Towards Movement Lawyering: An Old Ethos for Modern Indigenous Sovereignty

Movement lawyering is a new theory but an old practice that involves lawyers aligning with a movement and contribute their uniquely legal skills for the cause. Consistent with movement lawyering theory we adopt the recognition of pragmatic sovereignty as the overarching *goal* of an Indigenous movement proposing the creation of space as its *strategy.* Through interviews with current practitioners working with Indigenous Australians we understand power structures which reinforce oppression. We canvass the legal landscape as it currently impacts Indigenous Australians through three case-studies to propose discrete *tactics* aimed at furthering pragmatic sovereignty. The secondary movements of native title and pragmatic agreement-making, traditional knowledge protection and preservation and best practice development, and the criminal justice system and reframing discourse, are analysed. While discrete, we importantly recognise that the tactics identified in each case study are applicable across domains and can provide another Australian lawyer to be a movement lawyer.

I INTRODUCTION

> [M]ovement lawyering offers occasion for hope; a sign of ambition among a generation of lawyers eager to strengthen alliances with marginalised communities in the pursuit of a transformative social vision that reclaims government from the clutches of neoliberalism and nativism while crafting a progressive vision of social justice that attends to, but moves beyond, access to legal knowledge, dispute resolution, lawyers, and courts.[1]

Birthed from struggles for civil rights, most famously the Black Lives Matter Movement, "movement lawyering" has captured the imagination of activist lawyers and academics in the

[1] Scott Cummings, 'Movement Lawyering' (2020) 27(1) *Indiana Journal of Global Legal Studies* 87, 92.

United States. Zoe Bush and Sarah Schwartz propose that it is time the Australian legal profession consciously embrace lawyering as a movement – a concept novel in theory but aged in practice.[2] The Redfern Aboriginal Legal Service was established in 1970 as a grass-roots response to constrained government policy-making in New South Wales in what was an apotheosis of movement lawyering long pre-dating advent of the term itself.[3]

As a subset of cause lawyering, where the lawyer is no longer the protagonist, the theory of movement lawyering has developed in the past decade. By aspiring to 'collaborative client relationships' in the pursuit of long-term reform, movement lawyering *'plays out within a professional framework defined by standard legal ethics principles*'.[4] In this way, it overcomes the two primary critiques of public interest lawyering: the tendency for lawyers to assert dominance over vulnerable clients in pursuit of their broader social justice agenda; and litigation-focused law reform disguising 'entrenched structures of social power'.[5] In Australia, the conception of the lawyer as an agent for change has been treated with caution by reference to the impracticality of assuming a broader advocacy role within the confines of a client-centric professional field.[6] The result is a reluctance in practice to go beyond well-defined paradigms of lawyering and a failure to envision influence beyond litigation, advice and law-making.[7]

Any account of the Australian story rings hollow without properly acknowledging and apprehending the history and condition of its First Nations Peoples. Since the offering of the

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[2] Zoe Bush and Sarah Schwartz, 'What is Movement Lawyering?' *Reb Law Conference Australia* (Webpage, 2021) <https://reblaw.com.au/what-is-movement-lawyering/>.
[3] Ibid.
[4] Susan Carle and Scott Cummings, 'A Reflection on the Ethics of Movement Lawyering' (2018) 31 *The Georgetown Journal of Legal Ethics* 447, 449.
[5] Ibid 454-5.
[6] Eddie Cubillo, '30th Anniversary of the RCIADIC and the "white noise" of the justice system is loud and clear' (2021) *Alternative Law Journal* 1, 7; Kevin Dolman, 'Indigenous Lawyers: Success or Sacrifice?' (1997) 4(4) *Indigenous Law Bulletin* 4.
[7] Authors interviews with several Indigenous legal practitioners in August 2021.

Uluru Statement from the Heart in 2017, recent discourse has centred around the underlying principles of 'Voice, Treaty, Truth'.[8] Though undoubtedly valuable, these efforts are contingent upon the mustering of political will, logistical organisation and require agreement among First Nations groups. Therefore, we suggest that 'To see real, meaningful change, we need *both* the top-down and the *bottom-up* methods in synchronicity with each other'.[9]

Indigenous peoples are used to waiting and are well-versed in asserting sovereignty in everyday actions.[10] Our work is an exploration of the alliance between Indigenous Aspirations and the movement lawyer. Relying on integrated advocacy, the movement lawyer seeks to expand their practice by adopting *goals*, *strategies* and *tactics*, as defined by a broader campaign for change.[11] We begin by outlining the *goals* of First Nations Peoples in the modern search for "pragmatic sovereignty". A proposed *strategy* for achieving pragmatic sovereignty is the "creation of space" which allows 'the expression and articulation of [Indigenous] needs and political aspirations'.[12] We recognise that any meaningful attempt to implement this strategy must span beyond ordinarily distinct spheres of legal practice. While the spheres exist almost independent of one another, they ultimately all apply to groups which First Nations Peoples who share a common history of dispossession. Accordingly, through the lens of recent developments in three areas of law we will canvass specific *tactics* lawyers can engage in, to

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[8] Uluru Statement from the Heart (National Constitutional Convention, 26 May 2017).
[9] Inala Cooper and Shannan Dodson, 'Marrul (Changing Season)' in Paula Gerber and Melissa Castan (eds.) in *Critical Perspectives on Human Rights Law in Australia* (Thomson Reuters, Sydney, 2021) 350 (emphasis added). See also Betty Hung, 'Movement Lawyering as Rebellious Lawyering: Advocating with Humility, Love and Courage' (2017) 23(2) *Clinical Law Review* 663.
[10] Heidi Norman, Janet Hunt and Deirdre Howard-Wagner, 'Being Self-Determining in New South Wales - Treaty or Not!' in Harry Hobbs, Alison Whittaker and Lindon Coombes (eds) *Treaty-Making* (Federation Press, 2021) 125.
[11] Cummings (n 1) 114-5.
[12] Larissa Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future* (Federation Press, 2003) 115.

further pragmatic sovereignty. These are: native title, traditional knowledge (**TK**) and the criminal justice system.

A key part of movement lawyering is about discerning the real power dynamics and relations which exist within each community.[13] With that in mind, we conducted interviews with both Indigenous and non-Indigenous practitioners working at local and regional levels in differing capacities. Their unique experiences informed our understanding of the various internal power structures acting to undermine the realisation of Indigenous Aspirations. If the goal is to achieve pragmatic sovereignty, it is essential that the tactics implemented by movement lawyers 'emanate from a collaboratively developed strategy' aimed at dismantling divisive power structures.[14]

II INDIGENOUS SOVEREIGNTY: WHAT DOES IT MEAN TODAY?

Once brandished as a weapon for colonial dominance, today, "sovereignty" remains a source of discomfort in Indigenous memory while simultaneously promising resurgence. Understandings of sovereignty vary not only in legal and sociological discourse, but also across time, culture, and nationality. Non-western definitions of sovereignty focus upon the pursuit of self-determination and the subversion of imperialist rule. Self-determination aims to recognise the distinctive nature of Indigenous culture and facilitate 'the achievement of full

[13] Alexi Freeman and Jim Freeman, 'It's about Power, Not Policy: Movement Lawyering for Large Scale Social Change' (2016) 23(1) *Clinical Law Review* 147, 155-9.
[14] Ibid 159.

and effective *participation* of Aboriginal and Torres Strait Islander peoples in the decisions that affect them'.[15] Self-determination is therefore key pillar of indigenous sovereignty.[16]

Perceived as a participatory rather than a factious tool, self-determination has long been heralded by Indigenous peoples as a strategy for achieving sovereignty '*within* the life of the nation'.[17] As was explained by the National Aboriginal Island Health Organisation in 1985 (NAIHO):

> Sovereignty is not a vague legal concept. Sovereignty is a practical and achievable goal and … can be demonstrated as Aboriginal people controlling all aspects of their lives and destiny. Sovereignty is independent action. It is Aborigines doing things as Aboriginal people, controlling those aspects of our existence which are Aboriginal.[18]

This focus on a "realistic" type of sovereignty re-emphasises the pragmatic view which 'believes that Indigenous people can assert sovereignty in their day-to-day actions, that there is a *personal* aspect to sovereignty'.[19] We adopt this contemporary construction of sovereignty for our exploration, trusting its promise as a stepping-stone towards, what we hope, can be the continuation of a movement towards symbiosis amongst Indigenous and non-Indigenous Australia. We adopt it for its potential as a powerful mechanism to return what was dispossessed.

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[15] Megan Davis, 'Self-determination and the demise of the Aboriginal and Torres Strait Islander Commission' in Elliot Johnson, Martin Hinton and Daryle Rigney (eds) *Indigenous Australians and the Law* (Routledge Cavendish, 2nd ed, 2008) 217. Cf. Lisa Strelein, 'The Price of Compromise: Should Australia Ratify ILO Convention 169?' in Greta Bird, Gary Martin and Jennifer Nielsen (eds.) in *Majah: Indigenous Peoples and the Law* (Federation Press, Sydney, 1996) 79.
[16] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GOAR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007).
[17] Council for Aboriginal Reconciliation, Final Recommendations, Final Report in Davis (n 15) (emphasis added).
[18] National Aboriginal Island Health Organisation (NAIHO), *Written comment* (NAIHO Conference, 1985)
[19] Behrendt (n 12) 101.

Escaping the shackles of colonially imposed and institutionally confined ideas of sovereignty, ‘Indigenous Aspirations’ must equally be an aspiration for our legal system and its disciples. An aspiration, that will perhaps see a very real and raw reignition of a ‘debate over Indigenous empowerment through sovereignty ... [that] has become stymied”,[20] and “be part of the language of liberation”.[21]

III CASE-STUDY ONE: NATIVE TITLE AND BEYOND

A *Ngurra:[22] The importance of Country*

In 1987 Galarrwuy Yunupingu described land rights as ‘the key to Aboriginal self-determination’ and land as ‘the basis for our development of a secure social, cultural and economic base.’[23] Rights to land are also foundational for protecting and promoting indigenous identity. As a member of the First Nationals Regional Dialogue noted:

> We don’t have access to our own land … We can’t access special places for women’s and men’s business. Without our spirituality and identity we are nothing.[24]

Fundamental differences between non-indigenous and indigenous conceptions of land make it challenging to authentically recognise indigenous land rights within a legal system derived from Australia’s colonial past. Anglo/Eurocentric perspectives conceive of property rights as private protective measures to be utilised by individuals; ‘absolute’ rights anchored in the *Magna Carta*.[25] Contrastingly, Indigenous peoples have a relationship with the land which is

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[20] Ibid.

[21] T Alfred, *Peace, Power Righteousness: An Indigenous Manifesto*, 2nd edn (Oxford, Oxford University Press, 2009) 78.

[22] A common term in Western Desert languages meaning Country, homeland.

[23] Galarrquy Yunupingu, ‘What the Aboriginal People Want’, *The Age* (Australia, 26 August 1987).

[24] *National Constitutional Convention held at Uluru* (Final Report of the Referendum Council, 30 June 2017) 20.

[25] William Blackstone, Commentaries on the Laws of England (The Legal Classics Library, 1765) vol I, bk I, ch 1, 134.

inherently cultural and spiritual.[26] As Blackburn J said in *Milirrpum*: '[t]here is an unquestioned scheme of things in which the spirit ancestors, the people of the clan, particular land and everything that exists on and in it, are organic parts of one indissoluble whole.'[27] From an Indigenous perspective, people *belong to*, rather than *own* the land. This sense of belonging is based on an 'ontological relationship to country derived from the Dreaming'.[28] The Dreaming encompasses beliefs and stories of creation which are at the heart of Indigenous spirituality.[29]

Ensuring the law reflects this unique, metaphysical connection to land is fundamental to promoting pragmatic sovereignty and reconciliation. Modern frameworks for recognising land rights should also seek to allow space for the *development* of culture and modern expressions of indigeneity.

B *Creating space in native title*

Conceived as a burden on the Crown's radical title, native title exists as a *sui generis* type of law. Native title, which is communal in nature, does not exist as an individual proprietary right.[30] Rather, it is a recognition that indigenous laws and customs constitute bodies of normative rules, which give rise to rights and interests in relation to land and waters.[31] To be recognised, indigenous groups must demonstrate (among other things) a continuing connection to land in accordance with their traditional laws and customs. The rights and interests native

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[26] Behrendt (n 12) 33.
[27] *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 167.
[28] Aileen Moreton-Robinson, '"Our story is in the land": Why the Indigenous sense of belonging unsettles white Australia', *ABC Religion and Ethics* (online, 9 November 2020) <https://www.abc.net.au/religion/our-story-is-in-the-land-indigenous-sense-of-belonging/11159992>.
[29] *Kalman Murphy and others on behalf of Waturta v Piper Preston Pty Ltd* [2020] NNTTA 74 (26 November 2020).
[30] *Griffiths v Northern Territory* [2016] FCA 90, [219].
[31] *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 442 [40].

title recognises are sourced in, and obtain their content from, the traditional laws and customs of the group.[32]

The importance of *Mabo*,[33] which spurred the development of native title rights and prompted the enactment of the *Native Title Act 1993* (Cth) (***NTA***), is to be understood against the backdrop of the systemic racism which has plagued Australia's history. As Glen Kelly and Stuart Bradfield note, '*Mabo* set a new agenda'[34] and 'opened the door to a range of possibilities that were in the past, just dreams.[35]

However, where Brennan J's formulation of native title contemplates Indigenous interests being absorbed into general property law,[36] (through being understood as a 'bundle' of proprietary interests) there is an inherent difficulty in translating deeply humanistic and spiritual concepts into existing legal frameworks. As the High Court recognised in *Ward*,[37] native title represents an 'imperfect intersection'[38] of two systems of law:

> The spiritual or religious is translated into the legal. This requires the fragmentation of an integrated view of the ordering of affairs into rights and interests which are considered apart from the duties and obligations which go with them.[39]

Lawyers practising native title, whether it be in the Claims, Compensation or Future Acts space, are integral to recognising land rights and promoting indigenous sovereignty. Their day-to-day work represents a focal point at the interface of two legal frameworks. For native title to be an effective 'special procedure … for the just and proper ascertainment of native title rights and

[32] *Fejo v Northern Territory* (1998) 195 CLR 96, 128 [46] ('*Fejo*').
[33] *Mabo v The State of Queensland (No 2)* (1992) 175 CLR 1 (*'Mabo*').
[34] Glen Kelly and Stuart Bradfield, 'Winning Native Title, or Winning Out of Native Title?' (2012) 8(2) *Indigenous Law Bulletin* 14, 14.
[35] Ibid.
[36] Jeremy Webber, 'Native Title as Self-Government' (1999) 22(2) *UNSW Law Journal* 600, 601.
[37] *Western Australia v Ward* (2002) 213 CLR 1 ('*Ward*').
[38] See also, *Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 441 [37]-[38].
[39] *Ward* 64-65.

interests'[40] lawyers must be able to facilitate a dialogue between the two systems. Thus, lawyers must act as *translators*, ensuring knowledge holders can meaningfully engage with, *and* be heard in, Australia's legal system. Lawyers must create space and utilise their skills to demonstrate awareness of 'shifts in meaning and … collaborat[ing] with the [client] in managing these changes'.[41]

However, in assuming the role of translator, lawyers must be cognisant of Lisa Strelein's warning that the native title system 'does not approach Indigenous law as an equal partner in negotiating recognition and producing space in which both laws can operate'.[42] Therefore, there is a risk that, as a result of training within Anglo-Australian legal frameworks, lawyers unwittingly suppress Indigenous voices and reinforce a historical power imbalance that exists between non-indigenous parties and native title holders.[43] As Kate Galloway notes, the Anglo-Australian legal system is 'adversarial, deductive, impartial, objective [and] logical',[44] which creates the potential for lawyers to take control of the conversation because of their technical expertise.[45] Lawyers should therefore engage in mindful practice to ensure native title does not merely represent an 'interface of two distinct cultures: one dominant and the other dominated.'[46]

What then is mindful practice? One of our interviewees, an experienced native title practitioner and CEO of an Aboriginal Corporation, noted that lawyers need to become comfortable with 'holding space' and develop the 'soft skills' necessary to form relationships with First Nations

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[40] *Native Title Act 1993* (Cth), preamble.
[41] Clark Cunningham, 'Lawyer as Translator Representation as Text: Towards an Ethnography of Legal Discourse' (1991-1992) 77 *Cornell Law Review* 1298, 1301.
[42] Lisa Strelein, 'Conceptualising Native Title' (2001) 23 *Sydney Law Review* 95, 115.
[43] Kate Galloway, 'Practising in native title: the lawyer as god, but what about country?' (Conference Paper, Australasian Law Teachers Association Conference, 5-9 July 2009) 18.
[44] Ibid 15.
[45] Ibid 249.
[46] Ibid.

Peoples which are founded on trust and respect. She suggested lawyers should not only seek to obtain the information necessary to support an asserted legal position, but also to, as much as possible, develop an understanding of Indigenous peoples' unique way of life. This accords with Galloway's suggestion that native title lawyers should focus on lawyering which promotes promotes an 'exchange of moral views'.[47] Moving away from the notion of the 'lawyer as expert' assists in preserving First Nations Peoples' autonomy as clients.

C *Agreement-making: Native Title and Beyond*

To effectively realise Indigenous land rights, lawyers must understand the limitations of native title. Despite Keating's aspirations that native title would be 'the basis of a new relationship between indigenous and non-Aboriginal Australians',[48] Kelly and Bradfield suggest:

> It's easy to conclude that far from the instrument of recognition and empowerment that we thought it was after Eddie Mabo's triumph, the High Court's fine print, State and Federal Parliaments, and successive court decisions have incrementally reinforced the subservient position of Indigenous interests in favour of what the preamble to the [*NTA*] describes as 'the needs of the broader Australian community'.[49]

Aspects of native title which reinforce the subservient position include:

- the fact that native title rights are 'inherently fragile'[50] and easily extinguished;[51]
- the requirement of a continuous connection to land, which limits the rights native title protects (those in relation to land)[52] and ignores the historical displacement and forcible removal of First Nations Peoples; and

[47] Galloway (n 43).
[48] Paul Keating, 'Australian Launch of the International Year for the World's Indigenous People' (1993) 3(61) *Aboriginal Law Bulletin* 4.
[49] Kelly and Bradfield (n 34) 15.
[50] *Fejo* 96, 152.
[51] *Mabo* 63, 110-11, 184.
[52] *Ward* (2002) 213 CLR 1 [61].

- the hollow nature of native title rights, which have always been practiced by Indigenous peoples.[53]

Additionally, *Timber Creek*[54] demonstrates the innate difficulty in 'quantifying' the 'gut wrenching' pain[55] associated with cultural and spiritual loss.

Recognising the limitations of native title is important for two reasons. Firstly, a practice centred on a meaningful lawyer-client dialogue requires legal practitioners 'ascertain the client's expectations … and inform the client as to the realistic prospects of success'.[56] This is, in itself, a form of truth-telling in which lawyers must be open to recognising absurdities which may exist within the native title framework. Secondly, the identification of problems can lead to innovative solutions.

The recent finalisation of the South-West Settlement (the **Settlement**) is an example of how lawyers have recognised the limits of the native title system, but have forged a new path to realising pragmatic sovereignty through agreement-making. On 13 April 2021 the *NTA* ceased to apply over Noongar country; land in the south-west of Western Australia which is equal in size to Victoria.[57] The surrender of native title rights and the validation of potentially invalid past acts[58] were part of an agreement which has been described as the 'most compressive native title agreement in Australian history'.[59] The Settlement comprises six Indigenous Land Use Agreements (**ILUAs**) estimated to be worth $1.3 billion. In 2006 the Noongar people's native

[53] This was noted by our interviewee, Joshua Creamer. See also, Kelly and Bradfield (n 34) 14.
[54] *Northern Territory v Griffiths* (2019) 93 ALJR 327.
[55] Ibid [194].
[56] Galloway (n 43). 28.
[57] Kelly and Bradfield (n 34) 14.
[58] *Land Administration (South West Native Title Settlement Act) 2016* (WA).
[59] 'South West Native Title Settlement', *Western Australian Government* (Web Page) <https://www.wa.gov.au/organisation/department-of-the-premier-and-cabinet/south-west-native-title-settlement>.

title rights were recognised an area encompassing Perth.[60] Although that decision was overturned,[61] the WA Government committed to resolving native title claims by negotiation.

The Settlement aims to provide the Noongar people with 'sustainable assets and options for developing Noongar interests, including opportunities for the WA Government to work in partnership with the Noongar people to elevate economic, social and community outcomes'.[62] It includes an act of Parliament, recognising the Noongar people as the traditional owners of the South West and their continued relationship with the land.[63] The Settlement provides for the establishment of the Noongar Land Estate, which will comprise of up to 320,000ha of land upon which the Noongar people can exercise their right to self-determination.[64] Further, the package includes re-negotiated Standard Heritage Agreements, a transfer of 121 housing properties, and a framework to 'assist Noongar business capacity and interests towards improving participation in the wider economy'.[65] Along with other aspects, the Settlement compensates 'the Noongar people for the loss, surrender, diminution, impairment and other effects on their native title rights'.[66]

As Australia enters the 'compensation era' of native title, the Settlement provides a model by which governments may approach the task of recompense and reconciliation. At the first negotiation meeting Glen Kelly, CEO of the South West Land and Sea Council and a lead

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[60] *Bennell v Western Australia* (2006) 230 ALR 603
[61] *Bodney v Bennell* (2008) 167 FCR 84 ('*Bodney*').
[62] 'South West Native Title Settlement', *Western Australian Government* (Web Page) <https://www.wa.gov.au/organisation/department-of-the-premier-and-cabinet/south-west-native-title-settlement>.
[63] *Noongar (Koorah, Nitja, Boordahwan) (Past, Present Future) Recognition Act 2016* (WA).
[64] 'Noongar Land Estate -South West Native Title Settlement', *Western Australian Government* (Web Page) <https://www.wa.gov.au/organisation/department-of-planning-lands-and-heritage/noongar-land-estate-south-west-native-title-settlement>.
[65] 'Economic Participation - South West NAtive TItle Settlement', *Western Australian Government* (Web Page) <https://www.wa.gov.au/government/publications/economic-participation-south-west-native-title-settlement>.
[66] *Land Administration (South West Native Title Settlement Act) 2016* (WA).

Noongar negotiator, called for a 'nation-to-nation' dialogue.[67] While it is not within the scope of this essay to consider whether the Settlement truly is 'Australia's first Treaty',[68] the range of measures which it achieved and the innovative solutions it proposed represent a bold move away from traditional native title negotiations. By the Settlement the Noongar people were afforded more than a mere 'right to negotiate'. Instead, they were the leaders of sophisticated negotiations, in which they set the agenda for developing frameworks to pursue their social, cultural and economic self-determination.

What is evident from the negotiations is a 'maturing of native title dispute resolution'.[69] Consistent with movement lawyering, the negotiations were collaborative[70] and lawyers did not seek to control or limit the conversation by reverting to siloed technical thinking. The Settlement signals the possibility for native title agreements to include 'cultural redress, ... accounting of history and formal apologies, in addition to land and financial compensation'.[71] Thus, lawyers must be innovative and flexible in exploring uncharted paths to reconciliation.

This involves a mindful awareness that negotiation within rigid frameworks may not be in the client's best interests (whether the client is, the State, native title holders or a third-party). For example, despite its success in *Bodney* the State committed to resolving native title in the South West through negotiation. Indeed, the Settlement was perceived as 'an investment in both the

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[67] Kelly and Bradfield (n 34) 15.
[68] Harry Hobbs and George Williams, 'The Noongar Settlement: Australia's First Treaty' (2018) 40(1) *Sydney Law Review* 1; Western Australia, Parliamentary Debates, *Legislative Assembly*, 19 November 2015, 8688 (Roger Cook, Deputy Opposition Leader).
[69] Simon Young, 'From the Bike to the Bus: the Noongar Native Title Settlement', *The Conversation* (online), 15 July 2013 <https://theconversation.com/from-the-bike-to-the-bus-the-noongar-nativetitle-settlement-15955>.
[70] Cummings (n 1) 91.
[71] Hobbs and Williams (n 68) 34; Shireen Morris, 'Lessons from New Zealand: Towards a Better Working Relationship between Indigenous Peoples and the State' (2015) 18(2) *Australian Indigenous Law Review* 67, 79-80.

Noongar community and the shared future of the Western Australian community as a whole'.[72] Further, the Settlement looks beyond compensation, as understood by the High Court in *Timber Creek*, and towards land rights as a vehicle for sovereignty. As Glenn Kelly noted at the Settlement negotiations in 2010, the Noongar people were seeking to 'secure a footing in today's world which can be used to advance our people and our culture in a way that works today'.[73]

These lessons are not only pertinent for lawyers working in native title. The Settlement required a 'whole-of-government' approach and the mobilisation of different State departments. This represents an analogy for the way in which lawyers can contribute to the recognition of indigenous sovereignty across different practice areas through a 'client-centred and politically transformative'[74] lawyering.

IV CASE-STUDY TWO: TRADITIONAL KNOWLEDGE - A SYSTEM ON THE BRINK OF EXTINCTION?

TK embodies the unique spiritual and cultural connection which Indigenous peoples have held with Mother Earth since time immemorial.[75] Built upon an intricate understanding of native flora and fauna, TK forms an integral part of Indigenous identity, 'well-being and social cohesion'.[76] Laurelyn Whitt has described the erosion of TK as 'the politics of

[72] Western Australia, *Parliamentary Debates*, Legislative Assembly, 14 October 2015, 7313 (Colin Barnett, Premier).
[73] Glen Kelly, 'Opening Remarks', Plenary Session, South West Native Title Settlement Negotiations, Perth, 13 April 2010.
[74] Cummings (n 1) 97.
[75] We recognise that "traditional knowledge" is ever-evolving and not temporally-limited.
[76] 'Message from WIPO DG Gurry on the International Day of the World's Indigenous People', W*orld Intellectual Property Organisation* (Webpage, 8 August 2016) <https://www.wipo.int/tk/en/news/tk/2016/news_0005.html>. See also Terri Janke, 'Managing Indigenous Knowledge and Indigenous Cultural and Intellectual Property' (2005) 36(2) *Australian Indigenous Knowledge and Libraries* 95, 97.

disappearance';[77] the historic use of oppressive policies (the *politics*) as a means for eroding Indigenous knowledge systems, 'their very substance' and 'their conditions of existence' (the *disappearance*).[78]

As Professor Kathy Bowrey details, the *politics* presumed 'Indigenous [p]eople were too primitive to have legal rights or that Indigenous culture was archetypically "collectively" owned' situating them outside liberal property conceptions.[79] The former presumption has now been rebutted following Australia's ratification of the *Convention on Biological Diversity* (**CBD**),[80] and as a signatory to the *Nagoya Protocol*;[81] instruments which directly address "the politics of disappearance" by creating an international consensus in favour of *respecting*, *preserving* and *maintaining*:

> [the] knowledge … and practices of Indigenous and local communities … promote their wider application with the involvement of the holders of such knowledge … and encourage the equitable sharing of the benefits arising from the utilization of such knowledge.[82]

On the contrary, the latter presumption in Bowrey's statement still prevails today due to the way in which the law is perceived and taught; namely, as a doctrine bound by precedent, resistant to change.[83] Attempts to assimilate customary (*collective* obligations) and intellectual property (**IP**) law (*individual/exclusive* rights) have resultantly shown to be unworkable in

[77] Laurelyn Whitt, *Science, Colonialism, and Indigenous Peoples* (Cambridge University Press, 2009) 155.
[78] Ibid.
[79] Kathy Bowrey, 'Indigenous Culture, Knowledge and Intellectual Property: The Need for a New Category of Rights' in Kathy Bowrey, Michael Handler and Dianne Nicol (eds), *Emerging Challenges in Intellectual Property* (Oxford University Press, 2011) 46, 47.
[80] *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993) ('*CBD*').
[81] *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity*, opened for signature 29 October 2010 (entered into force 12 October 2014).
[82] CBD (n 80) art 8.
[83] Whitt (n 77) 175.

practice; a process which would simply lead to the subversion of TK to the dominant civil law system.

After a brief overview of modern attempts to recognise TK within IP law, we explore what we consider to be the more promising avenue for recognising practical Indigenous sovereignty and reversing the "politics of disappearance". Namely, the introduction of soft law counterparts outside the IP structure which seek to modify behaviour and develop a form of best practice, an ideal space for the movement lawyer. The nascency of TK legislation provides lawyers an opportunity to act as educators and intermediaries rather than hasty law-makers. The ratification of instruments such as the *Nagoya Protocol* or the creation of *sui generis* legislation are not futile; they are intrinsically political. And since no political party has been prepared to adequately recognise TK, they are not the correct priority.[84] In our view, change must occur elsewhere.

A *TK and IP: are the two systems compatible?*

We adopt Professor Ruth Okediki's listed definition of TK which recognises the importance of its 'cultural, collective and localised nature':[85]

> (1) an inter-generational system of institutions, norms and processes that govern knowledge production; (2) the knowledge is held collectively; (3) the knowledge is expressed in tangible and intangible forms … (4) the knowledge is governed by economic, spiritual, and cultural values, and (5) the knowledge is associated with a specific indigenous group …[86]

The central themes which surface from Okediki's definition include: communal ownership or possession; oral transmission of knowledge; and a metaphysical connection which informs how

[84] Interview with Professor Brad Sherman on 19 August 2021 ('Sherman Interview').

[85] Nopera Dennis-McCarthy, 'Indigenous Customary Law and International Intellectual Property: Ascertaining an Effective Indigenous Definition for Misappropriation of Traditional Knowledge' (2020) 51(4) *Victoria University of Wellington Law Review* 597, 600.

[86] Ruth L Okediji, 'A Tiered Approach to Rights in Traditional Knowledge' (2019) 58 *Washburn Law Journal* 271, 273.

TK is preserved and enriched for future generations. By juxtaposing these themes against the IP regime, the irreconcilable differences between the two systems are made palpably clear.

The fundamental conflict which arises is IP's focus on individual rights and protections. As Nopera Dennis-McCarthy explains, IP rights are 'characterised as a system conferring *exclusive* rights and privileges'.[87] In stark contrast, TK is held collectively,[88] and predicated on a 'bundle of relationships, rather than a bundle of economic rights'.[89] Abetted by Eurocentric and capitalist constructs of culture and property,[90] IP law has served as a 'means of transforming indigenous knowledge and genetic resources into profitable commodities'.[91]

In 1998, von Doussa J remarked:'[w]hilst it is superficially attractive to postulate that the common law should recognise communal title, it would be contrary to established legal principle for the common law to do so'.[92] Canadian Jurist, Chidi Oguamanam, has equally acknowledged that protection of TK 'with Western IP is possible at the price of forced epistemological assimilation of the former'.[93] Accordingly, Indigenous groups have long-opposed the convergence of customary and IP law. In a recent interview with Indigenous barrister, Joshua Creamer, it was made plain that such fears still ring true today. Creamer believes that the issue is not ameliorated by specialised legislation; more legislation is met by more paternalistic controls.

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[87] Dennis-McCarthy (n 85) 603 (*emphasis added*).

[88] Gary Meyers and Olasupo Owoeye, 'Intellectual Property Law and the Protection of Indigenous Australian Traditional Knowledge in Natural Resources' (2013) 22(2) *Journal of Law, Information and Science* 56, 62.

[89] Erica Irene-Daes, *Study on the protection of cultural and intellectual property of indigenous peoples* (United Nations Commission on Human Rights, E/CN.4/Sub.2/1993/28, 28 July 1993) [26].

[90] Shelley Wright, 'Intellectual Property and the "Imaginary Aboriginal"' in Greta Bird, Gary Martin and Jennifer Nielsen (eds), *Majah: Indigenous Peoples and the Law* (Federation Press, 1996) 129, 131.

[91] Ibid 139.

[92] *Bulun Bulun v R & Textiles* (1998) 86 FCR 244, 257.

[93] Chidi Oguamanam, 'Localizing Intellectual Property in the Globalization Epoch: The Integration of Indigenous Knowledge' (2004) 11(2) *Indiana Journal of Global Legal Studies* 135, 168-9.

Specialised statutory protection of TK may disguise underlying inequalities while increasing political capital; but where to from there? For example, under the *NTA*, benefits of a *sui generis* regime are apparent; but it remains inherently inferior and 'a disappointment to most stakeholders'.[94] Some academics prefer 'an investigation into practical uses of private law at the community level to protect custom over government law-making.[95] Archaic laws based on discriminatory customs should not be disguised by new legislation. They ought to be dismantled to allow the internal transformation of an innately fractured and politicised legal system. The movement lawyer can harness relationship-building and tailored communication abilities (whether the audience is biodiversity entities, universities, or researchers) to bring about a transformation from within.

B *TK protection and biodiversity practice*

In line with Australia's international obligations under the CBD,[96] the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) (the **EPBC**), and its corresponding regulations,[97] promote the 'use of indigenous peoples' knowledge of biodiversity'.[98] Access and benefit-sharing (**ABS**) between 'access providers' (which includes indigenous land owners), and applicants who seek to use biological resources for a commercial purpose is established.[99] Whilst the EPBC's enactment was a positive step forward,[100] it has since been

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[94] Erin MacKay, 'Indigenous Traditional Knowledge, Copyright and Art - Shortcomings in Protection and an Alternative Approach' (2009) 32(1) *University of New South Wales Law Journal* 1, 24.

[95] Kathy Bowrey, 'Alternative Intellectual Property?: Indigenous Protocols, Copyleft and New Juridifications of Customary Practices' (2006) 6 *Macquarie Law Journal* 65, 66; Sherman Interview (n 84).

[96] Meyers and Owoeye (n 88) 71.

[97] See *Environment Protection and Biodiversity Conservation Amendment Regulations 2005* (Cth).

[98] *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) s 3(1)(g).

[99] Meyers and Owoeye (n 88) 71.

[100] Marcia Langton and Zane Ma Rhea, 'Traditional Indigenous Biodiversity-related Knowledge' (2005) 36(2) *Australian Academic & Research Libraries* 45, 61.

described as outdated and ineffective. .[101] Indigenous leader, Joe Morrison, hopes that reform will take into account the 'long-standing and unique connection between people and nature'.[102] Given that analogous recommendations for reform have already gained traction with the passing of the *Biodiscovery and Other Legislation Amendment Bill 2019* (Qld) (the **Bill**),[103] we critique the Queensland framework to evaluate whether the amendments are effective in addressing the concerns raised.

The Explanatory Notes to ensure that the *Biodiscovery Act 2004* (Qld) (the ***Biodiscovery Act***) indicates that the core justification for these amendments was to maintain Queensland's globally-competitive biodiscovery industry. The absence of *Nagoya*-like provisions were not perceived as a hindrance to the protection of TK, but as a risk to biodiscovery entities 'being denied international collaborations'.[104] . Professor Carol Bacchi's starting point is to ask 'who framed the problem, how and why, and how does this problematization affect the potential policy outcomes'.[105] Applying that to the present study, the problem was:

- *framed* by the growing biodiversity sector;
- *because* of a change in the international regulatory context for ABS;
- which has *caused* many of Australia's trading and scientific partners to 'require demonstrated compliance' with the *Nagoya Protocol* 'before negotiating research or commercialisation of partnerships'.[106]

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[101] Joe Morrison, 'Caring for Country - Indigenous guardianship and the failure of our national environmental heritage laws' (2020) *Australian Environment Review* 100, 100.
[102] Ibid (emphasis added).
[103] Commenced on 30 September 2020.
[104] Explanatory Notes, Biodiscovery and Other Legislation Amendment Bill 2019 1 ('*Explanatory Notes*').
[105] Janet Ransley, 'From Evidence to Policy and Practice in Youth Justice' in Anna Stewart, Troy Allard and Susan Denninson (eds) *Evidence Based Policy & Practice in Youth Justice* (The Federation Press, 2011) 228 citing Carol Bacchi, *Analysing policy: what's the problem represented to be?* (Pearson Education, 2009).
[106] *Explanatory Notes* (n 42) 1.

Deconstructing the Bill in that way exemplifies the innately political nature of government law-making, which has and continues to consider Indigenous issues as ancillary to economic pursuits. The law is 'a form of politics'; a tool perennially used to 'preserve the status quo'.[107] The adherence of law to precedent[108] gears it to 'strengthen, not challenge',[109] especially about Indigenous/non-Indigenous relations.[110] In light of that, Whitt suggests that the first step in undermining the process by which 'legal theories of acquisition' have served as the 'legitimating rationale for' western domination is to put to 'rest the fractured fairytale of a neutral, apolitical legal system'.[111] Becoming cognisant of that reality, lawyers can fruitfully contribute to TK issues by, paradoxically, moving away from the law. The role of lawyers in this context is to act as intermediaries and educators in an effort to foster best practice among the profession and industry bodies alike. For Sherman, best practice represents the way forward because if all institutions and entities recognise TK, then political will becomes moot.[112] Packer et al share in this approach and assert that:

> [i]nherent differences in ideology and protocols of Western and Indigenous knowledge systems require the development of standards and best practice methods that are built on culturally appropriate experience, transparency, and mutual benefits in order to have a meaningful impact.[113]

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[107] Whitt (n 77) 175.

[108] Raymond Belliotti, 'The Legacy of Marxist Jurisprudence' in David Caudill and Steven Jay Gold (eds.) *Radical Philosophy of the Law: Contemporary Challenges to Mainstream Legal Theory and Practice* (Humanity Books, 1995) 14.

[109] Carl Swidorski, 'Constituting the Modern State' in David Caudill and Steven Gold (eds), *Radical Philosophy of Law: Contemporary Challenges to Mainstream Legal Theory and Practice* (Prometheus Books, 1995) 164.

[110] Whitt (n 77) 177.

[111] Ibid.

[112] Sherman Interview (n 84).

[113] Joanne Packer et al, 'Building partnerships for linking biomedical science with traditional knowledge of customary medicines: a case study with two Australian indigenous communities' (2019) 15(69) *Journal of Ethnobiology and Ethnomedicine* 1, 3.

Developing "best practice methods" can be assisted by soft law instruments. The Queensland Draft Traditional Knowledge in Biodiscovery Code of Practice (the **Code**) is a chief example.[114] While created under the *Biodiscovery Act*, the Code creates a framework which lawyers can operationalise and implement in everyday practices and communications without the need for legislative enforcement. In summary, the Code 'defines [five] minimum measures to be taken before traditional knowledge can be used for biodiscovery',[115] which include: identifying the TK custodians; obtaining free, prior and informed consent; and establishing ABS agreements.[116] Thus far, the Code has been well-received by the wider public, as is evident by the submissions received during the Bill's consultation process.[117]

Lawyers have an opportunity to use the Code and its underlying processes to inform their discussions with universities, research institutions and pharmaceutical companies in a pragmatic way free of government intervention. Distancing themselves from political discourse in this way and engaging in civil society, lawyers become the ultimate grass-roots labourers that define the direction of individual negotiations and use cases of TK in commercial realms. If a culture is created of practices informed by soft law codes, a combination of nudge effects and behavioural conformation across industry has the potential to result in a respectful system of TK use and dissemination.[118] Critics often undervalue the possibilities raised by the impact of unenforceable soft law measures doubting that voluntary compliance is a realistic

[114] Department of Environment and Science, 'Draft Traditional Knowledge in Biodiscovery Code of Practice' *Queensland Government* (Consultation Draft, 2021) <https://environment.des.qld.gov.au/__data/assets/pdf_file/0023/234707/biodiscovery-code.pdf>.
[115] Ibid 4.
[116] Ibid 5.
[117] See Andrea Bishop, Submission No 2 to Innovation, Tourism Development and Environment Committee, *Inquiry into Biodiscovery and Other Legislation Amendment Bill 2019* 7; David Claudie, John Locke and Leslie Shirreffs, Submission No 1, to Innovation, Tourism Development and Environment Committee, *Inquiry into Biodiscovery and Other Legislation Amendment Bill 2019* (7 January 2020) 3.
[118] MacKay (n 94) 19.

possibility.[119] But if the appropriate culture of legal education is combined with incentives for compliance, through reward mechanisms embedded in the system then such concerns can be alleviated. A best practice method is also responsive to discussions around the need for a unified and cross-jurisdictional approach.[120] Unlike concrete provisions, best practice has the potential to transgress domestic and international boundaries, which is of particular relevance when transacting with traditional resources located in several territorial domains.

V CASE STUDY THREE: INDIGENOUS PEOPLE, YOUTH AND CRIMINAL JUSTICE: WHOSE JUSTICE?

Despite the well-known statistics on incarceration of Indigenous peoples and volumes of reports dating back to the 1987 Royal Commission into Aboriginal Deaths in Custody, change is fiction. We defined sovereignty as the pragmatic exercise of autonomy by Indigenous peoples underpinned by the creation of space by non-Indigenous alliance. Dismantling the 'prison-industrial-complex' and bringing Indigenous youth back to their communities is the *goal* for Indigenous criminal justice advocates.[121] A justice system chained to its past imprisons the Indigenous population within a history of surveillance and control; it is time to bring community owned Indigenous-led justice initiatives to the forefront. Lawyers and law-makers must lobby for an alternative discourse.

A *Indigenous Peoples and Criminal Justice: A historical tale or present-day reality?*

The past is closer than anticipated. Indigenous peoples' crime first came into coloniser purview through a few instances of internal violence not long after colonisation itself.[122] In the 1829

[119] Ibid 20.

[120] Sherman Interview (n 84).

[121] Debbie Kilroy, 'Imagining Abolition' (2021) 74 *Griffith Review*

[122] Heather Douglas and Mark Finnae, *Indigenous Crime and Settler Law* (Palgrave Macmillan UK, 2012).

decision of *R v Ballard,*[123] Dowling J dismissed a charge of unlawful killing against an indigenous man for want of jurisdiction:

> Until the aboriginal natives of this Country shall consent, either actually or by implication, to the interposition of our laws in the administration of justice for acts committed by themselves upon themselves, I know of no reason human, or divine, which ought to justify us in interfering with their institutions.

Behrendt et. al. note the paradox whereby within the overtly racist statement lies a clear recognition 'that Aboriginal peoples exist with their own system of laws governing relations between them'.[124] Since *R v Murrell* in 1836,[125] 'the possibility of developing legal pluralism in the early years of the Australian colonies was effectively jettisoned' – a decision 'which later courts held as binding'.[126] In *Murrell*, Burton J (with whom Dowling J concurred, having changed his mind since 1829), found that Australian courts had jurisdiction over Indigenous peoples.[127]

Accounts such as that above became commonplace in justifying subsequent interventions and heavy policing.[128] Cunneen analyses the evolving interaction between Western governance and Indigenous peoples through the guise of colonial policies such as the 'establishment of

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[123] *R v Ballard* (1829) NSWSC 26 quoted in Larissa Behrendt, Chris Cunneen and Terri Libersman, *Indigenous Legal Relations in Australia* (Oxford University Press, 2009) 13.

[125] (1836) NSWSC 35.

[125] (1836) NSWSC 35.

[126] Chris Cunneen, 'Indigeneity, Sovereignty and the Law: Challenging the Processes of Criminalisation' (2011) 110 (2) *South Atlantic Quarterly* 309, 312.

[127] Bruce Kercher, 'Recognition of Indigenous Legal Autonomy in Nineteenth Century New South Wales' (1998) 4 (13) *Indigenous Law Bulletin* 7, 8.

[128] *Douglas and Finnae* (n 4).

reservations' or 'the imposition of an alien criminal justice system', which have 'sought to exterminate, assimilate, "civilize," and Christianize Indigenous peoples'.[129]

Indigenous peoples in the justice system have been the subject of, and subjected to, the latest whims of successive governments. As Creamer recognised,[130] the overwhelming narrative of government intervention has imposed selective accountability upon Indigenous peoples. Instead, outcomes in the justice system have consistently been influenced by external factors beyond Indigenous control – remnants of a Eurocentric framework, the acknowledgement of which 'remains crucial to making sense of Indigenous peoples' positions'.[131] Movement lawyering posits that lawyers must appreciate the socio-historical context of a movement.[132] In Indigenous contexts, understanding colonial impacts is merely a starting point.[133]

Traditionally, poor justice outcomes have been explained by targeted misuses of police power against Indigenous peoples.[134] Conversely, a simplified summary of the deficit discourse stems from statistical representations framed primarily by non-Indigenous communicators:[135]

- existence of statistically indicated social disadvantage;
- specific offender profiles prone to criminal justice contact;

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[129] *Cunneen* (n 9) 320.

[130] Interview with Joshua Creamer on 25 August 2021.

[131] Chris Cunneen and Simon Rowe, 'Decolonising Indigenous Victimisation' in Dean Wilson and Stuart Ross (eds) *Crime, Victims and Policy: International Contexts, Local Experiences* (Springer, 2015) ch 1.

[132] *Cummings* (n 1).

[133] Marcie Fisher-Borne, Jessie Cain and Suzanne Martin, 'From Mastery to Accountability: Cultural Humility as an Alternative to Cultural Competence' (2014) 34 *Social Work Education* 165, cited in Marcelle Burns, 'Are We There Yet: Indigenous Cultural Competency in Legal Education' (2018) 28(1) *Legal Education Review* 1, 17.

[134] Troy Allard, 'Indigenous Young People and the Justice System' in Anna Stewart, Troy Allard and Susan Dennison (eds), *Establishing an Evidence Base Evidence Based Policy & Practice in Youth Justice* (Federation Press, 2011) 30.

[135] Don Weatherburn, *Arresting Incarceration: Pathways Out of Indigenous Imprisonment* (Aboriginal Studies Press, 2014).

- the necessary intervention of governance agencies at all levels of offending;
- incarceration as inevitable, despite best intentions of the community.

The above account is criticised by commentators for conflating causation with correlation when explaining the causal roots of Indigenous over-incarceration;[136] overlooking the point that inequity is structural. O'Brien grieves 'the disturbing reality that over-policing, police profiling and incarceration is a daily experience for many young Indigenous peoples, particularly young males'.[137] As the below analysis shows, contemporary public discourse embodies those narratives..

B Youth Justice Amendment Act 2021 *(Qld): Surveillance, Populism and Tokens*

The *Youth Justice Amendment Act 2021* (Qld) (the **Amendment Act**) has caused apprehension, symbolizing further legislative overcriminalisation – *deja vu* of two centuries of oscillating surveillance policies.[138] Most controversially, the Amendment Act reverses the presumption against giving bail for youth who appear for breach of bail and have prescribed indictable offences on their record; allows electronic GPS trackers on 16-17 year old youth as a condition of bail; and permits police to search for knives in safe night precincts without reasonable suspicion.[139]

Criminal laws can be criticised for their content but 'relatively little attention has been paid to understanding and unpacking the nature and significance of different pre-enactment

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[136] Grace O'Brien, 'Racial Profiling, Surveillance and Over-Policing: The Over-Incarceration of Young First Nations Males in Australia' (2021) 10 *Social Sciences* 68, 72.

[137] *O'Brien* (n 136) 73.

[138] See, eg, Kate McKenna, 'The government's 'war on kids' won't stop the youth crime problem in Queensland, experts say', *ABC News* (online, 22 February 2021) *https://www.abc.net.au/news/2021-02-22/queensland-government-reforms-youth-repeat-offenders/13176562*.

[139] Explanatory Notes, Youth Justice Amendment Bill 2021, 3-6.

processes'.[140] The Amendment Act supports findings that changes in bail and parole were 'more likely to be the result of a process, involving less haste, some independence and some consultation'.[141] *Prima facie*, the Amendment Act enactment process shows no cause for concern; ticking all the boxes: publicised terms of reference by the Legal Affairs and Safety Committee (the LAS Committee), public consultation and receipt of oral recommendations followed by a public report to which the government responded. However, extending this analysis *within* and *behind* the *process* of enactment quickly reveals a system frozen in time: a case of pre-determined solutions to a populist problematization; tokenistic consultations; and legislation reinforcing recent trends of technological surveillance.

1 *The Amendment Act: Reinforcing Technological Surveillance Trend*

Apprehension surrounding the ubiquity of surveillance technology and its disproportionate impact on minority populations is vast, particularly in the United States.[142] Ignoring these concerns, Australia's efforts to create a national biometric identity database to exchange identity information culminated in the *Intergovernmental Agreement on Identity Matching Services* (**IGA**) which has somewhat normalised use of surveillance technologies in policing. The Amendment Act provides mechanisms for surveillance that will ultimately have disproportionate effects on Indigenous youth. Limited geographically to certain postcodes, the powers under the Amendment Act will only apply to certain postcodes; co-incidentally areas with high Indigenous populations. Queensland's Child and Family Commissioner noted two out of three children affected by the Amendment Act will be Indigenous.[143]

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[140] Luke McNamara et al, 'Understanding processes of criminalisation: Insights from an Australian study of criminal law-making' (2021) 21(3) *Criminology & Criminal Justice* 387, 388.

[141] *McNamara et al* (n 141) 402.

[142] See, eg, Ruha Benjamin, *Race After Technology* (Polity, 2019).

[143] Evidence to Legal Affairs and Safety Committee, Parliament of Queensland, Brisbane, 22 March 2021, 35 (Natalie Lewis).

2 *Tokenistic Consultations*

In the past two years, the Queensland government has commissioned a myriad of reports which have recommended preventative and early intervention policies to tackle criminal justice issues with Indigenous-led solutions. And yet, the next legislative act has yielded deterrence-based laws to justify further surveillance of Indigenous youth. Cubillo wonders 'whether this practice of appointing bodies and then ignoring them is a deliberate strategy of distraction'.[144] Cubillo's concerns are supported by the failure of numerous governments to implement recommendations starting from the 1987 Royal Commission into Aboriginal Deaths in Custody.

The Amendment Act has undergone a seemingly extensive consultation process, involving 83 submissions and seven public hearings across Queensland. But a closer look reveals that out of those 83 submissions only one was by an Indigenous individual whereas 35 were from non-Indigenous parties. Out of those 35, the largest cohort of submitters (24) were individuals, mostly Townsville residents, supporting the amendments and citing fear and anger as victims of crime.

That analysis reveals a story of inadequate consultation; a failure to create space that can support pragmatic sovereignty. The disconnect with communities is epitomised by a community member:[145]

> [Referring to Indigenous elders in a regional community] ... They are always wanting to be heard and to hear. Until I went out there Isabel, who I mentioned, was not aware of the

[144] Eddie Cubillo, '30th Anniversary of the RCIADIC and the 'white noise' of the justice system is loud and clear.' (2021) *Alternative Law Journal*. <doi:10.1177/1037969X211019139>

[145] Evidence to Legal Affairs and Safety Committee, Parliament of Queensland, Mt Isa, 16 March 2021, 7 (Anne Hodge).

> process and what was happening ...They feel they have not been given that opportunity .. they will let you know what they need and what they want.

The result is that holistic critical Indigenous theories as solutions to justice 'problems' is overlooked:

> Indigenous concepts of healing are based on addressing the relationship between the spiritual, emotional and physical in a holistic manner. An essential element of Indigenous healing is recognising the interconnectedness between, and the effects of, violence, social and economic disadvantage, racism and dispossession from land and culture on Indigenous peoples, families and communities.[146]

The story is only reinforced by the public hearings, whereout of 19 witnesses, a maximum of four (Mt Isa and Cairns) were Indigenous peoples at each location. Attendees were given a maximum of 3-minutes to speak - often cut off at crucial junctures, such as Patrick O'Shane, a Yalanju person at the Cairns public hearing:

> Mr O'Shane: People do not recognise who we are or that we must teach our children. You take them away and say, 'This is the way of life.' This is another way of life; it is not our way of life.
>
> CHAIR: I am sorry to interrupt, but we are running out of time in this session.[147]

Notwithstanding tokenistic and confined consultations there was no shortage of positive discourse and encouraging responses. So why did those contributions disappear in the final solution?

3 *Problematization is the Problem*

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[146] Chris Cunneen and Simone Rowe, 'Chapter 1' in Dean Wilson and Stuart Ross (eds) *Crime, Victims and Policy: International Contexts, Local Experiences* (Springer, 2015)

[147] Evidence to Legal Affairs and Safety Committee, Parliament of Queensland, Cairns, 18 March 2021, 9 (Patrick O'Shane).

Carl Bacchi's account of problematisation outlined above in case-study two reveals the problematisation of the Amendment Act quickly becomes clear from the following statement of the second reading speech:[148]

> The government has moved *swiftly* and *decisively* in response to the *continued risk posed to our community* by *a cohort* of *serious* and *persistent* youth *offenders*.[149]

Disregarding the blatantly political nature of terms such as 'swiftly' and 'decisively' and reflecting on Hal Colebatch's features of 'good politics', we can glean insight into how the policy problem is framed. Here, it is framed by politicians and the media. The penal populist rhetoric around youth offending has dominated media outlets as the 'fear' of Townsville residents in particular over youth offending attracts buzzwords like 'community safety', 'recidivist offending', 'kiddie crimes' and 'juvenile delinquents'. The result is what Peter Kelly calls 'at-risk discourse' on youth,[150] and Pratt's penal populism in action whereby politicians appeal to emotions of fear and anger about crime.[151] In other words, it is a case of 'good politics' meets 'bad policy' wherein politicians are able to perfectly time their 'rational' and 'clear' policy intervention to what is portrayed as a long-term pervasive problem, ensuring electoral votes.[152]

The problematisation states that the community is unsafe, safety must immediately be returned and the *cause* of the problem is offending of certain recidivist youth. Framing the problem in this way automatically leaves room for only one immediate solution: bringing the coercive

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[148] *Bacchi* (n 105).

[149] Queensland, *Parliamentary Debates*, Legislative Assembly, 25 February 2021, 33 (Mark Ryan).

[150] Peter Kelly, 'The dangerousness of youth-at-risk: the possibilities of surveillance and intervention in uncertain times' (2000) 23 *Journal of Adolescence* 463, 465.

[151] John Pratt, *Penal Populism* (Routledge, 2006)

[152] Hal Colebatch, *Beyond the policy cycle: the policy process in Australia* (Allen & Unwin, 2006) ch 13.

might of the State upon these youth ‘swiftly’ and ‘decisively’ to reinstate community safety as an immediate ‘fix’ in the face of plausible alternatives.

The fleet of suggestions of community owned Indigenous-led programs shared by the few Indigenous participants were relegated in the final report of the LAS Committee, under the heading, “Suggestions outside the scope of the Bill”. These suggestions included, early and community level intervention, relocation sentencing and on-country programs. By constantly reframing the issue as *urgent,* despite submissions that the levels of offending had not changed in decades, and by concentrating on the *current* cohort of offenders for whom prevention was too late, the consultative process was farcical. Whenever prevention or early intervention was mentioned, or long-term solutions discussed, focus was redirected to the victims – a short-termist view that permitted the introduction of legislation with long-term consequences reinforcing incarceration focused intervention.

The notion of legislative intervention as an immediate band-aid solution is a dangerous precedent. It is consistent with the impulsive policy-making that has characterised previous Indigenous justice initiatives. Instead, if the problematisation had been framed around a need for healing, and employed evidence-based policy that acknowledged the colonial discourse, then the possible range of solutions may have expanded considerably.

The movement lawyer can tactically lobby within the well-recognized interaction between the media, politician and public to ‘engender a more rational and less punitive discourse’.[153] Public emotions have been exploited for ‘good politics’ to create ‘bad policy’. Provision of information on alternative policies and a replacement discourse are apt in this context where a deficit discourse has dominated. Lawyers are linguist and an expert rhetoric who can help draft

[153] Margarita Dobrynina, ‘The Roots of “Penal Populism”: The Role of Media and Politics’ (2016) 4 *Kriminologijos Studjios* 99, 102.

media strategies, submissions and appear in the media to emphasize silenced solutions. While legal organizations did make submissions on the Amendment Act, consideration of Indigenous issues was often cursory and the media dialogue was dominated by justice officials.

The communicative content must be guided by Indigenous actors who are designing, developing and implementing Indigenous owned justice initiatives aimed at connecting youth to community. Influencing public sentiment is a central step towards dismantling the complex of prison architecture. In this way, employing rhetoric to create space for 'legitimate and effective alternative responses' reframing and the debates using Indigenous critical theory,[154] a lawyer can become a movement lawyer.

VI THE MOVEMENT LAWYER AND MODERN INDIGENOUS SOVEREIGNTY: *TACTICS* FOR CHANGE

Through case-studies examining native title, TK and the criminal justice system, we have sought to identify the role of the movement lawyer through a framework of analysis which positions a pragmatic interpretation of sovereignty as the overarching *goal*. We identified the recognition of land rights, the preservation and protection of TK, and the abolition of a prison-industrial complex as *sub-goals* of this movement. Across our three case-studies we explored the *strategy* of "creating space" and discussed the different *tactics* which lawyers can employ. We theorise that by creating space, beneficial outcomes could include: effective native title agreement-making; the development of best practice principles within TK; and the development of indigenous community-based justice initiatives.

We have attempted to identify the currently untapped potential of the Australian lawyer. We hope that an examination of the various tactics for creating space *within* the three legal domains

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[154] David Indermaur, 'What we can do to engender a more rational and less punitive crime policy?' (2009) 15 *European Journal of Criminal Policy Res* 181, 187-188.

exposes the commonalities *between* them. To that end, we hope to illustrate how movement lawyering in one practice area is intra-informed by lawyering in other areas. Indeed, the 'crucial point' of the movement lawyering model entails the deliberate coordination of *tactics* 'executed according to an *overarching strategy* designed to maximise their *combined power to advance the movement-defined goal*'.[155] For example, the tactic of adopting an ethic of care is not limited to native title, but offers beneficial outcomes in TK and the criminal justice system.

For native title, lawyers are, as facilitators and translators, holders of the baton in practical agreement-making. What the Noongar settlement symbolises is that effective change can result from a more localised approach which confronts these issues on a smaller-scale. Learning from native title, where legislative intervention was antecedent to the development of best practice, lawyers now have the scope to assist in defining the trajectory of policy making around TK. As explained, the order in which native title progressed should be reversed; best practice first, law-making second. The tactical repertoire involved in this process can be translated to the modern context of technology and surveillance in the criminal justice system. The only difference being the audience with whom lawyers converse. In this way, all lawyers must be aware of their roles as translators, facilitators, educators, journalists.

We hope that lawyers today, practising in a myriad of different legal domains within Australia can follow the example set by their predecessors in Redfern fifty years ago, who sought to circumvent political inaction with proactive community engagement beyond their traditionally-defined legal role. Actions which inspired the birth of the 'indigenous sector'.

[155] Cummings (n 1) 115 (emphasis added).

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We are deeply aware that our views, as non-Indigenous Australians and legal professionals, do not reflect those of the Indigenous peoples of this country. In recognition of that we try to foreground the views of Indigenous peoples as expressed in the literature and have included Indigneous participants wherever possible in the consultation and interview process. We take those perspectives, recognising that they are by no means homogeneous, as the starting point and guide to our analysis. We do not seek to explain the content of Indigenous law or customs, or propose specifics of how Indigenous peoples should act. Consistent with movement lawyering, we focus on tactics the movement lawyer can implement to create space for Indigenous exercise of modern Indigenous sovereignty.