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Over incarceration of Indigenous Offenders has been a long standing problem across many states. This over-incarceration had had significant adverse effects on indigenous communities. This article argues that the High Court analysis of Indigenous sentencing in *Bugmy v The Queen* unnecessarily and unconvincingly establishes a set of systemic and individualised factors that seek to address indigeneity in sentencing. It argues that the systemic factors dismissed by the Court court as part of an individualised sentencing process have already been used by in state and Commonwealth policy as well as the common law. As such, the failure to embrace a Canadian *Gladue*-type approach or the approach of the New Zealand Courts in *Bugmy* due to individualised justice and formal equality concerns not only misconstrues the extent to which aboriginality as a background consideration is already a factor in Aboriginal sentencing in Australia but also undercuts the development of the common law in sentencing

[Aboriginal burial disputes: A guide on hearings in New South Wales](#)

— *Louise Goodchild and Lucy-Ann Kelley* 446

First Nations Australians are filing burial disputes in Australian courts at a disproportionate rate. For such peoples, unique cultural and spiritual beliefs and practices surrounding the disposal of the body

mean that burial and funeral arrangements are of particular significance, with the deaths of deceased persons presenting a heightened site of conflict where the deceased died intestate and is of Aboriginal heritage. The purpose of this article is to provide a guide on Aboriginal burial dispute hearings in New South Wales, put together from recent jurisprudence emerging from the Supreme Court. The authors' intention in writing this article is to urge fellow counsel to encourage the use of alternative dispute resolution processes in matters of this kind, endeavouring to keep such matters out of the courts and thereby ameliorating the risk of parties' grief and suffering turning into family conflict and resentment.

First Nations reimagining of child welfare key to addressing ongoing disparities

— *Paul Gray*

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Legal frameworks have long authorised state intervention in the lives of First Nations children and families, causing significant harm. 'Bringing Them Home' and other reviews since have emphasised the need for significant structural change, particularly focused on respecting the self-determination of First Nations, and re-orienting systems to address the drivers of contact with child protection systems, prevention and family support. Government reforms have been more narrowly focused to address systems issues. The limitations of these reforms relative to the need for transformational change is discussed, including opportunities to reimagine child protection systems for First Nations children, families and communities.

Determining sovereignty: Through law? Or a political option?

— *Peter Kilduff and Asmi Wood*

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The European doctrine of discovery was reasonably rejected as a legal basis for the acquisition of territory. Australia's highest domestic court has reasonably held that examining issues of state are outside the jurisdiction of a municipal court. Further, the Australian Government has not proposed an alternative basis for the acquisition of territory or successfully claimed sovereignty in a transparent, lawful and fair manner, and this maintains the status quo ante (the status quo of land custodianship before colonisation) which is *uti possidetis*. According to Judge Sebutinde, 'the Court has never suggested that *uti possidetis* may be a peremptory norm of international law' but it is clearly customary. This article considers this as the correct legal basis at law but also takes into account the significant facts on the ground built in over the last two centuries of colonisation. That is, as things stand, neither the British nor their successors have a theoretical legal basis for their territorial claims over the continent under international law. The current legal position effectively exhausts domestic legal remedies on this important question of law. Exhausting domestic remedies is an important hurdle in seeking to move the dispute for resolution into the international plane, particularly on matters affecting human rights.

County Koori Court — Sentencing court for Aboriginal and Torres Strait Islander offenders in a higher jurisdiction

— *Irene Lawson*

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It has been 30 years since the final report of the Royal Commission into Aboriginal Deaths in Custody was handed down. Key recommendations were made that sought to address the overrepresentation of Aboriginal and Torres Strait Islander people within the criminal justice system in Victoria. The establishment and implementation of Koori courts are a key initiative that has been driven by the

Aboriginal community, modelled after the experience of Aboriginal courts operating in South Australia (the Munga Court). In Victoria, legislation establishes the courts in the Magistrates' Court, Children's Court and County Court levels. This article outlines the establishment of the County Koori Court by way of the County Court Act 1958 (Vic) and explains the structure and nature of the County Koori Court. Furthermore, the impacts of COVID-19 on the County Koori Court are highlighted, touching on the unique model that was developed, its benefits and the long-term impact of such developments on Aboriginal justice initiatives.

First Nations peoples and the law

— *Helen Milroy, Marshall Watson, Shraddha Kashyap and Pat Dudgeon* 510

To understand the overrepresentation of First Nations peoples in the criminal justice system, we need to understand the historical context, together with unresolved contemporary issues of sovereignty, self-determination, and the need for truth-telling. In this article, we provide an overview of the current situation, we discuss the historical and contemporary contexts which contribute to the risk of young First Nations peoples coming into contact with the justice system, and we make recommendations for prevention and healing, from a First Nations perspective. Overall, we argue that offending behaviours lie at the end of a continuum of risk. This continuum includes exposure to intergenerational and current trauma within the historical context of genocide, and the ongoing issues of generational poverty, social disadvantage, and discrimination.

The use of customary law in intestacy in Australian jurisdictions: Access to justice in action?

— *Prue Vines* 523

Australia ignored the civil law inheritance needs of its Indigenous people for a very long time, assuming that either they were 'traditional' and therefore did not need them or that they were 'non-traditional' and therefore had needs exactly the same as non-Indigenous people. Few attempts were made to allow for customary law to operate until late in the 20th century, and not until 2009 did the New South Wales Succession Act 2006 incorporate pt 4.4 into the Act. Part 4.4 and its counterpart in Tasmania allow the court to consider a scheme of distribution based on customary law where the deceased intestate was Indigenous. There have now been several cases on this legislation and this article considers whether and how evidence about what the customary law is should be considered. The cases so far have not been demanding in this respect, partly because of concern about costs increasing if there is extensive use of experts. The article asks when Aboriginal land councils, elders and various other people should be regarded as the authority concerning the customary law and considers some of the hurdles the courts may have to face in this respect.