from the 1950s, a practice which continued for decades to follow.
9 In 1909 it was acknowledged by the Chief Protector in Western Australia that Aboriginal mothers suffered grief from losing their children, however their grief was trivialised as likely to be ‘momentary’ rather than acute, see Gale, (1909) 9, cited in Colin Tatz, above n 7, 89; Human Rights and Equal Opportunity Commission, above n 1, 184; Archie Roach, ‘Took the Children Away’, Australian Art Orchestra, 2004, <http://www.aao.com.au/lyrics/took_the_children_away/> at 3 January 2008.
10 Bruce Elder, above n 1, 245.
11 Human Rights and Equal Opportunity Commission, above n 1, Chapter 11; Human Rights and Equal Opportunity Commission, above n 8. See also Trevorrow v State of South Australia (No.5) [2007] SASC 285, the first successful compensation claim for a member of the stolen generation. In this case at [1151–1157] Justice Gray accepted the evidence that suggested ‘the plaintiff had suffered a major depressive disorder for many years’ as a result of his experiences as a member of the stolen generation. For an analysis of this recent decision see Ann Curthoys, Ann Genovese and Alexander Reilly, Rights and Redemption – History, Law and Indigenous People (2008) 161–164.
13 Human Rights and Equal Opportunity Commission, above n 1, 156–165.
14 Official indicators of ‘success’ according to the Anglo-Australian paradigm seem to turn on a demonstrated willingness of Aboriginal peoples to assimilate, evidenced by the adoption of various features of Anglo-Australian lifestyles, such as achieving according to typical Anglo-Australian education and employment for example. See Human Rights and Equal Opportunity Commission, above n 1, 89. Some members of the stolen generation...
paradigm of ‘success’ should not be used to discount or trivialise the trauma suffered by so many others who have not. Yet in the wake of the release of the Bringing them home report there was a plethora of public commentary about various Indigenous people who had been removed and yet were now ‘successful’ because of their superior education and opportunities – with this reasoning used as some kind of justification that the experiences of removal could not therefore have been all bad, or as bad as some were now claiming. Some even went so far as to inhumanely suggest that Indigenous children forcibly removed from their families were ‘rescued’. They suggested that the Stolen Generations should be referred to as the ‘rescued’ generations. Reginald Marsh even going so far as to suggest that the Bringing them home report should have been named the “‘Report on the Rescued Children’”. However a close examination of the laws and policies detrimentally affecting Indigenous peoples in Queensland during the 1900s dispels such nonsense.

Although somewhat similar treatment of Indigenous peoples occurred in each Australian jurisdiction, my research will focus on Queensland so as to examine a sample of legislation and policy with a greater level of specificity. Examination of detailed legislation and policy will make the parallels between the jurisdictions of Nazi Germany and Australia more apparent, which will be dealt with at length in Chapter Four.

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16 For examples of this see Peter Howson, ‘Rescued from the Rabbit Burrow – Understanding the Stolen Generation’ (1999) June Quadrant 10; Reginald Marsh, “‘Lost”, “Stolen” or “Rescued”? ‘ (1999) June Quadrant 15.
17 Peter Howson, above n 16, 11; Reginald Marsh, above n 16, 17.
18 Ibid.
19 Reginald Marsh, above n 16, 17.
20 Human Rights and Equal Opportunity Commission, above n 1, 27–372; Elizabeth Eggleston, Fear, Favour or Affection – Aborigines and the Criminal Law in Victoria, South Australia and Western Australia (1976) Chapter Eight.
B. Frontier Violence – Massacres as Land Clearing

Each colonising state in Australia engaged in ‘land clearing’. This was not just an exercise of felling trees. It involved the brutal destruction of thousands of Aboriginal peoples.\(^{21}\) It has been estimated that there were ‘between 750 000 and 1.25 million’ Aboriginal peoples in 1788, however roughly 100,000 remained by 1901.\(^{22}\) ‘Within a generation of first contact on the frontier … hundreds of Aboriginal groups had been destroyed completely.’\(^{23}\) There was an influx of colonists into Queensland in the 1830s,\(^{24}\) and by 1859 Queensland had its own government.\(^{25}\) Colonial attitudes towards Aborigines in Queensland were marked with extreme violence.\(^{26}\) Arthur Hamilton Gordon wrote in 1883 that Aboriginal people were regarded ‘as vermin, to be cleared off the face of the earth’.\(^{27}\) He remarked that Queensland attitudes towards Aborigines were characterised by ‘a tone of brutality and cruelty’, that men spoke ‘not only of the wholesale butchery … but of the individual murder of natives, exactly as they would talk of a day’s sport, or having to kill some troublesome animal.’\(^{28}\) On the Queensland frontier violent crimes against Aboriginal peoples were commonplace and they were carried out with the knowledge that there would be no punishment by the government.\(^{29}\)

An editorial from a Queensland newspaper in 1880 vividly described the situation:

> On occupying new territory the [A]boriginal inhabitants are treated exactly in the same way as the wild beasts or birds the settlers may find there. Their lives and their property, the nets, canoes, and weapons which represent as much labour to them as the stock and buildings of the white settler, are held by the Europeans as being at their absolute disposal. Their goods are taken, their children are forcibly stolen, their women carried away, entirely at the caprice of the white men. The least show of resistance is answered by a rifle bullet; in fact, the first introduction between blacks and whites is often marked by the unprovoked murder of some of the former – in order to make a commencement of the work of “civilising” them. Little difference is made between the treatment of blacks at first disposed to be friendly and those who from the very outset assume a hostile attitude. As a rule the blacks have been friendly at first, and the longer they have endured provocation without retaliating the worse they have fared, for the more ferocious savages have inspired some fear, and have therefore been comparatively unmolested …

\(^{22}\) Bain Attwood, above n 21, 159.
\(^{23}\) Ibid.
\(^{24}\) Foundation for Aboriginal and Islander Research Action Ltd (FAIRA), *Beyond the Act* (1979) 62. Note that there was a colony established at Moreton Bay in 1825 as a penal outpost for New South Wales – Human Rights and Equal Opportunity Commission, above n 1, 71.
\(^{25}\) Ibid.
\(^{27}\) Arthur Hamilton Gordon cited in Colin Tatz, above n 7, 79.
\(^{28}\) Ibid.
Many, perhaps the majority … have stood aside in silent disgust whilst these things were being done … the protests of the minority have been disregarded by the people of the settled districts; the majority of outsiders who take no part in the outrages have been either apathetic or inclined to shield their companions, and the white brutes who fancied the amusement have murdered, ravished and robbed the blacks without let or hindrance. Not only have they been unchecked, but the Government of the colony has been always at hand to save them from the consequences of their crime.30

The frontier was a place where Indigenous peoples were certainly not protected by the law.31 Magistrates in Queensland during the early days of colonialism were often undertaking several roles which could conceivably have prevented them from carrying out their work with a measure of objectivity.32 Dr Rosalind Kidd, who has undertaken extensive research on colonial Queensland, states ‘[t]heir multiple status – as arbiters of justice, supporters of policing, and often landholders themselves in need of native police “expertise” – compounded the problem of partiality.’33 This led to the Attorney General instructing magistrates to protect Indigenous peoples as much as the colonists.34 Still those few who were charged in relation to brutal conduct towards Aborigines were unlikely to meet with punishment for their actions.35

The Queensland frontier was a violent place where brutality was the norm. Numerous writers have described this period as a time when violence towards Indigenous people was commonplace.36 Although traditionally Australian history books have been filled with images of peaceful ‘settlement’,37 this image is far from what occurred in reality.38 FAIRA contend that:

In reality a bloody war was waged between the original inhabitants and the invaders for over fifty years until the twentieth century. The war was unofficial because, for convenience, authorities turned a blind eye to the atrocious events that occurred during the reputed period of peaceful settlement by Europeans.39

When settlers were not using a rifle to ‘disperse’ Aborigines they found other ways to rid the land of their presence. There were numerous instances of poisoning Indigenous people with

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31 Henry Reynolds, above n 29, 122.
32 Rosalind Kidd, above n 29, 11.
33 Ibid 11–12.
34 Ibid.
37 Henry Reynolds, above n 1, 24.
food.40 Knowing of the desperate hunger suffered by Indigenous peoples with the theft of their traditional hunting grounds, white settlers took advantage of the situation and found a very effective method for ‘clearing’ the land in the form of feeding poison to the starving Aborigines.41

Frontier violence was also of a sexual nature.42 Carol Dowling comments ‘[t]he relationship between white colonial men and Aboriginal women was often violent, arbitrary and expediently cruel.’43 Colonisation has had a devastating impact upon many Aboriginal women, who were frequently sexually assaulted by the colonisers.44 Professor Judy Atkinson observes that ‘a whole language evolved in Australia around the sexual violations of Indigenous women: “gin” busts, “gin” sprees, “gin” jockeys, “gin” shepherds, and so on.’45 This language placed ‘sexual violence against women in the context of sport’ and portrayed ‘Aboriginal women as animals to be used for sporting pleasure.’46

Evans and others state that ‘the rape and subjugation of Aboriginal women was a key feature in European/Aboriginal sexual relations. … Cases of women being bought and sold, raped and generally ill treated, and even killed appeared periodically in the press.’47 However the colonisers developed negative stereotypes regarding Indigenous women’s sexuality which they used to try to justify sexual assaults perpetrated against Indigenous women. They sought to blame the sexual assaults on the moral inferiority of the victims.48

Rejecting accusations that Aboriginal women were forced to work for and have sex with the settlers, many nineteenth century writers declared that it was impossible to outrage or violate such immoral and depraved creatures. In 1884 Queensland Colonial Secretary, A.H. Palmer, asserted that it was impossible to rape an Aboriginal woman because as “[a]nyone who knew anything about the blacks knew that they had no idea of chastity – that a fig of tobacco would purchase any woman”.49

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40 Ibid 11; Alison Palmer, above n 38, 42.
41 Foundation for Aboriginal and Islander Research Action Ltd, above n 24, 11.
42 Raymond Evans, Kay Saunders and Kathryn Cronin, above n 26, 104; Alison Palmer, above n 38, 75; Rosalind Kidd, Trustees on Trial – Recovering the Stolen Wages (2006) 53, and 56–57.
44 Raymond Evans, Kay Saunders and Kathryn Cronin, above n 26, 104.
46 Ibid.
47 Raymond Evans, Kay Saunders and Kathryn Cronin, above n 26, 106.
48 Rosalind Kidd, above n 42, 59.
With such views held by government officials of the day Indigenous females had little chance of protection against settler outrages.

The situation for ‘Aboriginal women and children in occupied areas was particularly perilous’ as ‘[t]hey were taken from their families “at will and unchecked”’.  

Children were caught and traded like chattels.

Female children were particularly vulnerable, and slavery of such children was looked upon leniently by authorities.

For example, ‘[i]n 1903 a man arrested at Mareeba with a 16-year-old “half-caste” girl he had “owned” for eight years escaped criminal proceedings with a small fine.’

Rather than assist in protecting Aboriginal children from harm ‘the police themselves were keen traders in children, offering “tame” youngsters as servants and companions.’

Justice was not found through the courts, as ‘[l]ocal justices were also participants in the culture of abuse.’

In the 1800s Aboriginal people were rapidly dying as a result of murder, starvation, disease and addiction to the drugs introduced by Europeans.

Their ‘lifestyle was seriously threatened’ and they ‘were forced off their tribal lands, away from the bush and to the “safety” of stations or fringe-dwelling camps near townships.’

European colonisation meant ‘[t]hey could no longer survive by hunting or by food-gathering without the risk of being killed in the bush.’

The violence of the early colonial era gave rise to concerns in some quarters that there would be no Aboriginal peoples left.

The result was a government report prepared in 1896 which paved the way for the first piece of ‘protection’ legislation in Queensland.

Under the Queensland ‘Protection’ legislation Aborigines were to become a
protected species. Colin Tatz states “‘Protected Aborigines’ meant just that: a sub-species which had to be saved from the murderous impulses and practices of settler Australians.”

However ‘[t]he Queensland Government made little effort to interfere in the clashes between the races until after the conflict was complete and the Aborigines had been removed from the territories desired by the settlers.’ The ‘protection’ legislation authorised the removal of Aboriginal peoples to reserves or missions, where it was thought that they would be safe from the violence of the colonial frontier. However the reserves and missions were not free from violence, it was just violence of a different variety.

1. Native Police

In order to conquer the colonial frontier the Queensland government created the Native Police force. The mounted native police were an essential part of the colonisation process in Queensland. ‘The Native Mounted Police was a special unit consisting of armed Aborigines under the supervision of European officers.’ They were formed to assist the Queensland government clear the land of Aboriginal peoples so that the colonisers could dominate more and more territory. The Native Police are a perfect example of a ‘State apparatus’ which ‘functions by violence’ in a colonial society. They effectively institutionalised frontier violence. They were operational from 1859, however they had no legal authorisation until The Police Act 1864 (Vic) was enacted. Yet even without legal endorsement they engaged in numerous instances of violence. Once they were legally formed however, and carrying out violence which was deemed to be lawful under the new legal order, they effectively had a politico-legal stamp of approval for their activities. The Native Police were only decommissioned in 1896.
Although frontier violence occurred in various ways, FAIRA contend that ‘the most indiscriminate slaughtering of Queensland’s Aborigines must be attributed to the Queensland Native Mounted Police Force.’\(^{72}\) There were several euphemisms used by the Native Police for murdering Aboriginal peoples. One popular euphemism for murdering Aborigines was ‘dispersal’.\(^{73}\) The instructions of the Select Committee on Native Mounted Police stated ‘[i]t is the duty of the Officers at all times and opportunities to disperse any large assemblage of blacks.’\(^{74}\) This task involved killing Aborigines on sight. Henry Reynolds explains ‘the term “dispersal” was well understood and had been adopted into bush slang as a “convenient euphemism for wholesale massacre”’.\(^{75}\) Similarly, FAIRA maintains ‘“[d]ispersing” … was the official euphemism used by the force, as the more descriptive “killing” would be a blatant admission to the condoned slaughter of British subjects.’\(^{76}\) Another euphemism for the murder of Aborigines was that troopers were out shooting ‘kangaroos’,\(^{77}\) which was a disparaging likening of Aboriginal peoples to animals to be hunted down for sport.

Native Police were ordered to ‘“disperse any large assemblage of blacks”’ because authorities considered that ‘“such meetings, if not prevented, invariably lead to depredations or murder”’.\(^{78}\) Not many records remain detailing the activities of the Native Police.\(^{79}\) However when asked to explain what was meant by ‘dispersing’ Aborigines at the Queensland Select Committee of 1861, Lieutenant Wheeler responded ‘“Firing at them”’.\(^{80}\)

Henry Reynolds highlights the problems associated with the operation of the Native Police force, pointing out their extensive power:

> Enormous power and discretion had been handed to the Native Police officers – literally, power over life and death. They could decide how big a “large gathering” had to be before it qualified for dispersal, and what constituted a depredation. Was it one hut robbed, one cow speared? They could decide which was the guilty mob and how many of them should be shot. On the frontier they became investigating officers, magistrates, judge, jury and executioner.\(^{81}\)

\(^{72}\) Foundation for Aboriginal and Islander Research Action Ltd, above n 24, 12.

\(^{73}\) Ibid 13.

\(^{74}\) Instructions of the Committee of the Commandant to Officers and Camp Sergeants, Select Committee on Native Mounted Police, QVP, 1861, 151–152 cited in Henry Reynolds, above n 1, 47.

\(^{75}\) Henry Reynolds, above n 36, 105.

\(^{76}\) Foundation for Aboriginal and Islander Research Action Ltd, above n 24, 13.

\(^{77}\) Colin Tatz, above n 7, 81.


\(^{79}\) Henry Reynolds, above n 36, 102.

\(^{80}\) Ibid.

\(^{81}\) Ibid 103.
There was not even the appearance of a fair criminal trial process.

The activities of the Native Police were of a disturbingly violent character. Their behaviour eventually caused a measure of public consternation and a parliamentary committee inquiry was held in 1861 to examine their conduct. However the inquiry ‘exonerated the system and laid blame at the feet of a few negligent officers.’ Kidd comments that this was ‘[h]ardly surprising considering that every member of the committee was a squatter’. The Native Police were deemed useful because they were ‘available to perform the killings which were otherwise illegal.’ The genocidal conduct of the Native Police was clearly financed and condoned by the Queensland government. The government was ‘clearly aware of what the Native Police did; they approved and paid for the force and rejected criticism of the bloody work of dispersal.’

Members of the native police force experienced violence at the hands of their commanders.

The Native Police

were recruited – sometimes forcefully and sometimes by the allurements of military regalia, adventure or captured Aboriginal women – from distant tribal groupings and subjected to a rapid and, arguably, brutalizing course of drilling, rifle practice and “discipline” ... “discipline” largely involved an ultimate resort to the crude military procedure of flogging.

Training therefore was well associated with violence. Frantz Fanon has explained that those who learn violence through colonialism often engage in further violence against others. This type of transference of violence occurred with the Native Police force. The violence which occurred during the ‘training’ of the Native Police was replicated in the murder of other Aboriginal peoples from different tribes. Another factor which was likely to be at work was the internal colonisation process whereby the image of Aboriginal peoples adopted by the

82 Rosalind Kidd, above n 29, 9–10; Foundation for Aboriginal and Islander Research Action Ltd, above n 24, 13.
83 Rosalind Kidd, above n 29, 10.
84 Ibid.
85 Ibid.
86 Alison Palmer, above note 38, 193.
87 Henry Reynolds, above n 36, 114.
88 Rosalind Kidd, above n 36, 9.
89 Raymond Evans, Kay Saunders and Kathryn Cronin, above n 26, 57.
90 Frantz Fanon, The Wretched of the Earth (1963) 52.
colonisers involving negative stereotypes became part of the self-image of many Aboriginal people who were subjected to colonial practices. The Native Police were no doubt encouraged to adopt the colonisers’ view of Aboriginal peoples, a view which subscribed to denigrating stereotypes shaped by imperial considerations.

Many government documents relating specifically to the Native Police force ‘are missing from the historical archives.’ However from the evidence that remains it can be seen that the Queensland government provided the Native Police with a legal and administrative framework conducive to murdering Aboriginal peoples on the frontier. The involvement of the Queensland government with the Native Police led to ‘the subjugation of Aborigines through violence and death.’ Through their support of the Native Police force the Queensland government ‘was complicitly involved in a policy of recurrent, piecemeal massacres of Aborigines’. Alison Palmer concludes that ‘cumulatively, the result of piecemeal destruction was large-scale decimation. That this was intended is clearly demonstrated by the common use of the term extermination in reference to Aborigines.’ This has implications in relation to a finding of genocide, which will be discussed further on in this chapter.

C. Philosophical Foundations – Social Darwinism

The legislation and policies detrimentally affecting Aboriginal peoples in Australia were heavily influenced by Social Darwinism. Social Darwinism was based upon theories of evolution developed by Charles Darwin and Herbert Spencer. It portrayed humans ‘as divided into several biologically distinct and hierarchically ranked races whose physical,

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93 Alison Palmer, above n 38, 56.
94 Ibid 58.
95 Ibid 49.
96 Ibid 58.
intellectual, and moral capacities were genetically determined.\textsuperscript{98} In this way race was considered to determine ‘the characteristics not only of individuals but of whole societies, which, as essentially biological entities, were engaged in a constant competition for survival.’\textsuperscript{99} It was believed that ‘weaker races would be eliminated’ and ‘stronger ones would survive and evolve into higher, more complex, and hardier life forms.’\textsuperscript{100} David Hollinsworth explains that:

\begin{quote}
Social Darwinism argued that different races were effectively different species (even though able to interbreed) that had evolved separately, according to the laws of natural selection. Cultural and individual differences were regarded as expressions of underlying biological differences that caused them. … social Darwinists argued that the more civilised person in their own lifetime passes through the earlier (more primitive) stages of development at which various inferior races were stalled … This belief gave rise to the orthodox view that savages were childlike but with dangerous adult strength and animal passions. … this thinking … justified the extraordinary powers of surveillance and control that developed in most colonial societies, and such practices as refusing access to education because it was beyond the childlike natives.\textsuperscript{101}
\end{quote}

In keeping with the intellectual framework of Social Darwinism, many early colonists saw Aborigines as being stuck at some primitive point in human evolution. Social Darwinists considered Aboriginal peoples to be ‘an earlier, less evolved people’, ‘lower link[s]’ on an evolutionary chain.\textsuperscript{102} Social Darwinists engaged in research to try to gather support for their theories. They examined ‘the shape, size, volume and configuration of skulls which were avidly collected and minutely studied.’\textsuperscript{103} This ‘science’ of Phrenology enjoyed great popularity in Australian colonies from the 1820s.\textsuperscript{104} Phrenologists considered that their research could reveal information about character and capacity and they often ‘read’ Aboriginal skulls.\textsuperscript{105} Of course such a process was highly influenced by the value systems of those arranging racial hierarchies and the greed inherent in the colonial enterprise.\textsuperscript{106}

Many colonists considered the Aborigines to be like children, incapable of developing the necessary skills that ‘civilised’ Europeans had mastered.\textsuperscript{107} It was commonly believed ‘that

\begin{footnotes}
\footnotetext{98}{Ibid.}
\footnotetext{99}{Ibid.}
\footnotetext{100}{Ibid.}
\footnotetext{101}{David Hollinsworth, above n 49, 33.}
\footnotetext{102}{Henry Reynolds, above n 1, 114.}
\footnotetext{103}{Ibid 107.}
\footnotetext{104}{Ibid.}
\footnotetext{105}{Ibid 108.}
\footnotetext{106}{Irene Watson, above n 92, 47.}
\footnotetext{107}{David Hollinsworth, above n 49, 100.}
\end{footnotes}
Aborigines were a simple, primitive people … a “child-like race” on whom anything more than the most elementary education was wasted.’108 Hollingsworth cites J.D. Woods as an example of the prevailing attitude of the time:

In intellectual capacity the Aborigines seem to occupy a low position in the scale of humanity. … In fact, they seem to be incapable of any permanent improvement … They seem to be like children. Their brain seems to be only partially developed, and they cannot be instructed beyond a certain point. … Without a history, they have no past; without a religion, they have no hope; and without habits of forethought or providence, they can have no future. Their doom is sealed, and all that civilised man can do, now that the process of annihilation is so rapidly overtaking the Aborigines of Australia, is to take care that the closing hour shall not be hurried on by want, caused by culpable neglect on his part …109

Those determining what counted as intelligence could not see their own prejudice.110 This account is strikingly ignorant of Aboriginal history, religion and culture. However it was not an unusual intellectual process for colonising powers to adopt. Devaluing the original owners and occupiers of land has been commonplace amongst colonising powers.111 However the economic imperatives served by defining entire populations as too child-like to be suitable for anything other than menial labour for Europeans should not be overlooked.112 Social Darwinism was intricately connected with economic exploitation.113 It was used “to rationalise the hierarchies of privilege and profit, to consolidate the labour regimes of expanding capitalism, [and] to provide the psychological scaffolding for the exploitative structures of colonial rule.”114 Social Darwinism effectively ‘provided a pseudo-scientific rationale’ to legitimate oppression and the theft of Aboriginal lands.115 Yet many Europeans mistakenly saw ‘their economic and military domination as evidence of their cultural and racial superiority.’116

108 Ibid.
111 See for example the similar disparaging stereotypes towards colonised African people which were commonplace in South Africa, Colin Tatz, above n 7, 109.
112 Ibid; Raymond Evans, Kay Saunders and Kathryn Cronin, above n 26, 114; Irene Watson, above n 92, 47.
113 Irene Watson, above n 92, 47.
115 Gwenda Tavan, above n 97, 12.
116 David Hollinsworth, above n 49, 30.
Social Darwinism was a major factor in the discriminatory treatment meted out to Aboriginal peoples\textsuperscript{117} and effectively justified all manner of abuses by white colonisers.\textsuperscript{118} Rowley explains that according to ‘the frontier folklore’ Social Darwinism could be used to justify the worst offences by the whites, as members of the ‘superior race’ before whom the inferior ones would melt away and die out. Murder could be romanticised and abstracted; and depopulation by disease and other factors could be seen as the convenient operation of both immutable law and divine providence. This poor race would make way for the fine flower of British civilisation.\textsuperscript{119}

By appealing to the notion that racial hierarchies were somehow consistent with a ‘natural’ order,\textsuperscript{120} the colonists avoided moral concerns that otherwise might have been present about causing the death of thousands of Aborigines.\textsuperscript{121} There was a reluctance to acknowledge that ‘nature’ had a vast deal of help from murderous colonisers in the extinction of various Aboriginal groups.\textsuperscript{122} As Hollinsworth explains:

\begin{quote}
The invocation of natural selection as a Law of Nature sidestepped issues of morality and legality in relation to the dispossession and extermination of [I]ndigenous races. When metropolitan governments or humanitarian organisations criticised the brutality of frontier conditions, their case was refuted by assertions that dispossession and depopulation were beyond the reach of normal moral or social concern, being driven by irresistible forces of racial survival. Conversely, it was argued the extinction of the inferior races in such settler societies should be celebrated rather than lamented.\textsuperscript{123}
\end{quote}

Extinction of Indigenous peoples ‘was considered not only inevitable but also beneficial to the species as a whole.’\textsuperscript{124} This is because Social Darwinism saw the elimination of those who were considered to be inferior as beneficial for the remainder of society, as though somehow the remaining population would be strengthened by eradicating the so-called ‘weaker’

\begin{itemize}
\item \textsuperscript{117} Gwenda Tavan, above n 97, 12.
\item \textsuperscript{118} Rowley, (1970) 137, cited in David Hollinsworth, above n 49, 80–81.
\item \textsuperscript{119} Ibid.
\item \textsuperscript{120} Michel Foucault, “Society Must Be Defended” – Lectures at the Collège de France, 1975–76 (eds Mauro Bertani, Alessandro Fontana and Francois Ewald, translated by David Macey, 2004) 256–257. Foucault talks about the link between nineteenth-century biological theory and the discourse of power. Basically, evolutionism, understood in the broad sense – or in other words, not so much Darwin’s theory itself as a set, a bundle, of notions (such as: the hierarchy of species that grow from a common evolutionary tree, the struggle for existence among species, the selection that eliminates the less fit) – naturally became within a few years during the nineteenth century not simply a way of transcribing a political discourse into biological terms, and not simply a way of dressing up a political discourse in scientific clothing, but a real way of thinking about the relations between colonization, the necessity for wars, criminality, the phenomena of madness and mental illness, the history of societies with their different classes and so on. (at 256–257).
\item \textsuperscript{121} David Hollinsworth, above n 49, 81.
\item \textsuperscript{122} See generally Henry Reynolds, above n 36.
\item \textsuperscript{123} David Hollinsworth, above n 49, 35.
\item \textsuperscript{124} Ibid 82.
\end{itemize}
elements. However, it is arguable that humanity is strengthened by engaging in compassion towards any so-called ‘weaker’ elements, that in eradicating what is perceived as weakness or imperfection we may in fact prevent opportunities for greater human flourishing and richer understandings that promote growth towards a better future. Be that as it may, the colonial forces took a different view, and Social Darwinism was foundational to the assumption that it was the “manifest destiny” of Europeans to subdue and rule the world. It served a very utilitarian function by legitimising the dispossession and subordination of Indigenous peoples which benefited the colonisers. Hollingsworth explains that the ‘perceived inferiority’ of Indigenous peoples ‘was written into legislation and built into the structures that administered [I]ndigenous Australians; that is, institutionalised.’ The institutionalised racism inherent in Social Darwinism was taught consciously and unconsciously to successive generations of non-[I]ndigenous (and indeed [I]ndigenous) Australians. Indigenous people were either ignored or denigrated as “ignorant black savages”, while the settlers were glorified as “heroic pioneers and rugged battlers” whose hard work and enterprise brought development and progress to a “sleeping” continent. These messages were conveyed in formal school settings, especially Australian history curriculum, and informally in the literature, songs, poetry, films and humour of Australian popular culture. These racist assumptions and attitudes formed the basis for repressive legislation which aimed to separate [I]ndigenous people from the wider society and isolate them on segregated reserves where they could be “protected” and be permitted to die out in peace. These measures constituted the protection system that legitimised [I]ndigenous inferiority in a comprehensive system of institutional racism.

The legacy of Social Darwinism in Australia is powerful, and it still lingers on. It is a common thread running through colonial Australia’s dealings with Indigenous peoples. One of the prime vehicles carrying this thread of assumed racial superiority is the law.

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126 David Hollinsworth, above n 49, 38.
127 Ibid; Henry Reynolds, above n 29, 42.
128 David Hollinsworth, above n 49, 83–84.
129 Ibid.
130 Henry Reynolds, above n 1, 119.
Chapter 3 – A Haunting History – Persecution and Dehumanisation of Aboriginal Peoples in Queensland

D. The Use of Law to Legitimise Oppression

1. Defined by Law

Since the beginning of colonisation it seems that white Australia has been very preoccupied with defining Indigenous peoples. Jennifer Nielsen explains that ‘control over the meaning of “Aboriginal” identity was located with non-Indigenous authorities’ from the outset of colonisation. Definition has been used as a crucial tool to exercise colonial power over Indigenous peoples. There have been 67 different definitions of Indigenous peoples in more than 700 legislative enactments. The issue of definition is absolutely vital, for it has a very serious impact on the lives of those defined, under early legislation a ‘false or mistaken declaration could result in the instant loss of certain rights and liberties and subsequent incarceration in an institution or removal from it.’ This authoritarian obsession with definition ‘emerged in the nineteenth century’ however it is arguable that ‘the pattern of pervasive surveillance [has] continued well into the present’. The assumed right to define has been, and continues to be, inextricably linked to power relations between non-Indigenous and Indigenous people. It is central to the construction of ‘what is regarded as “truth”’.

Under The Aborigines and Torres Strait Island Affairs Act 1965 (Qld) Aboriginal people were defined as those who were ‘full blood’ (s 6(1)(a)), those having ‘a preponderance of the blood of an Aborigine’ (s 6(1)(b)), those who were ‘part-Aborigine’ (s 6(1)(c)), those with ‘a strain of the blood of the [I]ndigenous inhabitants of the Commonwealth’ and with ‘a strain of more than twenty-five per centum of such blood but … not a preponderance of such blood’ (s 6(2)(b)). Garth Nettheim has critiqued the definitions of Aboriginal people used in the Queensland legislation. He states that ‘[t]he 1965 Act defined four categories of Aborigines, two categories of part-Aborigines and four categories of Islanders, and did so, largely, by clumsy and unscientific references to “preponderance” or “strain” or percentages of

131 Jennifer Nielsen, above n 6, 85; Judy Atkinson and Glenn Woods, above n 5, 1.
132 Jennifer Nielsen, above n 6, 89.
133 David Hollinsworth, above n 49, 99.
134 Ibid.
135 Ibid.
137 Margaret Davies, above n 125, 285.
“blood.”\textsuperscript{138} The references to percentages of ‘blood’ purported to be scientific, rather than cultural constructs. Interestingly the colonisers did not define themselves by similar percentages, for example, one half English, one quarter Scottish and one quarter Irish. There were no similar categories affecting the vast bulk of white colonisers. Their whiteness was assumed to guarantee their racial superiority and their racial purity.

2. The ‘Protection’ Legislation

Legislation was enacted in each jurisdiction in Australia to allegedly ‘protect’ Indigenous peoples. These laws were used to facilitate the removal of Indigenous people from their families and communities and to justify their incarceration on reserves, missions and in other institutions.\textsuperscript{139} The \textit{Bringing them home} report explains:

The “protectionist” legislation was generally used in preference to the general child welfare legislation to remove Indigenous children. That way government officials acting under the authority of the Chief Protector or the Board could simply order the removal of an Indigenous child without having to establish to a court’s satisfaction that the child was neglected.

In Queensland … the Chief Protector used his removal and guardianship powers to force all Indigenous people onto large, highly regulated government settlements and missions, to remove children from their mothers at about the age of four years and place them in dormitories away from their families and to send them off the missions and settlements at about 14 to work. Indigenous girls who became pregnant were sent back to the mission or dormitory to have their child. The removal process then repeated itself.\textsuperscript{140}

Even with the enactment of legislation meant to facilitate the ‘protection’ of Indigenous peoples, appalling abuses by whites were still occurring. In the early 1900s some considered it their right to buy and sell Indigenous people as forms of livestock, and traded them “‘as they would a horse, or bullock.’”\textsuperscript{141} In some cases the Chief Protector removed Indigenous children because of the abuses they were suffering at the hands of whites. The 1905 \textit{Report of the Chief Protector of Aborigines} describes why ‘Harry Brown’ was removed from the clutches of an abusive white employer:

“Harry Brown”, half caste, twelve years, from Cloncurry, [removed] for alleged indecent practices. It was rather [on] account of the filthy surroundings in which this child had been living, and the treatment to which he had been subjected, that I recommended the

\textsuperscript{138} Garth Nettheim, \textit{Out Lawed: Queensland’s Aborigines and Islanders and the Rule of Law} (1973) 25.
\textsuperscript{139} For a brief summary of the Queensland legislation see Rosalind Kidd, above n 42, 173–179.
\textsuperscript{140} Human Rights and Equal Opportunity Commission, above n 1, 30.
\textsuperscript{141} Rosalind Kidd, above n 29, 61.
Another removal due to abusive behaviour by whites described in the same report is that of ‘Dolly’:

“Dolly”, half-caste, about thirteen years, lately in service with Mrs. M— in whose employ she has been for ten years past. Before leaving for Cooktown, Mrs. M— asked permission from Protector Galbraith to send the girl to a neighbouring station, as she feared the responsibility of taking her away with her to Cooktown, where she proposed residing, but never mentioned or hinted anything concerning her condition. Permission being refused, Dolly was accordingly handed over to the police, who had her examined by the doctor, when she was found to be seven months pregnant. The girl having been with her mistress so many years without receiving any wages, and only possessing the two articles of clothing which she stood up in, the Protector asked Mrs. M— what she was prepared to do for her, but could get no satisfaction ... Dolly was thereupon ordered to Yarrabah, but gave birth to a daughter soon after reaching Cooktown on her way south. The child died before the mother resumed her journey. I instructed the local Protector not to allow Mrs. M— any [A]boriginals, and to refer her to me if she applies for a permit. 143

There are several things that are quite telling in this account. Firstly, slave labour amongst Indigenous children was not uncommon. Dolly had been with her mistress for many years without receiving any wages. Secondly, rape of girl children in the employ of white settlers was also not uncommon. Dolly had obviously been interfered with sexually while in the ‘care’ of her employers. Thirdly, it seems that white settlers were allowed to get a ‘permit’ to keep Indigenous children. Nowadays permits are associated with things like keeping a dangerous dog rather than keeping a human who is then treated like a slave. By resorting to the language of ‘permits’ the ‘protection’ system facilitated demeaning stereotypes of Indigenous peoples.

Indigenous academic Judy Atkinson points out that although the legislation enacted was meant to ‘protect’ Indigenous peoples, it failed miserably. She argues ‘[t]he protection legislation was supposed to create safety for people who had been traumatised. Instead it enforced dependency while denying essential services. It gave power to people who used their power abusively. It tore families apart.’ 144

143 Ibid 203.
144 Judy Atkinson, above n 45, 67.
The first piece of ‘protection’ legislation enacted in Queensland was the *Aboriginal Protection and Restriction of the Sale of Opium Act 1897* (Qld). The 1897 legislation was precipitated by a report undertaken by Archibald Meston in 1896 titled the ‘Report on the Aborigines of North Queensland.’¹⁴⁵ This report documented the disgraceful treatment of Indigenous peoples.¹⁴⁶ It created an impetus for legislation to be enacted which would try to prevent Indigenous peoples from experiencing settler violence and exploitation.

As mentioned at the beginning of this chapter, other states and territories ended up developing similar ‘protection’ legislation to that which was created in Queensland. However Antonio Buti suggests that the Queensland legislation was very influential in terms of developing similar legislation in other states.¹⁴⁷ The *Aboriginal Protection and Restriction of the Sale of Opium Act 1897* (Qld) created the role of Protector, defined ‘ Aboriginal’, and gave the relevant Minister power to remove, detain, or relocate Aboriginal people. The Act has been described as both humanitarian and racist, in that it sought to protect Aboriginal people from exploitation, but placed them all under official “protection” whether they needed it or not.¹⁴⁸

The passing of the 1897 Act provided for the confinement of Aboriginal people on reserves.¹⁴⁹ It made it legal to force them stay on reserves, even if they did not want to be there.¹⁵⁰ This was considered necessary because ‘earlier mission efforts near settled areas had been defeated because of the unwillingness of Aborigines to remain on missions.’¹⁵¹ However not all Aboriginal peoples were detained on reserves. Under the 1897 Act there were some who were exempted from this compulsory detention. ‘Aboriginals who held permits for outside employment or to be absent from a reserve were excepted … An Aboriginal female lawfully married to, and residing with, a husband who [was] not an Aboriginal was also excepted.’¹⁵²

¹⁴⁶ Colin Tatz, above n 7, 80; Rosalind Kidd, above n 29, 42.
¹⁴⁸ Ibid 129–130. The parallels between this and the 2007 federal government military intervention in Aboriginal communities in the Northern Territory are obvious, and I will elaborate further on this in Chapter Five.
¹⁴⁹ Foundation for Aboriginal and Islander Research Action Ltd, above n 24, 18–19.
¹⁵⁰ Ibid.
¹⁵¹ Ibid 18.
¹⁵² Ibid 23.
After the enactment of the 1897 Act, Archibald Meston was given the position of Southern Protector and Dr Walter Roth became the Northern Protector. In 1914 the job of Chief Protector was taken up by John Bleakley. Like his predecessors, Bleakley had a paternalistic and patronising attitude towards Indigenous people. ‘Bleakley was of the opinion that Aborigines were a child race which needed to be “socialised” in order to be “christianised”’. Bleakley considered that missions and reserves were essential for safeguarding racial purity, stating: “Not only do they protect the child races from the unscrupulous white, but they help to preserve the purity of the white race from the grave social dangers that always threaten where there is a degraded race living in loose conditions at its back door.” Kidd describes Bleakely’s attitude to Aboriginal administration as ‘authoritarian’.

The Aboriginal Protection and Restriction of the Sale of Opium Act 1897 (Qld) was amended several times, however the legislation remained fairly similar in many respects. There has been a plethora of ‘protection’ legislation in Queensland. Garth Nettheim has argued that the legislation in Queensland got progressively better from 1939 to 1971. However he also identified many problems with the 1971 legislation which he regarded as a modified version of the earlier legislation. Various aspects of the ‘protection’ legislation will now be discussed.

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153 Rosalind Kidd, above n 29, 49.
154 Ibid 70.
155 Ibid.
157 Rosalind Kidd, above n 29, 71.
158 For a detailed account of the specific similarities between these pieces of legislation see Garth Nettheim, above n 138.
159 This includes The Native Labours’ Protection Act of 1884 (Qld); The Aboriginals Protection and Restriction of the Sale of Opium Acts Amendment Act 1897 (Qld); The Aboriginals Protection and Restriction of the Sale of Opium Acts Amendment Act 1901 (Qld); The Aboriginals Protection and Restriction of the Sale of Opium Acts Amendment Act of 1927 (Qld); The Aboriginals Protection and Restriction of the Sale of Opium Acts Amendment Act of 1928 (Qld); The Aboriginals Protection and Restriction of the Sale of Opium Acts Amendment Act of 1934 (Qld); The Aboriginals Preservation and Protection Acts 1939 to 1946 (Qld); The Aborigines and Torres Strait Island Affairs Act 1965 (Qld); The Aborigines Affairs Act 1967 (Qld); The Aborigines Act 1971 (Qld). The 1971 legislation was also amended in 1974, 1975 and 1979, Garth Nettheim, Victims of the Law – Black Queenslanders Today (1981) 8. However this chapter will deal primarily with the legislation up to and including the 1971 legislation.
160 Garth Nettheim, above n 138, 14.
The Aboriginals Protection and Restriction of the Sale of Opium Acts Amendment Act of 1934 (Qld) expanded the categories of people the Department would control. Later under The Aboriginals Protection and Restriction of the Sale of Opium Acts Amendment Act of 1939 (Qld)

A much narrower category defined those who would remain under departmental control. An Aboriginal under the new Act was someone having a preponderance of “Aboriginal blood”, one declared by a court to be in need of care and protection, a resident of a reserve, or the child of an Aboriginal mother on a reserve. The term “half-caste” was now replaced by “half-blood”, and applied only to a person of Aboriginal/European parentage, or a person of part-Aboriginal parents who had between 25 per cent and 50 per cent “Aboriginal blood”.

This legislation was enacted after the 1937 Aboriginal Welfare: Initial Conference of Commonwealth and State Aboriginal Authorities had developed a policy of assimilation. The 1939 legislation and its Regulations introduced significant changes. Aboriginal police, courts and councils were instituted. However they were all subordinate to superintendents, who had vast powers of dismissal. ‘Disciplinary powers of superintendents were increased, 32 hours (unpaid) work each week was made compulsory, and it became an offence to act in a manner “subversive of good order” on a reserve.’ Extensive by-laws were introduced, with a lengthy array of disciplinary offences and rigid requirements:

By-laws stated that every resident “shall observe habits of orderliness and cleanliness”, and shall attend, and cause their children to attend, all medical examinations and treatments. It became a duty to keep a dwelling and surrounds neat and tidy “to the satisfaction” of the superintendent, and to report any disease or injury.

Surveillance under this Act was all pervasive and aimed to produce good Christian converts with a Eurocentric work ethic.

The racist assumptions of those introducing the ‘protection’ legislation are apparent in the preliminary note to The Aboriginals Preservation and Protection Acts 1939 to 1946 (Qld) which stated that:

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162 Rosalind Kidd, above n 29, 137–138.
163 Ibid 146.
165 Rosalind Kidd, above n 29, 174.
166 Ibid.
167 Ibid.
168 Ibid 175.
Owing to the comparative backwardness of the [A]boriginal race in acquiring the arts of European civilisation legislation designed to protect its members and differentiate them in certain respects in the administration of law, became essential; and it was to this end that the Acts below were passed.\(^{169}\)

The *Aborigines’ and Torres Strait Islanders’ Affairs Act 1965* (Qld) was meant to abandon the policy of ‘protection’ and facilitate development of Aboriginal communities.\(^{170}\) However it was still very much influenced by the national policy of assimilation.\(^{171}\) Although the 1965 Act altered much of the language that had been used in Aboriginal Affairs, ‘reversing the rhetoric of control’,\(^{172}\) high levels of government control remained.\(^{173}\) The 1965 Act merely gave the appearance of giving Aboriginal people greater autonomy. In reality the structures put in place to allow some marginal Aboriginal empowerment in terms of Aboriginal community councils, Aboriginal courts and Aboriginal police were subject to high levels of bureaucratic control.\(^{174}\) Thus ‘police, courts, and councils were perceived as operating as expressions of official, rather than Aboriginal will.’\(^{175}\) In reality there was very limited success in terms of abandoning the policy of ‘protection’, as much remained within the legislation which facilitated excessive control of Aboriginal communities. For example, under section 34 of the *Aborigines’ and Torres Strait Islanders’ Affairs Act 1965* (Qld) the Director had power to ‘order assisted Aborigines and Islanders to be transferred to a reserve or from one reserve to another.’\(^{176}\) This kind of interference in the freedom of movement of Aboriginal peoples was commonplace.\(^{177}\)

### 3. Freedom of Movement

There was a great deal of concern amongst Indigenous people over the major issue of their restricted freedom of movement.\(^{178}\) The legislation had provided for the restriction of movement of Indigenous peoples to and from reserves and missions. For example under s 9 of

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\(^{170}\) Garth Nettheim, above n 138, 12.

\(^{171}\) David Hollinsworth, above n 49, 131–132 and 135.

\(^{172}\) Rosalind Kidd, above n 29, 241.

\(^{173}\) Ibid 244–245.

\(^{174}\) Ibid.

\(^{175}\) Ibid 245.

\(^{176}\) Garth Nettheim, above n 138, 33.

\(^{177}\) This was in clear breach of International Human Rights Law. For a comprehensive account of the manner in which the Queensland legislation breached international law see Garth Nettheim, above n 138, and Garth Nettheim, above n 159.

\(^{178}\) Foundation for Aboriginal and Islander Research Action Ltd, above n 24, 108.
The Aboriginal Protection and Restriction of the Sale of Opium Act 1901 (Qld) every Aboriginal person who was defined as an Aboriginal person under the legislation (who was not excepted from the operation of the legislation) was able to be ‘removed to’ and ‘kept within’ any reserve or mission. Section 9 states:

It shall be lawful for the Minister to cause every Aboriginal within any District, not being an Aboriginal excepted from the provisions of this section, to be removed to, and kept within the limits of, any reserve situated within such District, in such manner, and subject to such conditions, as may be prescribed. The Minister may, subject to the said conditions, cause any Aboriginal to be removed from one reserve to another.

Albert Holt, an Aboriginal man who was on Cherbourg mission, describes the restrictions on freedom of movement as follows:

The government restricted our freedom with a permit system. They had absolute control over us. Written permission had to be sought from the office and a permit obtained for anybody going from the mission. Any hunting or fishing trips had to have permission from the office clerk. Any breach of the permit time frame was seen as defying authority, and was a serious offence resulting in a criminal conviction, with a jail sentence of up to ninety days. The conditions enforced on our people were so unjust that we all lived in fear that, at any time, any one of us could be taken off to jail. It was very scary. People could be jailed just on allegations. There was no escaping this.

It took until 1971 for some aspects of the issue of freedom of movement to be addressed. Under The Aborigines Act 1971 (Qld) a change was made and ‘residence on a reserve’ was no longer ‘a matter of enforcement.’ In 1971 the offence of ‘escaping’ a reserve which had

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179 The definition of an Aboriginal person under s 4 of The Aboriginals Protection and Restriction of the Sale of Opium Act 1901 (Qld) is as follows:
Every person who is—
(a) An aboriginal inhabitant of Queensland; or
(b) A half-caste who, at the commencement of this Act, is living with an aboriginal as wife, husband, or child; or
(c) A half-caste who, otherwise than as wife, husband, or child, habitually lives or associates with aboriginals;
shall be deemed to be an aboriginal within the meaning of this Act.

180 Some Aboriginal people were exempted from the legislation. Section 10 of The Aboriginals Protection and Restriction of the Sale of Opium Act 1901 (Qld) stated:
Every aboriginal who is—
(a) Lawfully employed by any person under the provisions of this Act or the Regulations, or under any other law in force in Queensland;
(b) The holder of a permit to be absent from a reserve; or
(c) A female lawfully married to, and residing with, a husband who is not himself an aboriginal;
(d) Or for whom in the opinion of the Minister satisfactory provision is otherwise made;
shall be excepted from the provisions of the last preceding section.


182 Garth Nettheim, above n 138, 33.
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existed under the 1965 legislation was also abolished.\textsuperscript{184} This made some progress towards loosening the stranglehold on Aboriginal people’s lives. However, there were still problems that remained. Under s 17(1) of the 1971 Act, a person could not be on a reserve without permission. The section stated ‘A person shall not be on a reserve unless he is entitled under this Act so to be.’\textsuperscript{185} There was a penalty of $200 for committing an offence under this section, with a further penalty of $10 a day for continuing to contravene the section.\textsuperscript{186} This effectively meant that Indigenous people were unable to visit their kin without permission and it had a destructive impact on family life. It put in place a legal and administrative framework which was conducive to familial, social and cultural isolation. It allowed extreme control to be exercised over what many people nowadays would consider to be a basic right, the right to associate with family and community. It also prevented activists from speaking to Indigenous people to agitate for change.

Under \textit{The Aborigines Act 1971} (Qld), Commonwealth and Queensland officials had a right to be on a reserve but not residents. Residents were then considered to be there as a ‘privilege’, this privilege was removable at any time at the Director’s pleasure.\textsuperscript{187} In considering this aspect of the legislation, Garth Nettheim stated that ‘the Director [had] apparent power to revoke the residence permits … a formidable power to be placed in the hands of a (hypothetical) Director with authoritarian tendencies.’\textsuperscript{188} This power of expulsion remained until 1979.\textsuperscript{189} It was a very effective way of giving reserve managers the power to expel those they considered to be ‘agitators’.\textsuperscript{190}

4. \textit{Inter-racial sexual relationships}

The ‘Protection’ legislation grossly interfered with all aspects of life for Aboriginal peoples, even that which should be within the domain of every adult’s personal autonomy, their sexuality. For example, under section 9(1)(a) of \textit{The Aboriginals Protection and Restriction of the Sale of Opium Acts Amendment Act of 1934} (Qld) sexual intercourse or attempted sexual

\begin{footnotesize}
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\item\textsuperscript{184} Ibid.
\item\textsuperscript{185} Ibid 30.
\item\textsuperscript{186} Ibid.
\item\textsuperscript{187} Ibid 33.
\item\textsuperscript{188} Ibid 34; Rosalind Kidd, above n 29, 119.
\item\textsuperscript{189} Human Rights and Equal Opportunity Commission, above n 1, 79.
\item\textsuperscript{190} Such as the appellant in \textit{Neal v The Queen} (1982) 149 CLR 305, in this case the appellant spat on a reserve manager when he was frustrated about rotten meat being sold at the reserve store (at 313). In this case Justice Murphy referred to the appellant Mr Neal as an ‘agitator’ (at 316).
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intercourse between a ‘female Aboriginal, or “half-caste”’ and a non-Aboriginal man was an offence punishable by ‘a penalty of not more than fifty pounds or … imprisonment for any period not exceeding six months.’ Thus under this legislation interracial sexual intercourse or an attempt at such intercourse was a crime.

Of course not all sexual relationships between white colonisers and Aboriginal women were consensual, children with mixed heritage were frequently the result of rape. Many of these rapes involved very young girls. Shortly after the enactment of the 1897 Act amendments were sought to try to prevent the high level of sexual abuse occurring against Aboriginal girls. Rosalind Kidd states ‘[i]n less than eighteen months an amendment Bill was before parliament, aimed primarily at countering the most prevalent sexual abuses, namely the violation of girl children, some as young as six, and assaults on “adopted” females.’ The response to this by some members of parliament was absolutely deplorable: ‘Parliamentarians indignantly insisted that a man could readily mistake the maturity of “native” girls of nine or ten because they “ripened” much earlier in tropical areas.’

Queensland authorities stated their concern about inter-racial sexual relationships, not because of the circumstances of violence that often accompanied sexual relations, but because of notions of racial purity. ‘Blood mixing was believed to contaminate both white and black races, and was held to cause biological degeneration because mixed-bloods supposedly inherited the worst characteristics of both races.’ Undersecretary William Gall raised sterilisation as a possible solution to what some saw as the vexed problem of a growing ‘half-caste’ population. Archibald Meston considered inter-racial sexual relationships to be ‘degrading’ for white men. Similarly, John Bleakley condemned inter-racial sexual relationships. ‘In his annual report to Parliament in 1933, Bleakley expressed his deep worry

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192 Rosalind Kidd, above n 29, 50.
193 Ibid 50.
194 Morgan Blum, above n 191, 119.
195 Bleakley, 1933 Annual Report to Parliament, cited in Henry Reynolds, above n 36, 149; Raymond Evans, Kay Saunders and Kathryn Cronin, above n 26, 108.
197 Rosalind Kidd, above n 29, 137.
198 Raymond Evans, Kay Saunders and Kathryn Cronin, above n 26, 108.
about the increase of the “half-caste” population, which in all States had caused “grave concern”.199 He stated that it was
difficult to see how this social blot can be erased as long as the white and the black races are allowed in contact, no matter how stringent the laws may be made. Only complete segregation of the black race, which is financially impractical at present, or, as even suggested by some, sterilisation of the females, an absolutely unacceptable situation, will prevent the results of intercourse.

The efforts of the Department have in the past been directed to the checking of this evil, by sternly preventing miscegenation, as far as the limited machinery made possible. The marriage of whites and [A]borigines, unfortunately not discouraged in early years, has been absolutely prohibited, and every encouragement given to these women to marry amongst their own race.200

It can be seen that colonial authorities were gravely concerned about the issue of miscegenation. The above quotation reveals the development of governmental policy in Queensland designed to prevent any kind of intermixing of what were perceived to be different ‘races’ of humans. Hollinsworth explains:

To understand the passion and assumptions underlying the issue of miscegenation (race mixing) in the late nineteenth and twentieth centuries, the central concept of “blood” must be understood. Ideas of race and stock, of blood and breed were fundamental to social and political ideologies of nationalism, imperialism and progress … An individual’s character, morality, personality and worth were all seen as largely determined by their blood, an error arising from the lack of scientific knowledge of genetics.201

Any negative qualities attributed to Aboriginal peoples by the colonisers were ‘not presented as the products of social and cultural difference but as characteristics inherent in the race – in the “blood”’.202 The idea of the pure white race intermixing with the tainted or inferior blood of Indigenous peoples greatly influenced early legislation and policy in Queensland promoting segregation. However despite concerns of authorities over the growing mixed heritage population in Queensland, the shortage of white women in the tropics ensured a growth in numbers of those with mixed heritage.

Of course policies concerning inter-racial sexual relationships changed with the advent of assimilation. Assimilation policies advocated an approach of “transforming to white” everyone who was regarded as less than “full blood”.203 This was seen in the policies

199  Henry Reynolds, above n 36, 149.
201  David Hollinsworth, above n 49, 105–106.
202  Abdul JanMohamed, above n 91, 21.
203  Colin Tatz, above n 7, 91–92.
implemented by the Chief Protector for Western Australia, O.A. Neville, where marriage of ‘half-castes’ to non-Indigenous Australians was promoted. Neville’s approach was a ‘genocidal biological-absorption policy’. Neville was convinced that all Indigenous people who were not ‘full-blood’ could be absorbed within the white community:

Neville had a “three-point” plan: first, the “full bloods” would die out; second, take “half-castes” away from their mothers; third, control marriages among “half-castes” and so encourage intermarriage with the white community. … Here, in unmistakable language and intent, was ideology justifying why biology should solve this “social problem”.

Neville’s plan for Indigenous peoples was influenced by the White Australia Policy, where it was hoped that Australia would be a distinctively white nation. The emergence of children of colour was seen as a threat to this desired national objective. Neville made his genocidal policies clear in 1937 when he spoke the following words at the Conference of Commonwealth and State Aboriginal authorities: “Are we to have a population of 1,000,000 blacks in the Commonwealth, or are we going to merge them into our white community and eventually forget that there were any Aborigines in Australia?”

Government officials in other jurisdictions were just as concerned with the issue of ‘blood’ and racial purity, specifically, how to eradicate the presence of Indigenous ‘blood’ from Australia. This led to the adoption of policies promoting marriages between those defined at law as ‘half-castes’ with non-Indigenous Australians in some jurisdictions. The Chief Protector of Aboriginals for the Northern Territory, Dr Cecil Cook, ‘was determined to eradicate the part-descent population by “breeding out the colour” through rigid control of (female) sexuality.’ Cook wrote in 1933:

In the Territory the mating of [‘fullblood’] Aboriginals with any person other than an [A]boriginal is prohibited. The mating of coloured aliens with any female of part [A]boriginal blood is also prohibited. Every endeavour is being made to *breed out the colour* by elevating female half-castes to white standard[s] with a view to their absorption by mating into the white population. The adoption of a similar policy throughout the Commonwealth is, in my opinion, a matter of vital importance.

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204 Morgan Blum, above n 191, 127.
205 Colin Tatz, above n 7, 89.
206 Morgan Blum, above n 191, 119.
207 Ibid.
208 O.A. Neville cited in Henry Reynolds, above n 36, 153.
209 Morgan Blum, above n 191, 125.
210 David Hollinsworth, above n 49, 106.
211 Cecil Cook, cited in David Hollinsworth, above n 49, 106, emphasis added.
This language used by Cook to describe Aboriginal sexual relations was certainly disparaging. It was more reminiscent of a farmer talking about livestock than human sexuality. This was just another way of trying to animalise Aboriginal peoples in order to dehumanise them.212

The racial philosophies of Neville, Cook and Bleakley were implemented in the 1933 Northern Territories Administrators Report, which repeated the above quotation verbatim in clear ‘eugenicist language’.213 Thus it can be seen that the notions of ‘blood’ and ‘colour’ had great significance in terms of the practical consequences for Aboriginal peoples’ lives. Indeed it threatened their continued existence as distinct peoples. It had drastic effects preventing freedom in marriage and sexual relationships. These eugenicist policies were clearly implemented through legislation and sought to legitimise the oppression, indeed the eradication, of Indigenous peoples as distinct peoples. They were clearly genocidal in intent and effect.

5. Exploitation in Employment

Indigenous workers have experienced a long history of exploitative working conditions in Australia.214 They experienced extreme levels of control over their vocation215 and have regularly been forced to work for slave rations.216 They experienced workplace oppression as a direct consequence of the legislation in place. Garth Nettheim explains:

Under the 1965 [Queensland] regulations 70–74 there were considerable powers vested in reserve managers to direct employment or to direct cessation of employment of assisted Aborigines and Islanders. The remuneration required to be paid to those employed off Reserves other than under an Award … was very low. (There have been assertions that even these stipulated rates were not paid in all cases.) But for work done on the Reserves no minimum earnings were prescribed at all – evidence available suggests that very low rates were paid …217

212 Rowan Savage, above n 6, 22.
213 Colin Tatz, above n 7, 91.
214 Jennifer Nielsen, above n 6, 83.
215 Raymond Evans, Kay Saunders and Kathryn Cronin, above n 26, 110.
217 Garth Nettheim, above n 138, 62.
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Many Indigenous people who had qualifications to undertake better paid employment ‘were unwillingly detained on the settlements providing essential skilled labour for a pittance’.\(^{218}\) The rate at which Indigenous workers received payment for tasks was ‘set at two-thirds that for whites doing the same tasks.’\(^{219}\) The Queensland government was saving enormous sums of money by underpaying Indigenous workers, ‘around $1.588 million annually’.\(^{220}\)

The legislation made it lawful for Indigenous people to be paid under award wages for their labour.\(^{221}\) The Queensland legislation also had provisions governing ‘inexperienced, slow or retarded Aboriginal workers.’\(^{222}\) For example, regulations 69 and 70 of the Aborigines Regulations 1972 (Qld) were applied to ‘aged infirm or slow worker[s]’.\(^{223}\) These provisions were regularly applied to Aboriginal workers regardless of their capacity or competence.\(^{224}\) The legislation set up an exploitative scheme whereby Aboriginal peoples worked extremely hard for a pittance and were virtually slaves to white colonial masters.\(^{225}\) Yet the ‘civilizing mission’\(^{226}\) of the colonisers ensured that virtual ‘enslavement was legitimised as evangelisation’.\(^{227}\)

Employment situations could detrimentally affect whole families. Kidd explains ‘employers profited from, rather than patronised, workers’ dependents. Regulations decreed wives could be worked *unpaid* for twelve hours a week. And despite a legal minimum of 14 years, exploitation of child labour was entrenched’.\(^{228}\) Wives were often ‘“sweated” as full time

\(^{218}\) Rosalind Kidd, above n 29, 230. For example, payment for work done on Palm Island was appalling. ‘The paltry payments, even with “incentive” for skill, brazenly ignored the many community tradesmen who qualified for award wages and were so paid on the mainland. Comparisons reveal the level of exploitation: the police sergeant was paid $16.50 when the award rate was $45; mechanics got $16 rather than $40; carpenters $12 rather than $40; engine drivers $16 rather than $42.’ Rosalind Kidd, above n 29, 246.

\(^{219}\) Rosalind Kidd, above n 29, 74.

\(^{220}\) Ibid 281.


\(^{222}\) Garth Nettheim, above n 138, 13.


\(^{224}\) Rosalind Kidd, above n 29, 235; Rosalind Kidd, above n 42, 76.

\(^{225}\) Rosalind Kidd, above n 29, 234–235; Scott Emerson, above n 221, 6; Irene Watson, above n 221, 207; Raymond Evans, Kay Saunders and Kathryn Cronin, above n 26, xviii; Alison Palmer, above n 38, 105–107; and see Rosalind Kidd, above n 42, between pages 84–85 for the tragic personal testimony of several Aboriginal workers forced to work for a lifetime without just wages.


\(^{228}\) Rosalind Kidd, above n 29, 232–233.
labour.\textsuperscript{229} Thus the law allowed employers to force entire families to work in slave-like conditions, exacerbating the misery of dispossession and dislocation.

The Aborigines Act 1971 (Qld) increased the potential for Indigenous peoples to experience injustice in the area of employment\textsuperscript{230} by broadening ‘the regulation-making power’ so that it was ‘no longer confined to “assisted” Aborigines or Islanders.’\textsuperscript{231} Under section 56 of the 1971 legislation if the regulations relating to payment for Indigenous workers came into conflict with any relevant award rate then the regulations were to prevail to the extent that they were inconsistent with other industrial relations legislation.\textsuperscript{232} This delegation of power from Parliament to the Executive\textsuperscript{233} effectively ensured that Indigenous workers could be forced to endure race based work conditions inferior to those enjoyed by non-Indigenous workers.

The Chief Protector of Aborigines had the power to compel Indigenous people to undertake employment of a particular type with particular employers.\textsuperscript{234} There was no legal right to appeal against such arbitrary work allocations. The right to choose a vocation is taken for granted by many in today’s society. Yet Indigenous people endured decades of degrading work and had little opportunity to improve their skills or undertake employment which they might have considered more suitable.\textsuperscript{235} Forcing people to work for virtually nothing is slave labour. However in Australia there is a reluctance to acknowledge what amounts to slavery; the serious wage injustice suffered by generations of Indigenous Australians.\textsuperscript{236}

Jennifer Nielsen explains that the legal and administrative structures put in place for Aboriginal workers were seen as ‘welfare’ measures.\textsuperscript{237} As such Aboriginal workers did not
have ‘the rights afforded to those included within the status of “worker”’.238 This led to terrible working conditions for Indigenous peoples.239 Nielsen points out that:

In general, employment itself, was determined for “Aborigines” under the direction of the non-Indigenous authorities, their wages (if they got any) were not paid directly to them, and the way they spent their money was subject to the permission of white authorities. Some “Aboriginal” workers were supposed to receive “reasonable” wages; the question of what was reasonable was a matter left purely to the determination of the relevant non-[I]ndigenous authority. … Provision was made for “slow workers” to be paid lower than award rates (that is, the rates applicable to “Aboriginal” workers); the worker’s proficiency was subject to assessment by the employer and the welfare officer. Clearly, the “protective” legislation was open to and was subject to abuse.

In the pastoral industry, the employment conditions were particularly harsh and brutal. This Indigenous Australian labour was extremely important to the viability of the growing industry, due mainly to the fact that in many cases, (including right up to the 1950s and 1960s), no wages were paid to “Aboriginal” workers. Even when wages were introduced, they were lower wages than those paid to white workers, and invariably the laws defining the wages and conditions of Indigenous Australian workers were poorly regulated and enforced.240

Alison Palmer points out ‘[m]uch Aboriginal labour was not voluntary’ and ‘[f]orce and kidnapping were commonly used to obtain and retain Aboriginal labour in the pastoral and fishing industries.’241 Aboriginal people who ran away from their employers ‘were hunted down and severely punished.’242 This was so regardless of the reasons why Aboriginal people ran away. ‘Workers who walked off bad jobs were pursued by police and forcibly returned. Many protectors ignored Aboriginal complaints, labelling them as untrue, unsubstantiated or merely vindictive.’243 Many Aboriginal people were horribly abused in their employment situations.244 Aboriginal women, for example, suffered a great deal from the sexual predations of pastoralists.245 Many employers also used violence to subdue their Aboriginal employees.246 As Alison Palmer asserts, ‘[v]iolent discipline kept employed Aborigines in a state of terror and powerlessness.’247

238 Ibid.
239 Ibid.
240 Ibid 92–93.
241 Alison Palmer, above n 38, 107.
242 Jennifer Nielsen, above n 6, 93.
243 Rosalind Kidd, above n 29, 234.
244 Human Rights and Equal Opportunity Commission, above n 1, 75; Alison Palmer, above n 38, 64.
245 Jennifer Nielsen, above n 6, 93.
246 Alison Palmer, above n 38, 108.
247 Ibid.
Aboriginal people were also particularly vulnerable in trying to negotiate the terms and conditions of their employment. Under the legislation operating from 1946 an Aboriginal worker who refused to return to work when ordered to do so by a ‘Protector’ could be fined two pounds. White colonists could therefore exploit Aboriginal labour. When some Aboriginal people sought back pay owed to them they were treated in a violent and disturbing manner. For example, in 1927 it was reported that a ‘local constable went out to [a] station, terrorised the men and women, plied them with alcohol, threatened to have them all removed to a government settlement, and finally locked them in a poisons shed overnight to break their resistance.’

The rate of pay paid to Indigenous workers, if wages were paid at all, was substantially lower than wage rates for non-Indigenous workers. For example, at one stage ‘[w]ards in domestic service and the pastoral industry received weekly wages of $4.82 plus keep for males and $2.52 plus keep for females at a time when the basic wage was $23.60’. Kidd notes that ‘[e]ven a formal contract was no guarantee for Aboriginal wages … Wages functioned more often as book entries than as cash’.

The attitude of authorities towards Indigenous workers being paid was exemplified in the judgment of Kelly J in the 1944 case *The Australian Workers Union v EA Abbey*. Kelly J stated:

> it cannot … be assumed that the natives as a whole either need or desire the so-called standard of living claimed or enjoyed by Australians of European origin. Their values are different. In many cases … the payment of money wages for their labour would prove a cause of embarrassment both to the native and to his employer. In most other cases, the receipt of award rates and conditions would add to the bewilderment of the “full-blood” concerning the ways and customs of the “whites”. … it would be foolish and … it would be inadvisable and even cruel to pay them for the work they can do at the wage standards found to be appropriate for civilized “whites”. It has … been made clear that the natives should be encouraged to work in return for goods and services with which they are provided by the authorities charged with their protection or by those who give them work.

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248 Foundation for Aboriginal and Islander Research Action Ltd, above n 24, 30.
250 Jennifer Nielsen, above n 6, 92–93.
251 David Hollinsworth, above n 49, 128.
252 Rosalind Kidd, above n 29, 69.
253 *The Australian Workers Union v EA Abbey* (1944) 53 CAR 212.
The idea that the payment of wages for labour rendered should be considered an embarrassment or cruelty is truly astonishing. Yet such an example of judicial racism is not uncommon in Australian legal judgments. In critiquing this judgment Jennifer Nielsen states that according to the racist world view of Kelly J

their labour was provided in return for special protection – their employment was part of that special treatment, and for their own benefit they were protected from wages; the protection of that era would continue for their own good. Otherwise, these poor unworthy souls would be embarrassed and bewildered by the sophisticated and civilised ways of all those “competent white workers.”

Thus the politico-legal framework endorsed an oppressive employment structure which led to decades of entrenched poverty for Indigenous people.

6. Access to money

One major source of frustration for Indigenous peoples during the ‘protection’ era was their lack of freedom to manage their own finances. Indigenous people worked hard for a pittance and were then frequently denied access to the money they had lawfully earned. Nielsen points out that “[t]hose who were paid wages had only restricted access to them. The monies were largely held by “Aboriginal protectors”, and many of these funds found their way into state and territory coffers.” Some Indigenous workers ‘never received any of the cash component [of their wages] despite the fully thumbprinted books tendered at the end of contracted periods.’ Rosalind Kidd explains that:

Analysis of internal documents held by the department reveals a complex web of negligence, fraud and misappropriation in the official handling of income generated by Aboriginal workers. Financial abuses occurred at several points: non- or under-payment of wages and “pocket money”, fraud by police protectors, unofficial departmental appropriations, and official government confiscation.

Legislation coupled with the administration of that legislation made it incredibly difficult for Aboriginal people to gain access to the money which was rightfully theirs. For example, under s 27(1) of the Aborigines’ and Torres Strait Islanders’ Affairs Act of 1965 (Qld) a district officer could ‘undertake and maintain the management of the property of any assisted

256 Jennifer Nielsen, above n 6, 98.
257 Rosalind Kidd, above n 29, 129; Rosalind Kidd, above n 42, Chapters Four and Five.
258 Jennifer Nielsen, above n 6, 93.
259 Rosalind Kidd, above n 29, 178; see also Rosalind Kidd, above n 42, 86.
260 Rosalind Kidd, above n 29, 130; see also Rosalind Kidd, above n 42, 89.
Aborigine or assisted Islander’ either by request of that person (s 27(1)(a)) or if the district officer thought it was in ‘the best interests’ of that person or a member of their family requiring their support (s 27(1)(b)). A person who was having their property managed under s 27(1)(b) could apply to a Stipendiary Magistrate under s 29(1) ‘for an order that such district officer cease such management.’ However this was an arduous process to have to endure just to be able to spend their hard earned wages. Under the legislation ‘an “assisted” Aboriginal or Islander might have had the management of his own property undertaken against his wishes and/or continued against his wishes.’

On many occasions Indigenous people were not paid their wages at all. For example Regulation 97 of the 1965 Regulations required ‘that wages of Aborigines and Islanders be paid directly to the district officer.’ Section 56(15) of The Aborigines Act 1971 (Qld) allowed trust funds to be set up and maintained to manage the property of Aborigines and Islanders. Regulation 5 of the 1972 regulations allowed for the management of Aboriginal property:

1. The Director shall establish with the Commonwealth Savings Bank of Australia a Trust Fund or Trust Funds into which shall be paid all moneys, being the wages, property or savings of Aborigines whose property is being managed in accordance with Section 37 of the Act and shall in respect of each such Aborigine hold such money as Trustee …

3. The Director in his capacity as trustee … may withdraw from such fund or funds such sums as are required by the said Aborigine or are necessary for the payment of his just debts, payment of which has been duly authorised by the Director or a District Officer, provided that any such withdrawal shall only be made upon signature of or making of mark by the Aborigine on whose behalf such money is held or any person authorised in writing by such Aborigine …

Hundreds of thousands of dollars went missing from Aboriginal trust accounts. It can be easily comprehended that it would not have been too difficult to have forged a person’s ‘making of mark’. The laws did nothing to address the potential for fraud on the part of regulating authorities. ‘Entrenched police fraud and pilfering from Aboriginal savings was confirmed in 1932 by a public service inspection.’ Writing in 1968 Stevens stated that there

261 Garth Nettheim, above n 138, 66.
262 Rosalind Kidd, above n 42, Chapters Four and Five; Scott Emerson, above n 221, 6.
263 Garth Nettheim, above n 138, 67.
265 Rosalind Kidd, above n 42, Chapters Four, Five, Six and Seven; F.S. Stevens, Aboriginal Wages and the Trust System in Queensland, 18 February 1969, cited in Garth Nettheim, above n 138, 125.
266 Garth Nettheim, above n 138, 67–68.
267 Rosalind Kidd, above n 29, 132.
were ""widespread rackets in the handling of Aboriginal trust funds in North Queensland"" and that these were ""not only common knowledge"" but were ""only superficially concealed by the guilty parties"". He gives an example of 'a police sergeant in North Queensland [who] was arrested and charged on sixty counts of forgery, with bail being set at $31,000', for pilfering money from Aboriginal trust funds. Yet despite the evidence and warnings of fraud the government allowed this exploitative system to continue.

Pilfering money from trust accounts also occurred higher up the chain of command. As Chief Protector Bleakley had a practice of 'raiding Aboriginal trust monies to offset shortfalls in state funding.' The trust monies came from 'the Aboriginal Protection Property account, the trust fund set up to dispense unclaimed earnings to relatives.' Bleakley also placed an additional tax on the wages of all Aboriginal people not living on reserves or missions and filtered this money into the ‘Aboriginal Provident Fund’ which was meant to provide ‘for workers and their dependants when ill or out of work.’ However in reality this money was used to offset government expenditure in relation to Indigenous people. As Kidd explains:

A public service inquiry into the operations of the Aboriginal sub-department in 1922 detailed gross misappropriation of Aboriginal trust funds to cover departmental expenses. Country workers were levied 5 per cent for single and 10 per cent for married workers to cover lean periods, netting the Aboriginal Provident Fund over £3,000 in 1922 alone. Of this considerable sum only £253 had been allocated for rations, despite the widespread distress of families in the drought-decimated cattle industry. From the Aboriginal Protection Property Account, which held unclaimed wages for workers’ dependents, nearly £1,700 had been diverted for capital improvements at Barambah and £950 to cover mission shortfalls. (Two years later £500 per year was routinely diverted to keep Yarrabah operating, and a further £1,426 financed the new dormitory at Barambah.)

Thus not only did the government take a substantial proportion of Indigenous people’s wages, they also used these to finance the very system designed to oppress and eradicate Indigenous peoples as distinct peoples.

269 Ibid.
270 Rosalind Kidd, above n 42, 90.
272 Rosalind Kidd, above n 29, 71.
273 Ibid.
274 Ibid 75.
275 Ibid 85.
Government theft of Indigenous peoples’ incomes was common practice. 276 Tragically this practice continued for decades and contributed to the financial ruin of many families. 277 Theft from the savings accounts of Indigenous people was also not uncommon. 278 For example ‘[a]llocation for “daily maintenance” at Fantome Island was … around eleven pence per person. For many years, and quite illegally, the department deducted *more than twice that amount* per day from the savings of patients until accounts were all but cleaned out.’ 279

Kidd reports that in 1941 an ‘investigation into the operations of the department revealed extensive negligence.’ 280 The government inspectors condemned the use of ‘interest earned on combined private savings accounts to offset government expenditure.’ 281 Bleakley chose retirement over dismissal when his fraudulent practices of dealing with Aboriginal income were investigated. 282 The position of Chief Protector was then taken up by Cornelius O’Leary. 283

Still the lawfulness of government control over Indigenous people’s wages remained an issue. Under regulation 67 of the 1972 Regulations the wages of Indigenous people could be paid to the Director or a District Officer (‘managed’). 284 The regulations allowed all wages to be paid to the Director or District Officer (reg 67(1)). It was also made illegal for an employer to pay an Aboriginal or Islander directly if their property was being managed by the department and they were given a notice that all wages were to be paid to the department (reg 67(3)). Nettheim argues that this system amounted to an ‘arbitrary deprivation of property’. 285

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276 Rosalind Kidd, above n 42.
277 Ibid 128 and between pages 84–85 for the personal testimony of several Aboriginal people whose poverty was entrenched due to these racist discriminatory government practices.
278 Rosalind Kidd, above n 29, 113 and 133–134; Rosalind Kidd, above n 42, 119.
279 Rosalind Kidd, above n 29, 113.
280 Ibid 148.
281 Ibid.
282 Ibid 149.
283 Ibid.
284 Garth Nettheim, above n 138, 68. Regulation 67 of the 1972 Regulations provided

\( (1) \) The Director, or … a District Officer may by notice in writing to an employer of an Aborigine/Islander whose property is being managed … require that the whole or such part as he may specify of the wages, allowance or other moneys due to such Aborigine/Islander by virtue of his employment be paid to the Director or District Officer.

\( (2) \) The Director or District Officer shall in such manner as he deems fit apply the money so paid for the benefit of the Aborigine/Islander or his immediate family.

\( (3) \) Any employer who fails to comply with the terms of a notice given pursuant to subsection (1) of this Regulation shall be guilty of an offence against these regulations.

Authorities also pocketed the majority of income Aboriginal people’s received by way of pensions when these were introduced.\textsuperscript{286}

Under s 37 of \textit{The Aborigines Act 1971} (Qld) management of property was meant to require the consent of the Indigenous person concerned.\textsuperscript{287} However the 1971 Act provided that persons having their property managed under previous legislation would continue to have their property managed under the 1971 legislation.\textsuperscript{288} These provisions prevented freedom of choice in relation to Indigenous people being able to manage their own incomes. They often also prevented them from even being ‘conscious of their own economic position.’\textsuperscript{289} The legislation was racist and paternalistic and treated all Indigenous people as though they were financially incompetent.\textsuperscript{290}

There were excessive levels of government control placed on Aboriginal spending so they had no freedom to deal with their earnings as they saw fit.\textsuperscript{291} The motivation behind this appears to have been to allow the government to pilfer vast sums of money to finance the reserves and missions.\textsuperscript{292} There were ‘[s]ome protectors [who] arbitrarily rejected requests by workers to spend their own money’.\textsuperscript{293} Rosalind Kidd points out that:

\begin{quote}
Workers’ access to their own savings was restricted to items which were “in keeping with the objects for which the system was established”. Although Bleakley maintained that the “nest eggs” were to sustain workers through droughts or off-seasons, this pool of private wealth was exploited by the government. Bulk trust monies were invested to produce interest, which was used to reduce state allocations for items such as rations and blankets.\textsuperscript{294}
\end{quote}

High levels of scrutiny over relatively trivial purchases marked the lives of Indigenous people living under the Act,\textsuperscript{295} grossly interfering with the right of Indigenous people to spend their own income.\textsuperscript{296} Rosalind Kidd explains how

\begin{itemize}
\item \textsuperscript{286} Rosalind Kidd, above n 29, 236–237.
\item \textsuperscript{287} Garth Nettheim, above n 138, 69.
\item \textsuperscript{288} See section 4(6) of \textit{The Aborigines Act 1971} (Qld); Garth Nettheim, above n 138, 70–71.
\item \textsuperscript{289} F.S. Stevens, \textit{Aboriginal Wages and the Trust System in Queensland}, 18 February 1969, cited in Garth Nettheim, above n 138, 128.
\item \textsuperscript{290} A trend currently paralleled by the Federal government’s quarantine of part of welfare payments to Aboriginal people in the Northern Territory – SBS, ‘Insight’, 18 March 2008, 7.30pm.
\item \textsuperscript{291} Rosalind Kidd, above n 29, 178–179.
\item \textsuperscript{292} Ibid 71 and 73.
\item \textsuperscript{293} Ibid 69.
\item \textsuperscript{294} Ibid 73.
\item \textsuperscript{295} Ibid 178–179.
\end{itemize}
Workers had to run the gauntlet of protectors even to access the portion of wages paid directly to their bank accounts. No withdrawals could be effected without permission, and frequently head office intervened to monitor transactions. One man’s spending was restricted because he bought two pairs of trousers four months after a previous clothing purchase: “see that he is not allowed to become too extravagant in [his] clothing requirements”, directed O’Leary. One couple, despite ample funds, were denied permission to visit the Brisbane Exhibition because “they really have not made much effort to curtail their withdrawals”. Another woman’s request to buy a sewing machine was made dependent upon whether she was “careful in looking after other household goods”.297

There are numerous instances of Indigenous people being dissatisfied with not having access to their income. Some Indigenous people wrote letters trying to obtain the power to manage their own financial affairs.298 One letter writer put it like this: ‘I want to get out from under the act so I can handle my own money and affairs. All my money from wages is held by the Aboriginal and Island affairs and I would like to have the right to bank and use my money in the same banks as any other person.’299 Another stated: ‘I and my wife ___ wish to have full control of all our wages and money and not have it taken and put into the Aboriginal affairs bank where we can’t get proper use like people who have money banked in public banks.’300 The evidence establishes that many people were not satisfied with the Department controlling their finances.301 They desired higher levels of personal autonomy than the government was willing to allow.

7. Oppressive ‘Disciplinary’ Regimes

Indigenous peoples were subjected to a broad range of oppressive and demeaning disciplinary laws. For example, regulation 70 of *The Aborigines’ and Torres Strait Islanders’ Regulations of 1966* (Qld) set out a list of offences based on discipline.302 This has been likened to South African apartheid legislation.303 Regulation 70 contained the following provisions:

70.(1) Under and subject to this Regulation, an assisted Aborigine on a Reserve or community, upon order of the Manager, an Aboriginal Court or the Visiting Justice, may

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296 I speak here of a moral right, as obviously there was no legal right ensuring such freedom regarding their entitlement to their wages.
300 Ibid.
302 Ibid 135.
303 Foundation for Aboriginal and Islander Research Action Ltd, above n 24, 33.
be detained under supervision in a dormitory established for male or female Aborigines as the case may be at that Reserve or community.

(2) When any assisted Aborigine on a Reserve or community –

(a) Commits an offence against discipline; or
(b) Without lawful permission or excuse leaves or escapes or attempts to leave or escape from such Reserve or community; or
(c) Is guilty of any immoral act or immoral conduct; or
(d) By his failure to carry out instructions in hygiene, sanitation or infant welfare, endangers or injures, or is likely to endanger or injure, the life or health of any person (including himself);

the Aboriginal Court or Visiting Justice may, if it or he considers such assisted Aborigine should be so detained, order in writing his detention in a dormitory.304

Garth Nettheim says that this provision with its prohibition on ‘escape’ from a reserve ‘fortified the “prison camp” impression of reserves given by the disciplinary code generally’.305 Indeed Irene Watson has likened the reserves to ‘concentration camps’.306

In addition to dormitory detention, the Bringing them home report states that ‘[p]eople were moved among the missions and settlements as punishment for failure to conform to the discipline and lifestyle demanded.’307 This often brought about separation from family and community.308 ‘It was not uncommon for both tribal and legal marriages to be fractured by administrative deportation from towns and rural areas.’309 This involved a gross interference with the family life of Indigenous peoples.

Sub-regulation (3) of regulation 70 of The Aborigines’ and Torres Strait Islanders’ Regulations of 1966 (Qld) contained finite detail as to what constituted an offence against discipline. Sub-regulation 70(3) stated:

For the purposes of this Regulation, an assisted Aborigine commits an offence against discipline if he –

(a) Fails to obey any lawful instruction of the Manager, a Councillor or of any officer of the Reserve or community or fails to comply with any provision of any Regulation or By-law under this Act; or
(b) Is idle, careless or negligent at work or, without just excuse, refuses to work or wilfully mismanages his work; or

305 Garth Nettheim, above n 138, 135.
306 Irene Watson, above n 221, 207.
307 Human Rights and Equal Opportunity Commission, above n 1, 74.
308 Ibid.
309 Rosalind Kidd, above n 29, 106.
(c) Behaves in an offensive, threatening, insolent, insulting, disorderly, obscene or indecent manner; or

(d) Wilfully damages, destroys or defaces any property (including buildings) that is not his own; or

(e) In any other way offends against discipline or good order of the Reserve or community.310

Garth Nettheim notes that ‘(3)(a) (b) (c) and (e) in particular left a large measure of discretion in the authorities,’311 particularly disturbing given the propensity of managers of reserves and missions to display ‘authoritarian tendencies’.312 That people could be subjected to serious punishment such as detention in a dormitory for trivial breaches of a rigid moral code is truly outrageous.

These regulations had a similar effect to that of earlier ‘protection’ legislation, where there were also provisions allowing for arbitrary imprisonment. For example section 21 and 25 of The Aboriginals Protection and Restriction of the Sale of Opium Acts Amendment Act of 1934 (Qld) ‘allowed for Aboriginal people to be detained in prison indefinitely if they were considered “uncontrollable”’.313 These provisions allowed for non-judicial incarceration of Indigenous people. A person was deemed ‘uncontrollable’ if they were ‘a menace to the peace, order, and proper control and management of an institution.’314

Sub-regulation (6) of regulation 70 of The Aborigines’ and Torres Strait Islanders’ Regulations of 1966 (Qld) provided ‘[a]n assisted Aborigine detained under this Regulation in a dormitory shall be discharged therefrom if at any time the Director or Manager so directs.’315 Sub-regulation (7) of regulation 70 provided:

Unless sooner discharged hereunder, at the expiration of six months after his first being detained in a dormitory and thereafter at regular six monthly intervals during such detention, the circumstances surrounding the further detention of an assisted Aborigine therein shall be reported to the Director.316

311 Garth Nettheim, above n 138, 136.
312 Ibid 34.
313 Chris Cunneen and Terry Libesman, Indigenous People and the Law in Australia (1995) 34.
314 Section 21(b) of The Aboriginals Protection and Restriction of the Sale of Opium Acts Amendment Act of 1934 (Qld), or if they had been convicted of an offence – s 21(a).
316 Ibid 344.
Basically this meant that ‘dormitory detention could be of indefinite duration, at the Manager’s or Director’s pleasure, subject only to six monthly review.’\textsuperscript{317} Garth Nettheim claims that ‘[t]his was disturbingly reminiscent of the provision in South Africa’s Criminal Procedure Amendment Act, 1965 for 180 days detention, and was even more repressive in so far as in South Africa any subsequent 180 days’ detention require[d] fresh action.’\textsuperscript{318} These provisions are disturbing on several levels. Firstly, for a period of time imprisonment on a reserve could happen without any kind of trial proving guilt.\textsuperscript{319} The order of a reserve manager was sufficient to warrant imprisonment in a dormitory. This involved a dangerous level of discretion and allowed for a serious misuse of state power.\textsuperscript{320} Secondly, many of the so-called ‘offences’ contained in the regulations were absurd in the level of control they sought to exercise over Aboriginal peoples. They sought to control very basic life decisions which should be within the power of any adult to make of their own accord. Thirdly, the ‘punishment’ meted out was disproportionate to any ‘offences’. Fourthly, it seems that there was no ‘parole board’ as such, which left the Director or Manager with a dangerous level of discretion – effectively permitting a period of indefinite incarceration – often in relation to petty or trivial matters. Little wonder that there was growing discontent over what many saw as unjust and inhumane legislation.

The 1972 regulations prohibited a great deal in terms of behaviour. Regulation 11 required ‘[e]very resident on or visitor to a Reserve or Community [to] conform to a reasonable standard of good conduct and refrain from any behaviour detrimental to the well-being of other persons.’\textsuperscript{321} Regulation 10 required residents and visitors to ‘obey all lawful instructions of the Director, District Officer, Manager, Councillors or other officers of such Reserve or Community.’\textsuperscript{322} Regulation 12 stated that ‘[e]very resident on or visitor to a Reserve or Community’ who did ‘any act subversive of good order or discipline on such Reserve or Community or who endanger[ed] the safety of a resident or any property or livestock on the

\textsuperscript{317} Garth Nettheim, above n 138, 137.
\textsuperscript{318} Ibid.
\textsuperscript{319} Under the early ‘protection’ legislation – see sections 21 and 25 of the The Aboriginals Protection and Restriction of the Sale of Opium Acts Amendment Act of 1934 (Qld). Later Aboriginal courts were established on reserves – see Regulations 47–57 of the The Aborigines' and Torres Strait Islanders’ Regulations of 1966 (Qld).
\textsuperscript{320} It clearly violates the doctrine of the separation of powers. Tony Blackshield and George Williams, \textit{Australian Constitutional Law and Theory – Commentary and Materials} (2\textsuperscript{nd} ed, 1998) 27–29.
\textsuperscript{322} Ibid.
Reserve or in the Community [was] guilty of an offence’. These provisions have been criticised for being ‘excessively broad and excessively vague’. What amounts to ‘a reasonable standard of good conduct’ can vary from person to person. The provisions therefore provided an enormous amount of discretion to reserve managers, a discretion which was abused.

Some of those appointed as managers of reserves and missions had peculiar ideas as to what was required to ‘civilise’ and ‘discipline’ Aboriginal peoples. For example, Kidd refers to the superintendent Bill MacKenzie as perpetuating a ‘culture of abuse: disobedience or brawling led to whipping, chaining to trees, imprisonment without food or water, or banishment from the mission. It was alleged MacKenzie fired shots over people’s heads and on occasion threatened them directly with the gun.’ Anthropologist Donald Thomson was appalled by MacKenzie’s punitive regime which included head shaving, flogging, chained work gangs, and confinement in a small iron shed. But it was atrocities well outside institutional “authority” which sickened him most: like watching MacKenzie round up two women and three men at gunpoint and chain them together for the 240 mile (380-kilometre) walk across the peninsula to Laura for transportation to Palm Island. This practice was not uncommon. A year previously another group were force-marched a distance of 145 miles (230 kilometres) in twenty days. They were beaten by police before they left Aurukun, flogged several times along the way including one woman who was six months pregnant, and the women were sexually assaulted.

Another reserve manager whose disciplinary regime was suspect is ‘Yarrabah’s superintendent, ex-army captain James Wilcox’ whose discipline ‘included physical assaults on residents as well as the routine punishment of gaoling on bread and water’. The list of abuses under James Wilcox was considerable, ‘women, some of them pregnant, [were] confined to their yards for months for petty breaches of discipline; people [were] threatened for requesting sheet-iron or timber for house repairs … [and] routinely threatened with eviction to other missions or to Palm Island.’

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323 Ibid.
324 Garth Nettheim, above n 138, 97.
325 Human Rights and Equal Opportunity Commission, above n 1, 73.
326 Rosalind Kidd, above n 29, 119.
327 Ibid 120–121.
329 Ibid 211.
Another form of law that detrimentally affected Indigenous peoples living on reserves or missions were the by-laws made under the ‘Protection’ legislation. 330 Although by-laws were meant to be made by Aboriginal Councils living on reserves, Nettheim states that ‘a standard set of by-laws’ were ‘produced by the Department’ which Aboriginal Councils on reserves were expected to adopt. 331 These by-laws were excessively demanding in terms of the level of scrutiny they subjected reserve residents to. Here is a selection of the 1965 by-laws:

Chapter 3 – “All able-bodied persons over the age of fifteen years residing within the Community/Reserve shall unless otherwise determined by the Manager perform such work as is directed by the Manager or person authorised by him.” …

Chapter 6.10 – “A householder shall wash and drain his garbage bin after it has been emptied by the collector. If necessary disinfection of the bin by the householder may be directed by an authorised person”. …

Chapter 8.6 – “A householder shall allow an authorised person to enter his house for the purposes of an inspection”.

Chapter 9.3 – “A person using a gate or any other opening in a fence capable of being closed shall close it unless instructed by an authorised person to leave it open”.

Chapter 10.1 – “A person swimming and bathing shall be dressed in a manner approved by the Manager”.

Chapter 13.2 – “A person shall not use any electrical goods, other than a hot water jug, electric radio, iron or razor, unless permission is first obtained from an authorised person”. …

Chapter 24.3A – “Parents shall bring up their children with love and care and shall teach them good behaviour and conduct and shall ensure their compliance with these By-laws”. 332

These by-laws reveal much about the excessive power vested in the Department officials. 333 It can be seen that the laws detail even the most trivial matters, such as disinfecting rubbish bins and wearing approved bathing suits. With every detail of their lives governed by law there was very little scope for adult Aborigines to engage in adult decision-making. The excessive regulation of behaviour sought to permanently infantilise an entire group of people.

Writing in 1973, Garth Nettheim remarked that ‘the disciplinary code for reserves appears unduly repressive’. 334 He claimed:

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330 Garth Nettheim, above n 138, 98.
331 Ibid.
333 Ibid 99.
334 Ibid 101.
Quite apart from the issues of morality and justice at stake ... it is difficult, at a pragmatic level, to contemplate a regime less calculated to achieve the objectives so often avowed by the Queensland Government for its Aboriginal and Island citizens. The administration of Aboriginal reserves in particular has in the past created, not independence, but a repressive and demoralised dependence. The laws may have been not only unjust, discriminatory and wrong, but also ineffective to achieve their declared goals.335

This appears to be a very apt assessment of the reserve system operating in Queensland. The so-called 'protection' laws 'in practice provided for the control and subjugation of the Aboriginal people.'336 The government approach of assimilation ‘envisaged the final surrender of Aboriginal territory and culture with the absorption of the Aboriginal people into the Australian population.’337 The oppressive disciplinary regime operating on reserves was designed to facilitate this.338

8. Law – an elaborate system facilitating denigrating control of Indigenous peoples

An examination of these laws in operation in Queensland reveals an elaborate system of denigrating control that was forced upon Indigenous peoples. In 1938 the Indigenous activists Ferguson and Patten wrote a ‘manifesto’ commemorating 150 years of British occupation in Australia which is a very powerful critique of the so-called ‘protection’ laws:

You are the New Australians, but we are the Old Australians. We have in our arteries the blood of the Original Australians, who have lived in this land for many thousands of years. You came here only recently, and you took our land away from us by force. You have almost exterminated our people, but there are enough of us remaining to expose the humbug of your claim, as white Australians, to be a civilised, progressive, kindly and humane nation. By your cruelty and callousness towards the Aborigines you stand condemned in the eyes of the civilised world ... If you would openly admit that the purpose of your Aborigines Legislation has been, and now is, to exterminate the Aborigines completely so that not a trace of them or of their descendents remains, we could describe you as brutal, but honest. But you dare not admit openly that what you hope and wish is for our death! You hypothetically claim that you are trying to 'protect' us; but your modern policy of 'protection' (so-called) is killing us off just as surely as the pioneer policy of giving us poisoned damper and shooting us down like dingoes!339

Professor Judy Atkinson also points out that law has been used to facilitate violence towards Indigenous peoples through what it protects as lawful and what it fails to protect. She states

335 Ibid 101–102.
336 Ibid Appendix 1 120.
337 Ibid Appendix 1 120–121.
338 This ties in with what Foucault has to say about the disciplinary zeal of modern society placing pressure on people through ‘mechanisms of domination’. Michel Foucault, Power/Knowledge: Selected Interviews and Other Writings 1972–1977 (ed Colin Gordon, 1980) 106.
that ‘[i]n spite of the fact that colonisers have disregarded the rights of Indigenous peoples, and have used force to dominate, intimidate, subdue, violate, injure, destroy and kill, they do not consider their actions, either morally or under their law, to be violence.’ This then is the power of law – it can effectively permit violence against marginalised groups who are deemed to be undesirable by government. It does so with those engaged in such processes being unaccountable for the human misery they cause. After all, it is ‘lawful’.

The tendency of law to engage in violence through legitimising oppression has been theorised in Jacques Derrida’s ‘Force of Law’. Derrida theorises that law is linked to force, arguing that ‘law is always an authorized force, a force that justifies itself or is justified in applying itself, even if this justification may be judged from elsewhere to be unjust or unjustifiable’. He points out colonial societies, in particular, are founded on violence. Derrida claims ‘there is no law without enforceability, and no applicability or enforceability of the law without force, whether this force be direct or indirect, physical or symbolic, exterior or interior, brutal or subtly discursive and hermeneutic, coercive or regulative, and so forth.’

In colonial societies each of these violent forms is present at some point. Derrida also refers to the ‘originary violence’ which first establishes lawful authority. This ‘originary violence’ can be seen in the colonial legal system of Australia which established itself through physical acts of aggression and now continues to legitimise such acts through what may be described as legitimating or ‘conserving violence’. Derrida explains that ‘there is the distinction between two kinds of violence in law … the founding violence, the one that institutes and positions law … and the violence that conserves, the one that maintains, confirms, insures the permanence and enforceability of law.’

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340 Judy Atkinson, above n 45, 11.
342 Ibid 5.
344 Jacques Derrida, above n 341, 6.
345 Ibid.
346 Ibid.
347 Ibid 55.
348 Ibid 31.
The laws in operation throughout Queensland in the late 1800s to the late 1900s have been part of what may be described as ‘conserving violence’—the violence which conserves or maintains the original violence of colonisation. Yet as Derrida points out, ‘[t]he parliaments live in forgetfulness of the violence from which they are born.’ Instead of focusing on the ‘originary violence’ and ‘conserving violence’ brought about through the theft of the Australian continent through the discredited doctrine of terra nullius and later the operation of Australian parliaments, in recent years the government has sought to focus on violence within Indigenous communities, portraying such violence as an inherent aspect of Indigenous culture. However, as Irene Watson argues, the dysfunctional behaviour seen in those Indigenous communities cannot be separated from ‘[t]he violent foundations of the colonial project.’ This issue will be explored in further detail in Chapter Five.

E. An Australian Genocide

The term ‘genocide’ was first formulated by Raphael Lemkin in 1944. He described genocide in the following terms:

*genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups. Genocide is directed against the national group as an entity, and the actions involved are directed against individuals belonging to such groups … not in their individual capacity, but as members of the national group.*

Ibid 55.

Ibid 47.

Ibid 6.

Ibid 55.


This is a far broader conception of genocide than that which was adopted under the Genocide Convention.\footnote{United Nations, \textit{Convention on the Prevention and Punishment of the Crime of Genocide} (1948) <http://www.hrweb.org/legal/genocide.html> at 26 November 2009.} According to this formulation ‘[g]enocide proceeded in two phases: “destruction of the national pattern of the oppressed group” and then “the imposition of the national pattern of the oppressor’’.\footnote{Raphael Lemkin cited in Tony Barta, above n 356, 154.} Writing in 1985 Tony Barta argued:

\begin{quote}
the processes of colonization and economic expansion involved the virtual wiping out of the Aboriginal population. If ever a people has had to sustain an assault on its existence of the kind Lemkin described it would seem to have been over the last two hundred years in Australia.\footnote{Tony Barta, above n 356, 154.}
\end{quote}

As mentioned earlier, Article 2 of the 1948 \textit{Convention on the Prevention and Punishment of the Crime of Genocide} sets out the following definition of genocide:

\begin{quote}
genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
\begin{enumerate}
\item Killing members of the group;
\item Causing serious bodily or mental harm to members of the group;
\item Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
\item Imposing measures intended to prevent births within the group;
\item Forcibly transferring children of the group to another group.\footnote{\textit{Convention on the Prevention and Punishment of the Crime of Genocide}, above n 358.}
\end{enumerate}
\end{quote}

There is a strong argument, with which I agree, that Indigenous peoples have been subjected to genocide in Australia.\footnote{Human Rights and Equal Opportunity Commission, above n 1, 271–275; Matthew Storey, ‘\textit{Kruger v The Commonwealth}: Does Genocide Require Malice’ (1998) UNSWLJ 17, <http://www.austlii.edu.au/au/journals/UNSWLJ/1998/17.html> at 26 November 2009, 5; Colin Tatz, above n 7, 97–99; Irene Watson, ‘Law and Indigenous Peoples: the impact of colonialism on Indigenous cultures’ (1996) 14(1) \textit{Law in Context} 107, 108; Irene Watson, above n 353, 254 and 258 and 263; Irene Watson, above n 1, 48; Irene Watson, above n 221, 209; Tony Barta, above n 356, 157; Bruce Elder, above n 1, 245; Alison Palmer, above n 38, 1–3; Greta Bird, above n 226, 10 and 40; David Hollinsworth, above n 49, 187–188.} For example, all states engaged in policies of forcible child removal, which constitutes genocide under Article 2(e) where it occurs with the requisite ‘intent to destroy’. The \textit{Bringing them home} report explains that it is clear ‘the predominant aim of Indigenous child removals was the absorption or assimilation of the children into the wider, non-Indigenous, community so that their unique cultural values and ethnic identities would disappear, giving way to models of Western culture.’\footnote{Human Rights and Equal Opportunity Commission, above n 1, 272–273.} The \textit{Bringing them home} report concluded that this action on the part of government ‘could properly be labeled
“genocidal”.364 They considered this to have been the case under the *Convention on the Prevention and Punishment of the Crime of Genocide* since 1946 and also under international customary law which prohibited genocide prior to that time.365

Charges of genocide have also been made concerning the massacres that occurred on the frontier. In relation to Queensland Reynolds states ‘the colonial governments had decided upon a policy of extermination – of what since 1946 we have known as genocide.’366 Tony Barta refers to ‘the “kill the breeders” slogans of Queensland’.367 He states that:

> the prospect of genocide – “the most certain method of getting rid of the race” – was openly canvassed in the initial confrontations with the Aborigines, and the willingness to proceed down the path of genocide was fundamental to the establishment of the social order … The men who established our economy, our society, our political system knew they would have to kill for it, and they were prepared in that killing to envisage the disappearance of the prior inhabitants altogether.368

Similarly, the renowned genocide scholar Colin Tatz also points out that ‘Aborigines were killed, were the victims of bodily and mental harm, had birth-control measures imposed upon them and had their children forcibly transferred because of who they were.’369 Tatz strongly argues that:

> Australia is guilty of at least three … acts of genocide: first, the essentially private genocide, the physical killing committed by settlers and rogue police officers in the nineteenth century, while the state, in the form of colonial authorities, stood silently by (for the most part); second, the twentieth-century attempts to achieve the biological disappearance of those deemed “half-caste” Aborigines, both by intermarriage and by the official state policy and practice of forcibly transferring children from one group to another with the express intention that they cease being Aboriginal; third, a prima facie case that Australia’s actions to protect Aborigines in fact caused them serious bodily and/or mental harm.370

The *Convention on the Prevention and Punishment of the Crime of Genocide* requires that the activities be carried out ‘with intent to destroy’.371 Tatz observes that there seems to be some confusion over the difference between intent and motive in relation to what has happened in Australia with the removal of Indigenous children. He explains ‘[m]otive is the personal or

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364 Ibid 275.
366 Henry Reynolds, above n 36, 137.
367 Tony Barta, above n 356, 158.
368 Ibid 157.
369 Colin Tatz, above n 7, 95.
370 Ibid 73.
internal reason that guides one’s actions … intent is the basic volition required to perform a deliberate action or seek a specific result.\textsuperscript{372} He rightly asserts ‘[i]t matters not that Australian motives were “good”, “pure” or “Samaritan”; what matters is that the Genocide Convention deals with intent, not motivation, and child removers clearly intended that these children would cease to be Aboriginal.’\textsuperscript{373}

Some Australians involved in the process of child removal seem to be concerned that those removed are not ‘grateful’ for the good motivations of those involved in the removal process,\textsuperscript{374} without looking at the issue of intent or the actual genocidal consequences of their actions. They cannot see past their own motivations and recognise the harm caused by their actions. They seem to be incapable of realising that it is possible for “a perverted collective morality” to cause harm.\textsuperscript{375} Tatz contends ‘[n]owhere does the Convention implicitly or explicitly rule out intent with \textit{bona fides}, good faith, “for their own good” or “in their best interests”’.\textsuperscript{376} It is important to understand that the legislation which purported to be protective had detrimental effects on Indigenous people.\textsuperscript{377} This was so regardless of the stated intention behind it.

In recent years denialists like Windschuttle have argued that genocide did not occur in Australia because not all Indigenous people were annihilated through colonisation.\textsuperscript{378} However, as Colin Tatz explains:

\begin{quote}
the essence of the crime … was acting with the intention of destroying the group, not the extent to which that intention was achieved. The forcible removals were intended to “absorb”, “merge”, “assimilate” the children, “so that Aborigines as a distinct group would disappear”. That such actions by perpetrators were in their eyes “in the best interests of the children is irrelevant to a finding that their actions were genocidal”.\textsuperscript{379}
\end{quote}

Similarly, Matthew Storey points out that ‘[g]enocide does not require malice; it can be (misguidedly) committed “in the interests of” a protected population.’\textsuperscript{380} Much of the official

\textsuperscript{372} Colin Tatz, above n 7, 140.
\textsuperscript{373} Ibid.
\textsuperscript{374} See Peter Howson, above n 16, 11; Reginald Marsh, above n 16, 17.
\textsuperscript{375} Barbara Harff cited in Colin Tatz, above n 7, 97.
\textsuperscript{376} Colin Tatz, above n 7, 98–99.
\textsuperscript{377} Ibid 98.
\textsuperscript{379} Colin Tatz, above n 7, 98; and see Human Rights and Equal Opportunity Commission, above n 1, 272.
\textsuperscript{380} Matthew Storey, above n 362, 4.
literature makes it clear that the intention was in part that Indigenous people who were subjected to removal policies would *benefit* from such government intervention.\(^{381}\) However as Starkman explains, ‘‘“[t]he reasons for perpetrating the crime and the ultimate purpose of the deed are irrelevant. The crime of genocide is committed whenever the intentional destruction of a protected group takes place.”’\(^{382}\)

Matthew Storey also suggests that ‘while there must be … destructive intent, it does not have to be the sole, or even predominant, motive.’\(^{383}\) He concludes:

> that a program that was designed to benefit the children of a racial group by removing them from that group and eliminating from those children the features that distinguish the group as a group constituted genocide, … this is so even where an aspect of the removal program was the (intended) substantial improvement in the material condition of the children.\(^{384}\)

Alison Palmer, who has thoroughly researched colonial genocide, also examines how the issue of intention can be measured. She suggests that intention may refer to the existence of state policy where the destruction of a group is the conscious choice of policy makers. As such, the destruction is structural and systematic, and is usually instrumental to other ends. Intent is also demonstrated when the state makes no effort to stop the unintended genocidal consequences of action known to be taking place within its geo-political boundaries. Policy choice can be measured by statements from state representatives, by the operation of state policy – including continued or increased involvement in actions which have genocidal consequences – or by state ideology.\(^{385}\)

These convincing arguments have implications for a finding of genocide being committed against Indigenous peoples in Australia. They make it clear that genocide can in fact be committed where a state refuses to stop the killings of a group, as occurred on the frontier. It also implicates the government in genocide for funding the Native Police force and providing them with a legal and administrative framework that facilitated genocide. Likewise in relation to the Stolen Generations of Indigenous children, the evidence of state policy suggests that the intention behind such removals was that Indigenous peoples would cease to exist as distinct peoples, a clearly genocidal aim.\(^{386}\)

\(^{381}\) Human Rights and Equal Opportunity Commission, above n 1, 274.


\(^{383}\) Matthew Storey, above n 362, 5.

\(^{384}\) Ibid.

\(^{385}\) Alison Palmer, above n 38, 28, references omitted.
Alison Palmer also points out that ‘it is useful to distinguish between explicit and implicit intention.’\textsuperscript{387} She states that with explicit intention ‘the perpetrator intention can be determined from overt policy statements or from direct involvement in the actions of destruction.’\textsuperscript{388} With implicit intention

the perpetrator is less actively involved … but silently condones the destruction. In the absence of policy statements, implicit intention can be measured by determining the extent or absence of measures taken by the perpetrator to stop and prevent the destruction once it is known about, and by the provision or lack of financial support for the destruction.\textsuperscript{389}

On the basis of Palmer’s compelling analysis it can be argued that the genocide which has occurred in Australia against Indigenous peoples was quite likely to be \textit{explicitly intended}, or at the very least \textit{implicitly intended}. It therefore fulfils the criteria in the Genocide Convention.\textsuperscript{390} However genocide is not a crime under Australian law.

There is substantial evidence that genocide has been committed against Indigenous peoples in Australia. Yet despite this overwhelming evidence the Australian Federal and State governments still refuse to adequately address this issue. Alison Palmer concludes that the ‘role of the Queensland government was crucial for the genocide of Aborigines.’\textsuperscript{391} The Queensland government encouraged ‘settler violence under the guise of self-protection’ and maintained and funded the Native Police Corps who carried out frontier violence.\textsuperscript{392} ‘As such, the Queensland government actively condoned the ongoing slaughter, and made no attempts to bring it to an end.’\textsuperscript{393} Economic motives underpinned this genocide.\textsuperscript{394} The colonial society clearly saw the eradication of Indigenous peoples as economically beneficial.\textsuperscript{395} The decimation of Indigenous people paved the way for the economic ‘development’ of a new nation.\textsuperscript{396}

\begin{thebibliography}{99}
\bibitem{386} Colin Tatz, above n 7, 89; Morgan Blum, above n 191, 127.
\bibitem{387} Alison Palmer, above n 38, 194.
\bibitem{388} Ibid.
\bibitem{389} Ibid.
\bibitem{390} Convention on the Prevention and Punishment of the Crime of Genocide, above n 358.
\bibitem{391} Alison Palmer, above n 38, 63.
\bibitem{392} Ibid 193.
\bibitem{393} Ibid.
\bibitem{394} Ibid 197; Greta Bird, above n 226, 10.
\bibitem{395} Alison Palmer, above n 38, 197.
\bibitem{396} Greta Bird, above n 226, 10.
\end{thebibliography}
F. Economic Reasons for Racism

Colonialism is grounded in an ‘exploitative economic motive’. 397 Indeed Edward Said has highlighted that colonisers looked upon colonies as little more than outposts of England who existed to provide what colonists desired, mere conduits for the provision of desired goods and services. 398 Like all colonial states, Queensland had a financial motivation underlying its treatment of Indigenous peoples. Each emerging colony experienced economic pressures and contained those by exploiting a hunger for prosperity. 399 Palmer maintains there were ‘large numbers of miners and pastoralists who were prepared to destroy any obstacle to satisfy their material greed.’ 400 The economic links with racism should not be overlooked. 401 As Richard Delgado states, ‘racism can be seen as a force used by the majority to preserve an economically advantageous position for themselves.’ 402 It must be remembered that racism provided an ideological justification for much labour to be done for little or no pay. 403 Exploitative economic relations were considered desirable for the developing capitalist economy. As David Hollinsworth explains ‘[t]he development of capitalism and the emergence of European nationalism depended fundamentally on the labour of non-Europeans.’ 404 Indeed the ‘development’ of a capitalist economy required seeing Indigenous peoples as ‘underdeveloped.’ 405 As Hollinsworth states:

To the majority of settlers, Aborigines were simply an impediment to taking up the land. They were often considered as part of the flora and fauna, like dingoes and emus – something to be cleared from the land, to allow farming and grazing to develop in a safe, tidy and profitable environment. 406

The economic profits made by racism need to be remembered when assessing claims that the ‘protection’ legislation was for the welfare of Indigenous peoples. Indigenous children were regularly forced to work as domestics and farm labourers. 407 The unpaid or underpaid labour
provided by Indigenous peoples (both from adults and children) was considered ‘essential for the cost-effectiveness’ of the colony.\textsuperscript{408} Indigenous people regularly worked for nothing or next to nothing, which greatly assisted the profit margins of the colonial project.\textsuperscript{409} Efforts to recover the stolen wages of Indigenous workers have met with limited success, with several claimants only recovering $2,000–$7,000 for as much as a lifetime of hard labour.\textsuperscript{410} Kidd reports that few Indigenous people have been able to ‘understand why $2000 and $4000 payments could be considered a “generous” settlement for decades of missing money’.\textsuperscript{411} The Queensland ‘government ultimately paid almost $40 million in compensation on under-award wages but the full amount withheld from workers during the decade to 1986 was over $180 million’.\textsuperscript{412} This means the government continues to profit vastly from the exploitation of Indigenous workers. Also many claims have been considered untenable due to conveniently ‘lost’ departmental records.\textsuperscript{413} A sum of $9.3 million remains in the ‘Aboriginal Welfare Fund’, however ‘many in the Aboriginal community are deeply suspicious that the residue does not represent the true value.’\textsuperscript{414} Indigenous victims of these racist discriminatory government laws and policies continue to pursue wage justice from the Queensland government in order to get back what was stolen from them.

\textbf{G. Stolen Generations of Indigenous Children}

Tragically wages were not the only thing stolen from Indigenous peoples. From the earliest period of European colonisation Indigenous children were ‘forcibly separated from their families’ and ‘kidnapped and exploited for their labour’.\textsuperscript{415} They were captured and forced into lives of virtual slavery.\textsuperscript{416} Henry Reynolds observes that:

\begin{quote}
The practice of taking Aboriginal children began in the earliest years of settlement and was engaged in by members of the colonial elite – governors and clerics and magistrates – and by poorer settlers as well, who could use black children as personal servants, an experience never before available to them.\textsuperscript{417}
\end{quote}

\textsuperscript{408} Rosalind Kidd, above n 29, 23; Rosalind Kidd, above n 42, Chapters Four and Five.
\textsuperscript{409} For a detailed analysis of this issue see Rosalind Kidd, above n 42, Chapters Four and Five.
\textsuperscript{410} Ibid 3–4.
\textsuperscript{411} Ibid 15.
\textsuperscript{412} Ibid 20.
\textsuperscript{413} Ibid Chapter One and 166.
\textsuperscript{414} Ibid 129.
\textsuperscript{415} Human Rights and Equal Opportunity Commission, above n 1, 27.
\textsuperscript{416} Ibid.
\textsuperscript{417}
Such children were bought and sold.\textsuperscript{418} Thus,

A north Queensland squatter wrote with concern to the Attorney-General in 1869 about the frequent stealing of children. He instanced the case of two men who had stolen several children and taken them to the goldfields to sell. He feared the practice would continue because it paid so well.\textsuperscript{419}

The practice of separation of children from their families to carry out labour was not uncommon during the colonial era, be they European or non-European.\textsuperscript{420} Children from poorer classes were often required to perform adult work loads.\textsuperscript{421} However there was an added element to the removal of Indigenous children. ‘In contrast with the removal of non-Indigenous children, proof of “neglect” was not always required before an Indigenous child could be removed. Their Aboriginality would suffice.’\textsuperscript{422} With the enactment of ‘protection’ legislation the removal of Indigenous children became ‘bureaucratised and dominated by government departments.’\textsuperscript{423} While this reduced some of the dangers posed by frontier brutality, it facilitated new threats ‘from police officers and officials.’\textsuperscript{424} Removals of Indigenous children were forced in a very literal sense and backed up by State legislation which removed the rights of parents.\textsuperscript{425} It was also carried out on the basis of assumptions of racial inferiority, being greatly influenced by Social Darwinism.\textsuperscript{426} According to ‘the language of social Darwinism … the future of Aboriginal people was inevitably doomed’ and the role of the government was to ‘“smooth the dying pillow”’.\textsuperscript{427} As a result it was ‘considered acceptable, and indeed quite normal, to remove Aboriginal children from their extended families’.\textsuperscript{428}

\textsuperscript{417} Henry Reynolds, above n 36, 161.
\textsuperscript{418} Ibid.
\textsuperscript{419} Ibid.
\textsuperscript{421} Rosalind Kidd, above n 29, 20–22; Maureen Perkins, above n 420, 173; Shirleene Robinson, above n 420, 1–2.
\textsuperscript{422} Human Rights and Equal Opportunity Commission, above n 1, 11.
\textsuperscript{423} Henry Reynolds, above n 36, 162.
\textsuperscript{424} Ibid 163.
\textsuperscript{425} Bruce Elder, above n 1, 244–245.
\textsuperscript{426} Human Rights and Equal Opportunity Commission, above n 1, 28.
\textsuperscript{427} Ibid 28.
\textsuperscript{428} Henry Reynolds, above n 36, 162.
Those engaged in the removal process chose to see it as an act of great benevolence. Henry Reynolds explains that although colonists who received Indigenous children benefited in numerous ways, ‘it was always possible to present it as an act of benevolence that would benefit the child, who was being raised up to a higher level of civilisation.’ However some colonists had peculiar notions about what this ‘civilising’ process required. ‘Strict discipline and hard work without pay were clearly seen by many people who “owned” Aboriginal children as part of their tutelage in civilisation.’ Despite this the removal of Indigenous children ‘was regarded as being intrinsically and unquestionably a good thing, and absorption into the world of the settlers a benefit bestowed.’

The ‘benefit’ to accrue to Indigenous children from forced removal was conditional at best. The phrase ‘assimilation factories’ is a very accurate description for what occurred at the institutions where Indigenous children were impounded. Children who were removed underwent a process of indoctrination in order to try to convince them to develop a European work ethic and European religious beliefs. Both of these factors were necessary to facilitate capitalist wealth creation and exercise control over Indigenous populations. Whilst some involved in the removal process may have been genuinely motivated by religious zeal, Christianity was used in large measure to justify the power hierarchies inherent in European colonisation.

So great was the belief amongst Europeans that their culture and religion was superior that any degree of suffering caused by the policies of forcible removal was considered to be unquestioningly for the benefit of Indigenous children:

There was the … conviction among white Australians that children would benefit as a consequence of removal, that it was better done at an early age and better still if all contact with kin and culture was permanently severed. So powerful was this conviction and so deeply entrenched in European thinking that many of those involved in removing children were genuinely convinced that the project was a humane one enlivened by good intentions, regardless of how distressing the execution might be.

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429 Ibid.
430 Ibid.
431 Ibid.
432 Colin Tatz, above n 7, 165.
433 Human Rights and Equal Opportunity Commission, above n 1, 27 and 29.
434 Bruce Elder, above n 1, 245–246.
435 Henry Reynolds, above n 36, 163.
Indeed there was an assumption that Aborigines were a peculiarly ‘primitive’ people and as such that any emotional distress experienced as a result of forcible removal was irrelevant. Despite the obvious emotional turmoil such removals caused, there seemed to be a popular belief that Aboriginal mothers would only suffer ‘momentary grief’ and that they would soon forget about their children who were taken from them. For example, ‘[i]n 1909, C.F. Gale, the Chief Protector in Western Australia, wrote: “I would not hesitate for one moment to separate any half-caste from its Aboriginal mother, no matter how frantic her momentary grief might be at the time. They soon forget their offspring.”’

Removal of Aboriginal children from their families and communities had much to do with the assimilation policy driving the practices of the government and their collective desire to remove all traces of Aboriginality. Processes were put into place to ensure that this was carried out on all levels:

As 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. Apart from satisfying a demand for cheap servants, work increasingly eschewed by non-Indigenous females, it was thought that the long hours and exhausting work would curb the sexual promiscuity attributed to them by non-Indigenous people.

Some people have suggested that the experience of being removed was for the betterment of the Indigenous children concerned. They point to the supposed advancements of civilisation offered to those removed and consider these benefits to far outweigh the suffering of being removed from families and communities. However ‘[m]any Aborigines removed from their families complained of harsh conditions, denial of parental contact and cultural heritage, harsh punishment and physical and sexual abuse.’ Tatz aptly points out:

436 David Hollinsworth, above n 49, 100.
438 Ibid.
439 Ibid.
441 Ibid 31. The idea that people of colour are ‘promiscuous by nature’ has been common in countries where white people hold the power, Angela Harris, ‘Race and Essentialism in Feminist Legal Theory’ (1990) Stanford Law Review 581, 599; Peter Fitzpatrick, above n 91, 19.
442 Peter Howson, above n 16; Reginald Marsh, above n 16. For a critique of this view see Henry Reynolds, above n 36, 162.
443 Peter Howson, above n 16; Reginald Marsh, above n 16.
there was little that was wonderful in the experience; there was much to remember about physical brutality and sexual abuse; and, for the majority, the homes were scarcely homes, especially in the light of the then healthy Aboriginal practices of kinship, family reciprocity and child rearing in extended families.445

It is fair to argue that ‘the views of the inmates remain better testimony, certainly better than the clamours of Australian denialists that “nothing happened” or “nothing but good happened” in these institutions.’446

It is apparent that the removal of Aboriginal children could only take place with the denigration of Aboriginal motherhood, by painting a picture of incompetence on the part of Aboriginal mothers. Hollinsworth explains the views popular at the time which involved stereotypical conceptions of motherhood which were binary opposites and totally dependent on the ‘race’ of the mother:

Non-Aboriginal motherhood was ideologically valorised, so reports spoke of the removal of these children ‘from the blacks’ camp’ which carried powerful associations with filth, disease and degradation … Within this ideology, Aboriginal women were inevitably unfit mothers as they could never be “fit” to raise children whose “white blood” made them superior.447

Given that Aboriginal mothers were depicted as being unworthy to parent even their own children, it is surprising that so many white children were placed in the care of Aboriginal women and girls who were forced to work as nannies and domestic servants in white households. This is extremely ironic, and yet such irony seems to have been lost on those orchestrating removals at the time. The hypocrisy of official policies concerning the alleged unsuitable nature of Aboriginal women to care for children can be clearly seen with hindsight. The blatant racism of such policies is laid bare.

The tragic characteristics of the removal era have been summarised by Bruce Elder as follows:

It is a story of Welfare Boards, of segregation, of so-called “assimilation” policies which did not work, of assumptions about the benefits that would flow from such policies, of police forcibly removing children, of mothers fleeing into the bush with their babies, of the virtual slavery of the young girls who were sent out to rural properties to work as maids and nannies, of the children being treated like cattle (“We was bought like a market. We was all lined up in white dresses, and they’d come round and pick you out

445 Colin Tatz, above n 7, 93.
446 Colin Tatz, above n 7, 94.
447 David Hollinsworth, above n 49, 127.
like you was for sale”), of well-meaning church groups with theological rigidity and missionary zeal using the laws to try and win converts, of sadists who beat and punished their young charges, of religious people who blindly refused to believe the stories they were told by their young charges, and, more than anything else, of a deep racism which, by the definition of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, was unambiguously genocidal.448

Yet despite the growing body of evidence that generations of Indigenous children were stolen from their families and communities, the Federal government and most State governments have failed to adequately address this issue.449 Throughout the Howard regime ‘the members of the stolen generations were constructed as malcontents, themselves to blame for present circumstances’450 and members of the Stolen Generations who sought to litigate their claims against the government in order to obtain some kind of acknowledgment of wrongdoing and compensation were given short shrift.451 Thus far only the Tasmanian government has facilitated compensation for members of the Stolen Generations.452

Bruce Elder, above n 1, 245.

Although each government has issued an apology to members of the stolen generation, compensation has not been forthcoming (except in Tasmania) – Human Rights and Equal Opportunity Commission, above n 8, 17 and 27; Prime Minister Kevin Rudd, Apology to Australia’s Indigenous Peoples (13 February 2008) <www.aph.gov.au/house/rudd_speech.pdf> at 26 November 2009. There are also problems with a disproportionate number of Indigenous children experiencing contemporary removals from their families – Human Rights and Equal Opportunity Commission, above n 8, 425.


This issue of compensation will be discussed further in Chapter Six. Human Rights and Equal Opportunity Commission, above n 8, 27. As Eddie Thomas, a successful claimant under the Tasmanian stolen generations compensation scheme stated, the compensation offered by the Tasmanian government ‘has helped a lot of people to come to terms with life, it has given them justice and something to build a new life around. Money cannot erase all the sadness, but it will help us to now enjoy our lives and to help our families.’ Human Rights and Equal Opportunity Commission, above n 8, 29.
Chapter 3 – A Haunting History – Persecution and Dehumanisation of Aboriginal Peoples in Queensland

1. The white saviour complex

The removal process and the general pattern of discriminatory treatment directed towards Indigenous peoples was seen as justifiable on the basis of the white saviour complex. According to this perspective Indigenous peoples were seen as so primitive that any kind of interaction they were to have with white colonial society was deemed beneficial. It was part of what Greta Bird has described as the ‘civilizing mission’. It saw ‘the true and the proper in what it was to be Christian or civilized’. Europeans interacting with Indigenous peoples saw their interference as a ‘benevolent civilizing mission’ which would ‘rectify’ the presumed ‘deficiency’ of those they deemed less civilised. This involved ‘taming’ the ‘wild’ dispositions of those who Europeans chose to define as savages. This ‘civilizing mission’ involved both scientific and religious idealism.

The scientific idealism was interconnected with the project of modernity. In the Enlightenment era scientific rationality came to be seen as the ultimate pinnacle of knowledge. Enlightenment notions of ‘progress’ and ‘science’ were used to justify the domination of those considered to be racially inferior. The rhetoric was that of ‘civilising’ the ‘savages’, of ‘saving’ the ‘barbarians’, of ‘enlightening’ those living in ‘darkness’. As Winton Higgins states:

The European colonisers excused their activities by reference to the myth that they were not just different from, and militarily superior to, the ethnic groups and races they were destroying. They were, they claimed, vanguard cultures on “civilising” missions. They represented the future of humanity as a whole, and other cultures had no right to resist, or indeed to exist. Ideologues who promoted this aspect of the narrative developed race theory to bolster it.

453 Greta Bird, above n 226, 5.
454 Peter Fitzpatrick, above n 91, 11.
455 Ibid 17–18
457 Greta Bird, above n 226, 5.
459 Ibid.
460 Raymond Evans, Kay Saunders and Kathryn Cronin, above n 26, 70.
462 Winton Higgins, above n 461, 58.
Greta Bird explains how the ‘civilizing mission’ was intricately connected to power plays involving colonial domination and assumptions of white superiority.\(^{463}\) This process envisioned that Indigenous peoples would forever provide lowly labour.\(^{464}\) Bird states that the ‘civilizing mission’ aimed to make black people as much like the white as possible, but within a framework of dominance and subservience, with the Aborigine in the subservient role of the stockman or domestic servant under white employers and with black children being taken from Aboriginal families in order that they might be given the “blessings” of a civilized upbringing.\(^{465}\)

The ‘conversion’ to European standards\(^{466}\) was therefore undertaken with a demeaning role in mind for Indigenous peoples. There was an expectation that Indigenous peoples would simply accept their subordination as lesser beings. Yet as Peter Fitzpatrick so accurately states, the European ‘gift of civilization … was … a “grim present”’.\(^{467}\) The laws and policies stemming from this ‘gift’ were very much designed to foster a sense of inadequacy and inferiority.

Misguided religious zeal also had a significant role in the ‘civilizing mission’\(^{468}\) directed towards Indigenous peoples. Religious underpinnings had an important part to play in the colonisation of Australia.\(^{469}\) It was seen as being connected to fulfilling God’s ‘mission’ for the European man. Henry Reynolds explains that ‘[t]he most popular justification for the settlement of Australia during the first part of the 19th century was to refer to the Bible and to God’s instructions to humanity in the Old Testament to go forth and multiply and subdue the earth – or as the colonists argued – engage in agriculture.’\(^{470}\) Thus religious idealism provided a convenient justification for the violent takeover of land. Indeed those who engaged in this process could even convince themselves that they were doing ‘God’s work’, as ‘theological justifications’ were employed to support the idea of Aboriginal inferiority.\(^{471}\) Henry Reynolds points out:

> Practically all 19th century missionaries saw their task as not only the conversion of their flock but also their “civilization”. In practical terms that meant imposing all aspects of

\(^{464}\) Greta Bird, above n 226, 5 and 48.
\(^{465}\) Ibid 5.
\(^{466}\) Peter Fitzpatrick, above n 91, 13.
\(^{467}\) Ibid 19.
\(^{468}\) Greta Bird, above n 226, 5.
\(^{469}\) Raymond Evans, Kay Saunders and Kathryn Cronin, above n 26, 69.
\(^{470}\) Henry Reynolds, above n 1, 5.
\(^{471}\) Raymond Evans, Kay Saunders and Kathryn Cronin, above n 26, 69.
Western culture and at the same time suppressing Aboriginal customs and ceremonies. They were proud of their moral tyranny and wrote extensively of their triumph over “savagery” and “heathenism”.  

The compulsory religious instruction in Christianity on missions and reserves was carried out in the belief that spiritual salvation could be offered to the damned in exchange for their own land, culture, and religion. Although the church was able to facilitate the physical survival of some groups, saving ‘some groups from total extinction’, they also ‘took a part in the destruction of Aboriginal culture and institutions’. The religious rhetoric of ‘saving’ the ‘natives’ from being ‘eternally damned’ was used to justify some kind of trade off for the transfer of the wealth of the entire continent and the complete control of Indigenous peoples lives. It seems that there was a transaction being carried out where eternal salvation in heaven was offered in exchange for the entire continent – all the land, vegetation, minerals, animals and oceans. Bird highlights that the ‘civilizing mission’ was ‘an ideological camouflage for the destruction of the Aborigines’ political structure and economic base and legitimated the appropriation of their land’. Religious rhetoric was a key part of this process. As Reynolds concludes ‘[u]nfortunately, in the history of Australia, the Christian religion has been used as a means to help the settlers achieve their goals.’ However ‘[a]s the [I]ndigenous “remnant” was removed to reserves, many felt badly cheated by authorities who believed that “a blanket a year” was fair exchange for a continent.’ Yet despite ‘the moral bankruptcy of the “civilizing mission”’, it has played a significant role in justifying colonial laws and policies. It was particularly instrumental in the development of the reserve system.

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472 Henry Reynolds, above n 1, 160.
474 David Hollinsworth, above n 49, 68; Greta Bird, above n 226, 10.
475 David Hollinsworth, above n 49, 112.
476 Greta Bird, above n 226, 47.
478 David Hollinsworth, above n 49, 112.
479 Greta Bird, above n 226, 9.
480 Ibid 28.
H. Life on the Reserves

Due to the need to free up land for colonial wealth extraction, Indigenous peoples were hunted off their traditional territories.\textsuperscript{481} They were rapidly diminishing in numbers which caused concern in some quarters.\textsuperscript{482} These combined circumstances gave birth to the reserve system, a system with so-called ‘Protectors’ for Indigenous peoples.\textsuperscript{483} Indigenous peoples then experienced ‘pitiable acts of mercy as missions and ration stations were temporarily established to comfort the dispossessed race.’\textsuperscript{484} ‘Unable to prevent Europeans abusing and exploiting [I]ndigenous people, where possible the authorities chose the easier path of confining them to the margins of settler society’.\textsuperscript{485} The reserves were seen as a necessary solution to poverty stricken Aborigines who were considered to be threatening the pleasant ambiance of colonial townships.\textsuperscript{486} ‘Forced off their land to the edges of non-Indigenous settlement, dependent upon government rations if they could not find work, suffering from malnutrition and disease, their presence was unsettling and embarrassing to non-Indigenous people.’\textsuperscript{487} As townspeople became increasingly uncomfortable with the presence of impoverished Aborigines, reserves were created to absorb those who had survived the massacres. As Cassi Plate points out, the visibility of Indigenous peoples caused a significant degree of discomfort to white Australians, who sought to eradicate their visibility through the use of reserves:

After years of devastating colonial encounters and land seizures, there were still plenty of Aboriginal people to be seen, defying the ideal of a clean, white land. In the first years of Federated Australia, wherever possible, Aboriginal people were herded out of sight and mind, incarcerated with no rights or redress over family, land, movement, or work. Conditions were ‘barbarous’ indeed – little food or clothing, removal of children, pitiful health and education and virtual slave labour work conditions. I’m not the first to liken this incarceration of Aboriginal people to Nazi Germany’s concentration camps. Based on the same principles of eugenics, life on the settlements contributed to a genocide in which 90\% of the Aboriginal population died over the course of a century.\textsuperscript{488}

\textsuperscript{481} Raymond Evans, Kay Saunders and Kathryn Cronin, above n 26, 121.

\textsuperscript{482} Archibald Meston, Report on the Aborigines of North Queensland (1896) cited in Colin Tatz, above n 7, 80.

\textsuperscript{483} Human Rights and Equal Opportunity Commission, above n 1, 28.

\textsuperscript{484} Foundation for Aboriginal and Islander Research Action Ltd, above n 24, 62.

\textsuperscript{485} David Hollinsworth, above n 49, 77.

\textsuperscript{486} Human Rights and Equal Opportunity Commission, above n 1, 28.

\textsuperscript{487} Ibid.

One Queensland pastoralist writing in 1919 referred to the reserves as ‘Death settlements’.\textsuperscript{489} However the rhetoric of the day claimed that reserves were set up to ‘protect’ Aborigines, that such places were created for the ‘welfare’ of Aboriginal peoples. Hindsight has proven that this was simply not the case.\textsuperscript{490} Such a simplistic explanation does not do justice to the complexity of mixed motives that were the driving force behind the creation of reserves.\textsuperscript{491} As Evans and others observe, ‘other motives were always present which had little to do with a mere humanitarian concern.’\textsuperscript{492}

Evans and others describe the development of reserves as being grounded in utilitarian functionality for the colonial order.\textsuperscript{493} They argue the creation of reserves was profoundly affected by the desire of the colonists to separate Indigenous peoples who were considered useful from those who were not.\textsuperscript{494}

Aboriginal camps were removed by being razed to the ground, and the inhabitants then driven off by mounted men wielding stockwhips or firing carbines over their heads. Curfews were imposed after sunset, when Aboriginal labour services were no longer required. Yet, eventually, even these locally-adopted patterns of exclusion were not enough. Unchecked epidemics of syphilis and other diseases in the discreetly distant camps posed a serious health threat to the whites, and the presence of Aboriginal “prostitutes” with “half-caste” children provided an intolerable moral and racial affront. The new reserve system, therefore, removed the contaminating influence of diseased and immoral natives from the sphere of progressive white society, while leaving those Aborigines bound in service to whites untouched. The Queensland reserve system, therefore, did not segregate white from black so much as it separated the useless native from the useful one: The life-alternatives thereby created for the Aborigine were, quite literally, an exploited labour service or an excluded reservation sentence.\textsuperscript{495}

It was hoped that the reserve system would facilitate the development of ‘self-sufficient agricultural communities on reserved areas modelled on an English village’ and that this ‘would not interfere with the land claims of the colonists’.\textsuperscript{496} However in practice the areas of land selected for reserves were often arid places where agriculture was a hazardous enterprise.\textsuperscript{497} The land ‘reserved’ for Indigenous peoples was usually the most infertile, and

\begin{footnotes}
\textsuperscript{489} Raymond Evans, Kay Saunders and Kathryn Cronin, above n 26, xxix.
\textsuperscript{490} Colin Tatz, above n 7, 87.
\textsuperscript{491} Raymond Evans, Kay Saunders and Kathryn Cronin, above n 26, 119.
\textsuperscript{492} Ibid.
\textsuperscript{493} Ibid 121.
\textsuperscript{494} Ibid.
\textsuperscript{495} Ibid.
\textsuperscript{496} Human Rights and Equal Opportunity Commission, above n 1, 28.
\textsuperscript{497} Rosalind Kidd, above n 29, 37.
\end{footnotes}
most typically that considered to have little value to the colonists. As Kidd so colourfully states, ‘Aboriginal families driven from their lush country were directed to a pocket of sandhills and swamps reserved for them’. As a result many of the reserves were spectacularly unsuccessful. Kidd reports that initial attempts to place Indigenous peoples in reserves in Queensland were often quite disastrous. It seems that the idea of confinement on reserve land often held little appeal for those the government claimed to be ‘protecting’.

The reserves and missions were located in fairly isolated regions. This was a national exercise in sweeping the issue under the rug so to speak, away from prying eyes and away from the forefront of consciousness. It was a way of literally removing from sight that pesky matter likely to prick the sensitive conscience. However the official reasons for such geographical isolation were varied. In part there was a desire to ‘protect’ Indigenous peoples ‘from their predators’. There was also an aim to remove them ‘from the “centres of evil”’; to allow for the Christianising and civilising process in private and away from temptations. Reserves were also isolated ‘to enable better ministration’ to what was considered to be ‘a doomed, remnant people.’

Forced removal to reserves affected a great number of Indigenous people. However even those who were not actually confined on reserves lived with the threat of being removed to reserves. David Hollingsworth comments that:

While many Aboriginal families were able to avoid forced removal and confinement on reserves, all those identified as Aborigines were subject to the repressive laws. Even for those outside the reserves, the powers of police and other authorities to order immediate detention or removal from reserves impinged on almost every [I]ndigenous family.

Colin Tatz observes ‘[i]n the protection-segregation and wardship eras, settlements and missions were designed as “institutions”, with the residents termed “inmates”. There were locks and keys of a legal, administrative and physical kind.’ The fact that people were

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498 Alison Palmer, above n 38, 71–72.
499 Rosalind Kidd, above n 29, 37.
500 Ibid 35; Alison Palmer, above n 38, 70.
501 Rosalind Kidd, above n 29, 47.
502 Colin Tatz, above n 7, 82.
503 Ibid.
504 Ibid.
505 Rosalind Kidd, above n 29, 184; Human Rights and Equal Opportunity Commission, above n 1, 80.
506 David Hollingsworth, above n 49, 101.
507 Colin Tatz, above n 7, 86.
treated as inmates indicates that these institutions frequently more closely resembled jails than anything else. Life on the reserves was extremely difficult for Indigenous people. ‘Cut off from the rest of Australian society, reserve inmates were subject to strict discipline, loss of privacy and autonomy.’\textsuperscript{508} The living conditions that Indigenous people experienced on reserves resembled prison.\textsuperscript{509} ‘In the name of protection Indigenous people were subject to near-total control. Their entry to and exit from reserves was regulated as was their everyday life on the reserves, their right to marry and their employment.’\textsuperscript{510} Managers of reserves and missions ‘ran schools … established dormitories, built jails, prosecuted “wrongdoers”, jailed them, counselled them, controlled their incomes, forbade their customs and acted as sole legal guardians of every adult and every child.’\textsuperscript{511}

The reserves and missions were also chronically under funded so that Indigenous ‘people forced to move to these places were constantly hungry, denied basic facilities and medical treatment and as a result were likely to die prematurely.’\textsuperscript{512} Kidd concludes that reserves were ‘impoverished communities of impoverished individuals.’\textsuperscript{513} Tragically, instances of Indigenous people suffering from malnutrition and related health problems due to lack of food were not at all uncommon.\textsuperscript{514} Once ill, many Indigenous patients did not receive the medical attention they needed to recover.\textsuperscript{515} Thus governmental negligence on a massive scale contributed to the high death rates experienced by Indigenous people moved to reserves.\textsuperscript{516} Kidd has strongly argued that this involves a grave breach of the government’s fiduciary duty to Indigenous people.\textsuperscript{517} She gives the following graphic description of life on the Palm Island reserve:

fifty-eight people died in the first six months of 1943. Poor housing and lack of clothes proved the deadly combination: the elderly fell to chest disorders and the children to colds and diarrhoea. Pneumonia raged in cold weather when families huddled in huts for warmth. Contaminated well-water caused outbreaks of diarrhoea, and meat and butter

\textsuperscript{508} David Hollinsworth, above n 49, 102.
\textsuperscript{509} Paul Coe in Colin Tatz, above n 463, 108.
\textsuperscript{510} Human Rights and Equal Opportunity Commission, above n 1, 29.
\textsuperscript{511} Colin Tatz, above n 7, 82–83.
\textsuperscript{512} Human Rights and Equal Opportunity Commission, above n 1, 31.
\textsuperscript{513} Rosalind Kidd, above n 29, 165.
\textsuperscript{514} Ibid 63, 67 and 273; Albert Holt, above n 182, 24–31; Rosalind Kidd, above n 42, 65 and 94.
\textsuperscript{515} Rosalind Kidd, above n 29, 63, 67, 99 and 273; Rosalind Kidd, above n 42, 101–102.
\textsuperscript{516} Rosalind Kidd, above n 29, 63, 67 and 273.
\textsuperscript{517} Rosalind Kidd, above n 42, 101–103. She bases this on the argument that according to the well received test of what ‘a prudent man’ would do, the Queensland government failed to exercise any level of diligence in the face of repeated warnings from accountants that the government was losing Aboriginal trust moneys continuously through a range of well documented loss making ventures. See Chapter Seven, especially 130, 146–149 and 156.
routinely was rancid by the time they reached the store. Chronic malnutrition, lack of dietary fats, lack of bedding and a total absence of washing facilities underpinned persistent high child mortality and filthy and diseased skin in survivors. … With a death rate of 7.7 per cent at Palm Island, and infant mortality fifteen times the Queensland average, the Health department’s senior officer, Dr Johnson, was … directed to investigate a government settlement. Child diets, he reported, were grossly deficient in milk, vegetables and fruit. And hospital conditions were so pathological that infants routinely contracted septic sores during treatment. … The reports … to assess hospital practices … leave little to the imagination. Children’s cots and mattresses were found to be filthy and crawling with cockroaches; older patients slept on soiled and shabby mattresses; the labor ward was cramped and dirty; and food storage rooms were unventilated in the heat, and full of flies and uncovered slops.\footnote{518 Rosalind Kidd, above n 29, 171–172; and see Rosalind Kidd, above n 42, 124 for a description of life at Cherbourg.}

I can only imagine what it must have been like to be incarcerated for life in such awful conditions based on the unfortunate circumstance of the dominant society’s prejudice relating to skin colour and culture. Much of the testimony of Indigenous people indicates that life on the reserves was dreadful.\footnote{519 Albert Holt, above n 182, 12–16 and 24–31; Human Rights and Equal Opportunity Commission, above n 1, 31 and 193–195.} They lived in abject poverty.\footnote{520 Rosalind Kidd, above n 29, 263.} Indigenous people experienced a ‘journey into hell’ that ‘was effectively controlled by government agencies.’\footnote{521 Bruce Elder, above n 1, 242. See also Human Rights and Equal Opportunity Commission, above n 1, 160.} As Albert Holt states, ‘[t]here were no basic services and we had no redress through legal services to right any wrongs done to us. Who can you go to when it is the very authority set over you to govern that is committing the evil acts on you? It was a living hell here on earth.’\footnote{522 Albert Holt, above n 182, 15.}

Although policies of ‘protection’ allegedly sought the welfare of Indigenous peoples, with hindsight it can be seen that they were largely unsuccessful in achieving their stated purpose.\footnote{523 David Hollinsworth, above n 49, 98.} They produced ‘demoralised and dependent people.’\footnote{524 Ibid.} The paternalism underlying the legislation and policy ‘was debilitating for all those subjected to its routine and pervasive authority.’\footnote{525 Ibid 98–99.} Such ‘protection’ was ‘usually half-hearted, compromised and largely ineffectual. Protection and segregation served more to institutionalise [I]ndigenous oppression.’\footnote{526 Ibid 99.} Hollinsworth states ‘[a]s more [I]ndigenous people were incarcerated in … reserves, the negative, self-defeating nature of such institutions became all the more

\footnote{518 Rosalind Kidd, above n 29, 171–172; and see Rosalind Kidd, above n 42, 124 for a description of life at Cherbourg.}
obvious.’527 However the government chose to keep operating these institutions despite ‘appalling infant mortality rates, starvation diets and dreadful living conditions’.528

The reserve system allowed colonial authorities to wreak havoc on Indigenous families’ lives.529 It allowed children to be separated from their families through dormitory systems which were often hazardous environments.530 For example, the Cherbourg girls’ dormitory was described as ‘structurally unsound’, a ‘fire hazard’ where ‘eighty girls were impounded for ten hours in cramped unlit rooms’.531 Many dormitory systems were still operating in Queensland reserves and missions in the 1970s.532 These systems hindered families from experiencing natural bonding processes. The government set up a system designed to fracture Indigenous families without any qualms of conscience.

The reserve system also facilitated the systemic removal of children to fulfil labour demands for the white colonial society.533 ‘Children and adolescents were contracted out as workers by the various protection authorities.’534 Children removed were subjected to emotional and physical deprivation, and were often taught to despise their Aboriginality. Siblings were separated; children told their parents were dead or had abandoned them. Children’s names and birth-dates were changed to prevent families from locating them. Many children grew up confused about their self-worth and their identity. … Other memories stress the cruelty and hard work expected of children when placed into domestic service.535

In relation to the attitudes of those charged with the responsibility of ‘protection’ Colin Tatz observes that ‘[b]ly and large, Australian officials, lay and clerical, protected in a spirit of dislike, in … a configuration of contempt.’536 White personnel on missions and reserves typically considered Indigenous people to be inferior.537 With these sorts of attitudes

527 David Hollinsworth, above n 49, 112.
528 Ibid.
529 Human Rights and Equal Opportunity Commission, above n 1, 74.
531 Ibid 173.
532 Human Rights and Equal Opportunity Commission, above n 1, 75.
533 Ibid.
534 David Hollinsworth, above n 49, 107.
535 Ibid 108.
536 Colin Tatz, above n 7, 83.
537 Rosalind Kidd, above n 29, 165.
commonplace amongst ‘protectors’ it is no wonder that Indigenous peoples removed to reserves, missions and various government institutions often experienced abuse.\textsuperscript{538}

There were many instances where the government system of ‘protection’ actually facilitated the sexual abuse of women and children.\textsuperscript{539} Judy Atkinson points out that often ‘police protectors were the sexual violators.’\textsuperscript{540} She argues ‘[t]he fact that they were given the name and function of “protector” by the state is in itself another form of abuse.’\textsuperscript{541} It is yet another instance of the government indulging in ‘Orwellian language’ which ‘means the opposite of what it says’.\textsuperscript{542} Kidd explains that '[a]llegations of physical abuse by police were not uncommon, but routinely neutralised by internal police inquiries which often maligned the victim or the complainant and endorsed police integrity.'\textsuperscript{543}

The reserve system allowed colonial authorities to engage in rigorous control of Indigenous women’s sexuality. Colonial authorities have been intensely preoccupied ‘with control of sexuality and fertility of dominant and subjugated women.’\textsuperscript{544} Thus in Australia the focus of the child removal policies at various points was aimed at targeting Indigenous females of child bearing age, and ensuring that it would be difficult for such women to have access to traditional Aboriginal marriages.\textsuperscript{545} Instead young girls were forced to work on outback stations as domestic servants for white families, and frequently experienced sexual assaults leading to pregnancy.\textsuperscript{546} It has been suggested that over 90\% of Aboriginal girls forced into domestic service came back pregnant to white men.\textsuperscript{547} The reserve system thus facilitated the physical, emotional and sexual abuse of Indigenous children.\textsuperscript{548} ‘The yearly increase of illegitimate births to domestic workers bore testimony to the failure of the department to discharge its guardianship role. It was common practice after confinement for girls to be hired

\textsuperscript{538} Human Rights and Equal Opportunity Commission, above n 1, 193–195. The dislike, or contempt, shown towards Aborigines is well documented in the Bringing them home report where several people who experienced abusive treatment recounted their experiences to HREOC.
\textsuperscript{539} Judy Atkinson, above n 45, 66.
\textsuperscript{540} Ibid.
\textsuperscript{541} Ibid.
\textsuperscript{542} George Lakoff, Don’t Think of an Elephant – know your values and frame the debate (2005) 22.
\textsuperscript{543} Rosalind Kidd, above n 29, 180.
\textsuperscript{544} David Hollins worth, above n 49, 56.
\textsuperscript{545} Human Rights and Equal Opportunity Commission, above n 1, 31.
\textsuperscript{546} Ibid 30.
\textsuperscript{547} Ibid 75; Rosalind Kidd, above n 29, 126.
\textsuperscript{548} Human Rights and Equal Opportunity Commission, above n 1, 75.
Some colonists even looked upon this as an opportunity to gain another ‘potential servant’ as the child grew.\textsuperscript{550} The blame for the pregnancies was attributed to the girls who were considered to be sexually promiscuous and to have encouraged white men to enter into sexual behaviour.\textsuperscript{551} There seems to have been very little acknowledgment of the forced nature of sexual relations, of the numerous rapes committed against these poor young girls. Such a view is evident in the writing of Governor Leslie Wilson who claimed “One may deprecate the fact that white men become fathers of these half-caste children, [but] the blame must rest, to a very large extent, on the native girls, who, by temperament, and a desire to have a child by a white father, encourage white men in every way.”\textsuperscript{552} In this way numerous rapes were blamed upon the victims and white men were allowed to wash their hands of responsibility for their behaviour. The government officials with knowledge of the situation refused to act in a way to protect their wards. Many had very dubious notions of what it meant to carry out the obligations of a legal guardian, which are fiduciary in nature.

It is particularly disturbing how economic factors were taken into consideration in weighing up the harm caused to young girls in these situations. Kidd explains:

> The “moral welfare” of working women was important, but, as Bleakley cautioned his superiors, there were vital economic considerations. Over £1,460 in wages flowed into the settlement from domestic workers. To retain the girls at Cherbourg would cost the government at least £478 more per year.\textsuperscript{553}

In other words, it was considered to be cheaper for the government to have these young girls working in situations where they were being raped (and otherwise mistreated) than it was for the government to protect them. This is a rather damning indictment upon European ‘civilisation’.

The policies of ‘protection’ and forced removal to reserves involved severe control over every aspect of the lives of Indigenous peoples. As I stated earlier, reserves and missions had

\textsuperscript{549} Rosalind Kidd, above n 29, 76.
\textsuperscript{550} Ibid.
\textsuperscript{551} Ibid 126.
\textsuperscript{552} Governor Leslie Wilson, cited in Rosalind Kidd, above n 29, 126.
\textsuperscript{553} Rosalind Kidd, above n 29, 127.
draconian powers vested in officials … who maintained a regimen of work, instruction, discipline, good order and hygiene.’ The following describes what life was like on reserves:

In Queensland, protection in theory quickly became discrimination in practice. Stopping the predators from coming in resulted in Aborigines being incarcerated for life, even for generations, on the remotest of places … Protection of Aboriginal morality came to mean control of their movements, labour, marriages, private lives, reading matter, leisure and sports activities, even cultural and religious rituals. Protection of their income came to mean police constables – as official Protectors of Aborigines – controlling their wages, their withdrawals from compulsory savings bank accounts, rights to enter contracts of labour and of purchase and sale. … In Queensland, protection included banishment from one part of the state to another, for periods ranging from twelve months to life (“During the Director’s Pleasure” was the official phrase), for offences such as “disorderly conduct”, being “uncontrollable”, a “menace to young girls”, and “on discharge from [urban] prison”. It also involved imprisonment on the settlement or mission, for a maximum of three weeks per offence, for offences only Aborigines could commit: “being cheeky”, “refusing to work”, “calling the hygiene officer ‘a big eyed bastard’”, “leaving a horse and dray in the yard whereby a person might have been injured”, “committing adultery”, “playing cards”, “arranging to see a male person during the night”, “being untidy at the recreation hall”, “refusing to provide a sample of faeces required by the hygiene officer and further, willfully destroying the bottle provided for the purpose, the property of the department” …

These so called ‘offences’ are absolutely ludicrous. They were completely invasive and interfered on every level with any shred of human dignity that Indigenous peoples sought to retain. They ensured that Indigenous inmates on reserves experienced not one ounce of personal autonomy. The notion of ‘protection’ was used to justify a range of demeaning treatment.

Tatz writes about ‘the myth, and the euphemism, that all of this treatment – over nearly three-quarters of a century, at least – was simply and mundanely nothing more than “the era of handouts”.’ I can only imagine how infuriating and hurtful the idea must be to Indigenous peoples that years of incarceration, forced labour and abusive treatment should simply be described as ‘handouts’ for which Indigenous people should be grateful. The level of insensitivity of those who claim that this treatment was simply for the benefit of Indigenous people is astonishing. At the very least it must be acknowledged that there were mixed motives in the pursuit of government policies of assimilation and segregation. While some

554 Colin Tatz, above n 7, 85.
555 Ibid 84–85.
556 Ibid 86.
557 See for example Peter Howson, above n 16, 11; Reginald Marsh, above n 16, 17.
may have been guided mainly by benevolent desires, many were also clearly guided by the pursuit of eugenicist policies\textsuperscript{558} and economic wealth.\textsuperscript{559}

The rigid controls of the reserve system have been critiqued as excessive by numerous academics and activists.\textsuperscript{560} Excessive control has a demoralising effect on the human spirit. Jungian psychoanalyst Clarissa Pinkola Estes argues that ‘[w]hen a life is too controlled, there becomes less and less life to control.’\textsuperscript{561} Many Indigenous people survived a systematic assault on their spirit through the demoralising control exercised over their lives under the reserve system. Their capacity for resilience is truly astounding.

1. \textit{Education}

Indigenous children on reserves received a form of ‘education’ which was supposed to prepare them for their entry into white colonial society. The general focus of education was to promote assimilation into western society.\textsuperscript{562} Antonio Buti states that ‘much of the education practice, and the very way of life in residential schools and missions and other institutions, was aimed at inculcating European beliefs in Aboriginal children.’\textsuperscript{563} The education provided was ‘very substandard and significantly inferior to the more centralised State school system.’\textsuperscript{564} Buti explains:

\begin{quote}
The teachers were more often than not at the mission because of their religious zeal and biblical knowledge not because of their teaching abilities. Education was focused on basic literacy and numeracy and practical tasks such as general domestic chores for the girls and gardening and farming for the boys, as well as religious education and moral training. There was no room for education or development of the children’s [A]boriginal culture. The children were being “educated” to be employable as farm hands and domestic servants. And of course, bible lessons and Christian religious education formed a very important part of the education process.\textsuperscript{565}
\end{quote}

558 See for example Dr Cecil Cook, cited in David Hollinsworth, above n 49, 106 and O.A. Neville cited in Henry Reynolds, above n 36, 153.

559 Chidi Amuta, above n 397, 158.

560 Garth Nettheim, above n 138; Garth Nettheim, above n 159; Foundation for Aboriginal and Islander Research Action Ltd, above n 24; Irene Watson, above n 221, 207 and 209; Albert Holt, above n 182.


562 Antonio Buti, above n 444, 28.

563 Ibid.

564 Ibid.

565 Ibid.
Not only was the education provided on missions and reserves of an inferior quality which failed to develop the talents and potential of Indigenous children, it was also frequently coupled with abuse which detrimentally affected their well-being.\(^{566}\)

One negative side effect of colonisation is the way ‘the coloniser controls the imagination and the aspirations of the colonised’.\(^{567}\) Nowhere is this more evident than in Australia where Indigenous children were forbidden to speak in their own language and were encouraged to work as lowly domestics or farmhands rather than fulfill their potential.\(^{568}\) They were encouraged to believe that they could never be more than servants for their white colonial masters.\(^{569}\) They were ‘educated’ for servitude, ‘educated’ for domination. Any career aspirations were crushed.\(^{570}\) The colonists ‘attempted to convince the colonized … of their irremovable deficiencies and the consequent naturalness and permanence of their subordination’.\(^{571}\)

I. Assimilation – policies to ‘absorb’ Indigenous Australians into the non-Indigenous population

Assimilation was a ‘great “social engineering” experiment’.\(^{572}\) Each Australian jurisdiction adopted policies of assimilation.\(^{573}\) Assimilation involved ‘forcible removal of children from parents and family and “relocation” to white foster parents, white adoptive parents, or to special “half-caste” or “assimilation” homes.’\(^{574}\) Assimilation policy was laden with assumptions about the worthlessness of Indigenous culture. The Chief Protectors in each jurisdiction considered assimilation to be the best ‘solution’ to what they perceived as the Aboriginal ‘problem’. For example,

In 1905, W.E. Roth, the Chief Protector of Aborigines in Queensland, ruled that the “social status of half-caste children” had to be raised: “In the future, all such infants taken from the camps should be brought up as white children.” In his view, “if left to

\(^{566}\) Antonio Buti, above n 444, 28.


\(^{568}\) Rosalind Kidd, above n 29, 22; Human Rights and Equal Opportunity Commission, above n 1, 31.

\(^{569}\) Rosalind Kidd, above n 29, 30; Human Rights and Equal Opportunity Commission, above n 1, 173.

\(^{570}\) Human Rights and Equal Opportunity Commission, above n 1, 171.


\(^{572}\) Colin Tatz, above n 7, 87.

\(^{573}\) Human Rights and Equal Opportunity Commission, above n 1, 32.

\(^{574}\) Colin Tatz, above n 7, 88.
Social Darwinism underpinned the argument that Indigenous peoples should be assimilated. The planners of assimilation policy were enamoured with eugenics. Hollingsworth explains:

The long-term administrators (Neville, Cook and Bleakley) approached the “half-caste problem” from a medical and bureaucratic position. They already had legislation that enabled them to prohibit contact and marriages between different racial categories, and to remove and confine those who attempted to exercise sexual or marital choice. They were the legal guardians of the children of any “native” covered by their legislation and could remove children from their parents. Using scientific advice on the genetics of inter-racial reproduction … they reassured the [government] ministers that suitable “half-castes” could be absorbed into the white race without detriment or “throwbacks”…

When examining the attitudes expressed by the Chief Protectors it can be seen that there were at the very least mixed motives in the pursuit of assimilation policies. On the one hand there was an expressed desire to ‘save’ Indigenous peoples from colonial violence. On the other hand, there was a desire to eradicate Indigenous peoples as distinct peoples. As Alison Palmer argues, ‘the intention was to eradicate the Aboriginal culture, prevent the repopulation of Aboriginal peoples and to destroy the existence of … distinct Aboriginal people[s].’

There is evidence of a strong desire on the part of colonial authorities to create a homogenous nation. The 1937 Aboriginal Welfare: Initial Conference of Commonwealth and State Aboriginal Authorities concluded ‘the destiny of the natives of [A]boriginal origin, but not of the full blood, lies in their ultimate absorption by the people of the Commonwealth, and it therefore recommends that all efforts be directed to that end.’ At this conference it was decided that:

efforts of all State authorities should be directed towards the education of children of mixed Aboriginal blood at white standards, and their subsequent employment under the

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576 David Hollingsworth, above n 49, 116.
577 Ibid.
578 Colin Tatz, above n 7, 80.
579 O.A. Neville cited in Henry Reynolds, above n 36, 153; David Hollingsworth, above n 49, 106; Human Rights and Equal Opportunity Commission, above n 1, 32; Alison Palmer, above n 38, 3.
580 Alison Palmer, above n 38, 3.
581 Gwenda Tavan, above n 97, 8–11.
same conditions as whites with a view to their taking their place in the white community on an equal footing with the whites. 583

Although it was claimed that Indigenous children would benefit by being educated at the same standards as European children this never eventuated. 584 Instead Indigenous children often had an extremely basic education. 585 Although the conference recorded that the aim was to provide ‘employment under the same conditions as whites’ 586 the records show numerous instances of underpayment or non-payment for the labour of Indigenous Australians. 587 Records indicate that far more effort was put into training Indigenous children to engage in manual labour, to provide a slave type labour force to the colonists. 588 Similarly, although the conference claimed that the goal was to ensure that children with mixed heritage would take ‘their place in the white community on an equal footing with the whites’ 589 this clearly did not occur. Instead the children removed from their families were prepared for a lifetime of menial labour for little or no payment. 590 They were conditioned to be a permanent underclass in Australian society. 591 The words adopted by the conference were mere rhetoric. They simply provided a justification for the creation of a black servant class for white colonial society. 592

Chief Protector O’Leary, who came after Bleakley, tried to sell the idea of forcible assimilation of Indigenous children as an opportunity for them to experience “the privileges of the white community.” 593 This was based upon economic imperatives, because governments were finding it difficult financially to maintain reserves. 594 The economic imperatives in the process of assimilation were not always so openly acknowledged at the time. It was obviously seen as preferable to clothe the policy in more beneficial language with emphasis on the project of ‘civilisation’.

585 Antonio Buti, above n 147, 133.
587 Garth Nettheim, above n 138, 129–133; Rosalind Kidd, above n 29, 69; Rosalind Kidd, above n 42, 98.
588 Raymond Evans, Kay Saunders and Kathryn Cronin, above n 26, 110.
590 Raymond Evans, Kay Saunders and Kathryn Cronin, above n 26, 110; Rosalind Kidd, above n 29, 174 and 178.
591 Maureen Perkins, above n 420, 173; Raymond Evans, Kay Saunders and Kathryn Cronin, above n 26, 110.
592 Raymond Evans, Kay Saunders and Kathryn Cronin, above n 26, 112.
593 Chief Protector O’Leary cited in Rosalind Kidd, above n 29, 238.
594 Rosalind Kidd, above n 29, 238.
There was another conference on Indigenous Affairs in 1951, ‘the Australian Council for Native Welfare’, which adopted the following policy of assimilation:

that all Aborigines and ‘part-Aborigines’ shall attain the same manner of living as other Australians, enjoying the same rights and privileges, accepting the same responsibilities, observing the same customs and being influenced by the same beliefs, hopes and loyalties as other Australians.

This desire for homogenisation refused to acknowledge the level of diversity that existed even among non-Indigenous Australians at the time. It was ludicrous to speak of Australians ‘observing the same customs and being influenced by the same beliefs, hopes and loyalties’ given the diversity of political opinion and religion. It was simply unrealistic to strive for the kind of homogeneity stated by the conference, yet the fantasy of ‘racial and cultural homogeneity’ was clearly a driving force.

The 1951 assimilation policy was criticised which led to the 1965 ‘Native Welfare Conference’ amending the assimilation policy towards integration. The 1965 conference adopted the following policy of assimilation:

The policy of assimilation seeks that all persons of Aboriginal descent will choose to attain a similar manner and standard of living of other Australians and live as members of a single Australian community – enjoying the same rights and privileges, accepting the same responsibilities and influenced by the same hopes and loyalties as other Australians.

Theoretically this allowed Indigenous peoples to have some measure of ‘choice’ in relation to lifestyle, but it still assumed that essential features of a white colonial lifestyle would be adopted. Irene Watson argues that in effect there was no realistic ‘choice’ offered, that Indigenous peoples ‘had no choice between death and assimilation’. The 1965 assimilation policy also presumed that only a ‘similar manner and standard of living’ was appropriate.

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595 David Hollinsworth, above n 49, 126.
596 Ibid.
597 Ibid.
598 Gwenda Tavan, above n 97, 11.
599 David Hollinsworth, above n 49, 135.
601 Henry Reynolds, above n 1, 208.
602 Irene Watson, ‘Law and Indigenous Peoples’, above n 362, 112
for Indigenous peoples, not the same standard of living. Even within this framework Aboriginal peoples were clearly envisioned as less deserving.

It can be seen that assimilation has been the major policy directed towards Indigenous peoples for the better part of the twentieth century. Indigenous peoples ‘have resisted government schemes to assimilate them since the invasion’ and although ‘their efforts were commonly misinterpreted as evidence of stupidity or ingratitude, they have been successful in retaining a distinct cultural identity.’ It seems likely that what colonists saw as evidence of stupidity in refusing to adopt European lifestyles was simply a matter of Indigenous people exercising their preference for their own culture. As Foucault points out, ‘there are no relations of power without resistances’, and there is much in European culture that is problematic and therefore worthy of resistance. Noam Chomsky, for example, has referred to European civilisation as a ‘plague’ which has ‘devastated much of the world.’

J. Exemption from Aboriginality and ‘Passing’ for White

The push towards assimilation pressured Indigenous peoples to fit in with white colonial society. In order to escape the scrutiny of the authorities many Indigenous people with mixed heritage tried to ‘pass’ as white. There was a measure of coercion in this process. As Cheryl Harris states, ‘[t]he attempts to lay claim to whiteness through “passing” painfully illustrate the effects of the law’s recognition of whiteness.’ It is a powerful statement about the nature of white privilege. However, as Maureen Perkins points out, Indigenous people

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604 David Hollinsworth, above n 49, 128.
605 Michel Foucault, above n 338, 142.
608 Kenneth Nunn, above n 606, 429.
609 David Hollinsworth, above n 49, 122.
could only ever obtain ‘a false whiteness’ via the process of passing.612 The process ‘was often used to escape discrimination with regard to employment and place of residence.’613 It allowed some Indigenous people to experience ‘greater social freedom in the white world’.614 However it also came at a great cost, as ‘to deny one’s heritage and identity is a painful and damaging experience and particularly difficult where it severs contacts with parents, brothers and sisters.’615 Indigenous people often saw passing as a betrayal and this issue still causes tension in Indigenous communities.616 The fact that pressure was placed upon Aboriginal people to try to ‘pass’ as white demonstrates how damaging ‘racist attitudes and racialised legal and social practices’ were.617

Related to the issue of ‘passing’ is the matter of obtaining exemption certificates which officially exempted any certificate holder from the consequences of their Aboriginality, at least to some extent. Section 33 of the *Aboriginal Protection and Restriction of the Sale of Opium Act 1897* (Qld) governed exemption certificates.618 An exemption certificate could be revoked at the pleasure of the Director.619 There was no guaranteed freedom from the operation of the Act for any certain period of time. There were strict standards for Indigenous people to obtain an exemption certificate:

> To be eligible, a respectable “part-Aborigine” had to display exemplary behaviour in European terms and to cease all contact with non-exempt Aborigines other than filial relatives (mother, father, sons and daughters). Exemptions could be revoked for any lapse in behaviour or renewal of contact with non-exempt relatives within a three-year probation period. Exempt Aborigines were excused from the relentless surveillance and control under “the Act” and were more likely to receive welfare payments and to secure their children’s schooling and safety from removal. However, despite such benefits, the option of exemption was a cruel choice, and many refused to seek it.620

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611 Ibid.
612 Maureen Perkins, above n 420, 175.
613 David Hollinsworth, above n 49, 122.
614 Ibid.
615 Ibid.
616 Ibid 123.
617 Ibid 122.
618 This section states:
   > It shall be lawful for the Minister to issue to any half-caste, who, in his opinion, ought not to be subject to the provisions of this Act, a certificate, in writing under his hand, that such half-caste is exempt from the provisions of this Act and the Regulations, and from and after the issue of such certificate, such half-caste shall be so exempt accordingly.
620 David Hollinsworth, above n 49, 123.
Indigenous people referred to exemption certificates as “‘dog tags’ or “dog licences.” Nielsen explains they ‘gave “Aboriginal” people the “chance” to change their identity – to un-make their “Aboriginality”’. Yet such exemption was purchased at a high cost.

Exemption certificates were presented as a worthy aspiration for Indigenous people. It is interesting to note the use of language, a ‘certificate’ was granted to exempt people from their Aboriginality. In European culture certificates are usually awarded when a person has achieved some kind of socially acknowledged accomplishment. Thus, exempting a person from their Aboriginality was seen as a major social achievement on the part of the recipient – but at what cost? How tragic that Europeans could celebrate the relinquishment of another’s culture so readily.

K. The Propaganda of Colonial Discourse

This chapter has examined some of the racist discriminatory treatment that Indigenous peoples in Queensland were subjected to. However it is also important to consider the place of propaganda in facilitating and justifying this treatment. Propaganda plays an essential role in the process of dehumanisation. Indigenous peoples in Australia have been the subject of much racist propaganda. Certain racist propositions have been accepted as objective knowledge in order to justify the process of colonisation. However the knowledge which has been constructed through ‘colonial discourse’ about Indigenous peoples is less objective than colonial powers cared to imagine. Homi K. Bhabha asserts that ‘colonial discourse’ engages in ‘processes of subjectification’ by resorting to stereotypical images. Racist propaganda has been an effective part of this process of negative stereotyping. It is part of ‘the

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621 Jennifer Nielsen, above n 6, 90.
622 Ibid.
623 Ibid.
625 In agreement with Chinua Achebe I say ‘[l]et every people bring their gifts to the great festival of the world’s cultural harvest and mankind will be all the richer for the variety and distinctiveness of the offerings.’ Chinua Achebe, ‘Colonist Criticism’ in Bill Ashcroft, Gareth Griffiths and Helen Tiffin (eds), The Post Colonial Studies Reader (1995) 61.
626 Judy Atkinson and Glenn Woods, above n 5, 8.
Chapter 3 – A Haunting History – Persecution and Dehumanisation of Aboriginal Peoples in Queensland

propaganda of imperialism.' Bhabha argues that ‘[t]he objective of colonial discourse is to construe the colonized as a population of degenerate types on the basis of racial origin, in order to justify conquest and to establish systems of administration and instruction.’ Elaborate ‘systems of administration and instruction’ were put into place to control the lives of Indigenous peoples. These systems and institutions were seen as justifiable as a result of a ‘colonial discourse’ which likened all Indigenous people to children in need of discipline and instruction, regardless of age.

The construction of a ‘colonial discourse’ has had negative consequences for Indigenous peoples in Australia, and in every other colonial context. The language by which Indigenous peoples were described in ‘colonial discourse’ had the effect of reinforcing oppressive power relations of domination. As Michel Foucault argues, discourses ‘are the bearers of the specific effects of power.’ Similarly, Bill Ashcroft and others suggest that as ‘language is a discourse of power … it provides the terms and the structures by which individuals have a world, a method by which the “real” is determined … language itself implies certain assumptions about the world, a certain history, a certain way of seeing.’ The use of disparaging language to describe Indigenous peoples has therefore been crucial for the colonial agenda. The creation of a ‘colonial discourse’ has privileged those speaking from a colonial perspective and marginalised the concerns of Indigenous peoples. It has also presented this marginalisation of Indigenous peoples’ concerns as ‘natural’. As David Hollingsworth explains, a
discourse refers to the organising power of ways of thinking, acting and expressing particular topics. It is therefore like a language with its own vocabulary, grammatical rules, and behavioural or performative styles and codes. A discourse includes not only the content of that “language”, but what is appropriate and inappropriate to say and in what form, who can speak with authority, and who is silenced, whose way of speaking and

630 Diane Kirkby and Catherine Coleborne (eds), Law, history, colonialism – The reach of Empire (2001) vii.
631 Homi K. Bhabha, above n 628, 65.
632 Ibid.
633 Ibid 62.
634 Consider the range of disciplinary offences in regulation 70 of the Aborigines’ and Torres Strait Islanders’ Affairs Act 1965 (Qld); Human Rights and Equal Opportunity Commission, above n 1, 274.
635 Homi K. Bhabha, above n 628, 62.
636 Ibid.
637 Michel Foucault, above n 338, 94.
638 Bill Ashcroft, Gareth Griffiths and Helen Tiffin, above n 567, 55.
639 Homi K. Bhabha, above n 628, 62.
640 David Hollingsworth, above n 49, 27.
641 Ibid.
authorising can be ignored. Discourses produce effects. They provide the very means by which we apprehend and experience the world. Discourses generate knowledge as well as the forms available for its reproduction and dissemination. Discourses are not innocent or objective in that they empower some categories (or subject positions) while disempowering or silencing others. Discourses can also be seen as competing for dominance or authority … Discourses often intersect with, amplify or contradict other discourses. … The power of discourse in part lies in its ideological ability to naturalise itself, that is, to appear inevitable and permanent rather than socially constructed and historically specific.642

One of the ways in which white Australians sought to justify their inhumane treatment towards Indigenous peoples was to create a ‘colonial discourse’643 where Indigenous peoples were described by a range of negative stereotypes.644 ‘The device of stereotyping by the dominant group in any society … plays a decisive part in defining the character of minority groups and its inter-relationship with them’.645 Thus Indigenous peoples were likened to savage animals, pests, vermin, insects, bacteria and other unsavoury elements that needed to be eradicated.646 For example, on visiting an Aboriginal camp, Paul Hasluck, a Minister for Aboriginal Affairs, remarked that “[c]hildren swarmed in the huts and around the camping grounds”.647 He thus likened the children to swarming flies or a plague of insects that provided nothing but a menace to society. Indigenous peoples were also referred to as ‘brutes’, which, from the perspective of the colonists, seemed to justify the brutal treatment Indigenous peoples received.648 They were also referred to as creatures to be killed for sport and disparagingly called ‘black game’.649

As Evans and others point out, there is ‘a strong correlation … between racist thoughts and racistist practice.’650 The language of propaganda was an essential part of the process of dehumanisation. Without it Indigenous peoples may have been regarded as fully human rather than sub-human651 and different treatment may have been considered appropriate. The creation of negative stereotypical images through a ‘colonial discourse’ of propaganda has

642  Ibid, emphasis removed.
643  Homi K. Bhabha, above n 628, 62.
644  Rowan Savage, above n 6, 37; Jennifer Nielsen, above n 6, 85; Colin Tatz, above n 6, 49; Jennifer Baker, above n 6, 73–74.
645  Raymond Evans, Kay Saunders and Kathryn Cronin, above n 26, 11.
646  Rowan Savage, above n 6, 37; Rosalind Kidd, above n 29, xv–xvi; Henry Reynolds, above n 36, 167; Raymond Evans, Kay Saunders and Kathryn Cronin, above n 26, 77; Alison Palmer, above n 38, 92; Henry Reynolds, above n 29, 108.
647  Paul Hasluck cited in Henry Reynolds, above n 36, 167.
648  Raymond Evans, Kay Saunders and Kathryn Cronin, above n 26, 77.
649  Ibid 77; Rosalind Kidd, above n 29, xv–xvi.
650  Raymond Evans, Kay Saunders and Kathryn Cronin, above n 26, 77.
been a crucial element in the entrenchment of oppressive power relations. Jennifer Nielsen explains:

Since the age of colonialism began in Australia, the images constructed by non-Indigenous Australians have been and remain typically, romanticised or negative constructions, bolstered by the many myths which abound in Australian society about Indigenous Australians. The “Aboriginal” has been created and recreated to substantiate these myths, but it has always been the prerogative of non-Indigenous Australians to define the meaning of “Aboriginal”. The myths upon which these images are based become the non-Indigenous person’s truths. The corollary to this is that the truths of Indigenous Australians are speciously ignored or treated as insignificant.

A variety of Queensland newspapers played a part in the transmission of the colonial discourse of propaganda. As Raymond Evans states:

in Queensland, weekly papers … like the Queensland, Northern Miner, Queensland Punch, Figaro, Boomerang, Bulletin, Worker and Judge … provided their readers with a wealth of illustrative material which both popularized scientific racist theories and provided plenty of local examples to bear these theories out.

In addition to this, demeaning visual images of Indigenous peoples were published in several other forms. As Palmer highlights:

Indigenous peoples were … portrayed as “ignoble savages”, as a “squat, swarthy, highly emotional type of being completely lacking in any personal dignity” … to a large extent this was due to the unflattering images produced by the process of woodcut printing, which were integral to widely read comics, boys’ adventure books, and cheap publications of the evangelical Christian Missionary Society.

The dissemination of such information played a large role in the construction of racial privilege and the perpetuation of negative stereotypes of Aboriginality in colonial Australia. However, what is represented as reality in ‘colonial discourse’ is constructed to achieve the objectives of a colonial agenda. Colonial ideology required disparaging images of Aboriginality to flourish in the political and legal domains. Ideology has been described as a representation of ‘the imaginary relationship of individuals to their real conditions of

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651 Rowan Savage, above n 6, 39.
652 Greta Bird, above n 226, 37.
653 Jennifer Nielsen, above n 6, 85.
654 Raymond Evans, ‘Keep White The Strain – Race relations in a colonial setting’ in Raymond Evans, Kay Saunders and Kathryn Cronin, above n 26, 15.
655 Alison Palmer, above n 38, 76, references omitted.
656 Homi K. Bhabha, above n 628, 62.
657 Irene Watson, above n 353, 265.
658 Jennifer Nielsen, above n 6, 83–84.
existence’.\textsuperscript{659} In Australia the colonisers \textit{imagined} that they had superior attributes, culture and values to those of Indigenous Australians. This was a part of an elaborate ‘colonial fantasy’.\textsuperscript{660} However, in acting as though the fantasy were real, the colonisers appropriated power. The colonisers made representations to each other as to the supposed attributes of Indigenous peoples. In Australia attributing negative stereotypical qualities to Indigenous peoples has been an essential part of the justification for theft of land, culture and children.\textsuperscript{661} Propaganda has been an integral part of this process.

L. \textit{Public attitudes in Colonial Queensland}

It is significant to address the issue of public attitudes to the treatment of Indigenous peoples throughout this period under study. Colin Tatz has written that for genocide to occur there must be willing bystanders.\textsuperscript{662} It is clear that there have been numerous willing bystanders throughout Australia’s history.\textsuperscript{663} Frontier violence was allowed to continue unabated throughout most of the nineteenth century and indeed there are instances in the twentieth century.\textsuperscript{664} Few objections can be found regarding the forcible removal of Indigenous peoples to reserves and the forcible removal of Indigenous children, although there are some notable exceptions.\textsuperscript{665} For example one Queensland pastoralist was well aware of the dreadful ramifications of the reserve system, stating in 1919 ‘[t]here are no blacks here now – the so called [A]borigines [P]rotection Act has done its dreadful work. The poor natives have either been forced into slavery or sent to the Death settlements on Islands and other places’.\textsuperscript{666}

It is clear that there were some who understood the importance of connection to land for Indigenous peoples. For example, J.D. Lang, a clergyman writing in 1839 declared that “the difference between the Aboriginal and the European ideas of property in the soil is more

\begin{thebibliography}{9}
\bibitem{659} Louis Althusser, above n 68, 44.
\bibitem{660} Homi K. Bhabha, above n 628, 67.
\bibitem{661} See Brennan J in \textit{Mabo v Queensland (No 2)}(1992) 107 ALR 1 at 28; Human Rights and Equal Opportunity Commission, above n 1, 29; Raymond Evans, Kay Saunders and Kathryn Cronin, above n 26, 11.
\bibitem{662} Colin Tatz, above n 7, 69–70.
\bibitem{663} Alison Palmer, above n 38, 47.
\bibitem{664} Bruce Elder, above n 1.
\bibitem{665} Raymond Evans, Kay Saunders and Kathryn Cronin, above n 26, xxix and 78; Henry Reynolds, \textit{This Whispering in Our Hearts} (1998) 246–249.
\bibitem{666} Raymond Evans, Kay Saunders and Kathryn Cronin, above n 26, xxix.
\end{thebibliography}
imaginary than real.” He said the “idea of property in the soil, for hunting purposes, is universal among the Aborigines.” However such was a minority opinion; and the colonial agenda of land expropriation was carried on regardless of such views. When the issue of property rights for Indigenous peoples was finally adjudicated in Court it was held that Indigenous interests were not proprietary interests for the purposes of Australian property law. Even now the colonial recognition of ‘native title’ falls far short of a full acknowledgement of Aboriginal property rights.

Accounts of racist frontier violence were made public throughout many colonial newspapers in Queensland. Public opinion varied in relation to these incidents. It seems that there were a minority, even from the early days of colonial history, who argued Indigenous peoples should be treated with human dignity, those ‘who stood outside or resisted the brutality and inhumanity.’ Henry Reynolds points out there were some colonists who shared a ‘conviction that colonisation need not be so brutal, so lacking in compassion, so drenched in blood.’ He states ‘there always were people who objected to the course of events, who stood out against conventional and accepted views and who proclaimed the cause of justice and equality, reparation and regret and who often paid a high price for their principled dissent.’

In relation to frontier violence, a minority spoke up about their concerns about the lack of public interest in the murders of Indigenous peoples. However the minority concerned about the grave abuses suffered by Indigenous Australians were never able to influence the government or social agenda to the same degree as the majority. While some ‘stood aside in silent disgust’ over the frontier brutality, in ‘some areas, expressed public opinion clearly

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668 Ibid 75.
669 Milirrpum v Nabalco Pty Ltd and The Commonwealth of Australia (1971) 17 FLR 141 at 272, per Blackburn J.
670 Irene Watson, above n 353, 258. This will be discussed in further detail in Chapter Five.
672 David Hollinsworth, above n 49, 22.
673 Henry Reynolds, above n 665, 246.
674 Ibid 248–249.
675 Alison Palmer, above n 38, 47; Henry Reynolds, above n 29, 119.
676 Alison Palmer, above n 38, 47; Henry Reynolds, above n 665, 249.
677 Editorial, The Queenslander, 1 May 1880, cited in Rosalind Kidd, above n 29, xv, emphasis removed.
supported the killing.678 Henry Reynolds comments that there was a large measure of ‘public acceptance’ of ‘racial violence’.679 Writing in 1880 a minister reported that public opinion regarding Indigenous peoples was very low: ‘Nineteen-twentieths of the population of the Colony care nothing about them, and the other twentieth regard them as a nuisance to be got rid of’.680 Alison Palmer asserts that ‘[t]he majority of whites were silent either due to complacency or because they quietly condoned the violence.’681 Indeed, it seems that the colonisers often managed to fantasise that these actions truly were for the benefit of Indigenous peoples. The colonial culture largely normalised such discriminatory behaviour.

M. Conclusion

It can be seen that Indigenous people have been “‘subjected to discriminatory practices of quite extraordinary severity and detail’”.682 From the earliest days of colonisation ‘Aborigines were severely disadvantaged. No regard was paid to their possession of the land. … The various governments did little to stop the bloodshed on the frontier. Some positively encouraged it.’683 This should be borne in mind ‘when judging the benevolence expressed in formal government documents’.684 Knowing what is now known about the early days of colonial Australia it simply is not plausible to suggest that the policies concerning Indigenous people were created for their benefit. ‘State policy towards Aborigines was dominated by the intention to protect the white invaders.’685

Reynolds observes how ‘[t]he tradition of violence born on the frontier lived on long after the shooting stopped. The law provided little protection nor did public opinion. Racial ideology was used to justify the brutality suffered by Aborigines in all parts of the continent.’686 According to the racial ideology of Social Darwinism Indigenous peoples were ‘designated for extinction’.687 This led to a range of abuses being perpetrated by colonial society. While

678 Alison Palmer, above n 38, 48.
679 Henry Reynolds, above n 29, 119.
680 Raymond Evans, Kay Saunders and Kathryn Cronin, above n 26, 79.
681 Alison Palmer, above n 38, 47.
683 Henry Reynolds, above n 1, 183.
684 Ibid.
685 Alison Palmer, above n 38, 48.
686 Henry Reynolds, above n 1, 141.
some of these were carried out without the assistance of legislation, many abuses were
directly facilitated by racist legislation. The lives of Indigenous peoples ‘were … controlled
by legislation and the content of that legislation was determined by the attitudes and
prejudices that the members of parliament possessed.’\textsuperscript{688} The members of Parliament clearly
considered that assimilation was desirable, and used every possible means to eradicate
Indigenous peoples as distinct peoples. Economic considerations were the foundation for this
drive towards assimilation. Indeed the project of assimilation cannot really be divorced from
the desire of the colonisers that Aborigines be \textit{of use} in serving the colonial agenda.\textsuperscript{689} Kidd
refers to concerns expressed in 1874 that a government inquiry be held to ‘ameliorate the
condition of the [A]borigines and to make them more useful.’\textsuperscript{690} Archibald Meston similarly
had a vision of Indigenous people being trained to be ‘useful’.\textsuperscript{691} In his estimation Indigenous
peoples were ‘specially adapted’ to menial labour, and the reserve system was to facilitate
such training.\textsuperscript{692} Much of this menial labour was seen as being beneath the white man. It
seems that the fledgling colony was desperately in need of the labour that Indigenous peoples
so cheaply provided. Yet the high price such labour exacted on Indigenous peoples’ lives was
not acknowledged. The colonists were not content with the theft of the entire continent of
Australia; those in positions of power also saw fit to rob Indigenous people of their culture,
their energy, their lives, their labour and their children.\textsuperscript{693} This is a tragedy of gross
proportions.\textsuperscript{694}

In a study conducted by FAIRA, published in 1979, Indigenous people surveyed were asked
whether the ‘Protection’ legislation had affected them. Many felt that they suffered from
general ‘discrimination’ as a result of the legislation in the areas of access to ‘housing’, ‘at
hotels’ and ‘in obtaining jobs’.\textsuperscript{695} Many also considered that the legislation affected them
through preventing their free speech and through prohibiting their freedom of movement and
association.\textsuperscript{696} Many people considered the legislation ‘had resulted in their getting low
wages.’\textsuperscript{697} Some people believed that the legislation ‘had resulted in their having poor

\textsuperscript{688} Foundation for Aboriginal and Islander Research Action Ltd, above n 24, 26.
\textsuperscript{689} Rosalind Kidd, above n 29, 25.
\textsuperscript{690} Ibid, emphasis added.
\textsuperscript{691} Archibald Meston, cited in Foundation for Aboriginal and Islander Research Action Ltd, above n 24, 22.
\textsuperscript{692} Ibid.
\textsuperscript{693} Irene Watson, above n 1, 41.
\textsuperscript{694} Human Rights and Equal Opportunity Commission, above n 8, 20.
\textsuperscript{695} Foundation for Aboriginal and Islander Research Action Ltd, above n 24, 108.
\textsuperscript{696} Ibid.
\textsuperscript{697} Ibid 110.
education or training.’\textsuperscript{698} Some felt that the legislation ‘for them had meant that they had no control over their own affairs.’\textsuperscript{699} Some Indigenous people ‘felt that being under the Act was like a disease which only an Exemption ticket could cure’.\textsuperscript{700} Some felt that they were affected by the legislation but they could not find the words to describe its impact on their lives.\textsuperscript{701} It seems that for these people the impact of the legislation was so insidious that it became difficult to describe. However, some people did find the words to describe how the legislation impacted negatively in their lives, such as the twenty one year old man who stated ‘‘[t]he Act demoralizes, oppresses, discriminates and destroys blacks.’’\textsuperscript{702} Another person, a 56 year old woman, stated ‘‘[a]ll my life the Act affected me and I had no real control over my own life.’’\textsuperscript{703} Another 41 year old man complained he ‘‘[c]ouldn’t live a free life.’’\textsuperscript{704} What these comments reveal is that the so-called ‘protection’ legislation had a devastating impact on Indigenous peoples. Although it prevented Indigenous people from being completely annihilated through frontier violence it placed them in a position where they were subjected to severe hardship and rigorous discipline. Much was done to quench any fire in the spirits of those incarcerated.\textsuperscript{705} That there was an offence for ‘being cheeky’ is testament to this.\textsuperscript{706} People were imprisoned or subjected to other forms of degrading punishment for answering back to managers or white officials.\textsuperscript{707} The spirit white colonial authorities sought to inculcate in reserve inmates was one of unquestioning obedience.

As FAIRA conclude, the ‘protection’ legislation was a completely inadequate response to ‘the authentic aspirations’ of Indigenous peoples who it was ‘supposed to benefit’.\textsuperscript{708} There have been decades of so-called ‘protection’ laws which have not succeeded in benefiting Indigenous people. They have rather, as Garth Nettheim states, produced ‘a repressive and demoralised dependence’.\textsuperscript{709} I argue that they were destructive rather than protective. Indeed, they exchanged one form of oppression with another. Rosalind Kidd concludes that ‘[t]he

\begin{itemize}
  \item \textsuperscript{698} Ibid.
  \item \textsuperscript{699} Ibid 109.
  \item \textsuperscript{700} Ibid 185.
  \item \textsuperscript{701} Ibid 109.
  \item \textsuperscript{702} Ibid, emphasis removed.
  \item \textsuperscript{703} Ibid, emphasis removed.
  \item \textsuperscript{704} Ibid, emphasis removed.
  \item \textsuperscript{705} Consider the broad range of disciplinary offences under Sub-regulation (3) of regulation 70 of the\textsuperscript{706} Aborigines’ and Torres Strait Islanders’ Affairs Act 1965 (Qld).
  \item \textsuperscript{706} Colin Tatz, above n 7, 85.
  \item \textsuperscript{707} Rosalind Kidd, above n 29, 119–121 and 211.
  \item \textsuperscript{708} Foundation for Aboriginal and Islander Research Action Ltd, above n 24, 271.
  \item \textsuperscript{709} Garth Nettheim, above n 138, 101.
\end{itemize}
Aboriginal department in Queensland ... operated ... largely ... as a personal fiefdom.'\textsuperscript{710} Indigenous people worked in conditions of economic slavery.\textsuperscript{711} Forced removal to reserves and missions led to ‘decades of institutionally induced poverty’.\textsuperscript{712} Conditions of life on reserves were atrocious.\textsuperscript{713} Indigenous peoples were forced to become wards of the state. Governments then neglected their obligations of adequate care for those they forced to become their wards.\textsuperscript{714}

It is worthwhile reflecting on the connections between past and present race relations in Australia. In 1865 Meston commented on the unjust state of affairs afflicting Indigenous peoples in Queensland, stating, ‘they were too weak to compel justice, and we were too unjust to accord it without compulsion’.\textsuperscript{715} This portrayal of white colonial society is hardly flattering, a society which is too unjust to accord justice without compulsion. Yet it is worthwhile questioning how far we have travelled from the unjust society spoken of by Meston in the nineteenth century. I contend that we have a long way to travel before we truly accord justice. These issues will be revisited in Chapter Five.

In the next chapter a comparative analysis will be undertaken highlighting some of the parallels between discriminatory treatment of Jews under Nazi Germany and Indigenous peoples in Queensland.

\textsuperscript{710} Rosalind Kidd, above n 29, 346.
\textsuperscript{711} Ibid 178.
\textsuperscript{712} Ibid 264.
\textsuperscript{713} Human Rights and Equal Opportunity Commission, above n 1, 31.
\textsuperscript{714} Andrew Markus, above n 687, 18–19.
\textsuperscript{715} Foundation for Aboriginal and Islander Research Action Ltd, above n 24, 25, emphasis removed.
Chapter 4

NAZI GERMANY AND QUEENSLAND – EXPLORING THE PARALLELS

A. Introduction

In this Chapter I will undertake a comparative analysis of the laws and policies of Nazi Germany and Queensland, highlighting parallels between them. As I stated in Chapter One, I see some similar themes and philosophies influencing the government action taken under each regime. In choosing to undertake a comparative analysis between these two jurisdictions I am mindful that while most people recoil in horror when thinking of Nazi Germany, many Anglo-Australians seem to have difficulty acknowledging the genocidal impact of colonisation, and consider that even if there were some historical wrongs Indigenous people should simply ‘move on’. An examination of the legislation and policies of these jurisdictions reveals that recovering from such extreme government discrimination is a complex matter. Where governments orchestrate and endorse discriminatory treatment the adverse consequences to members of the target group are extensive.

Nazi Germany and Queensland offer prime examples of the intersection between law and trauma, and the role that law plays in facilitating violence to groups who are targeted as undesirable by government. As shown in Chapters Two and Three, in each jurisdiction groups were defined by law and targeted for racist treatment. There was a plethora of legislation enacted to legitimise this racist oppression. The dehumanisation which resulted highlights the inappropriateness of lawful oppression of marginalised groups. This issue remains as topical today as it was under the Nazi regime and in Queensland in the twentieth century.

In this chapter I examine the similarities between the philosophical foundations of Nazi Germany and Australia concerning their oppressive treatment of members of the target groups. Eugenics expressed as Social Darwinism played a large role in both the Nazi persecution and murder of Jews and the colonial persecution and murder of Indigenous peoples. Each government claimed to base their discrimination on ‘pseudo-scientific’ understandings of race in order to justify their appalling treatment. The economic rationale of expropriating wealth was also a driving force under both regimes. In addition, religious rationales informed the perspectives of those acting in an oppressive manner, with key actors often claiming that they were doing God’s will in carrying out activities which constitute genocide. Each regime also employed propaganda effectively to dehumanise those targeted.

After the years of persecution each regime has had its share of denialists – those who seek to argue that what happened either did not happen, or that what happened was not as terrible as

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3 Gwenda Tavan, above n 2, 12.


the victims claimed.\textsuperscript{8} Each target group has also suffered serious trauma which leaves its scars in the present generation, creating a wounded national psyche in both Germany and Australia.\textsuperscript{9}

Despite the various parallels between Nazi Germany and Australia, there is a marked difference in the attention given to the Holocaust and the plight of Indigenous peoples in Australia.\textsuperscript{10} Sonia Tascon points out that ‘the Holocaust has been given such visibility not only because of the numbers involved, but also because of its “Europeanness”.’\textsuperscript{11} She claims ‘[t]here is an implicit suggestion that the Holocaust was so disturbing because the event took place within … white borders’.\textsuperscript{12} It took place in a predominantly ‘white’ nation. In terms of their physical appearance the Jewish victims of the Holocaust often closely resembled those who were considered racially superior.\textsuperscript{13} The fact that the victims of the Holocaust were ‘white’ may account for the difference in attention.\textsuperscript{14} By contrast imperial powers regularly engaged in colonisation and the suffering of colonised peoples did not receive anything like the same level of international public condemnation. Colonial oppression was simply commonplace,\textsuperscript{15} but horrific levels of oppression directed towards European citizens was most unusual.\textsuperscript{16} As Irene Watson states, ‘the Australian story holds a more sanitised tone, for the people disappearing in Australia are Indigenous “primitive” “black” peoples.’\textsuperscript{17} The Holocaust engenders feelings of particular alarm because an apparently civilised nation used industrial processes for murder against other white people.\textsuperscript{18} Yet surely the means used do not diminish the tragedy of other genocides, such as those carried out against Indigenous people in Australia.

\textsuperscript{8} Colin Tatz, above n 1, 122–128 and 132–139.
\textsuperscript{11} Ibid.
\textsuperscript{12} Ibid.
\textsuperscript{13} Richard Miller, above n 4, 12.
\textsuperscript{14} Interestingly Jews also received more by way of reparation with the creation of the state of Israel.
\textsuperscript{15} See generally Bill Ashcroft, Gareth Griffiths and Helen Tiffin (eds), \textit{The Post Colonial Studies Reader} (1995).
\textsuperscript{16} Jewish rights of citizenship were removed of course, to facilitate persecution, see the ‘Nuremberg Laws on Reich Citizenship’ passed on September 15 1935 which effectively removed citizenship rights for Jews. Yitzhak Arad, Yisrael Gutman and Abraham Margaliot, \textit{Documents on the Holocaust – Selected Sources on the Destruction of the Jews of Germany and Austria, Poland, and the Soviet Union} (1981) 77 and 80.
\textsuperscript{17} Irene Watson, ‘Buried Alive’, above n 6, 267.
There are some who assert that what happened in Australia was not genocide. For example, Kenneth Minogue has claimed that ‘Indigenous peoples in their more extreme moments have a weakness for dramatising their sufferings by invoking the idea of genocide and the experience of the Holocaust.’ Similarly, Keith Windschuttle states there was no ‘Holocaust’ here and tries to trivialise the suffering of Indigenous peoples in Australia on that basis. However the point of genocide studies is not to rank the world’s genocides in some hierarchy of horror, diminishing the significance of those somehow deemed less horrific (as though clear cut criteria exists to measure that). Instead it involves, as Israel Charny suggests, ‘learning to care about humanity’. ‘The Holocaust is unique in a number of ways’, most notably in the industrial processes used for murder. The Nazis perfected ‘systematic assembly-line killing’. However there are parallels and resonances between each regime, which will be explored in this chapter.

B. Philosophical Foundations

In both Nazi Germany and Australia there were similar philosophical features underpinning the discriminatory treatment meted out to those targeted as undesirable. Social Darwinism played a major role in both government sanctioned eugenicist agendas. Religion was also a significant factor. Those who engaged in the persecution of despised minorities represented


20 Kenneth Minogue, above n 19, 14.


22 As Judith Hassan states, ‘Any attempt to compare suffering is doomed to failure and misconception.’ Judith Hassan, A House Next Door to Trauma: Learning from Holocaust Survivors How to Respond to Atrocity (2003) 50.


24 Ibid xv; Guenter Lewy, ‘Gypsies and Jews Under the Nazis’ (1999) 13(3) Holocaust and Genocide Studies 383, 398–399. Guenter Lewy states (at 398–399): What makes the murder of the Jews unique is not the number of victims but the intent of the murders. Only in the case of the Jews did the Nazis seek to annihilate physically every man, woman and child. This program of total extermination therefore deserves its own special appellation: the Holocaust or the Hebrew word Shoah. While the term “genocide”, as defined by the Genocide Convention, involves various acts designed to destroy a group in whole or in part and is not limited to killing, the term “Holocaust” stands for the attempted physical destruction of an entire people, pursued with relentless determination and, in its most lethal final phase, carried out with the mass-production methods of a modern factory. Only the Jews were caught up in this kind of murderous enterprise.

25 Colin Tatz, above n 18, 79; Guenter Lewy, above n 24, 398–399.

26 Gitta Sereny, above n 6, 88.
them as the worst kind of evil, as moral degenerates who had to be eradicated, or at the very least contained. Segregating those deemed undesirable was a key feature of containment under both regimes. However at various points in history, both also engaged in extermination.

1. Social Darwinism

The importance of ‘nineteenth-century race theory’ in each of the political and legal systems cannot be underestimated. In Australia Social Darwinism ‘provided an essential justification’ for all manner of abuses by white colonisers. Likewise in Nazi Germany Jews were persecuted and murdered through invoking the Social Darwinist framework of “natural selection”.

Each regime relied heavily on notions of race to justify their oppressive treatment towards those defined by authorities as inferior, using theories of Social Darwinism to bolster their claims. This was an alleged ‘science’ based upon race. Scientific knowledge has been privileged tremendously since the Enlightenment era as an ‘objective’ form of knowledge, yet as Colin Tatz argues, ‘[d]espite constant protestations to the contrary, all science and research is subjective.’ This is clearly apparent when considering the outcomes of Nazi racial science and the allegedly scientific endeavours of Australian colonial eugenics.

In both Nazi Germany and Australia a form of ‘racial nationalism’ developed which was highly influenced by Social Darwinism. Andrew Heywood states ‘the explicitly racial nationalism of Nazism … was reflected in the ideas of Aryanism, the belief that the German people are a “master race”’. In Australia there has also been a ‘racial nationalism’, one which has been firmly entrenched in whiteness, as seen in the White Australia Policy. In both jurisdictions this led to exclusions from citizenship based on race. The ‘Nuremberg Laws on Reich Citizenship’ passed on September 15 1935 effectively removed citizenship rights for Jews and supplementary decrees were made under this law. Similarly, in Australia

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27 Colin Tatz, above n 1, 12.
29 Andrew Heywood, above n 2, 220.
30 Colin Tatz, above n 1, 12; David Hollinsworth, above n 2, 80–81.
32 Colin Tatz, above n 1, 31.
33 Andrew Heywood, above n 2, 225.
34 Ibid.
35 Ibid.
36 Gwenda Tavan, above n 2, 7–8.
37 Yitzhak Arad, Yisrael Gutman and Abraham Margaliot, above n 16, 77 and 80.
Indigenous peoples have not had access to rights of citizenship.\textsuperscript{38} It has been argued that Indigenous peoples were “protected persons” rather than citizens’ throughout most of the twentieth century.\textsuperscript{39} This led to them being unable to access a wide range of rights taken for granted by many in the non-Indigenous community.\textsuperscript{40}

Notions of ‘blood’ and ‘race’ have been central under both jurisdictions. Hitler had rigid ideas about ‘blood’ and ‘race’ and considered that Jews were a ‘pest race’ who needed to be exterminated.\textsuperscript{41} Nazi Germany was obsessed with racial purity and the concept of ‘blood’.\textsuperscript{42} Similarly racial purity was of paramount importance for periods of Australia’s colonial history. ‘[F]rom the colonial period Australia was self-consciously established as an exclusively “white” country in which “non-whites” were to be either removed or contained so as to minimise the threat of contamination or displacement.’\textsuperscript{43} After a few decades of colonisation Indigenous peoples were rounded up and detained on reserves in an attempt to ensure the precious ‘white’ stock of the new colony remained ‘pure’. However the growing population of those with mixed Indigenous and non-Indigenous heritage showed that this mission was ultimately impossible. There is evidence that the predatory sexual impulses of the colonisers could not be curbed.\textsuperscript{44} However colonial authorities considered that racial purity was a serious objective. European concepts of ‘blood’ had serious implications for Indigenous peoples, who were referred to as ‘full blood’ and ‘half blood’.\textsuperscript{45} Nazi Germany also had its version of those considered ‘half-blood’ – Mischlinge.\textsuperscript{46} There was no biological difference warranting the different treatment meted out to Jewish people or those classed as Mischlinge, but the notion of ‘blood’ was used as a basis of differentiation for the purposes of discrimination.\textsuperscript{47} Similarly in Australia there was no biological difference warranting the disadvantageous treatment

\textsuperscript{38} Irene Watson, ‘From a Hard Place’, above n 6, 206–207; William Ferguson and John Patten, Aborigines Claim Citizen Rights cited in Human Rights and Equal Opportunity Commission, above n 6, 46; David Hollinsworth, above n 6, 115.

\textsuperscript{39} Irene Watson, ‘From a Hard Place’ above n 6, 206.

\textsuperscript{40} Such as the right to vote, rights of freedom of movement, and rights to associate freely with family.

\textsuperscript{41} Richard Miller, above n 4, 30 and 34–35; Colin Tatz, above n 1, 28.

\textsuperscript{42} Gerhard Weinberg, ‘Germany’s War for World Conquest and the Extermination of the Jews’ (1996) 10(2) Holocaust and Genocide Studies 119, 119 and 121–122; Richard Miller, above n 4, 16.

\textsuperscript{43} David Hollinsworth, above n 2, 2.

\textsuperscript{44} Raymond Evans, Kay Saunders and Kathryn Cronin, above n 5, 104 and 106; Judy Atkinson, above n 9, 61–62 and 66; Rosalind Kidd, The Way We Civilise – Aboriginal Affairs – the untold story (1997) 50; Human Rights and Equal Opportunity Commission, above n 6, 30.

\textsuperscript{45} Gwenda Tavan, above n 2, 12.

\textsuperscript{46} Richard Miller, above n 4, 16.
experienced by Indigenous peoples. However in both Australia and Nazi Germany racial hierarchies inherent in Social Darwinism led to privileged treatment for some and disadvantageous treatment for others.\(^{48}\) Theories of race and notions of racial purity have therefore been incredibly significant under both regimes, influencing the development of government policies and legislation.\(^{49}\)

2. Religious Rationale

Religious underpinnings had a significant part to play in the colonisation of Australia,\(^{50}\) and in the Anti-Semitism of the Nazis.\(^{51}\) Ideals about how religious faith might best be served thus contributed to the oppression experienced by members of the target group under each regime. As I mentioned in Chapter Two, Anti-Semitism was supported by various strains of theology which demonized Jews because of their involvement in the murder of Jesus\(^ {52}\) and wanted to punish them for rejecting Christ as their messiah.\(^ {53}\) Theology thus provided an anti-Semitic language which was used to justify discriminatory treatment against Jewish people.\(^ {54}\) Persecution of the Jews was depicted as a religious mission, using religious terminology.\(^ {55}\) Similarly, in Australia the project of colonisation was also often cast in terms of a religious mission.\(^ {56}\) The *white saviour complex* underpinned the removal process, painting a picture of Indigenous peoples as so primitive that any kind of interaction they were to have with white colonial society was deemed beneficial.\(^ {57}\) The colonial project was seen as being connected to fulfilling God’s ‘mission’ for the European man,\(^ {58}\) and ‘theological justifications’ were employed to support the idea of Aboriginal inferiority.\(^ {59}\) In both Nazi Germany and Australia the belief that certain activities were religious works fuelled the machinery of oppression. Evidence suggests that some engaged in this process were convinced their actions were

\(^{47}\) Ibid 17.

\(^{48}\) Gwenda Tavan, above n 2, 12; Andrew Heywood, above n 2, 220–221.

\(^{49}\) Andrew Heywood, above n 2, 233; David Hollinsworth, above n 2, 84.

\(^{50}\) Raymond Evans, Kay Saunders and Kathryn Cronin, above n 5, 69.

\(^{51}\) Andrew Heywood, above n 2, 233.


\(^{53}\) Donald Niewyk, above n 6, 143.

\(^{54}\) Robert Michael, above n 52, 2.

\(^{55}\) Saul Friedländer, above n 5, 87.

\(^{56}\) Henry Reynolds, above n 2, 155; Raymond Evans, Kay Saunders and Kathryn Cronin, above n 5, 69.

\(^{57}\) Greta Bird, above n 5, 5.

\(^{58}\) Henry Reynolds, above n 2, 5.

\(^{59}\) Raymond Evans, Kay Saunders and Kathryn Cronin, above n 5, 69.
justifiable because they accorded with divine will.\textsuperscript{60} However the consequences for members of the target groups were disastrous. Each regime demonstrates that misguided religious fervor can have dire consequences.

C. Defined by Law

Definition has been used as a crucial tool to exercise power over oppressed peoples.\textsuperscript{61} This was a key element in both Nazi Germany’s treatment of Jews and Australia’s treatment of Aboriginal peoples who were each subjected to a plethora of discriminatory legislation. As I explained in Chapter Two, the Nazis engaged in a process of definition so they could determine who was considered ‘Jewish’ for the purposes of the law and then used the law as a means to ensure that persecution was the norm.\textsuperscript{62} To be defined as Jewish under Nazi Germany had dire consequences, Jews were stripped of their citizenship rights and many ultimately lost their lives.\textsuperscript{63} Although the Nazis definition process was based on artificial constructions of race,\textsuperscript{64} they maintained that there were clear distinctions between Jews and Aryans, and considered Aryans to represent ‘the master race’.\textsuperscript{65} However the process for identifying whether a person belonged to this allegedly superior race was fraught with difficulty as Jews and Aryans often looked fairly similar.\textsuperscript{66} This shows how absurd Nazi race laws truly were. However despite this absurdity, an industry developed around these race laws,\textsuperscript{67} and obsessive genealogical hunts were good for the German economy.\textsuperscript{68} Likewise the process of definition and administration of racial policies have provided an economy for non-Indigenous Australians. Indeed in her maiden speech in 1996 Pauline Hanson was critical of those who she saw as ‘feed[ing] off the Aboriginal industry’.\textsuperscript{69} Since the beginning of colonisation white Australia has been very preoccupied with defining Indigenous peoples.\textsuperscript{70} This has been a crucial aspect of colonial control.\textsuperscript{71} The references to percentages of ‘blood’

\textsuperscript{60} Adolf Hitler, \textit{Mein Kampf} cited in Saul Friedländer, above n 5, 98; Henry Reynolds, above n 2, Chapter Six.
\textsuperscript{61} Richard Miller, above n 4, 9.
\textsuperscript{62} Ibid.
\textsuperscript{63} Saul Friedländer, above n 5, 76 and 149; Richard Miller, above n 4, 97.
\textsuperscript{64} Richard Miller, above n 4, 4.
\textsuperscript{65} Ibid 13.
\textsuperscript{66} Ibid 12.
\textsuperscript{67} Ibid.
\textsuperscript{68} Ibid.
\textsuperscript{69} Pauline Hanson’s maiden speech, Commonwealth, \textit{Parliamentary Debates}, House of Representatives, 10 September 1996, 3861 (Ms Pauline Hanson, Member for Oxley).
\textsuperscript{70} Jennifer Nielsen, above n 7, 85.
\textsuperscript{71} Ibid 89.
in various Aborigines Acts\footnote{Garth Nettheim, \textit{Out Lawed: Queensland’s Aborigines and Islanders and the Rule of Law} (1973) 25. For example see s 6(2)(b) of \textit{The Aborigines and Torres Strait Island Affairs Act 1965} (Qld).} purported to be scientific rather than cultural constructs. However, like Nazi constructs of Jewishness, they depended on choices made by those with power to engage in a process of definition.

**D. Use of Law to Legitimise Oppression**

In each regime law was used to oppress members of the target group defined as undesirable by government. Law was central to the Nazi regime’s claims to power.\footnote{Vivian Grosswald Curran, ‘The Politics of Memory/ Erinnerungspolitik and the Use and Propriety of Law in the Process of Memory Construction’ (2003) \textit{Law and Critique} 309, 310.} The situation has been similar in Australia to the extent that many people considered the treatment of Indigenous peoples to be largely justifiable because of legitimising legislation. Violent dispossession of land, ‘dispersal’ of Aborigines, incarceration on reserves and virtual slave labour were lawful and therefore the majority believed they were not extraordinary abuses of colonial power.\footnote{Alison Palmer, above n 4, 47; Henry Reynolds, \textit{This Whispering in Our Hearts} (1998) 249.} They became ordinary through the normative force of law.\footnote{Barbara Flagg, \textit{Was Blind, But Now I See – White Race Consciousness and the Law} (1998) 51.} There is often little notice taken of legislation which allows oppression to occur in the case of groups who have been defined as sub-human by those in positions of power. Where people are perceived to be inferior their degradation is not considered to be oppression.\footnote{Rowan Savage, above n 7, 20.} It is seen as natural. In each regime law has been an essential aspect of dehumanisation.

As I said in Chapter One, law has a powerful legitimating role in society.\footnote{Sandra Berns, \textit{To Speak as a Judge – Difference, Voice and Power} (1999) 105–106.} The language of law has a constituting power to shape perceptions of reality. Rowan Savage rightly points out that ‘language is a necessary, and usually central, component of dehumanisation. Language, by shaping understandings of reality, therefore shapes action.’\footnote{Hirsch and Smith (1991) 387 cited in Rowan Savage, above n 7, 21.} As Hirsch and Smith assert:

Perceptions of reality are linguistically created and meaning derives from the cultural, social and political context. In the social construction of reality, language not only represents perceptions of reality, but begins to constitute it. Victims are born out of fear and hate, but also through language that abstracts and fixes the identity of the other: the Jew, the infidel, the enemy of the revolution.\footnote{Rowan Savage, above n 7, 20.}
Language therefore ‘constructs reality: and the reality thus constructed is neither random nor accidental.’\(^8^0\) The language of law has shaped the reality of dehumanisation experienced by Jews in Nazi Germany and Indigenous peoples in Australia. The language of law can have a powerful effect on public attitudes, particularly in relation to legitimising discrimination directed towards groups who are targeted as undesirable minorities within society. Under each regime there was a gradual dehumanising process with accompanying legislation, and in each of the legal systems the language of dehumanisation was critical in terms of legitimising the suffering of members of the target groups. There is a lesson to be learnt in this: ‘[w]ith the power to speak the law comes responsibility.’\(^8^1\) The responsibility is to acknowledge the precious essence of human dignity that resides in every one of us.

**E. Economic Rationale**

One of the similarities between each oppressive regime is the economic rationale that lay behind the dehumanisation. Unfortunately it was far more profitable for people to be dehumanised than it was for them to be treated with human dignity. It was far more lucrative to confiscate wealth and enforce conditions of slave labour than to treat people humanely. There are some elements of difference in the form of confiscation taken by colonial and Nazi governing authorities, yet there are also some similarities.

In Australia the entire continent was confiscated from Indigenous Australians,\(^8^2\) driven by a colonial agenda of wealth accumulation.\(^8^3\) Indigenous peoples were cleared from the land in order for it to be ‘developed’ in accordance with European agricultural principles.\(^8^4\) Indigenous peoples were then either killed\(^8^5\) or used as virtual slave labour.\(^8^6\) Irene Watson explains that colonists have engaged in ‘the violent theft of all things Aboriginal – our lands, our lives, our laws and our culture’.\(^8^7\) Historian Henry Reynolds has also questioned whether non-Indigenous Australia is ‘a community of thieves’.\(^8^8\)

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\(^8^0\) Rowan Savage, above n 7, 21.
\(^8^3\) Alison Palmer, above n 4, 35.
\(^8^4\) Ibid.
\(^8^5\) Bruce Elder, above n 6.
\(^8^6\) Rosalind Kidd, above n 44, 69; Alison Palmer, above n 4, 107.
\(^8^7\) Irene Watson, ‘Settled and Unsettled Spaces’, above n 6, 41.
\(^8^8\) Henry Reynolds, above n 2, 66 and see generally Chapter Three.
Likewise ‘Aryan’ Germans profited vastly from their treatment of Jewish people. They too engaged in a process of mass confiscation of wealth, a process they called ‘“Aryanization” of the economy’. The economic agenda of the Nazis was critically linked to their persecution of the Jews. In 1939 Jews were ordered to relinquish personal property to organizations who then gave profits of sale to the government. In some cases confiscated/forfeited Jewish wealth was distributed at a reduced cost to members of the German public. It was all strikingly utilitarian, promoting the greatest benefit to the greatest number of people, but grossly unfair to those who were the victims of such decrees. Similarly, the confiscation of the Australian continent from Indigenous peoples was utilitarian, promoting the greatest benefit to the greatest number of people (who are non-Indigenous Australians), and yet grossly unfair to Indigenous Australians.

Confiscation of wealth was part of the process of dehumanisation under each regime. The Nazi confiscation of vast volumes of Jewish property was part of the process of destruction. By impoverishing Jews the Nazis were able to maintain the falsehood that Jews were a dirty and diseased people, when the confiscation of wealth was really at the core of such matters. Similarly in Australia, although Indigenous peoples had nothing like the volume of personal property typical of Europeans, what they did have was readily taken from them. Colonists stole ‘nets, canoes, and weapons’ in terms of personal property, as well as women and children. The conditions of enforced poverty brought about as a result of government sanctioned persecution led to a state of wretchedness for members of each of the target groups.

89 Richard Miller, above n 4, 165–166.
90 Ibid 97.
91 Gitta Sereny, above n 6, 129.
92 Richard Miller, above n 4, 113.
93 Ibid 127.
95 This ideology was elaborated upon by Jeremy Bentham, who believed an action would be right if it conformed to the principle of utility. He saw utility as providing ‘the greatest happiness of the greatest number’ – Stephen Bottomley, Neil Gunningham and Stephen Parker, *Law in Context* (1st ed, 1991) 30. According to Bentham ‘An action … may be said to be conformable to [the] principle of utility … when the tendency it has to augment the happiness of the community is greater than any it has to diminish it’ – Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (1781) 15.
96 David Hollinsworth, above n 2, 190.
97 Richard Miller, above n 4, 97, 100, 110–111, 113–114, 116 and 130.
98 Ibid 97.
100 Ibid.
There was also vast confiscation of labour under each regime. The Nazis benefited greatly from the slave labour of Jewish people.101 ‘The Jews were purposefully compelled to work in strategic areas where labor shortages were severe’.102 Similarly Indigenous peoples worked in conditions akin to slavery, with governments and the mining and pastoral industries benefiting substantially from exploitative working conditions.103

Both regimes engaged in massive confiscation of property, labour and lives of members of the targeted groups. Needless to say there was no government compensation offered for property forfeited to the government in Nazi Germany.104 Nor has there been adequate compensation offered in Australia for the theft of land, lives, children and labour.105 Thus it can be seen that human greed was a very significant factor in both the Holocaust and in Australia’s discriminatory treatment meted out to Indigenous peoples. Both regimes engaged in confiscation of property and benefited from slave labour extracted from those in the target groups. The Nazis justified such confiscation by subscribing to the idea that Jews had engaged in criminal behaviour.106 According to this train of thought Jewish property was acquired as a result of profits made via theft.107 It was therefore considered to be legitimate to confiscate it. They also justified their persecutory treatment of Jews by referring to them as lower forms of life.108 Australian colonists justified confiscation of the continent based on the myth of terra nullius, that the Australian land mass was virtually a waste land.109 They also justified their adverse treatment of Indigenous peoples by referring to them as ‘an earlier, less

101 Wolf Gruner, Jewish Forced Labor under the Nazis – Economic Needs and Racial Aims, 1938–1944 (translated by Kathleen Dell’orto, 2006) xiv; Interview with Nechama Epstein in Donald Niewyk, above n 6, 159–165; Gitta Sereny, above n 6, 28. They also benefited from the slave labour of others they marginalised too and forced into concentration camps.
102 Wolf Gruner, above n 101, x.
104 Richard Miller, above n 4, 102. Although some compensation has since been offered by the post Nazi German government – see the 1953 Federal Supplementary Law for the Compensation of the Victims of National Socialist Persecution – Ariel Colonomos and Andrea Armstrong, ‘German Reparations to the Jews after World War II: A Turning Point in the History of Reparations’ in Pablo De Greiff (ed), The Handbook of Reparations (2006) 402.
106 Richard Miller, above n 4, 123.
107 Ibid.
108 Ibid 27 and 29–30 and 34–35; Rowan Savage, above n 7, 34.
evolved people’, as ‘lower link[s]’ on an evolutionary chain.\textsuperscript{110} However such justifications cannot be separated from the economic profits made by these exploitative power hierarchies, and what has occurred in these two jurisdictions shows that placing economic agendas above humane treatment has disastrous consequences.\textsuperscript{111}

\section*{F. Access to Money}

In both Nazi Germany and Australia members of the target groups were prevented from freely accessing their money. Jewish people were subjected to restrictions limiting the amount of money they could withdraw from their own bank accounts,\textsuperscript{112} which effectively left more for the Nazi government to later confiscate. Similarly, in Australia Indigenous peoples were subjected to severe restrictions on their ability to access their money. During the ‘protection’ era Indigenous peoples were frustrated by their lack of freedom to manage their own finances.\textsuperscript{113} Indigenous people worked hard for a pittance and were then frequently denied access to the money they had lawfully earned.\textsuperscript{114} The state facilitated confiscation of Indigenous wealth.\textsuperscript{115} The legislation and the way it was administered made it difficult if not impossible for Indigenous people to gain access to the money which was rightfully theirs. There were many occasions where Indigenous people were not paid their wages at all.\textsuperscript{116} State facilitated trust funds were set up to manage Indigenous peoples’ finances; however hundreds of thousands of dollars went missing from Aboriginal trust accounts.\textsuperscript{117} Pilfering money from trust accounts regularly occurred.\textsuperscript{118} Theft from the savings accounts of Indigenous people was also not uncommon.\textsuperscript{119}

Limiting access to wealth in capitalist economies (where certain minimal finances are required for survival) was disastrous for members of the target groups. It created conditions of poverty which then led to negative stereotypes being developed in relation to matters, such as

\begin{footnotesize}
\begin{enumerate}
\item Henry Reynolds, above n 2, 114.
\item Donald Niewyk, above n 6, 149.
\item Richard Miller, above n 4, 109.
\item Garth Nettheim, above n 72, 129–132.
\item Rosalind Kidd, above n 44, 129.
\item Jennifer Nielsen, above n 7, 93.
\item Scott Emerson, ‘Relieved of wages for their own protection’, \textit{The Australian}, 17 May 2002, 6.
\item F.S. Stevens, \textit{Aboriginal Wages and the Trust System in Queensland}, 18 February 1969, cited in Garth Nettheim, above n 72, 125; Rosalind Kidd, above n 44, 71.
\item Rosalind Kidd, above n 44, 71.
\item Ibid 113 and 133–134.
\end{enumerate}
\end{footnotesize}
hygiene, for example,\textsuperscript{120} that actually had nothing to do with race, but were a natural consequence of degraded living conditions enforced upon Jews and Australian Indigenous peoples.

G. Ostracised for ‘Protection’

Another similarity between each regime is the way in which they imposed a type of ostracism on those targeted as ‘undesirable’. ‘Protection’ was the chief justification under both Nazi Germany and Australia. The Nazis segregated members of the target groups whose presence was constructed as a threat to the general population.\textsuperscript{121} In Australia, however, the protection was alleged to be for the benefit of Indigenous peoples.\textsuperscript{122} However in Australia the conditions of ostracism more closely resembled those of a concentration camp.\textsuperscript{123} The reserves and missions were also created to ‘protect’ racial purity,\textsuperscript{124} to segregate Indigenous peoples from the general population.\textsuperscript{125}

Ostracism in each regime had much to do with protecting the majority of the population. In each jurisdiction there were those who were uncomfortable with the presence of the persecuted in their midst. Robert Michael explains that ‘[c]hurchgoing Germans were squeamish about anti-Jewish violence on Germany’s streets. The Reich government solved this problem by establishing concentration camps and siting the death camps in Poland’.\textsuperscript{126} Similarly in Australia reserves were created because townspeople became increasingly uncomfortable with the presence of poverty stricken Aborigines who had survived the massacres.\textsuperscript{127} Indigenous peoples were considered a threat to the pleasant ambiance of colonial townships.\textsuperscript{128} Reserves therefore allowed many colonists to be shielded from the brutal realities of the undeclared war.\textsuperscript{129}

\textsuperscript{121} Richard Miller, above n 4, 30.
\textsuperscript{122} Colin Tatz, above n 1, 80. Yet with hindsight it can be seen that the ostracism of Aboriginal peoples on reserves and missions was an incredibly effective method of clearing the land for colonial enterprises.
\textsuperscript{123} This coroner was cited in Irene Watson, ‘Illusionists and Hunters’, above n 105, 18.
\textsuperscript{125} Ibid.
\textsuperscript{126} Robert Michael, above n 52, 10.
\textsuperscript{127} Human Rights and Equal Opportunity Commission, above n 6, 28.
\textsuperscript{128} Ibid.
Conditions of ostracism for each of the target groups were extremely harsh. The ghettos and concentration camps were rife with malnutrition, "death by hunger", and exacting labour with many being "literally worked to death." Brutal treatment was commonplace, including the degradation of hair removal. Similarly, life on the reserves was dire. Beatings and shaving heads was also part of the disciplinary regime of reserves. The under funding of reserves and missions meant the inmates of such institutions ‘were constantly hungry, denied basic facilities and medical treatment and as a result were likely to die prematurely.’ Reserves have been referred to as ‘Death settlements’. However the rhetoric of the day claimed that reserves were set up to ‘protect’ Aborigines, that such places were created for the ‘welfare’ of Indigenous peoples.

A common feature of the ostracism under each regime was that it involved involuntary incarceration of members of the target groups. Under the Nazi regime people were incarcerated without any kind of trial proving guilt and forced into concentration camps and/or murdered by government officials. Under the Nazi regime people could be placed in what was called “protective custody” which ‘was administrative incarceration to protect the state’ which ‘lasted until authorities thought the person no longer threatened the state.’ In the case of Jews this was an indefinite period of incarceration which most often resulted in death. In Queensland and in other states numerous Indigenous people were also subjected to involuntary incarceration. They were forced to reside in government institutions although they had committed no crime. They were described under the ‘Protection’ legislation as ‘inmates’ of these institutions. In addition, under this legislation the Minister had power to order the indefinite detention of any Indigenous person who he decided was ‘uncontrollable’ in a

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129 Foundation for Aboriginal and Islander Research Action Ltd (FAIRA), Beyond the Act (1979) 9.
130 Christopher Browning, above n 120, 27; Michael Phayer, ‘The Catholic Resistance Circle in Berlin and German Catholic Bishops during the Holocaust’ (1993) 7(2) Holocaust and Genocide Studies 216, 217.
131 Dr Walbaum cited in Christopher Browning, above n 120, 27.
132 Donald Niewyk, above n 6, 138.
133 Interview with Nechama Epstein in Donald Niewyk, above n 6, 158.
134 Ibid 158–159.
135 Rosalind Kidd, above n 44, 119–121; Bruce Elder, above n 6, 245; Human Rights and Equal Opportunity Commission, above n 6, 84.
137 Raymond Evans, Kay Saunders and Kathryn Cronin, above n 5, xxix.
138 David Hollinsworth, above n 2, 101.
139 Interview with Nechama Epstein in Donald Niewyk, above n 6, 157; Gitta Sereny, above n 6, 28.
140 Richard Miller, above n 4, 52.
141 See sections 4(c) and 26(4) of the The Aboriginals Protection and Restriction of the Sale of Opium Acts Amendment Act of 1934 (Qld).
Chapter 4 – Nazi Germany and Queensland – Exploring the Parallels

reserve dormitory/prison. Indigenous people detained on reserves in Queensland could also be impounded in a reserve dormitory/prison for breaking regulations.

Under each regime ostracism was grounded in a distinction made between useful and useless members of the target groups. Those who were considered useful were permitted to live and undertake slave labour. The Nazis made a distinction between useful and expendable Jews, a distinction between ‘those capable of doing slave labor for the Third Reich’ who were ‘worked to death’ and those ‘that could not work or who were not needed’ who were ‘sent to special camps for immediate extermination.’ Evans and others explain that a similar distinction based on usefulness operated in Queensland: ‘[t]he Queensland reserve system … did not segregate white from black so much as it separated the useless native from the useful one: The life-alternatives thereby created for the Aborigine were, quite literally, an exploited labour service or an excluded reservation sentence.’

As I mentioned earlier, utilitarianism was a common feature of both regimes. Government authorities of each regime saw those who were not useful as superfluous. This led to mass extermination of Jewish people and massive governmental negligence regarding the welfare of Indigenous peoples living on reserves which led to deaths of a high proportion of the population. Ostracism led to the premature deaths of millions of people under Nazism and, although allegedly for the ‘protection’ of Indigenous peoples, many thousands of deaths in Queensland. It can be seen that conditions of life in the segregated reserves, missions, ghettos and concentration camps were atrocious.

1. Restriction on Freedom of Movement

The desire to ostracise members of the target group under each regime meant that severe restrictions were placed upon freedom of movement. In order to facilitate this each regime issued special identification cards or passes to members of the target group. These passes made members of the target groups easier to identify and single out for persecution. They also

142 These placed further restrictions on those living in reserves, and involved confinement in a prison like setting. See sections 21 and 25 of the The Aboriginals Protection and Restriction of the Sale of Opium Acts Amendment Act of 1934 (Qld).
143 See regulation 70(1)–(3) of the The Aborigines’ and Torres Strait Islanders’ Regulations of 1966 (Qld).
144 Donald Niewyk, above n 6, 137.
145 Raymond Evans, Kay Saunders and Kathryn Cronin, above n 5, 121.
146 Gitta Sereny, above n 6, 142.
147 Rosalind Kidd, above n 44, 63 and 67 and 273.
prevented the unwanted presence of members of the target groups in public spaces which were designated for those presumed to be racially superior.

**H. Creating Conflicting Loyalties within the Target Groups**

One of the cruel aspects of each regime was the way in which they coerced members of the target groups to carry out atrocities against other members. Under each system members of the target group were enlisted in the service of the governments who were trying to annihilate them. In her seminal work, *Eichmann in Jerusalem – A Report on the Banality of Evil*, Hannah Arendt refers to the manner in which the Nazis used some Jewish people to cooperate in the destruction and transportation of others.\(^{149}\) One of the most renowned of these is Adolf Eichmann, who organised thousands of Jews for transportation to the concentration camps, ‘dispatching people to their death by the trainload’.\(^{150}\) He also streamlined the process by which Nazis were able to remove property belonging to Jews so that it resembled an ‘assembly line’ and facilitated the forced emigration of thousands of Jews.\(^{151}\) Hannah Arendt explains how Nazis involved Jews in the persecution of fellow Jews:

> Jewish Sonderkommandos (special units) had everywhere been employed in the actual killing process, they had committed criminal acts “in order to save themselves from the danger of immediate death”, and the Jewish Councils and Elders had cooperated because they thought they could “avert consequences more serious than those which resulted.”\(^{152}\)

Becoming a member of a Jewish Council in those perilous times was an unenviable task, which some were clearly reluctant to take on.\(^{153}\) The Nazis involved Jewish authorities in the process of selecting who would die and who would live.\(^{154}\) This involved each Council member in a ‘crushing moral dilemma’ where they had to evaluate who was more worthy of life.\(^{155}\) There were also the Kapos, ‘prisoners who, as camp barrack leaders, assisted in the

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\(^{150}\) Ibid 29. He was tried in Jerusalem after the war for committing ‘crimes against the Jewish people, crimes against humanity, and war crimes during the whole period of the Nazi regime’. Ibid 18.

\(^{151}\) Ibid 41 and 61.

\(^{152}\) Ibid 85–86. The quotations within this extract are from sections 10 and 11 of the *Nazis and Nazi Collaborators (Punishment) Law of 1950* enacted in Jerusalem to deal with those who had committed war crimes under Hitler.


\(^{154}\) Hannah Arendt, above n 149, 56; Isaiah Trunk, above n 153, 420.

\(^{155}\) Isaiah Trunk, above n 153, 424 and 428.
administration of the camp in return for better treatment.’ \(^{156}\) There were occasions where the Kapos behaved cruelly to other inmates in order to obtain favour with the SS. \(^{157}\) Some of the Kapos were Jewish. \(^{158}\) Even so there were instances where some tortured their fellow Jews. \(^{159}\) There were those who ‘assimilated the mores of their oppressors, and, contaminated by poisoned conditions and the complete breakdown of all ethical criteria among the German authorities, slavishly collaborated – coercing, blackmailing, and informing against their fellow Jews.’ \(^{160}\)

The category of ‘Real Liberation’, where those with Jewish ancestry were required to engage in extraordinary levels of persecution of Jewish people ‘to reveal’ their ‘true Aryan biological makeup’ \(^{161}\) is particularly obnoxious. This involved the Nazis turning their Jewish enemy against itself, a loathsome practice, designed to undermine any kind of solidarity amongst Jewish people. Similarly, the Queensland government enlisted the services of the Native Police who were required to disperse (that is, annihilate) groups of Indigenous peoples they came into contact with. \(^{162}\) Although many members of the Native Police came ‘from distant tribal groupings’ to those they killed, \(^{163}\) they undoubtedly had more in common with Aboriginal tribes than the colonists. Members of the target groups who participated in the extermination of their fellow members were no doubt under an enormous amount of pressure to cooperate with the governments in question. It was undoubtedly kill or be killed. Yet this additional layer of psychological torture was added to the tragedy – the knowledge that there were instances where their doom was facilitated by their own people.

I. Restricting Access to Education

Each regime also restricted access to education for members of the target groups. In Australia this occurred through educating Indigenous peoples for inferiority. Indigenous children were

\(^{156}\) Judith Hassan, above n 22, 53.
\(^{157}\) Ibid.
\(^{159}\) Ibid.
\(^{160}\) Isaiah Trunk, above n 153, 437.
\(^{161}\) Richard Miller, above n 4, 19.
\(^{163}\) Raymond Evans, Kay Saunders and Kathryn Cronin, above n 5, 57.
educated to work as lowly domestics or farmhands rather than fulfill their potential. They were encouraged to believe that they could never be more than servants for their white colonial masters. The Nazis were also keen to restrict access to education for Jewish people, although with a slightly different agenda. They did not wish to force assimilation through education, as occurred in Australia, but to facilitate segregation. However like the Australian colonists, the Nazis wanted to ensure that their target group was situated at the very bottom of the socio-economic ladder. As I stated earlier, the Nazis were concerned about the level of wealth Jewish people possessed. Restricting access to education was part of a strategy to limit the financial resources that could end up in Jewish hands. The aim was no doubt to limit the number of Jewish professionals, which would in turn limit the wealth that Jewish people could access. The attempt to concentrate wealth in the hands of those presumed to be racially superior was somewhat similar under each regime. By limiting the kinds of professions that those deemed undesirable could enter and by limiting their access to education each regime ensured that members of the target groups would be forced to live in comparative poverty. However instead of seeing their poverty as the consequence of an oppressive legal and political regime, the target groups themselves were classed as inherently dirty and unworthy of being treated with dignity. This facilitated their ostracism from ‘respectable’ society, working as a justification for their isolation and inhumane treatment.

J. Impact on Family Life and Relationships

At some point each regime enacted legislation to prevent what they saw as interracial sexual relationships. As explained earlier, their ideal was to safeguard what they saw as racial purity, drawing upon Social Darwinist philosophy. As a consequence of their racial philosophies each regime drastically interfered in family relationships, at times dissolving

166 Richard Miller, above n 4, 69.
167 Ibid 27, 29–30 and 34–35; Rowan Savage, above n 7, 34 and 37.
168 See Article 1(1) of the ‘Nuremberg Law for the Protection of German Blood and German Honor’ passed on 15 September 1935 and section 9(1)(a) of The Aboriginals Protection and Restriction of the Sale of Opium Acts Amendment Act of 1934 (Qld).
marriages and separating parents from children. These actions were devastating for members of the target groups.

The Nazi regime placed serious restrictions on marriage in order to try to protect what they saw as the racial purity of Aryan blood. Similarly, Australian authorities were also concerned with racial purity, regulating sexual conduct between those classified as belonging to different racial groups. Thus the Queensland ‘Protection’ legislation prohibited, for a period of time, interracial sexual intercourse between Indigenous and non-Indigenous people. Those who engaged in interracial sexual relationships with the unworthy ‘other’ were deemed to be defiling their nobler heritage.

Each regime fostered a distorted view of the sexuality of members of the target group. The Nazis considered that Jews were particularly inclined towards sexual deviancy, thus ‘[i]n the Nazi imagination … Jews were perceived as the embodiments of sexual potency and lust, somewhat like blacks for white racists’. Similarly, colonists attributed heightened sexuality to Aboriginal peoples. For example, it was argued that sexual assault of Aboriginal girls was justifiable because they were presumed to reach sexual maturity at a younger age.

Both regimes also engaged in forcible separations of children from their families and implemented legislation and government policy that destroyed the family life of members in

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169 Yitzhak Arad, Yisrael Gutman and Abraham Margaliot, above n 16, 78; Interview with Nechama Epstein in Donald Niewyk, above n 6, 157; Rosalind Kidd, above n 44, 106; Human Rights and Equal Opportunity Commission, above n 6, 30.
170 Interview with Nechama Epstein in Donald Niewyk, above n 6, 157; Human Rights and Equal Opportunity Commission, above n 6, Chapter 11; Human Rights and Equal Opportunity Commission, Us Taken-Away Kids – ‘Commemorating the 10th anniversary of the Bringing them home report’ (2007); Trevorrow v State of South Australia (No.5) [2007] SASC 285, [1151–1157].
171 Saul Friedländer, above n 5, 78 and 153.
172 Bleakley, 1933 Annual Report to Parliament, cited in Henry Reynolds, above n 162, 149; Raymond Evans, Kay Saunders and Kathryn Cronin, above n 5, 108.
173 A policy later reversed under the assimilation phase. However it was the official government position during the drive for segregation. Under section 9(1)(a) of The Aboriginals Protection and Restriction of the Sale of Opium Acts Amendment Act of 1934 (Qld) sexual intercourse or attempted sexual intercourse between a ‘female [A]boriginal, or “half-caste”’ and a non-Aboriginal man was an offence punishable by ‘a penalty of not more than fifty pounds or … imprisonment for any period not exceeding six months.’
174 Richard Miller, above n 4, 27; Raymond Evans, Kay Saunders and Kathryn Cronin, above n 5, 108.
175 Saul Friedländer, above n 5, 159.
176 Ibid.
177 Human Rights and Equal Opportunity Commission, above n 6, 31. The idea that people of colour are ‘promiscuous by nature’ has been common in countries where white people hold the power, Angela Harris, ‘Race and Essentialism in Feminist Legal Theory’ (1990) Stanford Law Review 581, 599; Peter Fitzpatrick, ‘Terminal legality: imperialism and the (de)composition of law’ in Diane Kirkby and Catherine Coleborne (eds), Law, history, colonialism – The reach of Empire (2001) 19.
the target groups.\textsuperscript{179} Jewish parental rights were effectively abolished under Nazism.\textsuperscript{180} Australian authorities showed a similar disregard for the family life of Indigenous peoples. The reserve system allowed colonial authorities to wreak havoc on Indigenous families’ lives,\textsuperscript{181} separating children from their families ‘by the rigid operation of a dormitory system’,\textsuperscript{182} and enforcing banishment from missions as punishment which fractured family and community networks.\textsuperscript{183}

Forcible child removal was a key feature of the interference in the family life of Indigenous Australians.\textsuperscript{184} The Nazis also showed a similar disregard for family life when they engaged in a broader child snatching effort of children who were good ‘Aryan’ types to further Hitler’s fantasy of Aryan world domination.\textsuperscript{185} These were Eastern European children who were considered to be ‘very good racial types’.\textsuperscript{186} The parents of these children were lied to, and told that children would be returned after medical examinations had taken place.\textsuperscript{187} The stolen children were then sent to \textit{Lebensborn} institutions. Like the Queensland reserves, life in the \textit{Lebensborn} institutions was hardly ideal. Beatings for refusing to adhere to the process of Germanization were not uncommon.\textsuperscript{188} Children were restricted from speaking their own language.\textsuperscript{189} As occurred in Australia, children who were taken by the Nazis were banned from having any kind of contact with their relations, and were given German names and German birth certificates.\textsuperscript{190}

At the \textit{Lebensborn} homes children were watched closely to see if they developed any behaviour traits which would identify them as being racially inferior.\textsuperscript{191} These homes were also training centres for the Germanization process, which forced assimilation into German culture. It bears a striking resemblance to the forced assimilation process that Aboriginal

\begin{thebibliography}{99}
\bibitem{178} Rosalind Kidd, above n 44, 50.
\bibitem{179} Yitzhak Arad, Yisrael Gutman and Abraham Margaliot, above n 16, 78; Interview with Nechama Epstein in Donald Niewyk, above n 6, 157; Rosalind Kidd, above n 44, 106; Human Rights and Equal Opportunity Commission, above n 6, 30.
\bibitem{180} Interview with Nechama Epstein in Donald Niewyk, above n 6, 157; Gitta Sereny, above n 6, 28.
\bibitem{181} Human Rights and Equal Opportunity Commission, above n 6, 74.
\bibitem{182} Ibid.
\bibitem{183} Ibid 74; Rosalind Kidd, above n 44, 106.
\bibitem{184} Bruce Elder, above n 6, 244–245.
\bibitem{186} Himmler cited in Gitta Sereny, above n 6, 38.
\bibitem{187} Gitta Sereny, above n 6, 45.
\bibitem{188} Ibid 47.
\bibitem{189} Ibid.
\bibitem{190} Ibid 39.
\end{thebibliography}
children have been subjected to in Australia. It can be seen that both Australia and Nazi Germany were prepared to engage in gross interference with family relationships on the basis of race. They both enacted legislation and implemented policies designed to destroy the family unit and prevent what they saw as interracial sexual relationships. Their eugenicist ideals have left a legacy of devastation.192

K. Traumatised Victims of State Sanctioned Oppression

Another common feature of each regime is that members of the target groups have been utterly traumatised as a result of the state sanctioned persecution and oppression. Jews who survived the Holocaust have been traumatised by the severe and prolonged persecution they experienced.193 For example, Holocaust survivor Elie Wiesel describes the traumatic experience of his first night at camp as turning his life ‘into one long night, seven times cursed and seven times sealed’ and a ‘nocturnal silence’ that deprived him ‘for all eternity, of the desire to live’.194 Trauma has also been a natural consequence of government policies affecting Aboriginal children who were removed from their families.195 This trauma has been likened to what Holocaust victims have suffered.196 Although there are obviously some differences in the nature of the traumatic events, the consequences of the trauma are similar. In so many cases members of each target group have suffered negative effects on their health as a result of the trauma experienced.197 Antonio Buti argues that:

Aborigines continue to endure the effects of the removal of children from families to be institutionalised. Loss of culture, family, connection and trust, to name but a few losses, and the pain of abuse, whether physical, sexual or psychological, has resulted in many Aborigines being unable to properly function as parents and members of communities. Often this has been played out through substance abuse, contact with the criminal justice

191 Ibid 45.
192 Interview with Nechama Epstein in Donald Niewyk, above n 6, 157; Human Rights and Equal Opportunity Commission, above n 6, Chapter 11; Human Rights and Equal Opportunity Commission, above n 170. See also Trevorrow v State of South Australia (No.5) [2007] SASC 285, the first successful compensation claim for a member of the stolen generation. In this case at [1151–1157] Justice Gray accepted the evidence that suggested ‘the plaintiff had suffered a major depressive disorder for many years’ as a result of his experiences as a member of the stolen generation.
193 Judith Hassan, above n 22, 32 and Chapter Six.
197 Human Rights and Equal Opportunity Commission, above n 6, 178 and 181 and 197; Judith Hassan, above n 22, 44–45.
system, poor health, suicide, mental illness, loneliness, and alienation. Professor Beverley, a psychiatrist, has stated that many Aboriginal people who were removed to missions and other institutional and foster care environments have displayed symptoms and behaviour similar to Holocaust victims.\textsuperscript{198}

Donald Niewyk asserts that ‘[s]tudies of Holocaust survivors have shown that virtually all suffered to some degree from a “survivor syndrome” that included acute anxiety, cognitive and memory disorders, depression, withdrawal, and hypochondria.’\textsuperscript{199} Similarly members of the Stolen Generations of Indigenous children were reported to suffer from many of the same sorts of ailments in the \textit{Bringing them home} report.\textsuperscript{200} One member of the Stolen Generation who gave evidence to HREOC stated ‘[i]t’s like a hole in your heart that can never heal.’\textsuperscript{201} Another testified that:

\begin{quote}
It never goes away. Just ‘cause we’re not walking around on crutches or with bandages or plasters on our legs and arms, doesn’t mean we’re not hurting. Just ‘cause you can’t see it doesn’t mean [it’s not there] I suspect I’ll carry these sorts of wounds ‘til the day I die. I’d just like it to be not quite as intense, that’s all.\textsuperscript{202}
\end{quote}

These statements reveal that the ‘impact of trauma is profound. It creates wounds which cannot necessarily be seen.’\textsuperscript{203} This trauma lives on in the memory of survivors long after the events.\textsuperscript{204} As Judith Hassan states, ‘trauma affects the lives of the traumatised long after the horror has ceased.’\textsuperscript{205} In the HREOC report \textit{Us Taken-Away Kids},\textsuperscript{206} members of the Stolen Generation shared their experiences of trauma experienced as a consequence of state sanctioned racist oppression. Many shared poetry to express their depth of feeling. One particularly touching poem by Jeannie Hayes is ‘Little China Doll’:

\begin{quote}
Hey little china doll, why don’t I see you smile?
‘They took away my toys and made me run for miles.
So little china doll, why the great big frown?
‘they dragged me from my bed, to dig up frozen ground.’
\end{quote}

\begin{footnotes}
\item[198] Antonio Buti, above n 196, 30.
\item[199] Donald Niewyk, above n 6, 144.
\item[201] Human Rights and Equal Opportunity Commission, above n 6, 177, emphasis removed.
\item[202] Ibid 178, emphasis removed.
\item[203] Judith Hassan, aboven n 22, 23.
\item[205] Judith Hassan, above n 22, 32.
\item[206] Human Rights and Equal Opportunity Commission, above n 170.
\end{footnotes}
Well, my little china doll, why don’t you ever speak?
‘try that ’round here, they’ll isolate you for a week.’

But little China doll, what do they feed you in that quarter?
‘Just a slice of plain bread and cup of luke warm water.’

What, little china doll, does go on with you?
‘They froze my heart and they will yours too;
They’ve hit me with their fists of broken glass
And till this day, the nightmares last.
So tell me little china doll, how do you survive?
‘There’s only one place where a little girl can hide;
There are places in my mind, where they can never go
They really resent that, you’d be shocked to know.
Dear little china doll, you seem like walking dead.
‘That I am; everywhere except inside my head.’

How do you know china doll, that you did survive?
‘I cut myself every week to feel if I’m alive.’

You’re much too broke for me to fix, little china doll;
Your mind is strong but your heart so very cold.
‘Just throw me back on the heap, they have since I was ten years old.’

This poem is poignantly tragic, touching on so many of the day to day hardships experienced by members of the Stolen Generation. It highlights the legacy of trauma left by the policies of forcible removal.

The trauma experienced by members of the target groups has had intergenerational effects in both Australia and Germany. The negative experiences of Indigenous Australian peoples throughout colonisation have been compared with ‘the transgenerational transmission of the trauma of the Nazi concentration camps’. This involves the transmission of trauma down through generations so that it continues to negatively affect later generations. Professor Judy Atkinson, an Indigenous academic who has worked extensively in this area, explains

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207 Ibid 49.
208 Judith Hassan, above n 22, 55–57; Judy Atkinson, above n 9, 81–88.
209 Judy Atkinson, above n 9, 86.
210 Ibid.
that ‘trauma can continue into the third and succeeding generations when the trauma is unrecognised or untreated.’ 211 Atkinson explains that:

Within central Queensland, trauma trails run across the country and generations from original locations of violence as people moved away from the places of pain. These trauma trails carried fragmented, fractured people and families. They are a record of the distress that occurred when relationships between people and their land and between people and people were willfully destroyed. 212

According to Atkinson trauma leads victims to ‘adapt their behaviours and beliefs to compensate for their traumatisation, compounding their traumatisation.’ 213 Finding strategies to cope with trauma is complex but necessary. 214 There is no simple solution to dealing with trauma. 215 However it most certainly will not be healed through denial.

L. Genocide

Genocide against the target groups was a consequence of government actions in both Australia and Nazi Germany, 216 although as Berel Lang rightly states, the Holocaust is ‘a paradigm … instance of genocide’. 217 The Convention on the Prevention and Punishment of the Crime of Genocide was formed largely in response to this horrific display of human brutality. 218 The Nazis engaged in murder (Article 2(a)), torture (Article 2(b)), life conditions designed to lead to the group’s destruction via the destruction of economic livelihood and forced existence in ghettos and concentration camps (Article 2(c)), restrictions on marriage

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211 Ibid.
212 Ibid 88.
213 Ibid 86.
214 Judith Hassan, above n 22, Chapter Three, 110 and 112.
215 Ibid 118.
216 Richard Miller, above n 4, Chapters Two, Three, Four and Five; Human Rights and Equal Opportunity Commission, above n 6, 274–275; Matthew Storey, above n 6, 5; Colin Tatz, above n 1, 97–99 and Chapter Three; Irene Watson, ‘Law and Indigenous Peoples’, above n 6, 108; Irene Watson, ‘Buried Alive’, above n 6, 254, 258 and 263; Irene Watson, ‘Settled and Unsettled Spaces’, above n 6, 48; Irene Watson, ‘From a Hard Place’, above n 6, 209; Tony Barta, above n 6, 157; Bruce Elder, above n 6, 245; Alison Palmer, above n 4, 1–3; Greta Bird, above n 5, 10 and 40; David Hollinsworth, above n 2, 187–188.
217 Berel Lang, above n 6, 37.
218 Article 2 of this Convention sets out the following definition of genocide:

- Killing members of the group;
- Causing serious bodily or mental harm to members of the group;
- Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- Imposing measures intended to prevent births within the group;
- Forcibly transferring children of the group to another group.
and imposing systematic persecution which prevented births (Article 2(d)), and forcible removal of children from their families both in the concentration camps and in the Germanization process (Article 2(e)).

Indigenous peoples have also been subjected to genocide in Australia. For example, all states engaged in policies of forcible child removal, which constitutes genocide under Article 2(e) where it occurs with the requisite ‘intent to destroy’. The Bringing them home report explains that it is clear ‘the predominant aim of Indigenous child removals was the absorption or assimilation of the children into the wider, non-Indigenous, community so that their unique cultural values and ethnic identities would disappear, giving way to models of Western culture.’ The report also concluded that this action on the part of government ‘could properly be labeled “genocidal”’. They considered this to have been the case under the Convention on the Prevention and Punishment of the Crime of Genocide since 1946 and also under international customary law which prohibited genocide prior to that time. Charges of genocide have also been made concerning the massacres that occurred on the frontier (Article 2(a)), and in relation to enforcing conditions of life upon Indigenous peoples that ‘caused them serious bodily and/or mental harm’ (Article 2(b)).

However ‘[t]he Holocaust … has become virtually synonymous with genocide.’ As such many Australians seem to have a reluctance to attach the label of genocide to events in Australia’s colonial history. Many Australian historians ‘write about pacifying, killing,
cleansing, excluding, exterminating, starving, poisoning, shooting, beheading, sterilising, exiling, removing, but avoid “genociding”. Somehow the thought of acknowledging the colonial policies and practices as genocidal seems too confronting. As Tony Barta asserts:

By associating genocide uniquely with the Holocaust, Australians have been able to make a classical transference of an unacknowledged shadow in their own past to a publicly acknowledged worse – indeed worst – case. Germans have a terrible legacy to live down – how could they let something like that happen? Whatever took place in our past, it was nothing like that. This very powerful importing of atrocity ... and the consequent exporting of outrage, is a major factor in the way Australians cope (or do not cope) with what happened here.

This ‘exporting of outrage’ is still occurring in Australia. In speaking of the Holocaust, Tony Barta contends:

It is this consciousness of a uniquely terrible event, this distance from anything we might recognize as genocide in our own past, which is so hard to break through for Australians. Thousands of Aborigines died violently at the hands of white settlers, whole peoples were wiped out by disease, degradation, alcohol and despair. But who planned it? Who carried it through? It seemed simply to happen.

It seems that wherever the white man went the white spectre of death soon followed. Although benevolent intentions were often expressed in government documents the ‘presence and everyday activities’ of colonists ‘had an effect which was genocidal’ so that ‘historically we have a relationship of genocide with the Aborigines which cannot be understood only in terms of a clear intention to wipe them out.’

What Reynolds fails to see is something he has consistently failed to see in all his writings: that the attempted destruction of “part” of a people is enough for the commission of the crime, and that genocide doesn’t have to be successful [in the sense of total destruction of an entire people] in order to be genocide. (In law, there is no lower or upper limit to the destruction of “part” of a people.) Furthermore, he ignores one essential difference between one particular criminal law and this particular international law: in the former, attempted murder is not murder but another crime, but in the latter, attempted genocide is genocide. He also ignores the Convention’s injunction that criminality is inherent in conspiracy, incitement and complicity in genocide.

228 Colin Tatz, above n 1, 67.
229 Tony Barta, above n 6, 155.
230 Ibid.
231 Consider the recent outrage over human rights abuses in East Timor and how Australia just had to go in to save the day. It is a pity that we actually had no moral high ground to stand on seeing as our own record is so blemished when it comes to human rights abuses being perpetrated by governments in our own country. The ‘exporting of outrage’ can also be seen in relation to Australia’s recent willingness to engage in an unprovoked attack on Iraq. Politicians talked about the evils of Saddam Hussein as a leader, and while I do not consider his regime to be admirable in any sense, I do not consider that an unprovoked attack which led to the murder of hundreds of thousands of civilians by the ‘coalition of the killing’ to be any better.
232 Tony Barta, above n 6, 156.
233 Ibid.
Whilst conservative politicians and historians quibble about numbers and allegedly benevolent motives they fail to take into consideration that the attempted destruction of ‘part’ of a people constitutes genocide.\(^{234}\) It matters little whether the government considered that it was in the best interests of Indigenous peoples that they simply cease to exist.\(^{235}\) The point is that it was quite clearly government policy for a long time in this country and legislation was enacted to carry that policy into effect. Morgan Blum identifies the 1937 Conference of Commonwealth and State Aboriginal Authorities as the point at which ‘the intent for genocide was directly confirmed.’\(^{236}\) Robert Manne also identifies this as the ‘moment in Australian history’ where ‘genocidal thought and administrative practice touched’\(^{237}\) At this conference Neville, who was the Chief Protector in Western Australia, spoke plainly of the need to ‘merge’ Indigenous peoples ‘into our white community’ so that we could ‘eventually forget that there were any Aborigines in Australia’\(^{238}\) Merging, as it was called, involved forced marriages, prohibition on sexual relationships and it tore families apart. It was clearly guided by the pursuit of eugenicist ideals.\(^{239}\)

Under both regimes members of the target groups were described in the most denigrating terms.\(^{240}\) This dehumanisation was a crucial justification of genocide.\(^{241}\) Rowan Savage points out that ‘genocide unleashes the bestiary … it unleashes a vocabulary which names victims as vermin, brutes and game.’\(^{242}\) He states that ‘perpetrators of genocide and genocidal killing use language to represent victims as non-human life forms.’\(^{243}\) Often the members of the target group are represented as posing a grave threat to the society at large, a threat which must be eradicated at all costs.\(^{244}\) Savage notes that genocide perpetrators adopt a ‘representation of victims as threatening creatures: wild and loathsome animals and vermin.’\(^{245}\) This type of
representation ‘is a tool to call for and legitimise killing, both in the eyes of the perpetrators themselves and in the opinion of the genocidal society.’ Savage observes that:

Likening victims to animals has been a significant feature in widely diverse episodes of genocide and mass killing. Naming victims as menacing animals presents them as a threat to human society (whether to person, property or to “civilisation” itself). At the same time, it places them outside a common universe of mutual human moral obligation. In other words, the victim group becomes a problem demanding immediate action, one for which a biological solution, such as killing, is legitimate. Such eliminationist representation can play an important role in facilitating genocide.

In both Nazi Germany and in early colonial Australia members of the target groups were declared to be “‘life unworthy of life’”. Under each regime people with pretensions to racial superiority presumed they had a right to determine who was worthy of life and who was not. Israel Charney has stated:

Each and every genocider … defines precisely who are the undeserving, condemnable and disposable in their era … Each victim group becomes the object of damning and unbelievable symbolizations by their killers as to their subhuman representations – lice, vermin, diseased, savages, heathens. What is needed is an understanding of this process as underlining and enabling the development of genocidal policies and actions.

Without successfully dehumanising a group of people legislative oppression becomes unthinkable. In Australia and Nazi Germany the process of dehumanisation was well under way by the time each of the governments sought to implement a program of legislation targeting each group deemed undesirable.

M. Dehumanising Propaganda

The ‘dehumanisation of a target people is an essential ingredient of genocide.’ Both Nazi Germany and the Queensland government effectively employed propaganda to dehumanise those targeted. In each jurisdiction the response towards target groups was alleged to be warranted as some kind of ‘protection’ necessary due to the biological and moral threat posed

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246 Ibid.
247 Ibid.
248 Berel Lang, above n 6. Whilst this phrase was specifically used by the Nazis to refer to anyone they decided was unworthy of life, traces of this attitude can be seen in the language used to denigrate Aboriginal peoples in Australia – see generally Rowan Savage, above n 7.
249 Israel Charney cited in Rowan Savage, above n 7, 18.
250 Colin Tatz, Peter Arnold and Sandra Tatz, above n 241, 10.
251 Richard Miller, above n 4, 14–15 and 27–35; Karin Doerr, above n 7, 28; Rowan Savage, above n 7, 37; Jennifer Nielsen, above n 7, 85; Raymond Evans, Kay Saunders and Kathryn Cronin, above n 5, 77; Alison Palmer, above n 4, 92.
by the target group. In both systems however the response to the alleged threat was entirely disproportionate. Each regime undertook a considerable amount of planning to respond to the alleged ‘threats’. Nazi Germany had a highly organised industrial death complex with special extermination camps. Queensland had a less industrialised process, but it contributed to the genocide of Indigenous peoples nevertheless.

Each regime relied upon the operation of a particular discourse which helped to create and sustain oppressive power relations. The Nazi regime relied upon a discourse of Anti-Semitism which had been operating within Europe for many years. In Australia a ‘colonial discourse’ was created to justify the dehumanising treatment meted out to Indigenous peoples. Both discourses were heavily reliant on negative stereotypes, and both utilised aspects of Social Darwinism as a justifying ideology. Both resulted in dehumanising legislation, policy and oppressive exercises of State power. Each regime is a vivid example of the way in which discourses have immense power.

When examining the language used by each of the regimes who engaged in brutal oppression, some striking similarities are apparent. Very similar terms were often used to describe members of the targeted group in ways that would dehumanise them, which in turn justified horrendous treatment in the minds of the perpetrators. The Nazis likened Jews to a variety of dangerous animals, insects, and threats. Appalling language was gradually used to strip

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253 Berel Lang, above n 6, 8.
254 Ibid 37.
256 Colin Tatz, above n 1, 23.
258 Rowan Savage, above n 7.
259 Andrew Heywood, above n 2, 220; Henry Reynolds, above n 2, 114; David Hollinsworth, above n 2, 82.
260 See Chapter 2 and Chapter 3 of this thesis.
261 Margaret Davies, above n 31, 332–334; Bill Ashcroft, Gareth Griffiths and Helen Tiffin, above n 15, 55; David Hollinsworth, above n 2, 27.
262 Rowan Savage, above n 7, 22.
263 Richard Miller, above n 4, 27, 29–30 and 34–35; Rowan Savage, above n 7, 28–39; Christopher Browning, above n 120, 21.
members of the target groups of their humanity and allow for their extermination to be seen as a necessary course of action to effectively protect the rest of society. Similarly, colonial culture created a denigrating stereotype of Indigenous people which has had a devastating impact upon them. Indigenous peoples were also likened to savage animals, pests, vermin, insects, bacteria and other unsavoury elements that needed to be eradicated. Indigenous peoples were also referred to as ‘brutes’, which, from the perspective of the colonists, seemed to justify the brutal treatment Indigenous peoples received. As Rowan Savage explains ‘[t]he term brute has been a convenient one for characterising others as sub-human; it can refer both to humans and to animals, and thus, applied to humans, is already partway to animalising them.’ Colonial massacres were described ‘in animalised terms.’ The ‘colonial discourse’ often ‘implicitly represented [I]ndigenous peoples as indigenous fauna [which] explicitly defined them out of existence as humans.’ Many colonists were only too happy to adopt an extermination policy when dealing with Indigenous peoples, as the following extract reveals:

Massacre of Aborigines was carried out by settlers, soldiers and Native Police, and an eliminationist mentality was evident in popular settler rhetoric. In 1883, a columnist in the Queensland Figaro wrote that “the blackfellow is a brute and must be put out of the way.” “North Gregory”, a correspondent to the Queenslander, explained that “if the whites are to settle and occupy their country, then a certain amount of cruelty and severity is unavoidable. You say we treat them like wild animals. Well, to a certain extent their attributes are the same, and must be met in the same manner.”

Thus Indigenous peoples were likened to ‘wild animals’, animals which presented a threat to the colonial project and the safety of colonial society. There was some degree of difference in the treatment received by people who were likened to tame animals and those likened to wild animals. ‘The “wild” were to be killed, the “tame” to be exploited or ignored.’ Indigenous people who were considered not to pose a threat to white society were described as ‘tame

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264 See Chapter Two for examples of this.
265 Rowan Savage, above n 7, 23.
266 Ibid 37; Rosalind Kidd, above n 44, xv–xvi; Henry Reynolds, The Question of Genocide, above n 162, 167; Raymond Evans, Kay Saunders and Kathryn Cronin, above n 5, 77; Alison Palmer, above n 4, 92; Henry Reynolds, above n 252, 108.
267 Raymond Evans, Kay Saunders and Kathryn Cronin, above n 5, 77.
268 Rowan Savage, above n 7, 37.
269 Ibid 40.
270 Homi K. Bhabha, above n 257, 62.
271 Rowan Savage, above n 7, 41.
273 Rowan Savage, above n 7, 39.
blacks’. The description of ‘tame’ as opposed to ‘wild’ Aborigines was a way of likening them to animals.

The comparisons made between target populations and animals or vermin served to ‘exclude victims from a humanity in common with the perpetrators and bystanders.’ Savage claims ‘in genocide and genocidal killing, the gap between perpetrator-self and victim-other becomes so wide that the victim falls beyond the boundary of the “human”’. ‘Animal representations which construct victims as a threat engender fear and hatred, ensuring that no moral reproach or question need be considered in relation to their deaths.’ Calling the target group ‘vermin’ effectively legitimates their murder (or at least their severe oppression) because killing vermin is seen as perfectly acceptable. Denigrating terminology is an integral part of the genocidal process. It facilitates a denial of the individuality of each of the victims.

Even so, facing the brutal reality of mass extermination presented a series of challenges. Thus under each regime a range of euphemisms was employed to deal with the genocide. Various euphemisms existed to describe the murder of Indigenous peoples, such as ‘snipe shooting’, ‘crow’ shooting and ‘kangaroo’ shooting. Similarly, the Nazi regime employed euphemisms to camouflage the extermination of Jews, so that the murder of Jews was described as ‘processing’, ‘special treatment’, ‘resettlement action’, and signified by the symbol ‘RU’ which ‘stood for Rückkehr unerwünscht (return not wanted)’. Of course the most famous Nazi euphemism for murder was the ‘Final Solution of the Jewish Problem’. Thus both regimes used euphemisms to camouflage their brutal treatment towards those they chose to target. The use of euphemisms functioned as a mechanism to

274 Raymond Evans, Kay Saunders and Kathryn Cronin, above n 5, 88.
275 Ibid 88–89.
276 Rowan Savage, above n 7, 18.
277 Ibid 25.
278 Ibid 19.
279 Ibid.
280 Ibid.
281 Ibid 35 and 40.
282 Gitta Sereny, above n 6, 78.
283 Guenter Lewy, above n 24, 389.
284 Karin Doerr, above n 7, 36.
285 Ibid 32.
286 Ibid 33.
neutralise guilt and also ‘prevented expressions of compassion and sorrow.’ Euphemisms allowed some ‘moral disengagement.’

Moral disengagement was also facilitated by perpetuating negative stereotypes about members of the target groups. Attributing negative stereotypical qualities to Indigenous peoples has been an essential part of the justification for theft of land, culture and children.

The trauma facilitated by law became possible because of the successful dehumanisation of Indigenous peoples through propaganda. Colin Tatz explains ‘Aborigines became not just different, or a people unlike us, but a people other than us. This geographic, religious and legal otherness, this quality of being “other” than us and, therefore, other than human, was the first step along the road to the various forms of genocide.’

In each regime the dehumanising language of propaganda allowed for a level of ‘moral disengagement.’ The gradual process of desensitisation that occurs when dehumanising speech is employed results in people becoming more and more accustomed to cruelty, and less likely to object to the degradation of their fellow human beings. Cruelty becomes justifiable in the face of dehumanisation. Indeed it is constructed as necessary. The process of dehumanisation involves the representation of the victim group as posing ‘a serious threat to the fabric of the perpetrator society in a way which necessitates their destruction as legitimate, as necessary, and as self-defence.’ The portrayal of certain groups of people as ‘sub-human’ is used to justify their being treated with less dignity and respect than other groups of people who are seen as ‘fully human’.

Those who are defined as sub-human in genocidal societies are treated as though they are so inferior that the same rights that others have should not be applied to them.

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287 Ibid 27; Richard Miller, above n 4, 40.
288 Rowan Savage, above n 7, 27.
289 See Brennan J in Maho v Queensland (No 2)(1992) 107 ALR 1 at 28; Human Rights and Equal Opportunity Commission, above n 6, 29; Raymond Evans, Kay Saunders and Kathryn Cronin, above n 5, 11.
290 Colin Tatz, above n 1, 143.
291 Rowan Savage, above n 7, 27.
292 Ibid.
293 Ibid 30.
294 Ibid 39.
295 Ibid 31.
N. Projection

As I mentioned above, in each of the regimes under study members of the target groups were described in dehumanising terms. Projection was the order of the day, with the dominant group projecting onto victims their own despised qualities. They sought to project their ‘shadow’ side onto members of the target groups. Thus Aborigines were described as ‘savages’ by people whose ‘savagery’ must have startled Aboriginal sensibilities. Germans described Jews as facilitators of all manner of evil, and yet it is difficult to imagine a more threatening evil than the Nazi regime itself.

Robert Johnson, a Jungian psychologist, suggests that each individual and culture has a ‘shadow’ side. This shadow side consists of the aspects of the personality and the culture that are rejected as unacceptable and yet retain a foothold in the individual or collective unconscious. Johnson states that individuals and nations have a tendency to engage in projection of their shadow side onto others. He sees the Holocaust as an instance of Germany falling ‘into the idiocy of projecting its virulent shadow on the Jewish people.’ Johnson considers the task of assimilating the shadow side into oneself or ones culture is infinitely more difficult than the path of projection. ‘Projection is always easier than assimilation.’ However as Johnson declares, ‘[i]t is a dark page in human history when people make others bear their shadow for them.’

Richard Miller points out that the Nazis indulged to a large measure in projection. This phenomenon of projection can also be seen in Australia where colonists treated Indigenous peoples brutally and yet labelled them ‘ferocious savages’. Reading historical accounts it is arguable that Indigenous peoples were certainly no more ‘savage’ than the colonists who...
slaughtered Aborigines indiscriminately. As Inga Clendinnen maintains, ‘[e]very society is adept at looking past its own forms of violence, and reserving its outrage for the violence of others.’ Postcolonial theorists have pointed out that colonial powers frequently engaged in projection when defining the colonised. Australian colonists projected onto Indigenous peoples all the negative qualities of themselves.

Throughout Australia’s colonial history Indigenous peoples have been encouraged to internalise the view of the coloniser: ‘to internalize as self-knowledge, the knowledge concocted by the master.’ Indigenous peoples were urged to adopt a negative view of Aboriginality based upon the negative stereotypes perpetrated by colonial authorities. For example some members of the Stolen Generation interviewed in the *Bringing Them Home* report explain how they grew up feeling like they had to be ashamed of their Aboriginality. This resulted in serious identity issues because they were encouraged to be ashamed of their Indigenous heritage rather than proud of it.

Obviously the task of assimilating Australia’s shadow side into our collective national psyche is a difficult one. The history wars can be seen as evidence of this struggle, the struggle to accept the paradox that is Australian history, the struggle to accept the shadow – the massacres, the oppression, the theft of land, culture and children. However, as Jungian analysis suggests, coming to terms with our national shadow is necessary if we ever hope to experience healing, wholeness and unity.

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306 Colin Tatz, above n 1, 79.
310 Human Rights and Equal Opportunity Commission, above n 6, 156–159 and 200.
311 Ibid. It seems that Jewish children were likewise taught to despise their Jewish heritage in school as well as in the public sphere generally. Jewish children were taught to denigrate their own people and their own culture, which was a very effective method for attempting to destroy cultural pride. The psychological impact on Jewish children attending school was tremendously harmful. Richard Miller, above n 4, 70–72.
313 Robert Johnson, above n 297, 38–41.
O. Public Attitudes

The socially accepted racism of each culture paved the way for extreme persecution and oppression. The role of bystanders in targeting the oppressed group was necessary in order for the oppression to be carried out.\textsuperscript{314} As Rowan Savage argues ‘[t]he dehumanisation of victims does not take place solely in the eyes of those who directly perpetrate genocide. For genocide to occur, there is a need, within the perpetrator society, not only for willing perpetrators but for tacitly-approving, or malevolent, bystanders.’\textsuperscript{315} Colin Tatz focuses on the importance of ‘the perpetrators, the victims and the bystanders’ in the process of genocide.\textsuperscript{316} He also considers there are others who are essential to the process of genocide, ‘the beneficiaries of genocide, and the denialists’, along with the ‘facilitators’, those who are ‘contributors, over long periods of time, to a range of ideas’ who are ‘affirmers of particular societal values.’\textsuperscript{317} In each regime under study there have been perpetrators, victims, bystanders, beneficiaries, facilitators and denialists of genocide.

Although a minority of people objected to the brutal treatment of members of the target groups, there were sufficient numbers of people who were complicit in the process of dehumanisation, persecution and oppression for it to occur. In relation to frontier violence, a minority spoke up about their concerns about the lack of public interest in the murders of Aboriginal peoples.\textsuperscript{318} Yet there was a large measure of ‘public acceptance’ of ‘racial violence’.\textsuperscript{319} Similarly, although there were some German citizens who protested about various measures introduced by the Nazi regime,\textsuperscript{320} the majority of citizens seem to have accepted the government position.\textsuperscript{321}

\textsuperscript{314} Rowan Savage, above n 7, 19.
\textsuperscript{315} Ibid.
\textsuperscript{316} Colin Tatz, above n 18, 91.
\textsuperscript{317} Ibid.
\textsuperscript{318} Alison Palmer, above n 4, 47; Henry Reynolds, above n 252, 119.
\textsuperscript{319} Henry Reynolds, above n 252, 118–119.
P. Denialism

Both Nazi Germany and Australia have had their fair share of denialists, those who try to deny or trivialise the extent of suffering experienced by members of the target groups.\(^\text{322}\) As I stated in Chapter One, denialism involves a concerted effort to sanitise history.\(^\text{323}\) Denial of the full extent of the trauma has occurred in relation to the Holocaust\(^\text{324}\) and also in relation to the massacres and the Stolen Generations of Indigenous peoples.\(^\text{325}\) Denialism attempts to convince the survivors of trauma that their memories are defective.\(^\text{326}\) Some Holocaust denialists, for example, claim that the Holocaust was a hoax.\(^\text{327}\) Others dispute the use of gas chambers for the mass murder of Jews.\(^\text{328}\) One of the most renowned of these is David Irving,\(^\text{329}\) although there have certainly been numerous others.\(^\text{330}\) The motive behind this trend appears to be to try to redeem aspects of Nazism. As Colin Tatz claims, ‘[o]nly the nullification of the Holocaust can make Naziness, and its derivatives, respectable or acceptable.’\(^\text{331}\)

Denialism involves a refusal or a reluctance to address the atrocities caused by perpetrator societies towards stigmatised minorities. Such events appear to be too difficult to confront, too hard to resolve. This phenomenon can be seen in both Australia and Germany. For example, Donald Niewyk asserts there has been a notable reluctance on the part of German historians to focus on the horrors of Nazism:

> Conservative German historians suggested that their countrymen are much too mindful of past Nazi crimes. It is time, they said, to regard the Holocaust as one of many genocidal acts around the world and pay closer attention to more positive episodes in German history. They were strongly attacked by scholars who stressed the uniqueness of the Holocaust and the need for Germans to confront their heavy historical responsibility for it.\(^\text{332}\)

\(^{322}\) Colin Tatz, above n 1, 122–128 and 132–139; Robert Kahn, above n 81, 65–73 and 77–78; Robert Manne, above n 237.
\(^{323}\) Colin Tatz, above n 1, 124.
\(^{324}\) Ibid 126; Robert Kahn, above n 81, 65–73 and 77–78.
\(^{325}\) Keith Windschuttle, above n 19; Peter Howson, ‘Rescued from the Rabbit Burrow – Understanding the Stolen Generation’ (1999) June Quadrant 10; Reginald Marsh, above n 19, 15. For a counter position see Robert Manne, above n 237; Robert Manne (ed), Whitewash – on Keith Windschuttle’s Fabrication of Aboriginal History (2003).
\(^{326}\) Colin Tatz, above n 1, 124.
\(^{327}\) Ibid 126.
\(^{328}\) Ibid.
\(^{329}\) Ibid 128.
\(^{330}\) Robert Kahn, above n 81, 65–73 and 77–78.
\(^{331}\) Colin Tatz, above n 1, 126.
\(^{332}\) Donald Niewyk, above n 6, 148.
The attitude adopted by the conservative German historians referred to above bears a striking resemblance to the position taken by former Prime Minister John Howard. Like the German historians wanting to shift the focus to more positive aspects of German nationality, Howard was concerned to ensure that Australians were presented with a more ‘upbeat’ version of Australian history. He wanted Australians to feel “‘relaxed and comfortable’”. He did not want to confront the brutal realities of a racist colonial legacy that lingers on with present day ramifications. Instead he urged Australians to celebrate the historical greatness of our nation rather than reflect upon that which is shameful. In John Howard’s estimation ‘[t]he balance sheet of our history is one of heroic achievement and … we have achieved much more as a nation of which we can be proud than of which we should be ashamed.’ This statement involved a denial of the gravity of trauma experienced by Indigenous peoples in Australia. It trivialised their trauma and involved a gross level of cultural insensitivity.

Examination of denialism in relation to the Australian genocide and the Holocaust shows that denial of historical traumas is closely connected with current political aims. As Gitta Sereny claims, denialists ‘are by no means motivated by an ethical or intellectual preoccupation with historical truth, but rather by precise political aims for the future.’ The diminishing or denial of past traumas is intricately connected to the political, social, legal and economic circumstances experienced by members of target groups today. By trivialising the trauma of the Stolen Generations, for example, the Howard government was able to present the contemporary situation of disadvantage faced by Indigenous peoples as disconnected to Australia’s racist colonial legacy.

Denialism asserts that what has happened to the survivors of trauma is not so terrible. This type of attitude can be seen in Keith Windschuttle’s work where he insists that the numbers of Indigenous peoples massacred are far fewer than indicated by contrary histories written by other historians, as though this actually makes the massacres themselves less appalling. Colin Tatz claims that what many denialists have in common is that they do neither fieldwork nor homework. They are passionate in defence of national pride and achievement, indignant in denying any alleged “racist, bigoted past”. Like so many genocide denialists, they assert but don’t demonstrate, they

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333 Prime Minister John Howard, cited in David Hollinsworth, above n 2, 19.
334 Ibid 17.
335 Gitta Sereny, above n 6, 135.
336 Keith Windschuttle, above n 19.
337 Ibid 2-4.
disapprove but don’t ever disprove; they assert that genocide never occurred here, or couldn’t have occurred here, or could never occur here. More commonly, they nibble at the edges, sniping at weaker points, in the hope (or belief) that if they can demonstrate one error of fact or figure, the central and essential “contention” of genocide will fall apart.338

The kind of denialism I have touched upon here reveals a level of emotional as well as intellectual immaturity. As a nation Australia is still in its adolescence. Australia is still learning to address the national trauma involved in its racist colonial legacy. There is a long way yet to travel before healing will come. However there will be no healing in denial. The German Government has come a long way in terms of acknowledging the harm caused under Nazism and making reparation.339 However in Australia the government response is pathetic by comparison.340 The refusal to engage with Australia’s past with integrity and deal with its present ramifications will keep Australia in a state of immaturity. Moreover, by refusing to address the horrors of the past we darken the present by failing to heal the wounds inflicted by dehumanising conduct.

As I suggested in Chapter One, a nation is infinitely diminished through its tolerance of dehumanising injustice.341 Gitta Sereny has written of the way in which Germany’s national psyche has been deeply affected by the Holocaust.342 She explains that millions of people in Germany are still trying to deal with a ‘deep wound’ as a result of the Holocaust.343 She contends that the type of trauma suffered through the Holocaust affects the character of the nation: ‘[t]he nation’s guilt – entirely unresolved – has become the nation’s trauma. This is not the past. This is now. This is not just their business. It is ours too in this new world of interdependence.’344 I argue that national traumas deeply affect the national psyche. South Africa had a truth and reconciliation commission in an attempt to deal with their national

338 Colin Tatz, above n 1, 132.
339 Some compensation has been offered by the post Nazi German government – see the 1953 Federal Supplementary Law for the Compensation of the Victims of National Socialist Persecution – Ariel Colonomos and Andrea Armstrong, above n 104, 402. On an international level, part of the reparation and healing for the Jews after the Holocaust has been the creation of the state of Israel. Indigenous peoples worldwide have had nothing like this form of international reparation for colonial genocides.
340 Though the apology of Prime Minister Kevin Rudd is somewhat of an improvement; this will be discussed in Chapter Six.
341 Greta Bird, ‘An unlawful non-citizen is being detained or (white) citizens are saving the nation from (non-white) non-citizens’ (2005) 9 University of Western Sydney Law Review 87, 110 and fn 135; Mabo v Queensland (No 2)(1992) 107 ALR 1 at 82 per Justices Deane and Gaudron.
342 Gitta Sereny, above n 6, xxii.
343 Ibid.
344 Ibid 61.
trauma.\textsuperscript{345} In Australia we have ‘sorry day’, a recommendation of the \textit{Bringing them home} report, ‘to commemorate the history of forcible removal and its effects.’\textsuperscript{346} Having a national ‘sorry day’ has been confronting for the nation, however national healing is a serious objective if we are ever going to grow from our national adolescence to national maturity. Professor Judy Atkinson has written powerfully about the need for healing the trauma that has occurred on a massive scale in Australia with the traumatisation of Indigenous peoples through racism. She writes that ‘[a]s Aboriginal people demand that society generally look at its own abusive behaviour, they are forcing a healing process to occur for Australian society generally.’\textsuperscript{347} She claims that this involves ‘Australia as a nation’ having ‘the courage to involve itself in an educational process of learning about itself at a deep level’ with a willingness to examine ‘what has made us what/who we are.’\textsuperscript{348} Addressing the trauma is the only way for the healing to begin.\textsuperscript{349} Whilst the 2008 Apology to members of the Stolen Generations was a step in the right direction many more are needed to heal the trauma of Australia’s racist colonial legacy.\textsuperscript{350}

\textbf{Q. Conclusion}

It has been suggested that there are ‘echoes and resonances rather than parallels’ between ‘Australian Aboriginal and European Jewish genocidal history’.\textsuperscript{351} However I see many similarities, which I have touched upon in this Chapter. I also see parallels in terms of traumatic effects on the survivors.\textsuperscript{352} The oppressive government legislation and policies in Nazi Germany and Australia have led to the transmission of trauma for succeeding generations of Nazi survivors and Indigenous Australians.\textsuperscript{353} Both target groups were subjected to oppressive government laws and policies which sought to eradicate them as distinct peoples, even if the means employed to accomplish this differed somewhat.\textsuperscript{354} The

\begin{thebibliography}{99}
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\item Human Rights and Equal Opportunity Commission, above n 6, 652.
\item Judy Atkinson, above n 9, 207.
\item Ibid 207–208.
\item Human Rights and Equal Opportunity Commission, above n 170, 64.
\item Colin Tatz, Peter Arnold and Sandra Tatz, above n 241, 12.
\item Judith Hassan, above n 22, 32 and Chapter Six; Human Rights and Equal Opportunity Commission, above n 6, Chapter 11; Human Rights and Equal Opportunity Commission, above n 170; \textit{Trevorrow v State of South Australia} (No.5) [2007] SASC 285 at [1151–1157].
\item Judith Hassan, above n 22, 55–57; Judy Atkinson, above n 9, 81–88.
\item Richard Miller, above n 4, Chapters Two, Three, Four and Five; Human Rights and Equal Opportunity Commission, above n 6, 274–275; Matthew Storey, above n 6, 5; Colin Tatz, above n 1, 97–99 and Chapter
\end{thebibliography}
impact of genocide on the victims is similar in many respects. Each group has been devastated by the state sanctioned trauma.

Each regime relied upon similar philosophical foundations which led to the oppression of members of the target groups. Evidence establishes that religious rationales often informed the perspectives of those acting in an oppressive manner, with key figures claiming they were doing God’s work. Social Darwinism is also clearly apparent in the political ideology of each of the systems under study, and this philosophy bears a large responsibility for the ‘genocide of millions of people.’

The poisonous propaganda disseminated by authorities in each jurisdiction also contributed greatly to the horror. In order for genocide to occur the process of dehumanisation must be carried out, and language is a crucial part of this process. Language creates an intellectual climate where the abuse of other human beings is not only acceptable, but comes to be seen as a necessity. Each regime fostered such a climate. Dehumanisation was in part achieved by portraying members of the target group as posing some kind threat to the existence of society. Under both Nazi Germany and Queensland the target groups were effectively portrayed as a dangerous evil that needed to be eradicated or at least stringently controlled. However, common to each system is the disproportionate response to the alleged ‘threat’ posed by members of the target groups. They each dealt with this ‘threat’ through legalised ostracism, persecution and murder.

Ostracism from society for ‘protection’ was a feature common to each jurisdiction. The Australian camps were ostensibly set up for the purpose of ‘protecting’ the Aboriginal remnant; however, they were also created to ‘protect’ racial purity. Nazi concentration
camps were formed to ‘protect’ German society from what was portrayed as a dangerous type of vermin in human form.363

Under both Nazi Germany and Australia there were gross interferences with family life and sexual relationships. Each regime drastically interfered in family relationships, at times dissolving marriages and separating parents from children.364 These actions were devastating for members of the target groups.365 In each of the systems under study the issue of miscegenation was taken so seriously that legislation was enacted at various points to ensure that there would not be any kind of intermixing of what were perceived to be different ‘races’ of humans.366 Concepts of racial purity and racial superiority were paramount.

In both regimes members of the target groups were deprived of their property without compensation by an oppressive politico-legal order.367 In both cases their economic base was shattered, leading to cycles of extreme poverty. Access to financial resources was an issue for members of the target groups under Nazi Germany and Queensland.368 Both regimes restricted the access of target populations to well paid employment, and effectively ensured that they would experience grave poverty. An economic rationale featured strongly in both the Nazi persecution of Jews and the Australian persecution of Indigenous peoples. In each of the regimes under study those in power considered that they had the right to use the humans they categorised as undesirable as slave labour.369 There were clearly utilitarian aspects to the theft of property and the forcible removal to camps under both regimes.370 Through enforced removal land was cleared of those considered undesirable. In Germany this meant that Jewish assets and property could be seized with no compensation.371 In Australia this meant that the

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363 Richard Miller, above n 4, 30.
364 Yitzhak Arad, Yisrael Gutman and Abraham Margaliot, above n 16, 78; Interview with Nechama Epstein in Donald Niewyk, above n 6, 157; Rosalind Kidd, above n 44, 106; Human Rights and Equal Opportunity Commission, above n 6, 30.
366 See Article 1(1) of the ‘Nuremberg Law for the Protection of German Blood and German Honor’ passed on 15 September 1935 and section 9(1)(a) of The Aboriginals Protection and Restriction of the Sale of Opium Acts Amendment Act of 1934 (Qld).
367 Richard Miller, above n 4, 102; Irene Watson, ‘Settled and Unsettled Spaces’, above n 6, 41; Irene Watson, ‘Illusionists and Hunters’, above n 105, 22; Sam Garkawe, above n 105, 277.
368 Richard Miller, above n 4, 109; Rosalind Kidd, above n 44, 129.
369 Interview with Nechama Epstein in Donald Niewyk, above n 6, 159–165; Gitta Sereny, above n 6, 28. They also benefited from the slave labour of others they marginalised too and forced into concentration camps. As for Queensland, see Rosalind Kidd, above n 44, 69; Alison Palmer, above n 4, 107.
370 Michael Stolleis, above n 94, 108; David Hollinsworth, above n 2, 190.
371 Richard Miller, above n 4, 102.
land, lives, children and labour of Indigenous peoples could be seized with no compensation. Clearly those in positions of power stood to gain a great deal economically from the dehumanisation of target populations.

Each regime engaged in the dissemination of information designed to facilitate the dehumanisation of members of the target group. They had power to disseminate information which assisted in the perpetuation of negative stereotypes and they enshrined these in law. Their power allowed them to create and circulate knowledge detrimental to those deemed undesirable. The knowledge created by those in positions of power was presented as ‘truth’. It is clear that powerful political and economic agendas underlay the ‘truth’ claims of Australian colonists and the Nazis. The governments of each regime benefited handsomely from confiscation of property belonging to members of the target groups.

Each regime had pretensions to racial superiority and enforced a range of discriminatory laws. As Tatz states, there is something deeply disturbing about ‘man’s reasoned, premeditated capacity for both the devising of racist philosophies … for the embodiment of such thinking in precise legal enactments, for the planned, efficient, neat, technologically competent and a-human manner of their implementation.’ Yet each regime engaged in oppressive exercises of parliamentary power. The language of law shaped the reality of dehumanisation experienced by Jews in Nazi Germany and Indigenous peoples in Australia. Under each regime there was a gradual dehumanising process with accompanying legislation. In each legal system law was ‘the creator and perpetuator of a special, inferior legal class of persons’ which attributed ‘immutable negative traits’ to members of that class. Law gave ‘legitimacy to prejudice, creat[ing] notions of difference and inferiority in the minds of an adult public, ordain[ing] and perpetuat[ing] racism.’ In reflecting on these racist laws of Nazi Germany and Australia Colin Tatz has concluded:

372 Irene Watson, ‘Settled and Unsettled Spaces’, above n 6, 41; Irene Watson, ‘Illusionists and Hunters’, above n 105, 22; Sam Garkawe, above n 105.
373 Michel Foucault argued that there is a close connection between truth and power, stating “‘Truth’ is linked in a circular relation with systems of power which produce and sustain it, and to effects of power which it induces and which extend it.” Michel Foucault, Power/Knowledge, above n 31, 133. Foucault also explains that ‘truth’ claims play an economic and political role (at 132).
375 Colin Tatz, Race Politics in Australia (1979) 49.
376 Ibid 51.
The quintessential evil and malignancy of racism is that it has “rational” philosophic underpinnings and articulations; that such race policies are coldly enshrined in law and practised both within and without the law with efficiency and with no moral repugnance. In short, it is practised by men and women in society who know precisely what they are doing.\textsuperscript{377}

This is perhaps the most disturbing aspect of the laws which have been the focal point of this research – the fact that they were implemented intentionally with public knowledge and with a significant level of public acquiescence. In fact the laws were expressed with a more moderated sentiment than that which was commonly expressed through the media.\textsuperscript{378} Whilst the racist sentiments expressed through the media were not enacted verbatim in legislation, their unchecked presence in mainstream media would have contributed to the perceived necessity for and justification of oppressive government laws.\textsuperscript{379} Racist representations of marginalised groups play a significant part in inciting public racism.\textsuperscript{380} Racist laws do not develop in a social and political vacuum.

In the next chapter I examine some more recent events during the term of the Howard government which resonate with Australia’s racist colonial legacy. I explore aspects of the racist colonial legacy that linger on, haunting the Australian legal landscape with traces of the past.

\textsuperscript{377} Colin Tatz, above n 374, 162.
\textsuperscript{378} Consider the highly inflammatory language of the Der Stürmer Nazi propaganda features referred to in Chapter Two and the variety of Queensland newspapers that transmitted the colonial discourse of propaganda referred to in Chapter Three.
\textsuperscript{380} Which is why Australia now has anti-racial vilification laws in place, such as section 18C of the \textit{Racial Discrimination Act 1975} (Cth).
Chapter 5

RECENT AUSTRALIAN RACIALLY DISCRIMINATORY LAWS

‘Law and the positivist concept of law ... reflect the cultural values associated with whiteness’.1

A. Introduction

The present day situation concerning race relations in Australia is shaped by historical injustices towards Indigenous peoples. These historical injustices, described in some detail in Chapters One, Three and Four, have led to institutional racism. Institutional racism distributes power in a way that “regularly and systematically advantages some ethnic and racial groups and disadvantages others”.2 Over time Australian institutions have been imbued with a racist flavour.3 As Chris Cunneen argues, “[t]he relationships created between institutions of the nation-state and Indigenous peoples have been forged within the context of a colonial political process and a colonial “mentality”.”4 I argue there is a serious problem with institutional racism in contemporary Australia. This institutional racism has been substantially critiqued by Indigenous academics.5 For example, Larissa Behrendt writes of the “‘psychological terra nullius that infects Australia’s institutions’”.6

1 Margaret Davies, Asking the Law Question (3rd ed, 2008) 298.
The previous chapters contain several examples of explicit institutional racism, such as the forcible removal of children from Indigenous families simply on the basis that they were Indigenous and the imposition of a system of work akin to slave labour. However, although ‘institutionalised racism can be explicit and official’ much of it is implicit. This occurs through the operation of institutional cultures which have specific ways of operating based on narrow understandings of what is normal or proper. These values, beliefs and practices may be derived from a very limited social base but are universalised as the only or best way of functioning. Such structures and processes become taken-for-granted and their consequences in maintaining racial inequalities go largely undetected.

In this chapter I will argue that structural racism systematically disadvantages Indigenous peoples in the contemporary politico-legal environment. I maintain Australia has shifted from having mostly explicitly discriminatory legislation which detrimentally affects Indigenous peoples to having mainly implicitly discriminating legislation. Contemporary legislation has, like its forbears, been presented as benevolent, but has actually resulted in discriminatory effects in terms of its consequences. Many contemporary politicians are skilled at Orwellian

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David Hollinsworth, above n 2, 47.

Ibid.

Such as the Native Title Amendment Act 1998 (Cth) and the legislation enacted in 2007 by the Howard government in response to child sexual abuse in Aboriginal communities in the Northern Territory – the Northern Territory National Emergency Response Act 2007 (Cth), Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007 (Cth), Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007 (Cth). While purporting to address a serious problem in Aboriginal communities, the Howard government also used this legislation as an opportunity to sweep away rights for Aboriginal peoples and quarantine part of their welfare payments. This punitive approach has been applied to all Aboriginal people within these communities, which discriminates against all regardless of how responsible they are with finances, and regardless of whether they actually have child care responsibilities. SBS, ‘Are They Safer’, Insight, 18 March 2008. Several Aboriginal people who appeared on this program said they were concerned over the lack of consultation in the Intervention process. Tom Calma (The Aboriginal and Torres Strait Islander Social Justice Commissioner) argued that it was a race based approach to child abuse being targeted only at Aboriginal people – not the broader community as a whole where child abuse also takes place. He asserted that the suspension of the Racial Discrimination Act 1975 (Cth) was very problematic and stated that the Intervention is a racist imposition on Aboriginal peoples.

These disadvantageous consequences will be elaborated upon below.
double speak\(^\text{13}\) when it comes to describing the stated purpose of various statutes. In this chapter I will examine several pieces of legislation which amount to oppressive exercises of parliamentary power when considering ‘the view from the bottom – not simply what oppressors say but how the oppressed respond to what they say’.\(^\text{14}\) As I stated in Chapter One, these legislative enactments are frequently presented in a form with a legislative title which is quite misleading as to the practical consequences of the legislation. They are described in classic ‘Orwellian language – language that means the opposite of what it says’.\(^\text{15}\) In dealing with Australian race relations the Australian government specialises in this use of ‘Orwellian language’. One fairly recent example of the use of Orwellian language by the government is the \textit{Native Title Act 1993} (Cth) which allows for the extinguishment of Indigenous interests in land and operates to validate white title to land, so much so that some consider that the Act should have been called the \textit{White Title Validation Act}.\(^\text{16}\) This was followed by the \textit{Native Title Amendment Act 1998} (Cth) which further exacerbated the disadvantage of the initial legislation.\(^\text{17}\) As Irene Watson argues, ‘native title sanctifies white people’s title as the rules of native title carry their own colonialisit safety net – of statutory validation and extinguishment.’\(^\text{18}\) Another fairly recent example of the use of Orwellian language is the \textit{Hindmarsh Island Bridge Act 1997} (Cth), which could more accurately be described as the \textit{Decimation of Aboriginal Sacred Sites Act}.\(^\text{19}\) I will also examine the legislation enacted in 2007 by the Howard government allegedly in response to child sexual abuse in Aboriginal communities in the Northern Territory.\(^\text{20}\) I argue that the issue of child sexual abuse has been

\(^\text{13}\) George Lakoff, \textit{Don’t Think of an Elephant – know your values and frame the debate} (2005) 22.

\(^\text{14}\) Anthony Cook, ‘Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, JR’ in Kimberlé Crenshaw, Neil Gotanda, Gary Peller, and Kendall Thomas (eds), \textit{Critical Race Theory – The Key Writings that Formed the Movement} (1995) 90. This idea of considering the perspective of those most disadvantaged is more likely to provide an appropriate safeguard to try to protect them from oppression by the majority.

\(^\text{15}\) George Lakoff, above n 13, 22.

\(^\text{16}\) Personal communication with Associate Professor Greta Bird and Lecturer Gary (Mick) Martin, academics at Southern Cross University. See also the critique of this legislation in Irene Watson, ‘Buried Alive’, above n 5, 264–266; Aileen Moreton-Robinson, ‘The House that Jack Built’, above n 5, 22.


\(^\text{18}\) Irene Watson, ‘Buried Alive’, above n 5, 266.


used as an opportunity by the Federal Government to sweep away rights for Indigenous peoples and quarantine part of their welfare payments.

In undertaking my analysis of this legislation I will use critical legal theory to highlight the manner in which the law was used to privilege non-Indigenous over Indigenous interests throughout the duration of the Howard government. In focusing on these three instances where the Federal Parliament chose to override the protections afforded under the *Racial Discrimination Act 1975* (Cth)\(^{21}\) I will draw upon postmodernism. As Helen Stacey explains:

> Postmodernism uncovers the lack of neutrality in law by exposing the methodological impossibility of the law’s claim to objectivity. Postmodernism therefore directly challenges the claims which have grounded the justification of state coercion through law. It has sought to uncover the ever-present, but unexpressed or silenced, perspectives of participants in legal relations. Deconstruction, used by postmodern critique to open up texts (written or unwritten) that purport to be ‘objective’, has application in framing legal critique, because it exposes preferred and subjugated interests. Applying postmodernism’s deconstruction to law therefore exposes the lack of conceptual integrity in normative jurisprudence, through the exposure of preferred interests masquerading under the rubric of disinterested neutrality.\(^{22}\)

Implicit discrimination also occurs in the courts when oppressive legislative acts are challenged by Indigenous peoples. Like all institutions, courts ‘have their own cultures and powerful processes of normalising and naturalising practices, which can be exclusionary and discriminatory while at the same time appearing neutral and commonsense.’\(^{23}\) In this chapter I undertake three case studies where oppressive exercises of parliamentary power have been upheld in the courts in accordance with legal principles that appear ‘neutral’ according to traditional jurisprudence. These cases are *Kartinyeri v The Commonwealth*,\(^{24}\) *Nulyarimma v Thompson*\(^{25}\) and *Wurridjal v The Commonwealth*\(^{26}\). In the context of these cases I consider the function of Australian courts in sustaining an ongoing colonial paradigm which detrimentally affects the interests of Indigenous Australians. Australian courts have played an


> in denying laws’ claims to independent and eternal legitimacy, postmodernism challenges legal discourse to be humble and open, to promote the production of more efficient and more just rules. Humility requires accepting the impossibility of attaining an eternally right answer. Openness demands receptivity to discourses and experiences previously ignored by law’s idiom.

\(^{23}\) David Hollinsworth, above n 2, 50.


\(^{25}\) *Nulyarimma v Thompson* (1999) 165 ALR 621.

important role in producing a colonial narrative. This is interesting to consider how the courts function as ‘an explanation and narrative of reality’ which is ‘established as the normative one.’ This involves what Gayatri Spivak refers to as ‘epistemic violence’. It is a violence which is structured into the very fabric of the Australian legal system. Parry similarly writes of ‘imperialism’s linguistic aggression’. Thus it is important to engage in a process of deconstructing ‘the structure of colonial discourse’. Judy Atkinson asserts colonisers have been reluctant to ‘consider their actions, either morally or under their law, to be violence.’ Yet the denial that this is actually violence is yet another type of violence that Indigenous peoples have had to endure in Australia. It is ‘epistemic violence’. As this chapter will show, the law still plays a large role in perpetuating ‘epistemic violence’. It does this by consistently privileging non-Indigenous interests over Indigenous interests which perpetuates Australia’s racist colonial legacy.

In this chapter the legislative and case examples I refer to highlight how “settler/invader” societies tend to create discursive practices which legitimise existing social and political hierarchies, they develop ‘dominant discursive practices which limit and define the possibility of opposition’. When a society can control the language in which one speaks they can control much of what is spoken. So much can become impossible to express through a dominant discursive paradigm. This often happens when Indigenous peoples attempt to bring actions through Australian courts, which are the “Courts of the Conqueror”. Consequently

27 Consider for example Davis v The Commonwealth (1986) 61 ALJR 32, where a group of Aboriginal people who were concerned about the bicentennial celebrations of colonial Australia were denied standing on the basis that their interest was merely an ‘emotional or intellectual’ concern. Greta Bird, The Process of Law in Australia – Intercultural Perspectives (2nd ed, 1993) 368–369. Other examples will be highlighted throughout this chapter.
32 Ibid 41.
34 Gayatri Chakravorty Spivak, above n 28, 25.
35 Ibid.
37 Ibid.
Indigenous people are forced to frame their arguments in terms recognisable by a colonial legal system with a colonial agenda. It is impossible to explain all of the concerns Indigenous peoples have within the legal frames of reference permitted in courts. Some stories or concerns will be excluded from the courtroom as ‘irrelevant’. Some stories will not be heard, and this limits the possibility of legally effective opposition to the colonial paradigm. ‘The law … sets the boundaries for acceptable forms of resistance to white oppression and dominance.’ Indigenous plaintiffs are forced to phrase their concerns in legal language, ‘forced to speak in a formalized idiom of the language of the state – the idiom of legal discourse.’ Much may get lost in the translation. Gerald Torres and Kathryn Milun question whether the use of legal terminology automatically leads to the privileging of state interests, suggesting ‘[t]he central problem is whether the limitations of the legal idiom permit one party truly to inform the other, or conversely, whether the dimension of power hidden in the idiomatic structure of legal storytelling forecloses one version in favor of another.’ Anthony Alfieri also states that the translation of a clients’ story into legal discourse ‘falsifies the normative content of that story.’ This involves some measure of ‘interpretive violence’. The different ways of knowing or perceiving events come head to head in the courts of the coloniser, and it is fairly obvious which perception/story will be privileged, as law is ‘an artifact of culture and power.’

In this chapter I utilise aspects of critical theory to argue that law engages in the production of an authorised version of ‘truth’. I draw upon Michel Foucault’s notion that people are ‘subjected to the production of truth through power’ and that power cannot be exercised ‘except through the production of truth.’ This process of power and truth production occurs in the way in which the court selects what is and is not deemed ‘relevant’ to a dispute.

39 See for example Davis v The Commonwealth (1986) 61 ALJR 32, and commentary above n 27.
42 Ibid 53.
45 Gerald Torres and Kathryn Milun, above n 41, 53.
Unfortunately for Indigenous activists, much of what they often consider to be ‘relevant’ has been deemed ‘irrelevant’ in Australian courts of law.48

One of the major contributions of a postmodern analysis of law is that it acknowledges that there are a multitude of perspectives from which to examine an issue, rather than one singular perspective which is ‘right’ whilst all other perspectives are determinedly ‘wrong’.49 Of course having said this it does not necessarily follow that all perspectives are of equal value in terms of operating within an ethical framework. The postmodern acknowledgement of a plurality of perspectives sees that law is engaged in the production of an authorised version of truth, yet there are always other ‘truths’, other ways of relating to events. Some of these truths are to my mind infinitely preferable to others. For example, I prefer to consider the claims and perspectives of historically marginalised Indigenous peoples over dominant colonial narratives which exist to justify present social, political, legal and economic hierarchies.

Within Australia’s colonial politico-legal culture there has been a heavy privileging of whiteness and the cultural values associated with whiteness.50 This has occurred alongside a denigrating stereotype of Indigenous Australians.51 Much of what is privileged within colonialism results from binary constructions which are a product of Enlightenment thinking, despite the ‘self-contradictions’ inherent in such ‘binary constructions’.52 As I stated in

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48 See for example Davis v The Commonwealth (1986) 61 ALJR 32, mentioned above n 27, and the Transcript of Proceedings, Nulyarimma & Ors v Thompson (High Court of Australia, Gummow, Kirby and Hayne JJ, 4 August 2000) <http://www.austlii.edu.au/other/hca/transcripts/1999/C18/1.html> at 26 November 2009, 14–15. In this situation the High Court refused to respond to a claim made by Isobell Coe that if the Court would not help bring an end to the undeclared war on Aboriginal peoples and stop the genocide in this country then they were also a party to the genocide being perpetrated by the government. The Justices promptly adjourned the court and asserted they would ‘not hear that sort of thing’.

49 For example Michel Foucault states ‘What looks like right, law, or obligation from the point of view of power looks like the abuse of power, violence, and exaction when it is seen from the viewpoint of the new discourse’ – Michel Foucault, “Society Must Be Defended” – Lectures at the Collège de France, 1975–76 (eds Mauro Bertani, Alessandro Fontana and Francois Ewald, translated by David Macey, 2004) 70.


52 Bill Ashcroft, Gareth Griffiths and Helen Tiffin, above n 36, 8.
Chapter One, this type of thinking has often been used to make hierarchical distinctions between Whites and non-Whites, perpetuating Australia’s racist colonial legacy.

I argue that Australia’s colonial legal system engages in the ongoing ‘production of dominance’. This ongoing colonial dominance has a devastating effect on Indigenous Australians and there is an urgent need for a process of decolonisation. As Bill Ashcroft and others suggest, ‘de-colonisation is a process of opposition to dominance’. What I aim to do in my research is to participate in some small way in this process of decolonisation as it relates to Australia. In order to do this I examine not only the writings of non-Indigenous authors, but also the writings of Indigenous academics and activists and consider their perspectives on the nature of dominance produced by the Australian politico-legal system. Any colonial country will at some point need to undergo the process of decolonisation if it is to attain its own identity, as opposed to an imposed colonial identity. Australia is struggling with this decolonisation process. Some remain firmly attached to the colonial identity forged by Anglo-Australian ancestors. Even now there is a reluctance to undo the power imbalance between coloniser and colonised. It has shaped the way many Australians think today even though many remain unaware of the subtleties of its influence. I aim to highlight some of these subtle and not so subtle influences by undertaking a ‘counter-discursive’ strategy, which involves ‘a mapping of the dominant discourse, a reading and exposing of its underlying assumptions, and the dis/mantling of these assumptions’.

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54 Bill Ashcroft, Gareth Griffiths and Helen Tiffin, above n 36, 9.
56 Bill Ashcroft, Gareth Griffiths and Helen Tiffin, above n 36, 10.
58 Consider for example former Prime Minister Howard’s attachment to narratives of history which celebrate colonial perspectives centering around ‘settlers’ engaging in ‘heroic achievement’ – John Howard, cited in David Hollinsworth, above n 2, 17.
60 Helen Tiffin, above n 57, 98.
B. The Elusive Search for Land Justice

Ever since the horrendous acts of dispossession from land took place in 1788 Indigenous peoples have sought land justice. They have struggled to have their rights upheld in courts. The controversy surrounding native title shows that land is central to the conflict between Indigenous and non-Indigenous Australians. As David Hollinsworth explains:

Conflict over land rights has been fundamental to Australian history since 1788. Indigenous communities have resisted dispossession by a variety of means and have sought compensation for lost land. Much of the frontier violence during the nineteenth century was the result of this fundamental struggle. Inevitably issues over land, access to resources, and control of its uses and meanings remain the central axis around which Australian race relations revolve.

Non-Indigenous Australians have had difficulty understanding Indigenous connections to country, and there has been an ongoing colonial reluctance to acknowledge that Indigenous peoples have rights to land. Hollinsworth points out that ‘land rights are a direct threat to the settler ideology basic to Australian nationalism. Land rights seriously challenge powerful mining, pastoral and tourist interests’. Those with these types of vested interests have had a tendency to consider Indigenous claims to land as ‘opportunistic and inauthentic’, an accusation that frequently sounds hollow coming from the mouths of those benefiting from the ‘opportunistic’ theft of the entire continent. It is also interesting to consider the accusations regarding Indigenous claims to land being ‘inauthentic’ when the legal basis upon which Australia was ‘settled’, terra nullius, has been found to be false. Colonists used the doctrine of terra nullius to justify their theft of the Australian continent from Indigenous peoples. Irene Watson explains the ‘white supremacist doctrine of terra nullius’ involved

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62 For example see Milirrpum v Nabalco Pty Ltd v The Commonwealth of Australia (1971) 17 FLR 141, at 272
63 David Hollinsworth, above n 2, 139.
64 Ibid 143.
65 Ibid.
67 Mabo v Queensland (No 2)(1992) 175 CLR 1, at 32–42 per Brennan J. Therefore who are non-Indigenous Australians to declare that another’s claim over land is ‘inauthentic’?
‘the idea of backward black savages roaming over vast tracts of open wastelands.’\textsuperscript{69} *Terra nullius* was applied because the colonists considered (as intimated by Justice Brennan in *Mabo v Queensland (No 2)*\textsuperscript{70} where he referred to *In re Southern Rhodesia*\textsuperscript{71} that Indigenous peoples were too ‘“low in the scale of social organization”’\textsuperscript{72} to be acknowledged as possessing rights to land. In *Mabo* the High Court acknowledged that *terra nullius* had been applied to Indigenous peoples in an unjust manner to deprive them of their property rights in land.\textsuperscript{73} In a rare display of impassioned judicial language Justices Deane and Gaudron declared that Australia’s treatment of Indigenous peoples has left ‘a national legacy of unutterable shame.’\textsuperscript{74} However the decision certainly had its limitations.\textsuperscript{75} As Derrida explains, *Mabo* was actually ‘a partial reparation, a partial act of justice, but since … it was phrased and produced in the name of the coloniser, it was still an injustice.’\textsuperscript{76} The decision reeked of ‘colonial narratives’.\textsuperscript{77} The High Court defined native title ‘as a weak right, susceptible to extinguishment by government without compensation and likely only to have survived to land which had never been granted to third parties.’\textsuperscript{78} Justice Brennan also referred to the capacity of native title to be extinguished by the ‘tide of history’ washing away Indigenous laws and connections to land.\textsuperscript{79} Thus ‘[t]he pernicious and pervasive methods through which colonial control was established [were] condensed into a monolithic force called “History” that [was] represented as an inexorable and impersonal force of Nature which one can neither blame nor contest.’\textsuperscript{80}

Despite these limitations, *Mabo* did raise the hopes of some Indigenous peoples that acknowledgement of Indigenous title to land could eventuate.\textsuperscript{81} The Labor government was

\begin{itemize}
\item \textsuperscript{70} *Mabo v Queensland (No 2)(1992) 175 CLR 1*, at 39.
\item \textsuperscript{71} *In re Southern Rhodesia* [1919] AC 211, at 233–234.
\item \textsuperscript{72} *Mabo v Queensland (No 2)(1992) 175 CLR 1*, at 39.
\item \textsuperscript{73} *Mabo v Queensland (No 2)(1992) 175 CLR 1*, at 32–42 per Brennan J.
\item \textsuperscript{74} *Mabo v Queensland (No 2)(1992) 175 CLR 1*, at 104 per Deane and Gaudron JJ.
\item \textsuperscript{75} These will be discussed in further detail below.
\item \textsuperscript{76} Jacques Derrida, *Deconstruction Engaged – The Sydney Seminars* (eds Paul Patton and Terry Smith, 2001) 86–87.
\item \textsuperscript{77} Sangeetha Chandra-Shikeran, ‘Challenging the Fiction of the Nation in the “Reconciliation” Texts of *Mabo and Bringing Them Home*’ (1998) 11 *Australian Feminist Law Journal* 107, 120.
\item \textsuperscript{79} *Mabo v Queensland (No 2)(1992) 175 CLR 1*, at 60 per Brennan J.
\item \textsuperscript{80} Sangeetha Chandra-Shikeran, above n 77, 122.
\item \textsuperscript{81} Wayne Atkinson, above n 61, 20.
\end{itemize}
swift to act after Mabo and created the *Native Title Act 1993* (Cth). This legislation set in place a complex scheme where a very limited class of claims could be made in relation to land.82

Although native title does constitute a form of property,83 as several Indigenous people have commented, it is by far an inferior form of title to land.84 It consistently fails to provide Indigenous peoples with sufficient economic security.85 Native title does not give Indigenous peoples ‘the ability to enter a market with a property right that can be traded.’86 James Reynolds maintains that in developing native title the government has been ‘unable to make the connection between land rights and greater economic empowerment.’87 Instead it has offered a small minority of Indigenous peoples an inferior title to land.88 Andrew Markus states that Indigenous people have often obtained rights to land which is typically ‘unproductive by European standards – desert, semi-desert or swamp land.’89 So despite the claims that the native title legislation has been productive of ‘windfall’ benefits for Indigenous peoples,90 it is important to assess both the quality of the land being recognised as owned by Indigenous peoples through the native title process and also the quality of the title being acknowledged. Native title is an inferior form of title to freehold title in many respects, because it limits what Indigenous people can do with the land.91 As Aileen Moreton-Robinson has argued, ‘it is nothing more than a bundle of rights to hunt, gather, and negotiate as determined by Australian law’.92 Such limitations are not similarly placed upon freehold title

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85 James Reynolds, above n 17, 5; Bryan Horrigan and Simon Young, ‘Western Australia v Ward: rolling back native title in the Kimberleys’ (2000) 14(9) *Australian Property Law Bulletin* 85, 87; Sarah Maddison, above n 84, 66.

86 James Reynolds, above n 17, 5.

87 Ibid.

88 Michael Mansell, above n 84, 4 and 6; Wayne Atkinson, above n 61, 20; Gary Foley, above n 82, 133.


90 As claimed by members of industry.

91 Aileen Moreton-Robinson, *Sovereign Subjects*, above n 5, 4; Gillian Triggs, above n 17, 401.

92 Aileen Moreton-Robinson, above n 84, 81.
which is typically held by Anglo-Australians. In this sense the native title regime imposed by government can be seen as fundamentally discriminatory.

The system of native title developed in Australia has been strongly critiqued by those who are negatively affected through the process.\textsuperscript{93} For example, Indigenous academic Irene Watson has argued that the entire system of native title is fundamentally inadequate because it refuses to address the issue of Indigenous rights to land and the issue of sovereignty.\textsuperscript{94} She contends that the rejection of terra nullius in \textit{Mabo} was ‘illusionary’\textsuperscript{95} and that ‘[t]he real death of terra nullius would have dismantled the Australian legal system.’\textsuperscript{96} In relation to \textit{Mabo} she maintains:

the court’s decision determined the ongoing genocide of Nungas, by accepting that Australian sovereignty was based on an ‘act of state’. The court refused to inquire further into an area it said would fracture the Australian legal system, as Brennan J was careful to ensure no radical departure was made from the existing rules and regulations. The court did not consider the question: what constitutes the sovereignty of the Australian state? It also avoided an interrogation of what Greta Bird suggests is how the “skeletal framework privileges white versions of history and legality”. Instead the court decided the question was non-justiciable within the Australian legal system.\textsuperscript{97}

Watson asserts \textit{Mabo} is ‘a decision which assists the laundering of’ Australia’s ‘colonial history’ but argues ‘the stains remain embedded in the fabric of Australian sovereign/laws, yet to be removed.’\textsuperscript{98} She states this decision ‘created an illusion of doing justice’.\textsuperscript{99} The creation


\textsuperscript{94} Irene Watson, ‘Indigenous Peoples’ Law Ways’, above n 5, 47; Irene Watson, ‘Buried Alive’, above n 5, 259–260. Michael Mansell has also been highly critical of native title on this basis – Michael Mansell, above n 84, 4–6. Aileen Moreton-Robinson also points out that the colonial native title system is inadequate because it refuses to deal with the issue of Aboriginal sovereignty, which ‘has never been ceded’ – Aileen Moreton-Robinson, ‘Writing off Indigenous sovereignty: The discourse of security and patriarchal white sovereignty’ in Aileen Moreton-Robinson (ed), \textit{Sovereign Subjects – Indigenous Sovereignty Matters} (2007) 87.

\textsuperscript{95} Irene Watson, ‘Buried Alive’, above n 5, 260.


\textsuperscript{97} Irene Watson, ‘Buried Alive’, above n 5, 259.

\textsuperscript{98} Ibid 260.

\textsuperscript{99} Ibid 259.
of native title has merely introduced ‘new terminology’.\(^{100}\) Irene Watson has described the native title process as ‘yet another unrecognised act of genocide’ which sacrifices the well-being of Indigenous peoples.\(^{101}\) It does this by upholding British claims to sovereignty and dismissing Indigenous sovereignty out of hand.\(^{102}\) Watson claims that the native title system has established ways to annihilate ‘the possibility of peaceful co-existence, cunningly, in a way which appears to be establishing “rights”’.\(^{103}\) She questions whether the native title process has merely brought about ‘the illusion of change’.\(^{104}\) Watson points out that the native title process entails a measure of duress applied to Indigenous peoples.\(^{105}\) There is an extreme power imbalance between Indigenous people and the colonial state.\(^{106}\) However Indigenous peoples work within the limits of a colonial legal system because ‘there is no alternative to the introduced law as it stands, other than reverting to direct political action.’\(^{107}\)

Aileen Moreton Robinson has also given a withering critique of the native title process.\(^{108}\) She strongly argues:

> What Indigenous people have been given, by way of white benevolence, is a white-constructed form of “Indigenous” proprietary rights that are not epistemologically and ontologically grounded in Indigenous conceptions of sovereignty. Indigenous land ownership, under these legislative regimes, amounts to little more than a mode of land tenure that enables a circumscribed form of autonomy and governance with minimum control and ownership of resources, on or below the ground, thus entrenching economic dependence on the nation state.\(^{109}\)

Michael Mansell has similarly stated that native title ‘amounts to no more than occupational rights.’\(^{110}\) Mansell argues that the colonial construct of native title is vastly inferior ‘compared with other forms of title to land.’\(^{111}\) He asserts that Mabo reinforced ‘white domination and superiority over Aborigines by recognising such a meagre Aboriginal form of rights over land.’\(^{112}\) These meagre rights have gradually been withered further away by judicial interpretation and legislative actions which enhance the vulnerability of what was an already

\(^{100}\) Phillip Falk and Gary Martin, above n 93, 35.
\(^{101}\) Irene Watson, ‘Buried Alive’, above n 5, 258.
\(^{102}\) Phillip Falk and Gary Martin, above n 93, 34.
\(^{103}\) Irene Watson, ‘Buried Alive’, above n 5, 260.
\(^{104}\) Irene Watson, ‘Settled and Unsettled Spaces’, above n 5, 41.
\(^{105}\) Irene Watson, ‘There is No Possibility of Rights without Law’, above n 93, 4.
\(^{106}\) Ibid 5; Irene Watson, ‘Indigenous Peoples’ Law Ways’, above n 5, 41; Maureen Tehan, above n 17, 564.
\(^{107}\) Wayne Atkinson, above n 61, 21.
\(^{109}\) Ibid.
\(^{110}\) Michael Mansell, above n 84, 6.
\(^{111}\) Ibid 4 and 6.
\(^{112}\) Ibid 6.
inferior land title.\textsuperscript{113} As Lisa Strelein states, ‘[i]t is the courts and the legislature that have invested the doctrine of native title with the vulnerability and contradictions that limit its capacity to protect the interests of Indigenous peoples.’\textsuperscript{114} After extensively examining native title developments since \textit{Mabo}, Strelein concludes that the law in this area merely asserts colonial dominance.\textsuperscript{115} She argues that the \textit{Native Title Act} in particular ‘allows the piecemeal erosion’ of Indigenous rights to land.\textsuperscript{116} Strelein also considers that judicial interpretations have ‘continually wound back … the notion of native title to accommodate non-Indigenous interests to the detriment of Indigenous peoples.’\textsuperscript{117} She is critical of the ways in which judicial interpretations of native title have ‘created a hierarchy of rights and interests which, at every turn, places other interests above those of Indigenous peoples.’\textsuperscript{118}

A key characteristic of native title as it was formulated in \textit{Mabo} is that it is subject to arbitrary extinguishment.\textsuperscript{119} This aspect of \textit{Mabo} has been described as ‘the greatest single act of dispossession in Australian history since 1788.’\textsuperscript{120} Extinguishment occurs through the government dealing with the subject land in a manner which is said to be ‘inconsistent with the continued existence of native title’.\textsuperscript{121} This principle allowing extinguishment is also enshrined in the \textit{Native Title Act 1993} (Cth) under Division 2B.\textsuperscript{122} Lisa Strelein is highly critical of the colonial principle of ‘extinguishment’ which has consistently been upheld in native title determinations.\textsuperscript{123} She claims ‘[a]s the doctrine of extinguishment has been constructed and applied, it unnecessarily perpetuates precisely the discrimination that the recognition of native title should seek to eliminate.’\textsuperscript{124} Irene Watson has also written a scathing critique of the operation of the doctrine of extinguishment, arguing:

\textsuperscript{113}Lisa Strelein, above n 17, 130.
\textsuperscript{114}Ibid.
\textsuperscript{115}Ibid 139 and 42.
\textsuperscript{116}Ibid 63.
\textsuperscript{117}Ibid 46. See also Bryan Horrigan and Simon Young, above n 85, 87.
\textsuperscript{118}Lisa Strelein, above n 17, 45–46. See also Maureen Tehan, above n 17, 556–563 where she comments on the restrictive judicial interpretations which promote further extinguishment of native title rights in the recent cases of \textit{Western Australia v Ward} (2002) 191 ALR 1; \textit{Wilson v Anderson} (2002) 190 ALR 313; and \textit{Members of the Yorta Yorta Aboriginal Community v Victoria} (2002) 194 ALR 538.
\textsuperscript{119}\textit{Mabo v Queensland (No 2)}(1992) 175 CLR 1 at 15 per Mason CJ and McHugh J, at 63 per Brennan J, at 110 per Deane and Gaudron JJ.
\textsuperscript{120}Gary Foley, above n 82, 132.
\textsuperscript{121}See the preamble to the \textit{Native Title Act 1993} (Cth) and Melissa Perry and Stephen Lloyd, above n 62, 14–15.
\textsuperscript{122}This Division allows for the ‘Confirmation of past extinguishment of native title by certain valid or validated acts’.
\textsuperscript{123}Lisa Strelein, above n 17, 139.
\textsuperscript{124}Ibid.
Survival inside the belly of the muldarbi compels Nungas to go before the state’s native title processes where native title applicants are required to prove the extent to which their nativeness has survived genocide. If nativeness is not proven it is considered extinguished. If it is proven it is open to extinguishment. Native title is extinguishment. Extinguishment is a form of genocide.

Basically non-Indigenous lawmakers have dreamed up the doctrine of extinguishment to legitimise the theft of land and it is being forced upon Indigenous peoples. It ensures an economic windfall for the State and has been justly criticised for maintaining the status quo by upholding ‘the property interests of settler society’ at the expense of developing ‘fair and just principles for the confiscation of Indigenous property’.

The native title system has also been criticised as ‘unnecessarily slow’ and facilitating the resolution of ‘only a small percentage of claims’. It ‘favours the resolution of claims by agreement’ but has typically led to ‘long and expensive litigation’. Jason Behrendt has pointed out that governments have not developed ‘efficient mechanisms to resolve claims or to accommodate Indigenous peoples’ interests’. The native title process also fails to justly deal with the ‘creative adaptation of tradition’ and take into account that Indigenous culture is ‘an evolving culture’.

Behrendt argues that Indigenous native title claimants have been ‘deprived by the application of eurocentric legal appraisals of what is “traditional”’. This was a key factor in the unsuccessful claim of *Yorta Yorta v State of Victoria* where the Yorta Yorta people were characterised as having ‘lost their culture and their status as a...

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125 Irene Watson, ‘Buried Alive’, above n 5, 263.
126 Sean Brennan, above n 83, 78.
127 Wayne Atkinson, above n 61, 20.
128 Jason Behrendt, above n 93, 13. Wayne Atkinson also claims the land returned via the native title system has been very small – Wayne Atkinson, above n 61, 20.
130 Jason Behrendt, above n 93, 13.
132 Jason Behrendt, above n 93, 14. Under s 223(1)(a) of the Native Title Act 1993 (Cth) native title ‘rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders’.
“traditional society”. At first instance Justice Olney held that the ‘tide of history’ had washed away the necessary Aboriginal connections with the land. Olney J concluded:

The tide of history has indeed washed away any real acknowledgment of their traditional laws and any real observance of their traditional customs. The foundation of the claim to native title in relation to the land previously occupied by those ancestors having disappeared, the native title rights and interests previously enjoyed are not capable of revival.

This finding provoked the following response from Wayne Atkinson, who was involved in the litigation:

Underpinning the events on which this “tide” rests, is a history of land injustice and flagrant human rights abuses. It is a history sourced in violence and bloodshed over the ownership and control of land, acts of genocide in relation to the forced removal and attempted break-up of Indigenous families, and racist government policies aimed at subjugating and controlling Indigenous people. It is ironic in the extreme, many might say obscene, that the crimes against humanity, which constitute this “tide”, can be invoked by those seeking to deny Indigenous groups their rights to land.

A significant problem faced by native title claimants is that colonial judges are authorised under colonial law to determine what amounts to the existence of traditional Indigenous laws and whether the claimants have continued to hold native title in accordance with those traditional laws. In the Yorta Yorta decision the majority of the Federal Court held that although traditional law can survive some evolution it would be considered lost where the practices can no longer ‘properly be characterised as “traditional”’. However it is questionable whether colonial judges are qualified to determine what is ‘traditional’ within Indigenous culture. The Yorta Yorta litigation demonstrates that Eurocentric notions of what ‘traditional’ means are privileged over Indigenous tradition itself, thus perpetuating the racist colonial legacy of injustice.

134 Lisa Strelein, above n 17, 85.
135 Quoting Brennan J in Mabo v Queensland (No 2) (1992) 175 CLR 1 at 60.
136 Members of the Yorta Yorta Aboriginal Community v The State of Victoria & Ors (Unreported, FC, Olney J, 18 December 1998); [1998] FCA 1606, [129].
137 Members of the Yorta Yorta Aboriginal Community v The State of Victoria & Ors (2001) 180 ALR 655, 687; [2001] FCA 45 [74].
139 Members of the Yorta Yorta Aboriginal Community v The State of Victoria & Ors (2001) 180 ALR 655.
140 Members of the Yorta Yorta Aboriginal Community v The State of Victoria & Ors (2001) 180 ALR 655, 687; [2001] FCA 45 [74].
In the *Yorta Yorta* decision European written histories were privileged over the oral testimony of the Indigenous claimants.\(^{142}\) Justice Olney held that ‘[t]he most credible source of information concerning the traditional laws and customs of the area’\(^{143}\) was to be found in what James Cockayne describes as ‘the amateur anthropological observations of the pastoralist Edward Curr from the 1840s’.\(^{144}\) This is despite the fact that early colonists ‘are notorious for interpreting traditional culture through their own blinkers’.\(^{145}\) Using Eurocentric sources to determine whether traditional connections to land have been maintained is bound to disadvantage Indigenous claimants.\(^{146}\) On appeal to the High Court it was held that the ‘acknowledgment and observance’ of traditional laws and customs ‘must have continued substantially uninterrupted’ since the commencement of colonisation.\(^{147}\) They held ‘the traditional laws and customs’ must constitute ‘a system that has had a continuous existence and vitality since sovereignty.’\(^{148}\) This requirement of ‘“substantial continuity”’ is an extremely difficult standard of proof for Indigenous claimants who have undoubtedly faced substantial challenges as a result of colonisation,\(^{149}\) such as trying to maintain their connection to land ‘through periods of violent conflict.’\(^{150}\) This finding highlights the fact that ‘native title tends to be difficult to prove.’\(^{151}\) The standards of proof are set so high as to frequently ensure the impossibility of success.\(^{152}\)


\(^{143}\) *Members of the Yorta Yorta Aboriginal Community v The State of Victoria & Ors* (Unreported, FC, Olney J, 18 December 1998); [1998] FCA 1606, [106].

\(^{144}\) James Cockayne, ‘*Members of the Yorta Yorta Aboriginal Community v Victoria – Indigenous and Colonial Traditions in Native Title*’ (2001) 25(3) *Melbourne University Law Review* 786, 788. Historian Ann McGrath has been critical of the way in which courts have not distinguished amateur from professional history – Ann Curthoys, Ann Genovese and Alexander Reilly, above n 142, 35.

\(^{145}\) Wayne Atkinson, above n 61, 21.

\(^{146}\) Ibid.

\(^{147}\) *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; 194 ALR 538; 77 ALJR 356; [2002] HCA 58 [89] per Gleeson CJ and Gummow and Hayne JJ.


\(^{149}\) This was acknowledged by the Judges to a degree – *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; 194 ALR 538; 77 ALJR 356; [2002] HCA 58 [89]. Melissa Perry and Stephen Lloyd, above n 62, 763. This requirement is reminiscent of the approach taken by Brennan J in *Mabo (No 2)* where he stated that Indigenous connections to land can be washed away by ‘the tide of history’ and thus native title applicants must demonstrate continued connection to the subject land (at 60). See also Maureen Tehan, above n 17, 563.

\(^{150}\) Robert Chambers, above n 83, 228.

\(^{151}\) Ibid 226; for a thorough exploration of this issue see Ann Curthoys, Ann Genovese and Alexander Reilly, above n 142, Chapter Three.

Indigenous people have criticised the way in which Eurocentric approaches in native title litigation have the power to obliterate Indigenous people’s legal entitlements to land.\(^{153}\)

Although native title is meant to be ‘given its content by the laws and customs of [I]ndigenous peoples and not the other way around,’\(^{154}\) judicial interpretations of these customs can have the effect of negating them for the purpose of successful native title claims. Michael Dodson suggests that judges have allowed their perceptions of Indigenous laws and customs to be the determining factor in native title claims, rather than the actual Indigenous laws and customs themselves.\(^{155}\) Jason Behrendt similarly explains that under the native title regime

> Hairs are now split between “rules having normative content” and “observable patterns of behaviour”. Aboriginal people can now maintain knowledge of sites and have some laws in relation to them, but such knowledge and laws are the subject of a qualitative assessment whereby the Courts determine the level of knowledge which is sufficient. If they do not carry out ceremonies, or do not know enough dances or ceremonies, they are said to no longer have traditional laws and customs. The legitimacy of the process by which traditional knowledge is transmitted is similarly assessed and judged. … None of these matters seem to be assessed from an Indigenous perspective as to what is sufficient, or what is legitimate.\(^{156}\)

There has also been ‘a trend towards restricting the recognition of native title through unrealistic and culturally insensitive criteria.’\(^{157}\) One example of this, according to Michael Dodson, was the imposition of a requirement on Indigenous claimants to ‘prove their biological descent back before 1788.’\(^{158}\) Thus although the construct of native title was originally meant to address aspects of discrimination against Indigenous Australians in relation to land,\(^{159}\) it is ‘increasingly evolving in isolation from the subject matter to which it relates.’\(^{160}\) Typically there is, as Lisa Strelein states, a ‘significant reluctance to disturb the colonial inheritance of 200 years of denial of the rights of Indigenous peoples.’\(^{161}\)

\(^{153}\) Wayne Atkinson, above n 61, 21.

\(^{154}\) Michael Dodson, above n 152, 2.

\(^{155}\) Ibid 5.

\(^{156}\) Jason Behrendt, above n 93, 14.

\(^{157}\) Michael Dodson, above n 152, 2.

\(^{158}\) Ibid 4.

\(^{159}\) The preliminary note to the *Native Title Act 1993* (Cth) states that the legislation was drafted taking into account that Aboriginal peoples ‘have been progressively dispossessed of their lands’ which ‘occurred largely without compensation’ resulting in Aboriginal people and Torres Strait Islanders becoming ‘the most disadvantaged [people] in Australian society’ (at 2129–2130). The *Native Title Act* was meant to ‘rectify the consequences of past injustices’ (at 2130).

\(^{160}\) Jason Behrendt, above n 93, 14.

\(^{161}\) Lisa Strelein, above n 17, 1.
Gary Foley has suggested that native title ‘was destined for failure from the beginning’ because it ‘was fundamentally flawed’ and ‘deviously avoided the issue of sovereignty.’

Maureen Tehan also states ‘[b]orn out of conflict, compromise and pressured last-minute negotiations, the Act was bound to have flaws.’ Even so the construct of native title has been the only colonial acknowledgement of Indigenous title to land.

Wayne Atkinson argues the system of native title developed in Australia has become ‘the instrument of power that is used to serve the vested interests of settler society and to maintain the status quo.’ The colonial system of native title implemented through the Mabo (No 2) decision and the Native Title Act 1993 (Cth) has been further weakened by the enactment of the Native Title Amendment Act 1998 (Cth). This legislation has been roundly criticised as ‘winding back’ rights that existed under both Mabo (No 2) and the original 1993 legislation.

It is arguable that the 1998 Native Title Amendment Act is a classic example of an oppressive exercise of parliamentary power. Via this piece of legislation the parliament purported to create ‘certainty’ for ‘outraged pastoralist and farming industry groups’. It delivered what Deputy Prime Minister Tim Fischer described as ‘“bucket-loads of extinguishment”’. The impetus was the High Court’s controversial Wik decision which led to an alarmist response by members of the pastoral and mining industries, and ultimately, a hysterical response by the Howard government:

The government asserted that whereas the Mabo ruling had opened some 36 per cent of the continent to native title claim, the Wik decision now added a further 42 per cent. The prime minister appeared on television with a map showing the bulk of the country potentially subject to Aboriginal control. The problem with such an interpretation was that under both rulings it was very difficult to establish native title and the Wik decision specifically upheld the priority of legitimate leaseholder use of land.

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162 Gary Foley, above n 82, 119.
163 Ibid 136–137.
164 Maureen Tehan, above n 17, 543.
165 Wayne Atkinson, above n 61, 22; and see Meredith Wilkie and Mark Gregory, above n 82, 1.
167 Lisa Strelein, above n 17, 7; and see The Hon Daryl Williams, ‘Ten Years Since Mabo (No 2): Engaging with the Future’ (2002) Australian Mining and Petroleum Law Association Yearbook 240, 241 and 254; David Hollinsworth, above n 2, 179; Maureen Tehan, above n 17, 552.
169 Wik Peoples v Queensland (1996) 187 CLR 1; (1996) 141 ALR 129; (1996) 71 ALJR 173. In this case it was held that pastoral leases do not necessarily extinguish native title, and there had been some uncertainty about this prior to the decision. Maureen Tehan, above n 17, 553.
170 Andrew Markus, above n 89, 42.
Yet Prime Minister Howard chose to interpret these decisions in an alarmist manner, fuelling the fears possessed by Anglo-Australians that they could lose their backyards.171 From a legal perspective both decisions were actually quite specific in terms of their scope, and turned on the provision of evidence that few Indigenous Australians would be able to adduce due to the government’s policies of forcible removal of Indigenous peoples from their land.172 However the response of the Howard government to Mabo and Wik was ‘to legislate to diminish the rights won by Aboriginal people in the High Court.’173

A series of rights that Indigenous peoples had under the original Native Title Act were substantially diminished under the 1998 Amendments.174 Amongst these was the right to negotiate which was ‘reduced to a shadow of its original intent.’175 It also became more difficult for native title claimants to even register their claims, let alone have them upheld.176 Indeed the 1998 amendments pushed through by the Howard government are said to have ripped ‘the heart’ out of the 1993 legislation.177

The Howard government’s ‘Ten Point Plan’ amending the Native Title Act 1993 (Cth) clearly aimed to reduce the rights of Indigenous Australians.178 The 1998 Amendments have been ‘described as “extinguishment by stealth”’.179 They have been justly criticised as ‘diminishing the first legally recognised Aboriginal economic right’180 and leaving ‘native title holders largely without any of the substantive rights or benefits of native title.’181 The 1998 amendments diminished ‘the area of land and water over which native title might exist and the areas of land or water and the types of activities over which [I]ndigenous people have meaningful rights in relation to future uses.’182 Lisa Strelein explains that the Native Title Amendment Act 1998 (Cth):

reduced the protection afforded by the common law, the RDA and the 1993 NTA with a series of substantial reforms:

171 Irene Watson, ‘From a Hard Place’, above n 5, 212; Larissa Behrendt, above n 93, 1–2 and 5.
172 Michael Mansell, above n 84, 4; Lisa Strelein, above n 17, Chapters One and Two.
173 Andrew Markus, above n 89, 42.
174 ATSIC, above n 166, 2.
175 Ibid 6.
176 Doug Young and Anthony Denholder, above n 78, 283; David Hollinsworth, above n 2, 180.
177 Noel Pearson cited in Andrew Markus, above n 89, 44.
178 Lisa Strelein, above n 17, 7; Gillian Triggs, above n 17, 397–408; ATSIC, above n 166, 2.
179 David Hollinsworth, above n 2, 184.
180 James Reynolds, above n 17, 6.
181 ATSIC, above n 166, 2.
182 Maureen Tehan, above n 17, 555.
• validating new grants by state governments since the introduction of the NTA (without regard to the future act regime);
• validating “renewals” of leases before 1994;
• “confirmation” that extinguishment is permanent; and
• “confirmation” of extinguishment in relation to freehold, leasehold and other tenures;
• “confirmation” of government authority over water and airspace;
• expanding the rights of pastoralists to undertake agricultural activities;
• raising the threshold for registration of applications (and thereby limiting access to procedural rights);
• diminishing or removing the right to negotiate and introduction of more limited rights to notification and comment in relation to various classes of acts; and
• the suspension of the RDA again to achieve this.\(^{183}\)

The ideological stripes of former Prime Minister Howard regarding Indigenous land rights\(^ {184}\) were evident in May 1998 when he ‘refused to endorse a resolution which stated that Aboriginal people had been dispossessed of their land.’\(^ {185}\) He saw such endorsement as wrongful acceptance of “‘hereditary guilt’” which would result in “‘dividing the country between black and white’”.\(^ {186}\) It is interesting that Howard spoke of the problem of dividing the country,\(^ {187}\) as though it were not already divided, as though we were a nation of peoples living in complete harmony with each other. Even after the race riots in Cronulla in 2005 he remained unable to acknowledge the extent of racial tension in Australia.\(^ {188}\)

Howard could not convince Indigenous peoples that his policies on native title were actually for their benefit. When Howard spoke to the Reconciliation Convention in May 1997 his reception was anything but popular.\(^ {189}\) Markus explains that:

To cries of “shame” he became increasingly angry, thumping the lectern and pointing at Aboriginal leaders in the audience, declaring that he had spent “a great deal of time in trying to find a just, fair and workable outcome” following the High Courts Wik ruling. His ten-point plan provided an “equitable balance” between the respect for the principles of native title and the interests of pastoralists and others “in securing certainty”. In “the name of truth” he repudiated the claim that the ten-point plan took away the rights of

\(^{183}\) Lisa Strelein, above n 17, 7. References to the RDA are to the *Racial Discrimination Act 1975* (Cth).
\(^{184}\) ‘Land rights’ for Indigenous peoples are substantially different from the colonial construct of native title currently on offer.
\(^{185}\) Andrew Markus, above n 89, 86.
\(^{186}\) John Howard cited in Andrew Markus, above n 89, 86.
\(^{187}\) The granting of native title rights was also described by conservative historian Geoffrey Blainey as a threat to national unity, he claimed that “[t]o extend land rights is to weaken … the real sovereignty and unity of the Australian people.” Geoffrey Blainey, *The Age Saturday Extra*, 12 June 1993, cited in David Hollinsworth, above n 2, 178.
\(^{189}\) Andrew Markus, above n 89, 108.
[I]ndigenous people. His plan was “fair and equitable” and “the only basis of a proper approach”.\textsuperscript{190}

Instead of finding the Indigenous community to be supportive of his ‘fair and equitable’ and ‘proper approach’,\textsuperscript{191} the Native Title Amendments were heralded as disastrous for race relations in Australia: ‘Charles Perkins was of the view that “we’ve slipped back, at least ten years, in terms of race relations”; Michael Mansell that “there’s hardly any sign of respect for Aboriginal people”; Professor Marcia Langton observed that “these blokes are reinventing the nineteenth century”.\textsuperscript{192}

The reason for the watered down Native Title legislation lies in the huge industry push to annihilate any rights won by Indigenous peoples in the \textit{Mabo} and \textit{Wik} decisions. Andrew Markus writes about the enormous resources industry dedicated to defeating land rights: ‘in the mid-1980s the National Farmers’ Federation had a “fighting fund” of over $10 million and the annual budget of its Canberra secretariat was $2.3 million.’\textsuperscript{193} Thus the enormous wealth of those with powerful positions was used to lobby government to ensure that legislation would protect the interests of industry. Hugh Morgan, a central player in the mining industry, voiced religious objections to allowing native title to interfere with the economic agendas of those in the mining industry.\textsuperscript{194} Once again, it is interesting how consistently God gets blamed for human greed. It can be seen that the religious links with past justifications for colonial exploitation mentioned in Chapter Three linger on.

After \textit{Mabo}, the enactment of the \textit{Native Title Amendment Act 1993} (Cth) and \textit{Wik}, those with vested interests waged war via the media against native title.\textsuperscript{195} David Hollinsworth explains that it

was the most sustained and extensive media debate on [I]ndigenous affairs in the history of Australia. Unfortunately, the bulk of these exchanges were ill-considered and frequently deliberately scaremongering. Sensational headlines dominated the coverage

\begin{enumerate}
\item[I]bid.
\item[I]bid.
\item Charles Perkins, Michael Mansell and Marcia Langton cited in Andrew Markus, above n 89, 108.
\item Andrew Markus, above n 89, 55.
\item Andrew Markus, above n 89, 61. Hugh Morgan claimed that: (at 61) “we have to rediscover the religious basis of our own activity.” He argued that it could be demonstrated that capitalism and hence the mining industry was “part of the divine order”. The authority for this view was St Paul, in his first letter to the Corinthians, 7:20: “Let every man abide in the same calling wherein he was called”. The “calling” of miners was an economic one, to be justified in terms of the provision of work and creation of wealth.
\item David Hollinsworth, above n 2, 157.
\end{enumerate}
with many of the false or partial reports and assertions being unexamined and unchallenged. ... The key point that very few Indigenous groups could demonstrate ongoing traditional attachment to claimable native title land was routinely ignored or misrepresented by mining, pastoral interests and numerous politicians.\textsuperscript{196}

It is remarkable just how successful the misinformation campaign launched by powerful mining and pastoral interests has been. In a society where few people rely on any other source of information apart from the mainstream media about current affairs,\textsuperscript{197} it was not difficult for those with vast financial resources to dominate the media and sway public opinion. The misinformation and virulent white supremacy disseminated through the media was tantamount to verbal arsenic.\textsuperscript{198}

The development of Native Title was powerfully opposed by the multi-million dollar mining industry. The mining industry argued ‘governments should treat all equally’ and ‘that “land rights should be equal rights”’.\textsuperscript{199} The mining industry successfully used the equal rights discourse to destroy public and government support for title to land for Indigenous peoples: ‘[t]hus the slogan “land rights should be equal rights”, audacious in its social radicalism, could be mouthed by millionaire miners and landowners with but few noticing the cut of the emperor’s clothes.’\textsuperscript{200}

In order to garner support for their position the mining industry issued polls to try to convince government that the public were not in favour of land rights for Indigenous Australians.\textsuperscript{201} Several polls conducted in the wake of \textit{Mabo (No 2)} were formulated to privilege mining interests and the information given to the public participating in the polls was misleading in several significant respects.\textsuperscript{202} In recent research conducted by Murray Goot and Tim Rowse, it was found that polls produced by the Roy Morgan Research Centre were particularly misleading in terms of how questions were phrased.\textsuperscript{203} People with a vested interest in the mining industry were responsible for formulating crucial questions which were then allegedly

\textsuperscript{196} Ibid 177–178, internal references omitted.


\textsuperscript{199} Andrew Markus, above n 89, xi.

\textsuperscript{200} Ibid xiii.


\textsuperscript{202} Ibid 102–120.

\textsuperscript{203} Ibid 102.
used to gather public opinion.\textsuperscript{204} One such person was the executive chairman of the Roy Morgan Research Centre who was also a chairman of a mining company.\textsuperscript{205} In this sense those with mining interests were heavily involved in ‘the construction of public opinion.’\textsuperscript{206} The industry driven ‘campaign to redirect public sentiment was waged around commonsense understandings of “fairness”, interpreted as identical treatment, irrespective of past history, its consequences, and current need.’\textsuperscript{207} Yet at the same time, those critical of so-called ‘handouts’ for Indigenous peoples\textsuperscript{208} do not seem to be equally concerned about other groups benefiting from government benevolence. ‘While the media trumpeted that the Land Fund would be allocated $1.4 billion over ten years, compared to the national needs, the allocation is relatively meagre. By comparison, miners and farmers receive more than $1.4 billion every year in diesel fuel rebates.’\textsuperscript{209}

The controversy surrounding native title highlights how inadequate a grasp many non-Indigenous Australians have of their position as beneficiaries of colonial policies of dispossession. Thus Hollingsworth refers to

\begin{quote}
the profound refusal of many Australians to accept that they and their forbears have benefited from the dispossession and exploitation of [I]ndigenous people. The determination of many to reject the connection between their (relative) affluence and the poverty of [I]ndigenous Australians has been strongly encouraged by campaigns such as those … in relation to land rights and native title.\textsuperscript{210}
\end{quote}

Not mindful of this connection, non-Indigenous resistance to acknowledging land rights for Indigenous peoples has continued. Yet, as Xavier Herbert has so powerfully stated,

\begin{quote}
Until we give back to the black man just a bit of the land that was his, and give it back without strings to snatch it back, without anything but generosity of spirit in concession for the evil we have done to him – until we do that we shall remain what we have always been, a people without integrity, not a nation, but a community of thieves.\textsuperscript{211}
\end{quote}

It is significant to consider this statement in light of the native title system operating in Australia. The colonial construct of native title imposes strict limits on the nature of the land

\textsuperscript{204} Ibid.
\textsuperscript{205} Ibid.
\textsuperscript{206} Ibid 31.
\textsuperscript{207} David Hollinsworth, above n 2, 157.
\textsuperscript{208} Irene Watson, ‘Illusionists and Hunters’, above n 5, 21.
\textsuperscript{209} David Hollinsworth, above n 2, 182.
\textsuperscript{210} Ibid 190. See also John Borrows, ‘Practical Recolonisation?’ (2005) 28(3) UNSW Law Journal 614, 615.
\textsuperscript{211} Xavier Herbert cited in Henry Reynolds, above n 68, 66, emphasis removed.
claimable,212 it is subject to the racist principle of extinguishment,213 and it imposes enormous evidentiary hurdles214 in the path of claimants so that it is extremely difficult for successful claims to be made. This system involves a very ‘partial’ giving back and when it does give back it does so with numerous strings attached. The 1998 Amendments demonstrate just how willing and ever ready colonists are to snatch back that which has been ‘given’ to Aboriginal peoples, particularly where colonists desire to take minerals from the land or confiscate Aboriginal lands for dumping nuclear waste.215 As Maureen Tehan concludes, what has been ‘given’ in terms of native title has proven to be ‘a hope disillusioned; an opportunity lost.’216 Native title has been ‘fatally wounded’ by the 1998 Amendments and restrictive judicial interpretations of the requirements of proving native title.217 This ultimately diminishes the rights of Indigenous peoples to land and perpetuates Australia’s racist colonial legacy.218 In her poem ‘What I know’, Anita Heiss, an Indigenous author, poet and activist, states the discriminatory Native Title process that has been forced on Indigenous peoples:

will continue to fail
while it is made up of
white lawyers
and every cocky
and CWA
has the
right to determine
“Aboriginal connection to land”.
I know those actually “connected”
remain voiceless.219

212 Melissa Perry and Stephen Lloyd, above n 62, 24; Meredith Wilkie and Mark Gregory, above n 82, 1.
213 Mabo v Queensland (No 2)(1992) 175 CLR 1 at 15 per Mason CJ and McHugh J, at 63 per Brennan J, at 110 per Deane and Gaudron JJ and Division 2B of the Native Title Act 1993 (Cth).
216 Maureen Tehan, above n 17, 564.
217 Ibid 571.
218 Gillian Triggs, above n 17, 403.
C. The Native Title Amendment Act 1998 (Cth) as an Oppressive Exercise of Parliamentary Power – Nulyarimma v Thompson

I have argued above why I consider the Native Title Amendment Act 1998 (Cth) to be an example of an oppressive exercise of parliamentary power. Several Indigenous people have argued that the impact of this legislation is in fact genocidal. In the case Nulyarimma v Thompson several Indigenous plaintiffs, who called themselves the ‘Aboriginal Genocide Prosecutors’, challenged this legislation as providing a legislative framework to facilitate genocide. Frustrated with failed attempts to find adequate redress via the Parliamentary forum they attempted to pursue protection of their connection to land through the courts. The case was heard alongside another matter, Buzzacott v Gray, however the focus of proceedings was on the claim of Nulyarimma v Thompson and therefore my case analysis will be similarly focused.

1. The background to Nulyarimma

Four members of the Aboriginal Tent Embassy, Wadjularbinna Nulyarimma, Isobel Coe, Billy Craigie, and Robbie Thorpe applied to have warrants issued for the arrest of various politicians, John Howard (Prime Minister), Tim Fisher (Deputy Prime Minister), Brian Harradine (Senator) and Pauline Hanson (Member of the House of Representatives). The Appellants asserted that in supporting the government’s ‘Ten Point Plan’ which was embodied in the Native Title Amendment Act 1998 (Cth) these and other politicians had committed genocide. ‘Howard and Fischer were accused of conspiracy to commit genocide as a result of the federal government’s 10-point plan … Harradine was accused of complicity in genocide, Hanson with public incitement to commit it.’ As explained above, the

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221 Nulyarimma v Thompson (1999) 165 ALR 621.
223 This matter also concerned Aboriginal connection to land and the charge of genocide. However the issue in this matter was whether the failure of the Commonwealth Government to ensure the land was listed as a protected World Heritage site constituted genocide. See Ann Curthoys, Ann Genovese and Alexander Reilly, above n 142, 119–120.
226 Henry Reynolds, above n 224, 7.
amendments extinguished some native title rights and undermined remaining rights.\textsuperscript{227} A Registrar of the ACT Magistrates Court, Phillip Thompson, had refused to issue the warrants for arrest\textsuperscript{228} because ‘the alleged crimes were unknown to the law of the ACT because the federal parliament had failed to enact legislation which embodied the Genocide Convention in Australian law.’\textsuperscript{229} The Appellants then delivered letters to every member of the Senate and House of Representatives accusing them of complicity in genocide because of parliament’s failure to legislate on the matter, thereby allowing genocide to continue while providing no legal recourse for the victims. They followed this up with formal letters to all 101 foreign embassies and consulates in Australia seeking immediate and urgent assistance to prevent further acts of genocide being committed against the Aboriginal people and, specifically, to gain the support of governments to initiate proceedings against Australia in the International Court of Justice in the Hague.\textsuperscript{230}

An unsuccessful appeal was then made against a decision of a single judge in the Supreme Court to uphold the decision of the Registrar.\textsuperscript{231} Part of the problem was the uncertainty regarding whether genocide is a crime under Australian law. The appellants had strongly argued that genocide has been committed against Indigenous peoples in Australia.\textsuperscript{232} On 23 July 1998 they submitted the following in the Supreme Court of the ACT:

\begin{quote}
Australia’s responsibility for crimes of genocide as defined in the Genocide Convention

The Commonwealth of Australia is responsible for past, present and continuing genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide against the original peoples of the land claimed by the Commonwealth of Australia to be under its sovereign jurisdiction. …

The Commonwealth of Australia is responsible for:

(a) killing members of each of the original peoples;
(b) causing serious mental and physical harm to members of each of the original peoples;
(c) deliberately inflicting on the original peoples of the land conditions of life likely to bring about the physical destruction of each of the original peoples in whole or in part;
(d) imposing measures intended to prevent births within each of the original peoples;
(e) forcibly transferring children of each of the original peoples to Europeans under the claimed jurisdiction of the Commonwealth of Australia.
\end{quote}

\textsuperscript{227} For a good discussion of these issues see Gillian Triggs, above n 17, 397–408; Lisa Strelein, above n 17, 7; ATSIC, above n 166, 2.
\textsuperscript{228} Nulyarimma v Thompson (1999) 165 ALR 621 at [2].
\textsuperscript{229} Henry Reynolds, above n 224, 7.
\textsuperscript{230} Ibid 7–8.
\textsuperscript{231} Nulyarimma v Thompson (1999) 165 ALR 621 at [2]. For an extensive account of the earlier litigation of this matter see Ann Curthoys, Ann Genovese and Alexander Reilly, above n 142, Chapter Five.
\textsuperscript{232} See aspects of this referred to in the judgment of Wilcox J Nulyarimma v Thompson (1999) 165 ALR 621, 624–627; Henry Reynolds, above n 224, 8–9; Ann Curthoys, Ann Genovese and Alexander Reilly, above n 142, Chapter Five.
The Commonwealth of Australia’s responsibility in this matter is made particularly grave by the fact that, had it enacted the necessary genocide legislation in 1949, then the original peoples of the land would have been spared the past 50 years of genocide.\(^{233}\)

Having been unsuccessful in the Supreme Court the Appellants then appealed to the full Court of the Federal Court where the appeal was similarly dismissed.\(^{234}\) The Federal Court needed to address the issue of whether genocide was a crime under Australian law, and also whether the crime of genocide had been committed through the implementation of the ‘Ten Point Plan’ embodied in the *Native Title Amendment Act 1998* (Cth). From the outset the case was highly politicised and extremely controversial, as ‘the allegation of genocide profoundly affects what can be thought of as the collective memory of the nation, and poses an acute threat to a nation’s sense of honour and reputation in history.’\(^{235}\)

2. **The Judicial Decision in Nulyarimma**

Justice Merkel held that even if genocide had of been committed via the enactment of the *Native Title Amendment Act 1998* (Cth) those who participated in this process would have been protected by parliamentary privilege.\(^{236}\) However on the facts Merkel J also concluded that there was no evidence of the requisite genocidal ‘intent’.\(^{237}\) He suggested that there were ‘dangers’ in ‘demeaning what is involved in the international crime of genocide’ and maintained that even if there was ‘deep offence or even substantial harm’ resulting to Indigenous peoples as a result of government laws and policies this did not constitute genocide.\(^{238}\) Merkel J held:

> While, understandably, many Aboriginal people genuinely believe that they have been subjected to genocide since the commencement of the exercise of British sovereignty over Australia last century, it is another thing altogether to translate that belief into allegations of genocide perpetrated by particular individuals in the context of modern Australian society. In the present matter none of the allegations relied upon by the appellants are capable of raising an arguable case that any of the persons the subject of the proposed warrants and informations have engaged in any conduct that is capable of constituting the crime of genocide under international and domestic law.\(^{239}\)

\(^{233}\) This written submission is cited in Henry Reynolds, above n 224, 8–9.

\(^{234}\) *Nulyarimma v Thompson* (1999) 165 ALR 621 at [34] per Wilcox J, [58] per Whitlam J and [233] per Merkel J.

\(^{235}\) Ann Curthoys, Ann Genovese and Alexander Reilly, above n 142, 130.

\(^{236}\) By the operation of the *Parliamentary Privileges Act 1987* (Cth), referred to by Merkel J *Nulyarimma v Thompson* (1999) 165 ALR 621 at [193].

\(^{237}\) *Nulyarimma v Thompson* (1999) 165 ALR 621 at [196–197].

\(^{238}\) *Nulyarimma v Thompson* (1999) 165 ALR 621 at [199].

\(^{239}\) *Nulyarimma v Thompson* (1999) 165 ALR 621 at [202].
The other judges similarly disposed of the argument of genocide raised by the Appellants.\textsuperscript{240} Although Justice Wilcox stated that ‘[a]nybody who considers Australian history since 1788 will readily perceive why some people think it appropriate to use the term “genocide” to describe the conduct of non-[I]ndigenes towards the [I]ndigenous population’\textsuperscript{241} he considered that the requisite ‘intent to destroy’ was not present.\textsuperscript{242} He regarded this lack of intent to be a crucial failing in the appellants case, stating:

I can understand the view that the proposals listed in the “Ten Point Plan”, and substantially enacted in the 1998 amendments to the Native Title Act, further disadvantaged [I]ndigenous people in relation to their traditional lands. Given the intimate connection between their traditional lands and Aboriginal and Torres Strait Islander people, and the importance of their lands to their way of life and culture, it is understandable some would see the “Ten Point Plan” and the 1998 amendments as only the latest step in a process that has been going on for more than 200 years. However, if one is to use a legal term like “genocide” to describe that process, it is important to remember this entails a requirement to prove an intent to destroy a people.\textsuperscript{243}

Justice Wilcox then went on to state that even if the Appellants had been able to prove the requisite genocidal intent, they still would not have succeeded in their claim because genocide is not a crime under Australian law.\textsuperscript{244}

The court had to determine ‘whether the crime of genocide, which attracts universal jurisdiction under international law, can become part of Australian law without a legislative act creating genocide as an offence’.\textsuperscript{245} The Appellants sought to argue that genocide was a crime in Australia by virtue of its prohibition under customary international law.\textsuperscript{246} This prohibition of genocide under customary international law is independent of any obligations Australia has under the \textit{Convention on the Prevention and Punishment of the Crime of Genocide}.\textsuperscript{247} Thus the court had to examine how customary international law can become part of Australian domestic law.\textsuperscript{248}

There are two theories on how customary international law can become part of domestic law, the ‘incorporation theory’ and the ‘transformation theory’ or ‘common law adoption’
theory. According to the incorporation theory customary international law automatically becomes part of the national law of a state unless it is in conflict with national legislation. The incorporation approach has been rejected by the High Court in *Chow Hung Ching v R*. Under the transformation theory an express act of either the legislature or the judiciary is necessary to ‘transform’ international custom into national law. The doctrine of transformation ‘stipulates that rules of international law do not become national law until they have been expressly adopted by the state’. The legislature has power to transform customary international law into domestic law through s 51(xxix) of the Constitution, and despite the majority decision in *Nulyarimma*, I argue the better view is that the judiciary can also transform customary international law into domestic law. The judiciary can transform international law into domestic law as part of their development of the common law. This approach is sometimes referred to as the ‘soft transformation’ theory. Thomas Feerick comments that the majority judges in *Nulyarimma* missed ‘a golden opportunity to examine the relationship between customary international law and the Australian common law.’ Only the minority judge, Justice Merkel, gave thorough consideration to the issue of the relationship between Australian domestic law and customary international law. After reviewing Australian case law Merkel J concluded that the “source” view or the common law adoption approach’ is correct. I argue that Merkel J’s approach is to be preferred.

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251 *Chow Hung Ching v R* (1948) 77 CLR 449 at 477 per Dixon J. Also see Brian Opeskin and Donald Rothwell (eds), *International Law and Australian Federalism* (1997) 40.


254 *Commonwealth of Australia Constitution Act* 1900 (IMP), see *Commonwealth v Tasmania* (1983) 158 CLR 1 at 131.


256 Bryan Horrigan and Brian Fitzgerald, above n 255, 41.

257 Douglas Guilfoyle, above n 255, 8.


259 Though his judgment has also been the subject of some critique, see Thomas Feerick, above n 258, 89–90.

Essentially Whitlam J considered that judicial transformation of the international crime of genocide would involve the judges creating a new offence. Whitlam J decided that Commonwealth legislation had abolished common law criminal offences, which meant the court had no jurisdiction to develop the common law in terms of creating an offence of genocide. By contrast, Merkel J concluded, ‘the offence of genocide is an offence under the common law of Australia’. Justice Merkel did not see the Commonwealth legislation Whitlam J spoke of as a barrier to adoption. Instead Merkel J suggested:

it is not accurate to say that reception into the common law of a universal crime under international law involves the courts in “creating” a new crime. Rather, the court is determining whether to “adopt” and therefore receive as part of the common law an existing offence under international law which has gained the status of a universal crime.

The majority judges imposed a significant qualification on transformation of customary international law. The majority judges were of the opinion that customary international law of a criminal nature can only become part of domestic law via a legislative act. However, the arguments made by the majority in this respect are far from convincing, and it has been suggested that this aspect of the decision was wrongly decided.

In relation to his view that judicial transformation of customary international law is limited to civil matters, it is interesting to note that Wilcox J stated ‘I am unable to point to much authority for my conclusion.’ The weakness of his argument is illustrated by the fact that he partially relies on a ‘non-argument’ made in *R v Bow Street Magistrate, ex parte Pinochet (No 3)*, something even he described as ‘but a straw in the wind’. This has been referred to somewhat diplomatically by Douglas Guilfoyle as ‘extraordinary reasoning’. Wilcox J claimed that it could be implied that customary international law relating to criminal matters cannot be judicially transformed and so become part of the common law because if it could

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263 Nulyarimma v Thompson (1999) 165 ALR 621 at [186], however he did conclude (at 670) that the elements of genocide were not made out on the facts of the case.
266 Douglas Guilfoyle, above n 255, 2; Thomas Feerick, above n 258, 83 and 94.
267 Nulyarimma v Thompson (1999) 165 ALR 621 at 630.
268 *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (Amnesty International and others intervening) (No 3)* [1999] 2 All ER 97.
269 Nulyarimma v Thompson (1999) 165 ALR 621 at 630.
then the Counsel in the _Pinochet_ case would have raised this argument. He pointed out that the Counsel in the _Pinochet_ case did not raise the issue of England having jurisdiction to try Pinochet by virtue of the incorporation of customary international law relating to torture. He claimed:

extradition on all charges would have been secured if counsel had been able to demonstrate that Pinochet would have been punishable in the United Kingdom before the commencement of the 1988 United Kingdom statute adopting and implementing the Torture Convention. Yet, although torture is an international crime, nobody suggested that Pinochet would have been triable in the United Kingdom before that date by reason of the incorporation into United Kingdom law of the international customary law about torture. The only explanation of this omission can be that those arguing for extradition accepted that torture was not a triable offence in the United Kingdom until implementing legislation was enacted.

This ‘non-argument’ that was not presented before the Court in _Pinochet_ led Wilcox J to conclude that Australian courts cannot enforce norms of criminal customary international law without implementing legislation. Yet there is an absence of convincing evidence to support this proposition. The obiter statements of Brennan J in _Polyukhovich v Commonwealth_ referred to by Wilcox J to support his proposition cannot, even under the most strained interpretation, be taken as meaning that judges have no power to transform customary international law of a criminal nature. In _Polyukhovich v Commonwealth_ Brennan J stated:

> what is left to municipal law is the adoption of international law as the governing law of what is an international crime … when municipal law adopts the international law definition of a crime as the municipal law definition of the crime, the jurisdiction exercised in applying the municipal law is recognised as an appropriate means of exercising universal jurisdiction under international law.

On reading this Wilcox J proclaimed ‘[p]lainly, his Honour had in mind adoption by legislation.’ However I would suggest there is nothing plain about such an interpretation at

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272 _Nulyarimma v Thompson_ (1999) 165 ALR 621 at 630. Bearing in mind that the incorporation approach prevailed in England rather than the transformation approach – Douglas Guilfoyle, above n 255, 13–14. It has been suggested by Guilfoyle that the situation in England is now quite different to other common law jurisdictions because of the European Union and the European Court of Human Rights (at 14).
273 _Nulyarimma v Thompson_ (1999) 165 ALR 621 at 630.
278 _Nulyarimma v Thompson_ (1999) 165 ALR 621 at 630.
all. Likewise the statement by Brownlie\(^{279}\) referred to by Wilcox J to support his contention cannot be construed as imposing the qualification on judicial transformation that Wilcox J sought to make.\(^{280}\)

By contrast, Merkel J said ‘[t]he authorities … do not suggest that the principles governing the adoption of customary international law relate only to international civil law and not to international criminal law.’\(^{281}\) He supported his conclusion by referring to the fact that under customary international law all nations have jurisdiction to punish pirates.\(^{282}\) He stated ‘piracy is a long recognised example of jurisdiction vesting in a municipal court in respect of international crimes without legislation conferring jurisdiction.’\(^{283}\) To my mind this has greater persuasive value than the ‘non-argument’ raised by Wilcox J.

Whitlam J held that as s 1.1 of the *Criminal Code* (Cth)\(^{284}\) abolished common law offences under Commonwealth law this meant that genocide could not be adopted ‘as a common law offence under Commonwealth law.’\(^{285}\) However, as Merkel J pointed out, s 1.1 ‘refers to Commonwealth statutory and common law offences and not to crimes arising under customary international law or the common law generally.’\(^{286}\) Whitlam J’s objection to adoption of genocide is based on the idea that there can be no more Federal common law offences, yet as Martin Flynn suggests ‘it seems most unlikely that Federal common law offences can exist after the High Court rejected the concept of a distinct Federal common law in *Lange v Australian Broadcasting Corporation*.\(^{287}\) Flynn maintains that ‘[i]f genocide is

\(^{279}\) Brownlie, *Principles of Public International Law* (4th edn, 1990) 561, cited by Wilcox J *Nulyarimma v Thompson* (1999) 165 ALR 621at 630. The comment is as follows:

> Since the latter half of the nineteenth century it has been generally recognised that there are acts or omissions for which international law imposes criminal responsibility on individuals and for which punishment may be imposed, either by properly empowered international tribunals or by national courts and military tribunals. These tribunals exercise an international jurisdiction by reason of the law applied and the constitution of the tribunal, or, in the case of national courts, by reason of the law applied and the nature of the jurisdiction (the exercise of which is justified by international law).

\(^{280}\) *Nulyarimma v Thompson* (1999) 165 ALR 621 at 630.

\(^{281}\) *Nulyarimma v Thompson* (1999) 165 ALR 621 [133].

\(^{282}\) *Re Piracy Jure Gentium* [1934] AC 586 at 589.

\(^{283}\) *Nulyarimma v Thompson* (1999) 165 ALR 621 at [139].

\(^{284}\) This section provides that the only offences against the Commonwealth are those created by, or under the authority of, the Code or any other Act.

\(^{285}\) *Nulyarimma v Thompson* (1999) 165 ALR 621 at [54].

\(^{286}\) *Nulyarimma v Thompson* (1999) 165 ALR 621 at 662.

not a Federal common law offence then it is simply a “common law offence”.

Although common law offences have been abolished in the code jurisdictions it could still be possible for the common law to be developed to include an offence of genocide in Australian jurisdictions not yet governed by a criminal code.

Furthermore there are strong arguments in favour of receiving the customary international law concerning genocide into Australian common law. As Douglas Guilfoyle states, ‘[i]f any principle of custom can be received into Australian common law, it is this. A stronger-case example is inconceivable.’ He argues ‘[g]enocide as an international crime could be more readily received into common law than any other customary principle, simply because it presents one of the strongest examples of a clearly recognised and articulated customary rule.’ Yet despite these arguments several cases have since upheld the finding in Nulyarimma that genocide is not a crime in Australia. Instead there has been an underlying assumption that Parliament is the appropriate avenue for protection against abuses of human rights. This assumption is problematic when Parliaments engage in oppressive exercises of parliamentary power to the detriment of minorities, as has repeatedly occurred in Australia with Indigenous peoples.

3. Critique of Nulyarimma

Although unsuccessful from a legal perspective, the case did highlight the unsatisfactory nature of the Parliament’s relationship with Australia’s racist colonial legacy. It also brought the issue of an Australian genocide to the fore. While each of the judges held that genocide had not occurred on the facts of the case, this finding has been strongly criticised in light of the evidence concerning the spiritual connections to land which have been detrimentally affected by the enactment of the Native Title Amendment Act 1998 (Cth). Alexander Reilly argues ‘[a]ccess and connection to land is fundamental to Aboriginal spirituality. Given the importance of access to land, and given the extensive impact of the NTAA on the continuing

288 Martin Flynn, above n 287, 71.
289 Ibid.
290 Douglas Guilfoyle, above n 255, 8.
291 Ibid 22.
293 Douglas Guilfoyle, above n 255, 34.
294 Henry Reynolds, above n 224, 9.
native title rights of Aboriginal people, the claim of genocide is not fanciful. Reilly maintains '[g]iven the calculated manner in which the legislation was formulated, and the submissions presented to the Parliament about the severe impact of the ten point plan on traditional Aboriginal connections to land, the specific intention component of the definition might well be satisfied.' The majority judges were reluctant to deal with the controversial issue of an Australian genocide perpetrated by Parliament against Indigenous peoples. This was evident in each judgment in relation to both past colonial conduct and the traces of that racist colonial legacy which can be seen in the current native title regime.

_Nulyarimma_ raises several significant issues relating to the oppressive exercise of parliamentary power and the role of the judiciary upholding the doctrine of Parliamentary Sovereignty. It is conceivable that the reluctance of the majority judges to engage in judicial transformation of customary international law is attributable to reliance on the doctrine of Parliamentary Sovereignty. This concept is firmly embedded in the Australian legal system, and it is ‘associated with majoritarian utilitarianism and the Positivist theory of law.’ Walker has colourfully described the influence of Parliamentary Sovereignty on legal perception, suggesting that it ‘is like some huge, ugly Victorian monument that dominates the legal and constitutional landscape and exerts a hypnotic effect on legal perception.’

In the Westminster tradition there has been an unwavering yet unsubstantiated belief that Parliament will guard the civil and political liberties of the citizen, thus it has been presumed

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296 Ibid 257.
297 Ibid 255.
298 The notion of Parliamentary Sovereignty was developed by A V Dicey. According to Dicey the ‘principle of Parliamentary Sovereignty means neither more nor less than this, namely, that Parliament … has … the right to make or unmake any law whatever.’ Dicey explains, '[a]ny Act of Parliament, or any part of an Act of Parliament, which makes a new law, or repeals or modifies an existing law, will be obeyed by the courts.’ A V Dicey, _An Introduction to the Study of the Law of the Constitution_ (10th ed, 1959) 39–40.
299 The principle of parliamentary supremacy has been strongly affirmed as an applicable principle of law in Australia. In _Polites v The Commonwealth_ (1945) 70 CLR 60 at 200, Dixon J declared: ‘[w]ithin the matters placed under its authority, the power of the Parliament was intended to be supreme’. Gummow and Hayne JJ referred to this statement with approval in _Kartinyeri v Commonwealth_ (1998) 195 CLR 337 at 385. In _Kable v The Director of Public Prosecutions for the State of New South Wales_ (1996) 189 CLR 51 at 74 Dawson J stated (at 76) ‘there can be no doubt that parliamentary supremacy is a basic principle of the legal system which has been inherited in this country from the United Kingdom.’ Dawson J went on to say ‘[t]he doctrine of parliamentary supremacy is a doctrine as deeply rooted as any in the common law. It is of its essence that a court, once it has ascertained the true scope and effect of an Act of Parliament, should give unquestioned effect to it accordingly.’ See also Alexander Reilly, above n 220, 267; The Hon Anthony Mason, ‘Future Directions in Australian Law’ (1987) 13 September _Monash Law Review_ 149, 156.
that protecting human rights should be left to the Parliament.302 There has been an underlying assumption that upholding the doctrine of Parliamentary Sovereignty can best protect individual rights.303 Such reasoning can be traced back to the philosophy of Dicey.304 Yet this assumption is highly questionable and has been the subject of much criticism.305 Even a cursory glance at Australian history reveals that a belief in the willingness of Parliament to protect individual and collective human rights is naïve; particularly where those requiring protection are politically ‘unpopular minorities’.306 Sadurski points out that ‘Parliament has an in-built systemic bias against respecting the interests of … minorities whose votes do not count, and/or who are unpopular in the community.’307 Such groups ‘have no realistic hope of entering into a successful coalition with other groups to form an effective pressure group, let alone a political majority.’308 In this way Australia’s voting system works against minority interests.309 It is fictitious to assume that the needs and rights of minorities will be protected by a self-interested majority.310

In *Nulyarimma* the majority judges held to an assumption that it was more appropriate for the type of issues raised by the case to be dealt with by Parliament. However this assumption ignores the reality that discriminatory legislation such as the *Native Title Amendment Act 1998* (Cth) was passed precisely because minority groups are not effectively represented in Parliament.311 It is, as Michael Coper states, ‘hollow to say that … the issue [must] be left to be sorted out by the Parliament if that Parliament is the very product of the unfairness in the system.’312

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303  Haig Patatpan, ‘Rewriting Australian Liberalism: The High Court’s Jurisprudence of Rights’ (1996) 31(2) *Australian Journal of Political Science* 225, 227. The Hon Alan Moses has written of the manner in which underlying assumptions can affect judicial reasoning, even where this process is not acknowledged – The Hon Alan Moses, above n 197, 22.

304  Haig Patatpan, above n 303, 227.

305  G De Q Walker, above n 301, 276.


307  Ibid 480.

308  Ibid 475. See also Sarah Maddison, above n 84, 36.


311  Sean Brennan, Larissa Behrendt, Lisa Strelein and George Williams, above n 168, 7.

Nulyarimma highlights the difficulties that Indigenous plaintiffs are faced with when they try to challenge oppressive acts of parliamentary power through the courts. They often find this avenue just as unrewarding as pursuing effective representation via a parliament bent on preserving majoritarian interests.\(^{313}\) In large part this stems from the perceptions of the role of the judiciary and the resort to legal positivism, which purports to disregard the moral and political dimensions of a dispute.\(^{314}\) The proper role of the judiciary is a controversial subject, and can only be briefly touched upon here.\(^{315}\) Some clearly consider that there is room for judicial activism,\(^{316}\) whilst some argue that any form of judicial activism is a corruption of the judicial function.\(^{317}\) Others suggest that controversy derives from definitional issues, in short that it depends upon how the phrase ‘judicial activism’ is defined.\(^{318}\) In my view arguably ‘[a]ll judges are activists’ because ‘even making no change whatsoever can be a form of activism.’\(^{319}\) However the prevailing view in Australian courts appears to be that judicial activism is not appropriate and ‘the protection of minority rights is a responsibility of the parliamentary process.’\(^{320}\) Conservative elements contend that judges ought not concern themselves with political and social matters lest the courts become politicised.\(^{321}\) Yet this view makes the erroneous assumption that the courts are not already politicised.\(^{322}\) The political nature of judicial decision-making has long been a subject of critical scholarship.\(^{323}\) For example the Realists highlighted ‘the impossibility of separating law from politics, not merely because of the judge’s subjectivity but also because of the impossibility of

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313 Wojciech Sadurski, above n 306, 475; Geoffrey Robertson, above n 309, 127.
314 Margaret Davies, above n 1, 117.
316 Wojciech Sadurski, above n 306, 477; Geoffrey Robertson, above n 309, 25.
318 The Hon Robert French, above n 315, 67; The Hon Ruth McColl, above n 315, 46–47.
321 The Hon Gerard Brennan, above n 320, 756; The Hon Dyson Heydon, above n 317, 10.
constructing a set of rules that could be applied in a neutral or objective manner.’ 324 They asserted that ‘law is essentially political, and must be seen as connected to existing political processes and institutions.’ 325 This contention has also been taken up by those working within the fields of critical race theory, critical whiteness studies and postcolonial theory. 326 Indeed critical legal theorists are ‘concerned to dig beneath the surface of legal doctrines and practices; to go beyond a project of explication and rationalisation and to interrogate the deeper political, historical and philosophical logics which underpin the power of law.’ 327 Such theorists argue that by reinforcing the dominant political ideologies of the state (such as the doctrine of Parliamentary Sovereignty) judges are indeed acting politically.

Those concerned about social justice often see the judiciary as the last bastion of hope in a system where the odds are stacked against minorities. 328 Lord Scarman has said that if people without political power are to be protected ‘“it won’t be done in Parliament – they will never muster a majority. It’s got to be done by the Courts”’. 329 Sadurski similarly argues ‘basic democratic values lend support to more rigorous judicial protection of those minorities who even in a perfectly representative democracy are less equal than others.’ 330 This suggests that judges do have some responsibility to protect the disempowered. However the decision in *Nulyarimma* shows a large measure of judicial reluctance to undertake that role.

There is an underlying assumption in *Nulyarimma* that judges are to ‘find’ or ‘declare’ law rather than ‘make’ it. 331 This is in accordance with the declaratory theory of law, 332 ‘which

324 James Boyle, above n 323, 692. Cf. the view that judges are impartial, objective and apolitical – The Hon Anthony Mason, above n 315, 33 and 42; The Hon David Ipp, above n 315, 88–89; The Hon Ruth McColl, above n 315, 51.
325 Margaret Davies, above n 1, 125.
329 Lord Scarman cited in The Hon Gerard Brennan, above n 320, 755. See also Geoffrey Robertson, above n 309, 127.
330 Wojciech Sadurski, above n 306, 484.
331 This fits with the declaratory theory of law, that judges ‘find’ the law then declare it – Margaret Davies, above n 1, 40–41.
Lord Reid … rightly characterised as a “fairy tale”. The majority judges clearly considered judicial transformation of customary international law to be the equivalent of creating new law. They therefore showed a reluctance to engage in what they considered to be judicial lawmaking. By contrast Justice Merkel claimed that judges do not ‘create’ law in judicially transforming customary international law, but, rather, they ‘adopt’ principles of international law, which they then apply to the factual situation before them. Thus Nulyarimma presented an opportunity to ‘adopt’ international customary law protecting human rights. It presented the court with an opportunity to protect Indigenous peoples from yet another oppressive exercise of parliamentary power, however this opportunity was missed.

It is evident from the language used by the judges in Nulyarimma that they saw the role of the judiciary in protecting human rights as non-existent. This can be seen in the statement made by Justice Merkel that ‘[i]t is not within the court’s power, nor … its function or role, to set right all of the wrongs of the past or to chart a just political and social course for the future.’ It can also be seen in his resort to positivist epistemology. He proclaimed 'the court is to determine … what the law is rather than what the law should be.' This closely resembles the classic statement of positivism formulated by John Austin, that jurists must concern themselves with the ‘law as it is’, and not with ‘law as it ought to be.’

Whilst the resort to legal positivism may appear neutral, it regularly disguises a conservative political agenda. A key element of positivism is that it attempts to appear objective. However ‘[t]he claim to objectivity has simply been an exceptionally powerful way of

333 George Winterton, above n 332, 73; and see The Hon Alan Moses, above n 197, 21.
335 Nulyarimma v Thompson (1999) 165 ALR 621 at [167].
336 Peter Gabel and Paul Harris, above n 323, 395. Gabel and Harris suggest (at 395) ‘[t]he advantage of overtly political cases is that they provide opportunities to dramatize the real basis of existing social conflicts and to challenge the State’s efforts to control the way these conflicts are portrayed within existing legal categories.’
339 Margaret Davies, Asking the Law Question (1994) 77.
341 Duncan Kennedy, above n 340, 562; Margaret Davies, above n 1, 117.
centralising a certain style of theory.' 342 Margaret Davies states ‘[t]he attempt to describe law as it is, rather than as it ought to be and the confinement of the matter of jurisprudence to positive law, are the basis of positivism’s claim to scientificity.’ 343 However she also points out that a statement claiming to describe what the law is ‘may in itself contain very strong, but usually unstated prescriptions.’ 344 Peter Gabel and Paul Harris further explain that as a form of legal reasoning, positivism ‘presupposes both the existence of and the legitimacy of existing hierarchical institutions.’ 345 By stating that it is not the place of a judge to be concerned about charting ‘a just political and social course for the future’, 346 Justice Merkel is in fact betraying a certain degree of complicity with the present power imbalances in society, and therefore participates in perpetuating Australia’s racist colonial legacy.

Our entire legal system is founded on positivism and this often makes the claims of positivism seem irrefutable. 347 However a major problem with positivism is that it reinforces the status quo. 348 It reinforces the status quo because ‘[t]he people who are dominant in society … dictate the laws’. 349 This entrenches disadvantage, such as that suffered by Indigenous peoples. The scenario presented in Nulyarimma highlights this. In Nulyarimma the Respondents are the lawmakers, they govern, they are in positions of power, they are dominant in society. The Appellants on the other hand, are the governed, they are disempowered, and they are such a minority in this country that they are not effectively represented in Parliament. 350 However the language of positivism employed by the judges disguises the glaring power imbalance in the courtroom and casts a spurious ‘objectivity’ over the proceedings. 351

342 Margaret Davies, above n 1, 117.
343 Ibid 101.
344 Ibid.
345 Peter Gabel and Paul Harris, above n 323, 373.
347 Margaret Davies, above n 1, 101.
348 Ibid.
349 Ibid. She argues (at 101):
One problem with positivism (apart from the fact that it tends simply to reinforce the legal status quo) is that it relies only on law in order to explain law. If we ask why a law is valid, positivists can only point to another law and not to anything more fundamental. But if we keep asking, we reach a paradox because eventually there has to be some non-legal reason for saying that something is law: it appears that mere political or ideological force distinguishes a legal rule from any other. The people who are dominant in society, who really have the means of social control, are those who dictate the laws.
350 Wojciech Sadurski, above n 306, 475.
The judges in *Nulyarimma* employed formalist methodology. Like legal positivism, formalism views law as a rational and scientific enterprise separated from political and moral considerations.  

Legal formalism (also known as “doctrinalism” or “legalism”) is an approach to legal reasoning which emphasises the specifically legal dimension of a dispute. The formal approach to determining a legal issue assumes that the law is a closed logical system: this means that it is considered to be the law alone – relations between legal concepts and the facts of a case – and not anything outside the law, which resolves legal questions.

In stating that judges are not to ‘set right all of the wrongs of the past or to chart a just political and social course for the future’ and by confining the scope of judicial inquiry to what the law ‘is’, Justice Merkel employs the formalist method of separating ‘law’ from what may be characterised as ‘non-law’. This allows the social reality of the Appellants to be suppressed and the strictly legal matters of the dispute to become paramount. However rather than being apolitical and neutral, the

supposed separation of law from morality … is in itself a political gesture. The exclusion, and effective suppression, of matters other than those which are determined to be “legal” cannot be politically neutral … the separation of law from non-law is a political separation because it sets up an authoritarian notion of jurisprudential correctness. The exclusion of politics is as political as its inclusion.

In accordance with formalist methodology, the judges in *Nulyarimma* did not wish for their judgments to be characterised by anything that could be considered ‘non-law’, such as mercy. The problem presented by adherence to formalist methodology is that formalism’s predominant concern is to produce a strictly ‘legal’ outcome, rather than an outcome that produces substantive justice. Substantive justice requires a contextualised approach to

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352 Margaret Davies, above n 1, 152.
353 Ibid 150.
355 This is referred to as ‘the separation thesis’ – Margaret Davies, above n 1, 114. It stems from the ideas of Hans Kelsen who claimed that law and morality are separate – Ian Stewart, ‘The Critical Legal Science of Hans Kelsen’ (1990) 17(3) *Journal of Law and Society* 273, 288. Kelsen developed a ‘pure theory of law’ where he insisted on a strict separation of law from non-law. Kelsen’s ‘pure theory of law’ purported to exclude everything from the analysis of law besides law itself. Kelsen contends that his ‘pure’ theory of law is ‘concerned solely with that part of knowledge which deals with law, excluding from such knowledge everything which does not strictly belong to the subject-matter law. That is, it endeavours to free the science of law from all foreign elements.’ Hans Kelsen, ‘The Pure Theory of Law: Its Method and Fundamental Concepts: Part 1’ (1934) 200 *Law Quarterly Review* 474, 477. There has been much criticism of this ‘separation thesis’ – Margaret Davies, above n 1, 117.
356 Margaret Davies, above n 1, 117.
357 Ibid 152.
358 Ibid 153; Geoffrey Leane, above n 340, 926.
judicial decision-making. Substantive justice requires sensitivity ‘to the facts and context of the individual case, taking it as socially and culturally situated rather than as potentially reducible to some legally recognised norm.’ As Geoffrey Leane points out, ‘[f]ormalism cannot produce substantive justice as an outcome until there is a reasonable measure of social equality. Without it, formalism can only perpetuate social (that is to say substantive) injustice.’ Adherence to formalist methodology by the judges in *Nulyarimma* meant that the Appellants received an outcome devoid of substantive justice.

There is a paradox in *Nulyarimma* in that those being oppressed by the law were attempting to use the power of the law, even while they were being oppressed by it. The case reveals the tension that exists between insiders and outsiders in the context of the Australian legal system. Margaret Davies explains that ‘[t]raditionally the laws of … understanding … associated with white Western men have constituted the inside, while it is everyone else’s explanations which have been wrong, mad, distorted or biased.’ In *Nulyarimma* the outsiders, the Appellants, are trying to use an insider mechanism of power to protect themselves, but they are warned about the viability of using insider power mechanisms to assist them in their pursuit of liberation. This is seen in the statement made by Justice Merkel where he refers to ‘the danger of raising unrealistic expectations about what might be achieved by recourse to the law to secure what might be perceived to be just outcomes for the Aboriginal people of Australia.’ This is an overtly political statement, revealing underlying assumptions that the law is not to concern itself with justice; and that however pitiful the plight of Indigenous people may be, the law is not an appropriate vehicle for their deliverance. Although such assumptions are harmonious with positivist epistemology and formalist methodology, they offer little comfort to the disempowered in society who long for substantive justice. From the perspective of the disempowered such a comment is highly offensive.

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359 Geoffrey Leane, above n 340, 926.
360 Ibid.
361 Ibid 944.
362 Ibid 12.
Chapter 5 – Recent Australian Racially Discriminatory Laws

Nulyarimma is a case that highlights the oppressive nature of law’s ‘colonial discourse’.\textsuperscript{365} In an application before the High Court for special leave to appeal Isobel Coe, an unrepresented applicant, had a great deal of difficulty in obtaining permission to speak. The following transcript from the proceedings reveals her evident frustration in being told to frame her complaints within the language of law:

MS COE: “Now, you know, it just seems that this is just another form of genocide that is happening right now against our people, and the legal system is a part of that genocide against our people. Now, if we cannot get any justice here, where do we go? We are desperate. Our people are dying everywhere…”

KIRBY J: “What is the substantive thing you want to say to the Court?”

MS COE: “Well, we want to say that, you know, this war against our people has to end”.

KIRBY J: “Yes, but…”

MS COE: “It has been an undeclared war for 212 years.”

KIRBY J: “Well, this is a Court of law. We are obliged to conform to the law and there are some very complicated legal questions which are before the Court and Ms Hampel has addressed the Court on those issues and we have to consider those. Now, is there anything else you want to say relevant to those issues? We cannot fix up every issue in the country. We can only deal with the matters that are before the Court”.

MS COE: “Well, I appreciate that but someone has got to help us to stop the genocide in this country against Aboriginal people. Now, if we cannot get justice here in the highest Court of this country, then I think that this court is just a party to the genocide as well.”

GUMMOW J: “No, we will not hear that sort of thing.”\textsuperscript{366}

The Justices promptly adjourned the court. This transcript illustrates how law silences the discourse of the ‘other’.\textsuperscript{367} In accordance with formalism, the judges attempted to confine the discussion to the narrow legal questions before them. They were not interested in hearing what Ms Coe had to say. They clearly considered her statements to involve political issues that were extraneous to law. This showed the influence of Kelsen’s “‘pure” theory of law’ which purports to exclude everything from the analysis of law besides law itself.\textsuperscript{368}

The Appellants were concerned that they were being unjustly severed from their land and that ‘the ordinary and strictly legal operation of governmental institutions is … a continuing act of genocide.’\textsuperscript{369} They were forced to frame their complaints within the language of law, ‘forced


\textsuperscript{366} Transcript of Proceedings, Nulyarimma & Ors v Thompson, above n 48, 14–15.

\textsuperscript{367} Margaret Davies, above n 362, 13.

\textsuperscript{368} Hans Kelsen, above n 355, 477.

to speak in a formalized idiom of the language of the state – the idiom of legal discourse.\textsuperscript{370}

This enabled but a partial telling of their story. Sandra Berns explains that:

\begin{quote}
To render an ordinary story in the grammar of law is simultaneously to cover it over with lawness and to rip it apart, shred the flesh of its meaning. The author may give evidence, may tell, both in examination in chief and under cross examination, her story, but it will not be her story, it will be the \textit{authorised} version, her story seen through the \textit{eyes of the law}.\textsuperscript{371}
\end{quote}

In \textit{Nulyarimma} it can be seen that a legal reality was constructed in the courtroom that genocide is not a crime in Australia, even though this does not correspond with the lived reality of Indigenous Peoples.\textsuperscript{372} In this way law’s discourse silences the discourse of the ‘other’, and the normative ‘force of law’ continues to perpetuate Australia’s racist colonial legacy.\textsuperscript{373} In \textit{Nulyarimma} the court can be seen as working within a broad government framework that refuses to take responsibility for human rights abuses in this country. The decision in \textit{Nulyarimma} is perhaps better understood as a response to the prevailing political situation involving the claims of Indigenous people in relation to native title, rather than as a mysteriously rational approach cut off from all extra-legal considerations.\textsuperscript{374} Despite the perspective that such issues should be dealt with by the Parliament,\textsuperscript{375} it is unrealistic to suggest that minority groups will have their needs addressed through the parliamentary process while a utilitarian concept of democracy prevails in Australia.\textsuperscript{376} This case highlights the problem that exists when law is fundamentally unjust. Where the makers of that law are politicians swayed by utilitarianism\textsuperscript{377} and the only course of redress is to attempt to vote them out, Indigenous peoples have no recourse except to bring their complaints before the courts. However as this case reveals, instead of providing substantive justice the courts assert

\begin{footnotes}
\footnote{370}{Gerald Torres and Kathryn Milun, above n 41, 52.}
\footnote{373}{Jacques Derrida, above n 44; Barbara Flagg, above n 326, 51.}
\footnote{374}{Margaret Davies, above n 1, 150–152.}
\footnote{375}{Haig Patatpan, above n 302, 211 and 232; Douglas Guilfoyle, above n 255, 34.}
\footnote{376}{Penelope Mathew, above n 328, 199. Australia has what may also be referred to as a ‘capitalist democracy’ – Noam Chomsky, above n 197, 375.}
\footnote{377}{Utilitarianism was elaborated upon by Jeremy Bentham, who believed an action would be right if it conformed to the principle of utility. He saw utility as providing ‘the greatest happiness of the greatest number’ – Stephen Bottomley, Neil Gunningham and Stephen Parker, \textit{Law in Context} (1\textsuperscript{st} ed., 1991) 30. According to Bentham ‘An action … may be said to be conformable to [the] principle of utility … when the tendency it has to augment the happiness of the community is greater than any it has to diminish it’ – Jeremy Bentham, \textit{An Introduction to the Principles of Morals and Legislation} (1781) 15.}
\end{footnotes}
that such problems should be resolved by the Parliament, despite the fact that the Parliament is the very reason for the oppressive legislation in the first place.

D. Decimation of Aboriginal Sacred Sites – The Hindmarsh Island Bridge Act 1997 and Kartinyeri v Commonwealth

Another piece of legislation that arguably fits into the category of an oppressive exercise of parliamentary power is the *Hindmarsh Island Bridge Act 1997* (Cth). In *Kartinyeri v Commonwealth* Indigenous plaintiffs challenged this legislation as providing a legislative framework which impeded their ability to protect their connection to land, specifically, their connection with various sacred sites on and surrounding Hindmarsh Island (Kumarangk).

1. The background to Kartinyeri

In order to facilitate the building of a bridge to Hindmarsh Island, the Commonwealth government removed the statutory rights of the Ngarrindjeri to have a declaration made under s 10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) to protect Hindmarsh Island and its surrounding waters, an area of great cultural and spiritual significance to the Ngarrindjeri. The Plaintiffs maintained that the *Bridge Act* adversely discriminated against the Ngarrindjeri and threatened them with cultural destruction. This was outlined in the report undertaken by Professor Cheryl Saunders who was given the task of reporting to former Minister Robert Tickner so that he could make a determination under the *Aboriginal and Torres Strait Islander Heritage Protection Act* about protecting Hindmarsh

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378 Hereafter the *Bridge Act*.
380 For an excellent and detailed account of the history of the Hindmarsh Island situation see Margaret Simons, *The Meeting of the Waters – The Hindmarsh Island Affair* (2003). This book contains a comprehensive account of the events leading up to the High Court case of *Kartinyeri v The Commonwealth*. It provides detail about evidence which was not before the Royal Commission, evidence which suggests there was no fabrication by those claiming the area had a spiritual significance for the Ngarrindjeri women. This is significant, because even thought the High Court did not expressly refer to the findings of the Royal Commission when deciding the validity of the Hindmarsh Island Bridge Act, the findings of fabrication by the Royal Commission may have been an unofficial factor of influence, as the majority judges in Kartinyeri seemed relatively unconcerned about the potential of the Bridge Act to authorise the decimation of Aboriginal sacred sites.
381 Hereafter the *Heritage Act*.
383 Margaret Simons, above n 380, 226–227 and 366–367; Tom Trevorrow, above n 19, 89; Doreen Kartinyeri and Sue Anderson, *My Ngarrindjeri Calling* (2008) 68, 115 and 155. Doreen Kartinyeri has stated that there are sacred sites all around Hindmarsh Island ‘every five or six kilometres’ (at 115). These include buried foetuses and skeletal remains of Ngarrindjeri ancestors.
Island.\textsuperscript{384} Saunders had been appointed to do the report to be considered by Minister Tickner out of respect for the beliefs of the Ngarrindjeri women who would not reveal their sacred beliefs to a man.\textsuperscript{385} The report of Saunders contained information revealing that Hindmarsh Island and the surrounding waters are sacred to the Ngarrindjeri women. She said the building of a bridge presented

a threat to the area in the form of a permanent, prominent and physical link above the water between two parts of the territory which would, in accordance with Ngarrindjeri tradition, render the cosmos, and human beings within it, sterile: and unable to reproduce. The Ngarrindjeri women believe that construction of the bridge would not only injure and desecrate their traditions but destroy their culture. Knowledge of these matters lies largely within the secret oral tradition of the Ngarrindjeri women.\textsuperscript{386}

She continued:

In essence, the Ngarrindjeri women regard the Murray Mouth area in general and Hindmarsh and Mundoo islands and the surrounding and separating waters in particular as crucial for the reproduction of the Ngarrindjeri people and their continued existence. This tradition is not mythological but spiritual and an actual reflection of traditional practice, handed down from mother to daughter, drawn out of the landscape itself.\textsuperscript{387}

Attempts to ensure the protection of the sacred sites were controversial,\textsuperscript{388} resulting in a Royal Commission and litigation.\textsuperscript{389} The Howard government ended up enacting the \textit{Hindmarsh Island Bridge Act 1997} (Cth) in an attempt to resolve the controversy in a manner favourable to capitalist development.\textsuperscript{390} The legislation thus enacted was deliberately designed to prevent

\begin{footnotesize}
\begin{enumerate}
  \item[385] Ibid 227.
  \item[386] Cheryl Saunders cited in Margaret Simons, above n 380, 226–227.
  \item[387] Ibid 227. See also Doreen Kartinyeri and Sue Anderson, above n 383, 169 and 202.
  \item[389] Margaret Simons, above n 380, 278–282 and 352–353. However people were not compelled to give evidence to the Royal Commission. As a result a great deal of evidence was not heard. Margaret Simons describes much of this evidence, and it tells quite a different story. Indeed it suggests there was no fabrication of secret women’s business, as found by the Royal Commission. In relation to Hindmarsh Island a less publicised case, \textit{Chapman v Luminis Pty Ltd} (2001) 123 FCR 62 was later heard and a judgment delivered in August 2001 by Justice von Doussa who ‘was not convinced that women’s business had been fabricated’ – Margaret Simons, above n 380, 447. See also Robin Creyke and John McMillan, \textit{Control of Government Action – Text, Cases and Commentary} (2005) 498. This hearing was more thorough in many respects than the Royal Commission and it had a greater volume of material before it to consider when making the decision about fabrication (Margaret Simons, above n 380, 446–452.) However I suspect this is cold comfort to the Ngarrindjeri women now that the bridge has been completed. The situation reveals how ‘[d]enial of the authenticity of many [I]ndigenous people is fundamental to Australian racism’ – David Hollinsworth, above n 2, 183. Thus ‘Hindmarsh Island became a cautionary tale. It was accepted, not only by the right-wing but by mainstream Australia, as being proof that Aboriginal people could and would lie about their heritage to gain power and take advantage of gullible whites’ – Margaret Simons, above n 380, 378. It resorted to negative colonial stereotypes of the untruthful and inferior Indigene. This process of denial of Indigenous authenticity seems to arise frequently in relation to land claims.
  \item[390] Margaret Simons, above n 380, 60 and 404–405.
\end{enumerate}
\end{footnotesize}
the Ngarrindjeri people from making any further claims for heritage protection under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth).391

2. **Critique of Kartinyeri**

The Indigenous Plaintiffs argued that s 51(xxvi) of the Constitution,392 the race head of power, should only be used to pass legislation that is for the benefit of Indigenous peoples.393 The majority of the High Court was unreceptive to the claim asserted by the Ngarrindjeri that the race power could not be used to adversely discriminate against Indigenous people and that the *Bridge Act* constituted such adverse discrimination. Only Kirby J clearly held that s 51(xxvi) endowed Parliament with power to enact laws purely for the benefit of a particular race.394 The majority did not see the *Hindmarsh Island Bridge Act 1997* (Cth) as a discriminatory piece of legislation. However, unlike the majority Justice Kirby engaged in a context based approach to judicial decision-making,395 considering the history of the 1967 referendum396 and the dangers of allowing increasingly discriminatory legislation to be enacted, referring to the laws of South African apartheid and Nazi Germany as a warning of the disastrous ramifications which can occur when a Parliament gradually strips away the protections of minorities.397 Justice Kirby considered that the race head of power must be ‘read against the history of racism during this century and the 1967 referendum in Australia intended to address that history.’398 This led him to conclude that the legislation was indeed discriminatory.399 Peter Phelps suggests that Justice Kirby’s dissenting judgment in *Kartinyeri*

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392 Commonwealth of Australia Constitution Act 1900 (IMP).
393 *Kartinyeri v The Commonwealth* (1998) 195 CLR 337, [115] per Kirby J. Section 51(xxvi) states: ‘The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to the people of any race, for whom it is deemed necessary to make special laws.’
394 *Kartinyeri v The Commonwealth* (1998) 195 CLR 337, [152] and [157]. Although Gaudron J stated there is a prima facie case that the race head of power ‘only authorises laws which operate to the benefit of Aboriginal Australians’ – at [45].
395 *Kartinyeri v The Commonwealth* (1998) 195 CLR 337, [135]. This was often his practice in judicial decision-making through his distinguished time on the bench, Greta Bird and Nicole Rogers, above n 322, xi. Bird and Rogers highlight (at xi) that:
   In many cases, Justice Kirby’s dissenting judgments provide a contextualised critique of the often legalistic judgments of his fellow judges, Justice Kirby’s judgments allow us to deconstruct the legalistic reasoning of the majority judges. While their judgments may exclusively refer to black letter law, Justice Kirby painstakingly unmasks the political bedrock of judicial reasoning. We find, in his judgments, an overwhelming concern for social justice and human rights.
was ‘a bizarre minority judgment for the edification and amusement of hip young left-wing law students.’\(^{400}\) I strongly disagree. In my estimation Justice Kirby’s judgement represents a much needed shift in the method of judicial decision making, because without a context based approach substantive justice will be impossible.\(^{401}\) Justice Kirby tells a richer more contextualised story in his dissenting judgment, one which directly addresses the historical racism in this country. Margaret Simons comments that ‘[t]he 1967 referendum had been one of the most important outpourings of goodwill towards Aboriginal people in the history of the country. Most Australians had understood that they were voting to give Aboriginal people rights, not to take them away.’\(^{402}\) However the majority judges excluded this as an ‘irrelevant’ consideration because an expression of goodwill was not written in to the ‘text’ of the constitution. Therefore they chose to interpret the provision in a manner which led to detrimental consequences for the Indigenous plaintiffs.

In Kartinyeri, Brennan CJ and McHugh J assumed that because Parliament had the power to enact beneficial legislation (the *Heritage Act*), they could also repeal such legislation with counteracting legislation (the *Bridge Act*).\(^{403}\) They concluded ‘[t]he power to make laws includes a power to unmake them.’\(^{404}\) They held ‘the power which supports a valid Act supports an Act repealing it.’\(^{405}\) They chose to characterise the *Bridge Act* as a mere repealing Act and assumed that any repealing Act possesses the same character as the law repealed.\(^{406}\) In this way they completely ignored the discriminatory consequences the *Bridge Act* had on the Ngarrindjeri people. It is arguable that the *Bridge Act* had an altogether different character from the *Heritage Act*. One was clearly for the benefit of Indigenous people; the other was clearly for the detriment of Indigenous people. Brennan CJ and McHugh J stated ‘[t]he only effect of the Bridge Act is partially to exclude the operation of the Heritage Protection Act in relation to the Hindmarsh Island Bridge area.’\(^{407}\) However this was but a very partial reading of the situation. The effect of the Bridge Act was to privilege colonial interests at the expense of Indigenous rights.

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402 Margaret Simons, above n 380, 414.


of the interests of Indigenous peoples and to ensure that capitalist notions of development were privileged over Aboriginal spirituality.\textsuperscript{408}

One explanation for the judicial decision making of Brennan CJ and McHugh J is that they were strongly influenced by the doctrine of Parliamentary Sovereignty.\textsuperscript{409} As I mentioned above, this concept is firmly embedded in our legal system.\textsuperscript{410} In \textit{Kartinyeri}, Brennan CJ and McHugh J adopted an approach consistent with maintaining this doctrine. They referred with approval to the following statement made by Blackstone:

\begin{quote}
The power and jurisdiction of parliament … is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds … It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical, or temporal, civil, military, maritime, or criminal: this being the place where that absolute despotic power, which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms.\textsuperscript{411}
\end{quote}

This description of parliamentary law-making authority as ‘absolute’ power which ‘cannot be confined, either for causes or persons, within any bounds’\textsuperscript{412} is disturbing to say the least, especially when considered in light of Australia’s discriminatory legislation which has had a genocidal impact on Indigenous peoples. This judgment indicates that all manner of oppressive legislation can legitimately be enacted by Parliament and be upheld by the High Court, provided that it falls within the gambit of one of the heads of s 51 of the Constitution. The Commonwealth’s Counsel in \textit{Kartinyeri}, Mr Griffith, argued just that, suggesting that it might be within Parliament’s power under s 51(xxvi) to enact legislation resembling that

\textsuperscript{408} This privileging of the material over the spiritual is a typical failing of Western culture.

\textsuperscript{409} The notion of Parliamentary Sovereignty was developed by A V Dicey. According to Dicey the ‘principle of Parliamentary Sovereignty means neither more nor less than this, namely, that Parliament … has … the right to make or unmake any law whatever.’ Dicey explains, ‘[a]ny Act of Parliament, or any part of an Act of Parliament, which makes a new law, or repeals or modifies an existing law, will be obeyed by the courts.’ A V Dicey, above n 298, 39–40.

\textsuperscript{410} The principle of parliamentary supremacy has been strongly affirmed as an applicable principle of law in Australia. In \textit{Polites v The Commonwealth} (1945) 70 CLR 60 at 200, Dixon J declared: ‘[w]ithin the matters placed under its authority, the power of the Parliament was intended to be supreme’. Gummow and Hayne J referred to this statement with approval in \textit{Kartinyeri v Commonwealth} (1998) 195 CLR 337 at 385. In \textit{Kable v The Director of Public Prosecutions for the State of New South Wales} (1996) 189 CLR 51 at 74 Dawson J stated (at 76) ‘there can be no doubt that parliamentary supremacy is a basic principle of the legal system which has been inherited in this country from the United Kingdom.’ Dawson J went on to say ‘[t]he doctrine of parliamentary supremacy is a doctrine as deeply rooted as any in the common law. It is of its essence that a court, once it has ascertained the true scope and effect of an Act of Parliament, should give unquestioned effect to it accordingly.’ See also Alexander Reilly, above n 220, 267; The Hon Anthony Mason, above n 299, 156.


\textsuperscript{412} Ibid.
enacted under the Apartheid regime and the Third Reich. When asked by the Court why the Bridge legislation fell within the race head of power the following disturbing exchange took place:

McHUGH J: But I was just going to also put to you, Dr Griffith, that another view is that the term “special law” itself is a limitation which is justiciable and to be special it must discriminate in some fashion. Whether detrimentally or advantageously does not matter but, if it does, it has to have some rational basis. It is for the Court then to say that there is no rational basis for this law.

MR GRIFFITH: With respect, your Honour, it may narrow subject matter but not narrow power.

KIRBY J: How would you apply that distinction to the case of Nuremberg-type laws which, after all, were race laws or to land area laws such as were enacted in South Africa? Would they be permissible under this power?

MR GRIFFITH: Your Honour, they may well be. The races power is an inherently … discriminatory law.

Brennan CJ and McHugh J expressed the view that ‘the Parliament can “make laws with respect to” the several subject matters contained in s 51 in such terms, with such qualifications and with such limitations as it chooses.’ According to this interpretation the only limitations on the s 51 heads of power are those Parliament chooses to impose on itself. Jennings states ‘it is not entirely ridiculous to say that a legislature is sovereign in respect of certain subjects, for it may then pass any sort of laws on those subjects’. In this sense the Commonwealth Parliament can be described as sovereign in relation to the s 51 heads of power, such as the race power under s 51(xxvi). The doctrine of Parliamentary Sovereignty has been described as ‘entrenched’ within our legal system. Justice Mason has stated that it ‘has been just as influential here as in the United Kingdom, notwithstanding that our Parliaments are legislatures of limited powers.’ As I mentioned above, judges continue to be strongly influenced by this doctrine. Yet it is not difficult to see the potential dangers

414 Ibid.
416 Whilst the Commonwealth Parliament does not have absolute power to legislate on all subjects (due to the fact that legislative power is divided between the Commonwealth and the States under the Constitution) the Commonwealth Parliament could be described as ‘sovereign’ in respect of those subjects allotted to it under the Constitution. W I Jennings, The Law and the Constitution (5th ed, 1959), cited in Tony Blackshield and George Williams, Australian Constitutional Law and Theory – Commentary and Materials (2nd ed, 1998) 93. Ibid.
417 Alexander Reilly, above n 220, 267.
418 The Hon Anthony Mason, above n 299, 156.
419 Alexander Reilly, above n 220, 267; The Hon Anthony Mason, above n 299, 156; G De Q Walker, above n 301, 283–284; John Dugard, ‘Human Rights, Apartheid and Lawyers. Are there any Lessons for Lawyers
of oppressive exercises of parliamentary power occurring under this model. It appears that any kind of legislative abomination is possible when Parliamentary Sovereignty is followed to its natural conclusion. One of the central tenets of this research is that it is dangerous to define Parliamentary power in such broad terms, because there is no safety mechanism built in to protect minority interests.\textsuperscript{421} This has proved to be disastrous for Indigenous Australians faced with a legislature bent on pursuing a colonial agenda.\textsuperscript{422}

It appears that too few limitations are placed upon Parliaments who act oppressively towards minorities.\textsuperscript{423} In \textit{Union Steamship Company of Australia v King}\textsuperscript{424} the High Court left open the question of whether the Court has a supervisory jurisdiction over legislative power. They surmised ‘[w]hether the exercise of … legislative power is subject to some restraints by reference to rights deeply rooted in our democratic system of government and the common law … is another question’.\textsuperscript{425} Thus it might be possible that the High Court has some right to question the validity of legislation based on a supervisory jurisdiction. However the problem with the exercise of supervisory jurisdiction is that ‘the extent of the supervisory jurisdiction depends on when a judge is prepared to invoke the jurisdiction.’\textsuperscript{426} Australia’s judicial history shows that judges are rarely inclined to invoke the supervisory jurisdiction for the purpose of invalidating a law. The spectre of Parliamentary Sovereignty seems to loom too large in judicial consciousness.

Interestingly, in \textit{Kartinyeri}, Gummow and Hayne JJ left open the question of whether the rule of law could act as a limitation on parliamentary power.\textsuperscript{427} They also considered the possibility of limiting an abuse of the Parliament’s race power by proposing a ‘“manifest abuse”’ test.\textsuperscript{428} Gummow and Hayne JJ held:

\begin{quote}
A law will only answer the constitutional description in s 51(xxvi) if it (i) is “deemed necessary” (ii) that “special laws” (iii) be made for “the people of any race”. The term
\end{quote}

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“deem” may mean “to judge or reach a conclusion about something”. Here, the judgment as to what is “deemed necessary” is that of the Parliament. Nevertheless, it may be that the character of a law purportedly based upon s 51(xxvi) will be denied to a law enacted in “manifest abuse” of that power of judgment.429

However Gummow and Hayne JJ held that no such manifest abuse occurred in *Kartinyeri*.430 This highlights the inadequacy of the manifest abuse test. In a clear case of adverse treatment, the manifest abuse test proposed by Gummow and Hayne JJ was completely ineffective as a means of protection for those discriminated against. As Justice Kirby points out, the test is hopelessly inadequate because judges will generally only apply such a test in what they perceive to be ‘extreme’ circumstances,431 by which time Courts may have lost effective power to check such abuses.432 Alexander Reilly comes to a similar conclusion, contending ‘it is likely that the “manifest abuse” test will be invoked, if at all, only in exceptional circumstances.’433 Of course what one considers an extreme or exceptional circumstance is a matter of perspective. In Australia, legislation detrimentally discriminating against Indigenous people has been commonplace.434 Therefore it may be that more legislation producing detrimental consequences will not be considered ‘extreme’ enough to warrant invalidation by members of the judiciary.

In *Kartinyeri* it also appears to be assumed that any remedies for the Plaintiff’s are to be found in the ballot box. However the political system is often unresponsive to the claims of Indigenous people. The nearly all white Parliament still look upon Indigenous people as ‘non-White objects to be governed’.435 The election process offers no guarantee that oppressive legislation will not be forced on Indigenous people.436 Despite the view of those who presume that remedies for injustice can be found through the electoral process, such as Peter Phelps, who suggests that those who ‘don’t like the law’ can just ‘kick the bums out,’437 such a

434 For example, the legislation that facilitated the removal of Aboriginal children from their families from the early 1900s until the late 1970s mentioned in Chapter Three; Human Rights and Equal Opportunity Commission, above n 7.
437 Peter Phelps, above n 400, 55.
situation is impossible for disadvantaged minority groups. However this quotation does highlight the manner in which those ‘who have been systematically victimised by winner-take-all majority rules usually get little sympathy from a society that wrongfully equates majority tyranny with democracy.’ By contrast philosopher Paul Ricoeur suggests democracy can be judged ‘by the manner of equitable treatment of minorities’. By this standard Australia is very undemocratic indeed.

The significant issue ignored by the majority judges in Kartinyeri is that all too often Indigenous people cannot find redress through the parliamentary system when discriminatory legislation such as the Bridge Act is enacted. As I highlighted above, ‘it is somewhat hollow to say … that the issue be left to be sorted out by the Parliament if that Parliament is the very product of the unfairness in the system.’ In Kartinyeri, the Ngarrindjeri were acutely aware that the government was ‘exploiting an imbalance of political strength’. Often Indigenous people and other minorities do not have the ability to safeguard their interests in the political process. Gaze and Jones point out that ‘some individual interests and many minority groups have insufficient political influence to protect themselves against the tyranny of the majority, and may have no prospect of ever being able to do so.’ For these people, judicial action on their behalf is the only hope they have to redress the power imbalance. Yet, as I mentioned earlier, judges are often reluctant to take on a role of protecting minorities. In part this is due to the limited independence of judges. As Lisa Strelein contends, there are ‘constitutional or structural barriers, which limit the power and independence of the courts.’ Limited independence arises from the fact that ultimately the judiciary is part of government. As part of government, the judiciary has a vested interest in supporting the system that sustains

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438 Geoffrey Robertson, above n 309, 172. Robertson argues that politicians are not able to be voted out ‘for three or four years, and then for reasons that relate to the economy, not to human rights.’
439 Lani Guinier, above n 310, 12.
441 Michael Coper, above n 312, 193.
442 Tom Trevoronrow, above n 19, 90.
444 Beth Gaze and Melinda Jones, above n 436, 41. Lani Guinier suggests that a system that allows ‘a tyranny by [t]he [m]ajority’ is not a ‘genuine democracy’. Lani Guinier, above n 310, 6.
445 That is, if they aim to act within the constraints imposed by the Anglo-Australian political and legal system.
446 Lisa Strelein, above n 38, 1. In Federal matters judges are also required to interpret legislation according to Parliament’s purpose pursuant to s 15AA and 15AB of the Acts Interpretation Act 1901 (Cth).
447 Frank Carrigan, above n 340, 163.
their position of power in society.\textsuperscript{448} Their position in the governing system strongly impacts upon how they interpret the law.\textsuperscript{449} As Dugard states, ‘judges and lawyers, generally, are of the establishment and for the establishment. When the establishment of which they are a part is threatened and the law is invoked as an instrument of discrimination and repression they generally support the use of the law in this way.’\textsuperscript{450} Despite their pretensions to objectivity, judges are also strongly influenced by their own value systems. Spann points out problems can arise due to ‘the majoritarianism inherent in a judge’s own assimilation of dominant social values.’\textsuperscript{451} Some judges might be aware that their own values have an impact on their judicial decisions. Yet curiously some consider that they can, by conscious effort, suppress all of the values they hold dear upon donning the judicial robe. For example Justice Brennan has stated:

Perhaps the independence that is most difficult for judges to achieve is independence from those influences which unconsciously affect our attitude to particular classes of people. Attitudes based on race, religion, ideology, gender or lifestyle that are irrelevant to the case in hand may unconsciously influence a judge who does not consciously address the possibility of prejudice and extirpate the gremlins of impermissible discrimination.\textsuperscript{452}

However judges cannot disassociate themselves completely from their own social conditioning, stereotypes, ideologies and value systems to provide a completely neutral adjudication.\textsuperscript{453} As Spann explains, ‘even if a justice makes strenuous efforts to compensate for his or her known prejudices, the justice will still be vulnerable to those biases and predispositions that continue to operate at a subconscious level – the level at which most noninvidious discrimination is likely to occur.’\textsuperscript{454} Similarly, Davies considers that judges are inevitably influenced by a whole range of external factors that constrain judicial decision making. Davies asserts:

Before a judge thinks anything about the facts of a case, and well before she opens her mouth to give reasons for a particular interpretation or decision, a whole mess of laws – social, political, sexual, intellectual (etc) conventions, laws of thought, laws of language,

\begin{itemize}
\item \textsuperscript{449} Alexander Reilly, above n 433, 476.
\item \textsuperscript{450} John Dugard, above n 420, 441.
\item \textsuperscript{452} Sir Gerard Brennan, ‘Justice Resides in the Courts’, *The Australian*, 8 November 1996, 15, cited in Lisa Strelein, above n 38, 8; see also The Hon Ruth McColl, above n 315, 52.
\item \textsuperscript{454} Girardeau Spann, above n 451, 24.
\end{itemize}
and other personal constraints – have already shaped the way she perceives the issues, approaches a solution, and determines the case.455

The denial of ideological influences on the part of members of the judiciary merely reflects the influence of the dominant legal theory of positivism.456 The classic statement of positivism formulated by John Austin is that jurists must concern themselves with what the law ‘is’, and not with what the law ‘ought to be’.457 Yet rather than separating what ‘is’ from what ‘ought to be’, it could be said that positivism merely seeks to persuade us that ‘what is ought to be’.458 The majority judges in Kartinyeri draw upon positivist theory in their judicial decision making. This is seen in their use of formalist methodology. Formalist methodology is a tool that legal positivists use to come to what they perceive to be a ‘right’ decision. Formalist methodology requires that the consequential effects of legislation be ignored.459

Positivism demands certainty, neutrality and objectivity.460 However positivism veils the reality that objectivity is in itself an ideological position.461 Ascribing ‘objectivity’ to a position merely operates to elevate that position to a privileged status.462 As Davies points out, ‘[t]he claim to objectivity has simply been an exceptionally powerful way of centralising a certain style of theory.’463 In Kartinyeri, the majority considered the Bridge Act merely as a partial repeal of the Heritage Act.464 In the final analysis, that view was considered to be objective. However the privileging of one position in court generally results in the denigration of another. In Kartinyeri the denigrated counter position was that the Bridge Act is a racist piece of legislation deliberately calculated to deprive Indigenous people of their legislative rights under the Heritage Act in a manner that was fundamentally unjust. However in accordance with formalist methodology the majority judges considered that the justice (or

455 Margaret Davies, above n 1, 383.
457 Margaret Davies, above n 1, 102.
458 Geoff Leane, above n 340, 949.
461 Margaret Davies, above n 1, 155–156.
462 Ibid 155.
463 Ibid 117.
rather the injustice) of the legislation was not a relevant consideration.465 Adherents of positivism do not consider justice as a relevant factor in judicial decision making because they believe that law and morality are quite separate.466 Positivists consider that a law can be valid independent of its content.467 This permits judges to uphold the most oppressive of laws without feeling the slightest responsibility that in doing so they are contributing to oppression.468 The majority judges in *Kartinyeri* took this approach.

In *Kartinyeri*, Gummow and Hayne JJ place great emphasis on the centrality of the constitutional text and demonstrate a reluctance to make implications from the text. By confining the scope of judicial inquiry to what the law ‘is’ as portrayed by the written text alone, Gummow and Hayne JJ employ the formalist method of separating ‘law’ from what may be characterised as ‘non-law’. Gummow and Hayne JJ rejected the Plaintiff’s submission that it could be implied from the 1967 referendum that the race power could only be exercised for the benefit of Indigenous people.469 They state:

>The circumstances surrounding the enactment of the 1967 Act … may indicate an aspiration of the legislature and the electors to provide federal legislative powers to advance the situation of persons of the Aboriginal race. But it does not follow that this was implemented by a change to the constitutional text which was hedged by limitations unexpressed therein.470

Thus in their view the written text alone is supreme. In essence, they contend that political opinion is irrelevant if not expressed within the law itself. In this way they make an artificial separation of law from the political realm.471

In accordance with formalist methodology, the majority judges in *Kartinyeri* did not wish for their judgments to be characterised by anything that could be considered ‘non-law’, such as mercy or morality.472 The majority judges purport not to allow what they perceive to be external factors to influence their decision, factors such as the racist purpose of the *Bridge Act*, the negative consequences of its application on the Ngarrindjeri, the political policy of

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465 Margaret Davies, above n 1, 153.
466 Ian Stewart, above n 355, 288; Margaret Davies, above n 1, 153.
467 Margaret Davies, above n 1, 100.
468 As did judges in Nazi Germany, see Chapter Two.
472 Margaret Davies, above n 1, 152.
oppression underpinning the Bridge Act, the potential economic consequences of the
decision, or the political pressure on the judiciary to decide the case in favour of the
government. Eliminating these factors from express consideration shows the influence of
Kelsen’s “pure” theory of law, which excludes everything from the analysis of law besides
law itself. By purporting to eliminate these factors from consideration, the majority judges
are trying to give the impression that they are objective. However their purportedly objective
approach is simply a powerful way of legitimising a particular viewpoint.

Drawing upon Kelsen’s pure theory of law cannot be seen as apolitical. Kelsen contends that
his ‘pure’ theory of law is ‘concerned solely with that part of knowledge which deals with
law, excluding from such knowledge everything which does not strictly belong to the subject-
matter law. That is, it endeavours to free the science of law from all foreign elements.’
Thus Kelsen’s pure theory of law assumes that law is quite a separate discipline, untainted by
other concerns such as social justice or political controversy. It assumes that an impenetrable
boundary exists between ‘law’ and ‘other’. However no such boundary exists. Law is the
direct result of a political process therefore it has political content. Since law serves an
ideological function its interpretation is ‘inevitably political’. Deference to the notion of
a boundary between law and other merely allows judges to purport to be apolitical when they
decide controversial cases with highly politicised content. Yet, as seen in Kartinyeri, the
notion of law’s separateness and law’s objectivity continue to be highly influential amongst
members of the judiciary.

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473 There was an economic rationale for the decision in Kartinyeri. ‘The company building the bridge claimed
that the government was liable for damages of up to $47.5 million under the guarantees it gave’ if the bridge
did not go ahead – Neil Andrews, above n 388, 16. See also Margaret Simons, above n 380, 270. Clearly
economic rationalism played a role in the decision of the government to pass such racist legislation, and
possibly in the judiciary’s decision to endorse it.

474 Political pressure to decide the case in favour of government arises from the judiciary occupying a place in
the structure of government, and from the criticisms made of members of the judiciary by members of
Parliament in the wake of Mabo v Queensland (No 2) (1992) 175 CLR 1 and Wik Peoples v Queensland
majority approach in Kartinyeri was a purportedly apolitical response to such criticism.

475 Hans Kelsen, above n 355, 477; Margaret Davies, above n 339, 108; Margaret Davies, ‘The De-capitation of

476 Margaret Davies, above n 1, 155.

477 Hans Kelsen, above n 355, 477.

478 Margaret Davies, above n 1, 383.

479 Ibid; Brigita White, ‘Is There a Place for Morality in Law?’ (1996) 12 Queensland University of Technology

480 Margaret Davies, ‘The De-capitation of a Discipline’, above n 475, 135 and 139; Tom Campbell, above n
300, 196.
Positivist theory ‘relies only on law … to explain law.’\(^{481}\) It ignores the political motivations underlying the enactment of legislation. In accordance with the positivist concern to legitimate the authority of law by sole reference to law,\(^ {482}\) Brennan CJ and McHugh J establish that the *Bridge Act* has a valid legal pedigree. They reason that it derives authority from a prior legislative act, the *Heritage Act*.\(^ {483}\) In legitimating the law by reference to other legal norms, Brennan CJ and McHugh J are drawing upon Kelsen’s theory of norms.\(^ {484}\) Brennan CJ and McHugh J characterise the *Bridge Act* as an Act which partially repeals the *Heritage Act*, and conclude that because the *Heritage Act* is validly supported by the race power, any Act which repeals part of the *Heritage Act* must similarly be supported by the race power.\(^ {485}\) In a somewhat artificial manner, they conclude that the only effect of the *Bridge Act* is to partially amend the *Heritage Act*.\(^ {486}\) This analysis denies the practical consequence of oppression resulting from the application of the *Bridge Act* to the Ngarrindjeri. To characterise the *Bridge Act* merely as an Act of partial repeal denies the racist discriminatory purpose the Act was intended to serve. Yet disguising the political nature of judicial decision making is something positivism does best.\(^ {487}\)

Positivism is a craftily constructed legal theory designed to legitimate existing power hierarchies and to shield judges from criticism over judicial decision making.\(^ {488}\) The theory of legal positivism acts as a justification for judges to uphold the status quo. As a form of legal reasoning, legal positivism ‘presupposes both the existence of and the legitimacy of existing hierarchical institutions.’\(^ {489}\) In professing that there is a ‘proper legal way to think about the institutional hierarchies that comprise the socioeconomic and political systems’ judges ‘help to constitute and sustain these hierarchies, by interpreting social conflict according to a form

\(^{481}\) Margaret Davies, above n 1, 101.
\(^{482}\) Ibid.
\(^{484}\) Kelsen developed the concept of law as a system of norms, with each norm being justifiable by reference to another norm higher up in the hierarchy of norms, the pinnacle of which was the ‘grundnorm’. Hans Kelsen, *General Theory of Law and State* (1961) 113–115 and 193–195, cited in Margaret Davies, above n 1, 107–109.
\(^{485}\) *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 358 per Brennan CJ and McHugh J.
\(^{486}\) *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 358 per Brennan CJ and McHugh J.
\(^{488}\) Geoffrey Leane, above n 340, 937; Margaret Davies, ‘The De-capitation of a Discipline’, above n 475, 139; Tom Campbell, above n 300, 196.
\(^{489}\) Peter Gabel and Paul Harris, above n 323, 373.
of thought … which presupposes their legitimacy.’

Tom Campbell contends that the ‘claims of Positivism to be a descriptive theory of actual legal and political process are in many respects false and often covertly political, in that the theory helps to hide the political views of judges behind the misleading rhetoric of detached liberalism.’

However despite the merited critiques of positivism, it appears to have an enduring impact upon judicial consciousness.

The majority judges in Kartinyeri took refuge in legal positivism and abstained from answering the deeper philosophical and moral issues that Kartinyeri raised. However the majority approach still represents a value judgment. A decision was made that racially discriminatory legislation was an acceptable exercise of legislative power. By adopting an approach that draws upon positivist epistemology and supports parliamentary supremacy, the majority judges upheld the status quo. In this respect the decision in Kartinyeri embodies conservative politics, even though it masquerades as objective decision making.

In a formalist framework, as long as the formal rules have been complied with then the decision is perceived to be just regardless of the outcome. The majority judges adhere to this formalist assumption. They apply the legal rules and endorse their decision regardless of the fact that it does not produce substantive justice. In Kartinyeri adherence to formalism produces substantive injustice. Substantive justice requires an examination of the unique context of the dispute.

Substantive justice is capable of remedying disadvantage, while formal justice ignores inequality and disadvantage. Substantive justice would require that the Ngarrindjeri not be threatened with cultural genocide merely because it is expedient for the government to do so. Substantive justice would require the power imbalance between the government and the Ngarrindjeri to be taken into consideration. Substantive justice would require the practical consequences of the decision be taken into account. However as a

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490 Ibid 377; Margaret Davies, ‘The De-capitation of a Discipline’, above n 475, 139.
491 Tom Campbell, above n 300, 196; Galligan, The Politics of the High Court (1987) cited in Beth Gaze and Melinda Jones, above n 436, 39; and The Hon Anthony Mason, above n 487, 78.
492 Legal realist, critical legal studies and postmodern scholars have all discredited positivism and formalism.
493 Margaret Davies, ‘The De-capitation of a Discipline’, above n 475, 130.
494 Geoffrey Leane, above n 340, 926.
495 Ibid 944.
496 Tom Trevorrow, a Ngarrindjeri Elder, contends that unrestricted access to Hindmarsh Island is threatening the Ngarrindjeri with ‘cultural genocide’. He asserts that ‘increased public access to the Island threatens Ngarrindjeri identity, and cultural and economic survival, thereby denying Ngarrindjeri people their rights to the use and enjoyment of their land, and to engage in the cultural and spiritual practices inextricably tied to
methodology, formalism is incapable of delivering substantive justice.\(^{497}\) The problem presented by adherence to formalist methodology is that formalism’s pre-dominant concern is to produce a strictly ‘legal’ outcome, rather than an outcome that produces substantive justice.\(^{498}\) Yet formalism still continues to dominate the legal landscape, particularly in cases involving Indigenous or minority interests. In this sense legal theory supports the colonial project and assists in the oppression of Indigenous people.

3. **Ngarrindjeri Dominion and Law’s ‘Truth’**

Courts are essentially sites of struggle where battles take place over whose version of ‘reality’ is to prevail.\(^{499}\) In the courtroom Judges choose from the competing realities presented to them, and produce an ‘authorised’ version of reality, which becomes law’s ‘truth’.\(^{500}\) In *Kartinyeri* the majority judges construct a legal ‘truth’ that the *Bridge Act* is merely an Act that partially repealed the *Heritage Act*.\(^{501}\) In *Kartinyeri* law attempts to silence the voice of the Ngarrindjeri people that the *Bridge Act* is a discriminatory piece of legislation that has no rightful place on the statute books. To the Ngarrindjeri, the *Bridge Act* is a vehicle through which the Australian government ‘has discriminated against the Ngarrindjeri with regard to their cultural, spiritual, and environmental practices, and particularly the secret religious practices of [Ngarrindjeri] women’.\(^{502}\) Yet law has not succeeded in silencing the Ngarrindjeri. In spite of the result in *Kartinyeri*, the Ngarrindjeri have proclaimed dominion over the area surrounding Hindmarsh Island.\(^{503}\) This dominion exists by virtue of the fact that the Ngarrindjeri have always occupied the area.\(^{504}\) It is a dominion that the British Parliament instructed the European colonists not to ignore.\(^{505}\) Yet the legal ‘truth’ constructed in *Kartinyeri* attempts to interfere with this dominion.

\(^{497}\) Geoffrey Leane, above n 340, 944.

\(^{498}\) Margaret Davies, above n 1, 153.


\(^{500}\) Ibid; Sandra Berns, above n 371, 104.


\(^{502}\) Tom Treverrow, above n 19, 89.

\(^{503}\) Ibid 98.

\(^{504}\) Ibid.
Law has immense power to legitimate oppression. Berns explains that law has ‘power to obliterate, to erase stories and replace them with legal narratives’. This is most evident in the judgment of Brennan CJ and McHugh J in *Kartinyeri*, where a story of discrimination and the threatened destruction of culture is turned into a dry legal dispute that essentially concludes ‘what Parliament can enact it may repeal’. Through the law the Plaintiff’s experience of oppression is obscured and the strictly legal matters of the dispute are made paramount. Through the law the issue of whether the dominant culture can legitimately destroy the culture of another gets pushed aside while strictly legal matters become pivotal. There is violence in the way that law reshapes such controversy into neat legal categorisation. It falls into the class that Derrida defines as ‘conserving violence’ and what Spivak refers to as ‘epistemic violence’. This association between law and violence can clearly be seen in *Kartinyeri* where law is used to legitimate colonial dominance.

*Kartinyeri* is another illustration of how the Anglo-Australian legal system allows the norms of the dominant to be imposed on those with less political power. The result in *Kartinyeri* gives weight to the criticism that ‘law is simply a legitimating tool for dominant power structures’. By proclaiming that the government has a legitimate right to enact discriminatory legislation the majority decision protects the existing power imbalance between the government and Indigenous people. In this context the law is merely a weapon used to silence Indigenous voices. As Joyce Green explains, “the law, and the courts that interpret and administer such law, are colonial emanations and constructs. They are rules of the ruler, interpreted by the ruler through the lens of the selective, racist history.”

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506 Sandra Berns, above n 371, 28.
507 Tom Trevorrow, above n 19, 89.
510 Jacques Derrida, above n 44, 55.
512 Neil Andrews, above n 388, 42.
513 Geoffrey Leane, above n 340, 937.
Law has been described as a means of ‘reinforcing social hierarchies’.\footnote{Margaret Davies, ‘The De-capitation of a Discipline’, above n 475, 136.} The social impact of the decision in \textit{Kartinyeri} should not be underestimated. Law has a substantial influence on society. Leane suggests ‘law determines as well as describes society’\footnote{Geoffrey Leane, above n 340, 931.} Thus when a government uses law to perpetuate racism, and when dominant legal theory dictates that such laws be declared valid in spite of their abhorrent content, this will have adverse social consequences for Indigenous people. The result in \textit{Kartinyeri} exacerbates the level of racial discrimination that exists in Australia by according it institutional legitimacy. Wildman and Davis rightly point out that ‘racism can only occur where it is culturally, socially and legally supported.’\footnote{Stephanie Wildman with Adrienne Davis, ‘Language and Silence: Making Systems of Privilege Visible’ in Richard Delgado and Jean Stefancic (eds), \textit{Critical Race Theory –The Cutting Edge} (2nd ed, 2000) 657.} In \textit{Kartinyeri} law perpetuates racism by disregarding the significance of adverse discrimination against Indigenous people.

It has been said that ‘[c]ourt judgments endow some perspectives, rather than others, with power.’\footnote{Martha Minow, above n 499, 94.} The majority judgments in \textit{Kartinyeri} endow the racist government agenda with power. Implicit in the majority judgments in \textit{Kartinyeri} is an assumption that Parliament can legitimately oppress people of any race because power to do so exists under the Australian Constitution. However many Indigenous people think differently about such claims to power. For example, Irene Watson, an Indigenous academic and activist, argues: ‘You the coloniser have rules and regulations, and it is those rules and regulations that we question. It is our belief that those rules and regulations are without any lawful foundation.’\footnote{Irene Watson, ‘Indigenous Peoples’ Law Ways’, above n 5, 45.}

E. ‘Protecting’ Children or Enforcing Assimilation? The 2007 Intervention/Invasion of Aboriginal Lands

The ideals of assimilation developed in the 1900s continue to cause problems for Aboriginal communities. Although abandoned as official policy under the Hawke and Keating governments there was a resurgence of this type of thinking under the Howard regime.\footnote{Gary Foley, above n 82, 139.} Throughout the term of the Howard government there were numerous laws and policies developed and implemented which gave rise to concern about the direction for race relations...
in Australia. Howard began to gradually dismantle every progressive element of the previous Labor government, including their approach to remote Aboriginal communities which had more closely resembled self-management (although at times it had been inaccurately described as self-determination). The Howard government wished to re-enliven our inglorious past with its aspirations of an era of ‘new paternalism’ – although in reality there was nothing ‘new’ about such an approach. ‘Mutual obligations’ became the catchcry of the Howard government in an effort to camouflage this wholehearted return to an agenda of assimilation. The rhetoric of ‘mutual obligations’ led to ‘a focus on practical measures to alleviate Indigenous disadvantage’ which the Howard government saw as a form of “practical reconciliation”. These policies include obligations on the part of Aboriginal people to do things like wipe their children’s faces in return for basic community services. Inherent in this approach was an attitude that Indigenous disadvantage was largely caused by the failure of Indigenous peoples to assimilate and embrace the capitalist neo-liberal paradigm at work within Australia. The Howard government was determined to shift ‘responsibility’, as they saw it, to ensure that Indigenous Australians had to comply with numerous responsibilities in order to obtain access to fundamental community services. This shift towards ‘mutual obligations’ aimed to facilitate greater assimilation of Indigenous Australians into the mainstream. The ‘mutual obligations’ policy was greeted with concern as it engaged in racist discrimination by subjecting Indigenous Australians to paternalistic obligations in order to get access to basic services that white Australians have access to purely because they are the ‘mainstream’. It was part of the colonial agenda to try to force Indigenous peoples to ‘dissolve into whiteness’. Yet however much the rhetoric of ‘mutual

522 Sarah Maddison, above n 84, 25 and 241.
524 Aileen Moreton-Robinson, Sovereign Subjects, above n 5, 5.
525 Ibid.
526 Ibid.
528 However as Aileen Moreton-Robinson points out, ‘there is no history of the government engaging in sustained economic development for Indigenous people; instead, there has been a history of exploiting Indigenous people’s labour for the economic development of the nation.’ Aileen Moreton-Robinson, Sovereign Subjects, above n 5, 11 and 6.
529 These have been brought about via Shared Responsibility Agreements. See Irene Watson, above n 69, 2.
531 Irene Watson, above n 69, 2.
obligations’ indicated a substantial shift backwards into assimilation style paternalism, it was just the precursor of worse things to come.

Towards the end of its term the Howard government shifted the focus away from land rights and self determination and chose instead to see the problems facing Indigenous peoples as being caused by violence and alcoholism within Aboriginal communities. Nowhere is this more evident than in the Howard government’s response to the recent Northern Territory Report on the problem of sexual abuse of children occurring within Aboriginal communities. In 2007 the Howard government decided that they would respond to the Little Children are Sacred report with a military Intervention in the Northern Territory. The Intervention legislation enabled the government to use military personnel to take control of several Aboriginal communities in the Northern Territory. The Howard government used this research to bring about numerous changes that had nothing to do with the concerns raised by the Little Children are Sacred report. Jennifer Martiniello rightly points out that:

The Little Children are Sacred report does not advocate physically and psychologically invasive examinations of Aboriginal children, which could only be carried out anally or vaginally. It does not recommend scrapping the permit system to enter Aboriginal lands, nor does it recommend taking over Aboriginal “towns” by enforced leases.

The Howard government used the release of this report to bring about a variety of sweeping changes in an election year in an instance of blatant ‘political opportunism.’ It used the emotionally charged issue of child sexual abuse to implement radical reductions in Indigenous peoples’ rights by the backdoor. Despite the rhetoric of ‘protecting’ children, the action

533 Sean Brennan, Larissa Behrendt, Lisa Streliein and George Williams, above n 168, 24.
536 Jennifer Martiniello, above n 215, 126.
538 Jennifer Martiniello, above n 215, 123.
539 Ibid 123–124.
540 Ibid 123.
‘[t]here are claims the intervention/invasion is to do with a broader push towards assimilation, mining uranium and with deals made with the US to provide land for uranium waste.’

The response of the Howard government focused on Aboriginal communities as inherently problematic, rather than situating the abuse in the context of colonial oppression since 1788. In determining a course of action the government divorced present day violence from Australia’s racist colonial legacy. Yet as Irene Watson argues, ‘[t]o view the contemporary crisis in Aboriginal communities without reference to the violent colonial history of this country is to look too simply at a complex and layered landscape.’ She explains:

By sending in the troops to “clean up” remote Aboriginal communities in the Northern Territory this plan has failed to take account of the colonial conditions which have oppressed Aboriginal peoples for more than two centuries and caused the critical conditions under which many communities continue to struggle. … The violence in Aboriginal communities has been a fact since early colonial days, a function of frontier violence, massacres, the inherent violence of the Aborigines Acts and all the violence that racist paternalistic legislation justified.

Watson maintains:

The violence in Aboriginal communities is also more a comment on the Australian government’s management of the colonial project, than it is about the culture of the perpetrators of violence. As Aboriginal communities across Australia continue to decline, the gaze turns away from the poverty and dispossession of Aboriginal Australia to cultural profiling of the other as barbarian. … So we return to the same old racial discourse we know so well, the one which provides the ideological basis that underlies the colonial foundations of the Australian state.

Throughout the Intervention the Howard government downplayed the significant proportion of white male offenders and painted a picture of Aboriginal men as ‘drunken, child raping

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549 Odette Kelada, above n 541, 8.
550 Jennifer Martiniello, above n 215, 124; Irene Watson, ‘De-Colonisation and Aboriginal Peoples’, above n 5, 118. Cowlishaw also writes that non-Aboriginal Australians tend to focus on Aboriginal peoples as a ‘problem population’. She explains how ‘national attention’ is directed towards ‘the Indigenous population as an ever-present national problem.’ Gillian Cowlishaw, Blackfellas, Whitefellas and the hidden injuries of race (2004) 246. I believe this pattern has grown into an almost religious national practice. Rather than acknowledging that the kinds of problems faced by Aboriginal communities are ‘a consequence of destructive colonial struggles’ (at 246) the problems facing these communities are generally considered to result from some deficiency or inferiority in Aboriginal peoples. However she states that “[t]he “problem” population appears unwilling to accept the nation’s diagnosis. Rejecting the proffered treatment of their ills could be seen as a way in which Indigenous people assert their autonomy from the state’s suffocating solicitude.’ (at 245–246)
551 Irene Watson, ‘De-Colonisation and Aboriginal Peoples’, above n 5, 118.
monsters.’\textsuperscript{555} The legislative paternalism implemented via the recent Intervention legislation has relied heavily on ‘the racist discourse of the primitive barbarian’.\textsuperscript{556} Several aspects of this legislation have rightfully been condemned as continuing in the same paternalistic vein as the assimilation legislation that facilitated the Stolen Generations.\textsuperscript{557} It resorts to similar negative racial stereotypes of Indigenous peoples as a group who are incapable of caring for their children. It justifies extreme government action based on paternalistic notions of it being ‘For their Own Good’.\textsuperscript{558}

The Intervention legislation has been described by HREOC as bringing about ‘significant actual and potential negative impacts upon the rights of Indigenous people which are discriminatory’.\textsuperscript{559} Like the ‘protection’ legislation which facilitated the Stolen Generations, the Intervention legislation has been created in a ‘discourse of protection and problem-solving [and] is racially framed, directed and applied’.\textsuperscript{560} This racist dynamic is not new. As explored in Chapters One and Three, there has been a consistent pattern of racism in Australia. Much of this racism has been brought about with stated aims of assisting or protecting Indigenous peoples. As Cowlishaw explains, much racism

\begin{quote}
\small is organically connected to processes which have a stated purpose of achieving social equity. Thus, practices which support racism are more commonly associated with the denial of racist beliefs than with the expression of racial hostility because essentialising racial categories are invoked and reproduced in various bureaucratic and institutional forums, even when the stated intention is to ameliorate racial inequality.\textsuperscript{561}
\end{quote}

This has frequently taken place through legislation affecting Indigenous Australians, for example, all of the ‘welfare’ legislation was of this vein. The Intervention legislation repeats this familiar colonial pattern of essentialising Indigenous Australians according to unfavourable stereotypes.\textsuperscript{562}

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\begin{itemize}
\item \textsuperscript{555} Jennifer Martiniello, above n 215, 125. See also Sarah Maddison, above n 84, 198.
\item \textsuperscript{556} Irene Watson, ‘Aboriginal Women’s Laws and Lives’, above n 541, 107.
\item \textsuperscript{557} Odette Kelada, above n 541, 4–6; Goldie Osuri, above n 541, 2.
\item \textsuperscript{558} Odette Kelada, above n 541, 7.
\item \textsuperscript{560} Goldie Osuri, above n 541, 2.
\item \textsuperscript{561} Cowlishaw (1997) 177, cited in David Hollinsworth, above n 2, 63.
\item \textsuperscript{562} Irene Watson, ‘Aboriginal Women’s Laws and Lives’, above n 541, 107.
\end{itemize}
The Intervention legislation has been couched in the language of national emergency. As explored in Chapter Two, the language of national emergency can permit all kinds of evils if those evils can be defined by government as ‘lesser evils’. \(^{563}\) However in carrying out these so-called ‘lesser evils’ our very humanity is at stake – the integrity and dignity of the oppressors is damaged as well as that of the oppressed, \(^{564}\) and at some point in this process it becomes difficult to distinguish between the so-called evil of the targeted ‘other’ and the evil of government action taken to address it.

The government has intervened in the lives of Indigenous Australians from the first moment of colonisation. This intervention has been disastrous on so many levels, initially causing and then exacerbating the trauma experienced by Indigenous peoples. \(^{565}\) Judy Atkinson explains that ‘[g]overnment interventions into Aboriginal lives have been multiple, protracted and many-layered, and at various levels have acted as traumatising agents, compounding the agony of already traumatised individuals and groups.’ \(^{566}\) She wrote this before the Federal Government’s 2007 Intervention which has involved the placement of Federal police and army personnel on Aboriginal lands, an act which has been referred to as the ‘Invasion’ by several Aboriginal leaders. \(^{567}\) It is tragic that little appears to have been learnt in terms of the devastation that colonial intervention brings in the lives of Indigenous Australians.

When it comes to issues confronting Indigenous peoples, Australian governments have engaged in seriously high levels of scrutiny. It has been assumed that increasing surveillance would remedy the problems faced by Indigenous peoples. This has not proven to be the case. Indeed it is arguable that such high levels of scrutiny have contributed more, rather than less, problems within Indigenous communities. \(^{568}\) Such scrutiny would certainly raise the ire of white Australians were they subjected to similar government interference. The Intervention increases surveillance of Indigenous Australians. \(^{569}\) Kelada explains ‘[t]o put the laws into action require instruments of surveillance which ensure Indigenous subjects are rendered

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\(^{563}\) George Lakoff, above n 13, 67–68.


\(^{565}\) Judy Atkinson, above n 33, 81.

\(^{566}\) Ibid 68.


\(^{568}\) Chris Cunneen, above n 4, 85–86.
constantly visible. The effect of such surveillance is an erosion of liberty, esteem and self-empowerment. She argues that this form of surveillance is a form of violence against Indigenous Australians.

Part of this surveillance involves quarantining welfare payments for Indigenous people living in remote communities. Despite the Federal government recently maintaining that this aspect of the Intervention will be continued because it allegedly ‘benefits’ Indigenous people, income management has provoked outrage and disgust by many of those adversely affected. The quarantine affects all Indigenous people in all these communities regardless of whether they ‘need’ such ‘assistance’, regardless of whether the communities are dry communities, and regardless of whether the Indigenous people have children in their care. Indigenous people adversely affected by this racist legislation and policy have described the situation as reverting back to the mission days of ‘rations’. They are given a ‘Basics Card’ with a pin number which has four categories of permitted expenditure (complete with condescending icons on the back) – ‘clothes’, ‘food’, ‘health items’ and ‘hygiene products’. These cards have been described as ‘like dog tags’. In addition, in some places there is only one shop which the government has liaised with to accept the cards, which has effectively dismantled competition and forced up the price of goods. Those adversely affected by the legislation state that although the government claimed to be ‘protecting’ children, in practice the laws have been about controlling income and compulsory acquisition of land, effectively bringing back ‘the mission days’. They argue it has more to do with assimilation than ‘protection’. Yet a recent government report about the Intervention, Closing the Gap in the

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569 Odette Kelada, above n 541, 4–5.
570 Ibid 5.
571 Ibid 5.
573 Barbara Shaw and Valerie Martin, above n 541; Peta MacGillvray, above n 541, 8.
574 Barbara Shaw and Valerie Martin, above n 541; SBS, ‘Are They Safer’, above n 11; Raelene Webb, above n 541, 18.
575 Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007 (Cth).
576 Barbara Shaw and Valerie Martin, above n 541.
577 Ibid. I saw one of these cards during this speech and was stunned by the disgusting racism which has led to their introduction, and their condescending icons showing government approved expenditure.
578 Ibid.
579 Ibid.
580 Ibid.
Northern Territory, refers to ‘financial management support services’ being provided to Aboriginal ‘customers whose income is managed’, with more illusory Orwellian language. The report states that Northern Territory communities have benefited from income management. Interestingly the report relies on evidence provided by stores to maintain that Indigenous people are in favour of this new system of income management. However these stores patently have a vested interest in the operation of the income management system. In conducting its research into the effectiveness of this aspect of the Intervention it is unfortunate that the government has relied upon hearsay rather than adequately consulting with Indigenous people adversely affected by the scheme.

The Intervention legislation has been roundly criticised as paternalistic due to the lack of consultation with Indigenous communities. It was rushed through parliament with no allowance for consultation or collaboration with Indigenous Australians, and ‘Indigenous leaders from the NT condemned the rushed legislation’. This legislation has been described as facilitating further genocide against Indigenous peoples. The paternalism present in this legislation ensures that no viable solution will be found to the problem of violence within some Indigenous communities. As Kelada astutely observes:

A crisis or state of emergency which calls for a paternalist response is a crisis which self-perpetuates, bites its own tail and creates the destruction it supposedly responds to so diligently. This meets the criteria of fantasy as the solutions put forth are inevitably illusory – illusions of cleaning up, restoring order, containing chaos. To appreciate the complexity of fantasy is to become aware that fantasy needs this chaos to exist. It thrives upon representations of disorder and crisis to ensure its own survival as it is through the stimulus of fear and alarm that its own existence is validated as necessary and access to control and capital as the domain of the white paternalist figure remains protected.

Kelada rightly argues that ‘[t]he need to wake up before continuing the cycle of harm is the real national emergency.’ The ‘real national emergency’ is the continued government actions which perpetuate Australia’s racist colonial legacy even as they do so in the name of

582 Department of Families, Housing, Community Services and Indigenous Affairs, Closing the Gap in the Northern Territory, above n 572, 34.
583 Ibid.
584 Ibid 35.
585 Ibid.
586 Ibid.
587 Ibid.
588 Ibid.
590 Ibid 9.
591 Ibid.
‘protection’. Yet the Labor government has chosen to continue the Intervention,592 regardless of the harm caused to Indigenous Australians by doing so,593 and despite the fact that it has done little to address Indigenous disadvantage or prevent the abuse of children.594 Indeed the Closing the Gap in the Northern Territory report indicates that substance abuse and reports of violence have increased since the Intervention commenced.595 Bringing in the army has clearly not been the silver bullet solution the Howard government heralded it to be.


1. The Judicial Decision in Wurridjal

On 2 February 2009 the High Court handed down their judgment in response to the challenge to the constitutionality of certain aspects of the Intervention legislation, the Northern Territory National Emergency Response Act 2007 (Cth) and the Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007 (Cth) (“the FaCSIA Act”).596 The Commonwealth had argued this legislation was supported by s 122 of the Constitution and s 51(xxvi) which gives the Commonwealth power ‘to make laws with respect to the people of any race for whom it is deemed necessary to make special laws.’597 In this very recent decision, Wurridjal v Commonwealth,598 the legislation was held by the majority to be constitutionally valid. The challenge to the legislation had been based upon s 51(33xi) of the Constitution; the argument was that the legislation amounted to an ‘acquisition’ of ‘property’

592 Department of Families, Housing, Community Services and Indigenous Affairs, Closing the Gap in the Northern Territory, above n 572, 4.
593 Peta MacGillvray, above n 541, 8.
595 Department of Families, Housing, Community Services and Indigenous Affairs, Closing the Gap in the Northern Territory, above n 572, 12–13 and 31–32.
596 Wurridjal v The Commonwealth of Australia [2009] HCA 2, [8]. Note the legislation which facilitated the quarantining of welfare payments was not part of the challenge.
which had not been made on ‘just terms’. The first and second plaintiffs were Aboriginal persons with a connection to ‘sites on affected land in the township of Maningrida’ and the third plaintiff was ‘an Aboriginal and Torres Strait Islander corporation’. Of particular concern to the plaintiff’s was s 31(1) of the NER Act which granted a lease of land to the Commonwealth for five years, land amounting to 10.456 square kilometres including several towns, such as Maningrida. They were also concerned about s 35 which gives the Commonwealth the right to ‘sublease, license, part with possession of, or otherwise deal with, its interest in the lease’. Section 35(2) provides that the Commonwealth does not have to pay rent in relation to the leased land under s 31.

The plaintiffs submitted that the challenged provisions resulted in the Land Trust losing possession and control, and income (including rent), to which the Land Trust was entitled in respect of the Maningrida land and that this significantly diminished the Land Trust’s estate in fee simple.

One element of the defence of the Commonwealth was that the legislation was supported by s 122 of the Constitution, the Territories power, and therefore did not need to comply with s 51(xxxi) relating to just terms compensation. An older authority, Teori Tau v The Commonwealth, had supported this proposition. However a majority of four overturned this aspect of Teori Tau, finding that s 122 was indeed subject to the s 51(xxxi) limitation.

A majority held the Intervention legislation did not infringe the ‘just terms’ compensation proviso in any way. This finding was somewhat inconsistent with the previous ‘liberal construction’ of s 51(xxxi). French CJ commented ‘[a]lthough broadly interpreted, acquisition is to be distinguished from mere extinguishment or termination of rights.’ He went on to say that ‘where a statutory right is inherently susceptible of variation, the mere fact

600 Wurridjal v The Commonwealth of Australia [2009] HCA 2, [8].
602 Wurridjal v The Commonwealth of Australia [2009] HCA 2, [32].
605 Wurridjal v The Commonwealth of Australia [2009] HCA 2, [32].
608 Wurridjal v The Commonwealth of Australia [2009] HCA 2 at [104] per French CJ, at [189] per Gummow and Hayne JJ and in this respect Kirby J agreed with the majority, see [287]. Crennan J considered that the case did not warrant judicial decision on the issue of the relationship of s 51(xxxi) to s 122 of the Constitution, see [355].
610 Wurridjal v The Commonwealth of Australia [2009] HCA 2, [87].
611 Wurridjal v The Commonwealth of Australia [2009] HCA 2, [90].
that a particular variation reduces an entitlement does not make that variation an acquisition of property’. 611 French CJ concluded the Commonwealth lease ‘was an acquisition of property’ even though it can also be said to have a ‘regulatory or other public purpose’. 612 Yet French CJ held the *Emergency Response Act* did provide ‘just terms’ for any acquisition of property obtained by the Commonwealth. 613

Like the other majority judges, 614 Chief Justice French held the plaintiffs were to have a costs order awarded against them, saddling them with the Commonwealth’s legal expenses in defending the action. 615 This was an additional blow to the plaintiffs, who not only faced the bitter disappointment of having their claims dismissed by the colonial legal order, but also the added burden of significant financial costs, which may well be intended to deter future actions of this kind. Unlike the majority, Kirby J took a very different approach to the matter of who should bear the costs of the litigation, he ordered the Commonwealth to pay all costs. 616 In this, his last dissenting judgment before retiring from the bench, he was critical of the majority’s approach, saying ‘to require the plaintiffs to pay the entire costs simply adds needless injustice to the Aboriginal claimants and compounds the legal error of the majority’s conclusion in this case.’ 617

Gummow and Hayne JJ concluded the five year lease acquired by the Commonwealth did not fetter ‘the continued exercise of the entitlements of the first and second plaintiffs’. 618 They found it significant to highlight that the ‘Emergency Response Act makes provision in s 62 for the determination of “a reasonable amount of rent” to be paid by the Commonwealth to a party such as the Land Trust’. 619 Gummow and Hayne JJ held that the terms under the legislation providing for ‘reasonable compensation’ meant that ‘just terms’ were provided, stating:

> The operation of Pt 4 of the *Emergency Response Act* has resulted in an acquisition of the property of the Land Trust to which s 51(xxxi) of the Constitution applies. Section 60(2)

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611 *Wurridjal v The Commonwealth of Australia* [2009] HCA 2, [93].
612 *Wurridjal v The Commonwealth of Australia* [2009] HCA 2, [103].
613 *Wurridjal v The Commonwealth of Australia* [2009] HCA 2, [104].
616 *Wurridjal v The Commonwealth of Australia* [2009] HCA 2, [310].
617 *Wurridjal v The Commonwealth of Australia* [2009] HCA 2, [311].
618 *Wurridjal v The Commonwealth of Australia* [2009] HCA 2, [162].
thus renders the Commonwealth “liable to pay a reasonable amount of compensation” to the Land Trust. If the parties do not agree on the amount of compensation … the Land Trust is empowered by s 60(3) to “institute proceedings in a court of competent jurisdiction for the recovery from the Commonwealth of such reasonable amount of compensation as the court determines”. …

The plaintiffs stigmatise s 60 as creating what are but “contingent” rights. That is not so. The section is in the well-recognised and preferable form whereby if the necessary constitutional fact exists (the operation of s 51(xxxi)) a liability is imposed by s 60(2) and jurisdiction is conferred by s 60(3). Section 60 is an example of prudent anticipation by the Parliament that its law may be held to attract the operation of s 51(xxxi) and of the inclusion of provision for compensation in that event, thereby avoiding the pitfall of invalidity. Moreover, the right to compensation is absolute if it transpires that s 51(xxxi) is engaged.

The provision for payment of “reasonable compensation” … satisfies the requirement of “just terms” with respect to the Maningrida Five Year Lease.621

They dismissed the concerns of the plaintiffs as raising ‘false alarm’.622 However, it is questionable whether ‘reasonable compensation’ truly amounts to ‘just terms’ or merely constitutes ‘reasonable injustice’. As is apparent from the research conducted thus far, Australian governments do not have a good record when it comes to determining what is ‘reasonable’ for Indigenous people. As I said in Chapter Three, what colonists deemed ‘reasonable’ in their exchange of an entire continent for religion and some blankets was certainly unjust from an Indigenous perspective.623 Thus the Indigenous people adversely affected by this legislation are understandably concerned about what compensation may be offered.624 They have good cause to be concerned given what has been deemed ‘reasonable’ throughout Australia’s racist colonial history. What has been considered reasonable has been associated with what Margaret Thornton describes as the ‘Benchmark Man’,625 one who is ‘white, Anglo-Celtic, male, heterosexual and within the bounds of what is considered to be physically and intellectually normal’.626 The majority judges, however, did not take these

622 Wurridjal v The Commonwealth of Australia [2009] HCA 2, [197].
623 David Hollinsworth, above n 2, 112.
624 A range of Aboriginal people who are negatively affected by the Intervention legislation have formed the Prescribed Area People’s Alliance to petition the UN regarding the Intervention laws – Leo Shanahan and Andra Jackson, ‘Kirby’s last dissent: my fellow judges racially biased’, The Age, 3 February 2009, <http://www.theage.com.au/national/kirbys-last-dissent-my-fellow-judges-racially-biased-20090202-7vr7.html> at 26 February 2009; Peta MacGillvray, above n 541, 6. The Prescribed Area People’s Alliance is arguing that the Intervention does not constitute special measures under the Racial Discrimination Act 1975 (Cth) because it is not necessary, not temporary and does not have as its sole purpose the advancement of the interests of Indigenous Australians (at 6).
considerations into account in their judicial reasoning. Indeed Gummow and Hayne JJ were at pains to emphasise that ‘[n]o different or special principle is to be applied to the determination of the demurrer to the plaintiffs’ pleading of invalidity of provisions of the Emergency Response Act and the FCSIA Act because the plaintiffs are Aboriginals.’627 They even went so far as to suggest that the adoption of such an approach would promote inequality,628 conveniently ignoring the reality of grave inequality that led to the enactment and implementation of such racist legislation in the first place.

As is often the case with highly politicised litigation there were several concerns of the plaintiffs which were not given judicial consideration.629 The plaintiffs argued, unsuccessfully, that the process providing for the Commonwealth’s alleged ‘reasonable compensation’ was ‘onerous, costly and time consuming … without aid or protection’.630 The plaintiffs were also concerned that the Commonwealth’s provision under the Intervention legislation for ‘reasonable compensation’ was not ‘just’ because it did not take into consideration non-monetary ‘terms’.631 As noted by Heydon J,

The plaintiffs submitted that “just terms” could require more than the provision of monetary compensation. An appeal was made to “the equitable maxim that one who suffers a wrong shall not be without a remedy, which applies where damages would be an inadequate remedy”, and to cases recognising a right to the specific performance of contracts. The plaintiffs submitted that a particular example of the extension of “just terms” beyond monetary compensation might arise where the acquisition of traditional Aboriginal rights and interests in land was under consideration, in view of their “sui generis nature”. … The plaintiffs also submitted that the acquisition of sacred sites by the Commonwealth was not on just terms because it had failed to consider the consequences of interfering in the rights of the Aboriginal peoples concerned with sacred sites in circumstances where the interference may have been unnecessary for the Commonwealth’s purposes.632

Heydon J stated ‘[t]he present case does not afford an occasion on which it is appropriate to consider these issues raised by the plaintiffs.’633 It remains to be seen whether this interesting argument relating to a more expansive interpretation of the ‘just terms’ requirement is taken up by the High Court at some future point. The point raised by the Indigenous plaintiff’s

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627 Wurridjial v The Commonwealth of Australia [2009] HCA 2, [122]. ‘A demurrer is “the formal mode in pleading of disputing the sufficiency in law of the pleading of the other side” – per Kirby J at [276].

(1999) 23(3) Melbourne University Law Review 749, 765; Margaret Thornton, above n 625, 8. See also Margaret Davies, above n 1, 91.
about unnecessary interference with sacred sites during the Intervention was significant. An example of a situation where interference with a sacred site was certainly unnecessary for the Commonwealth’s purposes occurred during the Intervention when ‘workers built a toilet on a sacred site after failing to consult with the traditional owners.’\(^{634}\) This is tragically metaphorical of the level of disrespect shown to Indigenous Australians throughout the Intervention.

Justice Crennan maintained that the case did ‘not present an occasion on which it [was] necessary to determine the relationship between s 122 and s 51(xxxi) of the Constitution.’\(^{635}\) She mentioned that s 51(xxxi) is a section which must be ‘construed widely’\(^{636}\) but is also subject to various limitations.\(^{637}\) Interestingly, Crennan J had a subheading in her judgement titled ‘History and context of the challenged provisions’.\(^{638}\) Initially I had hoped this might mean some engagement with the actual context of the legislation in terms of its somewhat controversial and politically opportunistic underpinnings,\(^{639}\) however disappointment set in as I read further. Although Crennan J had indicated an interest in ‘context’, the context she chose to examine was the colonial narrative of benevolent whites assisting needy Aborigines. In short Crennan J privileged a Eurocentric version of events and accepted the government rhetoric disseminated in the Minister’s Second Reading speech as a valid justification of the legislation’s purpose without delving deeper into the events which led to the introduction of the legislation.\(^{640}\) She did not examine the speech in terms of why it was written or who it was written for or what purpose it was written to serve.\(^{641}\) Naturally, a government will claim to be enacting legislation because they see it as necessary or desirable. However by refraining from undertaking a deeper analysis Crennan J ensured that fundamental issues which concerned the plaintiffs remained unaddressed. She went on to examine the Explanatory memorandum and the object section of the Emergency Response legislation, and, as to be expected, these conformed to the rhetoric of the Howard government claiming that this legislation was

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\(^{633}\) *Wurridjal v The Commonwealth of Australia* [2009] HCA 2, [339] and see [341].  
\(^{634}\) Sarah Maddison, above n 84, 78–79.  
\(^{635}\) *Wurridjal v The Commonwealth of Australia* [2009] HCA 2, [355].  
\(^{636}\) *Wurridjal v The Commonwealth of Australia* [2009] HCA 2, [356].  
\(^{637}\) *Wurridjal v The Commonwealth of Australia* [2009] HCA 2, [357].  
\(^{638}\) *Wurridjal v The Commonwealth of Australia* [2009] HCA 2, above para [371].  
\(^{639}\) Jennifer Martiniello, above n 215, 123–124.  
\(^{640}\) *Wurridjal v The Commonwealth of Australia* [2009] HCA 2, [373]–[374] and [378].  
\(^{641}\) This is the kind of approach taken when historians analyse a document – Ann Curthoys, Ann Genovese and Alexander Reilly, above n 142, 91.
Crennan J embraced the paternalism set out in the Second Reading speech by concluding that the provisions were for the benefit of the plaintiffs because they were directed to addressing problems in the Aboriginal community:

The challenged provisions (and the limited impairment of the fee simple which they entail) are directed to tackling the present problems by achieving conditions in which the current generation of traditional Aboriginal owners of the land can live and thrive. They are not directed to benefiting the Commonwealth or to acquiring property for the Commonwealth, as those terms are usually understood, nor are they directed to depriving traditional Aboriginal owners of any prior rights or interests, which are expressly preserved. The purposes of the challenged provisions are to support the current generation of traditional Aboriginal owners by improving living conditions quickly.645

In the course of her judgment Crennan J stated that the legislative intent of the Northern Territory Land Rights Act had been to allow Indigenous owners of the land to ‘live and thrive’ and that ‘[c]learly, communities subject to the present problems cannot properly support traditional Aboriginal owners living in them or enable them to thrive.’646 In doing so she was pointing out that the purpose of the Land Rights Act was not being carried out effectively, however this acts as a poor rationale for the validity of the Intervention legislation. There is a wealth of evidence to suggest that the Intervention legislation has no prospect of assisting Aboriginal communities to ‘live and thrive’.647 Chris Cunneen has long engaged in research indicating that increased government surveillance of Indigenous communities enhances rather

643 Wurridjal v The Commonwealth of Australia [2009] HCA 2, [427], emphasis added.
than reduces problems. Similarly Kelada has argued that increasing surveillance is simply part of the colonial monitoring of Indigenous peoples that continues a process of marginalisation and disempowerment.

Kiefel J concluded that the Emergency Response Act did result in an acquisition of property. However like French CJ, she considered that the legislation contained provisions to satisfy the requirement of acquisition on just terms. She agreed with the orders made by Gummow and Hayne JJ including that the plaintiffs pay the costs of the Commonwealth. Justice Kiefel also focused on the fact that the legislation had as its declared object the improvement of ‘the well-being of certain communities in the Northern Territory’. In doing so she ignored the fact that endorsing the paternalism underlying the legislation is hardly conducive to Aboriginal well-being.

The Wurridjal decision has highlighted the ongoing racial tension that exists in Australia and the manner in which racially discriminatory laws continue to be both enacted by parliaments and upheld in the Courts when such legislation is challenged by Indigenous plaintiffs who are rightfully dissatisfied with the status quo. The case also occasioned some tension on the bench, with French CJ commenting:

The conclusion at which I have arrived does not depend upon any opinion about the merits of the policy behind the challenged legislation. Nor, contrary to the gratuitous suggestion in the judgment of Kirby J, is the outcome of this case based on an approach less favourable to the plaintiffs because of their Aboriginality.

Kirby J had been at pains to consider the legislation in its political and historical context, as was his wont. He commenced his dissenting judgement by stating:

The claimants in these proceedings are, and represent, Aboriginal Australians. They live substantially according to their ancient traditions. This is not now a reason to diminish their legal rights. Given the history of the deprivation of such rights in Australia, their

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648 Chris Cunneen, above n 4, 85–86. The increase in substance abuse and reports of violence since the Intervention commenced adds weight to this argument. Department of Families, Housing, Community Services and Indigenous Affairs, Closing the Gap in the Northern Territory, above n 572, 12–13.
649 Odette Kelada, above n 541, 5.
650 Wurridjal v The Commonwealth of Australia [2009] HCA 2, [104].
651 Wurridjal v The Commonwealth of Australia [2009] HCA 2, [448].
655 The retirement of Justice Kirby leaves a significant intellectual gap on the High Court.
identity is now recognised as a ground for heightened vigilance and strict scrutiny of any alleged diminution.\textsuperscript{656}

He was alone in considering that the history of colonial deprivation warranted special scrutiny in the circumstances of this case. He nevertheless stated:

History, and not only ancient history, teaches that there are many dangers in enacting special laws that target people of a particular race and disadvantage their rights to liberty, property and other entitlements by reference to that criterion. The history of Australian law, including earlier decisions of this Court, stands as a warning about how such matters should be decided. Even great judges of the past were not immune from error in such cases. Wrongs to people of a particular race have also occurred in other courts and legal systems. In his dissenting opinion in \textit{Falbo v United States}, Murphy J observed, in famous words, that the “law knows no finer hour” than when it protects individuals from selective discrimination and persecution. This Court should be specially hesitant before declining effective access to the courts to those who enlist assistance in the face of legislation that involves an alleged deprivation of their legal rights on the basis of race. All such cases are deserving of the most transparent and painstaking of legal scrutiny.\textsuperscript{657}

In Kirby J’s estimation it was significant that the Intervention legislation required the express removal of the protections under the \textit{Racial Discrimination Act 1975} (Cth), which amount to a clear violation of Australia’s international human rights obligations under the \textit{International Convention on the Elimination of All Forms of Racial Discrimination}.\textsuperscript{658} He reasoned:

If any other Australians, selected by reference to their race, suffered the imposition on their pre-existing property interests of non-consensual five-year statutory leases, designed to authorise intensive intrusions into their lives and legal interests, it is difficult to believe that a challenge to such a law would fail as legally unarguable on the ground that no “property” had been “acquired”. Or that “just terms” had been afforded, although those affected were not consulted about the process and although rights cherished by them might be adversely affected.\textsuperscript{659}

Justice Kirby emphasised the history of the High Court where there had been ‘an expansive view of each of the critical expressions in s 51(\textit{xxxi}) of the Constitution, in issue in these proceedings: “acquisition”, “property” and the requirement of “just terms”.’\textsuperscript{660} He even went so far as to say that in his view ““just terms” arguably imports a notion wider than the provision of monetary compensation, which is the most that the challenged laws offer for the disturbance of the Aboriginal property’.\textsuperscript{661} Justice Kirby stated:

\begin{thebibliography}{99}
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The notion that the National Emergency Response legislation does not warrant scrutiny by a court at trial is counter-intuitive. This is particularly so given the timing and conceivable purpose of its enactment; its deliberately intrusive character; its unique and controversial features; its imposition upon property owners of unconsensual five-year leases that are intended to (and will) significantly affect the enjoyment of their legal rights; and the coincidental authorisation of other federal intrusions into the lives and activities of the Aboriginal peoples concerned.

In its approach to the legal entitlements of the claimants in these proceedings, this Court must examine what has been done by the laws that they challenge. It must do so against the standards that it has previously applied, both in peace and in war, to non-Aboriginal Australians. Those standards appear to attract strong protections for property interests.662

In his view the demurrer should have been overruled so that the matter could proceed to trial.663

Kirby J, like some of the majority judges, referred to the Little Children are Sacred report, however unlike the majority judges who simply assumed that the legislation was a valid response to the report because the government Minister proposing the legislation claimed that it was, Kirby J noted that the government had failed to abide by the recommendations of the report regarding consultation with Indigenous communities.664 He stressed that the Intervention legislation was ‘a unilateral initiative of the federal government’665 and emphasised that the matters addressed by the Intervention legislation were extensive.666

Interestingly, Kirby J did claim ‘[t]his Court is not, of course, concerned with the merits, wisdom, prudence, politics or justice of the legislation, or even (as such) its discriminatory provisions.’667 This statement reflected some influence of the positivist paradigm

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662 Wurridjal v The Commonwealth of Australia [2009] HCA 2, [207]–[208].
663 Wurridjal v The Commonwealth of Australia [2009] HCA 2, [212].
666 Wurridjal v The Commonwealth of Australia [2009] HCA 2, [232]. These are:
   a. A [six] month ban on alcohol on Aboriginal land,
   b. The compulsory acquisition of Aboriginal townships for five years to improve property and public housing,
   c. A ban on pornographic videos and an audit of Commonwealth computers to identify pornographic material,
   d. The quarantining of 50% of welfare payments so it can only be spent on essentials,
   e. Linking of income support and family assistance to school attendance and providing meals to children at school, which are to be paid for by parents,
   f. Compulsory health checks for Aboriginal children under 16,
   g. An increase in police numbers on Aboriginal communities,
   h. Engaging of the army in providing logistical support,
   i. Abolishing the entry permit system to Aboriginal reserves for common areas, road corridors and airstrips.
underpinning the legal system, which I have critiqued above. However, Kirby J went on to stress that a ‘vigilant approach’ was required in response to the plaintiff’s concerns.\footnote{Wurridjal v The Commonwealth of Australia [2009] HCA 2, [234].}

Kirby J pointed out that the declared motive of benevolence behind the legislation, which seemed to influence the decision-making of several others in the majority, was no reason to diminish the rights of the plaintiffs.\footnote{Wurridjal v The Commonwealth of Australia [2009] HCA 2, [236].} Unlike other members of the Court who sought guidance from the Minister’s second reading speech regarding the validity of the legislation,\footnote{Wurridjal v The Commonwealth of Australia [2009] HCA 2, French CJ at [3]–[7], Gummow and Hayne JJ at [134], Crennan J at [373]–[374], [378].} Kirby J considered that it was quite irrelevant in making the determination.\footnote{Wurridjal v The Commonwealth of Australia [2009] HCA 2, [243].}

He concluded:

> The Parliament authorised a remarkable governmental intrusion by the Commonwealth into the daily lives of Australian citizens in the Northern Territory, identified mostly by reference to their race. As was its intention, such intrusions impinged upon the property interests of at least some individuals and communities on the Maningrida land. The plaintiffs brought these proceedings to have their rights determined in light of this deliberate impingement upon their legal interests. On the face of things, they have a clearly arguable case on that issue warranting a trial.\footnote{Wurridjal v The Commonwealth of Australia [2009] HCA 2, [243].}

Kirby J was critical of the way in which the members of the majority chose to see the interests of the plaintiffs as a lessor form of entitlement, as ‘no more than a statutory “right, title or other interest in land”’.\footnote{Wurridjal v The Commonwealth of Australia [2009] HCA 2, [248].} He also pointed out that the approach being taken by the majority was contrary to the general principle that legislation that \textit{could} be read as diminishing basic civil rights \textit{will} ordinarily be read restrictively and protectively by the courts of this country. Legislation designed to protect such rights is ordinarily read beneficially. This is especially so where the legislation might otherwise be construed to diminish, or extinguish, the legal interests of [I]ndigenous peoples which, in earlier times, our law failed to protect adequately or at all.\footnote{Wurridjal v The Commonwealth of Australia [2009] HCA 2, [248].}

However this principle is classed as a secondary guide to legislative interpretation, and can be overridden by the purpose approach required by s 15AA of the Acts Interpretation Act 1901 (Cth).\footnote{Kath Hall and Claire Macken, \textit{Legislation and Statutory Interpretation} (2\textsuperscript{nd} ed, 2009) 83, 88 and 91.} This allows Parliament’s discriminatory purpose to be upheld. Even so, Kirby J stressed the importance of judicial scrutiny of legislation which detrimentally affects
Indigenous people. He argued that ‘[l]aws that appear to deprive or diminish the pre-
existing property rights of [I]ndigenous peoples must be strictly interpreted. This is especially 
so where such laws were not made with the effective participation of [I]ndigenous peoples 
themselves.’ The retirement of Justice Kirby leaves a serious gap on the High Court.

2. Critique of Wurridjal

Gayatri Spivak writes of the violence which is inherent in imperial processes and claims that 
colonial forces ‘are at their worst when they are most benevolent’. This is clearly seen in 
the majority judgments where they refer to the benevolent and beneficial purpose of the 
legislation discerned from the Ministerial Second Reading speech. The Second Reading 
Speech functions as colonial propaganda which is repeated verbatim by many of the majority 
judges. This occurred despite the well known controversy over the legislation. Justice 
Kirby was the only member of the judiciary who actually referred to the context of the 
legislation in anything resembling a thorough manner, and substantive justice requires a 
context based approach to be taken in judicial decision-making. Although some of the 
majority judges do refer to context inasmuch as they state that the legislation has come into 
being in response to the Little Children are Sacred report, they only refer to what the 
government claimed to be doing in enacting that legislation. They did not consider the ‘the 
view from the bottom – not simply what oppressors say but how the oppressed respond to 
what they say’, as advocated by critical race theorists, but rather endorsed the ‘top down’ 
approach of the Federal Government. However by resorting to the narrative of the benevolent 
coloniser the majority judges shielded themselves from the colonial violence inherent in their 
decision-making. In the act of adjudication the judges are engaged in ‘the bestowing of 
legitimacy on one story rather than another’. The story of colonial benevolence is 
privileged over that of those detrimentally affected by the legislation. The majority judges did 
not examine the controversial aspects of the legislation. They accepted the Minister’s word 
regarding the purpose of the legislation instead of considering the perspectives of those

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678 Gayatri Chakravorty Spivak, (ed Sarah Harasym), The Post-Colonial Critic – Interviews, Strategies, 
Dialogues (1990) 160.
679 Wurridjal v The Commonwealth of Australia [2009] HCA 2, French CJ at [3]–[7], Gummow and Hayne JJ at 
[134], Crennan J at [373]–[374], [378].
680 Stephanie Wildman with Adrienne Davis, above n 401, 318.
682 Anthony Cook, above n 14, 90.
affected by the legislation. Instead of subjecting the challenged provisions to rigorous scrutiny they effectively endorsed Australia’s ongoing racist colonial mentality. This decision reflects what Peter Fitzpatrick has written about law being ‘a form of … white mythology.’684 The majority judges endorsed Australia’s racist colonial mythology of benevolent whites rescuing colonised people from their barbarianism.685 This case highlights how ‘[l]aw is created by value-laden subjects’686 and shows how law is used to privilege the colonial narrative of benevolence at the expense of Indigenous perspectives about the detrimental consequences of the government’s legislation and invasion of Indigenous communities.687

The response to the Wurridjal decision was protest and entry into the High Court by a number of Indigenous people and their supporters.688 Although the unsuccessful outcome was not entirely unexpected689 it is disappointing nonetheless to have yet another oppressive exercise of Parliamentary power endorsed by the majority of the High Court. The plaintiffs have now taken the matter before the United Nations to see if they can attain justice via the UN Committee on the Elimination of Racial Discrimination.690 The Intervention legislation is in clear breach of Australia’s obligations under international law which prohibit racially discriminatory laws.691 Indeed it breaches Australia’s own anti-discrimination legislation, the Racial Discrimination Act 1975 (Cth), which had to be suspended in order not to clash with aspects of the racist Intervention legislation.692 Of course even a favourable determination by the UN will have no legal effect on Australia; it may however exert some political and moral pressure on the Federal government.693

686 Ben Mathews, above n 22, 108.
687 A range of Aboriginal people who are negatively affected by the Intervention legislation have formed the *Prescribed Area People’s Alliance* to petition the UN regarding the Intervention laws – Leo Shanahan and Andra Jackson, above n 624.
689 Louis Andrews and Sally Pryor, above n 688.
691 ‘Intervention to go to UN’, above n 690; Raeleene Webb, above n 541, 19.
The response of the Labor government to the *Wurridjal* decision has been to seek a valuation of what would be a reasonable rent for the compulsory five-year leases. The Labor government is also considering whether to reduce the boundaries covered by these leases. This is interesting given that ‘Rudd, in opposition, supported, without any amendment, Howard’s Intervention in the Northern Territory including the aspects that repealed the *Racial Discrimination Act*, the abolition of the permit system and the compulsory quarantining of all welfare payments.’ This reflects a reactive rather than a proactive stance to the issue. In some Indigenous communities the Labor government is taking an even more draconian stance than the Howard Liberal government, ‘insisting landowners lease their land to the Government for 40 years in return for new housing.’ The response of the Labor government to the Intervention legislation could have been more proactive. They could have, upon obtaining election, repealed the Intervention legislation and developed a program of assistance to remote Aboriginal communities in the Northern Territory in consultation with members of the affected communities. At the least they could have repealed the aspects of the legislation that clearly have nothing to do with protection of abused children and everything to do with consolidating colonial power.

**G. Conclusion**

This chapter has highlighted that Australia’s racist colonial legacy lingers on in the contemporary politico-legal climate. As a consequence Indigenous peoples continue to experience severe disadvantages in relation to the colonial state. This chapter has examined three situations during the Howard regime where legislation was enacted that was so discriminatory the *Racial Discrimination Act 1975* (Cth) had to be suspended. Over the term of the Howard government there were some very disappointing setbacks in relation to the protection of Indigenous rights, both in terms of legislation and case law. In the years of the Howard government there was a reactivation of assimilation legislation and policy such as many would never have dreamed possible. There was a consistent winding back of any rights that Indigenous peoples had won under previous Labor governments. Any time the Howard

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694 Department of Families, Housing, Community Services and Indigenous Affairs, *Closing the Gap in the Northern Territory*, above n 572, 15–16.
695 Leo Shanahan and Andra Jackson, above n 624.
696 Larissa Behrendt, Chris Cunneen and Terri Libesman, above n 21, 333.
government wished to enact legislation that Indigenous peoples might consider discriminatory the government simply suspended the operation of the *Racial Discrimination Act 1975* (Cth),\(^{698}\) which demonstrates that no effective protection exists when Federal Parliament decides to engage in oppressive exercises of parliamentary power.

The impact of legislation on society should not be underestimated. In addition to producing practical consequences, it also functions at an ideological level and says something about the kind of values possessed by the nation.\(^{699}\) Flagg argues that ‘legal doctrines do carry normative messages’.\(^{700}\) Similarly, Hollingsworth claims ‘legislation can bring about significant changes in expressed attitudes and in observable behaviour.’\(^{701}\) Before the election of the Howard government it was hoped that the enactment of anti-discrimination legislation would have an educative effect about the evils and the unacceptability of racial discrimination.\(^{702}\) However during its term of office the Howard government enacted several pieces of racially discriminatory legislation. This legislation has an educative function in the community and contributes to the ongoing colonial mentality prevalent in Australia. The educative effect of this legislation is the legitimisation of racially discriminatory behaviour.

In recent years there have also been a string of cases with devastating outcomes for Indigenous peoples.\(^{703}\) Constraints have prevented me from examining all of these cases thoroughly in this work, however I have endeavoured to analyse a selection of cases which I maintain have a similar theme. In each situation a piece of legislation was challenged due to its detrimental impact upon Indigenous people. Each case presented colonial courts with the challenge of addressing Australia’s racist colonial legacy. They highlight the inadequacy of

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\(^{698}\) Lisa Strelein, above n 17, 7; Larissa Behrendt, Chris Cunneen and Terri Libesman, above n 21, xiv and 333.

\(^{699}\) David Hollinsworth, above n 2, 270.

\(^{700}\) Barbara Flagg, above n 326, 51.

\(^{701}\) David Hollinsworth, above n 2, 270.

\(^{702}\) Ibid.

Australia’s democracy when it comes to protecting the interests of Indigenous peoples. They bring to the fore the tension between the utilitarian theory of democracy prevailing in Australia and a theory of democracy which ‘calls for majority rule curbed by respect for minority rights’. Another common theme throughout these cases is a reliance on legal formalism to the detriment of substantive justice so that when Indigenous people attempt to have their interests protected in courts after the enactment of what they perceive to be oppressive legislation they have found a judiciary steeped in formalism and legal positivism. They have found a majority of the judiciary unwilling to engage in context based judicial decision making. This ensures that the significant historical, political, social, economic and cultural discrimination which has led to the enactment of such legislation is ignored as an ‘irrelevant’ consideration. Indigenous plaintiffs have largely faced courtrooms where the dominant discursive paradigm of Australian law has been unwilling to allow them to speak. A classic example is the extract cited above from the High Court transcript in Nulyarimma where Isobel Coe was unable to speak of the colonial genocide perpetrated by the Government and the court adjourned to stop her from speaking. This involved a measure of ‘interpretive violence’/’epistemic violence’. Thomas Ross states that ‘judicial opinions embody violence in a special way.’ This is ‘the violence of the word.’ He explains however that:

“Law talk”, in its various forms, usually suppresses this connection with violence. Law talk is rational and calm, even dispassionate. Judicial opinions are generally well-controlled pieces of apparently rational discourse. Even in dissent, judges ultimately seem to take on the sense of detachment and cool rationality that is part of the ascribed cultural role of judges.

In these case studies the judges do not engage directly with the colonial power structure which continues to engage in oppressive acts of parliamentary power – but they continue to use the legal tools forged through imperial processes to ensure that colonial domination continues. This ongoing use of colonial implements ensures that race relations in Australia remain trapped in a colonial time warp.

704 Wojciech Sadurski, above n 306, 476.
705 Jacques Derrida, above n 44, 941; Anthony Alfieri, above n 43, 604.
708 Ibid 43.
709 Ibid.
This Chapter has aimed to reveal the ways in which court judgments can function as a justification for the legal and political authority of the coloniser. The court judgments I have examined have fulfilled a particular function as a type of ‘colonialist literature’, which justifies and enforces the colonialist paradigm still operating within Australia. In each of these cases the concerns of the Indigenous plaintiffs were systematically dismissed. The perspectives of the Indigenous plaintiffs contained in the transcripts (which failed to make it into the authorised version of ‘truth’ produced in the judgments) constitute ‘a counter-narrative to the ideology of white supremacy’, however white supremacy continues to construct Indigenous peoples as unworthy of the same level of privilege typically accorded to white Australians in Australia’s ongoing colonial condition. The cases demonstrate that law perpetually reinforces the position of subordination of Indigenous people while at the same time reinforcing the power of colonial authority. When Indigenous Australians sought to challenge the operation of the Native Title legislation in Nulyarimma they failed to protect their interests which were contrary to those of the non-Indigenous majority. When Indigenous Australians sought to argue for the protection of their rights to protect their cultural heritage in Kartinyeri they failed because such interests were counter to non-Indigenous development interests. Finally, when Indigenous Australians sought to argue that legislation acquiring their property rights was unconstitutional they failed because such acquisition was seen as being on ‘just terms’ or merely a ‘temporary alteration’ of their rights. This research has led me to conclude that Australian law has largely functioned as a mechanism and an agent of colonial power exercised upon Indigenous peoples to perpetuate domination.

These legislative and case studies reveal that the language of law ‘is a discourse of power, in that it provides the terms and the structures by which individuals have a world, a method by which the “real” is determined’. This ‘discourse of power’ has consistently privileged non-Indigenous interests over Indigenous ones, demonstrating, as Kenneth Nunn states, that

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713  For the role of law as an agent of domination see Michel Foucault, above n 47, 96 and 141.
714  Bill Ashcroft, Gareth Griffiths and Helen Tiffin, above n 36, 55.
715  Ibid.
‘law is a Eurocentric enterprise – part of a broader cultural endeavor that attempts to promote European values and interests at the expense of all others.’ Nunn explains:

The law and legal institutions, through the artful use of ritual and authority, uphold the legitimacy of European dominance. The constant self-congratulatory references to the majesty of the law, the continual praise of European thinkers, the unconscious reliance on European traditions, values, and ways of thinking, all become unremarkable and expected. The law operates as a key component in a vast and mainly invisible signifying system in support of white supremacy. The law is even more capable of structuring thought because its masquerade that it is fair, even-handed, and impartial is rarely contested. Consequently, the law works as an effective ‘tool for psychological and ideological enslavement’.

A significant factor ignored in each of these case studies is that what frequently looks like commonsense or fairness from the perspective of those possessing the privileges of whiteness looks like racial discrimination to those who are not white. As Foucault says, ‘[w]hat looks like right, law, or obligation from the point of view of power looks like the abuse of power, violence, and exaction when it is seen from the viewpoint of the new discourse’.

The legislation examined in this chapter and the case law challenging its detrimental impact on Indigenous peoples says much about Australian identity. These laws speak volumes about Australian society. Whilst some might consider that the laws detrimentally affecting Indigenous peoples are at the extreme end of the scale and that on the whole much of Australia is well ordered, as Agamben has argued, ‘a legal institution’s truest character is always defined by the exception and the extreme situation.’ The character of the Australian legal institution revealed here is disturbing. These legislative and case studies show that past attitudes of Indigenous inequality continue to haunt the legal system. Indigenous people have been “subjected to discriminatory practices of quite extraordinary severity and detail”, and they continue to be afflicted by discriminatory legislation and policy. Australia’s racist colonial legacy continues to ensure that Indigenous Australians are subjected to oppressive exercises of Parliamentary power and unfortunately there are no effective checks on the capacity of Parliament to engage in such racist discrimination. Despite the Australian rhetoric of ‘equality’ and a ‘fair go’ for all, Indigenous Australians continue to be disempowered by

716 Kenneth Nunn, above n 40, 429.
717 Ibid 434.
718 Jennifer Nielsen, above n 50, 5–12.
719 Michel Foucault, above n 49, 69–70.
720 Margaret Simons, above n 380, 413.
racist legislation. Moreover, if Australia does not address its racist colonial legacy ‘the presumptions of the past’ will ‘continue to shape the present’ and discrimination ‘founded on those presumptions will continue to occur’.\(^{723}\)

It is possible that law could be used as a mechanism to curb oppressive exercises of power and to achieve substantive justice.\(^{724}\) However for this to occur much would have to change within dominant legal theory, as this largely offers a rationalisation for the status quo. The dominant theory of positivism would have to give way to an approach that considers cases in their social and political context, with regard being had to the practical consequences of decisions, and with adequate consideration given to the viewpoints of those who claim to be oppressed by the law. Australia would also need to commit to a process of decolonisation. In my next chapter I will conclude by examining the Federal Government’s Apology to members of the Stolen Generations and consider the implications in terms of Australia’s national identity.


Chapter 6

CONCLUSION

A. Introduction

In this thesis I have drawn together some strains of commonality between past and present. I consider that we can only understand the present by understanding the past.1 As Gary Foley states, ‘History is always present. The past is always present. … We are all defined by our past. Those who forget or deny that are destined to keep repeating the mistakes of history.’2 I have commenced with an historical account of the race legislation in Queensland, from 1897 until the 1980s, and concluded by examining some more recent legislation enacted by the Howard government. I highlight the way in which law functions as a ‘justification for colonial oppression.’3

In my thesis I have addressed the following research questions:

1. What impact does discriminatory legislation have on minorities targeted by government on the basis of race? Chapters Two, Three, Four and Five address this.
2. What similarities are there between the persecution of Jews under Nazi Germany and Indigenous peoples in Queensland? Chapter Four addresses this.
3. What role does the dominant theory of legal positivism play in perpetuating racist oppression? Chapters Two and Five address this.
4. What role does parliamentary sovereignty play in enabling racist discriminatory legislation to be imposed on Indigenous peoples and does this call into question Australia’s claims to be a democracy? Chapter Five addresses this.
5. How far has Australia evolved in terms of its racist colonial legacy? Chapters Five and Six address this.

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This research has shown that when a government wishes to marginalise a group of people oppressive action is often undertaken with enabling legislation. This ‘lawfulness’ seems to be taken as some kind of measure of the level of civilisation of a society. Yet a closer examination of the laws of these societies reveals much about their incivility. As Geoffrey Robertson so accurately argues, ‘the true test of a society is the way it treats its most vilified members.’4 Yet the ‘force of law’5 demands from those who are oppressed by it that they accept the lawful violence administered by Parliaments and Judges. Where there is a legally supportive structure which operates to facilitate and legitimise racism there is little that minorities can do through legal channels. As Wildman and Davis state, ‘racism can only occur where it is culturally, socially, and legally supported.’6 I am concerned about the lack of effective limits imposed on the power of the state to act oppressively towards minorities.7 In each of the jurisdictions examined the state had no effective limits imposed on its capacity to engage in racist oppression of targeted minorities. Any constitutional protections in Germany were quickly suspended by the Nazi regime.8 In Australia constitutional rights for protection of minorities have either been absent or miniscule, leaving those without substantial material resources to battle their way through the courts and/or attempt to find effective representation in the political realm, a seemingly impossible task in Australia’s majoritarian democracy.9 As this research highlights, the consequences of having no effective protective limitations on abusive state power have been truly horrific. Yet what possibilities exist for limits? In Germany there has been a swing away from legal positivism towards natural law jurisprudence in order to try to prevent the kind of horrors under Nazism from reoccurring.10 However in Australia legal positivism still has a strong foothold, and judges remain enamoured with this approach which effectively upholds the status quo of colonial power and Indigenous oppression.11 In addition the Federal Parliament has shown a willingness to override what limited protections could have been applied to Indigenous peoples through the

7 Michel Foucault was also concerned about fixing limits to power. Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings 1972–1977* (ed Colin Gordon, 1980) 93.
8 Giorgio Agamben, *State of Exception* (translated by Kevin Attell, 2005) 2. Agamben likens the modern reliance on ‘a permanent state of emergency’ justifying the exercise of extraordinary state powers with this ‘state of exception’ that existed under the Nazi regime, 2.
Racial Discrimination Act 1975 (Cth) to further a colonial agenda of land expropriation and domination. This clearly occurred three times during the Howard era. Yet unfortunately the Labor government has done little to undo the racist legislative oppression facilitated by the Howard regime. Thus law continues to be used as an agent of domination, alongside dominant legal theory which exists as a method of subjugation.

In both Nazi German and Australian jurisprudence the philosophy of legal positivism has occupied a very important position. Laws are not enacted without a justifying philosophical framework, and legal positivism provides that framework. Legal positivism claims that a law is valid as long as it follows a particular process. Since World War II the courts of Germany have used Radbruch’s formula to invalidate some legislation. This seems to show some preference for a natural law approach rather than a positivist approach. They have had their apocalypse and have learnt from their jurisprudential errors – but have we? It seems not, for most Australian legal decision making continues to embody legal positivism and formalist methodology regardless of the racist outcomes produced by such reasoning. Like Frank Carrigan, I maintain that ‘in a bleak age, it is far preferable to consent to a form of legal reasoning aimed at blunting the edges of social injustice than to accept the covert social engineering imbricated within the organising principles of neo-formalism.’

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12 Larissa Behrendt, Chris Cunneen and Terri Libesman, Indigenous Legal Relations in Australia (2009) xiv and 333.
13 In the report Closing the Gap in the Northern Territory it is said that the government will seek to bring certain measures of the Intervention within the scope of the Racial Discrimination Act 1975 (Cth), such as ‘income management and alcohol and pornography controls’. Department of Families, Housing, Community Services and Indigenous Affairs, Closing the Gap in the Northern Territory (2009) <http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/Documents/closing_the_gap_nter/NTER_Monitoring_Report_v1.pdf> at 26 November 2009, 15. However this does not address many of the concerns Indigenous people have regarding the legislation critiqued in Chapter Five. It is still fundamentally racist in its operation. It is also questionable as to whether the legislation will truly reinstate the Racial Discrimination Act 1975 (Cth) and whether the Intervention legislation can genuinely be regarded as a ‘special measure’ under the RDA – Alison Vivian and Ben Schokman, ‘The Northern Territory Intervention and the Fabrication of “Special Measures” ’ (2009) 13(1) Australian Indigenous Law Review 78, 97; Jonathon Hunyor, ‘Is it time to re-think special measures under the Racial Discrimination Act? The case of the Northern Territory Intervention’ (2009) 14(2) Australian Journal of Human Rights 39, 39–47, 54–56 and 62–63.
14 Michel Foucault, above n 7, 96.
15 Heather Leawoods, ‘Gustav Radbruch: An Extraordinary Legal Philosopher’ (2000) 2 Journal of Law and Policy 489, 513. Radbruch considered laws to be invalid if they were contrary to the ‘fundamental principles of humanitarian morality’ – H.L.A. Hart, above n 10, 73. These were laws contrary to what he saw as natural law, Gustav Radbruch, ‘Five Minutes of Legal Philosophy’, in Joel Feinburg and Hyman Goss (eds), Philosophy of Law (4th ed, 1991) 103–104.
There needs to be ‘some form of legal protection sufficiently robust to withstand the shifting winds of political change.’\footnote{17} Law is a vehicle through which Indigenous peoples have been subjected to much racist discrimination.\footnote{18} Geoffrey Robertson has written compellingly of a need for a statutory bill of rights to protect people from abuses of state power.\footnote{19} However as seen by the willingness of the Howard government to suspend the \textit{Racial Discrimination Act 1975} (Cth), legislation which is intended to be protective can be suspended in relation to any racial group if the Federal Government chooses.\footnote{20} Hence a statutory bill of rights would offer insufficient protection for Indigenous peoples.\footnote{21} Brennan and others maintain that ‘[w]ithout constitutionally entrenched protection, the legal position of Indigenous peoples in Australia remains precarious.’\footnote{22} I agree to some extent; however I maintain that even if such protection was ingrained in the Constitution, adequate protection may still not be the outcome due to adherence to colonial forms of reasoning such as legal positivism and unconscious or conscious racial prejudice. There are many issues that need to be addressed before substantive justice can become a lived reality for Indigenous peoples.

As someone who has gone through law school I am familiar with the merits of human reason. However as someone investigating the horrors of the Holocaust I can also see that reason alone is not sufficient to safeguard respectful treatment of humans. In concurrence with Valerie Kerruish I suggest that law must find some way of ‘resisting the savagery that is being unleashed by reason.’\footnote{23} The Nazis used reason, but not ethics. While I see the importance of reason in the legal and political domains I maintain that other factors are necessary to ensure that justice for all is pursued, regardless of their level of wealth or status. I believe that ethics are fundamentally important in the formation, administration and adjudication of law.\footnote{24} Noam Chomsky writes, ‘the state has the power to enforce a certain concept of what is legal, but power doesn’t imply justice or even correctness’.\footnote{25} This is clearly illustrated in Nazi Germany and Australia. In each of these jurisdictions the state has had power to enact certain laws, but

\begin{footnotes}
\footnotetext[17]{Sean Brennan, Larissa Behrendt, Lisa Strelein and George Williams, \textit{Treaty} (2005) 9.}
\footnotetext[18]{Ibid 7 and 9.}
\footnotetext[19]{Geoffrey Robertson, above n 4.}
\footnotetext[21]{Ibid.}
\footnotetext[22]{Sean Brennan, Larissa Behrendt, Lisa Strelein and George Williams, above n 17, 65.}
\footnotetext[23]{Valerie Kerruish, ‘Responding to Kruger: The Constitutionality of Genocide’ (1998) 11 \textit{Australian Feminist Law Journal} 65, 82.}
\footnotetext[24]{Noel Preston, \textit{Understanding Ethics} (3\textsuperscript{rd} ed, 2007) 22.}
\end{footnotes}
these laws have been contrary to notions of fairness and human dignity. They have been unethical laws, and as I highlight in Chapter Five, unethical laws remain operative in Australia to this day. Despite this many Anglo-Australians seem to be unwilling to allow themselves to feel outrage at what has happened here, and outrage over what continues to happen here. There seems to be a block in the Australian psyche. There seems to be a popular myth that Indigenous peoples have suffered in the past but that they are now the ones who should bear the responsibility for their healing, poverty and ill health, without seeing a connection between Australia’s racism and the present disadvantage facing Indigenous Australians. This flourishes alongside the myth of Australian nationality where Australia is characterised as a good ‘white nation’.

B. The Good White Nation Once More Made Good? Apology for Atrocities to the Stolen Generations

The first item of business for the new Rudd Labor government was to issue a long awaited apology to members of the Stolen Generations. The Howard government had consistently promoted a view of Australia as a nation characterised by moral goodness. Ghassan Hage has referred to this as the ‘fantasy’ of the good ‘white nation’, a fantasy which was rigorously defended throughout the Howard regime. Hage elaborates on the perception that Australia contains many ‘Good White Nationalists’ who, according to the “‘White nation” fantasy’, demonstrate their goodness through their remarkable tolerance of non-white others. This emphasis on the moral goodness of the nation has become ingrained in Australia’s national mythology. As Suvendrini Perera points out, ‘national mythologies’ assert that Australia is ‘a decent and good colonizer.’ I explore the issue of apology to the Stolen Generations by the

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30 Ghassan Hage, above n 28, 18 and 78–79.
31 Ibid 78.
32 Ibid 18.
33 Ibid 79.
34 Suvendrini Perera, above n 29, 4.
federal government in light of the mythology of Australia as the ‘good white nation’. Drawing upon elements of critical legal theory and critical whiteness studies I argue that the mythology of the good white nation, which has always been central to Australia’s national identity, remains ingrained in the recent Federal Government apology. I contend that the perception of Australia as the good white nation continues in the apology – despite the acknowledgement of some of the grave injustices suffered by Indigenous Australians at the hands of colonial forces. It does this by suggesting that whatever the nation once was in terms of regularly engaging in colonial atrocities – the stain on the national soul has now been removed through the apology – thus the nation has been made good once more, unstained as it were by its troublesome colonial history.

The apology brought to the fore an inner tension within Australia, the desire to appear as ‘the good white nation’ while at the same time maintaining the essential politico-legal framework of a society structured on white supremacy. Prime Minister Rudd’s language was symptomatic of a desire for the nation to be made good once more, through the redemptive act of apology, using an almost religious symbolism. The ritual of the apology has thus been offered as a means of removing ‘a great stain from the nation’s soul’35 and as commencing a ‘new chapter’36 in Australian history. However the apology was never going to be a simple case of uniting Australians around a common goal of remorse for the atrocities that have long been the legacy of colonisation – and unfortunately it did nothing to challenge and reconfigure the colonial power structure which continues to perpetuate racial discrimination through such means as the Intervention.37 There was much divergence between the sorry speeches. Although Rudd spoke in terms of a united Australia offering its apologies to members of the Stolen Generations in a spirit of remorse and reconciliation, the ‘sorry’ speech of then Opposition Leader Brendan Nelson made it clear that there were many who could not say ‘sorry’ without qualifications and finger pointing.

36 Ibid.
Chapter 6 – Conclusion

The apology highlighted the white supremacy which lies at the core of Australia’s national identity. Hage explains that Australia has always been characterised by ‘the “White nation” fantasy’ which is premised upon ‘a fantasy of white supremacy’.\(^{38}\) Australia has long been founded on notions of whiteness, as evidenced by the development and implementation of the White Australia Policy. This privileging of whiteness has been reproduced in the legal system, leading to systematic disadvantage for Indigenous Australians, to the extent that being white in a society that privileges whiteness is something akin to a proprietary interest.\(^{39}\) However white Australia has generally not welcomed analysis of the construction and maintenance of such privilege. In part this reluctance relates to a desire to hold fast to an idealised vision of Australia as a morally good nation,\(^{40}\) a nation which can be distinguished from various non-white morally inferior others. Many non-Indigenous Australians suffer from what Michelle Fine describes as ‘[w]hite glaucoma’,\(^{41}\) a fundamental inability to see the position of privilege that whites have, especially in a colonial society such as Australia. This involves a lack of awareness of the benefits that accrue to whites as a result of the founding and conserving acts of colonial violence.\(^{42}\) This is evident in the debates that have raged within the nation over the vexed issue of native title – with no small amount of reluctance on the part of white Australia to give back what was wrongfully taken. Indeed in many quarters there has been outright hostility to the notion that Indigenous peoples should have any kind of rights to land, particularly the mining and pastoral industries.\(^{43}\) Just as the issue of land rights has brought white privilege to the fore, the calls for apology to members of the Stolen Generations did something to unsettle the settled nature of white colonial privilege,\(^{44}\) highlighting the manner in which atrocious acts were carried out on the basis of racist notions of superiority. Even so, the wording of both the Rudd and the Nelson apologies reveals a desire for national redemption so that the mythological good white nation is made good once more. However to understand the context of the apology it is first necessary to briefly examine the legacy left by the Howard Liberal government.

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\(^{38}\) Ghassan Hage, above n 28, 18.


\(^{40}\) Ghassan Hage, above n 28, 67–68 and 78–79.


\(^{42}\) Jacques Derrida, above n 5, 5 and 55.


1. The Howard Legacy

In 1997 the Human Rights and Equal Opportunity Commission (HREOC) submitted their findings to Federal Parliament in relation to the Stolen Generations of Indigenous children who had been forcibly removed from their families to further national policies of assimilation. The *Bringing them home* report, which had been commissioned by the previous Labor government, made numerous recommendations in terms of government action, including that an apology be issued to members of the Stolen Generations on behalf of the government.\(^{45}\) The Howard government expressed ‘regret’ about Australia’s history of injustice towards Indigenous Australians, but could not manage an apology.\(^ {46}\) The Howard government was opposed to what they considered ‘symbolic’ gestures of reconciliation, such as an apology, preferring what they dubbed ‘Practical Reconciliation’.\(^ {47}\) Hollingsworth suggests that people may have more readily accepted ‘the policy of practical reconciliation if it delivered the promised equity outcomes.’\(^ {48}\) Yet despite the rhetoric of practical reconciliation there is nothing to indicate that the Howard government ‘“delivered better outcomes for Indigenous Australians than their predecessors.”’\(^ {49}\) The ‘practical reconciliation’ approach simply denied governmental responsibility for the current circumstances of Indigenous communities and their connection with Australia’s racist colonial legacy. It urged Indigenous peoples to ‘move on’ from the past, ‘yet steadfastly [and] obstinately, refuse[d] to acknowledge what it is that they must move on from’;\(^ {50}\) and as Reynolds states, wanting Indigenous people to move on from the past ‘is a strange prescription coming from a community which has revered the fallen warrior and emblazoned the phrase “Lest We Forget” on monuments throughout the land.’\(^ {51}\)

Nevertheless former Prime Minister Howard clearly had support in relation to his refusal to give an official government apology to members of the Stolen Generations. For example,

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\(^ {48}\) David Hollinsworth, above n 47, 193.

\(^ {49}\) Altman and Hunter cited in David Hollinsworth, above n 47, 193.

\(^ {50}\) Colin Tatz, above n 27, xv.

some conservative commentators inhumanely suggested that Aboriginal children forcibly removed from their families were ‘rescued’. They suggested that the Stolen Generations should be referred to as the ‘rescued’ generations. Kenneth Minogue even claimed ‘[a]pology is no real help to them, for they have their own lives to live and must find ways of coming to terms with their condition’. This response, whilst remarkable in its callous indifference to the suffering experienced by Indigenous peoples, also conveniently avoids taking responsibility for that ‘condition’ which has been brought about in large measure by consistently oppressive laws and policies developed and implemented by colonial governments.

Throughout the Howard regime ‘the members of the stolen generations were constructed as malcontents, themselves to blame for present circumstances’ and members of the Stolen Generations who sought to litigate their claims against the government in order to obtain some kind of acknowledgment of wrongdoing and compensation were given short shrift. As Hannah McGlade argues:

> Australian courts have instead utilised the cases brought by surviving members of the stolen generation as an opportunity to ‘reconstruct and obscure’ the experience of Aboriginal child removal and recast as benign … past racially discriminatory laws … authorising the removal of children from their families. Analysis of the stolen generation judgements has shown that litigation has ‘… provided a forum where a revisionist colonial account of history has been privileged and legitimised.’

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54 Ibid.
The response of the Howard government to the Stolen Generations was extremely callous. The Howard government quibbled over numbers and contended that children could not accurately be described as ‘stolen’ when they were given over to government officials, and, as Robert Manne aptly points out:

To be informed by a government that there was no “stolen generation” because some children had been removed because of neglect or voluntarily given up, or because 10% did not constitute, according to a dictionary definition, a generation was rather like telling the Jews that there had been no Holocaust (literally a burnt sacrifice) because Hitler’s victims had died by gas or gun and not by fire.58

In attempting to justify his refusal to apologise to the Stolen Generations Howard claimed that this generation should not be made responsible for the sins of our white ancestors, as though the atrocities occurred in a long distant past. He consistently failed to acknowledge the connection between Australia’s racist colonial legacy and the ongoing disadvantage suffered by Indigenous Australians. Howard expressed a clear preference for a sanitised view of Australian history, stating the “‘black armband’ view of our past reflects a belief that most Australian history since 1788 has been little more than a disgraceful story of imperialism, exploitation, racism, sexism and other forms of discrimination”.59

Howard claimed that Australians should celebrate the historical greatness of our nation rather than reflect upon that which is shameful, as though the two are mutually exclusive. In Howard’s estimation ‘[t]he balance sheet of our history is one of heroic achievement and … we have achieved much more as a nation of which we can be proud than of which we should be ashamed’.60 It is illuminating that Howard spoke about a ‘balance sheet’ when Indigenous peoples raised concerns about human suffering caused by colonisation. This view, which seems to be an attempt at some kind of accounting approach, is inappropriate when dealing with issues of grave human suffering.

The very language used by Howard attempted to trivialise the sufferings of Indigenous peoples. Throughout his term of office Howard referred to the discrimination faced by Indigenous Australians as a ‘blemish’ on the nation. For Howard the use of the word ‘blemish’ can be seen as a means of trivialising the atrocities that have been perpetrated against Indigenous Australians. It was part of Howard’s determination to have a denialist

59 John Howard cited in David Hollinsworth, above n 47, 17.
version of Australian history. For example, as Howard spoke these words in the 2007 Federal Election Debate he became visibly animated and thumped the podium, proclaiming: ‘Why as a nation have we become so ashamed of the Australian story? It’s a wonderful story. It’s a story of great achievement; it’s a story of heroic endeavour. It’s not a story without blemish, but it’s a story of which all of us should be immensely proud’.  

In his rush to emphasise the moral goodness of the nation Howard trivialised the worst aspects of Australian history by simply referring to them as a ‘blemish’. In his desire to avoid a negative perception of national identity Howard refused to address the issues with integrity. He referred to the history of invasion, genocide, warfare, theft of land and theft of children as a ‘blemish’. A blemish implies that these events were a mere spot, rather than substantial events which have shaped the nation. Of course the word ‘blemish’ is also used to refer to discolouration of the skin. In this sense Howard’s use of the word ‘blemish’ was very loaded indeed. Those with dark skin were indeed a blemish on the nation according to those aspiring towards a white racial purity in accordance with the “White nation” fantasy. Howard quite literally wanted ‘white out the “black spots” in Australian history’.

The Howard government was concerned with promoting ‘a positive white identity, an identity that makes the white subject feel good’. Howard wanted white Australians to feel ‘relaxed and comfortable’. Indeed Howard declared that Australia was not a racist society, and by promoting the idealised imagery of the good white nation Howard sustained ‘the narcissism of whiteness’. These views shaped Howard’s refusal to apologise to the Stolen Generations.

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60 Ibid.
63 Transcript of the Leaders Debate, above n 61. For a counter position to Howard’s sanitised version of Australian history see Henry Reynolds, Why Weren’t We Told? A personal search for the truth about our history (2000) Chapters Ten and Eleven; Irene Watson, above n 44, 41
64 ‘Howard’s History’, above n 62.
65 Ibid.
66 Ghassan Hage, above n 28, 18.
68 Sara Ahmed, above n 46, 82.
69 David Hollinsworth, above n 47, 19.
70 Ghassan Hage, above n 28, 78–79.
71 Sara Ahmed, above n 46, 82.
2. Some positive changes under Rudd

The election of the Rudd Labor government in 2007 was met with enthusiasm in many quarters. The laws and policies of the Howard government had been heavily critiqued throughout its duration, as had Howard’s refusal to issue an apology to members of the Stolen Generations. After years of frustration with the refusal of the Howard government to apologise to members of the Stolen Generations in relation to horrific government oppression, the news that the Rudd government was going to issue an apology was like a cool breeze on a sweltering summer day. Yet almost immediately there were concerns as to what form the apology would take, how extensive it would be, what specific acts were to be covered, and, significantly, whether it would be used in the quest for compensation for members of the Stolen Generations. Much of this concern was baseless, as the Rudd government issued an apology which was conservative in terms of its consequences. Yet the apology of Rudd does contain some positive changes compared to the response of the Howard government.

Rudd at least showed some indication of a willingness to examine Australia’s colonial history with a modicum of intellectual honesty. Like former Prime Minister Keating, Rudd showed himself to be more concerned about issues of social justice for Indigenous Australians than Howard, who consistently showed a callous disregard for such matters. Rudd at least had the grace to acknowledge that serious trauma has resulted from the forcible removal of Indigenous children from their families. He acknowledged that members of the Stolen Generations ‘have been damaged deeply by the decisions of parliaments and governments’. Although he also chose to use the word ‘blemish’, placed in the context of his speech, it can be seen that Rudd considered the events of forcible child removal as more significant in terms of national character than Howard ever did. Rudd spoke, for example, of the need ‘to deal with the unfinished business of the nation, to remove a great stain from the nation’s soul and, in a true spirit of reconciliation, to open a new chapter in the history of this great land, Australia’. He stated that such events were ‘one of the darkest chapters in Australia’s

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73 Andrew Markus, above n 43, 41–42 and 86.
74 Prime Minister Kevin Rudd, above n 35.
75 Ibid.
history’.76 This level of acknowledgement was long overdue. It is therefore an important ‘gesture toward peace, between non-Indigenous and Indigenous Australians’.77

The Rudd apology acknowledged the searing pain which ‘screams from the pages’ of the Bringing them home report.78 Rudd acknowledged that such accounts ‘cry out for an apology’.79 The response of the Rudd government to the Stolen Generations issue is markedly different to that of the Howard government, which has been described as ‘pedantic and tactless in almost equal measure’.80 Rudd condemned the ‘stony and stubborn … silence for more than a decade’ on the part of the Howard government in response to the demand for an apology.81 Unlike Howard’s response, the Rudd apology demonstrated a willingness to dig beneath the statements of purported benevolence in relation to forcible child removal and examine the detrimental consequences of such removal in the lives of those removed. After referring to the blatantly eugenicist policies of the Northern Territory ‘Protector’ who clearly advocated a method for the eradication of Indigenous peoples, Rudd stated:

> These are uncomfortable things to be brought out into the light. They are not pleasant. They are profoundly disturbing. But we must acknowledge these facts if we are to deal once and for all with the argument that the policy of generic forced separation was somehow well motivated, justified by its historical context and, as a result, unworthy of an apology today.82

These words were in marked contrast to the views expressed by the Howard government and many conservative commentators who had long argued that various Indigenous people who had been removed were now ‘successful’ because of their superior education and opportunities – with this reasoning used as some kind of justification that the experiences of removal could not therefore have been as bad as some were now claiming. This type of thinking clearly influenced the denialism of the Howard government in its refusal to apologise.

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76 Ibid. This can be compared to then Prime Minister Paul Keating’s Redfern speech which spoke in much stronger terms of the need to recognise that white Australia bears an enormous responsibility for ‘failure to bring much more than devastation and demoralisation to Aboriginal Australia’ – ‘Paul Keating’s Redfern Speech’, 10 December 1992, <http://www.australianpolitics.com/executive/keating/92-12-10redfern-speech.shtml> at 26 November 2009. It is also weaker than the reference made to Australia’s ‘national legacy of unutterable shame’ by Deane and Gaudron JJ in Mabo v Queensland (No 2)(1992) 175 CLR 1 at 104. These statements expressed far stronger views on the importance of these events in shaping Australia’s national landscape.
77 Goldie Osuri, above n 37, 1.
78 Prime Minister Kevin Rudd, above n 35.
79 Ibid.
80 Robert Manne, above n 58, 83.
81 Prime Minister Kevin Rudd, above n 35.
82 Ibid.
for atrocities to members of the Stolen Generations and contrasts sharply with the approach taken by Rudd.

Rudd also dismissed another tactic of the Howard government when trying to avoid accountability to the members of the Stolen Generations, that of claiming these events happened in the long ago past. Rudd emphasised that the events are much nearer to this generation than Howard or the Howard-like intellectuals cared to acknowledge, stating ‘let us remember the fact that forcible removal of Aboriginal children was happening as late as the early 1970s. The 1970s is not exactly a point in remote antiquity. … It is well within the adult memory span of many of us.’

He placed responsibility for this atrocity with the parliament, something that Howard had been fiercely opposed to. Rudd acknowledged ‘the laws that our parliaments enacted made the stolen generations possible. We, the parliaments of the nation, are ultimately responsible, not those who gave effect to our laws. The problem lay with the laws themselves.’ This was at least some acknowledgment of the role that law has played in facilitating colonial oppression. Rudd spoke clearly of the role of government in the oppression of successive generations of Indigenous Australians. He pointed out that the government was to bear responsibility for these atrocities because it was the parliament which had enacted the legislation that authorised the forcible removals and thereby created the machinery which facilitated the creation of the Stolen Generations to begin with. The logic of this concept seemed to elude Howard throughout his entire term of office. However the apology was never going to be a simple case of uniting Australians around a common goal of remorse for the atrocities that have long been the legacy of colonisation. Ingrained in the wording of the apology is the desire for national redemption.

3. The Nelson ‘Apology’ and Justification for the Intervention

Nelson deliberately set out to justify the previous Liberal party stance in relation to the Stolen Generations. The ‘apology’ of Nelson was saturated with ‘good white nation’ mythology. Although Rudd spoke in terms of a united Australia offering its apologies to members of the Stolen Generations in a spirit of remorse and reconciliation, the ‘sorry’ speech of Nelson made it clear that there were many who could not say ‘sorry’ without qualifications and finger

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83 Ibid.
pointing. His was a strange form of apology, the kind one might make when caught out in some form of wrongdoing that one does not really want to apologise for. It resonated with elements of the same paternalistic dogma that caused the Stolen Generations. Essentially he said ‘we are sorry, BUT it was all so well intentioned – and hey by the way – look at the mess created by Aboriginal self-management in the Northern Territory’. Nelson seemed to be channeling the spirit of John Howard who found himself unable/unwilling to attend the ceremony and sorry speeches. Nelson made repeated references to the ‘good intentions’ and ‘the best of intentions’ of white Australians. He found himself unable to resist sympathising with those poor white ‘decent Australians’ who ‘are hurt by accusations of theft in relation to their good intentions’. Nelson found it desirable to state ‘[i]t is reasonably argued that removal from squalor led to better lives’ – with traces of the ‘rescued children’ dogma highlighted above. Odette Kelada has recently written of the way in which the ‘White Nation Fantasy … depends on paternalism’ and this is evident in the Nelson ‘apology’. It reeks of the same kind of white saviour complex that led to the oppressive assimilationist laws and policies being implemented in the first place.

Nelson’s speech moved from bad to worse. On a day that was meant to be commemorating the suffering of Indigenous Australians, Nelson saw fit to make reference to the ANZACs. It was a desperate plea to highlight the suffering of white Australians too, and totally inappropriate for the spirit of the occasion. It merely functioned as an attempted diversion from colonial responsibility for atrocities committed against Indigenous Australians. As though this was not bad enough, Nelson then saw fit to argue that the ‘disgraceful circumstances which many Indigenous Australians find themselves today’ could be attributed in large measure to ‘alcohol’ and what he described as ‘welfare without responsibilities’. These factors, according to Nelson, led many Indigenous people to live ‘lives of existential aimlessness’. In saying as much Nelson demonstrated a complete lack of respect for cultural differences of lifestyle, and failed to take into account that what may look like ‘existential aimlessness’ to one cultural group may well look like enlightenment or at least the beginning

84 Ibid.
86 Ibid.
87 Ibid.
88 Ibid.
89 Ibid.
90 Ibid.
of wisdom to another. Although the speech had well and truly plummeted by that point, Nelson aimed even lower, using the occasion as an opportunity to try to justify the government’s military presence in Northern Territory Aboriginal communities, knowing full well that numerous protestors had gathered outside parliament that day to object to the Intervention. He saw fit to describe male abuse against Indigenous children occurring in the context of ‘their mothers … drinking alcohol’ \(^{91}\) – as though the mothers were partly at fault for the abuse. His allusion to the drinking of alcohol on the part of Aboriginal mothers ties in with traditional negative stereotypes about Aboriginal mothers being unfit to care for their children, \(^{92}\) and is incongruous with genuine apology to the Stolen Generations.

The sorry speeches provided an opportune moment to address the issue of racism against Indigenous Australians that remains interwoven throughout the fabric of Australia. \(^{93}\) Racism degrades those who are subjected to negative stereotypes along with those who engage in subjecting others to negative stereotypes. \(^{94}\) ‘Racism and racial stigmatization harm not only the victim and the perpetrator of individual racist acts but also society as a whole.’ \(^{95}\) Yet somehow Nelson saw fit to resort to negative racial stereotypes of Indigenous peoples as a group who are incapable of caring for their children and needing government intervention in the form of the racist legislative package passed by the Howard government in 2007, \(^{96}\) legislation that has received substantial criticism by many within Indigenous communities. \(^{97}\) As I stated in Chapter Five, this legislation was allegedly in response to the *Little Children...
are Sacred report,\textsuperscript{98} yet the government conveniently neglected the fact that the ‘national emergency’ in relation to child sexual abuse in remote Indigenous communities has been, as Judy Atkinson rightly argues, an ‘emergency’ for at least ‘twenty years’.\textsuperscript{99} Like the ‘protection’ legislation which facilitated the Stolen Generations, the Intervention legislation has been created in a ‘discourse of protection and problem-solving [and] is racially framed, directed and applied’.\textsuperscript{100} On the day of the sorry speeches, objections to this legislation and its implementation were the subject of protest at the Aboriginal Tent Embassy. One of the chief complaints has centred on the lack of consultation with Indigenous people and the imposition of yet another paternalistic ‘top down’ approach on Indigenous communities.\textsuperscript{101}

The sorry speeches provided an opportune moment for Australia to engage with its racist colonial legacy. It provided an ideal opportunity to consider the ‘the moral and ethical complexities of confronting racism and genocide’.\textsuperscript{102} However this opportunity was not fully taken advantage of. There was a glossing over, in Nelson’s ‘sorry’ speech, of the atrocities perpetrated by the colonisers. He even saw fit to remind everyone of the justifications for the most recent set of oppressive laws detrimentally affecting Indigenous peoples in the Northern Territory – a legislation package that authorised military invasion of Aboriginal lands, inspections of all Indigenous children to uncover sexual abuse regardless of evidence, extreme levels of surveillance, quarantining of Indigenous people’s welfare payments, and removal of their land rights.\textsuperscript{103} Legislation that Nelson condescendingly indicated was ‘for their own good’ – an approach resonating with the same racist assumptions that the sorry speeches were meant to be addressing – which was ironic indeed. This inference that such actions are carried out ‘for their own good’ is intricately connected with the fantasy of the

\textsuperscript{98} Ampe Akelyernemane Meke Mekarle – ‘Little Children are Sacred’ Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse (2007) <http://www.inquirysaac.nt.gov.au> 26 November 2009. This is also known as the Little Children are Sacred report.


\textsuperscript{100} Goldie Osuri, above n 37, 2.


\textsuperscript{102} David Hollingsworth, above n 47, 20.

\textsuperscript{103} Jennifer Martiniello, above n 97, 123; Irene Watson, above n 37; Goldie Osuri, above n 37, 7; Odette Kelada, above n 37, 5; and Tom Calma (The Aboriginal and Torres Strait Islander Social Justice Commissioner) on SBS, ‘Are They Safer’, Insight, 18 March 2008.
good white nation, because the good white nation claims to act for the good of others – even if those others have different perceptions of what is ‘good’. The fantasy declares that pure benevolence lies behind the actions taken by the good white nation; that such actions are not tinged with colonial arrogance, racism and greed.

4. Apology as redemption

Although the Rudd apology was drastically better than the approach taken to the Stolen Generations by Howard or Nelson, on a closer reading of the Rudd apology it can be seen that it also contains traces of similar ‘good white nation’ mythology. Like Howard, Rudd also used the word ‘blemish’ to describe horrific acts which arguably define the character of the nation. Rudd spoke of the need to reflect on ‘this blemished chapter in our nation’s history’. As explained earlier, the use of the word ‘blemish’ is a loaded word, and one that, in my opinion, was poorly chosen, by both Rudd and Howard who preceded him. It implies that the colonial history of oppression towards Indigenous peoples is not really that significant.

Rudd’s language was also symptomatic of a desire for the nation to be made good once more, through the redemptive act of apology. Rudd therefore spoke of reconciliation being ‘a core value of our nation’ which embodies ‘a fair go for all’, drawing upon Australia’s popular rhetoric about ‘tolerance’, ‘equality’, and the land of the ‘fair go’. These concepts were greatly emphasised under Howard and can be seen as hallmarks of the mythology of the good white nation. Rudd also referred to the nation ‘wrestling with our own soul’, language with deep religious symbolism, as it faces ‘the truth: the cold, confronting, uncomfortable truth’ of the Stolen Generations. Rudd opened by saying the parliament was in session ‘to deal with this unfinished business of the nation, to remove a great stain from the nation’s soul’. Therefore it seems that Rudd saw the apology as significant in terms of removing the national ‘stain’ of Australia’s appalling treatment towards Indigenous peoples. This seems to resonate with an almost religious symbolism, as the national narrative is rapidly recast into the now redeemed nation entering its ‘new chapter’ where a ‘fair go’ will be provided for all. The

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104 Odette Kelada, above n 37, 7.
105 Prime Minister Kevin Rudd, above n 35.
106 Ibid.
107 Ghassan Hage, above n 28, 78–79.
108 Prime Minister Kevin Rudd, above n 35.
109 Ibid.
words have been uttered by one with a priest-like authority, and now it has been declared that the stain is removed.

Rudd’s symbolic language also correlates with what Hage has written about the way in which the ‘white nation fantasy’ involves a construction of an aspirational or idealised nation – here it involves the nation being made good by atonement which was said to be delivered via the apology. Rudd’s use of religiously symbolic language raises interesting questions, such as, what would it actually take to remove the stain from the soul of the nation? Can the stain be removed by words alone or is some form of ‘repentance’, in the sense of heading in the opposite direction of the wrongful conduct, actually required? Is it possible to remove such a deeply embedded stain? Or does the nation need to learn how to relate to this stain in a different way? While it is certainly worthwhile considering what it might take to remove this stain from the national soul, I argue that it is premature to declare the national soul cleansed from any former stain regarding treatment of Indigenous Australians. The stain is deeply embedded within the fabric of the nation. Whatever it might take to launder the stain from the soul of the nation, I suggest it is not something that can be achieved by words alone, however fine those words may be. It undoubtedly will not be achieved without reparation. Yet the Rudd apology implies that the soul of the nation is cleansed via the apology, he spoke of the apology as the vehicle for ‘righting the wrongs of the past’, and it has now been declared so by the seat of white colonial power. A new reality is therefore constructed – what was discriminatory in terms of historical treatment of Indigenous Australians has been declared wanting – but the ‘new chapter’ is said to begin. Despite this, there are links between past and present racist discrimination which remain unacknowledged and unaddressed. Although Rudd identified the responsibility of Parliament in creating laws which made the Stolen Generations possible, there was no acknowledgement of the continued acts of legislative paternalism via the more recent Intervention legislation, and no commitment to repealing the aspects of this legislation which have rightfully been condemned as continuing in the same paternalistic vein as the assimilation legislation that the apology was meant to address. In this sense the Rudd apology failed to address contemporary acts of racist

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111 Prime Minister Kevin Rudd, above n 35.
discrimination being perpetrated by Parliament, still failing to provide Indigenous people with the famed Australian ‘fair go for all’.

Of course the Rudd apology went a long way towards addressing the stain on the Federal Government over its failure to apologise to the Stolen Generations. This had become a source of shame for many non-Indigenous Australians, yet this too was interlinked with the mythology of the good white nation. Ahmed has explored well the place of shame in the construction of national identity, suggesting that for non-Indigenous Australians ‘our shame means that we mean well, and can work to reproduce the nation as an ideal’. She explains how the ‘politics of shame is contradictory’ because it is inevitably linked with a desire to restore national pride. This dynamic can be seen at work in the apology where the apology itself ‘becomes evidence of the restoration of an identity of which we can be proud’. This was alluded too by Rudd who emphasised the importance of the apology in its capacity ‘to transform the way in which the nation thinks about itself’. In this way the apology became central in reconstructing white national pride and reconfiguring Australia as the good white nation. It was a vehicle through which non-Indigenous Australians were encouraged to feel better about the nation. Ahmed writes that ‘feeling better’ is important, but emphasises that ‘[f]eeling better, whatever form it might take, is not about the overcoming of bad feeling, which are effects of histories of violence, but of finding a different relationship to them’. Similarly I argue that feeling better in terms of the stain on the soul of the nation regarding Australia’s racist colonial legacy is not about overcoming national shame and converting it into national pride, but of finding a different relationship to the stain. I suggest that the stain on the soul of the nation is what it is – what is done cannot be undone. Yet as a nation we can determine not to go down the same destructive even if well-intentioned paths of paternalism. This would require, at the very least, a substantial amendment or complete repeal of the current Intervention legislation and nothing less than full consultation and collaboration with Indigenous Australians. However as the recent government report, Closing the Gap in the

113 Sara Ahmed, above n 46, 78.
114 Ibid 77, emphasis removed.
115 Ibid 79.
116 Ibid 77; and Interview with Gary Foley by Crystal McKinnon, above n 2.
117 Prime Minister Kevin Rudd, above n 35.
118 Interview with Gary Foley by Crystal McKinnon, above n 2.
119 Sara Ahmed, above n 46, 83.
120 Ibid 84.
Northern Territory reveals, the Federal Government is committed to continuing the Intervention.\textsuperscript{122}

5. Concluding comments re the Apology

Like Howard before him, Nelson claimed that it was necessary to evaluate Australia’s history on balance, and he concluded his ‘sorry’ speech by honoring the suffering of all Australians in building the nation, not particularly members of the Stolen Generations. In doing so he honoured the efforts of all the good white colonisers who had such benevolent intentions. It showed a complete lack of statesmanship, and was well deserving of the single digit approval rating Nelson earned in the days following. His speech was met with no small amount of frustration on the part of numerous Indigenous people, many of whom turned their backs on him as he moved into paternalistic justifications for the Intervention. As Graham Ring observes, ‘Nelson started off well and then got steadily worse. His reference to the service of Australian soldiers overseas was distracting, and his harping about the NT intervention was unnecessary and jarring’.\textsuperscript{123}

However even Rudd’s speech, sensitive though it was in many respects, left several significant issues unaddressed which could have been dealt with differently. As mentioned above, Rudd failed to address the issue of the Intervention carrying on in the same paternalistic vein as the removal legislation. He also made several broad claims about what was being achieved by the apology – the removal of the stain on the national soul and the righting of past wrongs. Yet although ‘[t]he recognition of injury and injustice does matter’,\textsuperscript{124} I argue that the stain on the soul of the nation remains. In Rudd’s speech there was also an absence of a reference to ‘genocide’, which arguably is an apt term to describe the conduct of Australian colonisers.\textsuperscript{125} Rudd could have gone further in addressing Australia’s

\textsuperscript{122}  Department of Families, Housing, Community Services and Indigenous Affairs, above n 13, 4.
\textsuperscript{123}  Graham Ring, “‘Sorry’ a triumph, but only the start” (2008) 147(7) National Indigenous Times 26, 26.
racist colonial legacy and drawn stronger links between past injustice and present day disadvantage facing Indigenous Australians.\textsuperscript{126} He neglected to address the manner in which the Federal Parliament has been suspending the \textit{Racial Discrimination Act 1975} (Cth) in order to sidestep the protection afforded under it for Indigenous peoples.\textsuperscript{127} He also failed to appropriately address the issue of compensation, along with Nelson, who expressly stated that there should be no compensation for members of the Stolen Generations.\textsuperscript{128}

Yet despite Parliament’s claims that compensation for members of the Stolen Generations will not be forthcoming and is not appropriate, Indigenous leaders have argued that compensation is part of the way forward and that those who have been treated unjustly under the law ought to be compensated for their suffering.\textsuperscript{129} It has been suggested that ‘Rudd’s apology to the Stolen Generations was moving, but did not go far enough’.\textsuperscript{130} Michael Mansell has argued that the government should compensate members of the Stolen Generations and that it is unfair of the government to force Indigenous Australians to seek redress through the courts.\textsuperscript{131} While calls for compensation may have thus far found little favour in the mainstream political realm, there are strong justifications for compensating members of the Stolen Generations.\textsuperscript{132} Sam Garkawe argues strongly that ‘in a materialistic society such as Australia a monetary award is probably the best form of acknowledgment that any government can provide. It represents a societal recognition in a very public manner that a wrong has been committed’.\textsuperscript{133} Garkawe maintains that ‘reparations are essential to the reconciliation process’.\textsuperscript{134} There are also arguments based on the need to act with ‘[m]oral responsibility’, the inappropriateness of ‘unjust enrichment’, and ‘[p]romoting social justice and equality of outcomes’.\textsuperscript{135} Governments regularly engage in programs designed to compensate and assist whites, however they balk at making payments to members of the

\begin{itemize}
\item Palmer, above n 1, 1–3; Greta Bird, \textit{The Civilizing Mission: Race and the Construction of Crime} (1987) 10 and 40; David Hollinsworth, above n 47, 187–188.
\item Interview with Gary Foley by Crystal McKinnon, above n 2.
\item Larissa Behrendt, Chris Cunneen and Terri Libesman, above n 12, xiv and 333.
\item Opposition Leader Dr Brendan Nelson, above n 85.
\item Ibid.
\item Michael Mansell, interview, SBS, 13 February 2008.
\item Ibid n 32, 278.
\item Ibid 281.
\item Larissa Behrendt, Chris Cunneen and Terri Libesman, above n 12, 44–45.
\end{itemize}
Stolen Generations, while at the same time denying the racist undercurrent of their objections. As Martha Mahoney so astutely points out, ‘[p]rograms such as aid to agribusiness and bailouts for large corporations are officially treated as if they are “non-raced” when in actuality they are “white-raced”’.\(^{136}\) Also, as James Cockayne asserts, ‘[u]nless we create a … space for the reparation of members of the stolen generations, we will not be able to heal the injustices wrought by these past practices of forcible removal. Without such a space, there will be no home for reconciliation.’\(^{137}\)

Reparation is a significant aspect of the journey towards healing.\(^{138}\) Thus far we have had via the apology a partial confession of the sins of the nation (a full confession would involve admission of genocide) and no reparation. Yet without reparation claims to national ‘goodness’ remain illusory.\(^{139}\) Andrew Lynch rightly argues ‘[a]n apology without any attempt at atonement is a meanly given thing’.\(^{140}\) Surely ‘the good nation’ is one with the willingness to take full responsibility for its failings as well as its successes.

Whilst a Compensation Tribunal has been set up in Tasmania, other Australian jurisdictions have yet to follow suit.\(^{141}\) No doubt the calls for compensation for members of the Stolen Generations will continue. Time will tell how the Labor government will address this issue, whether it will merely be a matter of fine words or the substantive justice that is longed for. There is clearly a long path to travel if non-Indigenous Australia is serious about healing the wounds inflicted by over two hundred years of racial oppression.

The reality is, white Australians have ‘benefited and continue to benefit from Aboriginal dispossession and exploitation’.\(^{142}\) The fact that politicians quibble over compensation when ‘there is an accumulated debt that needs to be acknowledged and repaid’ is a tragedy.\(^{143}\) However there seems to be little acknowledgment by government of this existing debt. The apology to members of the Stolen Generations did not address this issue either. The apology


\(^{137}\) James Cockayne, above n 47, 583.

\(^{138}\) David Hollingsworth, above n 47, 22.

\(^{139}\) Interview with Gary Foley by Crystal McKinnon, above n 2.


\(^{141}\) Human Rights and Equal Opportunity Commission, Us Taken-Away Kids – ‘Commemorating the 10th anniversary of the Bringing them home report’ (2007) 27.

\(^{142}\) David Hollingsworth, above n 47, 21 and 244.
tinkers at the edges of a racist colonial order, leaving the essential foundations untouched and unexamined. It ‘presupposes both the existence of and the legitimacy of existing hierarchical institutions’ leaving intact the assumptions of white supremacy which remain at Australia’s core. Yet at the same time it resonates with concern about Australia being perceived as a morally good nation with all stains removed from the national soul. I argue that the white power to shape the nation is still endorsed throughout the apology, but there is a change in the desired perception of how white power operates in the construction of national identity. According to Rudd the apology removed the stain from the national soul. I suggest that this amounts to wishful thinking. Recognition of the injustice suffered by members of the Stolen Generations does not do away with the injustices themselves. Although acknowledgement of wrongdoing is extremely important it does not right those wrongs. To launch into celebrations over the moral goodness of the nation now that an apology has been issued to the Stolen Generations is premature. As long as oppressive laws and policies remain in force national self-congratulation is misplaced. The apology was a gesture which has laid the foundations for more positive outcomes to be achieved in the area of Australian race relations, it was a good first step, but many more are necessary in a journey towards substantive justice for Indigenous peoples. As Graham Ring states, ‘this is the beginning of the race, not the end’. Following the apology many Indigenous people have concluded that ‘what really matters is what happens the day after.’

C. Conclusion

In her Poem ‘Face the Truth’, Anita Heiss, an Aboriginal author, poet and activist, has this to say to contemporary Australia:

Why is it so hard to face the truth?
The facts around how this country was really settled?
Why do you lack the integrity to honestly portray the history of this country?

143 Ibid 21.
145 David Hollingsworth, above n 47, 244.
146 Sara Ahmed, above n 124, 14.
147 Interview with Gary Foley by Crystal McKinnon, above n 2.
148 Sarah Maddison, above n 121, 213.
149 Graham Ring, above n 123, 26.
The excuse that the world over was being colonized,
Does not validate the way in which you treated,
and continue to treat us
Even with your political correctness of today
You can’t bear to face or admit the reality of
Not only past injustices
But those you continue to perpetuate
and attempt
To disguise and hide.

Ironically your own government research, reviews and
evaluations
Continue to prove that we are an oppressed, disadvantaged people.
Legacies of a cruel invasion
and continued colonisation.

You may have impacted on the way in which we
live, work, relate to each other.
But you will never affect our spirit as Aboriginal people.

So you might as well own up and tell the truth. 151

In my thesis I have been attempting to ‘own up and tell the truth’ 152 about the oppressive racism inherent in the Anglo-Australian legal system. To those who might consider my research to be too negative I would say ‘[u]ncovering what is wrong must always precede the discovery of what is right.’ 153 In Australia there is a national legacy of dealing with Indigenous peoples in an oppressive manner, with legislation enacted which further entrenches their disempowerment. It is time for change. If this research contributes in any way to the creation of a growing awareness that legal processes must desist from facilitating the oppression of Indigenous peoples then I will have achieved my aim. Of course there is much more to be accomplished in relation to social justice for Indigenous Australians. I do not pretend otherwise. Nor do I pretend to be able to exhaustively address the wide range of

150 Sarah Maddison, above n 121, 226.
152 Ibid.
social justice issues facing Indigenous Australians in this work. I simply aim to address some of the issues I have felt compelled to write about, namely oppressive exercises of parliamentary power and the injustice of adhering to a positivist framework in adjudicating such racist legislation. I hope that my contribution will lead to some small step in a better direction for Indigenous and non-Indigenous Australians. For I believe that we will continue to be ‘diminished as a nation’154 as long as we fail to redress the injustices in our midst.

Howard successfully changed the face of Australian race relations during his time in office.155 I would like to see it change into something better than his unworkable assimilationist fantasy. Although some positive steps have been taken under the Labor government much remains to be done in order to attain substantive justice for Indigenous Australians. I maintain that it is essential to respect the desires of Indigenous peoples in relation to self determination.156 Oppressive legislation and policy remain in place, and I cannot help but wonder, how far down this path of dehumanisation will Australia continue to travel? What will it take to create a new path, a new way of interacting with each other? An awakening of empathy and emotional intelligence are required.157

The nation of Australia is in its adolescence and has a long way to go before attaining maturity. ‘It is a measure of the maturity of a society that it can face up to the atrocities in its past,’158 however Australia ‘remains stuck in a track marked by its colonial genesis. It continues to hold assumptions of white supremacy at its core.’ 159 When compared to other nations who have wronged the original owners of the land Australia’s response to Indigenous Australians is abysmal. South Africa has attempted to face its past with the Truth and

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154 Greta Bird, ‘An unlawful non-citizen is being detained or (white) citizens are saving the nation from (non-white) non-citizens’ (2005) 9 University of Western Sydney Law Review 87, 110 and fn 135; Mabo v Queensland (No 2)(1992) 107 ALR 1 at 82 per Justices Deane and Gaudron.
155 Andrew Markus, above n 43.
158 Geoffrey Robertson, above n 4, 199.
Reconciliation Commission.\textsuperscript{160} New Zealand has made the Treaty of Waitangi legally enforceable and has set up a Tribunal to hear Maori claims.\textsuperscript{161} Canada and America have acknowledged that their Indigenous peoples have “‘first nation’” status and engage in ‘true conversation about renegotiating understandings, treaties and compacts.’\textsuperscript{162} By contrast Australians ‘shrink and retreat from any and all such notions.’\textsuperscript{163} As Tatz so aptly points out, ‘[i]f the former colonial dominions were to be viewed as competing to address and redress the past as a way of confronting the present and handling the future, Australia would be running a clear last.’\textsuperscript{164} This is not a national legacy of which Australia can be proud.

I argue that we cannot ignore the ways in which Australia’s colonial past continues to shape the present, and we have a responsibility to address these issues.\textsuperscript{165} As Richard Mohr argues, ‘[t]o continue racist and potentially genocidal policies constitutes an ethical betrayal and a refusal of responsibility.’\textsuperscript{166} Australia’s racist colonial legacy remains and continues to disadvantage Indigenous Australians today. I highlight how law plays a role in facilitating colonial dominance, facilitating and endorsing trauma. This is a grave injustice. To attain a politico-legal culture which has integrity Australia must face itself as it is.

White Australia has a long path to travel to take responsibility for the atrocities that colonialism has inflicted on Indigenous peoples. Instead of fantasising that the racism was merely committed by others in another time, in another era,\textsuperscript{167} and that no responsibility inheres in us as the beneficiaries of racist practices, I argue that we do bear responsibility as beneficiaries of the racist colonial legacy at work within Australia. It is not a responsibility that can simply be wished away because of the difficulty of the burden. Derrida explains:

> the fact is that we are responsible for some things we have not done individually ourselves. We inherit a language, conditions of life, a culture which is, which carries the memory of what has been done, and the responsibility, so then we are responsible for things we have not done ourselves, and that is part of the concept of heritage. We are responsible for something Other than us. This shouldn’t be constructed as a very old conception of collective responsibility, but we cannot simply say: “well, I, I wash my

\textsuperscript{160} Colin Tatz, above n 27, 166.
\textsuperscript{161} Ibid.
\textsuperscript{162} Ibid 167.
\textsuperscript{163} Ibid.
\textsuperscript{164} Ibid. Australia is the only former British colony not to enter into a treaty with its Indigenous peoples. Sarah Maddison, above n 121, 45.
\textsuperscript{166} Richard Mohr, above n 165, 18.
hands, I was not here”. If I go on drawing some benefit from this violence and I live in a culture, in a land, in a society which is grounded on this original violence, then I am responsible for it. I cannot disclaim this history of colonial violence, neither in Australia nor anywhere else.168

This generation bears responsibility for the acts of colonial violence perpetrated in Australia. All non-Indigenous Australians benefit from the legacy of colonial violence carried out against Indigenous peoples. Barbara Flagg suggests that ‘even seemingly “benign” participation in racially unjust institutions fully implicates individuals in the maintenance of white supremacy. Those who wish to claim a nonracist white identity must find active ways of dismantling existing systems of racial privilege.’169 She states that ‘whites tend to adopt the “things are getting better” story of race relations, which allows us to suppose that our unfortunate history of socially approved race discrimination is largely behind us.’170 However many contemporary Indigenous writers argue that this is not so, and that oppressive racist legislation and policy is creating misery today.171 White supremacy refers not only ‘to the self-conscious racism of white supremacist hate groups’ but also ‘to a political, economic and cultural system in which whites overwhelmingly control power and material resources’.172 Whites overwhelming control political, legal, social and economic power Australia. This ‘produces material and psychological benefits for whites’, but extracts ‘a heavy material and psychological price’ from Aboriginal peoples.173

168 Jacques Derrida, above n 165, 102.
170 Ibid 47.
172 Frances Lee Ansley, ‘White Supremacy (And What We Should Do about It)’ in Richard Delgado and Jean Stefancic (eds), Critical White Studies – Looking Behind the Mirror (1997) 592.
173 Ibid.
No genuine reconciliation can occur between Indigenous and non-Indigenous Australians without there being a full and frank acknowledgment of the atrocities of colonisation.\textsuperscript{174} It is necessary that we whitefellas learn to do things differently; and promote substantive justice in our legal and political systems. Only if we promote substantive justice can we speak with integrity about reconciliation. Until then our words are meaningless. In dealing with the issues surrounding race relations in Australia we ought to think about what kind of legacy we want to leave for future generations. We as a society need to ask ourselves whether we are willing to leave the present legacy, imbued as it is with blatant discriminatory treatment, gross injustice and trauma, to our children and our children’s children. What kind of society will we be judged to be a hundred years from now? How would we like to be judged?

I assert that the challenges facing Indigenous communities and Indigenous peoples are effects of a racist colonial society and politico-legal system which continues to perpetuate disadvantage.\textsuperscript{175} Non-Indigenous Australia has a responsibility to ‘set its own house in order.’\textsuperscript{176} As Valerie Kerruish argues, ‘just as historically, Aboriginal survival and the survival of Aboriginal culture owes nothing to the humanist conceits of Western culture and everything to the Aborigines own capacity for endurance, so in the present and future, all that Western thought can contribute is to set its own house in order.’\textsuperscript{177} By highlighting deficiencies in the Australian politico-legal system in its treatment of Indigenous peoples I want to contribute to this process. How Australia addresses these issues has implications for the moral fabric of the nation.\textsuperscript{178} How we deal with the most disadvantaged members of society speaks volumes about our national character.\textsuperscript{179} Those who are defined as sub-human in genocidal societies are treated as though they are so inferior that the same rights that others have should not be applied to them.\textsuperscript{180} This happens repeatedly in Australia where, despite the lip service of governments, oppressive exercises of parliamentary power continue to inflict their malignant presence on the legal landscape and, significantly, on Indigenous peoples. As

\textsuperscript{174} Bain Attwood, \textit{Telling the Truth About Aboriginal History} (2005) 195–196; Sarah Maddison, above n 121, 221.

\textsuperscript{175} Irene Watson, ‘Aboriginal Women’s Laws and Lives’, above n 37, 104.


\textsuperscript{177} Ibid.


\textsuperscript{179} Geoffrey Robertson, above n 4, 8 and 98.

the late great Ngarrindjeri woman Doreen Kartinyeri states, ‘Today, as it was 200 years ago, there’s still genocide in this country. We are not … being killed by strychnine; we are being destroyed by policies and political people and the law of the land.’\(^{181}\) Oppressive laws are tantamount to incremental doses of arsenic.\(^{182}\) I live in hope that as a society we will stop feeding upon the poison and find an antidote before it is too late. One thing is clear, no ‘solution’ will be found in a ‘top down’ approach from government. There is no hope of resolving the challenges of Australia’s racist colonial legacy without genuine consultation, collaboration and empowerment of Indigenous Australians. The Australian government needs to address the matters that remain outstanding in terms of its racist colonial legacy: healing, reparation, acknowledgement of Indigenous sovereignty, the right to self-determination, a treaty, and freedom from oppressive exercises of parliamentary power.\(^{183}\)


My PhD Journey

This research has become a part of me
I’ve given my heart to it so completely
It’s taken me on an incredible journey
Exploring the deepest depths of depravity
My mind has been saturated with tragedy
The way a winter lawn is drenched with dew
It has led me into the shadow
And left me dwelling in darkness
With tears rolling down my cheeks
With eyes wet for weeks
Weeping over the tragedy
Weeping over their pain
And feeling disdain for the disgustingly racist institutions
That brought it all to pass
And so I’ve done something that’s not usually done in a law PhD
I’ve written passionately
Unable to disguise my disgust at the racist oppression
So normalised through the politico-legal institution
I know that having made this PhD journey I will never be the same
So much dross has been consumed by a flame
And my journey is almost at an end
It’s like giving birth and seeing the crowning of the head
I have almost finished this journey
Almost seen this research project through
And now I am thinking it is almost time to start anew
I long for some rest – for a period of leisure
I long for some lightness – for a season of pleasure
I have journeyed into darkness
But there must be balance in all things
So now my heart needs to bask in the beauty that sunlight brings...
APPENDIX

Personal Motivations for the Research Project

I have been influenced by the notion that dehumanising people is contrary to many spiritual traditions and liberal political ideology. Dehumanising legislation runs counter to what many religious traditions teach about the value of human life. For example, the bible states that humans have been made in the image of God.¹ Another example is that the teachings of Buddhism recommend that all life be treated respectfully.² Even within liberalism, in political theory, there is Mill’s harm principle advocating that humans should be able to do what they like so long as they harm no-one else.³ The prominent liberal philosopher, John Stuart Mill stated “the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others”.⁴ There seems to be a multitude of reasons explaining why it is that all humans should be treated respectfully, why all humans should be treated with dignity. Yet despite the spiritual mandates to love others⁵ and the political ideology of not harming others embodied in Mill’s harm principle, humans continue to engage in harmful behaviour. My research explores this problem of harm where its ideological basis is founded on racial discrimination. Much of this material is disturbing. It highlights how some humans manage to look at other people and not see them as people. I do not really understand how that can be so, although it is obviously connected to a desire for wealth and power even if this comes at the expense of the well-being of fellow human beings. This issue has driven me to explore some of the most frightful displays of appallingly inhumane treatment the world has ever seen. In each regime under study the dominant group looked at people they deemed undesirable and somehow did not see them as people. They were treated as sub-human at best and were often likened to non-human life forms.⁶

¹ Genesis 1:26–27.
⁵ Found for example in the religious traditions of Christianity and Buddhism.
I believe that any body of knowledge developed by a scholar is inevitably imbued with the perspective of that researcher. My academic position and my research methodology are influenced by my Christianity. My faith in God fuels my passion about the need for social justice, which is a key aspect of liberation theology. Liberation theology is deeply concerned about achieving ‘political change’ and opposing institutional forms of violence. It differs from conventional modes of Christianity which have simply ‘offered patience as a panacea for the pain of persecution and the joys of an afterlife as an answer for the sufferings of this life.’ Developed in Latin America in the 1960s–1970s, liberation theology critiques ‘unjust social, political and economic structures’, and actively opposes ‘oppressive situations whether the oppression be economic, political, social or sexual.’ ‘Liberation theology involves critical reflection on practice.’ It is critical of relations of domination where privilege is attained as ‘the fruit of injustice’, and draws upon aspects of Marxism. Liberation theologians interpret the Bible as ‘a narrative of liberation,’ where focus is not only on liberation of the spirit, but also liberation from institutional oppression. They point out that Jesus identified strongly ‘with the poor and oppressed’. Liberation theology is concerned with ‘the practice of justice and compassion towards the marginalized’. Consistent with liberation theology, I passionately believe that every person should be treated with dignity and that all people should be able to live in the world free from oppressive political, legal, social and economic structures. Mine is a form of liberal Christianity which is consistent with progressive values. As a Christian with progressive politics I consider it important to make a positive contribution to the world I live in. I believe that writing is a

12 Alister McGrath, above n 8, 105.
13 Denis Carroll, above n 10, 14.
14 Ibid 8.
15 Alister McGrath, above n 8, 106.
16 Denis Carroll, above n 10, 16.
17 Alister McGrath, above n 8, 106.
18 Ibid.
20 Sinclair Ferguson, David Wright and J.I. Packer, above n 8, 390.
21 Ibid 391.
significant aspect of addressing injustice.\textsuperscript{23} This research has been for me part of my spiritual practice, where I aim to highlight the seriousness of both past racial discrimination in Australia and contemporary forms of racial discrimination on the part of government in the hope that the future may be brighter than the darkness of the past.

This research has led me to confront human darkness, to read heart-wrenching accounts of human brutality, to examine disturbing testimony with pain that screams from the pages. As I have done this I have felt sickened by the role that law has played in the creation and exacerbation of so much misery. Confronting the darkness is immensely challenging, and as I have delved into the darkness of trauma with this research I have questioned what it is within me that felt drawn towards this suffering. I have had to ask myself some difficult questions in this process. I have asked myself why I identify on \textit{some} level with the pain of those whose lives have been traumatised. I cannot pretend to identify on \textit{every} level with their pain. There are of course many experiences that members of the target groups have suffered which I cannot begin to relate to. In saying that I identify on \textit{some} level with the pain they suffer I speak of personal knowledge of what it is to survive trauma. I know what it is to experience suffering, to know it deeply, to be wounded by it, but somehow, miraculously, not be destroyed. I am a survivor of many things. Like others who have experienced trauma I search for strategies to help me survive.\textsuperscript{24} This is, I believe, a lifelong journey. I know that even when a survivor of trauma appears to be coping well there are vulnerabilities that persist,\textsuperscript{25} such as a predisposition to health problems.\textsuperscript{26} I have experienced a spate of these, with my body frequently speaking the pain my lips could not say.\textsuperscript{27} My position of compassion for members of the stolen generations is influenced greatly by having experienced separation from my birth mother after six days. I know something of the struggles people face when they are separated from their primary carer at a young age.\textsuperscript{28} In my case my birth mother was very young and it was socially taboo for her to keep me and raise me as her child. My situation was

\begin{thebibliography}{9}
\bibitem{Lakoff} George Lakoff, \textit{Don’t Think of an Elephant – know your values and frame the debate} (2005) 102–103.
\bibitem{Cargas} Harry Cargas, ‘An Interview with Elie Wiesel’ (1986) 1(1) \textit{Holocaust and Genocide Studies} 5, 9.
\bibitem{Hassan} Judith Hassan, \textit{A House Next Door to Trauma: Learning from Holocaust Survivors How to Respond to Atrocity} (2003) 110 and 112.
\bibitem{Hassan2} Ibid 56.
\bibitem{Hassan3} Ibid 44–45.
\bibitem{Verrier} During my PhD enrolment I have experienced multiple cancer surgeries, pneumonia, spinal surgery and other health problems.
\bibitem{Verrier2} For an excellent book on this issue see Nancy Verrier, \textit{The Primal Wound: Understanding the Adopted Child} (1993).
\end{thebibliography}
not one where my race dictated my destiny. However like many Aboriginal children forcibly removed from their families I was placed with a family where I experienced much abuse. As a consequence I know something about the difficulties of struggling to come to terms with a dysfunctional and abusive upbringing. I also know what it feels like to grow up without experiencing that depth of connection families so often share. I know what it is like to look around and see no-one in your world that you resemble. My adoptive family required that I spend many hours undertaking harsh physical labour each day. I spent more hours at labour than in school. In this respect also I empathise with Aboriginal children who were forced to work an adult load with little or no payment for their work. I do not pretend to know what it is like to have suffered any of these things because of race. I can only imagine that to suffer these experiences based on race would have added other profound layers of grief, in addition to the structural levels of systematic political, legal, social, and economic discrimination.

29 The information I have retrieved from the Department of Community Services states that my birth parents were Caucasian.
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