Grappling with Slavery and Genocide: An update on reconciliation in Australia

1. INTRODUCTION

Slavery has never been legal under the laws of Australia.

This can be seen in the instructions of King George III to Captain Arthur Phillip before embarking on the establishment of Australia's first British colony in NSW. Phillip was instructed to protect the indigenous population and establish friendly relations, yet no concrete protections or rights were conferred on the indigenous population, and particularly there was no recognition of their right, to or use of the land.[1]

The treatment of indigenous Australian following colonization has been categorised as a genocide.

Holocaust survivor Elie Wiesel once said of victims of genocide, "Let us remember "what hurts the victim most is not the cruelty of the oppressor but the silence of the bystander."[2]

In this, Australia's legal system has played the role of both oppressor and bystander. Such a dichotomy can be seen in the instructions of King George III to Captain Arthur Phillip.

Hence, indigenous Australians experienced violence, abuse and cultural suppression almost from the outset of colonization in Australia. A project at the University of Newcastle, led by the late Professor Lyndall Ryan, has tracked over 400 massacre events against indigenous people occurring in Australia from 1788 to 1930.[3]

[1] Governor Phillip's Instructions 25 April 1787 (UK) (no date) Documenting Democracy. Available at: https://www.foundingdocs.gov.au/item-did-35.html (Accessed: 28 March 2025).
[2] Rescue of Jews during the Holocaust (no date) Yad Vashem. The World Holocaust Remembrance Center. Available at: https://www.yadvashem.org/holocaust/about/rescue.html (Accessed: 28 March 2025).
[3] Colonial Frontier Massacres in Australia, 1788-1930 (no date) Centre For 21st Century Humanities. Available at: https://c21ch.newcastle.edu.au/colonialmassacres/ (Accessed: 28 March 2025).

Moreover, they experienced what can be uncontroversially characterised as indentured servitude and what is commonly called 'blackbirding', whereby Indigenous Australians and South Pacific Islanders were removed from their ancestral homelands, families and communities, often by force, coercion or deception, and forced to work either in domestic roles or in harsh farming or mining labouring. Particularly, the booming sugar plantation trade meant countless indigenous Australians and South Pacific Islanders were forced into servitude between the period of 1863 and 1904.

In 2020, Then-Prime Minister Scott Morrison made a statement that there was 'no slavery in this country.'[4] He quickly tried to walk back this claim without going as far as classing these practices as slavery. While it is true that Australia was not a 'slave state' comparable to the American South, it is undeniable that Indigenous Australian were coercively and forcibly controlled in a manner akin to ownership. The Chief Protector in the Northern Territory in 1927 was recorded as noting that pastoral workers were 'kept in a servitude that is nothing short of slavery.'[5]

The genocide of indigenous Australians continued actively within the legal system, as the 1915 *Aborigines Protection Act* abrogated the judiciary of their oversight of the government's treatment of indigenous Australians. This left government and non-government actors unsanctioned in their removal of indigenous children from their families. This active attempt

[4] Scott Morrison sorry for 'no slavery in Australia' claim and acknowledges 'hideous practices' (2020) The Guardian. Available at: https://www.theguardian.com/australia-news/2020/jun/12/scott-morrison-sorry-for-no-slavery-in-australia-claim-and-acknowledges-hideous-practices (Accessed: 28 March 2025).
[5] Report - Unfinished Business: Indigenous stolen wages (no date) Standing Committee on Legal and Constitutional Affair. Available at: https://www.aph.gov.au/~/media/wopapub/senate/committee/legcon_ctte/completed_inquiries/2004_07/stolen_wages/report/report_pdf.ashx (Accessed: 28 March 2025).

to extinguish indigenous Australians and their culture occurred between 1910 and 1970 and is known in Australia as the Stolen Generation. Not only were children removed from their families, but they often went on to experience severe abuse, including physical and sexual abuse in government facilities, religious organisations and adoptive households, the repercussions of which are still felt by many in the indigenous community today.

From turning a blind eye to settler violence against Indigenous Australians, to actively allowing abuse and cultural suppression, the Australian legal system has been both an active oppressor and an inactive bystander, both of which established a genocide of indigenous Australians that spanned nearly two centuries, and some argue is continuing today.

In many ways, the Australian Parliament, the executive and the judiciary have come to terms with this and are taking active steps to suppress discrimination and uplift indigenous communities from the oppression of their past and present. Within this, there appears to be acknowledgement that it is not merely enough to remove the active oppression of indigenous Australians, but the government must take an active role and protect indigenous Australians from abuse and discrimination in all aspects of Australian life.

Each of the 1967 referendum, in which 91% of Australians voted to recognise Indigenous Australians under the constitution, the 1992 Mabo decision, which acknowledged indigenous rights to land as existing prior to colonisation, and the 2007 apology by the federal Prime Minister to victims of the Stolen Generation, lay the groundwork for efforts towards reconciliation, and importantly reparations. The following paper examines current and recent

efforts by all three of the legislatures, executive and judicial branches to build on these efforts and provide a snapshot of the current state-of-play for indigenous Australians today.

2. Legislative Progress - Treaty (Yeh!)

While the federal referendum to enshrine an indigenous voice to the federal parliament of Australia in the Constitution failed in 2023, efforts remain towards better legislative recognition of indigenous Australians throughout the state legislatures. Efforts to create state-based voices to parliament will be discussed in the following section titled Self-Represented Advocacy, but a key and more widespread legislative effort has been made across state parliament to enact *treaties*.

Generally, these treaties would agree to:

1. Acknowledge the existence of a distinct Indigenous people that owned, occupied and governed the continent before colonisation, thus also recognising the injustices caused by colonisation against these people and their pre-established societal structures.
2. A fair process of negotiation between *equals*, as opposed to conqueror and subjugated.
3. A commitment to responsibilities, promises and principles that bind the parties in ongoing relations moving forward.

Other benefits such as financial compensation, return of land and historic recognition of wrongs may flow from or occur within such treaties.

While Australia is seeing a move towards establishing such treaties, there are detractors who propose treaties as dangerous and divisive. Yet, in contrast, by many, treaties have been

described as a marriage not a divorce. Indigenous Australians are often ignored and subjugated within a legal regime that was not created for nor by them, and under which they often suffer due to cultural incongruences and the continuation of past injustices. A treaty would acknowledge this occurrence and allow a better relationship between indigenous Australians and the governments that govern them.

The following states have engaged distinct processes towards establishing treaties:

Victoria,

Queensland,

the Northern Territory; and

the Australian Capital Territory.

In Victoria, the *Advancing the Treaty Process with Aboriginal Victorians Act 2018* established a framework for negotiating treaties, and the *First Peoples' Assembly of Victoria* was created to represent indigenous communities within these.

Negotiations commenced in 2024 with a focus on reparations, land rights and governance, and the Victorian government aims for treaty legislation to be passed before 2026.

In 2019, the Queensland government launched a programme called *Path to Treaty*, with the *Path to Treaty Act 2023* passed to establish a framework for negotiations. The legislation included provision for a *Truth-Telling and Healing Enquiry* to document historical injustices and focus on recognising indigenous sovereignty and improve governance structures. Unfortunately, following a change of government in Queensland, the 2023 Act has been repealed.

In the Northern Territory, which has the largest indigenous population per capita of any Australian state or territory, the *Barunga Agreement* was signed in 2018 by the Northern

Territory Government and indigenous leaders. Again, a change of government in the Northern Territory has dismantled the treaty process, but a renewed focus has been given to restoring local control to remote community councils.

In the Australian Capital Territory, the ACT Aboriginal and Torres Strait Islander Agreement 2019-2028 committed the territory government to begin conversations and negotiations relating to treaty.

Separately, New South Wales, South Australia and Tasmania have each expressed intentions towards the establishment of treaties. In NSW, 'Treaty' Commissioners have even commenced a 12-month consultation period aimed at exploring pathways to treaty. Western Australia is the only jurisdiction that has not begun a process towards treaty or at least expressed an intention to do so.

3. Self-Represented Advocacy - You're the Voice (Try and Understand It!)

The proposition of an Indigenous Voice to Parliament first garnered steam in the 2017 Uluru Statement from the Heart, which is a petition to the people of Australia written by Aboriginal and Torres Strait Islander leaders selected as delegates to the First Nations National Constitutional Convention. Federally, this led to the 2023 Voice to Parliament referendum, which put it to the Australian people for a body to be enshrined in the constitution that would make representation to the Parliament and the Executive Government on matters relating to Aboriginal and Torres Strait Islander people. However, the referendum failed with only one Territory of the 8 Australian States and Territories, the Australian Capital Territory attaining a majority in support.

That has not however dissuaded efforts by state governments to establish voices to their parliaments. South Australia has become the first Australian state to establish a voice body in

March 2023. South Australia has established two levels of advocacy, being 6 voice bodies at the local level and one parliament-adjacent body at the state level. More than 110 candidates nominated for the First Nations Voice across the state and the inaugural First Nations Voice election was held on Saturday 16 March 2024. Aboriginal and Torres Strait Islander people living in South Australia were able to vote for their Local First Nations Voice representative. This has been a strong and important step towards legislated advocacy for indigenous Australians.

Similarly, a permanent state voice has also been included in the above-mentioned treaty negotiations in Victoria. In the Australian Capital Territory, there are two non-government bodies that work directly with the ACT government on issues of policy, heritage and land conservation. Both the Aboriginal and Torres Strait Islander Elected Body, and the United Ngunnawal Elders Council have become integrated into much of the decision making of the ACT government, allowing advocacy for indigenous Australians on a range of issues.

4. Specialised Indigenous Courts - (The Time Has Come To Say) Fair's Fair

White Australians have the benefit of engaging with a court system that directly reflect the cultural principles among which they have been raised. Indigenous Australians do not, and the courts often pose a completely foreign dispute resolution that is antithetical to their culture and lived experience. Many courts in states and territories across Australia have sought to make their systems fairer for indigenous Australians and incorporate indigenous cultural practices and principles in the adjudication of judicial decisions.

Indigenous-specific courts began emerging in the early 2000s, with Victoria establishing the first Koori Court in 2002. Similar indigenous-specific courts have emerged in other states, such as the Murri Courts in Queensland, Circle Sentencing in New South Wales, Nunga Courts in South Australia, the Galamby Court in the Australian Capital Territory, and the

Barndimalgu Court in Western Australia. While there are slight variations between the states, these courts are generally available to indigenous offenders who plead guilty. In this way, the determination of a crime is not altered in any way, however the court in its sentencing takes a more holistic approach to ensure a fair and effective sentence is handed down. Elders are often involved in advising on cultural context to ensure a better understanding of the individual's circumstances before conferring a sentence. In doing this, the goal is not to decrease punishment for indigenous Australians, but rather to make justice processes more culturally appropriate, reduce reoffending and increase community involvement with the judicial decision-making.

The Northern Territory and Tasmania are the only states that do not have specific, indigenous focused courts established. However, since indigenous Australians make up only 3.8% of the Australian population but make up over 36% of the incarcerated population,[6] it is important that all Australia's judicial jurisdictions attempt to achieve more effective sentencing of indigenous Australians to, most importantly, prevent reoffending.

5. Land Rights Cases - From Little Things Big Things Grow

The 1992 Mabo decision was a pivotal case in the progression of indigenous rights in Australia. The case rejected the notion that the continent existed *terra nullius* prior to colonisation (a.k.a. the land was unowned and unoccupied) and moreover acknowledged that indigenous Australians still held rights to the land by virtue of traditional customs and laws, and these rights had not been extinguished from the mere act of colonisation by the British. This allowed indigenous Australians the ability to obtain rights to land where they could establish title via custom such as stewardship, that was unbroken by colonisation.

[6] Prisoners in Australia, 2024 (no date) Australian Bureau of Statistics. Available at: https://www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/2024#data-downloads (Accessed: 28 March 2025). Relevant section excerpted at Annexure A.

Unsurprisingly, the operation of such a historically broad principle has taken significant judicial review to become an operable principal, a process which continues today. It also saw heavy backlash from various groups, who feared the possible commercial and social impacts.

However, these hurdles have not prevented native title from becoming a distinct legal principle in Australia, and we have seen some very promising cases recently. While not termed as *reparations*, these cases offer restitution for the colonial wrongs of the past and acknowledging the cultural rights of indigenous Australians that still exist today offers some remedy to the extinguishment of rights, and quite literally people, that occurred in the past.

A landmark case has come from the *Ngaliwurru* and *Nungali* peoples' claim against the Northern Territory government. The *Ngaliwurru* and *Nungali* peoples were awarded $2.53 million in compensation for the loss of native title rights in Timber Creek, Northern Territory. This was arguably the most-significant development to native title since *Mabo*, as it was determined that an extinguishment of title event had occurred, but the indigenous population were nonetheless still entitled to compensation for this loss - it should be noted that it was determined that *some* title remained, just not exclusive title. Additionally, it was significant in its acknowledgement of *both* cultural and economic losses resulting from colonisation.

In 2023, the *Widi* people achieved a significant agreement with mining giant *BHP*. The agreement commits to employment, training and contracting opportunities for the Widi people and improved education outcomes through annual bursary scholarships. The agreement also includes plans for Indigenous land use and cultural heritage management. While not a court case, it shows the power conferred on indigenous peoples by the progression of land rights, allowing groups to more independently engage in commercial dealings.

In 2024, 210 hectares of land in Toobeah, Queensland were awarded to the *Bigambul Native Title Aboriginal Corporation*. This grant was significant as the land was conferred entirely freehold, meaning the aboriginal incorporation would be able to engage with the property in the same manner as any other legal entity, thus allowing not only cultural and spiritual use but also economic profit.

In the recent High Court decision in favour of the Gumatj people of the Gove Peninsula where the Federal Court previously found Native Title rights and interest constituted property, with any extinguishment amounting to an acquisition. The Federal Court ruled that Gumatj clan's land was not acquired "on just terms" before it was leased to the mining consortium Nabalco. The High Court upheld the decision of the Federal Court. The matter has been referred back to the Federal Court to assess compensation which it has been estimated could be up to $700 million. This decision will likely have significant implications for the Commonwealth, particularly in relation to compensation claims from native title claimant groups for acts that occurred prior to 1993 that had the effect of extinguishing native title that would otherwise be recognised at common law. [7]

Finally, an ongoing litigation is the *Gia and Ngaro Peoples'* native title claim in the area covering Airlie Beach, the Whitsunday Islands and the surrounding maritime areas. This case, if successful, would cover both land and sea, and would provide title to engage in commercial fishing and tourism, as well as their cultural practices. Moreover, the case would be significant as, if successful, it would engage indigenous leaders in indigenous-led environmental management of marine parks and protected areas. Being an area significantly impacted by environmental threats including coral bleaching, this case would offer an

[7] *Commonwealth of Australia v Yunupingu (On behalf of the Gumatj clam or Estate Group) & Ors [2025] HCA 6*

opportunity to directly confer title for environmental management on an indigenous community.

6. Conclusion

In conclusion, Australia's efforts towards reparations and reconciliation have progressed significantly over the last 30 years. More crucially, they are continuing to progress into the future. While indigenous Australians have undoubtedly faced setbacks, including legislative restrictions on native title and the failure of the Voice referendum, on the whole we are seeing a net improvement in the rights and cultural protections for indigenous Australians. While the matters I have mentioned today are all important start-points, they are exactly that, a starting point, and Australia's legislatures, judiciaries and executive branches must all remember the significant path ahead to achieve equality, reconciliation and restitution.

In the words of the great Australian band Midnight Oil;

'How can we dance when our earth is turnin'?

How do we sleep while our beds are burnin'?'

And how can we move forward when we know that the foundation of Australia, our indigenous population, are being left behind?

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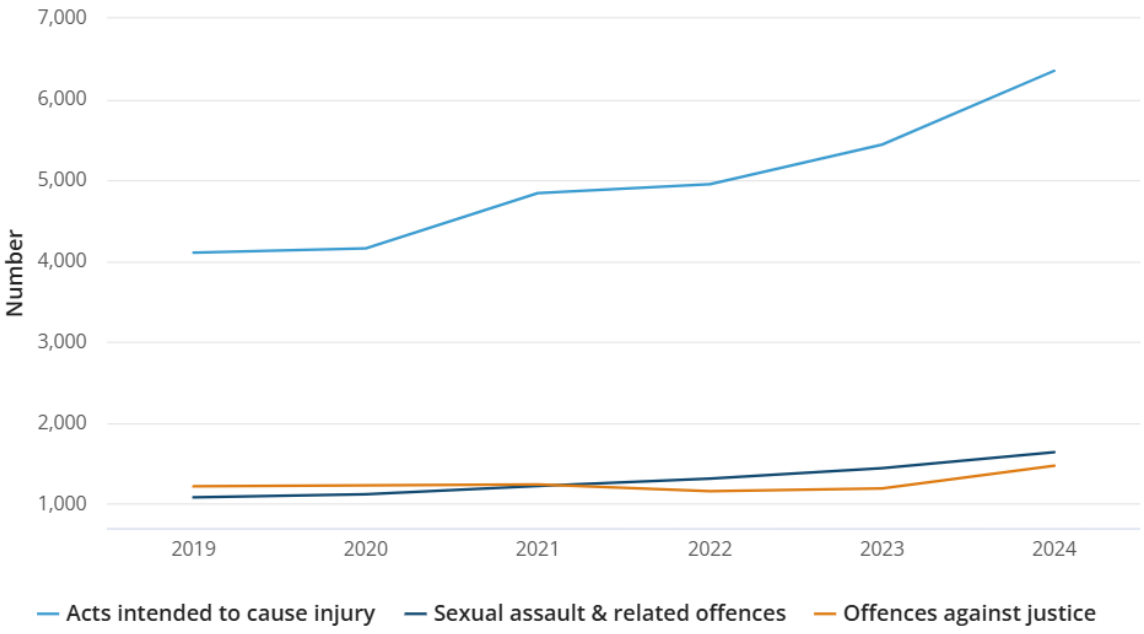
Annexure A

Aboriginal and Torres Strait Islander prisoners

Aboriginal and Torres Strait Islander prisoners by selected most serious offence/charge(a), 2019 to 2024

Graph | Table

Download



(a) For a definition of most serious offence/charge, see Methodology, Most serious offence/charge section.

From 30 June 2023 to 30 June 2024, Aboriginal and Torres Strait Islander prisoners increased by 15% (2,019) to 15,871. The largest numerical changes by most serious offence/charge were:

- acts intended to cause injury, up 17% (911) to 6,352
- offences against justice, up 23% (279) to 1,471
- sexual assault and related offences, up 14% (198) to 1,639

The age-standardised imprisonment rate increased from 2,266 to 2,559 prisoners per 100,000 Aboriginal and Torres Strait Islander adult population.

At 30 June 2024:

- Aboriginal and Torres Strait Islander prisoners accounted for 36% of all prisoners
- 90% (14,270) of Aboriginal and Torres Strait Islander prisoners were male, 10% (1,605) were female
- the median age was 33.6 years
- 76% (12,120) had experienced prior adult imprisonment