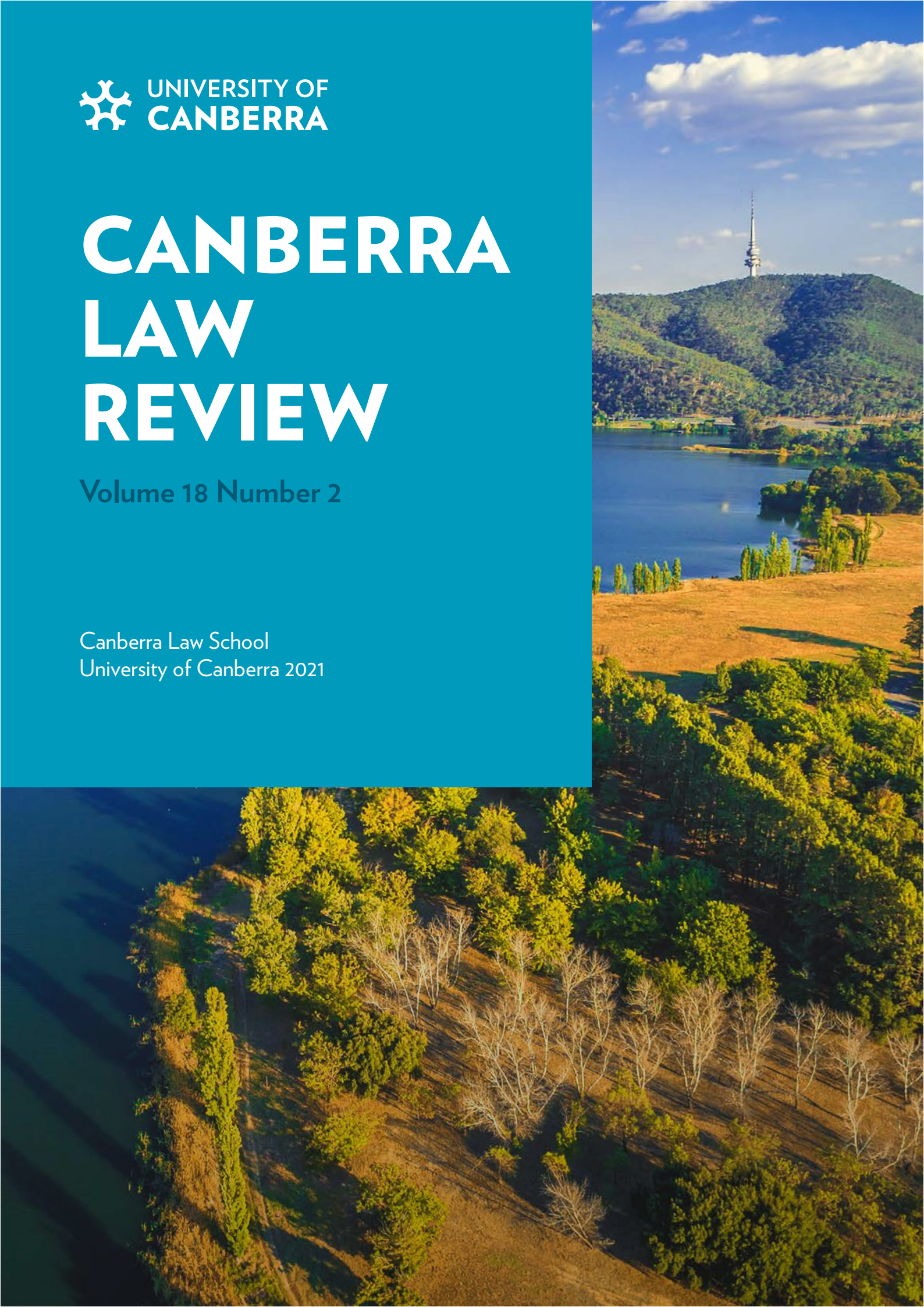
UNIVERSITY OF CANBERRA

CANBERRA LAW REVIEW

Volume 18 Number 2

Canberra Law School
University of Canberra 2021



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2021

Canberra Law Review

The *Canberra Law Review* is a peer-reviewed law journal published each year by the Canberra Law School at the University of Canberra.

It brings together academics, other scholars, legal practitioners, and students within and outside the University. It provides a peer-reviewed open access venue for innovative, cross-disciplinary and creative scholarly articles and commentaries on law and justice.

Submissions

The editors of the *Canberra Law Review* seek submissions on aspects of law.

We welcome articles relating to theory and practice, and traditional, innovative and cross-disciplinary approaches to law, justice, policy and society.

Guidelines

- Scholarly articles should be 5,000-14,000 words, case notes 1,500-3,000 words and book reviews 1,000-1,500 words (including references). Longer pieces are featured on an exceptional basis.
- Submissions must conform to the 4th edition of the *Australian Guide to Legal Citation* (AGLC4) and be 12 pt Times New Roman, single-spaced.
- Scholarly articles must be accompanied by an abstract of no more than 250 words.
- Submissions must not have been previously published in another journal.
- The focus is on Australian law and the *Review* is thus unlikely to accept submissions that are very specific to Asia, the Middle East and Eastern Europe.

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Scholarly articles are blind peer-reviewed by reviewers.

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ISSN

ISSN 1839-2660 (Online)

The ISSN for pre-digital (ie print) issues of CLR is 1320-6702.

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INTRODUCTION

This second issue of *Canberra Law Review* for 2021 – appearing somewhat late because of COVID-19 – features articles from Australian contributors regarding evidence, reporting and model litigants. It also features final-year work by Canberra Law School students alongside a review of major studies of the Constitution of the Australian Capital Territory and of constitutional reform as a remedy for political disenchantment, particularly relevant given violence by the far right at the end of 2021 such as the burning of the main entry to Old Parliament House.

Bede Harris' magisterial 'Should Australia's Judges Resign' offers a detailed exploration of a fundamental question: should judges who are required to apply law that infringes human rights resign rather than participate in an unjust legal system? The question is relevant to Australia because of the scope that the Constitution affords to Parliament to enact legislation that is contrary to internationally-accepted human rights norms, particularly in relation to liberty of the person which can be abrogated without judicial authorisation in a wide range of circumstances and which, in the case of immigration detention, can be indefinite. Building on a lucid examination of the moral responsibility of judges during the apartheid era in South Africa, for example regarding legislation authorising detention without trial and the psychological harm detention inflicted on detainees, Harris suggests that judges have open to them the option of refusing to apply such legislation by developing a common law bill of rights.

The theoretical justification could be based upon a restoration of the common law to the position enunciated by Coke CJ in *Dr Bonham's Case*, ie the power to refuse to apply Acts of Parliament contrary to 'right reason'. An alternative justification could be derived from the new understanding of the rule of law emerging in the United Kingdom, to the effect that the doctrine requires not only that the law conform to formal rules of validity but also that it should comply with external human rights norms, with the rule of law imposes on the courts a duty to restrain Parliament if it enacts oppressive legislation. the article argues that such a course should be adopted by courts in Australia, thereby enabling judges to resolve the moral dilemma presented by legislation that infringes human rights

Brendan Walker Munro's 'You Don't Need To Know' considers the blurring of traditional lines between "spies and cops" since 9/11, with Federal and State law having become more permissive of the use of criminal intelligence as evidence in proceedings. Walker-Munro argues that criminal intelligence (the synthesis of information and trained analysis to inform decision-making) has been the cornerstone of policing and national security investigations over the last century. The blurring has often occurred in circumstances where parties are not allowed to view the evidence, test its strength or even know it exists. The article engages with this paradigm, not only to expose its weaknesses but also to identify positivist mechanisms where such material – usually probative as to the facts in issue – might be used in ways that do not offend constitutional or common law principles.

'Duties To Report Child Sexual Offences: A New Era In Australian Criminal Law' by Ben Matthews notes that in 2021 Queensland became the most recent Australian State to enact a duty in criminal law requiring all adults in the community to report child sexual offences to police. The article conducts a comprehensive doctrinal and comparative analysis of these criminal law duties to identify common elements, and differences in nature and scope. Matthews argues that the laws constitute significant public policy interventions to better identify cases of child sexual abuse, also promoting both national and international policy imperatives to protect children. By creating a positive duty in the criminal law, the laws embody an approach to responsible citizenship which extends the traditional parameters of criminal law liability, but is justified in doing so given the characteristics and gravity of sexual offences against children and their typical non-disclosure.

In adopting a reform orientation, and using rule of law principles of clarity and consistency as an evaluative lens, the article argues that there is a need for a uniform approach across States and Territories. Matthews identifies areas requiring reform in jurisdictions that have already enacted legislation, and optimal approaches for legislative design in jurisdictions yet to enact the laws.

'Abuse of Power and the Issue of Prerogative Writs – Implications for Breach of the Commonwealth Model Litigant Policy' by Jason Donnelly considers prerogative writs. The grant of the prerogative writs and relief under s 39B of the *Judiciary Act 1903* (Cth) is a matter of discretion. The discretion to refuse relief is not to be exercised lightly. An established ground for refusing the grant of the prerogative writs is "bad faith" on the part of the applicant, either in the transaction out of which the duty to be enforced arises or towards the court to which the application is made.

The article considers the question of whether it is appropriate to withhold the grant of prerogative relief in circumstances where the Commonwealth, as a party to judicial review proceedings, has engaged in conduct considered an infringement of the Model Litigant Policy (MLP) made under the Legal Services Directions 2017 (Cth). Donnelly argues that contravention of the MLP by a Commonwealth party in judicial review proceedings should be considered a ground for a court, exercising judicial power, to refuse the grant of prerogative relief as an extension of the common law model litigant obligations imposed on Commonwealth entities.

A review of David Mossop' *The Constitution of the Australian Capital Territory* considers a landmark work on the law of the ACT, of value for legal practitioners within the Territory and more broadly for students grappling with the functioning of constitutions outside the national Constitution that all law students encounter as one of the Priestley subjects.

Student Section

This issue of *Canberra Law Review* also features contributions from six undergraduate and graduate law students.

Brittany Bretherton's 'Opting out of parenthood: A discussion on equality of reproductive rights and men's right to 'statutory termination'' argues that adoption of a right to 'statutory termination' raises novel questions about parenthood and equality in reproductive rights, but also difficult fundamental questions about equality before the law. The concept of statutory termination is that men should have equal reproductive choice and rights as women by providing a reciprocal right to terminate all responsibilities relating to an unintended pregnancy.

'Sic Itur Ad Astra: The CHM Principle, Celestial Bodies, the Moon Agreement and the Artemis Accords' by William Gallagher discusses international agreements regarding 'off world' activity, an area of increasing scholarly and commercial interest attributable to Australian government support of a 'space industry' and overseas initiatives led by entrepreneurs such as Jeff Bezos and Elon Musk.

Natasha Nguyen's 'Forging A Future For Nature: a comparative analysis of international, Commonwealth and ACT approaches to the law of biodiversity conservation' notes that although Australia is a signatory to both the World Charter for Nature and the Convention on Biological Diversity, its implementation of environmental laws have not optimally curbed this trend of biodiversity loss. Her article explores the interplay of biodiversity conservation laws in the ACT and the Commonwealth, evaluating whether the Environment Protection and Biodiversity Conservation Act 1999 (Cth) or Nature Conservation Act (ACT) strongly favours the conservation paths advanced by the World Charter for Nature or the Convention on Biological Diversity.

'Evaluating The Consequences Of Criminalising Coercive Control In The Australian Capital Territory' by Heidi Andriunas explores whether the Australian Capital Territory should consider introduction of a standalone offence of coercive control. Tasmania, Scotland,

England and Wales have all implemented coercive control offences. New South Wales and Queensland are conducting inquiries into the creation of an offence. It is pertinent to consider whether the ACT should follow.

Mallory Comyn's 'Locked Up And Drugged Up: Regulating The Use Of Chemical Restraint In Residential Settings' considers law regarding what has bleakly or indignantly characterised as the chemical cosh, building on the Royal Commission into Aged Care Quality & Safety disclosures regarding the alarming extent of neglect and abuse in Australia's residential aged care facilities.

'A Case for Recognition: A Fiduciary Relationship Between the Crown and Indigenous Australians' by John O'Connell offers insights into unsuccessful attempts by Indigenous Australians to utilise fiduciary law principles for greater recognition of their unique status in Australian society. It contrasts those attempts against the greater success of indigenous Canadians, going on to contrast the fiduciary law regimes in Australia and Canada, highlighting differences between the two jurisdictions, particularly in the context of judicial decision-making about the recognition of a fiduciary obligation owed to indigenous peoples and Canada's constitutional recognition of its First Nations.

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Should Australia's Judges Resign?

Bede Harris*

Should judges who are required to apply law that infringes human rights resign, rather than participate in an unjust legal system? This question is relevant to Australia because of the scope that the Constitution affords to Parliament to enact legislation that is contrary to internationally-accepted human rights norms. This is particularly the case in relation to liberty of the person which can be abrogated without judicial authorisation in a wide range of circumstances and which, in the case of immigration detention, can be indefinite. The question of whether judges should resign was the subject of academic debate during the apartheid era in South Africa. The particular focus of that debate was the moral responsibility of judges in the face of legislation authorising detention without trial and the psychological harm detention inflicted on detainees, a question which also confronts judges in contemporary Australia. The conclusion in South Africa was that resignation would, at best, be of symbolic effect. However, as an alternative to this, judges have open to them the option of refusing to apply such legislation by developing a common law bill of rights. Theoretical justification for this could be based upon a restoration of the common law to the position as enunciated by Coke CJ in *Dr Bonham's Case*, in which it was held that the courts had the power to refuse to apply Acts of Parliament contrary to 'right reason'. An alternative justification could be derived from the new understanding of the rule of law emerging in the United Kingdom, to the effect that the doctrine requires not only that the law conform to formal rules of validity but also that it should comply with external human rights norms. Under this approach, the rule of law imposes on the courts a duty to restrain Parliament if it enacts oppressive legislation. This article argues that such a course should be adopted by courts in Australia, thereby enabling judges to resolve the moral dilemma presented by legislation that infringes human rights.

I INTRODUCTION

This article examines the question of whether judges who are required to apply law that infringes human rights should resign or whether there is an alternative to that course. Its title echoes that of an article published by South African academic John Dugard in 1983 during a debate with fellow constitutional law academic Raymond Wacks. The topic of the debate was whether, by applying unjust law, judges contributed to the legitimacy of an unjust legal order and, if they opposed such law, ought therefore to resign. Part II of the article serves as a prelude to the debate in South Africa, by discussing the resignation two decades earlier of Sir Robert Tredgold, Chief Justice of the then Federation of Rhodesia and Nyasaland. Part III gives an overview of the deprivation of human rights in South Africa during the apartheid era. Part IV discusses the Wacks-Dugard debate. Part V discusses breaches of human rights by the Australian legal system, with a particular focus on liberty of the person. Part VI poses the question of what courses of action are open to Australian judges in the face of legislation that intrudes upon personal liberty and whether resignation would be a fruitful option. Part VII offers an alternative to resignation in the form of a judge-made bill of rights drawing both

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upon common law doctrines of the 17th and on recent developments in rule of law theory. The article concludes in Part VIII.

II PRELUDE: THE RESIGNATION OF CHIEF JUSTICE TREDGOLD

The Federation of Rhodesia and Nyasaland was formed in 1953.[1] Its component elements were the British colonies of Nyasaland, Northern Rhodesia and Southern Rhodesia. The reasons for its formation were to create a strong economic bloc in central Africa in which the different strengths of each member could be combined.[2] The United Kingdom also hoped that the Federation would serve as a liberal counterweight to South Africa, which in the process of erecting the legislative edifice of apartheid. However, a fundamental problem underlying the Federation was the fact that the constitutional status of its constituent elements differed. Whereas Nyasaland and Northern Rhodesia were protectorates in which executive power was wielded by a Governor, Southern Rhodesia was a Crown Colony which had enjoyed responsible government since 1923. Legislative power was vested in a Legislative Assembly, elected under a heavily qualified franchise that excluded all but a small number of blacks from the voters' roll.[3] The government was headed by the colony's Premier who was responsible to the Legislative Assembly in accordance with the Westminster model.

Throughout its brief 10-year history, the federation was wracked by political disputes over its very existence. Although all three countries had overwhelmingly black populations, Southern Rhodesia had a white minority population which, although comprising only 7.5% of the total, constituted a far higher proportion than in the two protectorates.[4] Black political activists had opposed the establishment of the federation, fearing dominance by Southern Rhodesia, while Southern Rhodesian whites hoped that the Federation was an avenue towards full independence – without the need to change franchise qualifications.

Severe political unrest occurred in 1960,[5] in response to which the Southern Rhodesian legislature responded by enacting the *Law and Order (Maintenance) Act No 53 of 1960* which either removed or limited a wide range of civil liberties and the *Emergency Powers Act No 48 of 1960,* s 3 of which gave the government the power to declare a state of emergency and s 4(2)(b) of which empowered the government to detain any person whose detention appeared to the Minister of Justice and Internal Affairs to be expedient in the public interest. In addition, s 4(2)(a) of the Act conferred on the executive a power to restrict people to designated areas of the country, a power which was used to restrict people to areas so remote as to amount to detention under another name.[6] It was in response to the publication of these Bills that Sir Robert Tredgold, Chief Justice of the Federation, resigned, stating that[7]

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[1] For a comprehensive history of the federation see J.R.T. Wood, *The Welensky Papers – A History of the Federation of Rhodesia and Nyasaland* (Graham Publishing, 1983).

[2] Peter Baxter, *Rhodesia: Last Outpost of the British Empire: 1890 – 1980* (Galago, 2010) 249-50.

[3] Reginald Austin, *Racism and apartheid in southern Africa – Rhodesia* (The Unesco Press, 1975) 69-70.

[4] W V Brelsford (ed), *Handbook to the Federation of Rhodesia and Nyasaland* (Cassell, 1960) 783

[5] James Barber, *Rhodesia: Road to Rebellion* (Oxford University Press, 1967) 51. For a survey of oppressive legislation enacted in Southern Rhodesia see Amnesty International, *Prison Conditions in Rhodesia* (1966, Amnesty International) and Christopher Zimmerli, 'Human Rights and the Rule of Law in Southern Rhodesia' (1971) 20 *International and Comparative Law Quarterly* 239.

[6] Barber above n 5, 55-6.

[7] Anon, 'Resignation of the Rt. Hon. Sir Robert Clarkson Tredgold, Chief Justice of the Federation of Rhodesia and Nyasaland' (1961) 78 *South African Law Journal* 13. See also John Redgment, 'Plus ca

> The [Law and Order (Maintenance)] Bill outrages almost every basic human right, and is, in addition, an unwarranted invasion by the executive in the sphere of the courts. These are the custodians of individual rights and are my special responsibility.

and later that that the Bill would 'compel the courts to become party to widespread injustice.'[8] The significance of the fact that Tredgold resigned even before the Bills were passed served to emphasise the degree of repugnance he felt for the inroads it would make into civil liberties and for the erosion of judicial power it would cause, as well as the clarity of his view that to carry on in office would make him complicit in the operation of an unjust legal system. Although no other judge followed Tredgold, the precedent he set was referred to in the debate that arose two decades later in South Africa on the role of the judiciary in an oppressive legal order, to which this article now turns.

III INDEFINITE DETENTION IN SOUTH AFRICA

The policy of apartheid made South Africa synonymous with the denial of human rights. The legal rules by which the policy was implemented were entirely statutory in origin, and at odds with South Africa's Roman-Dutch common law, the principles of which are protective of individual liberty, as is indicated by a number of cases in which judges held that racial discrimination was unlawful under common law.[9] The legislative measures through which apartheid was established were in part enacted in order to displace these common law principles.[10]

The legislative edifice of apartheid covered almost every aspect of life, from where one could live, whom one could marry or have sexual relations with, which school one could attend and which transport and public facilities one could use. Furthermore, in order to suppress the political opposition that apartheid engendered, numerous pieces of security legislation were enacted that either severely limited or entirely abrogated civil liberties.[11]

Perhaps most egregious of all of these were various measures that provided for detention without trial of those who engaged in, or were suspected of being about to engage in, acts of political opposition.[12] Provisions authorising detention were found in a variety of statutes and were subject to frequent change, but they shared the common feature of the exclusion of the jurisdiction of the courts to pronounce upon the validity of detention or to grant the *interdictum de homine libero exhibendo* (the Roman Dutch equivalent of habeas corpus).[13] In addition, the statutes prohibited detainees being allowed visitors or access to a lawyer.

The first of these provisions was s 3 of the *Public Safety Act 3 of 1953* which empowered the government to declare a state of emergency and to issue such regulations as it considered 'necessary or expedient for the safety of the public', which it used to issue regulations permitting arrest without warrant and detention without trial.[14] Subsequently, Parliament enacted the *General Law Amendment Act 37 of 1963*, s 17 of which authorised the executive

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change .... Fifty Years of Judges in Southern Rhodesia, Rhodesia and Zimbabwe' (1985) 102 *South African Law Journal* 529, 532.

[8] Robert Tredgold, *The Rhodesia That Was My Life* (Allen & Unwin, 1968) 232.

[9] *R v Carelse* 1943 CPD 242, *Tayob v Ermelo Local Road Transportation Board* 1951 (4) SA 440 (A). See also the dissenting judgment of Gardener AJA in *Minister of Posts and Telegraphs v Rasool* 1934 AD 167, 185-7.

[10] *Reservation of Separate Amenities Act* 49 of 1953, ss 2 and 3.

[11] Lennox Hinds, 'Apartheid in South Africa and the Universal Declaration of Human Rights' (1985) 24 *Crime and Social Justice* 5.

[12] The ever-expanding scope of legislative authority to detain is traced in John Dugard, *Human Rights and the South African Legal Order* (1978, Princeton University Press) 108-23; Anthony Mathews, *Freedom State Security and the Rule of Law – Dilemmas of the Apartheid Society* (Juta & Co, 1986) 62-100.

[13] See *Wood and others v Ondangwa Tribal Authority and another* 1975 (2) SA 294 (AD) for a discussion of the remedy.

[14] Regulations 4 and 19, Proc 91 (GGE 6403 of 30 March 1960).

to arrest without warrant any person who it was suspected had committed offences against specified Acts or who had knowledge of such offences for the purpose of interrogation until the detainee had answered all questions to the satisfaction of the detaining officer. Although detention was in theory limited to 90 days, new 90-day orders could be issued in succession. The 90-day detention regime was replaced by 180-day detention contained in s 215*bis* of the *Criminal Procedure Act 56 of 1955*. The 180-day detention law became largely redundant following the enactment of the *Terrorism Act No 83 of 1967*, s 6(1) of which permitted a senior police officer to detain a person without charge if they had reason to believe that the person had either committed an offence under the Act or had any knowledge of such an offence and to keep them in detention for the purposes of interrogation.

The scope of state power to detain reached its zenith with the enactment of the *Internal Security Act 74 of 1982*. Section 28(1)(b) authorised indefinite preventative detention *inter alia* on the extraordinarily broad and subjectively determined ground that the Minister of Law and Order was satisfied that the detainee would endanger the security of the state or the maintenance of law and order, without reference to suspicion that the detainee had our would commit any specific offence. Section 29 of the Act re-enacted s 6 of the *Terrorism Act* by providing that where the police suspected that a person had committed or would commit specified offences, or had knowledge of the commission of an offence or the intended commission of an offence by another person, the first person could be detained for the purpose of interrogation until the police were satisfied that the said person had satisfactorily replied to all questions or that no useful purpose would be served by their further detention.

The psychological effects of indefinite detention in South Africa were the subject of several studies. One of them described the mental condition of detainees as reflecting the D.D.D. syndrome – that is a syndrome of debility, dependency and dread, in which a person experiences extreme helplessness, malleability in the hands of the authority which controls his fate and a feeling of dread both for himself and his family.[15] This in turn leads to mental confusion, impaired concentration and suicidal tendencies. A study by Mathews and Albino found that the despair induced by the indefinite nature of the detention that was a key contributor to the psychological injury it inflicted, and criticised judges for being party to a system that allowed human rights to be abused in this way.[16] The study noted that had the detention been of limited duration, and had the detainee had the prospect of eventual release before some specified date in the same way as does a convicted prisoner, the purpose of the detention – which, apart from isolating opponents of the regime from society was to get them to speak to their interrogators - would have been undermined. In other words, the study concluded that the infliction of psychological injury was a key objective, rather than a by-product, of the process.

The reaction of the judiciary in South Africa to the over-ride of common law rights by apartheid legislation reflected a broad spectrum of what was possible within the parameters of a system based on parliamentary supremacy.[17] When faced with statutory ambiguity, judges who were ideologically aligned with apartheid resolved it in a manner supportive of government policy, even if it was open to them to apply the presumption that statutes are to be interpreted in such a way as to avoid deprivation of individual rights.[18] By contrast, other

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[15] J J Riekert, 'The D.D.D. syndrome - Solitary confinement and a South African Security Law Trial' in A N Bell and R D A Markie (eds), *Detention and Security Legislation in South Africa* (University of Natal, 1985) 121.

[16] A. S. Mathews and R. C. Albino, 'The Permanence of the Temporary – An Examination of the 90- and 180-Day Detention Laws' (1966) 83 *South African Law Journal* 16.

[17] John Dugard *Human Rights and the South African Legal Order* (Princeton University Press, 1978) 367.

[18] See, for example *R v Pitje* 1960 (4) SA 709 (AD), *Minister of the Interior v Lockhat and others* 1961 (2) SA 587 (AD), *Rossouw v Sachs* 1964 (2) SA 551, *Schermbrucker v Klindt N.O.* 1965 (4) SA 606 (AD), *South Afrucan Defence and Aid Fund and another v Minister of Justice* 1967 (1) SA 263 (AD) and *Sobukwe and another v Minister of Justice* 1972 (1) SA 693 (AD). For a survey of these cases see John

judges used the discretion conferred on them by rules of statutory interpretation and principles of administrative law to limit, to the extent that they were able, the effect of legislation which infringed fundamental rights,[19] – although in such instances the government was quick to enact legislation to block loopholes thus identified. In other cases, when faced with statutes that allowed no scope for interpretation, some judges made statements from the bench that were critical of apartheid and in which they declared that they were applying unjust legislation reluctantly. Typical of this was the statement by Didcott JA in *In re Dube*[20] in which he said

> Parliament has the power to pass the statutes it likes, and there is nothing the courts can do about that. The result is law. But that is not always the same as justice. The only way that Parliament can ever make legislation just is by making just legislation

The tensions faced by the judiciary in South Africa led to a famous academic debate which confronted squarely the question of what the moral responsibility of judges was when called upon to apply statutes antithetical to civil liberty enacted in an unjust legal order.

IV JUDGES AND UNJUST LAW – THE DEBATE IN SOUTH AFRICA

The origins of the debate in South Africa on how judges should respond to the unjust legal order lay in an inaugural lecture entitled 'Judges and Injustice' by Raymond Wacks on his appointment as professor at the School of Law at the University of Natal, Durban, in 1983, which was subsequently published in the *South African Law Journal*.[21] In this article, Wacks argued that the ever-diminishing scope of discretion left to judges by legislation, and the ever-widening powers granted by legislation to the executive, meant that judges had been reduced to being 'impotent spectators of administrative action' which was a 'grotesque distortion of their calling.'[22] What Wacks was essentially saying was that the doctrine of parliamentary sovereignty meant that judges had become the mere cyphers of the other two branches of government. This led him to state that[23]

> It is therefore self-evident that a judge who is unable morally to reconcile himself to the injustice of the system willy-nilly lends legitimacy to it.

and that[24]

> Of course, judicial independence, the Rule of Law, freedom and equality of the individual, are ideals of supreme importance; but the law, by violating them, fundamentally alters the very nature of the legal system. Of course, judges adopt the positivist view that Parliament is sovereign and that the law is what Parliament declares it to be, this is a pervasive notion in repressive law (though it is not exclusive to it). Of course, the law may be employed to control arbitrary power, but the courts are paralysed by legislation in almost every area pertaining to civil liberty. It is in this context that the judge's role (as well as the function of other elements in the legal system) needs to be analysed and evaluated.

Dugard, *Human Rights and the South African Legal Order* (1978, University of Princeton Press) 303-65.

[19] See, for example *R v Abdurahman* 1950 (3) SA 136 (AD), *R v Lusu* 1953 (2) SA 484 (AD), *R v Ngwevela* 1954 (1) SA 123 (AD), *Saliwa v Minister of Native Affairs* 1956 (2) SA310 (AD), *Wood and others v Ondangwa Tribal Authority and another* 1975 (2) SA 294 (AD), *Magubane v Minister of Police* (1982) 3 SA 542 (N), *Hurley v Minister of Law and Order* 1985 (4) SA 709 (D), *Minister of Law and Order v Hurley* 1986 (3) SA 568 (A) and *Rikhoto v East Rand Administration Board and another* 1982 (1) SA 257 (W).

[20] 1979 (3) SA 820 (N), 821.

[21] Raymond Wacks, 'Judges and Injustice' (1983) 101 *South African Law Journal* 266.

[22] Ibid 279

[23] Ibid 280.

[24] Ibid 281-2.

This led Wacks to his ultimate conclusion, which he supported with a reference to the precedent set by Tredgold CJ in the Federation of Rhodesia and Nyasaland, and which he expressed as follows:[25]

> If the judge is to square his conscience with his calling, there would appear to be no choice open to him but to resign. How have I arrived at this conclusion? First, by rejecting the positivist assumption that judges have discretion in the strong sense. Secondly, by recognizing that South Africa conforms in many ways to the model of a repressive legal system. Thirdly, by accepting that a judge in such a system who is unable to reconcile his moral standpoint with the law has three choices: to protest, to lie or to resign. And fourthly (by expressing doubts on whether protests would bear fruit, and by pointing to the limitations of the judicial lie—caused principally by the severe constraints of the courts' jurisdiction) concluding that there is no compelling alternative to resignation.

In response to Wacks, John Dugard published an article entitled 'Should Judges Resign? A Reply to Professor Wacks'[26] in which he argued that, despite the relative powerlessness of the courts in the face of the doctrine of parliamentary sovereignty upon which the South African constitution was based, judges still had sufficient room, applying the liberal principles of Roman-Dutch law and rules of statutory interpretation, to mitigate the harshness of legislation that infringed individual liberty.[27] Dugard conceded that[28]

> It may be that the scope for judicial discretion is so restricted that the good that a moral judge may do is outweighed by the harm done by his participation in and legitimation of the system.

However, his counter to this was that resignation of judges 35 years after apartheid was introduced would be 'too little and too late' and would be of minimal impact,[29] and that the question was[30]

> … whether judges and lawyers do more for justice in South Africa by actively participating in the system than by withdrawing from it and thereby depriving it of some measure of legitimacy.

This led him to conclude that since activism on the part of judges and lawyers might advance the cause of justice (even as it conferred legitimacy on the legal order) it was the duty of lawyers to continue in their role of offering their clients such defence as was possible and on judges to become sensitive to human rights values and to use them – again where possible – to fill the gaps left by unjust statute law. That such consciousness-raising could occur was not mere wishful thinking – many years after the demise of apartheid Dugard credited Mathews', Albino's and others' criticism of judges in the 1970s with drawing the attention of judges to their moral responsibility, which in turn led some of them to adopt a more activist role in the 1980's in which they endeavoured wherever possible to read race and security legislation down in accordance with the values of the common law.[31]

Wacks published a brief rejoinder to Dugard.[32] In it argued that the zone of discretion available to the just judge was so narrow as to give little scope for the operation of the values

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[25] Ibid 282-3.
[26] John Dugard, 'Should Judges Resign? A Reply to Professor Wacks' (1983) 101 *South African Law Journal* 286.
[27] Ibid 289-90.
[28] Ibid 291.
[29] Ibid 292.
[30] Ibid 293.
[31] John Dugard, 'Tony Mathews and Criticism of the Judiciary' in Marita Carnelly and Shannon Hoctor (eds), *Law, Order and Liberty - Essays in Honour of Tony Mathews* (2011, University of Kwa-Zulu Natal) 3, 6-7.
[32] Raymond Wacks, 'Judging Judges: A Brief Rejoinder to Professor Dugard' (1983) 101 *South African Law Journal* 295.

of the common law and that were a substantial number of judges to resign, it might have significant impact – although that of course was a matter of conjecture.

In the event, no South African judge did resign but the Wacks-Dugard debate had the effect of encouraging judges to enter into off-the-record debates about the future of the legal order[33] prior to the end of apartheid in 1989 and the holding of elections in 1992. The debate in South Africa remains relevant as a parallel to draw upon in discussing what the response of judges in other jurisdictions should be when their judicial duty compels them to apply law that is inimical to fundamental rights. It is to the situation in Australia that I now turn.

V HUMAN RIGHTS IN CONTEMPORARY AUSTRALIA – THE SPECIFIC QUESTION OF LIBERTY OF THE PERSON

A *Limited constitutional protection for human rights*

To what extent does the legal system in Australia put judges in the position of having to apply unjust law? The answer to this is a function of the relative absence – when compared to other liberal democracies – of constitutional protection for human rights. The Constitution exhibits inconsistency when it comes to rights protection. On the one hand, it gives express protection to five rights[34] and has been found to give implied protection to three more,[35] while on the other it denies protection to the many other rights recognised in the various international human rights documents that Australia has ratified. The reason for this lies in the absence of debate on broad questions of principle, in particular on the power of the state vis-à-vis the individual, at the Constitutional Conventions of the 1890s. Such rights as were included in the Constitution were incorporated not in order to give effect to any underlying theory but rather to address concerns on the part of the colonies about the balance of power in the federation and in order to defuse religious divisions that were then current. Nevertheless, the question should be asked as to why, if such rights as have been included in the Constitution have not unduly disturbed the balance between Parliament and the courts, the remining body of fundamental human rights ought not also be constitutionalised? Also of note is the contradiction inherent in the views of conservative academic commentators such who defend the constitutional right to some rights – for example freedom of religion[36] - while rejecting constitutional protection for other fundamental rights.[37]

The absence of constitutional restraints has enabled legislatures to enact a wide range of statutes which trench upon fundamental rights. In a report on rights and freedoms published in 2016, the Australian Law Reform Commission found numerous examples of Commonwealth legislation which infringed a range of rights including freedom of expression, freedom of association, the right to the presumption of innocence, the privilege against self-incrimination, freedom of movement and the right to a fair trial.[38] Space does not permit an analysis of the approach of the courts to the interpretation of all this legislation, so this article focuses attention on freedom of the person, in particular on the ethical questions posed for judges by legislation that imposes mandatory detention on refugees.

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[33] Dugard, above n 31, 7-8.

[34] The right to compensation when property is acquired by the Commonwealth (s 51(xxxi), freedom of inter-State trade commerce and intercourse (s 92), the right to a jury trial for indictable Commonwealth offences (s 90), the right not to be discriminated against on grounds of residence in another State (s116) and freedom of religion (s 118).

[35] Freedom of political communication (*Australian Capital Television v Commonwealth* (No.2) (1992) 177 CLR 106), the right to vote (*Roach v Electoral Commissioner* (2007) 233 CLR 162) and a qualified right to due process (*Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.

[36] Greg Craven, 'Deliver us from hostility to freedom of faith,' *The Australian* (Sydney) 12 October 2018.

[37] Greg Craven, *Conversations with the Constitution – Not Just a Piece of Paper* (University of New South Wales Press, 2004) 181-8.

[38] Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachment by Commonwealth Laws*, Report No 129 (2016).

B *The decision in Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*

The origin of the problem that forms the subject of this article lies in the High Court's decision in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*.[39] In *Lim*, Brennan, Deane and Dawson JJ held that while involuntary detention by the state is penal in character and, under the doctrine of separation of powers, can occur only as the result of a determination of criminal liability by the courts,[40] this was subject to a number of exceptions, including detention after arrest pending a criminal trial (noting that this was under the ultimate supervision of the courts), detention in cases of infectious disease or mental illness, the exercise of powers by military tribunals, and Parliament's exercise of its contempt powers, all of which the executive could effect without judicial authorisation.[41] In addition to these, and arising from the facts of *Lim* itself, the justices held that the power of the executive to detain aliens 'is neither punitive in nature nor part of the judicial power of the Commonwealth,' although they also stated that the power to detain under the *Migration Act 1958* (Cth) was[42]

> … limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered. On the other hand, if the detention which those sections require and authorize is not so limited, the authority which they purportedly confer upon the Executive cannot properly be seen as an incident of the executive powers to exclude, admit and deport an alien. In that event, they will be of a punitive nature and contravene Ch. III's insistence that the judicial power of the Commonwealth be vested exclusively in the courts which it designates.

In subsequent decisions the court held that the executive might detain people for a number of other purposes,[43] including public safety where noxious materials have escaped, drug treatment, detention pending extradition (although extradition would be as the result of judicial process), detention for a person's own welfare, detention during wartime when the executive believes a person to be disloyal, detention where a person is believed to pose a national security risk, detention where a person poses a threat by virtue of abnormality falling short of mental illness and detention for the safety and welfare of the community in general. Many of these – in particular the last five – are cast in extraordinarily broad language and raise the spectre of executive detention for reasons which are wholly subjective and, therefore, arbitrary. Furthermore, in a number of subsequent cases members of the court have held that the list of circumstances in which non-punitive detention by the executive is not closed.[44] Would the High Court uphold as non-punitive legislation which provided for detention in order to prevent some broad, yet arguably important, interest such as the prevention of social unrest, which was the reason for the enactment of the *Law and Order (Maintenance) Act* and the *Emergency Powers Act* in Southern Rhodesia? Indeed two of the categories which case law has already identified as being ones in which the executive may detain - detention where a person is believed to pose a national security risk and detention for the safety and welfare of the community in general – reflect the typical language used to justify detention by the

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[39] (1992) 176 CLR 1.
[40] Ibid 27.
[41] Ibid 28.
[42] Ibid 33. Similar reasoning was also advanced by McHugh J at 65-6, 71. The fact that the duration of detention was limited to such period as was required for processing an application or deportation was also emphasised by the court in *Plaintiff M76/2013 v Minister for Immigration, Cultural Affairs and Citizenship* (2013) 251 CLR 322, 369 (Crennan, Bell and Gageler JJ).
[43] These categories and the cases in which they were identified are listed in George Williams and David Hume, *Human Rights and the Australian* Constitution (Oxford University Press, 2nd ed, 2013) 345-6. For a discussion of them see Jeffrey Gordon, 'Imprisonment and the Separation of Judicial Power: A Defence of a Categorical Immunity from Non-Criminal Detention' (2012) 36 *Melbourne University Law Review* 41.
[44] Williams and Hume, above n 43, 346 n 149.

government in Southern Rhodesia and by governments in other countries where civil liberties have been curtailed. In light of this, the danger posed by executive detention can readily be appreciated.

There are three reasons why the reasoning in *Lim* (and subsequent cases in so far as they have applied or expanded upon *Lim*) is problematic. The first is the way in which the court used the word 'punitive.' Whether an act – in this case detention – is punitive depends on one's perspective. In the sense that the High Court uses the term, whether detention is punitive depends on the intention of the detaining authority, whereas from the perspective of the person subject to detention, whether detention is punitive depends on its effect. Since detention obviously always involves a deprivation of a right, one can say that, from the perspective of the detained person, it is always punitive, and that the concept of 'non-punitive detention' is therefore an oxymoron. This applies even if the detaining authority is acting with beneficial intent – for example, to protect a person who is mentally ill from harming themselves. In such instances the question should become one of determining whether achievement of the beneficial purpose outweighs the limitation of the right to personal liberty, a question which obviously requires adjudication by a court. The way the High Court uses the word 'punitive' has the effect of immunising from judicial oversight a wide range of measures authorising detention, simply on the basis of what is in the mind of the detaining authority. Furthermore, in *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs*[45] the court held that detention does not become punitive even if its conditions are inhumane – a striking illustration of how different is the meaning of the word 'punitive' when used by the court as compared to how it would be used by a person actually experiencing detention.

This brings one to the second problem with *Lim* and its progeny, which is the failure of the courts to enunciate any underlying theory or set of principles that would justify executive detention.[46] It appears that the court has simply identified a list of circumstances in which such detention has historically been permitted. Yet the fact that things have occurred historically does not, of course, provide justification for why they *should* occur, still less why they should stand as exceptions to the important general principle that separation of powers requires that a person not be deprived of liberty except by judicial process. Why should supervision by the courts be more lax in cases of non-punitive detention than they are in cases of punitive detention? The effect on the person is the same, but the sting more severe in the case where the subject of the detention has committed no crime. There is terrible irony in the fact that a person who commits a crime is arguably in a fact better position than one who is detained for some non-punitive purpose. The former has the comfort of knowing that his or her deprivation of liberty resulted from an application of its mind by a court and that that the duration of that deprivation of liberty will be fixed, whereas the latter has committed no offence and, as we shall see, may endure detention of limitless duration.

The decision in *Lim*, and in particular the absence of any underlying principle that could act as a limit on the capacity of the state to impose non-punitive detention, means that any of the Commonwealth's legislative powers could be used as the basis for non-judicially supervised detention. As examples of this, in *Al-Kateb v Godwin*[47] Gummow J said that that on the basis of the *Lim,* Parliament could enact a law under s 51(xxvii) providing for the administrative detention of bankrupts, or one under s 51(xi) confining everyone to their home on census night. Why the High Court abandoned the field to the executive in relation to these (potentially expanding) categories of detention is a mystery. The court could have said that separation of powers requires that deprivation of liberty is lawful only if grounds there for are proved to a court. Its failure to do so means, with respect, that the decision in *Lim* must be considered a blot on the legal landscape.

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[45] (2004) 219 CLR 486, 499 (Gleeson CJ).
[46] Williams and Hume, above n 43, 346, 350-1.
[47] (2004) 219 CLR 562, [133].

The third problem that arises from *Lim* is that by immunising a whole range of categories of detention from judicial oversight, it laid the way open for widespread deprivation of liberty which might be unlawful even in terms of the authorising legislation. The consequences of this are dire for people unfortunate enough to be caught up in the machinery of executive power: After the chance discovery that an Australian citizen, Vivian Alvarez Solon, had been deported because she was unable to communicate after a head injury, and that another citizen, Cornelia Rau, had been held in immigration detention after she was unable to identify herself because of mental illness, the Commonwealth Ombudsman was asked to conduct an investigation into immigration detention. His report found that no less than 247 citizens and lawful residents had been unlawfully detained under the *Migration Act 1958* (Cth) over a period of 14 years.[48] The fact that the executive has the power to detain people under various pieces of legislation, Commonwealth and State, without needing to prove reasonable grounds – or even the identity of the detainee - to a court, creates an obvious risk of widespread denial of rights, as the Ombudsman's investigation shows. The fact that, in theory, a detainee might be able to challenge a detention decision by means of judicial review provides cold comfort – for example, the mental condition of the detainee may be such as not to enable them to challenge their detention, as was so in the cases of Solon and Rau. Furthermore, it is contrary to the presumed liberty of a person under the common law that the detainee should have the burden of challenging detention rather than the detaining authority having the burden of proving its lawfulness.

C *Lim's descendants*

It is the application of *Lim* to migration law that has attracted the greatest controversy and has generated a significant amount of litigation in the High Court, particularly in relation to those provisions of the *Migration Act 1958* (Cth) which mandate detention of migrants deemed to have arrived in Australia unlawfully. Section 189 of the Act requires that an officer who knows or reasonably suspects that a person is an unlawful non-citizen to detain that person. Section 196(1) states that such a person must be kept in immigration detention until removed from Australia, deported or granted a visa. Section 198 of the Act governs removal from Australia. Its various sub-sections govern a number of circumstances in which a person must be removed from Australia 'as soon as reasonably practicable.'

As noted above, the majority in *Lim* stated that detention under the Act was 'limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered.' [49]

Similarly, in *Plaintiff S4/2014 v Minister for Immigration and Border Protection*[50] the court held that detention could only be for

> … one of three purposes: the purpose of removal from Australia; the purpose of receiving, investigating and determining an application for a visa permitting the alien to enter and remain in Australia; or, in a case such as the present, the purpose of determining whether to permit a valid application for a visa.

So far as the duration of detention is concerned, in *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship*[51] the court stated that the decision in *Lim* required that the

> … the period of detention be limited to the time necessarily taken in administrative processes directed to the limited purposes identified. The temporal limits and the

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[48] Commonwealth Ombudsman, *Lessons for public administration – Ombudsman investigation of referred immigration cases*. (2007).

[49] (1992) 176 CLR 1, 33 (Brennan, Deane and Dawson JJ).

[50] (2014) 253 CLR 219, [26] (French CJ, Hayne, Crennan, Kiefel and Keane JJ). See also *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 [138] (Crennan, Bell and Gageler JJ) and *Plaintiff M96A /2016 v Commonwealth* (2017) 261 CLR 581 [21] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ), [126] Hayne J.

[51] (2013) 251 CLR 322, [138] (Crennan, Bell and Gageler JJ).

> limited purposes are connected such that the power to detain is not unconstrained.

and that[52]

> The constitutional holding in Lim was therefore that conferring limited legal authority to detain a non-citizen in custody as an incident of the statutory conferral on the executive of powers to consider and grant permission to remain in Australia, and to deport or remove if permission is not granted, is consistent with Ch III if, but only if, the detention in custody is limited to such period of time as is reasonably capable of being seen as necessary for the completion of administrative processes directed to those purposes.

In *Plaintiff S4/2014 v Minister for Immigration and Border Protection*,[53] the court held that

> Because detention under the Act can only be for the purposes identified, the purposes must be pursued and carried into effect as soon as reasonably practicable…. The duration of any form of detention, and thus its lawfulness, must be capable of being determined at any time and from time to time. Otherwise, the lawfulness of the detention could not be determined and enforced by the courts, and, ultimately, by this Court.

The court further held that[54]

> … consideration of whether a protection visa may be sought by or granted to the plaintiff had to be undertaken and completed as soon as reasonably practicable. Departure from that requirement would entail departure from the purpose for his detention and could be justified only if the Act were construed as permitting detention at the discretion of the Executive. The Act is not to be construed as permitting detention of that kind.

Unfortunately, the limitations that these dicta appear to impose on the duration of detention proved to offer little protection to individual liberty when the question of what the legal position would be if the executive had not achieved any of the statutory processes contained in s 196(1) within a reasonable time was considered by the court in *Commonwealth of Australia v AJL20*.[55] The court held that a detainee could be held in detention 'until' one of those purposes had *actually* been achieved, not until one of them *ought reasonably* to have been achieved. In other words, the failure of the executive to fulfil any of the purposes for which detention was authorised within a reasonable time did not provide grounds for release of a detainee.[56] The court held that in such circumstances, the appropriate remedy was mandamus.[57] The court held that the fact that in *Plaintiff S4/2014 v Minister for Immigration and Border Protection*[58] the court had said that the duties of the executive under s 196(1) had to be performed as soon as was reasonably practicable did not mean that failure to do so changed the purpose of the detention in such a way as to make it unlawful.[59]

Even more controversial has been the question of whether detention is lawful when it becomes evident that there is no real likelihood of a person being able to be removed from Australia. In *Al-Kateb v Godwin*[60] the High Court considered the detention of the appellant who had unsuccessfully applied for a protection visa and who had asked to be removed from Australia. This was one of the circumstances in which s 198 of the Act required that the detainee be removed from Australia as soon as was reasonably practicable. However, the appellant was

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[52] Ibid [140].
[53] (2014) 253 CLR 219, [28] - [29] (French CJ, Hayne, Crennan, Kiefel and Keane JJ).
[54] Ibid [34].
[55] (2021) 391 ALR 562.
[56] Ibid [46] – [51] (Kiefel CJ, Gageler, Keane and Steward JJ).
[57] Ibid [52].
[58] (2014) 253 CLR 219, [28] - [29] (French CJ, Hayne, Crennan, Kiefel and Keane JJ).
[59] Ibid [68] – [70].
[60] (2004) 219 CLR 562.

stateless, and the Commonwealth could not get any other country to accept him. The question was whether it was lawful for him to be detained indefinitely. A majority of the Court, applied *Lim* to hold that the appellant's indefinite detention was necessary for the non-punitive purposes of either removing non-citizens or of separating them from the community until they could be removed, and that this was so even if it was not 'reasonably practicable' for them to be removed.[61]

The combined result of these decisions is that detention under immigration legislation is lawful even if the executive has not discharged within a reasonable time the purposes for which such detention may occur and that detention may continue indefinitely even if it is not possible for any of those purposes to be achieved.

The willingness of the High Court in *Lim* to accept that the existence of a wide range of categories in which the executive may detain without judicial authority, in *AJL20* that migration detention may continue even if the executive has not achieved its purpose within a reasonable time and in *Al-Kateb* that a person may be detained indefinitely is all the more surprising given how jealously the court has guarded separation of powers in other cases. To take an obvious example, in *Kable v Director of Public Prosecutions (NSW)*,[62] the court declared unconstitutional a legislative scheme in terms of which judges of the New South Wales courts were empowered to order the continued detention of the appellant after the completion of his sentence if they were reasonably satisfied on a balance of probabilities that the appellant was more likely than not to commit a serious offence. The court held that the vesting of such a power in the courts was incompatible with the judicial function and that its exercise would cause the confidence of the public in the integrity of the courts to be diminished, because it involved the detention of a person for what he might do rather than for what he had done.[63] As McHugh J stated[64]

> The Act seeks to ensure, so far as legislation can do it, that the appellant will be imprisoned by the Supreme Court when his sentence for manslaughter expires. It makes the Supreme Court the instrument of a legislative plan, initiated by the executive government, to imprison the appellant by a process that is far removed from the judicial process that is ordinarily invoked when a court is asked to imprison a person. The Act expressly removes the ordinary protections inherent in the judicial process. It does so by stating that its object is the preventive detention of the appellant, by removing the need to prove guilt beyond reasonable doubt .... The Act is thus far removed from the ordinary incidents of the judicial process. It invests the Supreme Court with a jurisdiction that is purely executive in nature.

It is difficult to understand why, if the legislative scheme struck down in *Kable* was found to be inconsistent with separation of powers, legislation which permits the executive to detain without any judicial authorisation at all in the categories identified in *Lim* and subsequent cases does not offend against the doctrine to a far greater degree. Equally, if the scheme in *Kable* was invalidated on the ground that it reduced the role of the courts to that of a rubber stamp for the executive, surely the conferral of a power on the executive to detain under the *Migration Act 1958* (Cth) amounts to a far greater intrusion by Parliament into the judicial function in that once it has been determined that an asylum-seeker falls within the ambit of the section, the courts have no option but to uphold his or her indefinite detention, irrespective of whether that detention is reasonably justifiable?

D *Detention, deterrence and psychological harm*

As we saw in Part III of this article, a key objective of indefinite detention in South Africa was to break the detainee psychologically in order to achieve the objective of making the detainee

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[61] Ibid 584-95 (McHugh J), 647-50 (Hayne J), 657-61 (Callinan J) and 662-3 (Heydon J).
[62] (1996) 189 CLR 51.
[63] Ibid 96-7 (Toohey J), 106-07 (Gaudron J), 120-4 (McHugh J), 132-4 (Gummow J).
[64] Ibid 122.

speak. The harmful psychological effects of detention, documented by Mathews and Albino,[65] was therefore integral to its effectiveness.

There is voluminous research containing evidence to the effect that mandatory detention of migrants by the Australian government causes severe psychological harm.[66] Perhaps most damning of all was a finding in 2013 by the United Nations Human Rights Committee that the policy of indefinite detention constituted cruel, inhuman or degrading treatment, contrary to Article 7 of the *International Covenant on Civil and Political Rights* and that the failure to treat detainees with dignity violated Article 10 of the same Convention.[67] In 2015 the United Nations found that Australian was in breach of the *International Convention Against Torture* because of its treatment of child detainees and the violence to which detainees in general were exposed.[68] In 2018 Medecins Sans Frontieres issued a report stating that the psychological harm inflicted on detainees was akin to that sustained by people who had been subjected to torture.[69] There are obvious parallels between the mental harm suffered by those held in detention by the Australian government and those who were detained under apartheid in South Africa. A similar parallel can also be found between the defiant attitude shown by the South African government in response to criticisms of apartheid by the United Nations – for example, Prime Minister John Vorster memorably said that United Nations criticism of South Africa was 'devoid of all sense and substance'[70] – and the attitude of Australian governments to adverse reports by that organisation – for example Prime Minister Tony Abbott saying that Australia was 'sick of being lectured to by the United Nations' after the publication of the report which found that Australia had breached the *International Convention Against Torture*.[71]

It is notorious that one of the purposes of immigration detention is to deter refugees from travelling to Australia. This is key to understanding both the cause and impact of the psychological harm suffered by detainees. Deterrence has been a consistent theme of government communication to would-be asylum-seekers, who are told that their journey will end in immigration detention.[72] That deterrence is an objective of mandatory detention has been openly stated by the government. As long ago as 1994, the Department of Immigration and Ethnic Affairs conceded that deterrence was incidental to the border control system.[73]

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[65] Mathews and Albino, above n 16.

[66] Jane McAdam and Fiona Chong, *Refugee Rights and Policy Wrongs* (2019, University of New South Wales Press) 104-09, 237 n 29.

[67] United Nations Human Rights Committee, *FKAG v Australia*, UN Doc CCPR/C/108/D/2094/2011, 26 July 2013, [3.12]; United Nations Human Rights Committee, UN Doc CCPR/C/108/D/2136/2012, 25 July 2013, [3.14].

[68] United Nations Office for the Commissioner for Human Rights, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Addendum: Observations on communications transmitted to Governments and replies received*, UN doc A/HRC/28/68/Add.1 (2015), [19].

[69] Medecins Sans Frontiere,s *Indefinite Despair - The tragic mental health consequences of offshore processing on Nauru*, 2 December 2018 https://www.msf.org/indefinite-despair-report-and-executive-summary-nauru.

[70] Kathleen Teltsch, 'South Africa is Condemned by U.N.' *The New York Times* (New York), 23 December 1976.

[71] Lisa Cox, 'Tony Abbott: Australians 'sick of being lectured to' by United Nations, after report finds anti-torture breach' *The Sydney Morning Herald* (Sydney), 10 March 2015.

[72] See Sharon Pickering and Leanne Weber, 'New Deterrence Scripts in Australia's Rejuvenated Offshore Detention Regime for Asylum Seekers' (2014) 39 *Law & Social Inquiry* 1006 and Caroline Fleay et al, 'Missing the Boat: Australia and Asylum Seeker Deterrence Messaging' (2016) 54 *International Migration* 60.

[73] Parliament of Australia, Joint Standing Committee on Migration *Asylum, Border Control and Detention* (1994) [4.12].

Similarly, during his tenure as Minister for Immigration, Philip Ruddock Attorney General stated that[74]

> . detention arrangements ...have been a very important mechanism for ensuring that people are available for processing and available for removal, and thereby a very important deterrent in preventing people from getting into boats ...

Similarly, while serving as Attorney-General he stated that[75]

> ... retaining the policies of excision, offshore processing and mandatory detention that act as a powerful deterrent to unauthorised arrivals.

Despite this, the courts have not characterised detention as having a deterrent purpose – a finding which would, on the High Court's own definition of the difference between punitive and non-punitive detention, in terms of which detention which has deterrence as one of its principal objects is punitive[76] - have led to a finding that migration detention was punitive and thus not lawful without judicial authorisation.

What is crucial to understand is that this deterrent effect is achieved not only by the fact that migrants will be placed in mandatory indefinite detention (a practice that sets Australia apart from other liberal democracies which impose time limits on detention)[77] but also by intentionally creating a psychologically damaging environment for them while they are in detention. In the words of one former Department of Immigration Officer, conditions in detention were designed to achieve[78]

> ... the deliberate and intentional removal of hope... As many asylum seekers flee countries, which are so dangerous that death is a very real and present fear, the only other way to create a meaningful deterrent in practice, is to actively remove a person's sense of hope. The intention is that these hopeless, broken people will then send a message back to any family members or friends who might be in transit towards Australia that it isn't worth coming.

It is therefore clear that whatever formal legal purpose mandatory detention serves under the *Migration Act 1958* (Cth), a key policy purpose is deterrence, and a major part of the deterrent effect is the cruelty of the system and the harm it inflicts. In other words, just as the psychological harm suffered by detainees in South Africa was an important component of detention and not merely an unfortunate by-product, so too in the case of migration detention in Australia the harshness of its conditions is designed to induce current detainees to give up their claims for asylum and, equally importantly, to deter other refugees from seeking asylum. In other words, the adverse mental effect of unending detention is an essential objective of the policy, because it is that prospect in which the deterrent effect lies. Therefore it can be said that, as in the case of political detainees in South Africa, a key purpose of immigration detention is the infliction of psychological harm. The harsher the regime and the greater the hopelessness it engenders the more effective it is in achieving its objective. Furthermore, as was held in *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs,*[79] detention remains lawful even if it crosses the line into inhumanity. If, as one must surely agree, the enforcement of legislation which authorised detention which caused psychological harm to detainees in South Africa was damnable, so too must one agree that the inhumanity of the conditions to which asylum-seekers are subject is something which presents a moral question which judges in Australia must answer. If one can agree that the

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[74] ABC Radio, 'Interview on the treatment of children in detention,' *Radio National Breakfast*, 1 August 2002.

[75] Joint Press Release, Attorney-General The Hon Philip Ruddock and Minister for Justice and Customs, Senator The Hon Christopher Ellison 'Strengthening our Borders,' E 140/04, 27 September 2004.

[76] *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1, [61] (McHugh J).

[77] McAdam and Chong, above n 66, 95-6.

[78] Greg Lake 'What Kind of Nation are we Building?' *Asylum Insight* (19 January 2015) <https://www.asyluminsight.com/c-greg-lake>.

[79] (2004) 219 CLR 486, 499 (Gleeson CJ).

infliction of devastating psychological harm though prolonged detention described by Mathews and Albino in South Africa was repugnant to the rule of law, why should one not reach the same conclusion in relation to mandatory indefinite detention under the *Migration Act 1958* (Cth)?

VI SHOULD AUSTRALIA'S JUDGES RESIGN?

None of the foregoing is to suggest that breaches of rights in Australia match either the seriousness or the scope of breaches that occurred in South Africa, but the indisputable fact remains that aspects of Australian law breach a significant number of rights to a serious extent, and that therefore the moral responsibility of judges in enforcing such laws is, in comparison to judges in those historical circumstances, one of degree rather than of type. The scheme of mandatory detention authorised by the *Migration Act 1958* (Cth) which is the focus of this article, is arguably the most egregious of these laws.

If the law as stated in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*[80] to the effect that there are a wide number of grounds upon which the executive can detain without judicial supervision, in *Commonwealth v AJL20* to the effect that detention remains lawful even if the executive has not achieved its statutory purpose within a reasonable time and in *Al-Kateb v Godwin* to the effect that detention may be of limitless duration is correct, and that the judges in those cases (or at least those in the majority) had no option but to find as they did (which one must presume, in light of the judicial oath, discussed below) then a moral dilemma arises for Australian judges just as it did for judges in South Africa.

In *Al-Kateb*, Hayne J, one of the majority justices said that the appellant's situation was 'tragic,'[81] and that while many had argued that the Constitution should contain a bill of rights, as the law stood

> … the justice or wisdom of the court taken by the parliament is not examinable in this or any other domestic court … it is not for the courts to determine whether the course taken by Parliament is unjust or contrary to basic human rights.

However, apart from such rare instances where judges have expressed reservations about the law they are required to apply, we cannot know what is in the mind of justices of the High Court when confronted with legislation that is repugnant to human rights. For some there may be no boundary beyond which Parliament may not legislate so long as the legislation falls within the Commonwealth's legislative power and therefore no law which they would not apply. Others may apply such law because they are of the view that their judicial role requires them to even though they may profoundly disagree with its content. When taking office judges swear an oath in terms of which, to take the example of the oath prescribed for justices of the High Court, they swear to 'do right to all manner of people according to law.'[82] What should a judge do if they come to the conclusion that in all conscience they cannot apply certain laws because of the unjust consequences of doing so? Judges cannot absolve themselves from moral responsibility on the basis of a constitutional requirement that they give effect to legislation enacted by Parliament, and I would respectfully argue that there is an obligation on judges to confront the same question that was raised in relation to judges in South Africa – whether they should resign.

Before discussing this, it is necessary in passing to anticipate and reject the argument that because in South Africa the franchise was restricted to whites, parallels cannot be drawn with Australia where there is universal adult franchise. Arguing in such a way is to accept the fallacy – unfortunately widespread – that the fact that an unjust law is the product of democratic processes cures its injustice. The bankruptcy of the theory of democratic positivism upon

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[80] (1992) 176 CLR 1.
[81] (2004) 219 CLR 562, 581. See also *Plaintiff M76 / 2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 32, [35] – [36], [130] Hayne J.
[82] Schedule to the *High Court of Australia Act 1979* (Cth).

which the argument is based is easily demonstrated: If one accepts that racial discrimination and the panoply of security laws required to sustain it in South Africa were unjust, would it have made any difference if, instead of being legislated by a Parliament representing 20% of the population which denied rights to the remaining 80%, those laws had been enacted by parliament, elected on the basis of universal franchise, in which MPs representing 51% of the voters had enacted legislation depriving the other 49% of their rights? Obviously not – the laws were inherently unjust, and majority support for them would not have altered that fact. Therefore, it makes no difference to the moral dilemma facing judges in Australia that the unjust laws they apply are the products of a democratic system.

In addressing the question of whether judges should resign, the mere fact that rights are breached in a society is, of course, in itself not a reason for judges to take such a step. Breaches of rights occur in every legal system, and the existence of courts and judges to staff them is necessary in order to provide a remedy in cases of breach. But that is not the issue here – the problem in Australia is the more fundamental one that the legal system protects no more than a handful of rights, which means that when the vast majority of human rights are breached, there is no remedy to be had.

Of course, only a small part of the law that judges apply that does not breach human rights. Most of the cases that come before the courts involve quotidian issues of criminal, contract and family law and so, to state the obvious, a resignation of judges *en masse* would work great social harm. Furthermore, the judge who resigns as a matter of principle will, in all likelihood, be replaced by a judge who has no such qualms, which means that the resignation by the first judge would have been counter-productive.[83] On the other hand, it is questionable moral reasoning for a person to say that there is no point in refusing to take an office in the discharge of which they must act unjustly because if they do not someone-else will.

But even if one was to conclude that the correct moral response to unjust legislation was to resign then, as in South Africa, next question that would need to be answered is the practical one of whether resigning (publicly stating why that step is being taken) would have any effect on the legal system. Consistent with what Wacks concluded in respect of the South African judiciary, I would regretfully conclude that in all likelihood it would not. Australian governments are notoriously thick-skinned when it comes to criticism of their failings with respect to human rights, and so the resignation of a judge who opposed government policy would in all likelihood be shrugged off – indeed might even be welcomed – by the government. Furthermore, there is little evidence of a deeply held understanding on the part of the public that courts are the final bastion of constitutionalism and the rule of law. Indeed the fact that politicians[84] and conservative academic commentators[85] find it profitable to refer in derogatory terms to 'unelected judges' when arguing against the expansion of constitutional rights protection suggests that, in the event of a controversy arising between the government and the courts, most members of the public would be likely to side with the former.

So if resignation would not achieve the objective of making the legal system more just, what course is left open to judges? The next part of this article offers an avenue by which the judiciary can resolve this moral dilemma.

VII A COMMON LAW BILL OF RIGHTS

A *Dr Bonham's Case*

The solution to the moral problem raised by the failure of the Australian legal order adequately to protect human rights has its roots in the doctrine of common law supremacy over the will

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[83] Wacks, above 32, 282.

[84] Warwick Stanley, 'Rights bill to empower unelected: Howard,' *The Sydney Morning Herald* (Sydney), 27 August 2009; Michael Gordon, 'Tony Abbott and Bill Shorten meet in private to nut out indigenous constitution question,' *The Sydney Morning Herald* (Sydney) 17 September 2014.

[85] Frank Brennan, *No Small Change: The Road to Recognition for Indigenous Australia*. (2015, University of Queensland Press) 246; Greg Craven, 'Heresy as Orthodoxy: Were the Founders Progressivists?' [2003] 31 *Federal Law Review* 87, 88 and Craven above n 37, 143, 150-1, 185.

of parliament, enunciated by Lord Coke CJ in his famous decision in *Dr Bonham's Case,*[86] as re-cast in recent decades.

The question in *Dr Bonham's Case* was whether it was lawful for the Royal College of Physicians to use a statutory power to impose a fine and subsequently imprisonment on Dr Bonham for practising medicine without a licence in circumstances where half the fine would accrue to the College. Because this made the College in its own cause in breach of the common law rule *nemo iudex in sua causa*, Coke CJ held the statute to be invalid, stating that[87]

> And it appears in our books, that in many cases, the common law will … controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it and adjudge such Act to be void.

The rule in *Dr Bonham's Case* was restated by Coke CJ in *Rowles v. Mason*[88] and was either followed or approved of throughout the 17th century in *Day v Savadge,*[89] *Sheffield v Radcliffe*,[90] *R v Love*,[91] *Streater's Case*,[92] *Thomas v Sorrell*,[93] *R v Earl of Banbury*,[94] in the 18th century in *City of London v Wood*[95] and *R v Inhabitants of Cumberland*[96] and even into the 19th century in *Forbes v Cochrane*[97] and *Green v. Mortimer*.[98] The point at which the principle in *Dr Bonham's Case* was no longer considered good law is uncertain. There was no express rejection of the doctrine until *Logan v Burslem,*[99] decided in 1842. In *Pickin v British Railway Board*,[100] Reid LJ stated that parliamentary supremacy had been established by the Glorious Revolution of 1688. However, in light of the continued application of the case in the 18th and 19th centuries, one cannot say that 1688 provides a bright line demarcating when *Dr Bonham* no longer correctly reflected the law. Nevertheless, appears that by the late 18th century the prevailing view was that *Dr Bonham's Case* was no longer authoritative: In his *Commentaries on the Laws of England*, Blackstone stated that while it was 'generally laid down that acts of parliament contrary to reason are void,' his view was that 'if the parliament will positively enact a thing to be done which is unreasonable, I know of no power … to control it…'[101] So it may not be possible to be more precise as to the timing of the abandonment of the rule in *Dr Bonham's Case* other than to say that, in the wake of the Glorious Revolution, and at some point in the 18th century the prevailing (although not universal) rule accepted by the courts was that they, as much the Crown, were subject to the supremacy of Parliament.[102] One final point to note is the significance of the fact that, in *Pickin*, Reid LJ attributed the origin of parliamentary supremacy to an historical event rather than to changes in case law. This is consistent with the way in which constitutional law evolved in the United Kingdom, where

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[86] (1610) 8 Co Rep 107a, 118a; 77 ER 638, 652
[87] Ibid 118a, 652.
[88] (1612) 2 Brownl 192, 198.
[89] (1614) Hob 85, 87; 80 ER 235, 237.
[90] (1615) Hob 334, 336.
[91] (1651) 5 St Tr 43, 172.
[92] (1653) 5 St Tr 366, 372.
[93] (1673) Vaughan 330, 336-337; 124 ER 1098, 1102.
[94] (1694) Skin. 517, 526-27; 90 ER 231, 236 – where it was stated that "every day" judges "construe and expound Acts of Parliament, and adjudge them to be void."
[95] (1702) 12 Mod 669, 687-88; 88 ER 1592, 1601-02.
[96] (1795) 6 T.R. 194, 195; 101 E.R. 507.
[97] (1824) 2 B & C 448, 471-2.
[98] (1861) 3 L.T. 642 (CP), 543.
[99] (1842) 4 Moore PC 284, 296. See also *Lee v Bude and Torrington Junction Railway Co* (1871) L.R. 6 C.P. 576, 582.
[100] [1974] AC 765 (HL), 782.
[101] William Blackstone, *Commentaries on the Laws of England* (Reprinted 2016, Oxford University Press) vol 1, 66.
[102] George Winterton 'Extra-Constitutional Notions in Australian Constitutional Law' (1986) 16 *Federal Law Review* 223, 231.

rules are shaped as much by changes in the balance of power between the institutions of government as by judicial decisions.

B *Contemporary theories on limits to legislative supremacy*

1 *New Zealand*

The idea that the common law might allow the courts to override the will of parliament received a new lease of life in New Zealand[103] where, in a number of cases[104] Cook CJ held (albeit without mentioning *Dr Bonham's Case*) held that common law rights might limit legislative power. The most frequently cited of these is *Taylor v New Zealand Poultry Board,*[105] where he stated:

> I do not think that literal compulsion, by torture for instance, would be within the lawful powers of Parliament. Some common law rights lie so deep that even Parliament could not override them.

Cooke expanded on his ideas extrajudicially, stating that a free and democratic society was based on the two fundamental pillars of a democratic legislature and independent courts and that if either of these was undermined then[106]

> … it would be the responsibility of the Judges to say so and, if their judgments to that effect were disregarded, to resign or to acknowledge frankly that they are prepared to depart from their judicial oath and to serve a state not entitled to be called a free democracy.

More specifically in relation to the issue of human rights, Cooke referred to hypothetical examples of legislation that deprived people of the franchise on the basis of religion or gender or which mandated that confessions be accepted irrespective of whether they were voluntary, and stated[107]

> Can any lawyer in all honesty accept as a viable principle that some infringements of human rights are so grave that if enacted in other countries they will not be recognised as law at all by us, but that this would not matter if they were enacted by our own legislature? It would seem that hypocrisy on that scale must be the ultimate result of taking Dicey undiluted. It is easy to say that the hypothetical examples are so unlikely that we need not bother about the problem. That may be so. On the other hand, if honesty compels one to admit that the concept of a free democracy must carry with it some limitation on legislative power, however generous, the focus of debate must shift. Then it becomes a matter of identifying the rights and freedoms that are implicit in the concept…. One may have to accept that working out truly fundamental rights and duties is ultimately an inescapable judicial responsibility.

That the idea of legislative subordination to fundamental common law rights was also enunciated extrajudicially by retired New Zealand Court of Appeal judge Edward Thomas who stated that[108]

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[103] For an overview of *Dr Bonham's Case* and its influence in New Zealand see Karen Grau, *Parliamentary Sovereignty: New Zealand – New Millennium* (2002) 33 *Victoria University of Wellington Law Review* 351.

[104] *L v M* [1979] 2 NZLR 73, 78 (dissenting), *New Zealand Drivers' Association v New Zealand Road Carriers* [1982] 1 NZLR 374, 390; *Fraser v State Services Commission* [1984] 1 NZLR 116, 121 and *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394, 398.

[105] [1984] 1 NZLR 394, 398.

[106] Robin Cooke, 'Fundamentals' [1988] *New Zealand Law Journal* 158, 164. See also support for Cooke's argument in John Caldwell, 'Judicial Sovereignty – A New View' [1984] *New Zealand Law Journal* 357.

[107] Cooke, above n 106, 164-5.

[108] Edward Thomas, 'The Relationship of Parliament and the Courts: A Tentative Thought or Two for the New Millennium' (2000) 31 *Victoria University of Wellington Law Review* 5, 36.

> [t]he possibility that courts may review the validity of extreme legislation is part of the ongoing development of a dynamic constitution…

The justification he advanced was based on the idea that under Westminster-style constitutions both parliament and the courts have a role to play in upholding the rule of law and that if Parliament broke the convention that it should not undermine the rule of law by enacting legislation that undermined democratic government,[109] or use its legislative power in a 'tyrannical or oppressive way,'[110] the courts might decline to enforce laws breaching those conventions.

Thomas rejected the idea that the fact that a parliament that had enacted tyrannical laws had been democratically elected would make it illegitimate for the courts to intervene, saying[111]

> An important qualification is at once required to confirm that the sovereignty of the people may need to be augmented by the support and, if necessary, resistance of an independent judiciary. The qualification is that the concept is not to be equated with the notion of majority rule. It has been widely recognised that the tyranny of the majority may be no less oppressive than the tyranny of a despot. Underlying the majoritarian principle, therefore, must be a recognition of the fact that majorities may be transient, may not be fully and freely informed, and may not be committed to the very democratic precepts which the majority invoke to exercise the power they hold. To the extent that any particular majority contrives to enact oppressive legislation, that majority simultaneously strikes at the legitimate basis of its own exercise of power. Its sway in Parliament is necessarily subject to the same limitations as Parliament itself if the ultimate sovereignty of the people is to be recognised through truly representative government. The constitutional predicate of the sovereignty of the people thus contains within itself a constitutional canon that gives force to enduring democratic values which may at any particular time be at variance with the wishes of a transient, ill-informed, or indifferent majority.

Subsequently he stated that[112]

> Working within this framework, the possibility of judicial review of oppressive legislation at a future date should be beneficial. It is salutary for Parliament to know that it works within legislative limits which are fixed, not by the majorities or coalitions within Parliament that may come and go, but by the permanent constraints of a constitution. A mature conception of democracy accepts that citizenship in a free and democratic society is founded on the observance of the rule of law and basic human rights, and that these qualities must therefore be placed beyond serious legislative encroachment.

In making his argument, Thomas did not rely on natural law theory as embodied in *Dr Bonham's Case*. According to him, neither the courts nor Parliament should be seen as supreme, and the right of the courts to over-ride the will of Parliament derives not from common law authority but rather from a contemporary analysis of constitutional structure, a view that has attracted increasing support in the United Kingdom.

2. *The United Kingdom*

In the United Kingdom, there has since the 1990s been a growing trend towards the view that the rule of law imposes limits on parliamentary sovereignty. Perhaps surprisingly, the charge has been led by judges in extra-judicial writing. Thus Lord Woolf, stated that[113]

> As both Parliament and the courts derive their authority from the rule of law, so both are subject to it and can not act in a manner which involves its

[109] Ibid 22.
[110] Ibid 23.
[111] Ibid 23-4.
[112] Ibid 30-31.
[113] Lord Woolf, 'Droit public – English style' (1995) *Public Law* 57, 68-9.

> repudiation….if Parliament did the unthinkable, then I would say that the courts would also be required to act in a manner which would be without precedent…I myself would consider that there are advantages in making it clear that ultimately there are even limits on the supremacy of Parliament which it is the courts' inalienable responsibility to identify and uphold.

Sir John Laws, positing a 'higher order law', superior to the will of Parliament argued that[114]

> The democratic credentials of an elected government cannot justify its enjoyment of a right to abolish fundamental freedoms. If its power in the state is in the last resort absolute, such fundamental rights such as free expression are only privileges; no less so if the absolute power rests in an elected body. The by-word of every tyrant is "My word is Law"; a democratic assembly having sovereign power beyond the reach of curtailment or review may make just such an assertion, and its elective base cannot immunise it from playing the tyrant's role….the fundamental sinews of the constitution, the cornerstones of democracy and of inalienable rights, ought not by law to be in the keeping of the government, because the only means by which these principles may be enshrined in the state is by their possessing a status which no government has the right to destroy.

He went on to note that the doctrine of parliamentary supremacy was created by the courts, even though its validity has been assumed, rather than argued, in recent centuries, and that the doctrine developed out of political facts[115] – an argument which accords with the idea that it was a reaction by the courts to the Glorious Revolution rather than a change in legal reasoning, which led to the establishment of the doctrine. This led him to conclude that[116]

> My thesis is that the citizen's democratic rights go hand in hand with other fundamental rights; the latter, certainly, may in reality imaginably at risk in any given political circumstances, than the former. The point is that both are or should be off limits for our elected representatives. They are not matters which in a delegated democracy - a psephocracy – the authority of the ballot box is any authority at all.

As justification for the need for judicial power to place restraints on government, Laws noted the irony that despite the subjection of the Crown to Parliament as a consequence of the Glorious Revolution, the increasing dominance by the executive over Parliament and its lack of accountability to Parliament meant that power had now moved back to the executive, albeit to ministers rather than to the monarch herself.[117] The control that the ministry had over Parliament and the absence of restraint over what legislation it might use its power to enact thus provided a rationale for the courts' adoption of a protective role.

Sir Stephen Sedley, Lord Justice of the Court of Appeal also rejected the idea of legislative supremacy, writing of a new constitutional order[118]

> … no longer of Dicey's supreme parliament to whose will the rule of law must finally bend, but of a bi-polar sovereignty of the Crown in Parliament and the Crown in its courts, to each of which the Crown's ministers are answerable - politically to Parliament, legally to the courts.

and further that[119]

> … if in our own society the rule of law is to mean much, it must at least mean that it is the obligation of the courts to articulate and uphold the ground rules of ethical social existence which we dignify as fundamental human rights…

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[114] Sir John Laws, 'Law and Democracy' (1995) *Public Law* 72, 84-5.
[115] Ibid 86-7.
[116] Ibid 90.
[117] Ibid 90-1.
[118] Sir Stephen Sedley, 'Human Rights: a Twenty-First Century Agenda' (1995) *Public Law* 386, 389.
[119] Ibid 391.

There was also academic comment to the same effect. T.R.S. Allan observed that[120] .

> It would clearly be absurd to allow a Parliament whose sovereign law-making power was justified on democratic grounds to exercise that power to destroy democracy, as by removing the right to vote from sections of society or abolishing elections. Moreover, an appropriately sophisticated conception of democracy would be likely to recognise the existence of certain basic individual human rights, whose importance to the fundamental idea of citizenship in a free society, governed in accordance with the rule of law, will properly place them beyond serious legislative encroachment.

However of greatest significance was the fact that similar views were subsequently expressed from the bench in *R (Jackson) v Attorney General*[121] in which members of the court suggested that in certain circumstances the courts might be able to over-ride the will of Parliament. Thus, pointing to the effect that the incorporation into United Kingdom law of the European Convention on Human Rights had had on the law in the United Kingdom, Steyn LJ stated[122]

> The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the general principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish. It is not necessary to explore the ramifications of this question in this opinion.

Similar views were expressed by Hope LJ who said[123]

> Parliamentary sovereignty is no longer, if it ever was, absolute. ... It is no longer right to say that its freedom to legislate admits of no qualification whatever. Step by step, gradually but surely, the English principle of the absolute legislative sovereignty of Parliament which Dicey derived from Coke and Blackstone is being qualified. ... The rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based.

In the same vein, Baroness Hale stated[124]

> The courts will treat with particular suspicion (and might even reject) any attempt to subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial scrutiny

The idea expressed by Steyn LJ that the doctrine of the sovereignty of Parliament was a creation of the courts and could therefore be modified by the courts received academic support from Jowell and O'Cinneide who stated[125]

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[120] T. R. S. Allan, 'Parliamentary sovereignty: Law, politics and revolution' (1997) 113 *Law Quarterly Review* 443, 448-9.

[121] [2006] 1 AC 262. For a discussion of this case see Jeffry Jowell and Colm O'Cinneide, *The Changing Constitution* (9th ed, 2019, Oxford University Press) 23-5, 52.

[122] [2006] 1 AC 262, [102].

[123] Ibid [104]. See also Hope LJ in *AXA General Insurance Ltd v HM Advocate* [2012] 1 AC 868, [50]-[51] where he said 'whether the principle of the sovereignty of the United Kingdom Parliament is absolute or may be subject to limitation in exceptional circumstances is still under discussion.' See also similar dicta in *Moohan v Lord Advocate* [2015] AC 901, [35].

[124] [2006] 1 AC 262, [159].

[125] Above n 121, 332.

> The classification of parliamentary sovereignty as a principle of the common law suggests that it is not Parliament who is supreme, but rather the courts. Parliament only enjoys legislative supremacy to the extent that it is conferred on it by the common law, as determined by the courts. Although it may be argued that legislation is able to override the common law, this too could also be construed as a principle of the common law. As such, it could be open to courts to modify this principle, such that there were aspects of the common law that could not be overridden by legislation, even if this was the clear and specific intention of Parliament.

The statements in *Jackson* found justification for the idea that the courts might over-ride the will of Parliament not in the theory of natural rights embodied in *Dr Bonham's Case,* but rather in the need to preserve the courts as a branch of government as a *sine qua non* of the rule of law. This reflects the development of the theory of dual sovereignty, which Knight refers to as 'bi-polar sovereignty,'[126] in terms of which sovereignty is shared by Parliament and the courts, rather than being vested in an omnipotent legislature. According to Knight, the theory has developed as a pragmatic response to alterations in the power-relationship between the branches of government and is therefore consistent with the history of constitutional evolution in the United Kingdom, which has been marked by practical changes effected in order to address new political realities. Thus he states[127]

> That the developments in the role of the judiciary illustrate the English tradition of institutional pragmatism stem from the observation that the expansion in judicial review has been a necessary corrective to what has been described by Sedley as a "long-term dysfunction in the democratic process". There has been a gradual evolution in the role of the House of Commons away from being a body which genuinely scrutinises governmental measures with consistent rigour. The courts have assumed the responsibility for providing the primary check on executive use of power. The shift in apparent institutional responsibility from the Commons to the courts is a pragmatic development to counter Lord Hailsham's fear of an "elective dictatorship". (References omitted).

These statements by English courts and academicians reflect a new understanding of the rule of law which goes beyond mere formalism and a requirement that the institutions of government (such as a democratically-elected Parliament and independent courts) be preserved to include a new requirement that the content of the law comply with extra-legal values. Hitherto, the problem with the concept of the rule of law is its meaning is nebulous. According to the narrowest definition, it means that government operates by law rather than by arbitrary will, that law is made by a defined process, that it is ascertainable, that it applies to everyone equally without prejudice and that it is enforceable by independent courts. As was stated extra-judicially by Lord Bingham of Cornhill, former Lord Chief Justice of England and Wales[128]

> The core of the existing principle is, I suggest, that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts.

However, this minimalist definition, may in fact have harmful consequences unintended by those who subscribe to it, in that it allows the rule of law to be used as a cover for denial of substantive freedoms. It is not difficult for an oppressive government to comply with the rule of law in its formal sense and yet enact oppressive legislation. As Raz noted 'The law may…institute slavery without violating the rule of law.'[129] It was in acknowledgement of this

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[126] C.J.S. Knight, 'Bi-Polar Sovereignty Restated' (2009) 68 *Cambridge Law Journal* 361.
[127] Ibid 362-3.
[128] Thomas Bingham, 'The rule of law' (2007) 66 *Cambridge Law Journal* 67, 69.
[129] Joseph Raz, 'The Rule of Law and its Virtue' in Joseph Raz (ed) *The Authority of Law* (Oxford University Press, 2009), 221.

defect in traditional, narrow definitions of the rule of law that Bingham formulated a broader definition, consisting of eight points, the fourth of which is that 'The rule of law must, surely, require legal protection of such human rights as, within that society, are seen as fundamental.'[130] A similar position was adopted by Lakin who, citing the dicta from the *Jackson* case, argued that the basis of the power of both Parliament and the courts is the rule of law, which requires not just adherence to processes but also conformity with the *values* that underlie the legal system.[131] This is consistent with the argument advanced by Marshall who stated[132]

> Though it is rarely formulated as a conventional rule the most obvious and undisputed convention of the British constitutional system is that Parliament does not use its unlimited sovereign power of legislation in an oppressive or tyrannical way. That is a vague but clearly accepted conventional rule resting on the principle of constitutionalism and the rule of law.

Poole addressed squarely the question of why defence of extra-legal values (which he based on Kantian notions of individual autonomy) would make it legitimate for the courts to over-ride the will of Parliament, stating as follows:[133]

> ...since in the non-ideal world we cannot rely on others not to interfere with our autonomy-protecting rights, the existence of rights demands an institution capable of enforcing them against the powerful, and especially the government .... the courts are ideal agents for assuming this role. Ordinary political institutions (like the legislature) cannot be trusted consistently to respect autonomy since it is their function to decide upon and implement policies which further particular ends, a process which may well produce results that are antithetical to the autonomy of particular individuals. The common law stands in stark contrast. Although courts also wield considerable power, they are unique in that they 'have no programme, no mandate, no popular vote,' and are, for that reason, in a position to prioritize autonomy in their decision-making. (References omitted).

A definition of the rule of law which imposes obligations relating to the content and not just the form of the law offers a justification for an application of the principle in *R (Jackson) v Attorney General*[134] to the effect that if Parliament enacts legislation that infringes fundamental rights, such legislation may be invalidated by the courts. How those rights are to be ascertained is discussed later in this article.

3 *Australia*

An early challenge to the absolutist view of parliamentary sovereignty in Australia was launched by Geoffrey de Q Walker, who argued that that preservation of the rule of law might empower the courts to imply rights, superior to the will of Parliament, to separation of powers, freedom of expression and freedom of association.[135] A number of other academics have expressed support for judicially-created rights.[136] However, Australian courts have not gone so far as have the courts in New Zealand and the United Kingdom in suggesting that there may be rights (outside what can be implied from the text of the Constitution) that Parliament

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[130] Bingham n 128, 75-7.
[131] Stuart Lakin, 'Debunking the Idea of Parliamentary Sovereignty: The Controlling Factor of Legality in the British Constitution' (2008) 28 *Oxford Journal of Legal Studies* 709, 729-34.
[132] Geoffrey Marshall, *Constitutional Conventions* (Clarendon Press, 1984) 9.
[133] Thomas Poole 'Back to the Future? Unearthing the Theory of Common Law Constitutionalism' (2003) 23 *Oxford Journal of Legal Studies* 435, 442.
[134] [2006] 1 AC 262.
[135] Geoffrey de Q Walker, 'Dicey's Dubious Dogma of Parliamentary Sovereignty' (1985) 59 *Australian Law Journal* 276, 282-3.
[136] David Feldman, 'Democracy, The Rule of Law and Judicial Review' (1995) 19 *Federal Law Review* 1, 6-7; David Smallbone, 'Recent Suggestions of an Implied 'Bill of Rights' in the Constitution, Considered as Part of a General Trend in Constitutional Interpretation' (1993) 21 *Federal Law Review* 254.

cannot over-ride, but even so, they have not shut the door on the idea that common law rights might limit legislative power. In *Union Steamship Co v King*,[137] the court, echoing the words of Cooke J, said that[138]

> Whether the exercise of … legislative power is subject to some restraints by reference to rights deeply rooted in our democratic system of government, and the common law … is another question which we need not explore.

Similar statements raising but not deciding the question have been made in a number other High Court decisions,[139] although it should be noted that in *Kable v Director of Public Prosecutions (NSW)*[140] two justices rejected the idea that there might be common law values capable of over-riding the will of Parliament.[141]

Support for the idea of a common law bill of rights has been expressed more openly in other contexts. Thus, writing extrajudicially, Toohey J stated that[142]

> …there is an increasing recognition of the tension between deference to the will of parliaments as expressed in legislation and maintenance of the rule of law. Parliaments are increasingly seen to be the de facto agents or facilitators of executive power, rather than bulwarks against it

He further wrote that[143]

> Of course, judicial review can directly and effectively influence the protection of liberties if a written constitution enshrines them in express terms. However, in the absence of such express articulation, a question arises as to whether a court which is established as guardian of a written constitution within the context of a liberal-democratic society may to any extent imply limits upon the powers with respect to subject matter granted by that constitution so as to protect core liberal-democratic value.

and that[144]

> …courts would over time articulate the content of the limits on power arising from fundamental common law liberties…. In that sense, an implied "bill of rights" might be constructed.

Thus, although it would run counter to current orthodoxy for a court to find that the common law vested the courts with the power to invalidate legislation which breached fundamental rights, in light of the discussion above one could not say that it would be beyond the range of contemplation. What remains to be considered is the theoretical basis that would justify that step, how the courts would identify fundamental rights and what the political repercussions of such a development would be.

C *Justification for a common law bill of rights in Australia*

On what theoretical basis could an Australian court justify the step of finding that it lay within its powers to invalidate an Act which infringed fundamental rights? There are two ways in which this could be done. The first is to revive the precedent in *Dr Bonham's Case* and its

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[137] (1988) 166 CLR I
[138] Ibid 10.
[139] *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 687 (Toohey J); *Momcilovic v The Queen* (2011) 254 CLR 1,47 n 217 (French CJ), 215-6 (Crennan and Kiefel JJ); *South Australia v Totani* (2010) 242 CLR 1, 29 (French CJ); *Durham Holdings v New South Wales* (2001) 205 CLR 399, 410 (Gaudron, McHugh, Gummow and Hayne JJ), 433 (Callinan J).
[140] (1996) 189 CLR 51.
[141] Ibid 66 (Brennan CJ), 76 (Dawson J). The same was said by Kirby J, then sitting in the New South Wales Supreme Court of Appeal in *Builders Labourers Federation v Minister for Industrial Relations* (1986) 7 NSWLR 372, 406.
[142] John Toohey, 'A Government of Laws and Not of Men?' (1993) 4 *Public Law Review*, 163.
[143] Ibid 169.
[144] Ibid 170.

application of 'right reason' in accordance with natural law. The second, reflected in the views expressed by judges and academics in New Zealand and the United Kingdom, is that the rule of law has evolved in such a way as to require not only that the law be administered in accordance with formal rules relating to the manner in which it is made and applied, but also that the law be consistent with human rights.

1 *Dr Bonham's case*

Taking the *Dr Bonham* route is conceptually uncomplicated – it involves the courts doing what they have always done, which is to declare what the common law is. This means that the courts could say that they were replacing the common law doctrine of legislative supremacy by the common law doctrine reflected in *Dr Bonham*. Such a step would not be as alien to Australian constitutionalism as might be supposed. Writing extrajudicially in an article entitled *The Common Law as the Ultimate Constitutional Foundation*, Dixon J stated that the common law 'is the source of the authority of the Parliament at Westminster' and thus, as the title of the article stated, the ultimate foundation of the Commonwealth Constitution.[145] He further stated that although a court must give effect to an Act of Parliament, 'the principle of parliamentary supremacy was a doctrine of the common law'[146] – which, given that the courts determine what the common law is, means that the courts could change the common law by stating that there are limits to what law Parliament can enact.

2 *A broad view of the rule of law*

Taking the rule of law approach is more complicated and involves paying attention to how the Constitution works in practice. A notable feature of the decision in *R (Jackson) v Attorney General,*[147] is that except for Steyn LJ's mention of the incorporation into United Kingdom law of the European Convention on Human Rights,[148] those members of the court who stated that absolute adherence to parliamentary sovereignty was no longer consistent with the rule of law did not refer to any specific development in the law itself as justification for their position. The only reason for the change must therefore have been a result of developments in the way public power was being wielded and the effect those developments had on the balance between the courts on the one hand and Parliament on the other. In other words, one could argue that just as in the 17th and 18th centuries political developments led to the need to restrain an overmighty Crown, resulting in a shift in power from the Crown to Parliament, the risk to liberty made evident by the consequences (both actual and potential) of an unrestrained Parliament now necessitates another shift, this time from Parliament to the courts in the specific circumstance where Parliament undermines fundamental human rights. Consistent with the evolutionary and incremental nature of English constitutional law, one cannot fix a precise date at which this new view of the rule of law became established, less still any specific event that precipitated it. All we have is the evidence from the *Jackson* decision that, at some point, views changed and that that change has now been articulated by the courts.

Turning to Australia, there is ample evidence to show why here too it is necessary for the courts to adopt a broad view of the rule of law and why the narrow view, which offers protection only to the purely formal aspects of the doctrine, is no longer sufficient.

Apart from the fact that the Commonwealth Constitution offers protection for only a handful of rights, as a consequence of which rights are frequently breached (discussed in Part V), the institutional structure the Constitution creates an ideal environment for the unrestrained exercise of legislative and executive power, to the extent that the claim that the Constitution embodies representative and responsible government no longer rings true.[149]

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[145] Owen Dixon, 'The Common Law as the Ultimate Constitutional Foundation' (1957) 31 *Australian Law Journal* 240, 242.
[146] Ibid.
[147] [2006] 1 AC 262.
[148] Ibid [102].
[149] For a full discussion of the extent to which the Commonwealth Constitution fails adequately to provide either for representative or for responsible government see Bede Harris, 'Representative

So far as representative government is concerned, the fact that the Constitution provides no guarantee of equality of voting power[150] has left Parliament free to create an electoral system for the House of Representatives which, in common with any system based on single-member electorates, is both unfair to individual voters and produces results that do not reflect the will of the voting population as a whole. The effect of a person's vote on the composition of the House is entirely dependent on the random circumstance of where their vote is cast relative to electorate boundaries. Election results are significantly distorted in that they do not reflect the relative support of parties nationwide, frequently enable a government to win power with a minority of first preference votes and can even lead to a government obtaining power with fewer votes than the opposition. Parliament is dominated by two major blocs, with minor parties rarely able to obtain representation despite the fact that they might gain a significant number of votes nationwide, to the extent that the system of government is best described as a duopoly rather than a democracy. The fact that, in comparison to countries such as the United Kingdom and New Zealand, the Commonwealth Parliament has a small number of seats relative to the voting population, has the effect of magnifying the distortion of results. So far as the Senate is concerned, the fact that an equal number of seats is allocated to each State means that the influence wielded by each voter varies widely according to which State they are registered in, to the extent that a voter in Tasmania has 13 times the influence of a voter in New South Wales. If democracy is defined as government in accordance with the will of the voters, the system created by Parliament can be described as democratic only to a very qualified extent. The Constitution vests an overwhelming preponderance of power in Parliament, and supporters of that distribution argue that the will of the people, as expressed through Parliament, provides optimal protection for rights. It is therefore ironic that, in a constitutional order where so much reliance is placed on representative democracy, the electoral system fails to achieve what is surely the most fundamental objective of a democratic system, which is accurately to reflect the national will. The arguments of those who support the current system of democratic supremacy would have more force if the Constitution did, in fact, guarantee true democracy.[151] As Toohey J noted, writing extrajudicially[152]

> the will which judicial review may frustrate is that of a current majority of members of a legislature. This does not necessarily coincide with the will of a majority of citizens.

The following observation about British politics by Allan would be equally true of politics in Australia today, requiring only the substitution of the words 'House of Representatives' for 'House of Commons':[153]

> [i]mportant freedoms are at the mercy of a temporary majority of the House of Commons, generally manipulated by the executive government, which cannot even claim the support of a clear majority of the electorate.

Next, although the Constitution is supposedly based on responsible government, in reality the doctrine no longer operates. As former Clerk of the Senate, Harry Evans, stated[154]

Democracy and Responsible Government - Two Australian Constitutional Myths' (2015) 13 *Canberra Law Review* 3 and Bede Harris, *Constitutional Reform as a Remedy for Political Disenchantment in Australia* (Springer, 2020) 65-71, 145-9.

[150] *Attorney General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1; *McGinty v Western Australia* (1996) 186 CLR 40. For a full discussion see Bede Harris, 'Does the Commonwealth Electoral Act Satisfy the Requirement That Representatives Be 'Directly Chosen' by the People?' (2016) 9 *Journal of Politics and Law* 78.

[151] In this regard see also Feldman, above n 136, 6-7.

[152] Toohey, above n 142, 172.

[153] T R S Allan 'Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism' (1986) 44 *Cambridge Law Journal* 111, 116.

[154] Harry Evans, 'The Australian Parliament: time for reformation' (Address to the National Press Club, Canberra, 24 April 2002) <https://australianpolitics.com/2002/04/24/harry-evans-parliamentary-reform-speech.html>

> Responsible government was a system which existed from the mid-19th century to the early 20th century, after which it disappeared. It involved a lower house of parliament with the ability to dismiss a government and appoint another between elections. This system has been replaced by one whereby the government of the day controls the lower house by a built-in, totally reliable and "rusted on" majority. Not only is the government not responsible to, that is, removable by, the lower house, but it is also not accountable to it. The government's control of the parliamentary processes means that it is never effectively called to account…

Lack of executive accountability is facilitated by the rigidity of party discipline, which is far stricter in Australia than in other Westminster democracies,[155] and which means that a government can always rely on both its front and back bench not to hold it accountable. The duopolistic political order created by the electoral system ensures that no government minister has ever been subject to penalties for refusing to answer questions out by a parliamentary committee, even in circumstances where the opposition controls the relevant chamber. The fact that today's opposition is tomorrow's government means that opposition parties are unwilling to establish the precedent of a government minister being compelled to answer questions and being subject to sanctions if they do not. Crucial conventions upon which the Westminster system depends, for example the rule that ministers, not their staffers or public servants must take responsibility for malfeasance or maladministration, are no longer followed.[156] The impunity with which the executive defies the legislature can be illustrated by reference to some of the more infamous examples of recalcitrance, including John Howard's refusal to allow political advisors employed in his office and in that of the then defence minister Peter Reith to appear at the inquiry into the Children Overboard affair,[157] the prohibition against a defence force officer appearing before the inquiry into what knowledge ADF personnel had of torture of Iraqi prisoners at Abu Ghraib,[158] and the prohibition against public servants appearing before the inquiry into the AWB scandal.[159] Then Minister for Migration, Scott Morrison, refused to answer questions posed by a Senate committee on migration matters[160] and officials from the Department of Immigration and from Operation Sovereign Borders refused to answer a Senate committee question as to whether the government had paid people smugglers to return asylum-seekers to Indonesia.[161]

In this environment of lack of governmental accountability, abuse of power – for example as occurred in the Haneef affair, when Dr Haneef was unlawfully detained[162] – and corruption in the allocation of public money – as exemplified by the sports grants scandal[163] – readily occur. Investigations into such events are conducted by government appointees in accordance with terms of reference carefully crafted by the government to exclude key questions from being considered. Those conducting investigations may be prevented from accessing relevant documents or interviewing witnesses[164] and when reports are concluded they are often not published.[165] The obvious lack of transparency and accountability inherent in the practice of

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[155] Frank Bongiorno, 'Politicians' inability to speak freely on issues that matter leaves democracy all the poorer' *The Conversation,* 21 June 2016.
[156] Judy Madigan, 'Ministerial responsibility: reality or myth?' (2011) 26 *Australasian Parliamentary Review* 158.
[157] P Walters, 'A fearless public servant' *The Australian* (Sydney), 17 August 2004.
[158] Australian Broadcasting Corporation, *The World Today* 1 June 2004.
[159] Samantha Maiden, 'Gag in Senate illegal, clerk warns' *The Australian* (Sydney), 12 April 2006.
[160] Australian Broadcasting Corporation, 'Immigration Minister Scott Morrison defies Senate order to release information about Operation Sovereign Borders.,' *ABC News* 19 November 2013.
[161] Australian Broadcasting Corporation, 'Senior officials refuse to answer questions on payments to people smugglers.' *ABC News,* 5 February 2016.
[162] Bede Harris, *Constitutional Reform as a Remedy for Political Disenchantment in Australia* (Springer, 2020) 5-6.
[163] Ibid 12-13.
[164] Ibid 6.
[165] Christopher Knaus and Josh Taylor, 'Sports rorts: Coalition blocking release of Phil Gaetjens' secret report, citing cabinet exemption' *The Guardian* (Online), 18 July 2021

governments investigating their own wrongdoing could be remedied by the establishment of an independent anti-corruption commission, but this is a step which the current government has persistently blocked.[166]

We are drawn therefore to the conclusion that the structure established by the Constitution is minimally democratic and barely responsible. Although the structural causes of these developments have existed since the Constitution came into force, there can be no doubt that the evolution of political practice, particularly over the last quarter century, has accelerated the pace at which virtually unbridled power is concentrated in the hands of the government, which in turn has created an environment in which breaches of human rights have been able to occur. The failure of the text and structure to impose adequate restraint on parliamentary and executive power means that self-imposed restraint derived from the rule of law provides the only barrier to abuses of human rights, but the increasing willingness of governments to depart from that convention – or, as one might put it, their unwillingness to play the game subject to conventional norms – means that they have breached the underlying compact between the executive and legislature on the one hand and the courts on the other, and that therefore the argument made in the United Kingdom to the effect that a correction in the balance between the branches of government is now necessary if the rule of law (in the broadest sense) is to be upheld, applies with equal force in Australia.

D *Identifying fundamental rights*

Australian constitutional law textbooks are largely devoid of critical discussion of the question of what values underpin the Constitution. Most state that the drafters of the Constitution did their work on the assumption that the Constitution was founded on 19th century British constitutionalism, including the idea that Parliament was not constrained by values external to the law. This meant that when the Australian colonists debated their constitutional arrangements, they thought there to be nothing wrong in providing that the States should be allowed to keep in force laws which restricted the franchise based on gender, race and property-ownership. Nor did they consider there to be anything wrong in rejecting a proposal that the Constitution should contain a right to due process, it being argued that since such a right could be read as requiring equality before the law, it would prevent the Commonwealth from discriminating against Asian and Indigenous people.[167]

In this values-free environment, how would judges create a common law bill of rights? Academic writers have cautioned that in order to avoid uncertainty and subjective choice by individual judges some theoretical framework would need to be developed in accordance with which rights would be identified.[168] This would be true irrespective of whether a court relied on natural law underlying *Dr Bonham's Case* or an expanded rule of law concept.

Gummow J, writing extra-judicially, advanced a number of arguments against the idea of a judicially-created common law bill of rights,[169] *inter alia* that it would not be consistent with the understanding of the law at the time the Constitution was adopted, that the Constitution over-rode the common law, that it was uncertain how fundamental rights were to be identified,

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<https://www.theguardian.com/australia-news/2021/jul/18/sports-rorts-coalition-blocking-release-of-phil-gaetjens-secret-report-citing-cabinet-exemption>

[166] Australian Broadcasting Corporation, 'Scott Morrison defends blocking proposed federal corruption commission after MP crosses the floor,' *ABC News,* 25 November 2021.

[167] *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 1898, 687 (Isaac Isaacs) and 690-91 (Patrick Glynn). See Geoffrey Robertson, *The Statute of Liberty: How Australians Can Take Back Their Rights* (Random House Australia, 2009) 59 and Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, *Bills of Rights in Australia: History, Politics and Law* (University of New South Wales Press, 2009) 24-6.

[168] Anne Twomey, 'Fundamental Common Law Principles as Limitations upon Legislative Power' (2009) 9 *Oxford University Commonwealth Law Journal* 47, 70-1; Williams and Hume, above n 43, 48.

[169] William Gummow, 'The Constitution: Ultimate Foundation of Australian Law?' (2005) 79 *Australian Law Journal* 167, 176.

that the common law should not be fixed at a particular point in time, that the common law was not the product of universal reason but was rather the result of human choice and that it was unclear how to distinguish between 'good' and 'bad' rules of the common law. A discussion of these arguments is useful because it can highlight what are, with respect, misunderstandings about the nature of the common law bill of rights project.

First, proponents of a common law bill of rights would accept the argument by Gummow J that that the creation of a common law bill of rights would not be consistent with the drafters' understanding of the relationship between the text of the Constitution and the common law. This is indeed why the theory of implied rights is of such limited usefulness in enhancing human rights protection. As the courts have emphasised, the doctrine of implied rights depends on a finding that such rights have some basis in the text of the Constitution, and so the courts have declined to recognise only such rights as are strictly necessary to permit the Constitution to function, which currently is limited to the implied freedom of political communication, the limited right to due process and a right to vote. But this is of little importance to the argument in favour of a common law bill of rights, because those rights would be independent of, and unconstrained by, the assumptions underpinning the Constitution.

It is also conceded that the drafters operated on the basis that, to the extent that there might be anything in the Constitution that was contrary to common law, the Constitution, as a statute, would over-ride the common law. The point is that because common law bill of rights theory is founded on the idea that the common law can over-ride statute and that the courts are not constrained by the text of the Constitution, the Constitution, to that extent, does not matter. The Commonwealth Constitution is, after all, just another statute of the United Kingdom Parliament and so, consistent either with *Dr Bonham's Case* or with the new conception of the rule of law, can be over-ridden just like any other. Furthermore, the development of a common law bill of rights would not involve freezing the common law at any point in time – as has always been the case with the common law, rules relating to fundamental rights would evolve over time in accordance with understanding of their content as they are applied to novel fact situations.

Finally, as to the question of how fundamental rights would be identified for inclusion in the new common law doctrine, the quest is not one governed by judicial subjectivity as was feared by Zines who said that the content of common law rights would depend on personal values[170] or Winterton, who raised the spectre of as many common law bills of rights as there are judges.[171]

As a starting point it is important to state what the basis of such rights would *not* be, and that is community values. As Winterton correctly pointed out, if the courts used a common law bill of rights to over-ride the will of Parliament that supposedly reflects community values, it cannot rationally be argued that the courts could refer to community values as justification for their course of action, as fidelity to community values would draw them in a circle back to the will of Parliament.[172] This also serves to demonstrate that the justification for a common law bill of rights has nothing to do with democracy. Democracy is not, as is often mistakenly thought, a source of rights – rather it is one of many rights dependant on an underlying value. Democracy itself is not in itself a value – it is simply a mechanism for law-making. Any claim that there is a *right* to a democratic form of government is logically dependant on some value

[170] Leslie Zines 'A Judicially Created Bill of Rights?' (1994) 16 *Sydney Law Review* 166, 180-4.
[171] Winterton, above n 102, 234.
[172] Ibid.

that is both external - and superior - to, democracy.[173] This was elegantly put by Poole who, commenting on extra-judicial writing by Sir John Laws,[174] stated as follows:[175]

> [Laws] accepts that democracy is the best form of politics in that it best respects the cardinal value of individual autonomy: by according citizens an equal voice in the law-making process, democracy presupposes that individuals are of equal worth. But Laws is at pains to point out what he sees as the secondary or derivative nature of democracy. Democracy is not good in and of itself, as it were, but by virtue of the fact that it is the mode of politics that accords most closely with the cardinal value of autonomy. The ideals of the good constitution are, for this reason, Laws argues, 'logically prior to democracy.' (References omitted).

What theory would judges draw on identifying the rights that a common law bill of rights would protect? Space does not permit an exegesis on the jurisprudential theories that underlie human rights. It suffices to say that the argument that there is no objective basis to human rights can be refuted by reference to Kantian theory, which founds rights on the autonomy and equality of each person implied by the overarching value of dignity,[176] and which has been adopted by modern philosophers such as Fuller,[177] Raz[178] and Waldron,[179] and which also formed the basis of the dignitarian school of jurisprudence of Laswell and McDougal.[180] Interestingly, the Kantian idea of individual autonomy was suggested as the foundational value for the development of constitutional common law rights by the English judge Sir John Laws, writing extra-judicially.[181] Another theory which provides jurisprudential justification for the objective existence and definable content of human rights can be justified by reference to Rawls' theory of imagining people in the original position behind a veil of ignorance who would rationally adopt rules based on respect for fundamental rights.[182]

The most obvious sources in which these theories have received concrete form are, of course, the numerous international human rights documents – the *Universal Declaration of Human Rights*,[183] the *International Covenant on Civil and Political Rights*,[184] the *International Covenant on Economic, Social and Cultural Rights*[185] and the *United Nations Declaration on the Rights of Indigenous Peoples*[186] to name only the most prominent – all of which, it should be noted, Australia has signed. In addition to this, one would expect the courts to draw on documents such as the *Canadian Charter of Rights and Freedoms* contained in the *Constitution Act* (1982) and the Bill of Rights contained in the *Republic of South Africa Constitution Act 108 of 1996*, as well as the case law in which those documents have been interpreted.

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[173] Bede Harris, *Constitutional Reform as a Remedy for Political Disenchantment in Australia* (Springer, 2020) 90-5.
[174] John Laws, 'The Constitution: Morals and Rights' (1996) *Public Law* 622.
[175] Poole, above n 133, 448.
[176] Immanuel Kant, *Groundwork of the Metaphysic of Morals* (Herbert Paton, trans, Routledge Classics, 2005) [trans of *Grundlegung zur Metaphysik der Sitten* (first published 1785)] 114-5, 161-2. For a general discussion of autonomy, including Kant's contribution, see Joel Feinberg, *Harm to Self* (Oxford University Press, 1986) 27-51.
[177] Lon Fuller, *The Morality of Law* (Yale University Press, 1964), 162.
[178] Raz, above n 129, 221.
[179] Jeremy Waldron, 'How Law protects Dignity' (2012) 71 *Cambridge Law Journal* 200.
[180] Harold Lasswell and Myers McDougal, 'Legal Education and Public Policy: Professional Training in the Public Interest 52 (1943) *Yale Law Journal* 203, 207; Harold Lasswell and Myers McDougal, 'Criteria for a Theory About Law' 44 (1971) *Southern California Law Review* 362, 393 and Myers McDougal, Harold Lasswell and Lung-Chu Chen, *Human Rights and World Public Order* (Yale University Press, 1980).
[181] Laws, above n 174, 623.
[182] John Rawls, *A Theory of Justice* (1972, Clarendon Press) 17–22, 60, 136-42, 303.
[183] GA Res 217A (III), UN Doc A/810 at 71 (10 December 1948).
[184] Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
[185] Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).
[186] GA Res 61 / 295 (13 September 2007).

Of course, a common law bill of rights would not emerge fully formed as the result of a single court decision. It would develop incrementally as cases arose. This would have the benefit of giving legislators and the executive the opportunity, when either enacting or applying law, to be mindful of the same international human rights documents the courts would refer to, and thereby to anticipate, and thus avoid, breaches of the rights they protect. Politicians would become mindful of human rights in a way that they never have before, and would act with abundant caution in order to avoid infringing rights, so as to minimise the risk that legislation or executive action would be invalidated. The mere prospect of judicial review of legislation would have a powerful educative effect and would act as a deterrent against parliamentary over-reach. Interestingly, the degree to which Parliament and the executive would need to moderate their conduct would be a measure of the truth or falsity of the argument raised by some opponents of a bill of rights to the effect that Australia does not need a bill of rights because the government does not infringe them. Given the evidence of the extent to which, as outlined in Part V, Parliament already has infringed rights, the reality is that the development of a common law bill of rights would require politicians would have significantly to change their approach to their exercise of power.

E *Applying the new doctrine to migration detention*

What would be the result if a court was to recognise a common law constitutional right to liberty of the person and was called upon to determine whether that right was breached by mandatory detention under ss 189 and 196 of the *Migration Act 1958* (Cth)? As discussed earlier, s 189 of the Act requires that an officer who knows or reasonably suspects that a person is an unlawful non-citizen to detain that person. Section 196(1) states that such a person must be kept in immigration detention until removed from Australia, deported or granted a visa.

As a first step, it would be necessary for the court to specify what the elements of the common law right are. Liberty of the person is a composite term which has two aspects – procedural and substantive. The procedural aspect is that any form of deprivation of liberty, irrespective of purpose, requires authorisation by a court, either prior to, or within a short period of, that deprivation occurring. Recognition of this aspect of the right would have the consequence of over-ruling *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*[187] in so far as it countenanced any exceptions to the need for judicial authorisation. The practical effect on all people under any form of detention under Commonwealth, State or Territory law would be that their detention would need to be regularised by application by the detaining authority to a court of competent jurisdiction within a reasonable time (which would need to be defined in the judgment in which the new common law right had been recognised). Consistent with this, any statutory provision conferring a power of detention – such as, for example, s 189 of the *Migration Act 1958* (Cth) – would either be ruled invalid as written or, if its lawfulness was to be preserved, be interpreted as being impliedly subject to a requirement that the detaining authority make application to a court within a reasonable time for authority to detain.

The second, substantive, aspect of the right is that detention is lawful only if the detaining authority could prove reasonable grounds for it. Whether reasonable grounds exist would depend on an application of a proportionality test found in *McCloy v New South Wales*.[188] The first element of this test is that it must be shown that a constitutionally-protected right has been limited. Assuming that is the case, the onus then moves to the authority that has limited the right to prove that the law limiting the right is rationally connected to a legitimate interest. Next it must be shown that the law limits the right to no greater extent than is necessary to achieve the purpose. If there are other reasonably practicable ways which would have been equally effective in achieving that purpose but which would have had a less restrictive effect on the right, then the law will be found invalid. The practical effect of this is that when Parliament enacts a law which has the effect of limiting rights, it must take care to do so in a manner which restricts rights as little as possible. The third stage involves an inquiry

[187] (1992) 176 CLR 1.
[188] (2015) 257 CLR 178, [2] – [3] (French CJ, Kiefel, Bell and Keane JJ).

as to whether there is proportionality between the importance of the purpose to which the law is directed and the extent to which the law limits the right. This requires a balancing of the benefit conferred by the law against the degree to which the right is limited. This will obviously be a matter of degree – the greater the importance of the purpose served by the law, the greater the limitation of rights that will be found to be justified. Conversely, a law serving a purpose of relatively low importance will not warrant a significant limitation of rights.

Applying the first element of the *McCloy* test to detention under ss 189 and 196 of the *Migration Act 1958* (Cth), it is obvious that detention involves a limitation of the right to liberty of the person.

In applying the next element, relating to legitimate purpose, a court would be likely to find that detention *prima facie* does serve the legitimate purposes of enabling the executive to assess the legal, health and security status of those arriving in the country without a visa. It would also be found that detention is rationally connected to that purpose. Importantly, a factor which would *not* be a legitimate purpose would be deterrence which, as discussed earlier, is a purpose that governments have sought to achieve *de facto* even though deterrence lies outside what the courts have identified as the non-punitive purposes of migration legislation. Deterrence is an illegitimate purpose not only because it is inherently punitive, being one of factors that taken into consideration in imposing sentences for criminal offences, but also because when making a decision as to whether to exercise power in relation to a person, a decision-maker is required to consider only factors relevant to that person, and it amounts to the taking into account of an irrelevant factor to consider what effect that exercise of power will have on others.

It is when a court reached the requirement that a law must achieve its objective in a manner that is least restrictive of the protected right that the impact of the new common law constitutional right would become apparent. The fact that under s 189 detention is mandatory and that under s 196 its duration is bounded by the achievement of certain purposes rather than being limited either to a period that is reasonably necessary to achieve those purposes or to specific periods of time, means that the sections do not limit the right to the least extent necessary in order to achieve their legitimate purpose – in essence, as written, the provisions are too broad. In applying the least restrictive manner test a court would therefore be likely to read s 189 as authorising detention only for the purposes of verifying the identity of the migrant, assessing their legal status (including, obviously, whether they are seeking asylum), and determining whether they pose a health or security risk.[189] This is a far more specific set of criteria than those justifying detention under current case law.

So far as the duration of detention is concerned, a court would depart from current case law by reading s 196 down to hold that detention would be lawful only for such reasonable period of time as is needed to achieve those purposes, because detention for longer than that would amount to a greater limitation on the right to freedom of the person than was necessary to achieve the purposes, and would therefore require the release of the detainee – a finding that would obviously mean the over-ruling of *Commonwealth of Australia v AJL20*.[190] What would be a reasonable time beyond which detention was unlawful would depend upon the facts of each detainee's case. Unlike under the current system of mandatory detention where, as has been noted by the courts,[191] a detainee's individual circumstances are irrelevant to the lawfulness of their detention, the least restrictive measures test would require that the specifics of each detainee's case be taken into account in assessing whether the legitimate purposes served by detention could be achieved by less restrictive means than keeping them in detention. In determining which less restrictive means would achieve the relevant purpose or purposes in any particular case, one would anticipate that a court would on the one hand take into account factors such as the flight risk presented by the detainee, the length of time it would take to resolve their legal status, whether they are suffering from communicable disease

[189] McAdam and Chong, above n 66, 102
[190] (2021) 391 ALR 562.
[191] *Al-Kateb v Godwin* (2004) 219 CLR 562, 574 (Gleeson CJ).

and their age, among others, while on the other the court would determine whether, taking those factors into account, the purposes of detention could be achieved by means such as community release and supervision, release with surety, surrender of travel documents, residence at designated location, a reporting obligation or electronic monitoring.[192] This would mean the over-ruling of *Al-Kateb v Godwin*[193] because the monitoring of a person such as the appellant in that case who could neither be granted a visa nor be sent to any other country could be achieved by one of these alternative means.

As can be seen from the above, in many, indeed probably most, instances, the least restrictive measures aspect of the *McCloy* test would be dispositive of detention cases, rendering an application of the proportionality stage of the test unnecessary. However, for sake of completeness it is necessary to discuss what would happen in a case where it was found that, in all the circumstances of a detainee's case, there were no less restrictive means of achieving one of the legitimate purposes of migration detention? It is difficult to imagine cases in which none of the measures falling short of detention would be unable to achieve its legislative purposes in the long term. However, one circumstance which might arise would be where a detainee suffered from a psychiatric illness of such seriousness that their health condition would a danger to themselves or others if they were released into the community. In such circumstances, an application of the least invasive measures test would lead to the conclusion that none of the alternative monitoring measures falling short of detention would be effective in achieving one of the purposes of detention – namely that of protecting the community from harm posed by a detainee's health condition. In such circumstances the least invasive measures test would lead to a result that there was no less invasive measure other than detention that could achieve that legitimate purpose. If a court then went on to apply the proportionality stage of the *McCloy* test, it would conclude that while ongoing detention amounted to a complete limitation of the right to freedom of the person, that would be outweighed by the importance of the need to protect both the detainee and society, noting of course that whether detention was justified in the future would depend on regular assessment of the state of the detainee's mental health from time to time. This is the same reasoning that would be adopted in cases where a court had to determine whether detention under mental health legislation constituted a justifiable limit on liberty of the person.

As is clear from the above, a migration regime which protected the right to liberty if the person and thus cast upon the detaining authority the onus of proving the reasonableness of detention in each individual case would have a dramatic effect on levels and duration of migration detention. [194]

F *Political consequences*

So far as the relationship between the branches of government are concerned, a decision by a court to declare an Act of Parliament invalid on the grounds that it disproportionately limited of a fundamental right would be revolutionary in the political sense and would doubtless lead to outrage in some quarters. However, the courts have previously successfully weathered the storms that erupted after decisions deemed controversial. In the wake of the decision in *Mabo v Queensland (No 2)*[195] Hugh Morgan, Managing Director of Western Mining Ltd said that 'The High Court has plunged property law into chaos and has given substance to the ambition of Australian communists and Bolshevik left for a separate Aboriginal state.'[196] The decision

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[192] McAdam and Chong, above n 66, 110-11.
[193] (2004) 219 CLR 562.
[194] In 2021 Independent MP Andrew Wilkie introduced the *Ending Indefinite and Arbitrary Immigration Detention Bill* to Parliament. Although the Bill was not proceeded with by the House, it provides a useful template for legislation which would conform to the right to individual liberty. The Bill can be accessed at <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Migration/ImmigrationDetentionBill>.
[195] (1992) 175 CLR 1.
[196] Hugh Morgan, *The Australian* (Sydney), 13 October 1992.

recognising the implied right to political communication in *Australian Capital Television v Commonwealth (No 2)*[197] led government Senator Chris Schacht to accuse the court of 'playing politics'[198] and to refer to the judgment as containing 'political sophistry of the worst kind,'[199] while Minister for Justice Michael Tate said that the government would not allow the High Court to 'usurp the power of Parliament.'[200] One journalist described the decision as one which imposed 'weird and wonderful meanings on the provisions of the Constitution.'[201] Even more vituperative was the criticism the High Court endured in the wake of its decision on native title in *Wik Peoples v Queensland*,[202] when Queensland Premier Rob Borbidge, described members of the court as 'self-appointed kings and queens,'[203] the statements of Chief Justice Brennan as 'pathetic,'[204] and those of Justice Kirby as 'rantings and ravings,'[205] and that the judges of the court were held in 'absolute and utter contempt'[206] by many Australians.

However, to say that a decision by the court was 'revolutionary' in the political sense does not mean that it would amount to a 'constitutional revolution'. By declaring a new rule of the common law (or resurrecting an old one) the courts would be doing precisely what their role entitles to do, which is to enunciate a common law rule about the power of Parliament. What could the government ultimately do if a court declared that a statute was invalid for breaching a common law right? If the executive did not acquiesce in the judgment, it would be faced with a choice of appointing additional judges to the bench, replacing the existing courts with new one or simply defying the ruling – all of which certainly *would* amount to an unconstitutional revolution by the executive itself, depriving it of the argument that it was seeking to uphold the Constitution. What this reveals is that in the final analysis, although all three branches of the government must act in accordance with the law, it is the judicial branch that declares what the law is, which means that it is the judicial branch which is the most powerful of them, even if judges have hitherto been hesitant to acknowledge, and still less, act, in accordance with that reality. Yet, as the American judicial realist Jerome Frank noted[207]

> When judges and lawyers announce that judges can never validly make law, they are not engaged in fooling the public; they have successfully fooled themselves.

The maxim *ius dicere, non facere* therefore does not amount to a restriction on the power of the courts to the degree that one might think, because to say *is* to make.

VIII CONCLUSION

It is useful to end this article where it began – with the resignation of Sir Robert Tredgold from his position as Chief Justice of the Supreme Court of the Federation of Rhodesia and Nyasaland in 1960. It will be recalled that he resigned not because he was already required to apply legislation that was inconsistent with liberty of the person and which intruded upon judicial power, but rather in *anticipation* of such legislation being enacted. To many, this would seem an unnecessary, perhaps even dramatic, gesture. But I would argue that far from reflecting excessive judicial punctilio, Chief Justice Tredgold's resignation was a necessary and principled step, taken in order to avoid his judicial office being co-opted to serve as a cog in

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[197] (1992) 177 CLR 106.
[198] Margo Kingston, 'Parliament Must Reclaim Role On Rights – Costello,' *The Age* (Melbourne), 7 October 1992.
[199] 'An Implied Bill of Rights' *Australian Press Council News* (4) 1992.
[200] Commonwealth *Parliamentary Debates*, Senate Hansard, 7 October 1992, 1280 (Michael Tate).
[201] Les Hollings, 'Don't Let the Judges Govern,' *Sunday Telegraph* (Sydney), 4 July 1993.
[202] (1996) 187 CLR 1.
[203] Gervase Green, 'Senator defies PM in attack on court', *The Age* (Melbourne), 4 March 1997, 4.
[204] Ibid.
[205] Adrian Rollins, 'Attacks "undermine" the role of the High Court,' *The Sunday Age* (Melbourne), 9 March 1997, 11.
[206] James Woodford, 'Borbidge steps up attack on High Court,' *Sydney Morning Herald* (Sydney), 1 March 1997, 7.
[207] Jerome Frank, *Law and the Modern Mind* (Stevens & Sons, 1949) 115.

the machinery of an unjust legal order, even though, as he himself admitted, given that no other judge followed him and the legal system carried on unaffected, he overestimated the effect that his resignation would have.[208] What this article has sought to do is to argue that when faced with legislation that infringes fundamental human rights, judges in Australia face the same moral question as was faced by Tredgold CJ and later by judges in South Africa. I have argued that in answering that question, they have the choice either of resigning or of being open to the new approach to the rule of law that is evolving in other jurisdictions, and of crafting a new rule to the effect that, in certain circumstances, the common law is superior to the will of Parliament – a rule which can be justified either by looking to the law as it stood in the 17th century or by giving effect to that new understanding of the rule of law and the correct balance between branches of government that it requires.

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[208] Tredgold, above n 8, 234-5.

"You Don't Need to Know": The Australian Experience of Criminal Intelligence as Evidence

Brendan Walker-Munro*

Criminal intelligence, the synthesis of information and trained analysis to inform decision-making, has formed the cornerstone of policing and national security investigations for the last century. However, since 9/11 the traditional lines between "spies and cops" has become blurred, and Federal and State laws have become more permissive of the use of criminal intelligence as evidence in proceedings, often in circumstances where the parties are not allowed to view the evidence, test its strength or even know it exists. This article intends to engage with this paradigm, not only to expose its weaknesses but also to identify positivist mechanisms where such material – usually probative as to the facts in issue – might be used in ways that do not offend constitutional or common law principles.

Introduction

In Australia, the Australian Federal Police (AFP) are considered the "major instrument of Commonwealth law enforcement", with an ambit to enforce Commonwealth criminal laws and protect Australia's national interests both domestically and internationally.[1] Yet over the past ten years this scope of the AFP's investigative and prosecutorial activities has expanded dramatically. Following the terrorist attacks of 9/11, the AFP took centre stage for much of the national security reform that occurred to consolidate counter-terrorism powers.[2] On 20 December 2017, Parliament established the Department of Home Affairs, bringing together the AFP, the Australian Border Force (ABF), Australian Criminal Intelligence Commission (ACIC), the Australian Transaction Reports and Analysis Centre (AUSTRAC) and the Australian Security Intelligence Organisation (ASIO) into a single "super-department".[3] This new body has investigative authority over a wide swathe of criminal conduct including counter-terrorism and money laundering, foreign interference and espionage, significant fraud, cybercrime, Customs, drugs, transnational organised crime and child exploitation.[4] State and Territory Police forces equally are experiencing expansions and deepening of their powers and remit in the investigation of ever-broader classes of crime.[5] Concomitant with this

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[1] Australian Federal Police, *Case Categorisation and Prioritisation Model (CCPM)*, 12 December 2020 <https://www.afp.gov.au/sites/default/files/PDF/ccpm-dec-2020.pdf>.

[2] Gregory Rose, Diana Nestorovska, 'Terrorism and National Security Intelligence Laws: Assessing Australian Reforms' (2005) *LawAsia Journal*, 137; Anthony Reilly, 'The Processes and Consequences of Counter-Terrorism Law Reform in Australia: 2001-2005' (2007) 10 *The Flinders Journal of Law Reform* 1, 81.

[3] Australian Federal Police, 'Home Affairs Portfolio established' (Media release, 20 December 2017) <https://www.afp.gov.au/news-media/media-releases/home-affairs-portfolio-established>.

[4] Consistent with the Ministerial Direction issued under section 37(2) of the *Australian Federal Police Act 1979* (Cth); see Australian Federal Police, *Ministerial Direction* (16 December 2020) <https://www.afp.gov.au/sites/default/files/PDF/MinisterialDirection-2020.pdf>.

[5] Greg Martin, 'No worries? Yes worries! How New South W ales is creeping towards a police state' (2010) 35 *Alternative Law Journal* 3, 163-167; Greg Carne, 'Beyond Terrorism: Enlarging the National Security Footprint Through the *Telecommunications Interception and Intelligence Services Legislation Amendment Act 2011* (Cth)' (2011) 13 *Flinders Law Journal* 2, 177-239; Penny Crofts, Jason Prior, 'The Proposed Re-Introduction of Policing and Crime into the Regulation of Brothels in New South Wales' (2016) 28 Current Issues in Criminal Justice 1, 209; Vicki Sentas, Michael Grewcock, Criminal law as police power: Serious crime, unsafe protest and risks to public safety (2018) 7 *International Journal for Crime, Justice and Social Democracy* 3, 75-90. DOI: 10.5204/ijcjsd.v7i3.554; Luke McNamara, Juliea Quilter, Russell Hogg, Heather Douglas, Arlie

expansion of jurisdiction has been the growth in the use of "criminal intelligence" as a form of policing product. As will be explored later, the term criminal intelligence is one of contention, differing as to whether it is defined by statute or by policy. Criminal intelligence has, by Byzantine loops and knee-jerk policy positions, become embedded as a form of "secret evidence" that may be relied upon by Courts and Tribunals in numerous Australian jurisdictions to make a host of decisions across the domains of occupational regulation, security, employment and asset confiscation schemes.[6] Yet the interjurisdictional treatment of "secret evidence" under statute and common law has only been the subject of limited examination.

The purpose of this article is, in four parts, to add to existing scholarship on the increase in secrecy in Australia since 9/11, the intelligence/evidence overlap, and the growing migration of national security paradigms into other legal spheres. For my purposes, "secret evidence" is defined as the use of (predominantly) criminal intelligence in furtherance of a party's case where that evidence is not supplied as a matter of right to the contradicting party, that party's legal representatives, or the public at large. Part 1 will examine the frameworks in Commonwealth and State legislation that permit the use of criminal intelligence as secret evidence in proceedings. In Part 2, we will identify some of the challenges and dangers under the current Australian jurisprudential experience of criminal intelligence as secret evidence. Part 3 will benchmark Australia's experience with that of the United Kingdom. I will conclude with Part 4 by suggesting some policy and legal proposals that might the Courts to make better and more robust decisions on secret evidence.

I: The Australian experience of secrecy

The concept of an open and transparent proceeding is integral to the fundamental legal tradition of fairness and equality.[7] Not only does a fundamental requirement of proceedings involve the disclosure to the parties of all evidence intended to be relied upon in reaching a judicial decision, but each party must be vested with rights to test and confront all of that evidence.[8] The idea that a Court might, on the application of an organ of the State, entertain legal argument and the filing of evidence in the absence of any of the parties (especially the one whom the proceedings may be about) is 'antithetical to that tradition'.[9]

This is not to say that the traditional tests of relevance and admissibility reflected in the uniform *Evidence Acts* have not been modified to preclude information of a sensitive nature from reaching an open courtroom. Law enforcement and intelligence agencies have always had recourse to the public interest immunity (PII) to resist production of material that, although relevant and admissible, would be 'injurious to the public interest'.[10] Cabinet papers[11], the names of police informers[12], and the records of security operations[13] have all been recognised as falling within the scope of the immunity.

Loughnan, David Brown, 'Theorising Criminalisation: The Value of a Modalities Approach' (2018) 7 *International Journal for Crime, Justice and Social Democracy* 3, 91.

[6] See for example Anna Talbot, 'The use of secret evidence in civil and criminal proceedings' (2017) 142 *Precedent* 30.

[7] *Scott v Scott* [1913] AC 417, 476; *R v Sussex Justices, Ex p McCarthy* [1924] 1 KB 256, 259.

[8] *Lee v The Queen* (1998) 195 CLR 594, 32.

[9] *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* [2013] HCA 7, 1.

[10] *Sankey v Whitlam* (1978) 142 CLR 1, 38.

[11] *Australian National Airlines Commission v The Commonwealth* (1945) 71 CLR 29; *Lanyon v the Commonwealth* (1974) 129 CLR 650; *R v Lewes Justices; Ex parte Home Secretary* [1972] 2 All ER 1057; *Sankey*, n 11.

[12] *Marks v Beyfus* (1890) 25 QBD 494; *Spargos Mining NL v Standard Chartered Aust Ltd* (No 1) (1989) 1 ACSR 311; *Attorney-General for New South Wales v Stuart* (1994) 34 NSWLR 667; *ASIC v P Dawson Nominees Pty Ltd* (2008) 169 FCR 227.

[13] *Allister v R* (1984) 154 CLR 404.

Nor is PII solely limited in Australia to the common law. Section 130 of the uniform *Evidence Acts*[14] enshrines the test in *Sankey* to exclude admitting into evidence something that relates to matters of state[15], unless the public interest in admission and the administration of justice outweighs the public interest in preserving the secrecy or confidentiality of the evidence because of its potential damage to the nation or public service.[16] Irrespective of the scope of the immunity, the Court may, in determining whether or not the immunity has accrued, may examine the material, but only to determine whether the public interest attaches.[17] If the objection is not upheld, and the evidence is relevant and otherwise admissible, there is no scope for the evidence to be further withheld from the parties.[18]

A second statutory doctrine of secrecy was then created by the passing of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth). This Act modified many of the rules of evidence relating to federal criminal and civil proceedings, defining "national security information" (NSI) as any information that related to national security, or the disclosure of which might affect national security.[19] The term "national security" is likewise broad, and covers Australia's interests in defence, security, international relations and law enforcement.[20] The law enforcement interests include specific reference to criminal intelligence: the interests of the Commonwealth are in 'avoiding disruption to national and international efforts relating to… criminal intelligence', 'protecting the technologies and methods used to collect, analyse, secure or otherwise deal with, criminal intelligence' and 'protection and safety of informants and of persons associated with informants'.[21]

The process of dealing with NSI will feature later in this article, but for present purposes an obligation is placed on the parties to notify the Attorney-General if national security information may be revealed in a criminal or civil proceeding.[22] The Attorney-General must then determine whether such a disclosure might prejudice national security. The Attorney-General may then proceed to intervene and be heard in the proceedings[23], issue a non-disclosure certificate[24], prevent witnesses from answering questions[25] or otherwise affect various aspects of the admission of evidence in an open Court to all of the parties.[26]

Despite these inherent interferences with the long common law traditions of open courts[27] (and the cluster of human rights associated with them[28]), there now appears to be an increasing reliance in Commonwealth and State law involving a third statutory doctrine of

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[14] *Evidence Act 1995* (Cth); *Evidence Act 2011* (ACT); *Evidence Act 1995* (NSW); *Evidence (National Uniform Legislation) Act 2011* (NT); *Evidence Act 2001* (TAS); *Evidence Act 2008* (Vic).
[15] See for example *Evidence Act 1995* (Cth), s 130(4).
[16] Elucidating the balance described in *Conway v Rimmer* [1973] AC 388, 400.
[17] *Condon* (2013) 252 CLR 38, 97.
[18] *Al Rawi v Security Service* [2012] 1 AC 531, 580, 586, 592 and 595; *HT v The Queen* [2019] HCA 40.
[19] *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth), s 7.
[20] Ibid, s 8.
[21] Ibid, s 11.
[22] Ibid, ss 24 and 38D.
[23] Ibid, ss 20A and 38AA.
[24] Ibid, ss 26 and 38F.
[25] Ibid, ss 25 and 38E.
[26] Ibid, ss 20B, 22, 38AB, and 38B.
[27] Dan Meagher, 'The Common Law Principle of Legality in the Age of Rights' (2011) 35 *Melbourne University Law Review* 449.
[28] Anthony Gray, 'Constitutionally Protecting the Presumption of Innocence' (2012) 31 *University of Tasmania Law Review* 1, 132; Anthony Gray, 'Constitutionally Heeding the Right to Silence in Australia' (2013) 39 *Monash University Law Review* 156; Anthony Davidson Gray, 'Forfeiture Provisions and the Criminal–Civil Divide' (2012) 15 *New Criminal Law Review* 32; Anthony Gray, 'Freedom of Association in the Australian Constitution and the Crime of Consorting' (2013) 32 *University of Tasmania Law Review* 2, 149. Internationally the United Kingdom's system was struck down in *A v United Kingdom* [2009] II Eur Court HR 137, 234 for being in contravention of art. 6 of the *Convention for the Protection of Human Rights and Fundamental Freedoms* (opened for signature 4 November 1950, 213 UNTS 221, entered into force 3 September 1953).

secret evidence: criminal intelligence. The mechanics of this species of secret evidence are illustrated by reference to the *Serious and Organised Crime (Control) Act 2009* (SA).[29] The Act permits the Commissioner of Police to make application to the Supreme Court to make a declaration that 'members of the organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity' and 'the organisation represents a risk to public safety and order', or for control orders for individuals to prevent consorting.[30] These application may be supported by the admission of criminal intelligence, being 'information relating to actual or suspected criminal activity…the disclosure of which could reasonably be expected to prejudice criminal investigations, to enable the discovery of the existence or identity of a confidential source of information relevant to law enforcement or to endanger a person's life or physical safety'.[31] The Commissioner of Police is responsible for making a determination whether or not such information is indeed criminal intelligence, a determination that is not reviewable and may indeed be made retrospectively (in the case of public safety orders).[32] The Court also has various duties associated with receiving and handling this evidence, such as maintaining confidentiality of the intelligence as well as hearing arguments and receiving evidence in the absence of the parties.[33]

Nor are these provisions solely the province of South Australian jurisprudence. Table One shows a listing of all Australian legislation that currently refers to, or deals with, the various uses of secret evidence.

Table 1: Australian legislation containing references to "criminal intelligence"

Jurisdiction	**Legislation**
Commonwealth	*Auscheck Act 2007* (Cth), s 14A *Australian Citizenship Act 2007* (Cth), s 36B *Australian Crime Commission Act 2002* (Cth), ss 7A and 7C *Australian Passports Act 2005* (Cth), s 50 *Competition and Consumer Act 2010* (Cth), ss 157, 157B and 157C *Criminal Code* (Cth), Div 104 *Foreign Passports (Law Enforcement and Security) Act 2005* (Cth), s 23 *Migration Act 1958* (Cth), ss 503A and 503B *Narcotics Drugs Act 1967* (Cth), ss 4 and 15M *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth), s 11 *Public Interests Disclosure Act 2013* (Cth), s 41
Queensland	*Criminal Code*, s 86 *Judicial Review Act 1991* (Qld), Schedule 2 *Liquor Act 1992* (Qld), ss 4, 47, 107, 107E, 142R, 142ZK, 173EQ and 344

[29] See also Greg Martin, 'Outlaw Motorcycle Gangs and Secret Evidence: Reflections on the Use of Criminal Intelligence in the Control of Serious Organised Crime in Australia' (2014) 36 *Sydney Law Review* 3, 501.
[30] *Serious and Organised Crime (Control) Act 2009* (SA), ss 9 and 11.
[31] Ibid, s 3.
[32] Ibid, ss 5A, 9, 29 and 39Y.
[33] Ibid, s 5A.

	Motor Dealers and Chattel Auctioneers Act 2014 (Qld), ss 23, 158, 230A and 240, and Schedule 3 *Police Service Administration Act 1990* (Qld), Schedule 1 *Racing Integrity Act 2016* (Qld), ss 53A, 83, 101, 212 and 296 and Schedule 1 *Second-Hand Dealers and Pawnbrokers Act 2003* (Qld), ss 7, 111 and 141, and Schedule 3 *Security Providers Act 1993* (Qld), ss 11, 13, 48 and 71, and Schedule 1 *Tattoo Industry Act 2013* (Qld), ss 12, 34, 35C, 61, 75, and Schedule 1 *Tow Truck Act 1973* (Qld), ss 4C, 21A, 36B, 36C and 50, and Schedule 2 *Weapons Act 1990* (Qld), ss 10B, 10C, 15, 18, 19, 28, 29, 30, 142A and 194, and Schedule 2
New South Wales	*Betting and Racing Act 1998* (NSW), s 15B *Combat Sports Act 2013* (NSW), ss 26, 31, 41, 45, 67, 78, 94 and 95 *Commercial Agents and Private Inquiry Agents Act 2004* (NSW), ss 4(2A) and 7(3) *Crimes (Criminal Organisation Control) Act 2012* (NSW), Part 3B *Crime Commission Act 2012* (NSW), s 78A *Drug Supply Prohibition Order Pilot Scheme Act 2020* (NSW), s 10 *Explosives Act 2003* (NSW), ss 13 and 24A *Firearms Act 1996* (NSW), ss 11, 29 and 75 *Government Information (Public Access) Act 2009* (NSW), Schedule 1 *Independent Commission Against Corruption Act 1988* (NSW), s 104C *Law Enforcement Conduct Commission 2016* (NSW), s 189 *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), ss 87R, 87T and 87X *Liquor Act 2007* (NSW), ss 4, 45, 68, 140, 142 and 144 *Motor Dealers and Repairers Act 2013* (NSW), s 4, 27 and 176 *National Disability Insurance Scheme (Worker Checks) Act 2016* (NSW), ss 30, 33 and 44, and Schedule 1 *Paintball Act 2018* (NSW), s 69 *Pawnbrokers and Second-Hand Dealers 1996* (NSW), ss 8A(2A) and 9 *Police Act 1990* (NSW), s 96B *Poppy Industry Act 2016* (NSW), ss 4, 23 and 25 *Security Industry Act 1997* (NSW), ss 15, 26, 29 and 39D *Tattoo Parlours Act 2012* (NSW), Part 3, Division 3 *Terrorism (Police Powers) Act 2002* (NSW), ss 25K and 26ZH *Tow Truck Industry Act 1998* (NSW), ss 3, 18, 26, 43 and 45 *Weapons Prohibition Act 1998* (NSW), ss 10 and 35

Australian Capital Territory	*Crimes (Sentencing) Act 2005* (ACT), Part 4.6 *Security Industry Act 2003* (ACT), Part 2A *Liquor Act 2010* (ACT), Part 16A *Construction Occupations (Licensing) Act 2004* (ACT), Part 5A, Division 5A.2
Northern Territory	*Associations Act 2003* (NT), s 40 *Firearms Act 1997* (NT), ss 3, 10, 33, 40A, 49F and 49N *Information Act 2002* (NT), s 49AA *Serious Crime Control Act 2009* (NT), ss 6, 73 and 80
Victoria	*Criminal Organisations Control Act 2012* (Vic), ss 3 and 137, and Part 4
Tasmania	*Firearms Act 1996* (TAS), ss 29 and 141 *Registration to Work with Vulnerable People Act 2013* (TAS), ss 3, 28, 30, 50, 51 and 53 *Right to Information Act 2009* (TAS), s 30 *Security and Investigation Agents Act 2002* (TAS), ss 8 and 37 *Sex Industry Offences Act 2005* (TAS), s 17
South Australia	*Casino Act 1997* (SA), s 45A *Child Safety (Prohibited Persons) Act 2016* (SA), ss 5, 10, 42A and 42B *Child Sex Offenders Registration Act 2006* (SA), ss 4 and 5A *Controlled Substances Act 1984* (SA), ss 30A, 30Y and 30ZZM *Correctional Services Act 1982* (SA), ss 4 and 6 *Criminal Investigation (Covert Operations) Act 2009* (SA) *Disability Inclusion Act 2018* (SA), ss 18A, 18C, 18Y and 18Z *Firearms Act 2015* (SA), s 4, 15, 20, 24, 30, 33, 44, 47, 48 and 49 *Freedom of Information Act 1991* (SA), Schedule 1 *Gambling Administration Act 2019* (SA), ss 5 and 22 *Hydroponics Industry Control Act 2009* (SA), ss 3, 6, 7 and 37 *Industrial Hemp Act 2017* (SA), ss 3, 5 and 16 *Labour Hire Licensing Act 2017* (SA), ss 6 and 33 *Liquor Licensing Act 1997* (SA), ss 4, 28A and 128AB *Parliamentary Committees Act 1991* (SA), s 15O *Police Act 1998* (SA), s 74A *Second-Hand Dealers and Pawnbrokers Act 1996* (SA), ss 3 and 5A *Security and Investigation Industry Act 1995* (SA), ss 3 and 5B *Serious Organised Crime (Control) Act 2008* (SA), ss 3, 5A, 7, 9, 29, 39Y and 42A *Serious Organised Crime (Unexplained Wealth) 2009* (SA), ss 3, 6, 34 and 35 *Summary Offences Act 1953* (SA), ss 6AA, 21A, 21F, 21J, 66, 66B, 66J, 74BA, 74BGA and 74BU *Tattooing Industry Control Act 2015* (SA), ss 3, 5 and 8

Western Australia	*Criminal Organisations Control Act 2012* (WA), Part 5 *Freedom of Information Act 1992* (WA), Schedules 1 and 2

Table One shows us that the largest proportion of Acts that purport to deal with criminal intelligence as a form of secret evidence are in the NSW, Queensland and South Australian jurisdictions – perhaps unsurprising given these States were the key battlegrounds for policymakers and law enforcers struggling to contain outlaw motorcycle groups.[34] Western Australia and Victoria have the least, followed by the ACT and NT, though all of these states have had demonstrated issues controlling organised crime in the last decade.[35]

Criminal intelligence in Australian jurisprudence is also distinguishable from the concept of PII and NSI on four bases:

- **The use of the evidence:** PII and NSI resist admission of otherwise relevant and admissible evidence[36], forcing Courts to make a decision on 'less than the whole of the relevant materials'.[37] Criminal intelligence on the other hand is often relied on to directly inform decision-makers and withheld from all of the parties[38];
- **The role of the Court:** in PII and NSI cases the role of the Court is exclusionary, determining potential admissibility of the evidence by determining the truth of possible damage to the public interest[39] or Australia's national security.[40] If the objection is upheld 'they are not available to either [party] and the court may not use them. There is no question of unfairness or inequality'.[41] But for criminal intelligence, the Court's discretion is inclusionary – it must not only determine if the evidence is criminal intelligence, but also whether it may be admitted, and the purposes and limits for such admission.[42] If it does so, the Court will be statute barred from making that material available to anyone[43];
- **The nature of the evidence:** PII may attach to items or classes of evidence that may or may not go facts in issue, but otherwise have contents, or are within a class of documents, that offend the PII principle. NSI are likewise of a "class", generally being documents or oral evidence from the security agencies of Australia.[44] On the other hand, criminal intelligence – as the 'insights and understanding obtained through

[34] Martin, n 29.
[35] See for example Bob Gosford, 'Is the NT's Hells Angels ban unlawful?' (2013) *Crikey*, <https://blogs.crikey.com.au/northern/2013/04/08/is-the-nts-hells-angels-ban-unlawful/>; Glynis Quinlan, 'Police association: Bikie gangs mocking Government and putting Canberrans in "incredible danger" (2018) *RiotACT!*, < https://the-riotact.com/police-association-bikie-gangs-mocking-government-and-putting-canberrans-in-incredible-danger/265188>; Margaret White, Andrew Cappie-Wood, *Review of Victorian Criminal Organisation Laws – Stage One* (Report to Victorian Parliament, 30 June 2020).
[36] *Sankey*, n 11; *Marconi's Wireless Telegraph Co Ltd v Commonwealth (No 2)* (1913) 16 CLR 178; *Rogers v Home Secretary [1973] AC 388*; see also *Lodhi v R* [2006] NSWCCA 101; *R v Collaery (No 7)* [2020] ACTSC 165.
[37] *Graham v Minister for Immigration and Border Protection; Te Puia v Minister for Immigration and Border Protection* [2017] HCA 33, [33]; citing *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532, 556.
[38] *Commissioner of Police New South Wales v Gray* [2009] NSWCA 49; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501; *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319; *South Australia v Totani* (2010) 242 CLR 1; W*ainohu v New South Wales* (2011) 243 CLR 181.
[39] *Robinson v State of South Australia (No 2)* [1931] AC 704.
[40] *Lodhi v R* [2006] NSWCCA 101; *R v Khazaal* [2006] NSWSC 1353; *R v Collaery (No 7)* [2020] ACTSC 165.
[41] *HT v R* [2019] HCA 40, [32].
[42] See also the former *Criminal Organisation Act 2009* (Qld), s 59.
[43] *South Australia v Totani* (2010) 242 CLR 1; W*ainohu v New South Wales* (2011) 243 CLR 181.
[44] *Thomas v Mowbray* [2007] HCA 33; *Al Rawi v Security Service* [2012] 1 AC 531.

analysis of available information and data' – essentially constitutes the opinion of the analyst and/or hearsay of the informer and would, but for the enabling Acts, be more limited in its admission[45];

- **Nature of proceedings:** Claims for PII are usually determined on a certificate or affidavit evidence from the public officer or Minister having responsibility or authority over the evidence that is the subject of the claim.[46] Criminal intelligence proceedings involve the State producing the evidence to the Court *in camera* and in the absence of the other parties, and seeking that the Court make a decision on that material without the other parties viewing, commenting or testing it. Though NSI proceedings adopt *in camera* hearings, the parties are at least seized of awareness of the NSI and may be heard and/or make submissions in respect of the Attorney-General's assertions as to that NSI.[47]

Thus we can say with some confidence that, although criminal intelligence might be evidence or a class of evidence to which PII and/or NSI could properly attach, the current statutory treatment of criminal intelligence is a wholly new paradigm, supported by a statutory framework that sits ill-at-odds with the Court's traditional approaches to public and adversarial battles informed by all of the evidence. Challenges to strike down the principles of these Acts as unconstitutional (usually by reference to *Kable*[48] or *Kirk*[49]) have been mostly unsuccessful.[50] Ananian-Walsh summed up secret evidence thus:

> The cases set up three necessary conditions for secret evidence to be acceptable in court proceedings. Secret evidence is permitted if the court: has the capacity to reassess the classification of the information; is not being forced to take particular steps with respect to the evidence; and retains sufficient discretion to potentially counteract any unfairness (for example, by attributing less weight to the evidence or ordering a stay of proceedings).[51]

The above exposition of the current state of Commonwealth and State law does not readily lend itself to a dissection of the challenges facing the use of criminal intelligence. This is because the enabling Acts often create a process enabling receipt of the evidence by the Court to prove certain facts in issue, but without notifying the other parties the evidence exists or permitting them to examine it.[52]

II: The challenges of criminal intelligence

Nomenclature

The first of the challenges to any meaningful scholarly and policy debate about criminal intelligence is that there exists no consistent statutory definition between the Commonwealth, States and Territories. Take for example the definitions as they are applied in policy and statute. The South Australian Act (as discussed earlier) defines criminal intelligence as '…

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[45] See for example the exclusion of opinion evidence under the uniform *Evidence Acts*, Parts 3.2 and 3.3, though noting that the evidence of intelligence analysts are likely to satisfy the 'specialised knowledge based on the person's training, study or experience' criterion to otherwise qualify as "expert evidence" under section 79.

[46] *Barton v Csidei* [1979] 1 NSWLR 524; *Alister v R* (1983) 154 CLR 404; *Sankey*, n 11; *R v Rusmanto* (1997) 6 NTLR 68; *Woodroffe v National Crime Authority* (1999) 168 ALR 585.

[47] See generally *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth), Division 3 of Part 3 and Division 3 of Part 3A.

[48] *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51.

[49] *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

[50] *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501; *South Australia v Totani* (2010) 242 CLR 1; *Wainohu v New South Wales* (2011) 243 CLR 181; *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* [2013] HCA 7.

[51] Rebecca Ananian-Welsh, 'Knowing the case against you: secrecy is eroding fair process' (2014) *The Conversation*, <https://theconversation.com/knowing-the-case-against-you-secrecy-is-eroding-fair-process-22686>.

[52] See for example *Serious Organised Crime (Control) Act 2008* (SA), s 5A.

information relating to actual or suspected criminal activity (whether in this State or elsewhere) the disclosure of which could reasonably be expected to prejudice criminal investigations, to enable the discovery of the existence or identity of a confidential source of information relevant to law enforcement or to endanger a person's life or physical safety.'[53] However the definition used by the ACIC – Australia's frontline criminal intelligence agency – is vastly different: '… insights and understanding obtained through analysis of available information and data on complex offending patterns, serious organised crime groups, networks or syndicates and individuals involved in various types of criminal activities.'[54]

While both definitions draw out the connection between actual or potential criminal offending and the identities of offenders, the contrast of these definitions demonstrates one of the serious misunderstandings in law enforcement: confusing or conflating the disparate and overlapping concepts of information and intelligence.[55] Information (sometimes called data) is raw input – detail about a person's whereabouts, phone calls, or online browser history; whereas intelligence is the result of a reasonable and informed analysis and processing, drawing inferences from that data that supports or guides an investigative decision or outcome.[56] Yet despite the yawning chasm separating these two concepts, both information[57] and intelligence[58] are referred to as a "national asset" by the Commonwealth.

At common law, the two concepts of information and intelligence are equally murky. The High Court considers information according to its ordinary meaning:

> [w]ithout necessary relation to a recipient: that which inheres in or is represented by a particular arrangement, sequence, or set, that may be stored in, transferred by, and responded to by inanimate things'.[59]

This does not stop the Commonwealth and States from legislating the term information without a degree of sufficient precision.[60] Further, although the definition of criminal intelligence in the State "serious crime" Acts are the same across Queensland, ACT, NSW, SA and Victoria[61], these definitions do not always seem to flow into the Acts that have been amended to rely on criminal intelligence for decision-making. Take for example the following further definitions of criminal intelligence: 'in relation to a person, means any information about the person's connection with or involvement in criminal activity'[62]; or even 'information that relates to criminal activities and is obtained from … the Commissioner of Police; or … any other entity, or body, responsible for the enforcement of laws of the Commonwealth or of this

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[53] *Serious and Organised Crime (Control) Act 2008* (SA), s 3.
[54] Australian Criminal Intelligence Commission, *Australian Criminal Intelligence Management Strategy 2017-2020* (Australian Criminal Intelligence Commission, 2020).
[55] Celine C Cocq, '"Information" and "intelligence": The current divergences between national legal systems and the need for common (European) notion' (2017) 8 *New Journal of European Criminal Law* 3, 352-373. <https://doi.org/10.1177/2032284417723098>
[56] Adapted from United Nations Office on Drugs and Crime, *Criminal Intelligence. Manual for Front-Line Law Enforcement* (New York, United Nations, 2010), 1; United Nations Office on Drugs and Crime, *Criminal Intelligence. Manual for Analysts* (New York, United Nations, 2011), 1.
[57] Lyria Bennett Moses, 'Who Owns Information? Law Enforcement Information Sharing as a Case Study in Conceptual Confusion' (2020) 43 *UNSW Law Journal* 2, 615-641; citing Department of the Prime Minister and Cabinet, *Australian Government Public Data Policy Statement* (Policy Statement, 7 December 2015).
[58] ACIC, n 6.
[59] *D'Arcy v Myriad Genetics Inc* (2015) 258 CLR 334, 371.
[60] For a comprehensive review, see Bennett Moses, n 48, 615.
[61] *Criminal Organisation Act 2009*, s 59 (now repealed); *Criminal Code* (Qld), s 86(3); *Criminal Organisations Control Act 2012* (Vic), s 3; *Crimes (Sentencing) Act 2005* (ACT), s 61B; *Crimes (Criminal Organisation Control) Act 2012* (NSW), s 3. WA and NT's contribution to criminal intelligence adds the disclosure or prejudicing of Police investigative, surveillance and information-gathering methods and procedures: *Criminal Organisations Control Act 2012* (WA), s 109; *Serious Crime Control Act 2009* (NT), s 6.
[62] *Weapons Act 1990* (Qld), Schedule 2.

or any other State or of a Territory'.[63] In South Australia, numerous Acts permit the Commissioner of Police to "classify" evidence as criminal intelligence through a non-reviewable decision-making process, at which point all the protections of criminal intelligence will attach.[64] Ironically, there are finally various laws across Australian jurisdictions which rely on criminal intelligence as evidence and yet have no definition.[65]

These concerns around nomenclature are not simply abstract, academic or theoretical, and may have profound outcomes on the parties that are the subject of criminal intelligence that may be faulty, patchy, incomplete or simply wrong. For some, they may be blocked from undertaking otherwise legitimate or lawful professional activities or businesses[66], or face deportation from Australia[67] for reasons they will never be allowed to know. In no other case is the danger of flawed criminal intelligence more profound in the case of Dr Haneef – arrested, charged, stripped of a visa and subjected to significant pre-trial detention in circumstances where ASIO's own security assessments did not deem him a security threat.[68]

The roots of criminal intelligence provisions

As we have already covered, the second difficulty with criminal intelligence is that its current statutory and common law treatment differs significantly to that of NSI and PII claims because they derive from substantially different legal traditions. It is to be remembered that PII involves only a balancing between the public interest in protecting the Executive and the public interest in the open administration of justice.[69] This protection derives from the idea that 'proper decisions can be made at high levels of government only if there is complete freedom and candour in stating facts, tendering advice and exchanging views and opinions'.[70]

The protection of NSI, though seemingly capable of being a sub-set of PII, essentially 'tilts the balance' in favour of the protection of that material.[71] Though the effect of the enabling legislation may place a hand on the scale and affect the Court's assessment of NSI, this does not make it unconstitutional or affect the integrity of the Court conducting the assessment.[72] The protection of NSI was deemed necessary because '[t]he existing rules of evidence and procedure do not provide adequate protection for information that relates to, or the disclosure of which may affect, national security'.[73] However this suggestion – given the lengthy history of successful PII claims – is perhaps disingenuous; instead, it is perhaps more correct to suggest that NSI was introduced to permit prosecutions (and subsequently civil suits) for national security issues to proceed apace:

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[63] *Registration to Work with Vulnerable People Act 2013* (TAS), ss 3, 28, 30, 50, 51 and 53; *Security and Investigation Agents Act 2002* (TAS), ss 8 and 37.
[64] *Casino Act 1997* (SA), s 45A; *Child Safety (Prohibited Persons) Act 2016* (SA), s 5; *Disability Inclusion Act 2018* (SA), ss 18A, 18C, 18Y and 18Z; *Firearms Act 2015* (SA), s 4; *Freedom of Information Act 1991* (SA), Schedule 1; *Gambling Administration Act 2019* (SA), s 5; *Hydroponics Industry Control Act 2009* (SA), s 3; *Liquor Licensing Act 1997* (SA), s 4; *Parliamentary Committees Act 1991* (SA), s 15O; *Serious Organised Crime (Unexplained Wealth) 2009* (SA), s 3.
[65] *Betting and Racing Act 1998* (NSW); *Combat Sports Act 2013* (NSW); *Drug Supply Prohibition Order Pilot Scheme Act 2020* (NSW); *Explosives Act 2003* (NSW), ss 13 and 24A; *Firearms Act 1996* (NSW), ss 11, 29 and 75; *Paintball Act 2018* (NSW), s 69; *Tattoo Parlours Act 2012* (NSW). See also *Associations Act 2003* (NT), s 40; *Firearms Act 1996* (Tas), ss 29 and 141; *Sex Industry Offences Act 2005* (Tas), s 17
[66] *K-Generation Pty Limited v Liquor Licensing Court* [2009] HCA 4; *Commissioner of Police v Sleiman & AVS Group of Companies Pty Ltd & Ors* [2011] NSWCA 21
[67] *Graham,* n 34.
[68] John Clarke, *Report of the Inquiry into the Case of Dr Mohamed Haneef: Volume 1* (2008).
[69] *Alister v The Queen* [1984] HCA 85; (1984) 154 CLR 404.
[70] *Sankey v Whitlam* (1978) 142 CLR 1, 43.
[71] *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth), ss 31(8) and 38L(8).
[72] *Faheem Khalid Lodhi v R* [2007] NSWCCA 360, [66]-[68].
[73] Explanatory Memorandum, *National Security Information (Criminal Proceedings) Bill 2004* (Cth), 2.

> A court which has found that sensitive security related information should not be disclosed will have an alternative to simply dismissing the charge. It will be able to admit documents and information in a redacted form that protects national security but preserves the essence of the information. Consequently, the Commonwealth will no longer have to choose between risking the disclosure of sensitive information that relates to national security and protecting this information by abandoning the prosecution, even when the prosecution relates to alleged crimes that could have grave consequences for our national security.[74]

The roots requiring the protection of criminal intelligence derive, coincidentally, from the two classes of information deemed expedient to be covered by the protection in the WA and NT definitions of criminal intelligence: that is, a.) the protection of sources of intelligence as well as existing or future investigations; and b.) the general secrecy of Police methodologies and tactics. Police informers have been protected by a long line of authority on PII[75], subject to the qualification that informers' identities and evidence must be disclosed if it could tend to show the innocence of the accused.[76] And the secrecy of methodologies and tactics is perhaps not that surprising, as these in turn appear to have derived from patent cases (which also prohibited publication of certain matters in decisions).[77] Thus criminal intelligence provisions could, on one viewing, be seen as codifying the common law rules of PII.[78]

However much criminal intelligence that feeds into investigations is the result of a process of information receipt, digestion, analysis and formulation – it is as much an outcome of art than mere "information" in the terms referred by the High Court.[79] Thus what is unique about criminal intelligence material is a capacity to be not only opinion[80] or hearsay, but also suggestive (even probative) of certain tendencies in circumstances where the usual restriction on admitting or challenging such evidence is unavailable. This makes the various purposes to which criminal intelligence might be put a shaky proposition on which to base judicial or administrative decision-making.

Use for which criminal intelligence may be put as evidence

We come then to the principal danger attendant with using criminal intelligence as evidence; that is, the possibility that untested opinion, hearsay and tendency evidence may be deemed admissible to and considered by the Court in circumstances where the respondent has no capacity to view or challenge the material, or even know such material exists. Though speaking of the difficulties in dealing with PII claims, the dicta of Hampel J is instructive:

> Establishment of a legitimate forensic purpose, or apparent relevance is … a difficult exercise for the defence, as they do not have access to the material over which Public Interest Immunity is claimed. The defence cannot refer to the actual content of the documents when submitting there is a legitimate forensic purpose in seeking access to the documents sought, or that they have apparent relevance to an issue in the trial. The defence is, of necessity, restricted to broad or general assertions about legitimate forensic purpose or apparent relevance.[81]

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[74] Commonwealth, *Parliamentary Debates*, Senate, 30 November 2004, 80 (Christopher Ellison); see also the example of the "Alan Johns" matter – Independent National Security Legislation Monitor, *Current Reviews* (Australian Government, 2020), <https://www.inslm.gov.au/current-review-work>.
[75] *R v Hardy* (1794) 24 State Tr 199; *Attorney-General v Briant* (1846) 15 M & W 169; *Marks v Beyfus* (1890) 25 QBD 494, 498 and 500; *Royal Women's Hospital v Medical Practitioners Board of Victoria* (2006) 15 VR 22.
[76] *D v National Society for the Prevention of Cruelty to Children* [1978] AC 170; *Alister v R* (1984) 154 CLR 404; *AB v CD & EF* [2017] VSCA 338 (the "Lawyer X" case).
[77] *Aktiebolaget Hassle v Commissioner of Patents (No 2)* (1989) 96 FLR 175; applied in *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police* [2008] HCA 4, [184].
[78] See for example Lord Diplock in *D*, n 67, where he called the protection of informers a 'rule of law'.
[79] *D'Arcy*, above n 51.
[80] Irrespective of whether this opinion is deemed "expert" or not; see n 42.
[81] [46].

Mason J (as he then was) made point irresistibly clear in *Re JRL; Ex CPL*[82], saying 'It would be inconsistent with basic notions of fairness that a judge should take into account, or even receive, secret or private representations on behalf of a party or from a stranger with reference to a case which he has to decide.' It was for this reason – that the provisions *inter alia* permitting the use of criminal intelligence were 'unnecessary, excessive and disproportionate'[83] – the Queensland industry regulation framework no longer allows for criminal intelligence to be considered as evidence in making administrative decisions.[84] These amendments were made pursuant to the *Serious and Organised Crime Legislation Amendment Act 2016* (Qld), in turn following a Taskforce report into the efficiency of the legislative measures to combat outlaw motorcycle groups.[85]

Of course, Mason J's comments in *Re JRL; Ex CPL*[86] were prefaced with the words 'unless Parliament otherwise provides', and ironically, just prior to the repeal of the Queensland legislation the High Court in *Pompano*[87] settled the issue that Parliament can (and in that case did) exercise a legitimate source of constitutional power to allow for criminal intelligence to be utilised secretly.[88] So the substantive challenge to criminal intelligence as evidence remains; as Churches puts it, the effect of the line of High Court authority[89] is the creation of a constitutionally valid, legislative framework where 'evidence that formerly would not have been available to the affected party, pursuant to public interest immunity, on which basis it was not utilised by the court, may now still not be available to the affected party, but **can** be used by the court' (emphasis in the original).[90]

The third doctrine of secrecy and "curial" fairness

It follows logically that where a party cannot use, contest or even be aware of evidence that may go against their position or interests, the principles of open justice and procedural fairness become compromised.[91] Such compromises are not unknown to Australian jurisprudence; for example, in *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*[92] the High Court described that the Court, in dealing with PII claims, may 'mould their procedures to accommodate' the immunity. It was not until *Gypsy Jokers*[93] that the High Court has since applied this same moulding principle to the acceptance and consideration by a Court of criminal intelligence evidence. In vitiating the

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[82] (1986) 161 CLR 342, 350.
[83] Explanatory Notes, *Serious and Organised Crime Legislation Amendment Bill 2016* (Qld), 2.
[84] *Security Providers Act 1993* (Qld), ss 11(3)(b) and 13(3A)(b), *Liquor Act 1992* (Qld) ss 107, 107E, 142ZK, 173EQ; *Motor Dealers and Chattel Auctioneers Act 2014* (Qld), ss 23, 158, 230A and 240; *Racing Integrity Act 2016* (Qld), ss 53A, 83, 101, 212 and 296; *Second-Hand Dealers and Pawnbrokers Act 2003* (Qld), ss 7, 111 and 141; *Tow Truck Act 1973* (Qld), ss 4C, 21A, 36B, 36C and 50. The *Weapons Act 1990* (Qld) still permits criminal intelligence to be used, as the regulation of firearms and other weapons is restricted solely to the jurisdiction of the Queensland Police Service.
[85] Explanatory Notes, *Serious and Organised Crime Legislation Amendment Bill 2016* (Qld), 1 and 28-34.
[86] (1986) 161 CLR 342, 350.
[87] *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* (2013) 252 CLR 38.
[88] Cf. *Russell v Russell* (1976) 134 CLR 495, 520.
[89] *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532; *K-Generation v Liquor Licensing Court* (2009) 237 CLR 501; *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* [2013] HCA 7.
[90] Steven Churches, 'Paradise Lost; But the Station is Always There' (2010) 12 *Flinders Law Journal* 1, 20.
[91] *Russell v Duke of Norfolk* [1949] 1 All ER 109; *Re v K (Infants)* [1963] Ch 381; *Nicholas v The Queen* (1998) 193 CLR 173; *Re Nolan; Ex parte Young* (1991) 172 CLR 460; *Grollo v Palmer* (1995) 184 CLR 348; *Wilson* (1996) 189 CLR 1, 22; *Bass v Permanent Trustee Co* (1999) 198 CLR 334; *Wainohu v New South Wales* (2011) 243 CLR 181; *Pompano*, [159].
[92] (2005) 225 CLR 88; citing *Sankey*, n 11, and *Alister*, n 43.
[93] *Gypsy Jokers*, n 34, [183].

usual procedural safeguards, Australia's highest court appears to have formulated the concept of "curial fairness"[94] as a novel safeguard for the interests of the opposing parties.

Curial fairness appears distilled as a synthesis of the Court's inherent jurisdiction[95] and an interpretation of the statutory provisions permitting the admission of criminal intelligence.[96] Reliance on statutory authority seems absolutely necessary – as was laid bare in *Cameron v Cole*[97], the Court's inherent jurisdiction may be altered by clear statutory intention.[98] However where the statute makes such an alteration, the principles of statutory interpretation also require that any operation of a power conferred by statute (i.e. to receive secret evidence) be exercised with procedural fairness to those whose interests may be adversely affected by the exercise of that power (i.e. those to whom the secret evidence may refer).[99] There is also the danger that a respondent, keen to defend their position, overcompensates or makes admissions against their interests to defend or counter evidence they don't know or understand.[100] So whilst procedural fairness may be extinguished, especially in circumstances invoking doctrines of secrecy[101], there must be some form of protection exercised in respect of the respondent's interests.

In cases involving criminal intelligence therefore, the Court has stood as necessary protector of the rights of respondents, by invoking the Court's inherent jurisdiction and viewing the material said to constitute criminal intelligence. There appear several good policy reasons for this.

One aspect of the necessity is because of the risk that Police may misclassify criminal intelligence (benignly or negligently) and thus deny the respondent crucial information relevant to their proceedings.[102] Another is the fact that secret evidence may be constitutionally valid but still offends the justiciable principles at the heart of the common law.[103] A third aspect allows the Court, having viewed the material and confirmed the nature of its secrecy and potential injury to the public interest, may then undertake its usual function of attributing what weight (if any) to assign to the criminal intelligence evidence.[104] Fourthly and lastly, *Pompano*[105] stands as clear authority that the Court retains control of its procedures to protect the respondent's interest, whether by staying the proceedings indefinitely or rejecting any use of the evidence for want of relevance or credibility.

These various aspects contributing to the role of the Court in Australia's third doctrine of secrecy have corollaries in international jurisprudence. This article will now examine the United Kingdom's experience with handling secret criminal intelligence as evidence, through the evolution of its closed material procedures (CMP) and the use of special advocates.

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[94] Churches, n 81, 10.
[95] For a comprehensive review, see Rebecca Ananian-Welsh, 'The Inherent Jurisdiction of Courts and the Fair Trial' (2019) 41 *Sydney Law Review* 4, 423.
[96] See Table 1.
[97] (1944) 68 CLR 571; see also *R v Carroll* (2002) 213 CLR 635.
[98] Cf. in *Hussain v Elonex Plc* [1999] IRLR 420 where their Lordships said that a Court must act and receive evidence in the open and that '[n]o custom or practice may override that basic principle'. Yet their Lordships said nothing of Parliament's power to do so.
[99] *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636.
[100] Greg Martin, 'Jurisprudence of Secrecy: Wainohu and Beyond' (2012) 14 *Flinders Law Journal* 2, 201.
[101] *Leghaei v Director-General of Security* [2005] FCA 1576, [88]; this reasoning was not disturbed on appeal: *Leghaei v Director-General of Security* [2007] FCAFC 37, [51]-[55]. See also *Plaintiff M47/2012 v Director General of Security* (2012) 251 CLR 1.
[102] *Gypsy Jokers*, n 34; see also Rebecca Ananian-Welsh, George Williams, 'The New Terrorists: The Normalisation and Spread of Anti-Terror Laws in Australia' (2014) 38 *Melbourne University Law Review* 2, 362.
[103] George Williams, David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2013), 325-328.
[104] *Pompano*, n 10.
[105] *Pompano*, n 10.

III: The United Kingdom's experiences with CMPs

The origin of CMPs is an evolution from the enactment of the Special Immigration Appeals Commission (SIAC), a body constituted to consider appeals of migration cases decided by the Home Secretary on the grounds of national security.[106] SIAC proceedings were held *ex parte*, *in camera* and involved the appointment of a special advocate for the appellant with an appropriate security clearance to consider national security information.[107] In SIAC proceedings special advocates fulfil two functions: to test the executive's case for non-disclosure (the disclosure function) and to represent the interests of the person in the proceedings (the representative function).[108] Despite widespread criticism in both academia and media[109] the enactment of the *Prevention of Terrorism Act 2005* (UK) and the *Counter-Terrorism Act 2008* (UK) sought to permit Courts to hold *in camera* hearings to accept and consider law enforcement or security service information which could not be provided to the accused in criminal proceedings.[110]

The conceptual vehicle of CMPs and special advocates existing as a creature of both statute and the Court's inherent jurisdiction to control its own civil proceedings was challenged in in *Al Rawi*.[111] There, the UK Supreme Court ruled that CMPs might have a legitimate basis in determining PII claims, but could not be used in civil proceedings without a specific statutory authority. Indeed as Lord Dyson put it 'subject to certain exceptions and statutory qualifications, the right to be confronted by one's accusers is such a fundamental element of the common law right to a fair trial that the court cannot abrogate it in the exercise of its inherent power. Only Parliament can do that.'[112]

Lord Dyson was not alone in his criticism of the CMP and special advocates. The European Court of Human Rights determined that even the appointment of a special advocate is insufficient protection, as the accused does not know the nature of the allegations against them and so cannot instruct the advocate appropriately.[113] In *Tariq v Home Office*[114] the UK Supreme Court held that a CMP did not violate the human rights of the appellant because 'the demands of national security may necessitate a system for determining complaints under which a claimant is, for reasons of national security, unable to know the secret material by reference to which his complaint is determined' and held that the CMP system was both necessary and contained sufficient safeguards. Despite this, the judiciary considered that even with statutory authority the rule of law required disclosure of sufficient information about the allegations against them.[115]

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[106] *Special Immigration Appeals Commission Act 1997* (UK); an Act itself passed because of criticism of the Home Office by the European Court of Human Rights in *Chahal v United Kingdom* (1996) 23 EHRR.

[107] Ibid, s 6 and *Special Immigration Appeals Commission (Procedure) Rules 2003* (UK), r 35.

[108] Evan Nanopolous, 'European Human Rights Law and the Normalisation of the "Closed Material Procedure": Limit or Source?' (2015) 78 *Modern Law Review* 6, 913-944; see also *M v Secretary of State for the Home Department* [2004] 2 All ER 863, [13]; *Charkaoui v Canada (Citizenship and Immigration)* [2007] 1 SCR 350.

[109] Rebecca Scott-Bray, Greg Martin, 'Closing down open justice in the United Kingdom' (2012) 37 *Alternative Law Journal* 2, 126-127; Katherine Biber, 'In Crime's Archive - The Cultural Afterlife of Criminal Evidence' (2013) 53 *British Journal of Criminology* 6, 1033.

[110] *Roberts (FC) v Parole Board* [2005] UKHL 45; Mark Rix, 'Counter-Terrorism and Information: The NSI Act, fair trials and open, accountable government' (2011) 25 *Continuum: Journal of Media and Cultural Studies* 2, 285-97.

[111] *Al Rawi and others v The Security Service and others* [2012] 1 AC 531.

[112] Ibid, [35]; see also Adrian Zuckerman, 'Closed Material Procedure – Denial of Natural Justice: Al Rawi v Security Service [2011] UKSC 34' (2011) 30 *Civil Law Quarterly,* 345-359.

[113] *A v United Kingdom* [2009] ECHR 301, [220].

[114] [2012] 1 AC 452.

[115] Rebecca Scott Bray, 'Executive Impunity and Parallel Justice? The United Kingdom Debate on Secret Inquests and Inquiries' (2012) 19(1) *Journal of Law and Medicine* 1, 592.

This is ultimately because the special advocate's role derives not from a protection of the accused's interests, but a protection of the public interest, i.e. to verify that the non-disclosure by the State to the other party has been exercised appropriately. Given this is the root of the relevant principle for CMPs, it is unsurprising that special advocates cannot adduce evidence to rebut the contents of the intelligence material.[116] Nor are the provisions of CMPs immutable – in *Kennedy*[117] a hearing was conducted entirely in the absence of both the parties and the special advocate, where the Court heard evidence of secret surveillance and law enforcement activities. The House of Lords called these arrangements 'Kafkaesque'[118] and 'the stuff of nightmares'.[119]

Later, the UK Supreme Court held that in considering a CMP, a Court needed to ensure the excluded party received as much information as possible about the closed evidence, efforts should be made by the parties to minimise the extent of closed material, and that the court should consider whether it is possible to avoid a closed hearing.[120] Even with these conditions, the majority of the court viewed CMPs with 'distaste and concern'.[121]

Sweeping away these concerns of the Supreme Court, UK Parliament subsequently passed the *Justice and Security Act 2013* (UK) ("the JSA") which specifically authorised the use of CMPs and special advocates in civil proceedings, and codified the earlier judgments allowing the use of CMPs in lower Tribunals and Courts.[122] In the years since the passing of the JSA, CMPs have been adopted in other proceedings with varying levels of judicial support and criticism.[123] CMPs have, most recently, even been used in interlocutory proceedings where the State has resisted orders for production of applications for search warrants.[124]

IV: What can Australia learn?

Quite separate from the challenges outlined by the Supreme Court, House of Lords and European Courts of Human Rights, the CMP and special advocates frameworks face further unique difficulties in being "copied across" to the Australian legislative context, even in circumstances where CMPs have already been found to be valid exercise of the Court's inherent jurisdiction.[125] As Martin[126] summarised special advocates cannot adduce contradictory evidence against criminal intelligence, find difficulties in government objections to disclosure (such as by PII), and limitations on the ordinarily free and frank discussions that could be had between special advocates and their "clients".[127] Even the provisions for special

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[116] Adam Tomkins, 'National Security and the Due Process of Law' (2011) 64 *Current Legal Problems* 1, 3.
[117] *Kennedy v United Kingdom* (2011) 52 EHRR 4.
[118] *Roberts*, n 102, 95.
[119] *AF v Secretary of State for the Home Department* [2009] UKHL 28, [38]; see also *ZZ v Secretary of State for the Home Department* [2013] 3 CMLR 46, 1274-1275.
[120] *Bank Mellat v Her Majesty's Treasury [No1]* [2013] 4 All ER 495.
[121] Ibid, 510.
[122] *Justice and Security Act 2013* (UK), Part 2.
[123] *R (British Sky Broadcasting Ltd) v Central Criminal Court* [2014] UKSC 17; *Gulamhussein and Tariq v the United Kingdom* (Application Nos 46538/11 and 3960/12) unreported, 8 May 2018; *Belhaj v*
Director of Public Prosecutions [2018] UKSC 33; see also Mark Pope, 'The UK Justice and Security Bill 2012–2013: Using secrecy to legitimize the securitization of the law' (2019) 12 *Media, War and Conflict* 1, 50-68.
[124] *R (on the application of Haralambous) v Crown Court at St Albans* [2018] UKSC 1; for a fuller analysis, see Daniella Lock, 'A New Chapter in the Normalisation of Closed Material Procedures' (2020) 83 *Modern Law Review* 1, 202-216.
[125] *R v Lodhi* [2006] NSWSC 571; *AVS Group of Companies Pty Limited and Ors v Commissioner of Police and Anor* [2010] NSWSC 109.
[126] Martin, n 29, 501.
[127] See also Adam Tomkins, 'National Security and the Due Process of Law' (2011) 64 *Current Legal Problems* 1, 215.

advocates in Canada, held up as 'the [law's] best means at our disposal'[128] in handling secret evidence, have not been capable of solving these complexities.[129]

Rather than a special advocate existing as a rule of common law, the statutes themselves might be modified to insert a statutory officer to protect the rights and interests of the accused or respondent. In Queensland this mechanism was typified by the Criminal Organisation Public Interest Monitor (COPIM).[130] The COPIM was authorised as a 'statutory *amicus curiae*' to monitor and file submissions in respect of proposed declarations and control orders.[131] In particular, the role of the COPIM was to 'to test, and make submissions to the court about, the appropriateness and validity of the monitored application'.[132] Similarly, the Independent National Security Legislation Monitor (INSLM) is an independent statutory officer with functions to review Australia's national security and counter-terrorism legislation.[133]

Yet both the COPIM and INSLM are not an exemplar of the kind necessary to mitigate issues with the special advocate system. Firstly, statutory office holders may be subject to conditions on the terms of their appointment, somewhat diluting their independence.[134] Secondly, the functions of the COPIM are monitoring in nature – whilst this might discharge the "disclosure function"[135] of special advocates, it fails to deliver a representative function. In effect the COPIM protected the public interest residing in not disclosing criminal intelligence, rather than the public interest in protecting the rights of the accused or respondent.[136] Thirdly, in practice the COPIM was not the protection the legislature may have hoped it would be – it '… doubtless adds to the integrity of the process. But it cannot cure a want of procedural fairness'.[137]

Roach discussed other options available under the Canadian system, including reviews of intelligence declarations by Canada's intelligence watchdog (Security Intelligence Review Committee) and disclosing secret evidence to counsel for the affected party on undertakings that the counsel will not share that evidence with his or own client.[138] This approach was criticised in the UK Court of Appeal in *R v Davis*[139] as requiring an unacceptable severance of the duty owed by defence counsel to their clients; however, some scholars disagree, suggesting that counsel's duty to the Court is superior to that of the client, and that counsel will strive to preserve the secrecy on pains of serious professional misconduct, financial penalty or even imprisonment.[140]

The review of criminal intelligence by a watchdog or ombudsman type body does carry some force in an Australian context. Both the Commonwealth Ombudsman and Inspector-General

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[128] Graham Hudson, Daniel Alati, 'Behind closed doors: Secret law and the special advocate system in Canada' (2018) 44 *Queen's Law Journal* 1, 67.
[129] Kent Roach, 'Secret Evidence and its Alternatives', in Aniceto Masferrer (Ed.), *Post 9/11 and the State of Permanent Legal Emergency: Security and Human Rights in Countering Terrorism* (Springer, 2012), 179-200.
[130] Pursuant to Part 7 of the now-repealed *Criminal Organisations Act 2009* (Qld).
[131] Queensland, Legislative Assembly, Explanatory Notes to the *Criminal Organisation Bill 2009*, 3.
[132] *Criminal Organisations Act 2009* (Qld), s 86(c).
[133] Though this does not extend to making submissions to, or appearing before, a Court: *Independent National Security Legislation Monitor Act 2010* (Cth), ss 5 and 6.
[134] Though noting that once appointed the INSLM is subject only to limited direction by either the Prime Minister or Attorney-General; *Independent National Security Legislation Monitor Act 2010* (Cth), s 7; cf. *Criminal Organisations Act 2009* (Qld), s 83.
[135] Evan Nanopolous, n 100, 920.
[136] Talbot, n 7, 30; see also *Pompano*, n 10, [54].
[137] *Pompano*, n 10, [208].
[138] Roach, n 121, 186.
[139] [1995] 1 WLR 613.
[140] Lucy Line, David Plater, 'Police, Prosecutors and Ex Parte Public Interest Immunity Claims: The Use of Special Advocates in Australia' (2014) 33 *University of Tasmania Law Review* 2, 255

of Intelligence and Security have significant powers of inspection and review[141], coupled with a lengthy history of frank and robust engagement with contentious matters of national policy.[142] Either these bodies could receive criminal intelligence monitoring functions or a "criminal intelligence monitor" could be established as a separate statutory office holder.

In either event, the monitoring powers must be exercisable in a manner that is explicitly not subject to Ministerial direction.[143] These powers should be exercised by a quorum of qualified individuals, including at least one current or former Judge of a Court[144] but also a former Police officer of senior rank with experience in the handling and treatment of criminal intelligence and a legal practitioner with specific experience in civil rights or PII/NSI claims. These areas of expertise are important in bridging the divide of what constitutes criminal intelligence between legalistic/formal definitions and those employed "at the coalface" of intelligence operations.[145] This body should also be given the specific, statutory function of protecting the common law rights of the accused or respondent (as opposed to preserving the public interest in the secrecy of the criminal intelligence information).

When criminal intelligence is sought to be used in a proceeding, the statute should require a notice to be given to this criminal intelligence monitor, who may then appear as *amicus curiae* in the proceeding, including any parts held *in camera* or *ex parte*. The criminal intelligence monitor must be capable of being served all of the information provided to the Court, subject to any anonymization of informant identities (such as was the case with the COPIM[146]). The person leading the criminal intelligence evidence should also be compelled to give the criminal intelligence monitor a short statement explaining what aspects of the evidence offend the public interest against disclosure. In making submissions and appearing before the Court in respect of criminal intelligence evidence, the criminal intelligence monitor must have a statutory requirement to prioritise its "representative function" over the "disclosure function" [147] to protect the rights of the parties that cannot view that evidence. The criminal intelligence monitor should also – subject to appropriate orders of secrecy or non-disclosure – be capable of cross-examining the witnesses who generated the intelligence, i.e. intelligence officers. Such a distinction is important, as often intelligence staff are not called as witnesses to proceedings to protect their operational capability, yet they are the people who make the "informed guesswork" which forms the bedrock of modern intelligence practice.[148]

Finally, and perhaps most importantly, there will need to be a specific provision for any criminal intelligence monitor to be capable of receiving instructions from the (co-)accused or respondent(s). Not only must these communications be given the highest imprimatur of protections from disclosure, but such communications must be deemed inadmissible in all forms of proceedings or exercise of statutory power.[149] Whilst the criminal intelligence

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[141] *Ombudsman Act 1976* (Cth), Division 1 of Part II; *Inspector-General of Intelligence and Security Act 1986* (Cth), Division 3 of Part II.

[142] See for example Richard Glenn, *Centrelink's automated debt raising and recovery system* (Commonwealth Ombudsman report, April 2017); Vivienne Thom, *Inquiry into the attendance of legal representatives at ASIO interviews, and related matters* (Inspector-General of Intelligence and Security report, January 2014).

[143] Cf. the limited powers of influence over the INSLM.

[144] Similar to, and subject to the same "private practice" restrictions imposed on the COPIM in the *Criminal Organisation Act 2009* (Qld).

[145] Talbot, n 7.

[146] *Criminal Organisation Act 2009* (Qld), s 88(1) cf. s 88(2).

[147] Nanopolous, n 100.

[148] Nina Cope, '"Intelligence Led Policing or Policing Led Intelligence?" Integrating Volume Crime Analysis into Policing' (2004) 44 *British Journal of Criminology* 2, 188-203; Shane Holmquist, *Incorporating Intelligence-Led Policing in Integrated Cross-Border Maritime Law Enforcement Operations in British Columbia* (PhD Thesis, University of the Fraser Valley, 2017); David Bright, Chad Whelan, 'On the relationship between goals, membership and network design in multi-agency "fusion" centres' (2019) 42 *Policing: An International Journal* 3, 441-454.

[149] Including by specific enactments in the State and Territory *Evidence Acts* to extend legal-professional privilege to communications with the criminal intelligence monitor; see also Ian Dennis,

monitor should rightly be prohibited from "on-disclosing" the nature or content of the material given to it by the State[150], it nonetheless will be seized of an awareness of both the reasons for the secrecy of the evidence (from its exercise of the test function) but also its application to the (co-)accused or respondent(s) subject to that evidence. In effect, the criminal intelligence monitor must be the circuit breaker between operational intelligence officers and the parties about whom that intelligence has been generated, whilst providing the Court with the best possible method for admitting, weighting and then using that evidence to determine the rights *inter partes*.

V: Conclusion

In the 2005 House of Lords case of *Roberts*, Lord Steyn made numerous deliberate references to the position of the appellant and the fictional character Joseph K in Franz Kafka's *The Trial*. Though speaking of autocratic and authoritarian European regimes in the early 20th century, some of Kafka's words might ring disturbingly in the ears of those subject to criminal intelligence evidence:

> the legal records of the case, and above all the actual charge-sheets, were inaccessible to the accused and his counsel, consequently one did not know in general, or at least did not know with any precision, what charges to meet in the first plea; accordingly it could be only by pure chance that it contained really relevant matter … In such circumstances the Defence was naturally in a very ticklish and difficult position. Yet that, too, was intentional. For the Defence was not actually countenanced by the Law, but only tolerated, and there were differences of opinion even on that point, whether the Law could be interpreted to admit such tolerance at all.[151]

Australia thus finds itself in a unique position, possessing the statutory frameworks of three doctrines of secrecy. In criminal, civil and even administrative proceedings, there now exists fundamental potential for Joseph K's "secret legal records" to have a foundation in reality. Unsurprisingly, such blanket secrecy skews the needle of fairness too far in favour of the State. On the other hand, there exists a good policy position for protecting police and security agencies ability to operate covertly, identifying and neutralising threats to good public order and the safety of the body politic. What is needed is an appropriate balance, and not one determined by the Judges of the land. What we have argued for here is the establishment by Parliament of a criminal intelligence monitor, who have the ability to achieve this balance by reference to both law enforcement and law preservation.

In concluding, we would encourage further debate and research on this domain of State secrecy and achieving sound policy by the legislature. The rights to be balanced are not equal, are highly complex, and constantly in a state of flux. Yet, as Table 1 shows, Parliaments are not likely to slow in their use of criminal intelligence as a lever of control against offenders and lawbreakers. To avoid a catastrophic police state of which even Kafka would be ashamed, we must strive to achieve the balance that properly permits the Courts to assess what we all – were we in the shoes of Joseph K – might "need to know".

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'The Human Rights Act and the Law of Criminal Evidence: Ten Years On' (2011) 33 *Sydney Law Review* 3, 352.

[150] See for example Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice* (ALRC Report No 108, August 2008), 28.4.

[151] Roberts, n 102, 95.

Duties To Report Child Sexual Offences: A New Era In Australian Criminal Law

Ben Matthews*

In July 2021, Queensland became the most recent Australian State to enact a duty in criminal law requiring all adults in the community to report child sexual offences to police. These laws constitute significant public policy interventions to better identify cases of child sexual abuse, which also promote both national and international policy imperatives to protect children. In addition, by creating a positive duty in the criminal law, the laws embody an approach to responsible citizenship which extends the traditional parameters of criminal law liability, but is justified in doing so given the characteristics and gravity of sexual offences against children and their typical non-disclosure. This article conducts a comprehensive doctrinal and comparative analysis of these criminal law duties to identify common elements, and differences in nature and scope. Adopting a reform orientation, and using rule of law principles of clarity and consistency as an evaluative lens, the article will argue that there is a need for a uniform approach across States and Territories, and will identify areas requiring reform in jurisdictions that have already enacted legislation, and optimal approaches for legislative design in jurisdictions yet to enact the laws.

I Introduction

A *Child sexual abuse and the national and international policy agenda*

Child sexual abuse is both a widespread problem, and one which resists ready identification by social welfare and criminal justice agencies. Both internationally and within Australia, studies have found concerningly high prevalence. A global meta-analysis found approximately 12.7% of all children experienced sexual abuse.[1] The most comprehensive Australian study to date found 33.6% of women and 15.9% of men experienced non-penetrative CSA, and 12.2% of women and 4.1% of men experienced penetrative CSA.[2] Another Australian study found 1.1 per cent of participants reported sexual abuse by a parent.[3] A study in Victoria found 14.0% of girls and 4.6% of boys reported contact CSA.[4] Alongside its frequency, an invidious problem is the secrecy and non-disclosure of child sexual abuse. Those who inflict sexual abuse rarely disclose their criminal conduct, and research across cultures has found that nondisclosure and delayed disclosure of child sexual abuse by survivors is typical,[5] and is influenced by multiple

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[1] Marije Stoltenborgh, Marinus H van Ijzendoorn, Eveline M Euser and Marian J Bakermans-Kranenburg, 'A global perspective on child sexual abuse: Meta-analysis of prevalence around the world' (2011) 16(2) *Child Maltreatment* 79–101. This figure of 12.7% comprised 18.0% of girls and 7.6% of boys.

[2] Michael Dunne, David Purdie, Michelle Cook, Frances Boyle and Jake Najman, 'Is child sexual abuse declining? Evidence from a population-based survey of men and women in Australia' (2003) 27 *Child Abuse & Neglect* 141–52.

[3] Stephen Rosenman and Bryan Rodgers, 'Childhood adversity in an Australian population' (2004) 39(9) *Social Psychiatry and Psychiatric Epidemiology* 695–702.

[4] Elya Moore, Helena Romaniuk, Craig Olsson, Yasmin Jayasinghe, John Carlin and George Patton, 'The prevalence of childhood sexual abuse and adolescent unwanted sexual contact among boys and girls living in Victoria, Australia' (2010) 34 *Child Abuse & Neglect* 379–85.

[5] A review of studies of disclosure found that 60–70% of adult survivors of child sexual abuse said they did not disclose their abuse during childhood: Kamala London, Maggie Bruck, Stephen Ceci and Daniel Shuman, 'Disclosure of child sexual abuse: A review of the contemporary empirical literature' in

factors.[6] Indeed, in relation to sexual abuse inflicted in both non-institutional settings involving family members or other known acquaintances, and in institutional settings, empirical evidence has conclusively shown delayed disclosure and non-disclosure are common. For example, in its *Final Report*, Australia's Royal Commission Into Institutional Responses to Child Sexual Abuse[7] found that of those who contacted the Commission and were involved in private sessions, 57.4% first disclosed as adults, and it took these individuals an average of 31.9 years to disclose.[8] In its *Interim Report*, the Royal Commission found that out of 1677 people engaged in private sessions, it took an average of 22 years for those who disclosed institutional child sexual abuse to be able to do so.[9] Moreover, it is known that where disclosures do occur, they are less often made to criminal justice agencies.[10]

National and international policy agendas in recent years have witnessed increased recognition of the importance of both sexual abuse prevention and early responses. Within Australia, multiple inquiries at State and Territory level have considered these policy imperatives. These have occurred in multiple jurisdictions in the last decade alone, including New South Wales,[11] the Northern Territory,[12] Queensland,[13] and perhaps most decisively for the purposes of this article, in Victoria.[14] Nationally, over its tenure from 2012-17, the Royal Commission considered child sexual abuse within a range of organisational settings spanning education, religion, sport, culture, recreation and the arts, and considered multiple legal systems including criminal law and the various dimensions of its responsive capacity.[15] As will be discussed, these inquiries have spurred new legal and policy initiatives, and supported the development and ongoing expansion of existing initiatives, to better prevent and identify cases of child sexual abuse.

At the international level, the last three decades have seen sustained and gradually intensifying policy recognition of the importance of child abuse prevention. In 1989, the United Nations Convention on the Rights of the Child established clear imperatives to better promote and protect children's safety and development, including through early detection of sexual abuse.[16] Article 19 requires States parties to take all appropriate measures, including legislative measures, to protect children from all form of, including sexual abuse. Most relevantly for this

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Margaret-Ellen Pipe, Michael E Lamb, Yael Orbach and Ann-Christin Cederborg (eds), *Child sexual abuse: Disclosure, delay, and denial* (Routledge, 2007) 11–39. See also, eg, Scott D Easton, 'Disclosure of Child Sexual Abuse Among Adult Male Survivors' (2013) 41(4) *Clinical Social Work Journal* 344–55, who studied 487 men whose mean age of onset of child sexual abuse was 10.3 years, and found that on average, it took participants 21 years to tell someone, and the mean age at the time of first disclosure was 32.

[6] Ramona Alaggia, Delphine Collin-Vézina and Rusan Lateef, 'Facilitators and barriers to child sexual abuse (CSA) disclosures: A research update (2000-2016)' (2017) 21 *Trauma, Violence & Abuse* 1–26.

[7] Hereafter referred to as the Royal Commission.

[8] Australian Government Royal Commission Into Institutional Responses to Child Sexual Abuse, *Final report, Vol. 4* (Sydney, 2017).

[9] Australian Government Royal Commission into Institutional Responses to Child Sexual Abuse (2014). *Interim report, Vol. 1* (Sydney, 2014).

[10] Easton, ibid.

[11] J Wood, *Report of the Special Committee of Inquiry into Child Protection Services in New South Wales* (Government of the State of New South Wales, 2008).

[12] R Wild and P Anderson, *Ampe Akelyernemane Meke Mekarle ('Little Children Are Sacred'): Report of the Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse* (Darwin, 2007).

[13] T Carmody, *Taking responsibility: A roadmap for Queensland child protection* (Brisbane, 2013).

[14] See, eg, Victorian Family and Community Development Committee, *Betrayal of Trust: Inquiry Into the Handling of Child Abuse by Religious and Other Nongovernment Organisations* (Melbourne, 2013); see also P Cummins, D Scott and B Scales, *Report of the Protecting Victoria's Vulnerable Children Inquiry* (State of Victoria Department of Premier and Cabinet, 2012). The significance of the Betrayal of Trust Inquiry's recommendation is discussed below.

[15] Royal Commission Into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (Sydney, 2017).

[16] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

analysis, article 19(2) states that these protective measures should include procedures for the "identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment".[17] Article 34 has further specific emphasis on the protection of children from sexual abuse, and requires States parties to "protect the child from all forms of sexual exploitation and sexual abuse". In 2011, the Committee on the Rights of the Child provided further guidance on the nature and application of article 19.[18] In 2015, the United Nations Sustainable Development Goals ('SDGs') urged all nations to eradicate child maltreatment, and require governments to report on their efforts.[19] In particular, SDG Target 16.2 aims to end abuse, exploitation, trafficking, and all forms of violence against and torture of children; Target 5.2 aims to eliminate all forms of violence against all women and girls in the public and private spheres, including trafficking and sexual and other types of exploitation; and Target 5.3 aims to eliminate all harmful practices, including child marriage and female genital mutilation.

Ground-breaking developments are emerging in other legal and scholarly settings. Other legal responses have continued to develop to better respond to cases of child sexual abuse. In the criminal law context, new offences have been created by all States and Territories to prohibit online child sexual abuse and exploitation,[20] and the *Online Safety Act 2021* (Cth) was recently enacted to better regulate online content including by imposing obligations on both individuals and internet service providers. In the civil law context, statutes of limitation have

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[17] Article 19 provides: 1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child. 2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

[18] United Nations Committee on the Rights of the Child, *General Comment No. 13 on the Right of the Child to Freedom from All Forms of Violence (art. 19)* (2011). The General Comment states (19–20):

> The Committee strongly recommends that all States parties develop safe, well-publicized, confidential and accessible support mechanisms for children, their representatives and others to report violence against children, including through the use of 24-h toll-free hotlines and other ICTs. The establishment of reporting mechanisms includes: (a) providing appropriate information to facilitate the making of complaints; (b) participation in investigations and court proceedings; (c) developing protocols which are appropriate for different circumstances and made widely known to children and the general public; (d) establishing related support services for children and families; and (e) training and providing ongoing support for personnel to receive and advance the information received through reporting systems. Reporting mechanisms must be coupled with, and should present themselves as help-oriented services offering public health and social support, rather than as triggering responses which are primarily punitive … In every country, the reporting of instances, suspicion or risk of violence should, at a minimum, be required by professionals working directly with children. When reports are made in good faith, processes must be in place to ensure the protection of the professional making the report.

[19] United Nations General Assembly, *Sustainable Development Goals* (United Nations, 2015) <https://sustainabledevelopment.un.org/>.

[20] See, eg, *Crimes Act 1900* (ACT) ss 64–65; *Crimes Act 1900* (NSW) s 91H, 91FA-FB; *Criminal Code* (NT) s 125B; *Criminal Code 1899* (Qld) ss 228A-E; *Criminal Law Consolidation Act 1935* (SA) ss 62–63; *Criminal Code 1924* (Tas) s 1A; ss130-130G; Crimes Act 1958 (Vic) ss 51C, 51D, 51G; *Criminal Code Act 1913* (WA) ss 217-221A; and see also *Criminal Code Act 1995* (Cth) Chapter 10. See further Clare McGlynn and Erika Rackley, 'Image-based sexual abuse' (2017) 37(3) *Oxford Journal of Legal Studies* 534; Anastasia Henry and Nicola Powell, 'Sexual violence in the digital age: The scope and limits of criminal law' (2016) 25 *Social & Legal Studies* 397; Nicola Henry, Asher Flynn and Anastasia Powell, 'Image-based sexual abuse: Victims and perpetrators' (2019) 572 *Trends & Issues in Crime and Criminal Justice* 1.

been abolished for civil compensation claims.[21] Progress continues in developing agreement about the conceptual nature of child sexual abuse.[22] Leading philosophers such as Martha Nussbaum have turned their attention to this problem, and have declared child sexual abuse is a form of interpersonal violence requiring strong policy intervention.[23] Accordingly, the new criminal law reporting duties can be understood as part of a wave of regulatory responses to a major social problem that for too long has lacked adequate legal frameworks.

B *Legal innovations in Australian criminal law: ongoing evolution*

State and Territory inquiries have been accompanied by intensified public discourse and deepened understanding of the scale and gravity of child sexual abuse, its harmful consequences, and its clandestine and undisclosed nature. As a result of this new sensitisation to the problem, several Australian State and Territory governments have in recent years adopted a legal innovation, introducing new criminal law provisions which impose a positive obligation on all adults to report to police their awareness of cases of child sexual abuse. This expanding initiative is remarkable given the traditional scope of the criminal law is to punish acts, rather than omissions, and its reluctance to impose positive duties on third parties.

Since States and Territories have the legislative power to create their own criminal laws, and since this new context continues to evolve, the legal context across the nation raises important questions about the nature and application of the criminal law duties, and their consistency across jurisdictions. Within the criminal law setting, citizens need to know what their duties are, and this applies all the more to adults who commonly deal with children in various professional contexts. In addition, well-established rule of law tenets make it clear that the law must be intelligible, clear and predictable,[24] and unless there are clear jurisdiction-specific reasons which justify different approaches, it is desirable for State and Territory laws about the same topic to be both soundly framed, and consistent.

Scholarly research to date in this field has considered the application of some of these duties in specific contexts. For example, research has considered the application of the Victoria and New South Wales provisions to religious confession,[25] and other work has considered its application in contexts of researchers conducting epidemiological studies,[26] and medical consultations with adolescents engaged in consensual peer sexual activity.[27] Research has also outlined the nature of duties to report child sexual abuse in different branches of law, spanning criminal law, child protection law, and tort law.[28] However, the literature to date does not include a detailed analysis devoted to the nature and application of these duties in the

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[21] See Ben Mathews and Elizabeth Dallaston, 'Reform of Civil Statutes of Limitation for Child Sexual Abuse Claims: Seismic change and ongoing challenges' (2020) 43(2) *University of New South Wales Law Journal* 386.

[22] See Ben Mathews and Delphine Collin-Vézina, 'Child Sexual Abuse: Toward a Conceptual Model and Definition' (2019) 20(2) *Trauma, Violence, & Abuse* 131. The authors developed a model whereby child sexual abuse was understood as including a range of contact and non-contact sexual acts by any adult or child in a position of power over the victim, done to obtain sexual gratification for the person or another person whether immediately or deferred in time and space, when the child either does not have capacity to provide consent, or has capacity but does not provide consent.

[23] Martha Nussbaum, *Creating Capabilities* (Harvard University Press, 2011). Nussbaum declared (148): 'Some issues are, or should be, easy: we should all agree that domestic violence and child sexual abuse should be aggressively policed by the state'.

[24] Lord Thomas Bingham, 'The rule of law' (2007) 66(1) *Cambridge Law Journal* 67–85, 69.

[25] Anthony Gray, 'Is the Seal of the Confessional Protected by Constitutional or Common Law?' (2018) 44(1) *Monash University Law Review* 112–150.

[26] Ben Mathews, 'Legal Duties of Researchers to Protect Participants in Child Maltreatment Surveys: Advancing Legal Epidemiology' (2022) 45(2) *University of New South Wales Law Journal* (in press).

[27] Ben Mathews and Lena Sanci, 'Doctors' Criminal Law Duty to Report Consensual Sexual Activity Between Adolescents: Legal and Clinical Issues' (2021) 215(3) *Medical Journal of Australia* 109–113.e1.

[28] Ben Mathews, 'A Taxonomy of Duties to Report Child Sexual Abuse: Legal Developments Offer New Ways to Facilitate Disclosure' (2019) 88 *Child Abuse & Neglect* 337–47; Ben Mathews, *New International Frontiers in Child Sexual Abuse: Theory, Problems and Progress* (Springer, 2019).

Australian context, with coverage of all enactments including the recently commenced Queensland law. In addition, no analysis to date has adopted a reform orientation, employing analysis to inform future legal development.

Accordingly, this analysis is significant for all Australian States and Territories. The article extends previous scholarship to first conduct a comprehensive doctrinal and comparative analysis of these criminal law duties to identify both their common elements, and differences in nature and scope.[29] Then, informed by the socio-legal context, and using principles of clarity and consistency as an evaluative lens, the article argues there is a need for a uniform approach across States and Territories, and identifies areas requiring reform in those jurisdictions that have already enacted legislation, and directions for legislative drafting in those yet to do so. Findings and recommendations are relevant for all Australian States and Territories, and may be informative for other common law jurisdictions.[30]

II Legal duties in criminal law to report designated criminal child sexual offences

A *Jurisprudential background and Victoria's landmark change*

In criminal jurisprudence, law is generally concerned with prohibiting specified acts rather than punishing omissions. However, it is accepted that in certain circumstances, the criminal law can justifiably impose duties and criminalise omissions.[31] As articulated by Ashworth, the normative argument for criminalising specified omissions has three bases. First, based on the principle of urgency, the law may impose criminal liability in situations of sufficient individual or social urgency involving fundamental human interests or social values. Second, based on the principle of the priority of life, the law recognises the importance of each individual person and their right to life and survival. This right to survival includes the right not to be subjected to degrading treatment. This principle is afforded such stature that the criminal law may legitimately criminalise an individual's omission to take protective action on behalf of another, in special circumstances where it is reasonable to require that individual to act to preserve this right. Third, the principle of opportunity and capacity states that where the first two conditions are met, it is legitimate to impose a duty on a person who has both the opportunity to give assistance to another – here, for example, through physical presence in witnessing the act, or personally receiving a disclosure from the victim with sufficient details) – and the capacity to give that assistance, such as by making a report to police.[32]

In Australian law, concealment offences had existed before the recent enactment of the duties to report child sexual abuse discussed here. However, they were not widely present, and were of narrow scope in that they required an element of personal gain.[33] For example, Victoria's *Crimes Act 1958* s 326 contained an element of personal benefit. Similarly, in Queensland, the offence of compounding an indictable offence in the *Criminal Code Act 1899* (Qld) s 133 epitomised this conceptual approach:

> Any person who asks for, receives, or obtains, or agrees or attempts to receive or obtain, any property or benefit of any kind for himself, herself or any other person, upon any agreement or understanding that the person will compound or conceal an

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[29] The analysis presented here covers the law as current to 28 September 2021.

[30] In English law, for example, the longstanding reluctance to impose positive duties on citizens has recently witnessed some developments, as exemplified by duties to report female genital mutilation: *Female Genital Mutilation Act 2003* (UK) s 5B, inserted by the *Serious Crime Act 2015* (UK) s 74. However, even these duties are imposed only on selected professionals rather than all members of the public, and there remain no comparative criminal law duties to report child sexual offences more generally.

[31] Andrew Ashworth, *Positive obligations in criminal law* (Hart, 2013), 41.

[32] See further, eg, Andrew Ashworth, 'Positive duties, regulation and the criminal sanction' (2017) 133 *Law Quarterly Review* 606–30; Andrew Ashworth, 'A new generation of omissions offences?' (2018) 5 *Criminal Law Review* 354–64.

[33] For example, this element of personal benefit is also contained in the *Crimes Act 1958* (Vic) s 326, and the *Criminal Code 1924* (Tas) s 102.

> indictable offence, or will abstain from, discontinue, or delay, a prosecution for an indictable offence, or will withhold any evidence thereof, is guilty of an indictable offence.

The problem with this approach was that where there was no clear and demonstrable personal benefit, the ambit of the duty was reduced. This had the effect that not only was it difficult to prosecute cases of institutional concealment – which while often containing intangible benefits, rarely if ever contained concrete property or benefit such as financial gain – it was also a narrowly cast duty to report which did not have at its core a fundamental obligation imposed on citizens to take positive action to assist a victim of crime. It did not respond to the fundamental human interests and societal values at stake, and it did not recognise each individual's right to freedom from degrading treatment.

In addition, a problem with the former conventional concealment offences was that in order to secure a conviction, a high degree of knowledge had to be proved beyond reasonable doubt, and in the context of child sexual abuse this was not appropriate. The unsuitability of this level of knowledge would be expressly noted in the New South Wales Parliament when its amending legislation was introduced.[34] The difficulty of securing a conviction under the old scheme became starkly evident in 2018 when a conviction was overturned.[35]

B *Victoria's landmark change*

The landmark legislative reform occurred as a result of a State government inquiry into institutional child abuse. The key breakthrough occurred in 2013, when Victoria's *Betrayal of Trust Inquiry* identified wide-scale sexual abuse of children within non-government organisations, persisting over decades and continuing to the present era, and cover-ups of that abuse by people who knew about it. The Inquiry acknowledged evidence of children's highly vulnerable position, the severe and lasting effects of sexual abuse, and the clandestine nature of offending and susceptibility to calculated concealment and other lack of remedial action. These findings animated recommendations for the creation of new reporting duties in criminal

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[34] See New South Wales, *Hansard*, Legislative Assembly, 6 June 2018, 4 (Mr Speakman, Attorney-General, Second reading), where the Attorney-General stated: 'However, section 316 is not well adapted to this policy purpose. It requires a high standard of knowledge before a person can be prosecuted—the prosecution must show that the person knows or believes that an offence has been committed. This may not address the wilful blindness by those in authority uncovered by the royal commission.'

[35] The case involved the prosecution of Archbishop Philip Wilson for breaching the New South Wales concealment offence in s 316 as it stood at the time. In May 2018, Philip Wilson, the Archbishop of Adelaide, was found guilty of concealing his knowledge of child sexual abuse committed by a priest named James Fletcher against two altar boys in the 1970s. Fletcher had earlier been found guilty of nine counts of child sexual abuse and died in prison in 2006. Wilson claimed he could not remember either boy telling him they were abused, and his counsel argued there was no evidence to prove he was told about the abuse, believed it was true, or remembered being told about it. However, the Court believed the testimony of Peter Creigh, one of the altar boys. Mr. Creigh testified he had trusted that Wilson, who at the time was an assistant priest, would take appropriate action after he told him that Fletcher had abused him repeatedly in 1971 when he was 10. He testified that Wilson had a "look of horror" on his face when he heard this, but took no action and did not tell police. The other former altar boy said he went to confession in 1976 when he was aged 11, and told Wilson that Fletcher had abused him. He testified that Wilson refused to believe him because Fletcher "was a good bloke", and ordered the boy out of the confessional with a demand to say prayers as an act of contrition. On 12 February 2015, in the Local Court, Stone LCM refused an application by Archbishop Wilson to quash or permanently stay a court attendance notice. An appeal against this decision was dismissed in *Wilson v Department of Public Prosecutions (NSW)* [2016] NSWSC 1458 (Schmidt J). This decision by Schmidt J was also then appealed, and dismissed, by the New South Wales Court of Appeal (*Wilson v Director of Public Prosecutions* (NSW) [2017] NSWCA 128). The issue before the Court was whether at the time Wilson was alleged to have withheld information relevant to Father Fletcher's alleged offence, s 81 (indecent assault on male) was a "serious indictable offence" within the meaning of the *Crimes Act* s 4. The Court of Appeal dismissed the appeal. However, in December 2018, Wilson's conviction was overturned on appeal in the District Court by Ellis DCJ, with a core part of the Court's reasoning concluding there was not sufficient evidence of the relevant state of mind: *R v Wilson* [2018] NSWDC 487, [86–96].

law, applied to all adults in the community, to bring cases of designated types of child abuse to the attention of police, even when such close and direct personal gain was not present. As a result, the *Betrayal of Trust Inquiry* recommended amendments to the *Crimes Act 1958* (Vic) s 326, to remove the element of personal gain from this prior version of the concealment offence.[36] In making its recommendation, the *Betrayal of Trust Inquiry* also recognised the importance of reporting child sexual offences to the police, even in situations where the victim does not wish to pursue the matter through the criminal justice system. The reason for this was because disclosing the information to police might corroborate the account of another victim, or encourage other victims to come forward.

This recommendation would be substantially accepted by the Victorian Government, which passed the *Crimes Amendment (Protection of Children) Act 2014* (Vic) to create an entirely new offence provision in s 327. The second reading of the amending legislation – the Crimes Amendment (Protection of Children) Bill 2014 (Vic) – clearly observed the influence of the Inquiry's recommendations and their context. The newly enacted s 327 provision was designed to create a broader safety net to detect cases of child sexual abuse, by creating a community-wide obligation to bring known cases to attention.[37] The duty therefore requires all adults who have knowledge or belief that child sexual abuse has been committed to report this to the police. The *Crimes Act 1958* (Vic) s 327(2) requires an adult in Victoria or elsewhere 'who has information that leads the person to form a reasonable belief that a sexual offence has been committed in Victoria against a child under the age of 16' by an adult aged 18 or over to 'disclose that information to a police officer … unless the person has a reasonable excuse for not doing so'. Failure to report constitutes an offence punishable by a maximum of 3 years imprisonment. Notably, and in contrast with the provisions that would be enacted subsequently in other jurisdictions, the duty in Victoria is expressed to apply to adults both inside and outside Victoria.[38] This provision commenced on 27 October 2014.

Subsequent enactments in other Australian jurisdictions would take a broadly similar approach, although as seen below there would be some distinct variations between the provisions. These developments were supported by the Victorian breakthrough, but were also a response to a similar duty recommended in 2017 by the Royal Commission. Although its recommendation was restricted to persons in institutional settings, as a result of terms of reference, the duty recommended by the Royal Commission was of similar nature.[39] It was underpinned by the gravity of child sexual abuse, its susceptibility to active concealment and turning a blind eye, and an acknowledgment of children's heightened vulnerability and less capacity to take steps to protect themselves, leaving them particularly in need of active assistance and protection by adults. The Royal Commission also recommended the duty to report should not be subject to any exemption for religious confession. In Queensland, where

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[36] Victorian Family and Community Development Committee, *Betrayal of Trust: Inquiry Into the Handling of Child Abuse by Religious and Other Nongovernment Organisations* (2013, recommendation 23.1) <http://www.parliament.vic.gov.au/component/content/article/340-inquiry-into-the-handling-of-child-abuse-by-religious-and-other-organisations/1788-report>.

[37] See, eg, Victoria, *Hansard*, House of Assembly, 26 March 2014, 912–4 (Mr Clark, Attorney-General, Second reading).

[38] As do other States and Territories, Victoria has the power to create legislation with extra-territorial application for the peace, order and good government of the state: *Australia Act 1986* (Cth) s 2(1). A law creating an offence of a failure to report sexual offences against children is within those parameters, and the commission of the sexual offence within Victoria provides the requisite real connection with the jurisdiction. The terms of the provision expressly contradict both the common law presumption of territorial limitations and the provisions in the *Interpretation of Legislation Act 1984* (Vic) which stipulates that 'locality, jurisdiction or other matter or thing shall be construed as a reference to such locality, jurisdiction or other matter or thing in and of Victoria': s 48(2). Section 327 only requires the reporting of sexual offences committed in Victoria, and creates no obligation to disclose beliefs about sexual offences committed outside Victoria.

[39] Royal Commission, *Criminal Justice Report*, above n 15, recommendation 33. Recommendation 35 was that the duty to report should not be subject to any exemption for religious confession.

the new reporting duty most recently commenced, the second reading of the Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Bill (Qld) reflected the powerful influence of the Royal Commission's recommendations.[40]

Concerns that the duty may be expressed too broadly may be assuaged by pointing to the conventional features of the criminal justice system that protect the fair trial rights of the accused. A clear and strong body of evidence would be required to underpin a viable prosecution. In addition, such concerns may be allayed by the conventional control on decisions to prosecute. Official prosecution guidelines in each State and Territory contain a fundamental principle that a prosecution may only proceed if there is a reasonable prospect of a conviction; and if a prosecution is in the public interest.[41]

Accordingly, the State and Territory amendments to criminal law reporting duties have expanded those previously existing concealment offences beyond their original narrower scope – directed more towards preventing active concealment of offences for personal gain – to a broader application with more prosocial motivation to assist detection of serious crimes, regardless of any personal gain or vested interest. In addition, in most but not all cases, their temporal scope is wide, normally extending to knowledge or belief about cases of child abuse obtained after commencement of the legislation, but which can relate to abuse occurring before commencement.[42]

C *Expansion to other States and Territories*

After Victoria's legislative expansion, other States and Territories considered their own reforms and from 2014 to date have continued a slow albeit steady movement in which the laws have gradually spread to four other jurisdictions.[43] As will be seen, because the Northern Territory has a hybrid reporting duty (combining elements of a child welfare and criminal law model), it could be concluded that as of September 2021, six of the eight States and Territories

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[40] Queensland, *Hansard*, 13 August 2020, 2118-19 (Ms Dath, Attorney-General and Minister for Justice, Second reading).

[41] Office of the Director of Public Prosecutions for the Australian Capital Territory, *The Prosecution Policy of the Australian Capital Territory* (13 April 2015) 3–5, https://www.dpp.act.gov.au/__data/assets/pdf_file/0006/715506/PROSECUTION-POLICY-OF-THE-AUSTRALIAN-CAPITAL-TERRITORY.pdf; Office of the Director of Public Prosecutions for New South Wales, *Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales* (2021) 8–10, https://www.odpp.nsw.gov.au/sites/default/files/attachments/f-prosecution_guidelines.pdf ('*New South Wales Guidelines*'); Office of the Director of Public Prosecutions for the Northern Territory, *Guidelines of the Director of Public Prosecutions* 2–3, https://dpp.nt.gov.au/__data/assets/pdf_file/0005/574124/DPP-Guidelines-Current-2016.pdf; Office of the Director of Public Prosecutions Queensland, *Directors Guidelines* (30 June 2016) 2–4, https://www.justice.qld.gov.au/__data/assets/pdf_file/0015/16701/directors-guidelines.pdf; Director of Public Prosecutions South Australia, *Statement of Prosecution Policy & Guidelines* (October 2014) 5–8, http://www.dpp.sa.gov.au/wp-content/uploads/2015/03/DPP-Prosecution-and-Policy-Guidelines.pdf; Office of the Director of Public Prosecutions for Tasmania, *Prosecutions Policy and Guidelines* (Updated 23 October 2019) 7–9, https://www.dpp.tas.gov.au/__data/assets/pdf_file/0006/570858/DPP-prosecution-guidelines6.pdf; Office of Public Prosecutions Victoria, *Policy of the Director of Public Prosecutions for Victoria* (17 September 2020) 2–4, http://www.opp.vic.gov.au/Resources/Policies; Office of the Director of Public Prosecutions for Western Australia, *Statement of Prosecution, Policy Guidelines* 6–9, (1 September 2018) https://www.dpp.wa.gov.au/_files/publications/Statement-of-Prosecution-Policy-and-Guidelines.pdf.

[42] But not always: see the discussion of Victoria's more limited approach below.

[43] Amending legislation was first introduced in 2014 in Victoria, and from 2018 onwards in other States and Territories: Crimes Amendment (Protection of Children) Bill 2014 (Vic); Criminal Legislation Amendment (Child Sexual Abuse) Bill 2018 (NSW); Criminal Code and Related Legislation Amendment (Child Abuse) Bill 2018 (Tas); Royal Commission Criminal Justice Legislation Amendment Bill 2019 (ACT); Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Bill 2019 (Qld).

have some version of a criminal law reporting duty for child sexual offences, although five of these have been designed intentionally to be tailored to this specific criminal law model.

In chronological sequence, the commencement of these laws spread from Victoria in 2014 to New South Wales (31 August 2018), the Australian Capital Territory (1 September 2019), Tasmania (2 October 2019), and Queensland (5 July 2021). Five of the eight States and Territories have therefore now enacted a duty in criminal law requiring reports to police of specified significant child abuse offences, with all of these including designated child sexual offences.[44] In Victoria, New South Wales, Tasmania, the Australian Capital Territory, and Queensland, the duty requires all adults to report knowledge or a reasonable belief about specified sexual offences. It can be noted that the provisions in New South Wales and Tasmania also extend to specified physical assaults, although further discussion of this is beyond the scope of this article and warrants separate analysis.[45] None of the duties apply to other types of child maltreatment, namely emotional abuse, neglect, or exposure to domestic violence. To date, no legislation has been passed or introduced in South Australia or Western Australia, and no specific criminal law duty has been introduced in the Northern Territory.[46]

D *Comparative analysis: Victoria, New South Wales, ACT, Tasmania, Queensland*

1 *Common elements*

The essential nature of the duty is similar in each of the five jurisdictions with dedicated criminal law provisions. The provisions generally require an adult who believes a sexual offence has been committed against a child to disclose the information supporting that belief to police. The key difference between the jurisdictions is evident in the choice of whether or not to incorporate an objective element as well as a subjective approach. This was consciously done in New South Wales, for example, to "ensure a person cannot use wilful blindness to escape the application of the offence";[47] and Queensland has also adopted this model in an indication that lessons have been learned from the different approaches taken to date in different States. Any possible doubt that the duty in this form has this broad application would be resolved quite clearly through the application of settled principles of statutory interpretation so that its broader ambit would remain undisturbed.[48] The core nature of the duty to report in each jurisdiction is set out in Table 1.

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[44] *Crimes Act 1900* (ACT) s 66AA Failure to report child sexual offence (commenced 1 September 2019); *Crimes Act 1900* (NSW) s 316A Concealing child abuse offence (commenced 31 August 2018); *Criminal Code Act 1899* (Qld) s 229BC Failure to report belief of child sexual offence committed in relation to child (commenced 5 July 2021); *Criminal Code 1924* (Tas) s 105A Failing to report the abuse of a child (commenced 2 October 2019); *Crimes Act 1958* (Vic) s 327 Failure to disclose sexual offence committed against child under the age of 16 years (commenced 27 October 2014).

[45] Note that to date there is no judicial consideration of the new duty in relation to sexual offences. In New South Wales, the duty in s 316A was referred to obliquely in *Ellison & Mallick and Anor* [2018] FamCA 603, a case which turned on other issues. However, the duty to report physical abuse was the subject of judicial consideration in the New South Wales case of *R v George (a pseudonym)* [2021] NSWDC 18 (16 February 2021), where the accused was convicted and sentenced to imprisonment for 4 years. After discounts for a guilty plea and other factors including remorse, the term of imprisonment was 2 years 7 months with a non-parole period of 1 year 8 months. The case concerned the father of a six week old infant who was aware that his partner, the infant's mother, had committed serious life threatening physical assaults on the infant, yet failed to notify the police. Colefax SC DCJ stated: "The abuse of children – whether psychological or physical and whether sexual or non-sexual – is abhorrent and the Courts must impose stern sentences to protect children from such abuse – especially where that abuse is inflicted by their own parents and in their own homes."

[46] But see the position in the Northern Territory as outlined below.

[47] New South Wales, *Hansard*, above n 34, 6. This may have been influenced by the outcome in the case of Wilson.

[48] All States and Territories' interpretation legislation recognise that legislative provisions must be interpreted to give effect to the statute's purpose: *Legislation Act 2001* (ACT) s 139; *Interpretation Act 1987* (NSW) s 33; *Interpretation Act 1978* (NT) s 62A; *Acts Interpretation Act 1954* (Qld) s 14A; *Acts*

Table 1 Core nature of the criminal law duty to report child sexual offences to police

State / Territory	Core nature of duty to report
Victoria s 327(2)	An adult 'who has information that leads the person to form a reasonable belief that a sexual offence has been committed in Victoria' against a child under 16 by a person over 18 … must disclose that information to a police officer
NSW s 316A(1)	An adult who knows, believes, or reasonably ought to know that a child abuse offence has been committed … and who knows, believes, or reasonably ought to know that he or she has information that might be of material assistance in securing the apprehension of the offender or the prosecution or conviction of the offender [must] bring that information to the attention of a member of the NSW Police Force
ACT s 66AA(1)	An adult must report 'information that leads to the person reasonably believing that a sexual offence has been committed against a child' to a police officer
Tasmania s 105A(2)	An adult must report 'information that leads the person to form a reasonable belief that an abuse offence has been committed against another person who was a child at the time of the alleged offence' to a police officer
Queensland s 229BC(1)-(2)	An adult who 'gains information that causes the adult to believe on reasonable grounds, or ought reasonably to cause the adult to believe, that a child sexual offence is being or has been committed against a child [aged under 16]' by an adult … must disclose the information to a police officer

There are other common elements. These include: the duty only applies to adults, not to minors;[49] the duty does not apply where it is known that the situation has already been reported to police;[50] the duty does not apply where there otherwise is a lawful claim of right or privilege;[51] the duty does not apply where the person reasonably fears that disclosing the information would endanger the safety of another person other than the alleged offender;[52] and those who make reports are afforded protections from liability in civil, criminal and administrative processes.[53]

In addition, the provisions include a number of exceptions to be able to respond to exceptional circumstances and acknowledge that in some circumstances a higher ethical value may merit priority. There are two main exceptions, which are present in some form in each of the five

Interpretation Act 1915 (SA) s 22; *Acts Interpretation Act 1931* (Tas) s 8A; *Interpretation of Legislation Act 1984* (Vic) s 35(a); *Interpretation Act 1984* (WA) s 18. The contemporary approach to statutory interpretation must consider the legislative text, context and purpose, and in doing so, the context of the provision must be considered at the outset: *see SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, where Kiefel CJ, Nettle and Gordon JJ stated (368): "The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense."

[49] *Crimes Act 1900* (ACT) s 66AA(1)(a); *Crimes Act 1900* (NSW) s 316A(1); *Criminal Code Act 1899* (Qld) s 229BC(1); *Criminal Code Act 1924* (Tas) s 105A(3)(a); *Crimes Act 1958* (Vic) ss 327(2), 327(7)(a).

[50] *Crimes Act 1900* (ACT) s 66AA(2)(c); *Crimes Act 1900* (NSW) s 316A(2)(a); *Criminal Code Act 1899* (Qld) s 229BC(4)(a); *Criminal Code Act 1924* (Tas) s 105A(4)(c); *Crimes Act 1958* (Vic) s 327(3)(b).

[51] *Crimes Act 1900* (ACT) s 66AA(6); *Crimes Act 1900* (NSW) s 316A(6)-(7) (although not express); *Criminal Code Act 1924* (Tas) s 105A(4)(b); *Crimes Act 1958* (Vic) s 327(7)(b)-(c).

[52] *Crimes Act 1900* (ACT) s 66AA(2)(b); *Crimes Act 1900* (NSW) s 316A(2)(d); *Criminal Code Act 1899* (Qld) s 229BC(4)(d); *Criminal Code Act 1924* (Tas) s 105A(4)(a); *Crimes Act 1958* (Vic) s 327(3)(a).

[53] *Crimes Act 1900* (ACT) s 66AA(5); *Crimes Act 1900* (NSW) s 316A(8); *Criminal Code Act 1899* (Qld) s 229BC(5); *Crimes Act 1958* (Vic) s 328. Tasmania's provisions lack this component.

legal models. First, the duty is rendered inapplicable in situations where the person with the knowledge or belief reasonably believes the survivor of the sexual offence does not wish it to be reported to police. This exception serves the purpose of privileging the survivor's autonomy and privacy over other values underpinning the provisions, such as positive beneficence. Second, the duty is expressed to be inapplicable if the person with the knowledge or belief has a reasonable excuse for not reporting it. However, the scope of the exceptions is not consistent between jurisdictions, and the nature of the reasonable excuse exception means it is of uncertain application; these variations will be considered below.

2 *Dimensions of inconsistency*

Despite these similar broad parameters, there are several dimensions of inconsistency. Some of these are about potentially more minor matters, but others are more substantive. These key dimensions of inconsistency are summarised in Table 2, and discussed in further detail below.

Table 2 Key dimensions of inconsistency

State or Territory	Age of survivor / victim	Exclusion where reasonable belief survivor / victim does not wish report to be made	Exclusion by reasonable excuse	Expressly applies duty to religious confession
Victoria	Applies only to victims born on or after 28 Oct 1998	Yes (if victim is 16 or over) + victim request	Yes – but not exhaustively defined	No
NSW	Applies to victims of all ages	Yes (if victim is 18 or over)	Yes – but not exhaustively defined	Yes
ACT	Applies to victims of all ages	Yes (if victim is 18 or over)	Yes – but not exhaustively defined	Yes
Tasmania	Applies to victims of all ages	Yes (if victim is 18 or over)	Yes – but not exhaustively defined	Yes
Queensland	Applies to victims of all ages	Yes (if victim is 18 or over)	Yes – but not exhaustively defined	Yes

(a) Penalties and prosecution

The penalties for failure to report vary, ranging from 2 years in the ACT, 3 years in Queensland and Victoria, and 2 years or 5 years in New South Wales (depending on the penalty for the index offence).[54] In addition, three of the five jurisdictions – Victoria, New South Wales and Tasmania – expressly enable prosecution to be commenced only with the approval of the Director of Public Prosecutions.[55] This suggests a perceived need for a control on inappropriate prosecutions, but has the potential to create uncertainty and inconsistency.[56] The ACT and

[54] *Crimes Act 1900* (ACT) s 66AA(1); *Crimes Act 1900* (NSW) s 316A(1); *Criminal Code Act 1899* (Qld) s 229BC(2); *Criminal Code Act 1924* (Tas) s 105A(2); *Crimes Act 1958* (Vic) ss 327(2).

[55] *Crimes Act 1900* (NSW) s 316A(6); *Criminal Code Act 1924* (Tas) s 105A(6); *Crimes Act 1958* (Vic) s 327(8). While Queensland and the Australian Capital Territory do not have this express legislative provision, hence depriving this conclusion of the same force, the prosecutorial guidelines would still need to be contemplated in any potential prosecution.

[56] Another notable difference is that New South Wales is alone in apparently adding a layer of insulation from the duty in relation to several named professions. The *Crimes Act 1900* (NSW) s 316A(6) states that a prosecution for an offence under s 316A(1) is not to be commenced without approval of the Director of Public Prosecutions regarding information obtained by an adult in the course of practising

Queensland lack this mechanism, which may suggest a more liberal approach to prosecution. The ACT and Queensland should add this requirement for DPP approval. Ideally, penalties should also be harmonised.

(b) Religious confession

A further area of inconsistency concerns the application of the duty to knowledge or belief generated through religious confession. Here, four of the five jurisdictions expressly state the duty does apply.[57] Victoria is alone in not extending the duty this far, perhaps reflecting its earlier passage, uninformed by the Royal Commission's recommendation in relation to this feature. Victoria should amend its legislation to apply the duty to situations where the knowledge or reasonable belief was gained during confession.

(c) *Application to different settings*

Three jurisdictions apply the duty to report child sexual offences both to situations involving two minors aged under 16, and to situations involving a minor and an adult. In contrast, Victoria only applies the duty to situations involving a minor and an adult. Accordingly, Victoria's duty is narrower, perhaps out of a concern that otherwise it may inappropriately embrace consensual adolescents' sexual activity. However, much child sexual abuse does occur between adolescents, suggesting this limitation is undesirable. Victoria should amend its legislation to apply the duty to situations involving minors.

(d) *Age of the person who was the victim/survivor of the sexual offence*

Victoria is alone in expressly limiting the duty to cases of child sexual abuse that have occurred only after a recent point in time. A network of provisions determines the relevant date.[58] As a result, Victoria's duty applies only if the victim was born on or after 28 October 1998, dramatically confining its scope. In contrast, the other jurisdictions do not impose this restriction. The clear benefit of not applying a limit is so that situations of previously undisclosed serious criminal sexual offending can be detected, which may not only enable prosecution of offences involving the immediate survivor, but also of other cases involving the same offender and other victims. The disadvantage may be discerned as potentially leading to a large volume of reports to police, but to date this has not been the documented experience in other States, and in any event it is arguable that police are equipped to make judgments about the appropriate management of any such calls. Arguably, Victoria should amend its legislation to apply the duty to situations regardless of the victim's age.

(e) *Exception based on reasonable belief the person does not wish the information to be reported*

An important exception exists where the person with the designated state of mind reasonably believes the person does not want the information reported to police. This exception exists in

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a profession prescribed by the regulations for the purposes of s 316A(6). Section 316A(7) states the regulations may prescribe a profession as referred to in s 316A(6). The *Crimes Regulation 2015* (NSW) r 4 prescribes a range of professions for the purpose of s 316A(6). However, a complicating factor in applying this exception is the DPP's residual discretion to prosecute.

[57] *Crimes Act 1900* (ACT) s 66AA(3); *Criminal Code Act 1899* (Qld) s 229BC(3); *Criminal Code 1924* (Tas) s 105A(5). In New South Wales, s 316A does not clearly state this, but no exception is included in the provisions, and furthermore in the second reading the Attorney-General stated that 'The offence will apply to members of the clergy, although prosecutions against clergy and other prescribed professionals must be approved by the Attorney General, as is the case with the existing section 316': New South Wales, *Hansard*, above n 34, 5.

[58] Section 327(7)(f) states that a person does not contravene the duty in s 327(2) if the victim of the alleged offence attained the age of 16 before commencement of s 4 of the *Crimes Amendment (Protection of Children) Act 2014* (Vic). The *Crimes Amendment (Protection of Children) Act 2014* inserted s 327, and commenced on 27 October 2014: Victoria, *Gazette: Special*, No 350, 7 October 2014.

all five States and Territories. In New South Wales and Queensland, this basis for not reporting is designated as a species of a 'reasonable excuse',[59] but elsewhere it is a separate exception.[60]

The exception is similar across jurisdictions, although there are two important differences in scope. First, in Victoria, it applies to all alleged victims aged 16 or over, whereas elsewhere it applies only to those aged 18 and over. This age difference creates inequality in recognising adolescent capacity and autonomy. Jurisdictions that have limited this exception to those aged 18 and over have seldom explained in detail the reason for justifying this narrower scope.[61] However, Victoria justified its preference for a broader model privileging 16 year olds' expressed preference based on an acknowledgment of developmental capacity and the age at which adolescents are legally empowered to make other important decisions.[62] This aspect of the law presents a significant policy choice. The Victorian position is justified by developmental evidence about the cognitive capacity of 16 year olds,[63] and it is true that at this age adolescents possess a number of other legal powers including the capacity to consent to medical treatment.[64] On balance, it is arguable that Victoria's position is more consistent with both developmental science, and creates more coherence across legal domains. Accordingly, the better view would seem to be that the application of this exception to 16 year olds should be adopted in other jurisdictions.[65]

Second, Victoria is alone in applying this exception only if the information came from the victim of the offence *and* the victim requested the information not be disclosed.[66] There are

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[59] *Crimes Act 1900* (NSW) s 316A(2)(f); *Criminal Code Act 1899* (Qld) s 229BC(4)(c).

[60] *Crimes Act 1900* (ACT) s 66AA(2)(a); *Criminal Code Act 1924* (Tas) s 105A(3)(b); *Crimes Act 1958* (Vic) s 327(5).

[61] New South Wales, *Hansard*, above n 34, 5. The Attorney-General stated: "A person also will have a reasonable excuse if the victim of the offence is now an adult, and the person reasonably believes that the victim does not want the offence to be reported to police. This strikes a balance between the need for police to be alerted to offences to protect other children and the importance of protecting the privacy and autonomy of adult survivors."

[62] Victoria, *Hansard*, above n 37, 914. The Attorney-General stated:

> The bill also respects the position of a victim who does not want details of the offending disclosed and who is sufficiently mature to make that judgement. Setting the age at which a victim is to be treated as having that maturity is a matter of judgement. The bill sets that age at 16, being the age at which the law already recognises a capacity for certain judgements in relation to sexual matters. The obligation to disclose therefore does not apply where the information comes from a person aged 16 or over who requests that the offence not be reported to police.
>
> However, the law will recognise that a child under 16 is not able to make such a decision. The committee found that children felt shame and embarrassment from what had been done to them and lacked the knowledge and experience to understand how this sexual abuse would affect them. Further, child sexual offending occurs in a context of secrecy in which the child is often told by the perpetrator to keep the offending secret. The committee's report identified the importance of reporting child abuse to the police, even if the victim does not wish to pursue the matter through the justice system. This is because disclosing the information to police might corroborate the account of another victim or encourage other victims to come forward.

[63] See, eg, Laurence Steinberg and Grace Icenogle, 'Using developmental science to distinguish adolescents and adults under the law' (2019) 1 *Annual Review of Developmental Psychology* 21–40.

[64] See, eg, Ben Mathews and Malcolm Smith, 'Children and consent to medical treatment' in Ben White, Fiona McDonald and Lindy Willmott (eds) *Health law in Australia* (Thomson Reuters, 2018) 159–206.

[65] It can be further noted that in exceptional circumstances, another type of legal reporting duty may supersede this outcome. So, for example, in a situation in Victoria where this exception may apply, but where the offender is known to be offending against other children, the person with the knowledge may have a duty of care in negligence to make a report.

[66] The *Crimes Act 1958* (Vic) s 327(5) states: 'A person does not contravene subsection (2) if—(a) the information forming the basis of the person's belief that a sexual offence has been committed came from the victim of the alleged offence, whether directly or indirectly; and (b) the victim was of or over the age

two additional differences here, related to the source of the information, and the direct request. To consider the "direct request" difference first: it can be seen that while Victoria applies this exception more broadly based on the survivor's age – 16, rather than 18 – there is an additional control on this exception requiring the survivor to make a direct request. In Victoria, this exception would only apply where a survivor of a child sexual offence aged at least 16 stated she or he did not want it reported to police. In contrast, in the other four jurisdictions, this excuse is engaged if the person with the knowledge or reasonable belief simply has a reasonable belief that the person does not wish the information to be reported,[67] without requiring a victim's direct request. Therefore, this exception could apply in the other States and Territories in a broader range of circumstances where the person was aged 18 or over, and a reasonable belief was formed even without such a direct statement from the victim. This could occur, for example, if the victim made indirect statements capable of supporting a reasonable belief they did not wish the information to be reported. Other examples include situations where it is clear that the offender has died, or has already been prosecuted, or where the person otherwise makes it sufficiently clear they do not otherwise want to revisit the matter. It would also apply of course if the victim/survivor expressly stated this preference.

The advantage of Victoria's narrower approach is that it is clear and avoids uncertainty of application. It also operates alongside the general provision which retains the openness of the reasonable excuse exception which does not exhaustively confine its scope. The disadvantage of Victoria's narrower approach is that for this exception to be engaged, it requires the victim to make a direct statement when she or he may not wish to do so, and it may be otherwise clear that they do not wish it to be reported. The broader approach in the other jurisdictions, where the victim's direct request is not required to engage this specific category of exception, has the advantage of not requiring the victim to make this statement or choice. However, the disadvantage of the broader approach is that it may create uncertainty about the scope of this exception, since it is unclear when such a belief will be reasonable. This aspect of the law is not susceptible of a simple solution. It is arguable that requiring the victim's direct request is preferable, in that it avoids undesired dilution of the duty and even calculated attempts to avoid its operation. However, what may be a more desirable approach is to clarify through the use of legislative textual examples the types of situation in which such a reasonable belief will exist, and to specify that where any doubt exists about whether the exception operates, the duty applies.

(f) *Exception based on a 'reasonable excuse' for not reporting*

An important exception applies where the person with the designated state of mind has a 'reasonable excuse' for not reporting it to police. This general exception acknowledges that there are some circumstances where it is legitimate for the duty to be rendered inapplicable for reasons that are either normative (for example, where a competing ethical interest should take priority), or simply practical (for example, where the information has already been reported and there is a need to avoid duplication and administrative burden).

All five legislatures have incorporated the reasonable excuse core exception,[68] but have adopted different approaches to enumerate specific examples of when such a reasonable excuse will exist. In all States and Territories, the provisions clearly state they do not

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of 16 years at the time of providing that information to any person; and (c) the victim requested that the information not be disclosed'.

[67] In New South Wales, for example, the *Crimes Act 1900* (NSW) s 316A(2)(f) expressly includes situations where the alleged victim was an adult at the time the information was obtained by the person, and the person believes on reasonable grounds that the alleged victim 'does not wish the information to be reported to police'. Similar wording is used in Queensland, the ACT and Tasmania: see *Criminal Code Act 1899* (Qld) s 229BC(4)(c); *Crimes Act 1900* (ACT) s 66AA(2)(a); and *Criminal Code Act 1924* (Tas) s 105A(3)(b).

[68] *Crimes Act 1900* (ACT) s 66AA(2)(g); *Crimes Act 1900* (NSW) ss 316A(1)(c), 316(2); *Criminal Code Act 1899* (Qld) ss 229BC(2); *Criminal Code Act 1924* (Tas) s 105A(2)(b); *Crimes Act 1958* (Vic) s 327(2).

exhaustively define the concept of a 'reasonable excuse'.[69] In Victoria, for example, s 327(2) provides a non-exhaustive definition,[70] and includes specific situations where a reasonable excuse exists, including where the person believes on reasonable grounds that the information has already been disclosed to police and the person has no further relevant information.[71] Other States and Territories adopt a similar approach, while not all provisions delineate these same examples (Table 3).

Table 3 Reasonable excuse provisions

Core reasonable excuse provision	Belief on reasonable grounds the information is already known to police	Belief on reasonable grounds the information has otherwise been reported	Reasonable grounds to believe reporting would endanger the safety of another person (subjective) **and** this belief is reasonable in the circumstances (objective)
Victoria s 327(3)	s 327(3)(b)	s 327(3)(b)	s 327(3)(a) Both subjective and objective
NSW s 316A(2)	s 316A(2)(a)	s 316A(2)(b)–(c)	s 316A(2)(d) Partial: subjective only
ACT s 6AA(2)(g)	s 66AA(2)(c)	s 66AA(2)(d)	s 66AA(2)(b) Partial: subjective only
Tasmania s 105A(4)	s 105(4)(c)	s 105(4)(c)	s 105A(4)(a) Partial: subjective only
Queensland s 229BC(4)	s 229BC(4)(a)	s 229BC(4)(b)	s 229BC(4)(b) Both subjective and objective

It can be observed that the concept of a 'reasonable excuse' is used in a range of legislative settings. Its conceptual breadth provides it with an advantage of leaving open the categories of case where it can be applied; however, this also has the disadvantage of uncertainty.

The High Court of Australia has acknowledged that the term 'reasonable excuse' is a common legislative concept.[72] However, it is also clear from High Court jurisprudence that in each legislative instance, its proper construction depends on the purpose of the provision and the circumstances of the case. Accordingly, decisions concerning what constitutes a reasonable excuse in one setting do not provide guidance in other settings.[73] The majority of the High Court in *Taikato* confirmed that when legislatures enact defences such as 'reasonable excuse' they intend to give the courts the power to determine their content.[74] This residual flexibility

[69] *Crimes Act 1900* (ACT) s 66AA(2)(g); *Crimes Act 1900* (NSW) s 316A(3); *Criminal Code Act 1899* (Qld) s 229BC(4); *Criminal Code Act 1924* (Tas) s 105A(4); *Crimes Act 1958* (Vic) s 327(3).
[70] *Crimes Act 1958* (Vic) s 327(3).
[71] *Crimes Act 1958* (Vic) s 327(3)(b).
[72] *Taikato* v R (1996) 186 CLR 454, 464 (Brennan CJ, Toohey, McHugh and Gummow JJ). Dawson J stated (470): 'A reasonable excuse is no more or less than an excuse which would be accepted by a reasonable person … Reasonableness provides a test which is well-known in both criminal and civil law and, though it may involve a judgment of degree, has a ready application in widely differing circumstances. The fact that the test of reasonableness frequently involves a question of degree so that minds may differ upon the answer … does not justify confining its scope for the sake of greater precision or certainty.'
[73] Ibid 464 (Brennan CJ, Toohey, McHugh and Gummow JJ).
[74] Ibid 466 (Brennan CJ, Toohey, McHugh and Gummow JJ), stating: 'Defences in this form are categories of indeterminate reference that have no content until a court makes its decision. They effectively require the courts to prescribe the relevant rule of conduct after the fact of its occurrence.'

is useful, although arguably wherever possible the legislature should incorporate as much clear guidance as possible and avoid requiring recourse to judicial consideration.

(i) The enumerated category of reasonable exception based on endangering a person's safety

This enumerated category raises a particularly important issue. Here, comparative analysis reveals that there is a key difference in approach. In three jurisdictions – New South Wales, the ACT, and Tasmania – a subjective approach is employed, so that the reasonable excuse exception can be relied upon by the person based on a claim that subjectively, the person had reasonable grounds to believe that reporting would endanger the safety of either themselves or another person (other than the alleged offender). This approach gives broader scope to the application of the reasonable excuse concept in this domain of personal endangerment since it relies only on the person's own state of mind and claim that this belief was reasonable. In contrast, two jurisdictions – Victoria and Queensland – adopt a two-limbed test that combines a subjective and an objective element. This requires that not only does the person claim that subjectively, they had reasonable grounds to believe that reporting would endanger the safety of another person (other than the alleged offender), but also that this belief is reasonable in the circumstances, which imports an objective test. This two-limbed test has the advantage of avoiding unduly limiting the operation of the duty, and of ruling out the prospect that a person could calculatingly avoid compliance with the duty based on a specious claim of potential danger to another person. Because of the nature of the duty and the problems it is designed to overcome, the two-limbed test is preferable. It is potentially arguable that even the one limbed test imports a degree of objectivity simply by use of the concept of reasonable grounds. However, a response to this may plausibly argue that it still provides too much leeway for inappropriate failure to report.[75] Accordingly, the two-limbed response is preferable, and New South Wales, the ACT, and Tasmania should amend this enumerated category of reasonable excuse to adopt the two-limbed test.

(ii) A note on consensual adolescent sexual activity

One clear example of a situation common to all Australian jurisdictions where a person may clearly have a reasonable excuse for not reporting a child sexual offence is where it is known that two adolescent peers in a genuinely consensual romantic relationship are engaging in developmentally normative sexual activity without any element of coercion. In some jurisdictions, where the age of consent is 16, sexual activity between two 15 year olds for example may technically constitute an offence. However, such activity is clearly not the object of the criminal law reporting provisions, is not properly classed as sexual abuse, and does not warrant intervention by police or the criminal justice system.[76] The reasonable excuse exception, properly applied, would serve to exclude this type of activity from the duty to report. However, its conceptual openness combined with the lack of the acknowledgment of this type of activity as an enumerated category of a situation that falls within the excuse, is a weakness and can particularly present difficulties for adults who deal with adolescents and who may develop knowledge of such activity, such as medical practitioners and teachers.[77] Arguably, a

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[75] For example, the person with the knowledge may claim that if they report their knowledge, they are in danger of some kind of reprisal.

[76] Currently, the legal 'age of consent' prohibits intercourse with minors under a specified age, presuming children under this age lack capacity to provide true consent. This age is 16 in six jurisdictions, and 17 in South Australia and Tasmania. Acknowledging that sexual activity between adolescents may be consensual and is ethically permissible, criminal laws in five jurisdictions – the ACT, New South Wales, South Australia, Tasmania, and Victoria – provide a 'close in age' defence to criminal offences where the act involves consenting persons who are both minors aged under 16, or similar in age (normally not more than two years apart): *Crimes Act 1900* (ACT) s 55(3)(b); *Crimes Act 1900* (NSW) s 80AG; *Criminal Law Consolidation Act 1935* (SA) s 49(4); *Criminal Code Act 1924* (Tas) s 124(3); Crimes Act 1958 (Vic) s 49V.

[77] On the problems caused for medical practitioners providing treatment to adolescents in consensual relationships, see Mathews and Sanci, above n 27.

useful amendment would therefore be to add this activity as an enumerated example falling within the reasonable excuse exception.

E The Northern Territory

The preceding sections have detailed a comparative analysis of the nature of the provisions in five jurisdictions that have enacted duties to report child sexual offences in their criminal law. It is necessary to make some observations about the legislative context in the Northern Territory, which presents some interesting and unique characteristics.

In the Northern Territory, the situation is substantially different to the five jurisdictions analysed above, but there are some similarities. The Northern Territory has enacted a legislative duty, applied to all adults, to report specified types of child sexual offences. However, the duty is contained not within the criminal law, but within child protection legislation. Because of its location and its nature, the reporting duty is a hybrid of a criminal law-based reporting duty and a traditional child protection-based mandatory reporting law. The *Care and Protection of Children Act 2007* (NT) s 26, which in its original form was first enacted in 1984,[78] predates Victoria's landmark criminal law provisions by three decades, and makes all adult persons mandated reporters of a range of situations of child maltreatment.[79]

In this sense, the Northern Territory's approach to child protection-based mandatory reporting duties differs from that of all other States and Territories, which instead designated members of specified occupational groups as mandated reporters for situations of specified child abuse and neglect, which primarily (although not exclusively in the case of sexual abuse) are aimed at circumstances within the family home. Moreover, the Northern Territory provisions possess other characteristics which mean they more closely resemble a criminal law-based reporting duty, rather than the child protection-based duty more traditionally adopted.[80]

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[78] The *Community Welfare Act 1983* (No 76) commenced on 20 April 1984. The Act contained wide mandatory reporting provisions which, uniquely for Australian jurisdictions, applied to all persons (s 14); a separate provision specifically applied to police officers (s 13). Section 14 required a person other than a member of the police force 'who believes, on reasonable grounds, that a child has suffered or is suffering maltreatment' to report it. Section 4(3) provided that a child will have suffered 'maltreatment' in situations including where: (d) he has been sexually abused or exploited, or where there is substantial risk of such abuse or exploitation occurring, and his parents, guardians or persons having the custody of him or her are unable or unwilling to protect him or her from such abuse or exploitation'.

[79] The *Care and Protection of Children Act 2007* (NT) s 26 states: '(1) A person is guilty of an offence if the person: (a) believes, on reasonable grounds, any of the following: (i) a child has suffered or is likely to suffer harm or exploitation; (ii) a child aged less than 14 years has been or is likely to be a victim of a sexual offence; (iii) a child has been or is likely to be a victim of an offence against section 128 of the Criminal Code; and (b) does not, as soon as possible after forming that belief, report (orally or in writing) to the CEO or a police officer: (i) that belief; and (ii) any knowledge of the person forming the grounds for that belief; and (iii) any factual circumstances on which that knowledge is based'.

[80] Each State and Territory has enacted legislation about child protection, which contain provisions commonly called 'mandatory reporting laws'. These laws require designated persons to report known and suspected cases of specified kinds of child maltreatment to child welfare agencies: *Children and Young People Act 2008* (ACT) s 356; *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 23, 27; *Care and Protection of Children Act 2007* (NT) ss 15, 16, 26; *Child Protection Act 1999* (Qld) s 13E(2); *Children and Young People (Safety) Act 2017* (SA) ss 17–18, 30–31; *Children, Young Persons and Their Families Act 1997* (Tas) ss 3–4, 14; *Children, Youth and Families Act 2005* (Vic) ss 162(1)(c)–(d), 182, 184; *Children and Community Services Act 2004* (WA) ss 124A, 124B(1)(b). The lists of designated persons are generally restricted to members of specified occupations who typically deal with children in the course of their professional work, although each State and Territory has a different list of such occupations. In all eight States and Territories, child sexual abuse must be reported; however, reflecting a narrower purpose in principle (namely, the core purpose of protecting children in the family context), even here, there are limits: Victoria and Queensland, for example, require reports of sexual abuse only if the child does not or may not have a parent or caregiver who is able and willing to protect the child from the abuse and the harm caused: *Children, Youth and Families Act 2005* (Vic) ss 162(1)(d), 184; *Child Protection Act 1999* (Qld) s 13E(2)(b).

In particular, s 24(a) sets out one of the purposes of the Act as being 'to oblige members of the public to report cases of children at risk of harm or exploitation'. The concept of 'harm' is defined in s 15(1) as: 'any significant detrimental effect caused by any act, omission or circumstance on: (a) the physical, psychological or emotional wellbeing of the child; or (b) the physical, psychological or emotional development of the child'. Section 15(2) states that 'Without limiting subsection (1), harm can be caused by the following: (a) physical, psychological or emotional abuse or neglect of the child; (b) sexual abuse or other exploitation of the child; (c) exposure of the child to physical violence'. The concept of 'exploitation' is defined in s 16, and relates to a range of forms of sexual exploitation. Section 26 then applies the duty to any 'person'. Furthermore, s 26(3) provides a defence to prosecution for failure to comply with the reporting duty if the person has 'a reasonable excuse'. The 'reasonable excuse' concept is not further defined.

Accordingly, the Northern Territory context is primarily based on a child protection model, but also combines elements of the criminal law model. Yet, this approach has not been designed specifically to implement a comprehensive criminal model, and has not been specifically informed by the concerns raised by the Royal Commission. For these reasons, the current approach lacks several core features of the criminal model now being adopted elsewhere. It is arguably desirable for reforms to occur in the Northern Territory to create a separate criminal law reporting model, which can exist in parallel with the child protection model, especially given the Royal Commission's recommendations and the expanding adoption of a dedicated criminal law model by other Australian States and Territories.

III Recommendations for reform

The comparative analysis conducted has revealed significant areas of commonality in approach, but has also disclosed a number of important variations in the legal models adopted by the five jurisdictions to date. Informed by the socio-legal context and the intention of these legal duties, and using principles of consistency and clarity as an evaluative lens, this comparative analysis leads to a number of conclusions about recommended reforms.

As detailed in Part IID1, the common elements of the laws should serve as a useful guide for

South Australia and Tasmania (and arguably the Northern Territory also) in drafting their legislation. These include:

- the duty only applies to adults, not to minors;
- the duty does not apply where it is known that the situation has already been reported to police;
- the duty does not apply where there otherwise is a lawful claim of right or privilege;
- the duty does not apply where the person has a reasonable excuse; and
- those who make reports are afforded protections from liability in civil, criminal and administrative processes.

As detailed in Part IID2(a)-(f), key domains of inconsistency in the laws in Victoria, New South Wales, Queensland, Tasmania and the ACT should be the subject of reforms. Furthermore, these issues need to be considered by the three remaining jurisdictions in their legislative drafting processes. The foregoing analysis has identified which approach is more justified in relation to each of these matters. To achieve desirable uniformity and sound legislative design across States and Territories, this article makes the following 10 recommendations about optimal approaches to these dimensions.

1. Core nature of the duty: The core nature of the duty in a form similar to that as expressed by New South Wales and Queensland should be preferred over its expression elsewhere. This model includes an objective element which ensures a person cannot evade operation of the duty by unjustifiably pleading subjective lack of knowledge or belief. Accordingly,

the duty should apply so that an adult bears the duty when she or he knows, believes, or reasonably ought to know or believe that a child abuse has offence has been committed against another person. Therefore, Victoria, Tasmania and the ACT should make this amendment to align with New South Wales and Queensland.

2. Penalties: Ideally, penalties should be harmonised (see Part IID2(a)).
3. Prosecution: The ACT and Queensland should add this requirement for DPP approval (see Part IID2(a)).
4. Religious confession: Victoria should amend its legislation to apply the duty to situations where the knowledge or reasonable belief was gained during confession (see Part IID2(b).
5. Application to different settings of child sexual abuse: Victoria should amend its legislation to apply the duty to sexual offences involving minors (see Part IID2(c)).
6. Age of the person who was the victim/survivor of the sexual offence: Victoria should amend its legislation to apply the duty to all situations regardless of the victim's age (see Part IID2(d)).
7. Exception based on reasonable belief the person does not wish the information to be reported. The first recommendation here is that the Victorian model should be adopted, enabling those aged 16 and over to express the wish that the offence not be reported (rather than being limited to those aged 18 and over); accordingly, New South Wales, Queensland, Tasmania and the ACT should make this amendment to align with Victoria (see Part IID2(e)).
8. Exception based on reasonable belief the person does not wish the information to be reported. The second recommendation here is that Victoria should not limit this exception only to situations where the victim/survivor expresses the wish for the offence not to be disclosed. Rather, the model elsewhere should be adopted, so that this exception applies if a reasonable belief exists that the victim/survivor does not wish the offence to be disclosed, where this belief can be supported either by such a direct express wish or by other sufficient grounds. The legislation should use textual examples to delineate the types of situation in which such a reasonable belief will exist, and should also specify that where any doubt exists about whether the exception operates, the duty applies (see Part IID2(e)).
9. Exception based on a 'reasonable excuse' for not reporting: enumerated category of reasonable exception based on endangering a person's safety. The two-limbed approach preferred by Victoria and Queensland combining a subjective and an objective element is clearly preferable to the alternative approach based only on subjectivity. Accordingly, New South Wales, the ACT, and Tasmania should amend this enumerated category of reasonable excuse to adopt the two-limbed test (see Part IID2(f)(i)).
10. Exception based on a 'reasonable excuse' for not reporting: To remove any doubt about whether adults should report technical offences involving genuinely consensual adolescent sexual activity, the reasonable excuse provision should include an enumerated example to this effect (see Part IID2(f)(ii)).

IV Conclusion

Much has happened since Victoria passed the first criminal law reporting duty in 2014. Other Australian States and Territories have witnessed the strengths and limitations of Victoria's model, and significantly, they have had the benefit of learning from the experience of the Royal Commission. All Australian States and Territories can draw from the insights gained from the Royal Commission's unprecedented examination of child sexual abuse in institutional settings. Moreover, they are obliged to respond to its recommendations for reform, and should now be well-positioned to deliberate on how best those recommendations can be implemented.

These new criminal law duties are an important acknowledgment of citizens' duties to take positive action to protect the rights of children in circumstances of serious criminal offending.

It is important to note that the creation of these legal duties assists to create a new social norm to encourage a certain type of protective behaviour; they are not simply provisions created to punish failure to comply. In addition, now, more than ever, societal conditions are under immense strain and new challenges continue to emerge. The technological revolution, and the effects of the COVID-19 pandemic, for example, may be associated with increases in some forms of serious sexual offences against children, including through online sexual exploitation.

Australia is at the forefront of socio-legal responses to child sexual abuse, and much of this progress has been catalysed by government inquiries and the Royal Commission's sustained forensic analysis. The evolution and geographical spread of criminal law duties in this context constitute a further important advance in protecting children from sexual abuse, although challenges remain in ensuring our legislative approaches are soundly designed. This article has identified a range of reforms that can further strengthen and harmonise Australia's legislative framework. Other nations may also draw from the Australian experience to better support children in responding to sexual abuse.

Appendix 1: Criminal law duty to report child sexual offences, imposed on all adults – full provisions

ACT	**s 66AA Failure to report child sexual offence**
Crimes Act 1900 (ACT) Inserted by *Royal Commission Criminal Justice Legislation Amendment Act 2019* (ACT) s 7	(1) A person commits an offence if the person— (a) is an adult; and (b) obtains information that leads to the person reasonably believing that a sexual offence has been committed against a child; and (c) does not, as soon as practicable after forming the belief, give the information to a police officer. Maximum penalty: imprisonment for 2 years. (2) Subsection (1) does not apply if— (a) the person— (i) obtains the information when the alleged victim was no longer a child; and (ii) reasonably believes the alleged victim does not want a police officer to be told about the person's belief; or (b) the person reasonably believes that giving the information to a police officer would endanger the safety of a person (other than a person reasonably believed to have committed the sexual offence); or (c) the person reasonably believes a police officer already has the information; or (d) the person— (i) is a mandated reporter under the Children and Young People Act 2008, section 356 (2); and (ii) has reported the information under that Act, division 11.1.2 (Reporting abuse and neglect of children and young people) or reasonably believes someone else has done so; or (e) subject to subsection (3), giving the information to a police officer would disclose information in relation to which privilege may be claimed under a law in force in the Territory; or (f) the information is generally available in the public domain; or (g) the person has another reasonable excuse. (3) A person who is or was a member of the clergy of a church or religious denomination is not entitled to refuse to give information under subsection (1) because the information was communicated to the member during a religious confession.

	(4) The Criminal Code, chapter 2 (other than the applied provisions) does not apply to an offence against this section. (5) If a person gives information mentioned in subsection (1) to a police officer honestly and without recklessness— (a) giving the information is not a breach of— (i) confidence; or (ii) professional etiquette or ethics; or (iii) a rule of professional conduct; and (b) the person does not incur civil or criminal liability only because of giving the information. (6) Subsection (5) does not apply if giving the information would be a breach of client legal privilege. (7) This section applies to information obtained on or after the commencement of this section, including information about a sexual offence that occurred before the commencement of this section. (8) In this section: ***applied provisions***—see the Criminal Code, section 10 (1). ***religious confession*** means a confession made by a person to a member of the clergy in the member's professional capacity according to the ritual of the member's church or religious denomination. ***sexual offence*** means— (a) an offence against— (i) this part; or (ii) any other provision prescribed by regulation; or (b) an offence against a sexual offence provision of this Act previously in force.
NSW *Crimes Act 1900* ss 316A(1), (9)(b) Inserted by *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018*, commenced 31 August 2018.	**316A Concealing child abuse offence** (1) An adult: (a) who knows, believes or reasonably ought to know that a child abuse offence has been committed against another person, and (b) who knows, believes or reasonably ought to know that he or she has information that might be of material assistance in securing the apprehension of the offender or the prosecution or conviction of the offender for that offence, and (c) who fails without reasonable excuse to bring that information to the attention of a member of the NSW Police Force as soon as it is practicable to do so, is guilty of an offence. Maximum penalty: Imprisonment for: (a) 2 years--if the maximum penalty for the child abuse offence is less than 5 years imprisonment, or (b) 5 years--if the maximum penalty for the child abuse offence is 5 years imprisonment or more. (2) For the purposes of subsection (1), a person has a reasonable excuse for failing to bring information to the attention of a member of the NSW Police Force if: (a) the person believes on reasonable grounds that the information is already known to police, or (b) the person has reported the information in accordance with the applicable requirements under Part 2 of Chapter 3 of the Children and Young Persons

	(Care and Protection) Act 1998 or Part 4 of the Children's Guardian Act 2019 or believes on reasonable grounds that another person has done so, or (c) immediately before the repeal of Part 3A of the Ombudsman Act 1974by the Children's Guardian Act 2019, the person had reported the information to the Ombudsman under that Part, or believed on reasonable grounds that another person had done so, or (d) the person has reasonable grounds to fear for the safety of the person or any other person (other than the offender) if the information were to be reported to police, or (e) the information was obtained by the person when the person was under the age of 18 years, or (f) the alleged victim was an adult at the time that the information was obtained by the person and the person believes on reasonable grounds that the alleged victim does not wish the information to be reported to police, or (g) the information is about an offence under section 60E that did not result in any injury other than a minor injury (for example, minor bruising, cuts or grazing of the skin) and the alleged offender and the alleged victim are both school students who are under the age of 18 years, but only if the person is a member of staff of: (i) a government school and the person has taken reasonable steps to ensure that the incident reporting unit (however described) of the Department of Education is made aware of the alleged offence, or (ii) a non-government school and the person has taken reasonable steps to ensure that the principal or governing body of the school is made aware of the alleged offence. (3) Subsection (2) does not limit the grounds on which it may be established that a person has a reasonable excuse for failing to bring information to the attention of a member of the NSW Police Force. (4) A person who solicits, accepts or agrees to accept any benefit for the person or any other person in consideration for doing anything that would be an offence under subsection (1) is guilty of an offence. Maximum penalty: Imprisonment for: (a) 5 years—if the maximum penalty for the child abuse offence is less than 5 years imprisonment, or (b) 7 years—if the maximum penalty for the child abuse offence is 5 years imprisonment or more. (5) It is not an offence under subsection (4) merely to solicit, accept or agree to accept the making good of loss or injury caused by an offence or the making of reasonable compensation for that loss or injury. (6) A prosecution for an offence under subsection (1) is not to be commenced against a person without the approval of the Director of Public Prosecutions in respect of information obtained by an adult in the course of practising or following a profession, calling or vocation prescribed by the regulations for the purposes of this subsection. (7) The regulations may prescribe a profession, calling or vocation as referred to in subsection (6). (8) The reporting of information by a person in good faith under this section: (a) does not constitute unprofessional conduct or a breach of professional ethics on the part of the person, and (b) does not make the person subject to any civil liability in respect of it (including liability for defamation).

	(9) In this section: ***child*** means a person who is under the age of 18 years. ***child abuse offence*** means: (a) murder or manslaughter of a child (including under section 22A), or (b) an offence under section 27, 29, 33, 35, 37, 38, 38A, 39, 41, 41A, 44, 45, 45A, 46, 59, 60E, 86 or 91J or Division 10, 10A, 10B or 15 of Part 3 where the alleged victim is a child, or (c) an offence under section 42, 43, 43A, 91G or 91H, or (d) an offence under a provision of this Act set out in Column 1 of Schedule 1A where the alleged victim was a child, or (e) an offence of attempting to commit an offence referred to in paragraphs (a)–(d), or (f) an offence under a previous enactment that is substantially similar to an offence referred to in paragraphs (a)–(e). ***government school*** and ***non-government school*** have the same meanings as in the Education Act 1990. ***member of staff***, ***school*** and ***school student*** have the same meanings as in Division 8B of Part 3. ***obtain*** includes receive or become aware of.
NT *Care and Protection of Children Act 2007* Section 26 substituted by the *Care and Protection of Children Amendment Act 2009*, commenced 1 September 2009. Original s 26 created a similar obligation, commenced 7 May 2008	**15 Harm to child** (1) Harm to a child is any significant detrimental effect caused by any act, omission or circumstance on: (a) the physical, psychological or emotional wellbeing of the child; or (b) the physical, psychological or emotional development of the child. (2) Without limiting subsection (1), harm can be caused by the following: (a) physical, psychological or emotional abuse or neglect of the child; (b) sexual abuse or other exploitation of the child; (c) exposure of the child to physical violence. *Example - A child witnessing violence between the child's parents at home.* **16 Exploitation of child** (1) Exploitation of a child includes sexual and any other forms of exploitation of the child. (2) Without limiting subsection (1), sexual exploitation of a child includes: (a) sexual abuse of the child; and (b) involving the child as a participant or spectator in any of the following: (i) an act of a sexual nature; (ii) prostitution; (iii) a pornographic performance. **26 Reporting obligations** (1) A person is guilty of an offence if the person: (a) believes, on reasonable grounds, any of the following: (i) a child has suffered or is likely to suffer harm or exploitation;

	(ii) a child aged less than 14 years has been or is likely to be a victim of a sexual offence; (iii) a child has been or is likely to be a victim of an offence against section 128 of the Criminal Code; and (b) does not, as soon as possible after forming that belief, report (orally or in writing) to the CEO or a police officer: (i) that belief; and (ii) any knowledge of the person forming the grounds for that belief; and (iii) any factual circumstances on which that knowledge is based. Maximum penalty: 200 penalty units. (2) A person is guilty of an offence if the person: (a) is a health practitioner or someone who performs work of a kind that is prescribed by regulation; and (b) believes, on reasonable grounds: (i) that a child aged at least 14 years (but less than 16 years) has been or is likely to be a victim of a sexual offence; and (ii) that the difference in age between the child and alleged sexual offender is more than 2 years; and (c) does not, as soon as possible after forming that belief, report (orally or in writing) to the CEO or a police officer: (i) that belief; and (ii) any knowledge of the person forming the grounds for that belief; and (iii) any factual circumstances on which that knowledge is based. Maximum penalty: 200 penalty units. *Example for subsection (2)(b)(ii) - A health practitioner believes, on reasonable grounds, that a child who has just turned 14 is likely to be a victim of a sexual offence committed by someone aged 16 and a half.* (3) It is a defence to a prosecution for an offence against subsection (1) or (2) if the defendant has a reasonable excuse. (4) This section has effect despite any other provision in this Act or another law of the Territory.
Qld Comm 5 July 2021 Inserted by Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Act 2020	**229BC Failure to report belief of child sexual offence committed in relation to child** (1) This section applies to an adult if— (a) the adult gains information that causes the adult to believe on reasonable grounds, or ought reasonably to cause the adult to believe, that a child sexual offence is being or has been committed against a child by another adult; and (b) at the relevant time, the child is or was— (i) under 16 years; or (ii) a person with an impairment of the mind. (2) If, without reasonable excuse, the adult fails to disclose the information to a police officer as soon as reasonably practicable after the belief is, or ought reasonably to have been, formed, the adult commits a misdemeanour. Maximum penalty—3 years imprisonment.

	(3) For subsection (1), it does not matter that the information was gained by the adult during, or in connection with, a religious confession. (4) Without limiting what may be a reasonable excuse for subsection (2), an adult has a reasonable excuse if— (a) the adult believes on reasonable grounds that the information has already been disclosed to a police officer; or (b) the adult has already reported the information under any of the following provisions, or believes on reasonable grounds that another person has done or will do so— (i) the Child Protection Act 1999, chapter 2, part 1AA; (ii) the Education (General Provisions) Act 2006, chapter 12, part 10; (iii) the Youth Justice Act 1992, part 8 or 9; or (c) the adult gains the information after the child becomes an adult (the alleged victim), and the adult reasonably believes the alleged victim does not want the information to be disclosed to a police officer; or (d) both of the following apply— (i) the adult reasonably believes disclosing the information to a police officer would endanger the safety of the adult or another person, other than the alleged offender, regardless of whether the belief arises because of the fact of the disclosure or the information disclosed; (ii) failure to disclose the information to a police officer is a reasonable response in the circumstances. (5) An adult who, in good faith, discloses information mentioned in subsection (1)(a) to a police officer is not liable civilly, criminally or under an administrative process for making the disclosure. (6) In this section— relevant time, in relation to the child sexual offence mentioned in subsection (1)(a), means the time that the adult— (a) believes to be the time of commission of the offence; or (b) ought reasonably to believe to be the time of commission of the offence.
SA	No provision.
Tas Criminal Code s 105A Inserted by Criminal Code and Related Legislation Amendment (Child Abuse) Bill 2018 s 7	**105A Failing to report the abuse of a child** (1) In this section – ***abuse offence*** means the following: (a) an offence against section 124, 125, 125A, 125B, 125C, 125D, 126, 127, 129, 130, 130A, 133, 157, 158, 159, 165A, 166, 170, 172, 175, 176, 177, 178, 178A or 178B; (b) an offence under chapter XIX or XX; (c) an offence of attempting to commit an offence referred to in paragraph (a) or (b); (d) an offence under a previous enactment that is substantially similar to an offence referred to in paragraph (a), (b) or (c); ***child*** means a person under the age of 18 years; ***proper authority*** has the same meaning as in section 162A; ***religious confession*** has the same meaning as in section 127 of the *Evidence Act* 2001. (2) A person is guilty of a crime if the person –

	(a) has information that leads the person to form a reasonable belief that an abuse offence has been committed against another person who was a child at the time of the alleged offence; and (b) fails without reasonable excuse to disclose that information to a police officer as soon as practicable. Charge: Failing to report the abuse of a child. (3) A person is not guilty of an offence under subsection (2) if – (a) the information was obtained by that person when he or she was a child; or (b) the alleged victim of the offence to which the information relates had attained the age of 18 years at the time the information was obtained by the person and the person believes on reasonable grounds that the alleged victim does not wish the information to be reported to a police officer. (4) Without limiting the matters that may constitute a reasonable excuse for the purposes of subsection (2), a person has a reasonable excuse for failing to comply with that subsection if – (a) the person fears on reasonable grounds that disclosing the information would endanger the safety of any person (other than the person reasonably believed to have committed, or to have been involved in, the child abuse offence); or (b) subject to subsection (5), reporting the information would disclose information in respect of which there is a lawful claim or right of privilege; or (c) the person believes on reasonable grounds that – (i) another person has already reported the information to a proper authority; or (ii) a proper authority already has the information; or (d) the information is generally available to members of the public. (5) Despite section 127 of the Evidence Act 2001, a member of the clergy of any church or religious denomination is not entitled to refuse to disclose information under subsection (2) on the grounds that the information was communicated to that member of the clergy during a religious confession. (6) A prosecution for an offence against subsection (2) is not to be commenced without the written authority of the Director of Public Prosecutions.
Vic *Crimes Act 1958* s 327 Inserted by *Crimes Amendment (Protection of Children) Act* *2014* (Vic), commenced 27 October 2014.	**327 Failure to disclose sexual offence committed against child under the age of 16 years** (1) In this section— ***interests*** includes reputation, legal liability and financial status; ***organisation*** includes a body corporate or an unincorporated body or association, whether the body or association— (a) is based in or outside Australia; or (b) is part of a larger organisation; ***sexual offence*** means— (a) an offence committed under Subdivision (8A), (8B), (8C), (8E), (8F) or (8FA) of Division 1 of Part I on or after 1 July 2017; or (b) an offence committed under Subdivision (8D) of Division 1 of Part I on or after 1 July 2017 other than an offence that only relates to child abuse material of a kind described in paragraph (a)(i)(A) of the definition of child abuse material in section 51A(1), where the torture, cruelty or abuse is not sexual; or **Example**

	An offence committed under Subdivision (8D) of Division 1 of Part I that relates to child abuse material that depicts or describes a child as a victim of sexual abuse. (c) an offence committed before 1 July 2017 under Subdivision (8A), (8B), (8C), (8D), (8E) or (8EAA) as then in force; or (d) an attempt to commit an offence referred to in paragraph (a), (b) or (c); or (e) an assault with intent to commit an offence referred to in paragraph (a), (b) or (c). (2) Subject to subsections (5) and (7), a person of or over the age of 18 years (whether in Victoria or elsewhere) who has information that leads the person to form a reasonable belief that a sexual offence has been committed in Victoria against a child under the age of 16 years by another person of or over the age of 18 years must disclose that information to a police officer as soon as it is practicable to do so, unless the person has a reasonable excuse for not doing so. Penalty: 3 years imprisonment. (3) For the purposes of subsection (2) and without limiting that subsection, a person has a reasonable excuse for failing to comply with that subsection if— (a) the person fears on reasonable grounds for the safety of any person (other than the person reasonably believed to have committed, or to have been involved in, the sexual offence) were the person to disclose the information to police (irrespective of whether the fear arises because of the fact of disclosure or the information disclosed) and the failure to disclose the information to police is a reasonable response in the circumstances; or (b) the person believes on reasonable grounds that the information has already been disclosed to police by another person and the firstmentioned person has no further information. **Example -** A person may believe on reasonable grounds that the information has already been disclosed to police by another person if the person has made a report disclosing all of the information in his or her possession in compliance with mandatory reporting obligations under the Children, Youth and Families Act 2005. (4) For the purposes of subsection (2) and without limiting that subsection, a person does not have a reasonable excuse for failing to comply with that subsection only because the person is concerned for the perceived interests of— (a) the person reasonably believed to have committed, or to have been involved in, the sexual offence; or (b) any organisation. (5) A person does not contravene subsection (2) if— (a) the information forming the basis of the person's belief that a sexual offence has been committed came from the victim of the alleged offence, whether directly or indirectly; and (b) the victim was of or over the age of 16 years at the time of providing that information to any person; and (c) the victim requested that the information not be disclosed. (6) Subsection (5) does not apply if— (a) at the time of providing the information, the victim of the alleged sexual offence— (i) has an intellectual disability (within the meaning of the Disability Act 2006); and

	(ii) does not have the capacity to make an informed decision about whether or not the information should be disclosed; and (b) the person to whom the information is provided is aware, or ought reasonably to have been aware, of those facts. (7) A person does not contravene subsection (2) if— (a) the person comes into possession of the information referred to in subsection (2) when a child; or (b) the information referred to in subsection (2) would be privileged under Part 3.10 of Chapter 3 of the Evidence Act 2008; or (c) the information referred to in subsection (2) is a confidential communication within the meaning of section 32B of the Evidence (Miscellaneous Provisions) Act 1958; or (d) the person comes into possession of the information referred to in subsection (2) solely through the public domain or forms the belief referred to in subsection (2) solely from information in the public domain; or (e) the person is a police officer acting in the course of his or her duty in respect of the victim of the alleged sexual offence; or (f) the victim of the alleged sexual offence has attained the age of 16 years before the commencement of section 4 of the Crimes Amendment (Protection of Children) Act 2014. (8) A prosecution for an offence under subsection (2) must not be commenced without the consent of the Director of Public Prosecutions. (9) In determining whether to consent to a prosecution for an offence under subsection (2), the Director of Public Prosecutions must consider whether the alleged offender has been subjected to family violence (within the meaning of the Family Violence Protection Act 2008) that is relevant to the circumstances in which the offence is alleged to have been committed.
WA	No provision.

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Abuse of Power and the Issue of Prerogative Writs – Implications for Breach of the Commonwealth Model Litigant Policy

Jason Donnelly*

The grant of the prerogative writs and relief under s 39B of the *Judiciary Act 1903* (Cth) in Australia is a matter of discretion. The discretion to refuse relief is not to be exercised lightly. One of the established grounds for refusing the grant of the prerogative writs is "bad faith" on the part of the applicant, either in the transaction out of which the duty to be enforced arises or towards the court to which the application is made. In a little-discussed topic, this article considers the question of whether it is appropriate to withhold the grant of prerogative relief in circumstances where the Commonwealth, as a party to judicial review proceedings, has engaged in conduct considered an infringement of the Model Litigant Policy (MLP) made under the *Legal Services Directions 2017* (Cth). The article argues that contravention of the MLP by a Commonwealth party in judicial review proceedings should be considered a ground for a court, exercising judicial power, to refuse the grant of prerogative relief as an extension of the common law model litigant obligations imposed on Commonwealth entities.

Introduction

The grant of the prerogative writs and relief under s 39B of the *Judiciary Act 1903* (Cth) (the *Judiciary Act*) is a matter of discretion.[1] The discretion to refuse relief is not to be exercised lightly.[2] Certiorari[3] vindicates the public interest in executive power being exercised according to law.[4] Mandamus, being a demand by a particular applicant for the power to be exercised, may have a private aspect to it.[5]

One of the established grounds for refusing the grant of judicial review remedies is "bad faith" on the part of the applicant, "either in the transaction out of which the duty to be enforced arises or towards the court to which the application is made".[6] In a little-discussed topic, this article considers the question of whether it is appropriate to withhold the grant of prerogative relief in circumstances where the Commonwealth, as a party to judicial review proceedings, has engaged in conduct considered an infringement of the Model Litigant Policy (the MLP).

The article argues that contravention of the MLP by a Commonwealth party in judicial review proceedings should be considered a ground for a court, exercising judicial power, to refuse the

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[1] *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v PDWL* [2021] FCAFC 48 [62] (*PDWL*).

[2] *Re Refugee Review Tribunal; Ex parte Aala* [2000] HCA 57; (2000) 204 CLR 82 at [54]-[56].

[3] The function of an order in the nature of certiorari, it has been said, "is to remove the legal consequences, or purported legal consequences, of an exercise or purported exercise of power which has, at the date of the order, a discernible or apparent legal effect upon rights": *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2018] HCA 4, (2018) 264 CLR 1 at [28], (2018) 264 CLR at 13 per Kiefel CJ, Bell, Keane, Nettle and Gordon JJ. See also: *DMI16 v Federal Circuit Court of Australia* [2018] FCAFC 95 at [38], [2018] FCAFC 95; (2018) 264 FCR 454 at 464 per Collier, Logan and Perry JJ.

[4] *PDWL* [63].

[5] *SZQBN v Minister for Immigration and Citizenship* [2013] FCAFC 94; (2013) 213 FCR 297 at [43]-[49].

[6] *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* [1949] HCA 33; (1949) 78 CLR 389 at 400.

grant of relevant judicial review remedies sought. Presently, a contravention of the MLP is not an established ground for refusing the grant of the relevant prerogative writs in Australia.

Model Litigant Policy

The MLP, as it is commonly described, is a Legal Service Direction (the **LSD**) issued by the Attorney-General under s 55ZF of the *Judiciary Act*.[7] The LSD was first issued in 1999. The current version is Appendix B of the Legal Services Directions 2017.

Paragraph 1 of the MLP indicates that consistently with the Attorney-General's responsibility for maintaining proper standards in litigation, the Commonwealth and Commonwealth agencies are to behave as model litigants in the conduct of litigation.

Paragraph 2 outlines the nature of the obligation concerning the MLP. The paragraph indicates that the obligation to act as a model litigant requires that the Commonwealth and Commonwealth agencies act honestly and fairly in handling claims and litigation brought by or against the Commonwealth or a Commonwealth agency by, inter alia:

- dealing with claims promptly and not causing unnecessary delay in the handling of claims and litigation, making an early assessment of the Commonwealth's prospects of success in legal proceedings that may be brought against the Commonwealth
- acting consistently in the handling of claims and litigation, endeavouring to avoid, prevent and limit the scope of legal proceedings wherever possible, including by giving consideration in all cases to alternative dispute resolution before initiating legal proceedings and by participating in alternative dispute resolution processes where appropriate
- where it is not possible to avoid litigation, keeping the costs of litigation to a minimum[8]
- not taking advantage of a claimant who lacks the resources to litigate a legitimate claim
- not undertaking and pursuing appeals unless the Commonwealth or the agency believes that it has reasonable prospects for success or the appeal is otherwise justified in the public interest.[9]

Paragraph 5.1 outlines that the Commonwealth or a Commonwealth agency is only to start court proceedings if it has considered other methods of dispute resolution (eg alternative dispute resolution or settlement negotiations).

Some judges have equated the Crown's model litigant obligation with the obligations of probity and fair dealing of judicial officers.[10] There is considerable overlap between the obligations reflected in the MLP and those under the *Federal Court Act 1975* (Cth).[11]

In 2007, Johnson J said the following in the decision of *Priest v State of New South Wales* [2007] NSWSC 41: 'In a sense, s.56 has the result that every litigant in civil proceedings in this Court is now a model litigant'. That statement may be true as far as the description "model litigant" goes.[12] However, it is clear that some of the duties imposed under the MLP go beyond those imposed on private litigants.[13]

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[7] Eugene Wheelahan, 'Model Litigant Obligations: What Are They and How Are They Enforced?' (Speech, Federal Court of Australia Ethics Series, 15 March 2016), 1.
[8] See further John Basten, 'Disputes Involving the Commonwealth: Observations from the Outside' (1999) 92 *Canberra Bulletin of Judicial Administration* 38.
[9] See further Zac Chami, 'The Obligation to Act as a Model Litigant' (2010) 64 *AIAL Forum* 47.
[10] See discussion of *Sebel Products v Commissioner of Customs and Excise* [1949] Ch 409, 413 (Vaisey J) and *R v Tower Hamlets LBC* [1988] AC 858 in Camille Cameron and Michelle Taylor-Sands, "Playing Fair": Governments as Litigants' (2007) 26 *Civil Justice Quarterly* 497, 499
[11] Wheelahan, n 7 above, 2.
[12] Ibid.
[13] ibid.

The additional obligations imposed on the Commonwealth can be seen to be directed more to good governance and administration than mere conduct as a litigant in court – examples include: acting consistently across cases; avoiding technical arguments; not appealing unless there are reasonable prospects or it is in the public interest; etc.[14] Such restrictions do not apply to a private litigant – even if they are a large, well-resourced, and repeat litigant.[15] The principles and justifications underpinning the MLP are rooted in the relationship between the Crown and its subjects.[16]

In a modern-day context, it arises because of the obligation on the Attorney-General (as "First Law Officer") for the preservation of proper standards in litigation.[17] As King CJ said in *Kenny v South Australia*,[18] the court and the Attorney-General have "joint responsibility for fostering the expeditious conduct of and disposal of litigation".

In *Hughes Aircraft Systems International v Airservices Australia*,[19] Finn J held:

> There is, I consider much to be said for the view that, having no legitimate private interest in the performance of its functions, a public body … should be required as of course to act fairly towards those with whom it deals at least in so far as this is consistent with its obligation to serve the public interest (or interests) for which it has been created.

His Honour went on to observe that the obligation serves to (a) protect the reasonable expectations of those dealing with public bodies that they will act honestly and fairly; (b) ensure public bodies exercise their powers for the public good; and (c) require that public bodies act as "moral exemplars".[20]

Lack of Enforcement?

An obvious question arises as to how the MLP is enforced. Section 55ZG of the *Judiciary Act* provides, in effect, that any person who may be a client of the AGS – for example, the Commonwealth, a Commonwealth Minster, a Commonwealth body, or an employee of the Commonwealth – must comply with the Legal Services Direction as well as any legal practitioner or firm of practitioners acting for such a person.[21]

Critical, s 55ZG(3) of the *Judiciary Act* provides compliance with a LSD (i.e. MLP) is not enforceable except by, or upon the application of, the Attorney-General.[22] Furthermore, subsection (3) mandates that the issue of non-compliance with a LSD may not be raised in any

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[14] ibid.
[15] ibid.
[16] ibid. In the 1912 case of *Melbourne Steamship Co Ltd v Morehead* (1912) 15 CLR 333, 342, Griffith CJ described the obligation of the Crown in litigation as: "[T]he old-fashioned, traditional and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects, which I learned a very long time ago to regard as elementary." This standard is said to apply because of the Crown's position as "the source and fountain of justice": *Sebel Products v Commissioner of Customs and Excise* [1949] Ch 409, 413.
[17] Wheelahan, n 7 above, 3.
[18] (1987) 46 SASR 268, 273. See also: Gabrielle Appleby, "The Government as Litigant" (2014) 37(1) *UNSW Law Journal* 94, 96.
[19] (1997) 76 FCR 151, 196.
[20] *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151, 197.
[21] For further analysis of the operation and effectiveness, see Michelle Taylor-Sands and Camille Cameron, 'Regulating Parties in Dispute: Analysing the Effectiveness of the Commonwealth Model Litigant Rules Monitoring and Enforcement Process' (2010) 21 *Public Law Review* 188.
[22] Paul Finn, *The Crown as a Model Litigant: The Crown as a Litigator* (Law Society of South Australia, 2005), 4.

proceeding (whether in a court, tribunal or other body) except by, or on behalf of, the Commonwealth.[23]

Given the preceding context, a question arises, therefore, what can a private litigant do if the Commonwealth or one of its lawyers breaches the MLP in a judicial review context. The first thing they can do is make a complaint through administrative channels.[24] However, in many instances, a litigant will want more immediate redress from the court.[25]

Here it becomes imperative to distinguish between a breach of the MLP itself, being the Direction issued by the Attorney-General (and which cannot be raised in court), and a breach of the model litigant obligation imposed on governments and their legal representatives under common law.[26]

Before exploring the model litigant obligation reflected in the common law, two observations need to be made. First, it is readily accepted that a breach of the LSD (such as the MLP) cannot, of itself, form a basis for the withholding of prerogative relief against a Commonwealth party in judicial review litigation. Secondly, however, it does not follow that the contravention of the MLP by a Commonwealth party is not relevant to the broader question as to whether the relevant prerogative writ(s) should issue in a case where the Commonwealth has otherwise demonstrated jurisdictional error.[27]

In *ASIC v Rich*,[28] and a matter of some importance, Austen J held that the LSD might be referred to as an aid to understanding the content of the common law duty:

> Those restrictions prevent the defendants from raising the issue of non-compliance with the directions, as such, but it seems to me that the notion of Commonwealth agencies as "model litigants", the subject of the [LSD], is a notion that also underlies the special duty of fairness of Commonwealth agencies in civil litigation, as articulated in *Scott* and other cases. In principle, therefore, the directions can be referred to as an aid to understanding the content of the litigation duty, notwithstanding s 55ZG(2) and (3).

Wheelahan has observed that there are a number of ways in which a court may exercise their powers to redress a perceived breach of the common law obligation:[29]

- it may be a factor that weighs into the exercise of a discretion to grant a stay or adjournment, order discovery, order the calling of a witness, or various other interlocutory or procedural matters
- there are also cases the court has made an adverse costs order against a government litigant at the conclusion of proceedings because of a perceived breach of the obligation.

Citing various cases, Wheelahan concluded that, generally, there is a growing tendency on the part of Federal and State courts and tribunals to enforce or exact the standard of fair dealing to be expected from government litigants in this way.[30] However, none of the cases cited by Wheelahan dealt with the question the subject of this article.[31]

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[23] Charles Gardner Geyh found that the possibility of disciplinary sanctions can serve as the 'shotgun behind the door': Charles Gardner Geyh, 'Informal Methods of Judicial Discipline' (1993) 142 *University of Pennsylvania Law Review* 243, 283.
[24] Wheelahan, n 7 above, 4.
[25] Ibid.
[26] ibid.
[27] Jurisdictional error on the part of an administrative decision-maker, it may be accepted, may lead to a decision having no legal consequences: cf. *Minister for Immigration and Multicultural Affairs v Bhardwaj* [2002] HCA 11, (2009) 209 CLR 597.
[28] (2009) 236 FLR 1 [527].
[29] Wheelahan, n 7 above, 4-5.
[30] Ibid, 5.
[31] ibid, 5-7.

The Argument

There are at least *four reasons* why a court should consider withholding prerogative relief where a Commonwealth party in judicial review proceedings has been successful in demonstrating jurisdictional error (but has otherwise engaged in conduct contrary to the MLP under the LSD).

Reason 1 (Public Interest)

As observed in the introduction to this article, certiorari vindicates the public interest in executive power being exercised according to law.[32] It is likely upon that foundation that the High Court of Australia in *Ex parte Aala*[33] determined that the discretion to refuse relief (concerning the issue of the prerogative writs) is not to be exercised lightly—even accepting that legal principle, that are good reasons for departing from the apparent presumption that the writ of certiorari should issue almost as of right.[34]

However, there is an equally strong public interest consideration that a Commonwealth party is behaving as a model litigant in the conduct of judicial review litigation. It could hardly be argued, for example, that the obligation to act as a model litigant requiring that the Commonwealth and Commonwealth agencies act honestly and fairly in handling claims and litigation brought by or against the Commonwealth or a Commonwealth agency is not a matter of public interest.

Commonwealth parties are funded from the public purse at the expense of Australian taxpayers.[35] In that context, members of the Australian community have a public right to know how Commonwealth entities conduct themselves in the context of judicial review proceedings in Australian courts.[36]

Implicitly, the public interest nature of the MLP also derives from the fact that it is an Appendix to the latest Commonwealth LSD. It is an instrument made under s 55ZF of the *Judiciary Act*. The fact that the MLP has legislative recognition inherently demonstrates the apparent importance of the obligations reflected in that document.

Given the preceding, at a broader level of generality, there appears to be competing public interest considerations: the public interest in executive decision-makers acting within the confines of statutory power on the one hand, and on the other, Commonwealth parties to litigation promoting the administration of justice by duly observing the fundamental objectives and obligations reflected in the MLP.[37]

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[32] *PDWL* [63].

[33] *Re Refugee Review Tribunal; Ex parte Aala* [2000] HCA 57; (2000) 204 CLR 82 at [54]-[56].

[34] Some scholars have argued that enunciating core values or ethics of government is superior to relying on the concept of 'public interest' alone: See Bradley Selway, 'The Duties of Lawyers Acting for Government' (1999) 10 *Public Law Review* 114, 122; Paul Finn, 'A Sovereign People, A Public Trust' in P D Finn (ed), *Essays on Law and Government: Volume 1 Principles and Values* (The Law Book Company, 1995), 22-32; John C Tait, 'The Public Service Lawyer, Service to the Client and the Rule of Law' (1997) 23 *Commonwealth Law Bulletin* 542, 548.

[35] In a different context, the Joint Committee of Public Accounts has explained that government entities could be expected to meet more social responsibilities than their private entities counterparts because they were 'charged with the expenditure of public money and public trust in the operation of government entities: Joint Committee of Public Accounts, Parliament of Australia, *Social Responsibilities of Commonwealth Statutory Authorities and Government Business Enterprises* (1992), 15.

[36] See further Camille Cameron and Michelle Taylor-Sands, '"Corporate Governments" as Model Litigants' (2007) 20 *Legal Ethics* 154.

[37] Conrad Lohe, the former Queensland Crown Solicitor, has further explained that '[t]he power of the State is to be used for the public good and in the public interest, and not as a means of oppression, even in litigation: Conrad Lohe, 'The Model Litigant Principles' (Paper presented at the Legal Managers', Breakfast Briefing, Queensland, 28 June 2007), 1.

If it is accepted that there are competing public interest considerations[38] as described above, as a matter of logic, it may be the case, given the particular circumstances, that the public interest concerning infringement of the MLP outweighs countervailing public interest considerations; such that a court (in the context of judicial review proceedings) would withhold the issue of prerogative relief to a Commonwealth party that has engaged in conduct contrary to the prescribed MLP. Such a conclusion would vindicate the public interest in executive power being exercised according to established policy principles given legal effect under the contemporary LSD.

In *PDWL*,[39] the Full Court of the Federal Court of Australia recently held that like prohibition, certiorari has a public content in the sense that it is "concerned with the exercise by … an official of administrative powers in want of, or in excess of, jurisdiction".[40] Citing *Aala*[41] in the High Court of Australia, the Full Court said certiorari would issue "almost as of right".[42] The Full Court went further, so holding that certiorari should not ordinarily be withheld where the result would be to confer a benefit to a non-citizen in contravention of the Act.[43]

Although the reasoning of the Full Court in *PDWL* above is persuasive, there are at least three responses. First, contravention of the MLP (in the context of a LSD) also has public content because it is concerned with the Commonwealth acting in conformity with a statutory instrument made under the *Judiciary Act*.

Secondly, the writ of certiorari should not necessarily issue 'almost as of right'; keeping in mind that one is dealing with the exercise of a broad discretionary power vested in a court exercising judicial power (and otherwise noting that there may be competing powerful public interest factors that require due consideration).

Thirdly, as to the perceived benefit issue outlined in *PDWL*, that is hardly to the point. If a Commonwealth entity contravenes the MLP, they should not otherwise benefit from such contravention by implication (by merely demonstrating jurisdictional error).[44] A contrary view would mean, in effect, an infringement of the MLP in a LSD would have no legal or practical effect.

As will be explored shortly, there is a close relationship between the statutory MLP and the common law model litigant obligations imposed upon the Commonwealth; the latter of which can have practical and legal consequences for a Commonwealth party in proceedings before a court exercising judicial power.

It should also be kept ready in mind that there is "no universal proposition that jurisdictional error" necessarily has the effect of bringing about legal consequences.[45]

Reason 2 (Implications of Section 55ZG of the Judiciary Act)

Compliance with a LSD is not *enforceable*[46] except by or upon the Attorney General's application.[47] The word 'enforceable' is not defined in the *Judiciary Act*; thus, there is no reason why the phrase should not be construed literally. Enforceable is taken to mean 'possible

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[38] Cf, *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v PDWL* [2020] FCA 1354 [67] (*PDWL first instance*).
[39] *PDWL* [72].
[40] *SZQBN v Minister for Immigration and Citizenship* [2013] FCAFC 94; (2013) 213 FCR 297 at [48].
[41] *Re Refugee Review Tribunal; Ex parte Aala* [2000] HCA 57; (2000) 204 CLR 82 at [51] and [149]. See also *R v Ross-Jones; Ex Part Green* [1984] HCA 82; (1984) 156 CLR 185 at 194.
[42] *PDWL* [72].
[43] *PDWL* [72].
[44] *PDWL first instance* [74].
[45] *Jadwan Pty Ltd v Secretary, Department of Health and Aged Care* [2003] FCAFC 288 at [42], (2003) 145 FCR 1 at 16.
[46] The word 'enforceable' is not defined in the *Judiciary Act 1903* (Cth); thus, there is no reason in principle why the phrase should not be construed literally.
[47] *Judiciary Act 1903* (Cth), s 55ZG(2).

to *make people obey*, or possible to make happen or be accepted' (own emphasis).[48] Given that language, where a Commonwealth party has contravened the MLP, it is difficult to see how that impugned conduct could not be relevant to a Court potentially withholding prerogative relief against the Commonwealth in judicial review proceedings; this is because the aggrieved party would not necessarily be seeking the 'enforcement' of the contravened MLP, but rather to argue that there should be legal consequences by the Commonwealth failing to comply with relevant prescribed duties under the MLP.

Section 55ZG of the *Judiciary Act* should be read in light of s 55ZI. There, by subsection (1), a person (other than the Attorney-General) is not liable to an action or other proceeding, whether civil or criminal, for or in relation to an act done or omitted to be done by the person in compliance, or in good faith in purported compliance, with a Legal Services Direction.

The statutory effect of section 55ZI(2) would have no application in circumstances where a party contends that prerogative relief should be withheld for the Commonwealth on account of contravening the MLP (since the relevant aggrieved party would not be seeking the enforcement of an 'action' in the context of judicial review proceedings). At its highest, the aggrieved party would simply be contending that in circumstances where the court has identified a jurisdictional error, relief should not issue to the successful party (i.e. the Commonwealth) because of their impugned conduct relevantly associated with the proceedings.

Despite the potential avoidance of sections 55ZG(2) and 55ZI(2) of the *Judiciary Act* in the context of the prerogative relief argument, section 55ZG(3) is more problematic. Under that subsection, Parliament has made plain that the issue of non-compliance with a LSD may not be raised in any proceeding (including a court) except by, or on behalf of, the Commonwealth. The statutory effect of section 55ZG(3) would thus make, on its face, inadmissible any argument that prerogative relief should be withheld to the Commonwealth on account of non-compliance with the MLP.

Thankfully, it appears that Australian courts have been creative in getting around the statutory effect of section 55ZG of the *Judiciary Act*. By way of example, in the case of *Scott v Handley*,[49] the Full Federal Court overturned the trial judge's decision to refuse an application for adjournment by the appellants (who were self-represented). The respondent, an officer of the Commonwealth, filed three lengthy affidavits six days before the trial – and three months after they were due under the trial directions. This fact was not relied upon by the self-represented appellants. The Full Court held that the respondent took advantage of the appellants' inability to articulate the basis for the adjournment properly. Given his position of obvious advantage, this amounted to a miscarriage of justice.

In one of the *Melbourne Voyager* cases,[50] the NSW Supreme Court made adverse costs orders against the Commonwealth because of its delay in seeking to cross-examine the author of an expert report tendered by the plaintiff. It also criticised its approach to applications for extension of limitation periods in claims by former HMAS Melbourne personnel, noting that only three were successfully resisted after 30 applications to the court. It referred to the common law model litigant obligation and the case of *Scott*.

In *Mahenthirarasa v State Rail Authority of New South Wales (No 2)*[51] the NSW Court of appeal made an adverse costs order against the Authority for, among other things, filing submitting appearances in the Supreme Court and then the Court of Appeal despite an invitation from the court to participate in the hearings. It held that it was inappropriate for the court to be deprived of the assistance of the executive branch of government.[52]

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[48] https://dictionary.cambridge.org/dictionary/english/enforceable
[49] (1999) 58 ALD 373.
[50] *Galea v Commonwealth of Australia (No. 2)* [2008] NSWSC 260 at [20]-[21].
[51] (2008) 72 NSWLR 273.
[52] Wheelahan, n 7 above, 5.

A survey of the cases reveals that the courts have been willing to recognise common law obligations on government litigants that, in some instances, go beyond those set out in the LSD.[53] For example, courts have held that the obligation extends to, inter alia, informing the court of the full circumstances of the case, not adopting a strategy that aims to impair the other party's capacity to defend itself, not claiming legal professional privilege to prevent documents falling into the hands of a potential claimant and making appropriate concessions and not taking every point.[54]

The preceding cases demonstrate that Australian courts have been willing to exercise a discretionary power unfavourably to a Commonwealth party acting contrary to the common law model litigant obligation. Given that the grant of prerogative relief is a matter of discretion, there appears to be no reason in principle why the common law model litigant obligation should not have implications in the context of the grant of prerogative relief in judicial review proceedings. And, as Austen J made plain in *Rich*, regard may be had to the LSD in understanding the scope and nature of the common law model litigant obligation.

Reason 3 (Promotion of Overarching Purpose of Litigation)

If it is accepted that non-compliance with the MLP can have adverse consequences for a Commonwealth party in the context of whether certain prerogative writs should issue, the implications of recognising such a ground are consistent with advancing the overarching purpose of Australian practice and procedure in civil practice.

For example, by s 37M(1) of the *Federal Court of Australia Act 1976* (Cth), the overarching purpose of the civil practice and procedure provisions is to facilitate the just resolution of disputes according to law and as quickly, inexpensively, and efficiently as possible. By subsection (2), Parliament has made clear that the overarching purpose includes, inter alia, objectives related to the just determination of all proceedings before the court, the efficient use of the judicial and administrative resources available for the court, the disposal of proceedings promptly, and the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute.[55]

The formulation of techniques and procedures that will enhance speed, efficiency, or fairness in the resolution of civil disputes is within the court's power.[56] Novelty is no bar to such power or duty; however, the trammelling of fundamental common law or statutory rights is such a bar.[57]

In truth, the model litigant obligations imposed upon the Commonwealth closely align with the overarching objectives of civil litigation in Australia. That observation is important because nothing in ss 55ZG and 55ZI of the *Judiciary Act* can be taken to prohibit courts from giving effect to the overarching purpose of civil practice and procedure provisions in the context of civil litigation in Australia.

Suppose there was an established ground that meant the issue of prerogative writs could be withheld on account of the Commonwealth entity acting inconsistently with the MLP; in that

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[53] Ibid, 6.

[54] Appleby, n above 18, 106-108. See further *Comaz (Aust) Pty Ltd v Commissioner of State Revenue* [2015] VSC 294 [78].

[55] In a New South Wales context, by way of example, see *Dennis v Australian Broadcasting Corporation* [2008] NSWCA 37. In that case, at [29], Spigelman CJ said that in New South Wales, *J L Holdings* must now be understood as operating subject to the statutory duty imposed upon the courts by s 56(2) of the *Civil Procedure Act 2005* (NSW), which requires the Court in mandatory terms — "must seek" — to give effect to the overriding purpose — to "facilitate the just, quick and cheap resolution of the real issues in the proceedings" — when exercising any power under the Act or Rules. See further *Aon Risk Services Australia v Australian National University* (2009) 239 CLR 175 French CJ at [6]; Gummow, Hayne, Crennan, Kiefel and Bell JJ at [111]; Heydon J at [133].

[56] Civil Trials Bench Book, Case management, [2-0010] Overview, Judicial Commission of New South Wales 2021.

[57] *State of NSW v Public Transport Ticketing Corporation (No 3)* (2011) 81 NSWLR 394.

case, this principle could provide a good deterrent against the Commonwealth acting contrary to the overarching purpose of the civil practice and procedure provisions (keeping steadily in mind the close overlap between the MLP and the respective objectives concerned with civil practice and procedure provisions in Australia).[58]

Reason 4 (Necessity for Bad Faith?)

One of the established grounds for refusing the grant of judicial review remedies is "bad faith" on the part of the applicant, "either in the transaction out of which the duty to be enforced arises or towards the court to which the application is made".[59] It has been argued that "bad faith" in the relevant sense ordinarily requires significant dishonesty to subvert the proper processes of, secure an advantageous outcome in, the relevant transaction or court proceeding; moral obloquy; or fraud.[60]

The established ground of bad faith poses a high threshold for an aggrieved party to meet. Given that high threshold, it might be thought that the introduction of an established ground related to the infringement of the MLP undermines the necessity for the bad faith ground (since it might be easier to demonstrate an infringement of the MLP without showing bad faith on the part of the Commonwealth).

However, given the broad discretionary power vested in a court exercising judicial power, the established ground of bad faith should be no roadblock for introducing a new ground related to an infringement of the MLP and common law model litigant obligations.

In *F Hoffmann-La Roche*,[61] a case in the United Kingdom, Lord Denning held that one of the circumstances in which prerogative relief may be refused is if the applicant's conduct "has been disgraceful and he has in fact suffered no injustice". This ground may be demonstrated without the necessity to prove bad faith on the part of the Commonwealth. In other words, there is no necessity for bad faith to be demonstrated before a court might consider exercising its broad discretionary power to refuse prerogative relief to an otherwise successful Commonwealth party who has demonstrated jurisdictional error with an executive decision.

A Missed Opportunity?

In *PDWL*,[62] Flick J took the brave step of refusing prerogative relief in the form of a grant of certiorari to the Minister for Immigration, Citizenship, Migrant Services, and Multicultural Affairs on account of the Minister's impugned conduct in the context of that case.[63] Justice Flick determined that given the Minister did not explain why the non-citizen was still in immigration detention contrary to an order of the Administrative Appeals Tribunal (Tribunal) and otherwise has failed to comply with an order of the court, warranted an exercise of discretion to refuse the applicant Minister an order quashing the Tribunal decision.[64]

Justice Flick reasoned as follows at [62] in *PDWL*:

> At the heart of the decision-making tasks being undertaken by the delegate, the Minister and the Tribunal were questions going to the ability of PDWL to remain lawfully in this Country and to avoid persecution, and questions going to his very liberty. Such matters were peremptorily placed to one side by the Minister simply because of a personal dislike of the Tribunal decision and an unwillingness to explain

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[58] Christine Parker found that to be effective, training and education must be backed up with incentives, rewards and sanctions: Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge University Press, 2002), 121-124.
[59] *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* [1949] HCA 33; (1949) 78 CLR 389 at 400.
[60] *PDWL* [64].
[61] *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295 at 320.
[62] *PDWL first instance*.
[63] *PDWL first instance* [61]-[62], [69], [74].
[64] *PDWL first instance* [61]-[62], [69].

> his conduct, even when ordered to do so.[65]

At [68], Flick J concluded that in a proceeding in the Federal Court, be it a Minister of the Crown or otherwise, he cannot fail to comply with findings and orders made by the Tribunal or the Federal Court simply because he "does not like" them. Decisions and orders or directions of the Tribunal or a court, made under the law, are to be complied with.[66] The Minister cannot unilaterally place himself above the law.[67]

The Full Court of the Federal Court of Australia allowed the Minister's appeal against the judgment of Flick J.[68] The Full Court reasoned that the primary judge had not put with sufficient clarity the unlawful findings directed at the Minister, such that he had been denied procedural fairness in not being permitted to respond to those adverse findings.[69]

Justices McKerracher, Burley, and O'Callaghan JJ in *PDWL* further reasoned that raising the exercise of the discretion to refuse relief issue based on "bad faith" (as the primary judge did) was not sufficient to draw all these matters (i.e. unlawful findings) to the attention of the Minister.[70] As such, the Full Court took it upon itself to determine the exercise of discretion issue.[71] In that regard, at [73], the Full Court held that: '[t]here is no good reason that this Court should not, acting on the principles just stated, resolve to exercise the discretion in place of the primary judge so as to grant the relief sought by the Minister which simply requires the Tribunal to exercise its jurisdiction according to law'.

Ultimately, the Full Court reasoned that '[w]hile the relevant conduct left much to be desired and gave rise to the purported unlawful detention of an individual, the evidence contained in the [Minister's affidavit] … reveals that such conduct did not amount to "bad faith" on the part of the Minister or the Department'.[72]

Accordingly, for the Full Court, as the Minister's conduct was not co-extensive with bad faith, there was no basis for withholding prerogative relief in favour of the Minister (as jurisdictional error had otherwise been demonstrated for the Tribunal's decision). With respect, the difficulty with the Full Court's reasoning in *PDWL* is that it did not squarely consider whether prerogative relief should be withheld to the Minister on account of acting contrary to the MLP and otherwise engaging in conduct that would contravene model litigant obligations at common law.

Critically, at [35] of the Full Court's judgment, the following was said:

> … there is no doubt that the primary judge and others were correct in strongly criticising the non-release of the respondent and, in effect, the concealment of the true reasons for the failure to release him. The affidavit did not even explain that the Minister considered the respondent did not hold a visa, or state why. Although this course was adopted on advice of counsel, such *conduct fell well short of the standard that is to be expected of a model litigant such as a Minister of the Commonwealth* acting through his or her Department, or indeed any litigant, and particularly so where the court was seeking information on the purported unlawful detention of a subject (own emphasis).

A fair reading of paragraph [35] of the Full Court's judgment in *PDWL* appears to accept that the Minister had engaged in conduct that was contrary to the MLP (since the Full Court found that the Minister, acting through his Department, had engaged in conduct that fell well short

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[65] Justice Flick further reasoned another matter that was also of relevance to the exercise of the discretion is the absence of any application made by the Minister to the Tribunal to defer the "coming into effect" of its decision: *PDWL first instance* [63].
[66] *PDWL first instance* [68].
[67] *PDWL first instance* [68].
[68] *PDWL* [88].
[69] *PDWL* [58], [60].
[70] *PDWL* [58].
[71] *PDWL* [62]-[73].
[72] *PDWL* [73].

of the standard expected of a model litigant). Having made that finding, it would not be a significant leap to consider whether the Minister's impugned conduct, which contravened model litigant obligations, provided a foundation upon which to withhold prerogative relief in favour of the Minister.

Conclusion

Abuse of power by a Commonwealth party to the litigation, not amounting to bad faith, should be no bar to withholding prerogative relief (if it can otherwise be accepted that the relevant party has engaged in an infringement of the model litigant obligations at common law, readily informed by the MLP under the LSD).

In fairness to the Full Court in *PDWL*, the reasons for judgment do not precisely make clear whether the non-citizen, in that case, had expressly advanced the contention that prerogative relief should be withheld on account of the Minister acting in contravention of the model litigant obligations at common law (to be understood, in context, having regard to the MLP). At its highest, the non-citizen appears to have contended that one of the circumstances in which relief may be refused is if the applicant's conduct "has been disgraceful and he has in fact suffered no injustice".[73]

Being a discretionary remedy, there are powerful reasons why an infringement of the MLP may have relevance as to whether the grant of prerogative relief should issue in a particular case where a Commonwealth party has otherwise demonstrated jurisdictional error. Although there is undoubtedly a public interest in purported executive decisions being corrected, there is also a public interest consideration that a Commonwealth entity does not engage in conduct that has the effect of undermining the administration of justice. Nothing within the meaning of s 55ZG of the *Judiciary Act* should be taken to act as a prohibition on the argument advanced in this article.

What is being contended for is an extension of the common law model litigant obligation (readily informed by the current MLP).[74] That common law obligation may be enlivened without the necessity of an aggrieved party having to demonstrate bad faith on the part of a Commonwealth party. Depending on the circumstances of the case, there well may be consequences in a public law context for a Commonwealth party engaging in less than desirable conduct that does not necessarily meet the threshold of bad faith, to be refused prerogative relief. We expect the government as a litigant to play fair.[75]

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[73] *PDWL* [70].

[74] It is not a matter of sanctioning or 'punishing' the government litigant for their behaviour: Christopher Peadon, 'What Cost to the Crown a Failure to Act as a Model Litigant' (2010) 33 *Australian Bar Review* 239, 255. Peadon argues that the cases are better understood as turning on the particular conduct of the government litigant rather than a failure to act as a model litigant. Once it is accepted that in some of those cases that the conduct of the government litigant would not have been dealt with in the same way had the litigant been a private body, Peadon's position appears to be drawing a distinction without a difference.

[75] Appleby, n above 18, 94.

REVIEWS

Review: David Mossop, *The Constitution of the Australian Capital Territory* (Federation Press, 2021)

Bruce Baer Arnold*

The Australian Capital Territory is a quirk of federation, an artefact from the era of whalebone corsets and telegram boys in which the parochial squabble between New South Wales and Victoria about which jurisdiction would host the national capital was resolved with the answer 'neither'. It is a jurisdiction that critics dismiss as an over-indulged metropolitan council, a location for bureaucrats who did not quite cut it in the Australian Public Service, a domain of quinoa puddings and feel-good government policies that on occasion are a matter of woke self-congratulation. Critics can be unkind. *The Constitution of the Australian Capital Territory* (Federation Press, 2021) by Justice David Mossop of the ACT Supreme Court offers a different and welcome perspective that is of value for scholars, practitioners and policy-makers within and outside the Territory.[1] The 258 page book complements authoritative studies of other jurisdictions, for example Twomey's *The Constitution of New South Wales* and Harris' *A New Constitution for Australia*.[2]

In explaining the constitutional arrangements for the government of the Australian Capital Territory Mossop offers an outline of the Commonwealth enactments that make up the constitution of the Territory, most notably the *Australian Capital Territory (Self-Government) Act 1988* (Cth). The work covers the establishment of the Territory and the history of its government since 1911, addressing the granting of self-government in 1989 (a grant not unanimously applauded by ACT residents accustomed to Commonwealth support), the Commonwealth's constitutional power to make laws for the government of the Territory and the extent to which the power in s 122 of the Constitution is qualified by other provisions of the Constitution, the constitutional framework for the Legislative Assembly and the power of the Assembly to make laws and the scope of executive and judicial power in the Territory, and the division of responsibilities for land management in the Territory between the Commonwealth and Territory governments.

The book is structured as nine chapters dealing with the constitutional development of the Territory, the Commonwealth's Territories Power, Self-government, the Legislative Assembly, Legislative Power, Finance, Executive Power, Land management and Judicial Power. The emphasis is on statute and case law; there is sparse reference to non-legal literature.

The first chapter considers the history of s 125 of the national Constitution, the determination of the location of the seat of government, the acceptance of the Territory and its naming, questions of land tenure (misread by some Canberrans as a perpetual lease), administration of the Territory from 1911 to 1989, and arguments regarding statehood. The latter resurface periodically in the ACT and Northern Territory, most recently in the 2021 Ensuring Northern Territory Rights Bill 2021 that sought to 'reduce the level of Commonwealth interference with laws of the Northern Territory related to acquisition of property on just terms, voluntary assisted dying and powers in relation to the hearing and determining of employment disputes'. In a submission to the Senate Legal and Constitutional Affairs Legislation Committee considering that Bill, George Williams noted that the Australian constitution 'reserves rights

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[1] Justice Mossop's 'The Associate Judge of the Supreme Court of the Australian Capital Territory' appeared in (2020) 17(2) *Canberra Law Review* 18.

[2] Annew Twomey, The Constitution of New South Wales (Federation Press, 2004) and Bede Harris, *A New Constitution For Australia* (Cavendish, 2002).

and privileges to the states and Australians who live there, while permitting these to be denied to Territorians':

> This entrenched discrimination is made all the worse by the special powers of the Commonwealth to intervene in territory affairs. Self-government in the ACT and the Northern Territory depends upon the favour of the Commonwealth. It can at any time remove their right to be governed by a local assembly and can return either to direct federal rule.

Chapter Two of the book offers a more detailed discussion of that Territories Power, identifying over a century of territories cases before considering s 122 of the Constitution (a plenary power) and the status of the Australian Capital Territory as part of "the Commonwealth" for the purposes of s 51. Mossop discusses when are laws made under s 122, the relationship between s 122 and other provisions of the Constitution, and implied restrictions on the s 122 power. The third chapter covers the move to self-government for the Territory, identifying the self-government legislation, changes to the structure of self-government since 1989, the Territory as a "body politic under the Crown", the Crown's role, the transfer of laws at self-government and the relationship to the Jervis Bay Territory.

Chapter Four considers the ACT Legislative Assembly., discussing that legislature's basic structure, elections and dissolution, the formation of a government, deliberative procedure, the process for making laws, privileges and immunities. Chapter Five addresses Legislative Power, with a discussion of "peace, order and good government", limitations on power from the Constitution, express exclusions from legislative power in the Self-Government Act, inconsistency between Commonwealth and Territory laws, the extent to which the Commonwealth is bound by Territory laws, laws mandated by the self-government legislation, powers retained in the *Seat of Government (Administration) Act 1910* (Cth), the relationship between Territory and State laws, and 'Manner and Form' requirements.

Through a neoliberal lens government is a matter of getting and spending money. Mossop's sixth chapter deals with Finance, encompassing the public moneys of the Territory, the withdrawal of public moneys and appropriations, financial relations with the Commonwealth, borrowing and unauthorised payments. Chapter Seven concerns the Territory Executive. The chapter analyses statute and case law regarding what is the Executive, its composition, the Cabinet, the Executive's powers and responsibility, the Crown in right of the Territory, and the relationship with executive power of the Commonwealth under s 61 of the Constitution.

The penultimate chapter looks at law regarding land management, with a valuable introduction to the Planning & Land Management Act, the National Capital Plan and Territory Plan, before questions about the Canberra Airport and Googong Dam. The final chapter concerns the Judicial Power. It offers an introduction to the history of judicial power in the ACT, the constitutional position of Territory courts, s 48A of the Self-Government Act, the tenure and removal of judges, and the separation of powers.

Overall *The Constitution of the Australian Capital Territory* is a reference book that is likely to feature on the shelves of all ACT law forms and might usefully be embraced by political candidates and their advisors, particularly those whose enthusiasm for reform (or for a media opportunity) outleaps their understanding of what is constitutionally possible. A major critique of the ACT as one of the three 'human rights' jurisdictions and a work on integrity mechanisms such as the Territory's freedom of information regime remains to be written.

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STUDENT SECTION

Opting out of parenthood: A discussion on equality of reproductive rights and men's right to 'statutory termination'

Brittany Bretherton

The adoption of a right to 'statutory termination' raises interesting novel questions about parenthood and equality in reproductive rights, but also difficult fundamental questions about equality before the law. The concept of statutory termination is that men should have equal reproductive choice and rights as women by providing a reciprocal right to terminate all responsibilities relating to an unintended pregnancy. The topic is not a comfortable one and not one that has been well embraced either socially or legally in any country, including Australia. However, it is incrementally gaining acceptance and some women have started speaking out in favour of these reforms due to their own concerns about fundamental inequality under the law. The article provides an introductory discussion to the concept of statutory termination and its recent history and considers the viability and practicality of its introduction into Australia's legal system. In doing so, it draws heavily on US case law to analyse the relevant legal principles found in the common law and contextualises the discussion within the social and academic debate on relevant public policy issues.

INTRODUCTION

Abortion is a vexed issue that produces strong and emotive arguments on each side of the debate, and it is no different in the context of novel arguments in favour of 'abortion' rights for men.[1] Proposed 'abortion rights' for men – hereafter referred to as 'statutory termination' - have no physical implications for a pregnant woman, but rather take the form of severing financial and parental responsibilities and rights for children borne out of unintended pregnancies to which the father is opposed continuing.[2] It raises novel legal and philosophical questions in the specific context of reproductive rights. However, it also raises fundamental questions about whether it is acceptable, desirable, or necessary for inequalities to be written into and applied by the law where it is thought justifiable on bases of social convention, traditional notions of morality, or public policy. This article proceeds on the assumption that our society seeks to resolve and remedy inequalities under the law when and where they are identified. Within this context, the history of the concept is outlined to define the scope and application of the right to statutory termination as discussed in this article. The application of existing common law principles is then considered through an analysis of US case law but ultimately rejected as a viable source of legal foundation for the introduction of this right. The implications for Australia's legislative framework governing parental rights and responsibilities are considered and potential areas of statutory reform are outlined to give effect to a right to statutory termination. Arguments for and against the introduction of this right are considered and ultimately conclude that their introduction is necessary to achieve parity in reproductive rights between men and women and may also better serve the best interests of the child.

Context

The legal, theoretical, and philosophical implications of changing society's legal approach to parenthood are vast in breadth and complexity. A detailed identification and analysis of all issues stemming from the proposed reforms is unfortunately beyond the scope of this article.

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[1] The rights discussed may be referred to interchangeably as 'statutory termination', 'statutory abortion', 'financial termination', 'financial abortion', 'paper termination', or 'paper abortion' within public debate sources and academic literature. See, generally, Catherine Deveny, 'Financial abortion: Should men be able to 'opt out' of parenthood?' *Australian Broadcasting Corporation* (Online, 19 December 2016) <https://www.abc.net.au/news/2016-12-04/financial-abortion-men-opt-out-parenthood/8049576?nw=0>.

[2] Ibid.

Principally, the limitations of this article mean that it provides only a superficial identification of key areas of the concept, legal issues, and public and academic debate. The proposed legislative amendments offer only a high-level identification of key areas for reform and suggested key amendments that would be necessary to give effect to a right to statutory termination. Furthermore, given the intensity of views and debate within the sphere of reproductive rights, it is important to clarify that this article does not take a general position on men's or women's right. It is not, for example, argued that women's rights have reached a pinnacle and should be wound back, nor that women's rights further no further advancement. Additionally, the questions of the rights of the unborn child, or whether it is ethically or morally appropriate to bring a child into the world when one parent is vehemently opposed to its existence, are acknowledged as being relevant to the issue, but also beyond the limited scope of this article. Rather, the focus is placed on the current state of reproductive rights of men and women in the context of unintended pregnancies and the apparent tensions that arise between the state of these rights and the fundamental tenet of equality under the law.

PART I: THE CONCEPT OF STATUTORY TERMINATION AND ITS HISTORY IN BRIEF

Statutory termination is the term used to refer to a man's right in certain circumstances to legally and financially sever any legal or social ties to a child upon becoming aware of its existence during pregnancy or after its birth.[3] This form of termination is distinguished from the pregnancy termination available to women in that it has no physical bearing on whether a woman brings a pregnancy to term and bears a child. Rather, the man is only legally empowered to choose whether to assume the responsibilities of parenthood or not. A decision to terminate his status as parent would not only absolve him of financial responsibilities, but also terminate any rights to privileges in the child such as spending time with the child or playing any role in the child's life, effectively transforming his status from 'father' to 'sperm donor'.[4] There is no suggestion in this article that pregnancy termination laws should be changed in relation to the rights that women now possess, or that a man's right to terminate his parental responsibilities should have any legal impact on a woman's decision to either continue or terminate a pregnancy. It is also assumed that, in situations where each parent has voluntarily assumed responsibility for their child, they have an ongoing equal responsibility for their child's ongoing care and support, even in circumstances where they later separated.

The circumstances in which it is envisaged that this right may be enlivened is in limited cases where there was no intention between the man and woman for a pregnancy to result from intercourse, coupled with expressed opposition to the pregnancy continuing by the father. As with most areas of the law, the novel scenarios in which an unintended father might seek to enliven this right, and the potential disputable variables that might arise are potentially innumerable. However, for illustrative purposes, the types of cases where it might be applied include, for example, where a man and woman agree to use prophylactics and contraceptives prior to intercourse and mutually agree to an abortion in the event of an unintended pregnancy, but the woman changes her mind and decides against terminating the pregnancy. It would also capture situations where a woman might be deceptive about her fertility status or intentions with regards to pregnancy. It is unnecessary for the purposes of this article to consider similar situations in which a woman has a stated desire not to fall pregnant as women have existing rights to termination services in Australia, if they choose to access them.

The concept of statutory termination most notably gained traction with a 1996 article written by Stephen Hales who argued that men should not have an absolute duty to provide 'material' support to their children and should have a right of refusal.[5] Hales based his argument on the following presuppositions and the inconsistencies arising between them: that women have

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[3] Ibid.

[4] Ibid; Anne Morris and Sue Nott, 'Rights and responsibilities: contested parenthood' (2010) 31(1) *Journal of Social Welfare and Family Law* 1, 3-16.

[5] Stephen Hales, 'Abortion and Fathers' Rights' in James M. Humber and Robert F. Almeder (eds) *Reproduction, Technology, and Rights*, (Humana Press, 1996) 1, 5.

been granted an absolute right to abortion on demand; that men and women have equal moral rights and duties and should have correspondingly equal legal rights and duties; and, that parents have a moral duty to support their child once they are born and any legal duty currently supervenes those moral duties.[6] The concept was also heavily litigated in the United States through the 1970s, 1980s and 1990s, as fathers of children borne out of unintended pregnancies (hereafter referred to as 'unintended fathers') sought to avoid financial responsibility for their offspring. The most well-known of these cases was *Dubay v Wells* which, at the time, was billed as being "*Roe v Wade* For Men".[7] In *Dubay v Wells,* Dubay argued against the obligation to pay child support on grounds of reproductive fraud on the part of the mother, Wells.[8] Wells had made undertakings that she was infertile and taking contraception as an additional precautionary measure due to their mutually stated intention of avoiding an unintended pregnancy.[9] Following this case, in 1998, Frances Goldscheider, a female philosopher, produced an op-ed out of Brown University in which she voiced support for providing men with equal rights and responsibilities in fatherhood and advocated for statutory termination as a means of achieving equal rights between men and women.[10]

In 2016, the issue gained some prominence in the Australian context with an opinion piece by Australian comedian and columnist Catherine Deveny who argued strongly in favour of men's rights to statutory termination on feminist, equality, and social progression grounds.[11] Specifically, Deveny argued that: consent to sex should no longer be construed as consent to parenthood; that if it is not fair to force a woman to become a parent then it cannot be fair to force the same upon a man; and, that women would be better supported by policies and laws that allowed them to make fully informed decisions about the responsibility of single parenthood without forcing them into an ongoing situation of tension with an unintended father. Deveny's solution was to introduce rights of statutory termination for men coupled with supplementary financial support provided by the State.[12] Deveny's article has received strong support from some as the logic of 'consent to sex does not amount to consent to parenthood' applies equally to men and women.[13] Furthermore, support was subsequently expressed for Deveny's view that any notion of men being 'providers' and women being 'cared for' are founded in outdated and oppressive heteronormative values.[14] Kerri Sackville, an Australian commentator, subsequently responded to Deveny's article in vehement opposition. Sackville argued that any moves to provide men with rights abrogating their parental responsibilities would further oppress women and that, not only would it be undesirable for men to have equal rights to avoid parenthood as women, but it would be impossible until men were physically capable of bearing children themselves.[15]

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[6] Ibid.

[7] The National Center For Men, 'Roe vs. Wade....For Men: Men's Center files pro-choice lawsuit in federal court' *The Press Release* (Web Page, March 2006) <https://nationalcenterformen.org/roe-vs-wade-for-men-press-release/>.

[8] *Dubay v Wells*, 442 F Supp. 2d 405 (Lawson, District Judge) (United States District Court, E.D. Michigan, 2006) ('*Dubay v Wells*').

[9] Ibid.

[10] Frances Goldscheider, 'Men, Children and the Future of the Family in the Third Millennium', *Men, Children, and the Future of the Family in the Third Millennium* (Online article, December 1998) <https://www.brown.edu/Administration/News_Bureau/Op-Eds/Goldscheider.html>.

[11] Deveny (n 1).

[12] Ibid.

[13] Frances Goldscheider, 'The case for 'financial abortion'', *Policy Forum* (Web Page, 13 February 2017) <https://www.policyforum.net/case-financial-abortion/>; Michael Cook, 'Is 'financial abortion' an idea whose time has come? ', *BioEdge* (Web Page, 10 December 2016) <https://www.bioedge.org/bioethics/is-financial-abortion-an-idea-whose-time-has-come/12123>.

[14] Cook (n 13).

[15] Kerri Sackville, 'Swedish group wants men to be given 'legal abortion' rights ', *The Daily Telegraph* (Online, 15 March 2016) <https://www.news.com.au/lifestyle/parenting/pregnancy/swedish-group-wants-men-to-be-given-legal-abortion-rights/news-story/8b07c1a8513e6d3bd92d2ba0b490b3d0>.

Two key reasons supporting the introduction of statutory termination have emerged from the public debate on the issue: principled opposition to forcing a person to be responsible for a child they did not intend to produce or took steps to avoid producing, and, achieving parity in reproductive rights between men and women. Despite these seemingly legitimate and compelling reasons for introducing a right for the termination of parental responsibilities, all litigation on the issue in the United States has so far failed. There is currently no case in which principles of the common law have successfully been found to support a man's right to abrogate his responsibilities towards unintended offspring. However, the litigation on the issue from the United States provides a useful means of analysing the applicable common law principles to demonstrate the need for statutory reform to achieve equality of reproductive rights between men and women.

PART II LEGAL PRINCIPLES AND THE COMMON LAW

The genesis and extent of parental duties under the law have not yet been settled. There is a compelling theoretical and philosophical argument that parental duties arise by artificial social convents rather than by natural law.[16] From this, it is argued that the superficiality of social conventions explains the lack of proportionality between the extent of parental duties acquired and the level of risk or precautions taken during intercourse.[17] The social convention basis for parental duties also goes towards explaining the tolerance of inequalities in the law, as well as the inconsistencies and incoherencies provided by courts when denying relief to fathers of unintended pregnancies.[18] In contrast, the common law takes the view that parental duties arise from natural law dating back to Blackstone's Commentaries where parents were considered to have a duty to provide for the maintenance of their children as a principle of natural law.[19] Blackstone opined that, by being a party to the conception, parents entered into a voluntary obligation to support and preserve their child's life, thus giving rise to a right in the child to receive maintenance from their parents.[20]

The application of the natural law line of reasoning forms the basis of common law decisions of paternal responsibilities for unwanted children and has been relied upon to refuse relief on a number of grounds including equality, fraud or misrepresentation of fertility or contraceptive use, intentional infliction of emotional distress and financial harm, and breach of contract.[21] The only case in the US that held a mother's conduct should impact a child support award occurred in 1981 but was subsequently overturned on appeal.[22] The trial judge had held that equity required the court to read an exception into paternity statutes where a mother had intentionally deceived him regarding her use of contraception.[23] The court did not take an absolutist position of absolving the father of his child support rights, but rather held that the mother would not be entitled to child support until her resources were insufficient to meet the child's needs as a means of ensuring the child was provided for.[24]

The inconsistencies of legal reasoning noted above can perhaps be best illustrated in considering the core reasoning in *Roe v Wade* - that a woman's constitutionally protected right to privacy protects the right of any person, either married or single, to be "free from unwarranted governmental intrusions into matters so fundamentally affecting a person as to the decision whether to bear or beget a child".[25] However, this reasoning is demonstrably not

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[16] Jill E. Evans, 'In Search of Paternal Equity: A Father's Right to Pursue a Claim of Misrepresentation of Fertility' (Pt 2) (2005) 36(4) *Loyala University Chicago Law Journal* 1045, 1106-1007.
[17] Ibid.
[18] Ibid 1048.
[19] William Blackstone, *Commentaries on the Laws of England in Four Books* (Clarendon Press, 1765-1770) 447.
[20] Ibid.
[21] Evans (n 16), 1047.
[22] Ibid 3079, citing *Pamela P v Frank S* 443 NYS 2d 343 (NY Fam Ct, 1981).
[23] Ibid.
[24] Ibid.
[25] *Einstadt v Baird*, 405 US, 438 (1972).

applied and in fact is argued against by the judiciary in the context of a father's right to decide the same. Inconsistencies can also be demonstrated when considering the common law approach to consent, intercourse, and parenthood. This lends weight to arguments that duties imposed upon parents by the State result from social convention rather than any sense of natural law. Furthermore, arguments that a man's consent to sexual intercourse was contingent upon undertakings that the female was taking precautions against pregnancy or was incapable of falling pregnant have been routinely struck down by the courts.[26] This rejection of the relevance of consent is, in a strict legal sense, at odds with the courts own reasoning in cases of assisted reproduction where, for example, a couple who have created fertilised embryos must equally consent to use of the embryos.

In assisted reproductive cases, a lack of consent by the father was initially sufficient grounds to prevent the mother from impregnating herself with their jointly created embryos.[27] Subsequent legal reforms have allowed men to withdraw consent to being treated as the legal 'father' but still allow the woman to use the embryos, which, as noted above, effectively converts his status from 'father' to 'donor'.[28] Comments by the judiciary indicate that the assumption underlying these changes appears to be that, it is less harmful to prevent the viability of an embryo than to impose parenthood on an unwilling person[29] and that a man "is entitled to say that he does not want to become a father by a woman…with whom he no longer has anything in common part form the frozen embryos…".[30] Furthermore, that it would not be unreasonable for a father to decline fatherhood when he would not be in a position to play "a full and proper paternal role".[31] With assisted reproduction, each parent has the right – regardless of the other parents' preferences or intentions - to reject parenthood at any point before impregnation occurs, even though the embryo exists.[32]

The common law therefore considers that the right to not have a child or accept parenthood exists but that engaging in sexual intercourse is a course of conduct inconsistent with the exercise of that right.[33] The rationale behind this is that the reproductive consequences of a father's actions are imposed by 'operation of nature, not statute'.[34] Further, it has been held that there is no requirement for the law to correct any sense of unfairness in this context by allowing biological fathers to abrogate their financial responsibilities for supporting a child 'as a proxy for the loss of control of the events that naturally flow from sexual intercourse'.[35] We have therefore progressed from a position at common law where men had exclusive rights in their children with the mother merely entitled to 'reverence and respect',[36] to a position where women have all rights to pregnancy and to decide whether a child is brought into existence. The law further operates in such a manner as to create a strict liability standard for men who have no right to consent to sex on the belief – induced or otherwise – that there is a mutual intent not to produce a child.[37] Furthermore, the seminal case on the matter in the US, *Dubay v Wells*, found any introduction of a right for men to terminate parent responsibilities as being 'so foreign to our legal traditions that it has no "foundation", no

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[26] Melanie G. McCulley, 'The Male Abortion: The Putative Father's Right to Terminate His Interests In and Obligations to the Unborn Child' (1998) 7(1) *Journal of Law and Policy* 23-26. citing Anne M. Payne, 'Parents Child Support Liability as Affected by Other Parent's Fraudulent Misrepresentation Regarding Sterility or Use of Birth Control, Or Refusal to Abort Pregnancy', (1992) 2(5) *American Law Reports* 337, 350.
[27] *Davis v. Davis*, 842 SW 2d 588 (Tenn, 1992).
[28] Nott (n 4).
[29] Ibid.
[30] *Evans v Amicus Healthcare Ltd,* WSHC 2161, 319 (Fam, 2003).
[31] Ibid 252.
[32] Nott (n 4).
[33] *Child Support Enforcement Agency v Doe*, 125 P.3d 461, 469 (Haw, 2005).
[34] Ibid 460.
[35] *N.E. v Hedges*, 391 F.3d 832 (6th Circuit, 2004).
[36] *Dubay v Wells* (n 8), citing W.E Shipley, Women's Rights to Have Abortion Without Consent of, or Against Objection of, Child's Father', (1975) 3 *American Law Reports* 1097.
[37] McCulley (n 26), 26-28.

chance of success'.[38] What is clear from the case law is that, there are no legal principles that the judiciary is either willing or able to draw upon to recognise a right for fathers not to become a parent in the contexts discussed in this article. The only means of achieving this are through legislative reforms.

PART II PROPOSED LEGISLATIVE REFORM

It is acknowledged that the case law and common law principles discussed above are based on the US legal system and are not neatly analogous to the Australian legal context. For example, arguments based on *Roe v Wade* are not particularly translatable to the Australian context as we do not have a recognised legal right to privacy, either constitutionally, in statute, or at common law. Furthermore, a key argument underpinning the decisions of US courts is that "it is well settled that the State does not have an affirmative duty to correct underlying inequality in society".[39] While this may be true of the social context in America, it is not necessarily true for the Australian context where the State has a much more prominent role in supporting vulnerable members of society. Additionally, it is plainly open to the Australian Government to legislate on this matter at the federal level under the Australian Constitution which provides the federal government with the power to make laws with respect to 'divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants'.[40]

As a brief overview of the relevant aspects of Australia's legal framework, women's abortion rights are regulated at the State level and parental rights and obligations are principally regulated federally under the *Family Law Act 1975 (Cth)* and the *Child Support (Assessment) Act 1989 (Cth)*. The current state of abortion rights in Australia provides women generally with access to abortion in all States but with varying degrees of access depending on the stage of pregnancy. For example, in Queensland, abortion is legal up to 22 weeks but thereafter requires the approval of two doctors whereas in Tasmania, abortion is only available up to 16 weeks before the requirement for two doctor's approval is triggered.[41] In the Northern Territory, the laws are stricter again with abortions being legal up to 16 weeks with one doctors' approval, up to 23 weeks with two doctors' approval, and illegal thereafter unless required to save the mother's life.[42] None of the state-level or federal level laws in Australia provide men with any rights in relation to abortion, including either notification of intent to terminate a pregnancy or any right to participate in any part of the decision-making with the mother. Under the current legal framework for parental rights, parents have a presumption of equal shared parental responsibility, but this does not translate into a right to equal shared custody.[43] Children also enjoy a right to know and have meaningful relationships with each parent and to be protected from harm.[44] Parents also have a duty to support the child, regardless of who the child lives with, and parents are able to arrange this between themselves if they obtain independent legal advice and meet a range of obligations.[45] Alternatively, parents can apply for a government conducted child support assessment to determine the amount of payable child support.[46] The legislative framework is complex, and reforms should seek to give effect to a right to statutory termination in a simplified manner.

A number of proposals have been raised in academic literature and social debate for resolving the inequality between men and women's rights and for introducing frameworks for giving effect to a right to statutory termination. Goldscheider advocated for women to be obliged to

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[38] *Dubay v Wells* (n 8), 18-19.
[39] *Deshaney v Winnebago County Department of Social Services*, 489 US 189, 195 (1989).
[40] *Commonwealth of Australia Constitution Act 1900* s51(xxii).
[41] *Termination of Pregnancy Act 2018* (Qld); *Reproductive Health (Access to Terminations)* Act 2013 (No 72. Of 2013) (Tas) pt 2.
[42] *Termination of Pregnancy Law Reform Act 2017* (NT) pt 2.
[43] *Family Law Act 1975 (Cth)* s 61DA.
[44] *Family Law Act 1975 (Cth)* s 60B.
[45] *Child Support (Assessment) Act 1989* (Cth) s 3; pt 6.
[46] Ibid pt 4.

inform their sexual partner as soon as the mother becomes aware of the pregnancy and to decide within a reasonable period of time whether to continue with the pregnancy.[47] Further, Goldscheider favoured penalties for women who failed to meet their obligations for violating their sexual partner's rights.[48] Deveny suggested that, similar to an organ donor register, a 'no children' register be created so that men could register their lack of desire to have children.[49] The intent behind this would be to provide men with a means of evidencing their lack of desire to have children. McGulley provided a draft statute that would require women to notify the father within a specified period of time; would provide the father with options to terminate his responsibilities and rights regardless of whether the woman complied with the statutory notification periods or not; and, would create an avenue to petition the courts to recognise his termination of rights and responsibilities with a specified period of time.[50] In general, the thrust of the various proposed methods of giving effect to a right to statutory termination base their timeframe on the point of viability of a foetus and focus on the following key requirements: for the father to have demonstrated their lack of reproductive intent, to have taken active steps in to give effect to that intention, and to communicate their opposition to continuing with the pregnancy once they became aware of it.[51]

The fundamental problem with the proposed approaches is that they rely heavily on the introduction of a burden of proof and fault element as triggering mechanisms for enlivening a right to statutory termination. However, this has significant potential to increase tension between unintended mothers and fathers, and to result in an influx of litigation to the court systems. Any reforms should instead focus on empowering each parent to make their own decision independent of the other, taking into consideration their individual life circumstances. The aim of these reforms should be for men and women to gain have equal rights to choose whether to embrace the rights and responsibilities of parenthood, and for any resulting child to be wanted and supported by a willing parent or willing parents. The focus of the reforms suggested in this article therefore focus on implementing carve outs in existing laws for unintended fathers. Although state level abortion laws do not require reform and would be unaffected by a right to statutory termination, they may have implications for the timeframe within which a man's right to statutory termination would need to be exercised. However, as demonstrated above, the abortion laws in Australia are not harmonised to a single point of pregnancy stages, so determining the timeframe within which a statutory termination would have to occur requires considered thought. It may not be satisfactory for the right to decide to simply match the equivalent state-level timeframe within which a woman must decide whether to continue with or terminate a pregnancy.

Giving effect to a right to statutory termination would require reforms to Australia's federal *Family Law Act 1975 (Cth)* and *Child Support (Assessment) Act 1989 (Cth)* at least. The *Family Law Act 1975 (Cth)* would require changes to at least Part VII, Division 2, to provide an exception to section 61C, which currently stipulates that each parent has parental responsibilities. It would also be prudent to amend Part VII, Division 1, Sub-division BA to allow the court to determine that the best interests of the child may be best served by allowing the father to sever his financial and other ties to the child. Corresponding reforms would also be required for the *Child Support (Assessment) Act 1989 (Cth)* Part 3 to exclude application of the Act to fathers who had exercised their right to statutory termination. The *A New Tax System (Family Assistance) Act 1999 (Cth)* already provides for Government funded financial assistance to be prorated depending upon the percentage of care that a parent undertakes (*New Tax System (Family Assistance) Act 1990 (Cth)* s 35B) and this is further adjusted if there are any relevant child support arrangements in place (*New Tax System (Family Assistance) Act 1990 (Cth)* sub-div F). It would appear that the legislation has been drafted with sufficient flexibility to allow for scenarios where a parent may conceivably have

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47 Goldscheider (n 10).
48 Ibid.
49 Deveny (n 1).
50 McCulley (n 26).
51 Ibid; Goldscheider (n 3); Deveny (n 1).

all care time of a child and receive government financial support that would otherwise be provided through child support. However, significant research and analysis would be required to properly consider the legislative reform implications of financial support under Australia's social support and tax legislation.

PART IV RECONSIDERING THE BEST INTERESTS OF THE CHILD

The right to statutory termination in the terms discussed in this article is relatively modern; however, critics of the proposal argue that it is simply a return to times in which men had no responsibilities towards children born out of wedlock and women had no recourse to obtain financial assistance.[52] This line of argument cites concerns that, although women have the choice of not continuing with a pregnancy, enabling men to abrogate their responsibilities will perpetuate the oppression that women have historically faced.[53] However, within the modern context, the provision of child support is arguably primarily providing for the best interests of the State as it has a vested interest in ensuring that the mother and child are not relying on the State and taxpayer for public assistance.[54] Yet, the relationship between citizen and the State has evolved to a point where there is now an expectation that the State provide support for members of society, and vulnerable members of society in particular. Children are undoubtedly vulnerable members of society, and it is justifiable for the State to intervene in circumstances where it is in the best interests of the child. It seems particularly reasonable for the State to intervene in circumstances where a child is caught between parents who cannot agree on the most fundamental of issues - its very existence.

In these circumstances, it may be in the best interests of the child for a number of reasons to allow the reluctant father to remove themselves and there are compelling arguments supporting this. For example, Swedish sociologist and feminist academic Karen Sjurop argues in favour of the proposal on grounds that voluntary termination of parental rights may serve to protect the best interests of the child by avoiding constant rejection through non-payment and subsequent conflict between the parents.[55] This is further echoed by arguments that two parents do not always make for a positive and stable environment for a child, and that it may be less traumatic and disruptive for a child if the father is able to remove himself from the situation in the very early stages of the child's life.[56] The current approach of forcing fathers to remain involved appears to be based on assumptions that child rear must necessarily take place within a family context resembling a traditional 'nuclear family', and that a parent's involvement is therefore assumed to be in the best interests of the child.[57]

This appears to further assume that all adults are capable of looking after themselves to some degree and, by extension, are also capable of caring for a child. The courts themselves assume that 'many…will necessarily expand the boundaries of their moral sensibility' and that parenthood 'has the potential to set in motion a process of engagement that is powerful and cumulative, and whose duration spans a lifetime'.[58] Reconsideration of these assumptions is, however, justified in circumstances where either parent states that they are unwilling or unable to assume the significant responsibilities of raising a child. Currently women have a range of options available to them to enable them to make this decision in a responsible and considered way; however, as a society, we currently cast aside any opinion of potential fathers as 'intrusive,

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[52] Joseph Millum, 'How Do We Acquire Parental Responsibilities? ' (2008) 34(1) *Social Theory and Practice* 73, 85.
[53] Claudia Mills, 'What Do Fathers Owe their children?' in A. Byrne. R Stalnaker, and R Wedgwood (eds) *Facts and Value: Essays on Ethics and Metaphysics for Judith Jarvis Thomson* (A Bradford Book, 2001) 183, 195.
[54] McCulley (n 26); Ibid.
[55] Interview with Karen Sjorup, Associate Professor (Kristian Villesan, Information, 6 February 2016) <https://www.information.dk/moti/2016/02/juridisk-abort-god-ting-ogsaa-kvinderne>.
[56] Deveny (n 1).
[57] Interview with Sjorup (n 55).
[58] *Rivera v Minnich* 483 US 547, 584-85 (1987).

irrelevant, and patriarchal'.[59] In some circumstances, it may be more responsible for a parent to remove themselves and this may also better serve the best interests of the child. The means of achieving this are through re-evaluating society and the law's approach to parental responsibility and introducing reforms that empower men to make their own choices, whilst also empowering women to take on the role of motherhood without having to choose between financial destitution or ongoing conflict with an unwilling father.

CONCLUSION

The current state of reproductive rights is one in which women have rightfully gained the power to control their bodies and to choose when and how they become parents, if at all. However, male parties to an unintended pregnancy have largely lost control of their reproductive rights. They have no recourse once a pregnancy occurs, and the strict liability threshold employed by the current legal regime means that their primary choices are preventative in nature: to abstain from sexual intercourse. It may be that this is an area of life and law where it is neither achievable nor desirable to realise equality, and that society is satisfied with the status quo as the lesser of two evils. If so, then the current state of law which imposes parenthood on reluctant fathers is suitable if unjust. If this is the case then, in situations where the necessary means of achieving true parity of rights is unpalatable to the communal conscience, we must acknowledge that we are not in truth seeking equality, but rather are satisfied with qualified equality. However, any notion that equality should be abandoned because it is inconvenient or unpleasant is arguably a more repellent notion than reassessing the dominant historical social narrative that intercourse necessarily gives rise to each parent's consent, obligation, and capacity to raise a child. If inequalities are neither desirable nor necessary, then rights for men to terminate parental responsibilities in the limited circumstances discussed in this article may be beneficial for the fathers and mothers. Furthermore, in circumstances where a father opposes the child's existence, allowing an unintended father to voluntarily remove himself from the child's life potentially has the added benefit of removing a significant source of tension from the child and mother's lives. Where the financial support is supplemented by the State, this situation may ultimately better serve the best interests of the child.

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[59] Kirsten West Savali, 'Should Men Have the Right to 'Financial Abortions'?', 20 December 2011) <https://www.huffpost.com/entry/fathers-financial-abortion_b_1015286?guccounter=1>.

Sic Itur Ad Astra: The CHM Principle, Celestial Bodies, the Moon Agreement and the Artemis Accords

William Gallagher*

This article considers the Common Heritage of Mankind Principle (CHM) in an exploration of the *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies,* the *Agreement Governing the Activities of States on the Moon and Other Celestial Bodies* and the 2020 *Artemis Accord.* From an Australian perspective, the Moon Agreement is inadequate international law because of its incapacity in regulating great powers due to the low rate of signature on the treaty. As such, signatories are put at an unreasonable disadvantage. Regulation should develop for the purpose of international cooperation and ratification. The article discusses Australia's interests and the shape of regulation that reflects the CHM.

I Introduction

> The exploration and use of outer space, including the Moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all mankind.

The above statement is articulated in Article 1 of the *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies* (herein referred to as the 'OST'). [1]Article 1 of the OST has defined the way in which space affairs have been conducted since 1967. The treaty's primary purpose is to foster international cooperation in the peaceful use of outer space. Whilst the OST is not the primary focus of this article, Article 1 of the OST highlights an underlying principle known as the common heritage of mankind principle (herein the 'CHM principle') which will present a large focus of this article. *The Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (herein referred to as the 'Moon Agreement'*)[2] is the predominant piece of international law that elaborates on the common heritage of mankind principle pertaining to space, as such this piece will be a primary feature of this article with a particular focus on Article 11 of the Moon Agreement which relates to the exploitation of celestial bodies.

At the time of space laws' inception, the predominant concern of the United Nations (UN) and its signatories was the exploitation of space by state actors as a consequence of the instability presented by the Cold War. From the perspective of maintaining international order, it is logical that regulation surrounding space mining should develop similarly to deep sea mining due to their likeness. Their likeness exists through their common trait of being beyond national sovereign claims and these area's use for scientific and peaceful purposes. As such, at the time of space law's inception, it made sense to create law that would be analogous to existing law. However, from an Australian domestic perspective, the Moon Agreement is insufficient as a

* William Gallagher is a Canberra Law School graduate. Sic itur ad astra (Thus, one journeys to the stars) is voiced in Virgil, Aeneid IX 641 by Apollo to Aeneas's young son Iulus

[1] *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies,* opened for signature 27 January 1967, 610 UNTS 205 (entered into force 10 October 1967), art 1.

[2] *Agreement governing the Activities of States on the Moon and Other Celestial Bodies*, New York, United States of America, opened for signature 5 December 1979, UNTS 1363 (entered into force 11 July 1984).

piece of international law because of its incapacity in regulating great powers due to the low rate of signature on the treaty. As such, signatories are put at an unreasonable disadvantage. Regulation should develop for the purpose of international cooperation and ratification whilst also discussing Australia's interests in this space.

Australia is the only state to have signed both the Artemis Accord[3] and the Moon Agreement.[4] Australia must spearhead the development of international law regulating asteroid mining for this reason. Australia should seek the support of member states to the Moon Agreement to amend the agreement, however, this is highly unlikely and as such it will ultimately require Australia to choose to withdraw from the Moon Agreement. Whilst extreme, withdrawing support from the Moon Agreement will allow Australia to align its' values with the US and benefit from the eventual exploitation of celestial bodies. Aligning Australia's interests with the United States will continue to strengthen the two states' longstanding positive relationship, as well as Australia's relationship with other signatories such as the United Kingdom, Japan, and the Republic of Korea. Simply put, the primary considerations of this article are:

a) The common heritage of mankind principle; and

b) The development of regulation concerning deep sea mining; and

c) How the law should develop from an international perspective pertaining to the common heritage of mankind principle and celestial body exploitation; and

d) How the law pertaining to celestial body exploitation should develop from an Australian domestic perspective.

This article looks at how the common heritage of mankind principle developed over the 20th and 21st centuries. It will further analyse events or circumstances that it applies to, the elements of the principle, and the principle's legal status. Through this analysis, it becomes clear that the meaning of the common heritage of mankind principle is ambiguous despite its use in international law over the past several decades.

As a result, this presents significant challenges when determining how asteroid mining should be regulated. In combination with this, the Moon Agreement is effectively useless presenting further challenges regarding enforceability. The Agreement is ineffective because no powerful state has agreed to be bound by it such as the United States of America, the Russian Federation and China.

Purpose

This article contributes to the evolving area of international space law as well as Australian domestic legislation. Literature in this space exists but is limited in its application to Australia. Due to Australia's new membership to the Artemis Accord, there is next to no literature discussing the complexity of the relationship between the two. As such, the path for Australia is one to be determined. This article contributes to discussion by analysing the strengths and weaknesses pertaining to international law with respect to the principle of the common heritage of mankind and how it currently impacts and will impact the regulatory schemes behind global mining industries. In conjunction with this, Australia's advanced mining capability is a strength it may choose to exploit to further strengthen its economic prowess through cooperation with the United States of America.

The exploitation of celestial bodies is the primary focus of this article. However, in order to aptly analyse the law surrounding this industry, it is necessary to analyse deep-sea mining in order to get a complete understanding of how the law may develop. The Deep-sea and its

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[3] *The Artemis Accords: Principles For Cooperation In The Civil Exploration And Use Of The Moon, Mars, Comets, And Asteroids For Peaceful Purposes,* signed 13 October 2020, entered into force 13 October 2020, section 10.

[4] *Agreement governing the Activities of States on the Moon and Other Celestial Bodies*, New York, United States of America, opened for signature 5 December 1979, UNTS 1363 (entered into force 11 July 1984). Australia acceded to this Agreement in 1986.

exploitation is intrinsically linked with the exploitation of Outer Space, states such as the United States have refused to ratify the UN Convention on the law of the sea because of this link.[5] Moving on, the UN Convention on the Law of the Sea, the related Implementation Agreement, the Moon Agreement, and the Artemis Accords will be the primary pieces of law to be analysed through this article. The Moon Agreement, different to the Outer Space Treaty, is one of 5 treaties enacted to regulate the exploration, exploitation, and colonisation of Space under international law. It is widely accepted as the least effective treaty that governs space due to its failure to encourage global powers to be bound by it. Australia is one of the few middle powers to have signed the Agreement, as a result of this, Australia should continue to fulfil its obligations under the agreement until such time it chooses to withdraw, or amendments are made to the Agreement so long as the amendments encourage superpower states to be bound by them.

The Artemis Accords is an agreement that was signed in November of 2020 by Australia in conjunction with the United States and several other states. Many of the principles found within the Accord are contrary to the Moon Agreement and as such Australia has found itself in a precarious position that must be navigated through. This precarious position is because of conflicting provisions relating to celestial body exploitation, which, if not resolved would result in Australia breaching international law.

This article will also briefly look at Australia's domestic legislation to provide an understanding of the country's current interests and approach to space. The main focus of this article is that of celestial body exploitation. The article will draw analysis of the law of the sea, specifically the provisions and regulation presently developing around deep-sea mining in order to discuss the difficulties presented by the common heritage of mankind principle.

This article largely uses comparative research methodology by comparing primary sources such as the *United Nations Convention on the Law of the Sea* (UNCLOS) and the *Moon Agreement* to understand how the law pertaining to asteroid mining may develop into the future and provide suggestions for reform and development by comparing the law that is currently developing surrounding Deep-Sea mining. It further uses secondary sources to discuss the relationship between the Moon Agreement and the Artemis Accords from an Australian perspective.

Structure

This article is comprised of four themed sections. Section 2 begins by laying out the origins and meanings of the common heritage of mankind principle over the past 70 years through reference to Deep Sea mining and the Antarctic treaty, thus connecting it to the discussion found in Section 3.

Section 3, in combination with its analysis of the International Seabed Authority and Deep-Sea mining will look at international law surrounding asteroid mining through reference to the Moon agreement and provide comment on how the law should develop in the interest of all mankind. This article notes that to represent the entirety of humankind's interests is subjective as perspectives differ from a variety of factors such as culture, economic capacity, age demographics and a number of other factors, especially geopolitical tensions. The goal of the implementation of any system must focus itself on fairness. This article looks to make a judgement as to what is in the interest of mankind by evaluating the principles primary components that are referenced in Section 2, specifically regarding the peaceful purposes clauses, environmental clauses, and economic benefit.

The fourth section is concerned with the interaction between the Moon Agreement and the Artemis Accords. It will discuss how Australia's present position, if it were to act upon either agreement would result in a contravention of the other agreement. It will discuss Australia's interests and provide suggestions as to how the Moon Agreement should develop from an Australian perspective. In the alternative, it will provide reasoning as to why Australia may

[5] K Wong "Rumsfeld still opposes Law of Sea Treaty." *The Washington Times*, 14 June 2012.

wish to withdraw from the Moon Agreement until such time that reasonable amendments are made to encourage global participation in the Agreement. The article will then conclude, presenting its findings and suggestions from both an International, and domestic Australian perspective.

The Common Heritage of Mankind Principle

This section discusses the origins of the common heritage of mankind principle and provides three examples of its use in modern international law. It then presents arguments in favour of and against the principle. It will wrap up by explaining why the principle in its current form is too ambiguous for it to be effective in regulating signatories whilst simultaneously serving as a barrier to encourage global powers to become signatories.

The CHM Principle is of particular importance to this article, and moreover, the future of Space Mining when looked at from the perspective of the UN and developing nations. It must be understood that in the principle's current form in law it is not possible to gather a complete understanding from any single definition this thesis could present. Rather, an analysis of each piece of law that contains the principle would have to take place. Clearly, this presents difficulty to states and non-state actors alike due to its inconsistency in international law. In spite of this, this article gives credit to, and notes that the original purpose of the principle was described by the father of the law of the sea as:

> In ocean space, … the time has come to recognise as a basic principle of international law the overriding common interest of mankind in the preservation of the quality of the marine environment and in the rational and equitable development of resources lying beyond national jurisdiction.[6]

Pardo later elaborated upon his wishes for the concept of the principle as:

> [F]irst, the common heritage cannot be appropriated — it could be used but not owned; second, the use of the common heritage required a system of management in which all users must share; third, it implied an active sharing of benefits, including not only financial benefits but also benefits derived from shared management and exchange and transfer of technologies; fourth, the principle of common heritage implied eventual reservation for peaceful purposes; and, finally, it implied transmission of the heritage substantially unimpaired to future generations.[7]

The basic pillars of the principle are found within the above quote and encapsulate the purpose and basic meaning of the principle from Pardo's perspective. This article seeks to provide clarity surrounding the principle by referring to the principle as the rational and equitable development of resources lying beyond national jurisdiction. To provide further clarity, as discussed in part 2.3, the UN should seek to further clarify what it means when stating that[8] resources should be developed or shared equitably. Consequently, space, planets, asteroids, and other celestial bodies all fall within this category. As such, these bodies, through this article' understanding ought to be subject to equitable and rational development and exploitation. Of further note, whilst the principle was coined for the purpose of the law of the sea, its first implementation into law was in fact the Moon Agreement, which was adopted by

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[6] A. Pardo, *The common Heritage; Selected Papers on Oceans and World Order 1967–1974* (Malta University Press, 1975), 176

[7] A. Pardo and C. Christol, 'The common Interest: Tension Between the Whole of the Parts' in MacDonald and Johnston (eds) *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory* (1983) 273

[8] *Article 140, UNCLOS; see also Agreement governing the Activities of States on the Moon and Other Celestial Bodies*, New York, United States of America, opened for signature 5 December 1979, UNTS 1363 (entered into force 11 July 1984), Article 11(7)(d).

the general assembly in 1979, [9] though it did not enter into force until 1984 whilst the UNCLOS III entered into force in 1982. This is significant to this article because it demonstrates the inefficacy of the Moon Agreement in encouraging participation whereas UNCLOS III may be seen as a successful international treaty.

As explained above there is little to no consensus on what the principle means and what obligations it sets out. Both from an analysis of the law, and from the perspective of developing and developed nations which is to be explained below. The only consensus that presently exists is that the principle is a concept for the management of areas that are not within national jurisdictions. In summary, it appears that the principle in its present form sets out a moral undertaking rather than any meaningful legal obligation. If the principle provided a legal obligation on its own, then any subsequent provisions, such as those that exist to provide for peaceful purposes would become unnecessary. In actuality, it appears that the only obligation, either legal or moral that exists, is that mankind, or humankind recognises that the maintenance of a resource, or a bundle of resources is in the interest of mankind.

It may perhaps be wiser to recognise the principle as a bundle of provisions, rather than any single article. [10] This article does not seek to understate the importance of moral obligations such as the principle. However, it does recognise that in its current form it is only possible to gather a semblance of understanding of the principle on a case-by-case basis by analysing the content of each treaty rather than a single cohesive definition by which a state, or non-state actor may refer to.

Differing perspectives on the CHM

This article understands that a certain level of ambiguity may at times encourage inclusion in treaties, however, where it becomes too ambiguous, its efficacy becomes no more than that of a political concept, resulting in an idea rather than any concrete legal obligation. Due to the nature of the principle as it stands in the UNCLOS III, the principle seemingly questioned long standing international legal principles by shifting away from the centrality of state sovereignty and national interests to one of global benefits. This was controversial among states that had previously interpreted the 'freedom of the high seas'[11] as a right to use the oceans and seas as they please, resulting in the degradation and pollution of the oceans and seas with little to no regard for the environment nor the economic interests of developing nations.[12] The creation of the principle brings this article to its analysis of how it has been included in law pertaining to Deep-Sea mining, the Antarctic treaty, and inevitably, the Moon Agreement to demonstrate its broad use and ambiguity in its application. Of particular relevance, Part 2.3. No Man's Seabed discusses the interpretation of the term equitably versus equally to demonstrate one of the challenges that is posed by the principle.

No Man's Seabed

The purpose of the UNCLOS III is stated in its preamble, which among other things, the primary purpose of the convention prioritising the creation of a legal order which will facilitate international communications and the peaceful use of the sea and that the CHM principle is developed relating to the seabed for the purpose of ensuring that any exploration and exploitation of the seabed is carried out for the benefit of mankind as a whole.

Whilst a number of other important areas of law are mentioned in the preamble that are foundational to the convention, the inclusion of the CHM principle demonstrates that it was

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[9] *Agreement governing the Activities of States on the Moon and Other Celestial Bodies*, New York, United States of America, opened for signature 5 December 1979, UNTS 1363 (entered into force 11 July 1984), Article 11.

[10] *Agreement governing the Activities of States on the Moon and Other Celestial Bodies*, New York, United States of America, opened for signature 5 December 1979, UNTS 1363 (entered into force 11 July 1984), Article 11; see also Articles 136 – 149.

[11] Please see Article 87 of UNCLOS III.

[12] J A Jiru, Comment, Star Wars and Space Malls: When the Paint Chips Off a Treaty's Golden Handcuffs, *42 S. TEX. L. Rev.* 155, 161.

also to be considered as foundational upon international law. The succeeding paragraphs, in addition to further discussion in section 2 will analyse whether UNCLOS III has been effective at implementing the CHM Principle. The principle was not a passing thought, it was a central principle in the convention. Specifically, the convention states that: 'The United Nations… declared that the area of the seabed and ocean floor…. (are) beyond the limits of national jurisdiction, as well as its resources, … are the common heritage of mankind, the exploration and exploitation of which shall be carried out for the benefit of mankind as a whole…'[13] The inclusion of the principle into the UNCLOS[14] as illustrated through the preamble, is vastly important, and similarly to the Moon Agreement resulted in much controversy. This indirectly resulted in the US, among other states, refusing to become a signatory and instead creating their own pieces of domestic law and multilateral agreements by which to regulate themselves.[15] Whilst the US originally declined to become a signatory to the convention, it eventually signed a complimentary agreement which amended the convention in 1994. As of 2021 the US has not ratified the Convention nor the agreement. It should also be noted, that in spite of the US' refusal to ratify the convention, it has yet to provide any licenses to non-state actors that would allow them to exploit resources outside of their territorial waters. The US was able to be convinced to sign the 1994 Agreement due to changes in the way that the International Seabed Authority (ISA) was to operate, the change in the decision-making system allows the individual interests of states to override the interests of mankind. [16] The US, in its decision to refuse signing the convention stated that, it was opposed to the original system as it "unfairly and unnecessarily granted a disproportionate voice to developing countries that have little or no investment in seabed mining operation." [17] This view was echoed by other developed nations.[18] Excluding the states which have chosen not to sign or ratify either the Convention or the Agreement, the CHM principle primarily concerns itself with the management and access to resources rather than necessarily the ownership of territory. This is the case because the principle deals with international management of resources within a territory rather than the territory itself. [19]

Under the principle, claims of titles are worthless and unrecognised,[20] thus the issue becomes access. The primary benefit of the principle comes to developing and landlocked nations, their understanding as the principle means that any designated area falls under the jurisdiction of no single sovereign, but instead to all nations. This understanding unsurprisingly is of contention to developed states, which interpret the principle as meaning that 'any state can exploit the natural resources so long as no single nation claims exclusive jurisdiction.'[21] Effectively, access is given to all states, whether they choose to, and whether they have the capacity to exploit that access is up to them, thus not burdening developed nations.

A significant issue within the provisions providing for the principle can be found in Article 140(2) of the convention, particularly, it governs the rules for the authority stating that it "shall

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[13] *United Nations Convention on the Law of the Sea,* opened for signature 10 December 1982, UNTS 1833, 1834, 1835 (entered into force 16 November 1994) Preamble.
[14] *United Nations Convention on the Law of the Sea,* opened for signature 10 December 1982, UNTS 1833, 1834, 1835 (entered into force 16 November 1994) Art 136.
[15] *The Deep Seabed Hard Mineral Resources Act*: 30 U.S.C. §§ 1441 – 1444 (1980); states such as Germany, France, the UK, Japan and the then Soviet Union also developed their own law, most of these states excluding the USA have since ratified the convention.
[16] E Guntrip (2003). The common Heritage of Mankind: An Adequate Regime for Managing the Deep Seabed? *Melbourne Journal of International Law,* 376 4(2) 392
[17] M Harry, 'The Deep Seabed: The common Heritage of Mankind or Arena for Unilateral Exploitation?' (1992) 40 *Naval Law Review* 207, 22
[18] Ibid.
[19] C Joyner, The Concept of the common Heritage of Mankind in International Law' (1999) 13 *Emory International Law Review* 615, 620.
[20] C R Buxton, P'roperty in Outer Space: The common Heritage of Mankind Principle vs. the First in Time, First in Right, Rule of Property' (2004) 69 *Journal of Air Law & Com.* 689, 692 (2004).
[21] M E. Schwind, Open Stars: An Examination of the United States Push to Privatize International Telecommunications Satellites, 10 *Suffolk Transnatl L. Rev.* 93, 97(1986).

provide for equitable sharing of financial and other economic benefits…"[22] The issue of contention is the term equitable, if interpreted literally, equitable sharing may imply sharing based on contribution to the exploitation of materials. Conversely, if equal were to be used, it would imply dividing the benefits evenly, this, among other things was part of the reason the United States refused to become a signatory to begin with. The usage of equitable sharing is also seen in the Moon Agreement. Further, relating to the Moon agreement, it would be prudent, from an international perspective to provide further clarity on the present usage of the term and make necessary amendments to encourage signature and ratification. The principle in action will be further discussed in section 2 where it will analyse the application of the principle relating to the International Seabed Authority and its impact on deep sea mining.

As mentioned above, a subsequent Agreement related to UNCLOS III was adopted in June 1994 that complemented the convention. This Agreement, formally known as the *Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea* (the "Implementation Agreement")[23] amended a number of controversial provisions found in the convention. Among other things, the Implementation Agreement reduced operating costs of the International Seabed Authority, protected intellectual property rights by eliminating obligatory technology transfers and changed the way voting was to occur in the ISA. It further developed the meaning of benefit sharing by developing an economic assistance fund, which is to be solely financed through payments from contractors and voluntary contributions. Instead of the division of resources that have been exploited, the ISA has come up with an alternate scheme best understood as a parallel system, effectively, a parallel system is the division of an area, not necessarily having common borders, being split into two areas of equal commercial value. The parallel system is explained in further detail in this section. This system will be used as a suggestion as to how the United Nations may be able to encourage the participation by larger states into a complimentary agreement to the Moon Agreement. This would have a similar premise as the Implementing Agreement.

Sovereign Claims on the High Seas

As has been discussed in prior paragraphs, an important part of the principle is that it restricts and refuses to recognise any sovereign claim over any area within. Effectively, part of the principle provides ownership to the entire world over these areas, but the ownership only exists in its entirety and cannot be divided. Articles pertaining to sovereign claims over the high seas are featured throughout UNCLOS III. Firstly, it is mentioned in the preamble, following that it is mentioned in Part VII pertaining to the high seas generally, and is further mentioned in Article 137 which is the core of the convention's position on the principle. [24]

Antarctica

Whilst the Antarctic Treaty does not explicitly contain the CHM Principle, many of its' provisions feature similar characteristics to the effect of many of the provisions found in the UNCLOS III or Moon Agreement. Articles I-III all echo many of the provisions that assist to make up the principle as can be seen below:

(1) Article I mandates that: Antarctica shall be used for peaceful purposes only. This concept can be found in UNCLOS III Articles 88 and 141 for example, Art 141 of

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[22] *United Nations Convention on the Law of the Sea,* opened for signature 10 December 1982, UNTS 1833, 1834, 1835 (entered into force 16 November 1994) Art 140 (2); a number of additional articles exist pertaining to the principle. Please see, Articles 137 (non-appropriation principle) 139 (state responsibility), 141 (use for peaceful purposes), 143 (scientific research for the benefit of mankind), 145 (environmental protection), 148 (promotion of cooperation, particularly developing states) and articles 156-185 (management of the area through the ISA, discussed in section 2) for further reference.

[23] *Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea,* opened for signature 28 July 1994, entered into force 16 November 1994.

[24] *United Nations Convention on the Law of the Sea,* opened for signature 10 December 1982, UNTS 1833, 1834, 1835 (entered into force 16 November 1994) Art 137.

UNCLOS specifically governs for the area to be used exclusively for peaceful purposes and is prescribed for under the CHM principles.

(2) Article II mandates that: freedom of scientific investigation and cooperation… shall continue.

(3) Article III mandates that: scientific observations and results from Antarctica shall be… made freely available. [25]

Whilst this article specifically analyses the principle with respect to celestial body mining, the Antarctic Treaty demonstrates that it is the provisions subsequent to the principle within a treaty that empower the principle, and that its' exclusion from a treaty does not expressly remove the moral obligation to protect a resource, or area of land. In addition to the Antarctic Treaty, another agreement, known as the Protocol on Environmental Protection (the Madrid Protocol)[26] bans mining in Antarctica indefinitely, rather than economic reasons, the common heritage of mankind exists through the world's interest in maintaining the environment by banning mining. Whilst this does not alone imply the existence of the CHM principle in Antarctica, if it is looked at from a broad perspective, it can be observed that the principle, or a significant number of components found within the principle can be found in Antarctic international law, and as such, it is reasonable to consider Antarctic International law a part of the CHM principle.

The Antarctic territory is presently subject to legitimate territorial claims from 7 states; however, the Antarctic Treaty has barred any claim from existing from 1961 onwards, further, no claim can be enlarged. As such, Antarctica's system is quite different to that of the Moon Agreement or UNCLOS III. As such, the principle of common heritage stands, albeit with exceptions due to historical claims. Noting these exceptions, similarly to the UNCLOS III, there exists an environmental and economic interest in Antarctica. These interests are protected by the treaty and the Madrid Protocol in a way that is not unsimilar to the law of the seas. As such, many of the core features found within the CHM principle exists within Antarctica.

CHM Provisions

In summary, the CHM principle retains the following core tenets, an area beyond claims of national sovereignty, an objective to protect a resource or area in the interest of all mankind, the development of an area for scientific advancement and the interest in maintaining peace in any area provided for. The previous paragraph established that the CHM principle can apply without being explicitly stated. As such, the CHM principle is best described as a bundle of provisions rather than any single term, it is present in the Antarctic territory and treaty and could continue to exist in the Moon Agreement were Article 11 be amended or removed in line with the suggestions provided for in the next sections.

The Moon Agreement

The Moon Agreement was the first piece of international law that included the CHM principle. Whilst it was the first, it is regarded as the least impactful piece of law containing the CHM principle because of its low participation rates as a result of contentions surrounding Article 11. Moreover, it is arguably the least impactful piece of Space law. Due to the Agreement's low number of signatories, including powerful states such as the USA, the Russian Federation, and the People's Republic of China. As such, the states that are most likely to achieve celestial body exploitation have not agreed to bind themselves by this piece of international law. It is in the interests of developing nations that the Moon Agreement be amended to encourage developed states to participate.

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[25] *The Antarctic Treaty,* opened for signature 1 December 1959 (entered into force 23 June 1961) Articles I-III.

[26] *The Protocol on Environmental Protection to the Antarctic Treaty,* opened for signature 4 October 1991 (entered into force 14 January 1998) Art 7.

Whilst the Agreement is not without issue, it is worth analysing the components found within the Agreement in order to get a fuller understanding of the CHM Principle and to demonstrate its versatility in application. The versatility of the principle demonstrates significant benefits, in that it allows for broader interpretation but also provides for significant issues, such as discussed in part 2.3. 'No man's seabed.' Moving forward, the principle is contained in Article 11 stating, that:

> 1. The moon and its natural resources are the common heritage of mankind, which finds its expression in the provisions of this Agreement and in particular in paragraph 5 or this article.

Paragraph 5 of the same Article states that:

> 5. States Parties to this Agreement hereby undertake to establish an international regime, including appropriate procedures, to govern the exploitation of the natural resources of the moon as such exploitation is about to become feasible.

Effectively, paragraph 1 of Article 11 provides for the CHM principle. Further, paragraph 5 of the same article enables the creation of an authority, similarly to the international seabed authority to in order to provide for the components that are found within the principle.[27] The Moon Agreement's primary interest relating to the principle is the rational and equitable sharing of benefits of resources that are of the common heritage of mankind. Further, the article also provides that the Moon is not subject to national appropriation by any claim of sovereignty, this is in line with how the principle is presented in the UNCLOS III and the Antarctic Treaties (Madrid Protocol). However, the equitable sharing of the 'benefits' of resources extracted from the Moon and other celestial bodies is not reasonable comparable to that of the sea because of the extreme difficulty and lack of profitability of space resources for the foreseeable future.

III – THE PRINCIPLE IN ACTION RELATING TO THE DEEP SEA AND THE MOON

This section discusses the impact the principle has had in practise on international regulation. It will discuss the International Seabed Authority's contribution to, or lack thereof in its role in the development to the common heritage of mankind principle in setting up meaningful administrative processes to manage the equitable sharing of, and access to resources. It then proceeds to discuss how the information discussed pertaining to the ISA may be applied in relation to celestial body exploitation.

Whilst the principle exists in a variety of pieces of international law, little has been done in practice to meaningfully manifest and administer the principle, as, whilst the Authority has been created, it has not yet had the chance to exercise its powers beyond the granting of exploration licences. Beyond the creation of the International Seabed Authority, the principle exists solely as a moral obligation. At present, it would be reasonable to pronounce the principle as nothing more than an idea, rather than any concrete concept by which states regulate themselves by. The ISA has developed a framework to enact the principle, however, significant steps are yet to have been taken to make the framework effective. This section will introduce and discuss the role and functions of the ISA with a view to provide insight into the strengths and weaknesses of the authority and how it may or may not be applied to an international celestial body authority.

The International Seabed Authority

A core development established by the UNCLOS III was the creation of an intergovernmental body designed to act as an agent for dispensing the common good on behalf of mankind.

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[27] *Agreement governing the Activities of States on the Moon and Other Celestial Bodies*, New York, United States of America, opened for signature 5 December 1979, UNTS 1363 (entered into force 11 July 1984), Article 11 (1) & (5).

Despite the powerful abilities granted to the ISA[28], it has faced various challenges that have severely impacted its capacity to develop meaningful legal rules and administrative processes. The ISA was established as the organ through which all states party to UNCLOS organise and control all seabed mining related activities within an area.[29]

The ISA has three bodies (the Assembly, the Council, and the Secretariat). These operate through two organs, the Legal and Technical Commission and the Finance Committee. [30] Whilst not directly relevant to the article, there is an additional organ called the Enterprise, it was created for the purpose of overseeing mining, transportation, processing, and the sale of resources. This was never set up and as such will not be discussed in this article.[31] The Secretariat currently performs the role of the Enterprise. Moving on, the ISA effectively serves as the Legislature and Executive simultaneously, similar to that of governments using the Westminster system. This enables them to create rules and simultaneously enforce them for the purpose of the protection of the area (including for environmental purposes) in the interest of the common heritage of mankind.[32] This encapsulates the processes used for executing activities within an area and the equitable sharing of benefits among other things.

The ISA faces exceedingly complex challenges. There was and continues to be a need to establish a viable framework which encourages commercial investment whilst providing for legal stability for parties to make informed decisions and mitigating environmental degradation. [33] As of 2021, there have been zero exploitation contracts issued by the ISA. However, 31 15-years exploration contracts for polymetallic nodule fields containing minerals such as iron and manganese and other resources have been entered into by the ISA, commercial operators, and sponsor state parties.[34] In August 2017, the ISA issued its' first set of draft regulations on exploitation of resources in the deep-sea for public comment. These regulations were the product of a four-year consultation process from ISA stakeholders, discussion papers and expert workshops. In March of 2018, the Council conducted its' first substantive evaluation of the drafts. Since then, from the perspective of the ISA there has been little movement occurring beyond further community consultation and exploration licences granted to commercial actors. This process was especially slow as a result of conflicting views on how the authority should develop, as well as the application of the equitable division provisions among others.

As a result of the slow development of the regulation, the nation of Nauru has recently invoked its right to compel the ISA to allow seabed mining to go ahead within two years, thus ensuring that regulation must be finalised by middle 2023. [35] This invocation has brought an end to a 29-year delay between the ISA's inception and the implementation of relevant regulation that will allow for the seabed to be exploited for mineral resources. Whilst the delay in creating administrative processes is extreme, the ISA has faced a number of challenges from various

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[28] *Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea,* opened for signature 28 July 1994, entered into force 16 November 1994, Annex, ss 1-9. 18.; *United Nations Convention on the Law of the Sea,* opened for signature 10 December 1982, UNTS 1833, 1834, 1835 (entered into force 16 November 1994) Art 156 & 157; *Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea,* opened for signature 28 July 1994 (entered into force 16 November 1994) Annex, s 1.

[30] *United Nations Convention on the Law of the Sea,* opened for signature 10 December 1982, UNTS 1833, 1834, 1835 (entered into force 16 November 1994) Art 163; *Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea,* opened for signature 28 July 1994 (entered into force 16 November 1994) Annex, s 1(4).

[31] *Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea,* opened for signature 28 July 1994, entered into force 16 November 1994, Annex, s 2.

[32] UNCLOS, art.145

[33] C G Brown (2018). "Mining at 2,500 Fathoms under the Sea: Thoughts on an Emerging Regulatory Framework." *Ocean Science Journal* 287 53(2) 288.

[34] International Seabed Authority "Exploration Contracts" Our Work (viewed 29 October 2021) (webpage) < https://www.isa.org.jm/exploration-contracts>

[35] *Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea,* opened for signature 28 July 1994, entered into force 16 November 1994, Annex, s 1(15).

lobbying groups, with concerns regarding environmental damage, 'unfair' deals for commercial actors, or for developed or developing nations., the creation of law that applies to the globe is challenging. these challenges are discussed in the following sections.

Processes In Existence For The Division Of Seabed Resources

The International Seabed Authority's current approach to allow for the 'equitable' sharing of resources occurs when an exploration license is applied for. Every application made for the purpose of exploration by a developed State must cover a total area that is sufficient to allow two mining operations concurrently. At present, the two areas need not be contained within a single area, but the applicant is required to divide the total area into two parts of equal estimated commercial value, which must be substantiated through the provision of survey data. This process, whilst costly and time-consuming for commercial operators, allows for a 'fairer' process than straight division of wealth on an equal basis. Rather, this process seems to uphold the understanding of equitable sharing, though it falls short in encouraging international cooperation. The concept of fairness is discussed below.

Fairness in the Parallel System

In an international context, the meaning of fairness is inevitably subjective. It is this way because fairness is subjective and very much impacted by ethnocentrism. Ethnocentrism is the concept of a term being based on a cultural view rather than being universally objective. However, as stated by Franck, who was described as a leading American scholar of international law,[36] fairness is decided upon by consensus, or, by legitimacy and compliance. Legitimacy implies an idea that for a system of rules to be fair, "it must be made firmly rooted in a framework of formal requirements about how rules are made, interpreted and applied." [37] Distributive justice on the other hand deals with the substantive value of rules and how they may challenge existing procedure. Where these factors exist and are not inconsistent with another, then, and only then may fairness be determined. Where they exist, the rules become valid on the basis that they are voluntarily complied with by the international legal system. In regard to the parallel system created by the ISA, its fairness can only be determined by looking at the community consultation process as well as the figures surrounding how many signatories there are within the Convention and Implementation Agreement. By briefly analysing these numbers, it provides some level of understanding as to the fairness of the system in the context of procedural fairness.

Franck elaborated upon distributive justice by referencing the pre-existing Maximin principle, coined by John Rawls stating that "unequal distribution is justifiable only if it narrows, or does not widen, the existing inequality of persons' and/or states' entitlements.' [38] In his elaboration, Franck stated that 'fairness as a destination remains for us always an open question… we assume that fairness incorporates an element of equalisation: of life chances and access to goods…. the issue is not a society's definition of fairness in any particular instance… rather the openness by which those definitions are reached.' [39] In simpler terms, distributive justice concerns itself with change, in furtherance, it concerns itself with whether the rule is an appropriate allocation of burdens and benefits and secured throughout society by the rule or rules themselves. [40] In this regard, to determine fairness of the parallel system, it must be determined whether the allocation of the burden of exploring two areas and one being placed in reserve is sufficiently beneficial for the exploring parties. Whilst a state may choose to give legitimacy to a rule, as the state parties that have signed the convention and the

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[36] H Dennis (May 30, 2009). "Thomas Franck, Who Advised Countries on Law, Dies at 77". *The New York Times*.
[37] T M Franck, *Fairness in International Law and Institutions* (1995), at 8.
[38] T M Franck, *Fairness in International Law and Institutions* (1995), at 18; see also J.Rawls, *A Theory of Justice* (rev.edn, 1999), at 266.
[39] Ibid at 83.
[40] I Scobbie (2002) "Tom Franck's Fairness" *Edinburgh Journal of International Law* 13(4) 909, 910.

Implementation Agreement have, the rule becomes fair if, and only if, the distribution of what the rule concerns is reasonably beneficial or burdensome.

The next section will use this understanding of fairness to make an impartial analysis of whether the parallel system is fair. Whilst there is an intent to make an impartial analysis, it is worth noting that there are inevitably subjective elements to the authors understanding of fairness in this context. Fairness is to be determined on whether the following factors are present: legitimacy and distributive justice.

Legitimacy is to be determined by whether state parties have contributed to, voluntarily entered into, and ratified a piece of law. In order to determine whether these circumstances have occurred it is necessary to look at the numbers surrounding entrance into the agreements.

Annex III of the Implementation Agreement establishes the basic conditions behind the exploration and exploitation of the seabed. Article 8 of the same Annex establishes the processes behind the division of land in respect to placing areas of land in reserve. The Implementation Agreement has, as of 2021, 79 signatories and 151 parties out of the recognised 193 countries in the world. This results in figures of slightly over three quarters of the world consenting to be bound by the agreement, and, by proxy, the convention. Australia is both a signatory and a party to the agreement. Firstly, it can be argued that given the Implementation Agreements' purpose was to elaborate upon existing principles that firmly rooted in a framework of clearly articulated rules. Secondly, the manner of which international law functions, through voluntary compliance further encourages fairness for all parties involved from the perspective of legitimacy.

Accordingly the Implementation Agreement itself can be considered legitimate. Community consultation relating to the work the International Seabed Authority has been conducting over the past decade further cements the legitimacy of the rule of the law of the sea and the administrative processes behind it. On multiple occasions, the International Seabed Authority has welcomed input from stakeholders, and governments from states both developed and developing. [41]This process further strengthens the legitimacy of the ISA's actions in regulating the exploration and exploitation of the seabed.

The preceding part has established that the parallel system is fair from the perspective of legitimacy. This section discusses whether the distribution of land in reserve is just in the sense that this process does or does not result in a widening of equity between developing and developed states. This system undoubtedly places a burden upon a license applicant, as the applicant is required under their contract to prospect an area, or two areas of equal commercial value but will only be able to exploit (upon the settling of the rules by the ISA) half of the area they have explored. However, whilst a burden is placed upon the applicant, the license provides significant benefit to the applicant, whilst also ensuring a mutual benefit to the state party that is allocated the land in reserve. Whilst an argument of unfairness may be present, its prospects of succeeding in persuading anyone who may listen are low, in this scenario, the reasonable conclusion is that the burden placed upon the applicant is not unjust.

In conclusion, legitimacy and distributive justice are present in the parallel system, and, as such it is reasonable to say that the parallel system is fair when looked at in its' entirety. Further, the division of resources is in the interest of mankind.

Now that the processes behind the implementation of the CHM principle have been discussed relating to deep-sea mining, this article will proceed to examining whether the processes may be suitable to be applied to the development of international law relating to celestial body exploitation.

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[41] See for example: Responses to the HLAP Public Consultation: https://www.isa.org.jm/responses-hlap-public-consultation; and "Government of Australia's comments on the International Seabed Authority's report on the draft framework for the regulation of exploitation activities in the Area." https://isa.org.jm/files/austgovt.pdf

Exploitation of Celestial Bodies

As discussed in section I, the Moon Agreement, in its present form contains a number of provisions that would allow for the creation of a body that is not dissimilar to the International Seabed Authority. Through the creation of an International Celestial Mining Authority, the body would be able to implement protocols suited to the exploitation of celestial bodies. To preface this section of the article, the author acknowledges that the exploitation of celestial resources presents significant scientific and economic challenges. Additionally, it is possible that the resources exploited on celestial bodies into the future will not be returned to the Earth, but instead be used for the purpose of 'setting up' bases on the Moon and other celestial bodies. However, the concept is worthy of discussion in advance of it becoming technically feasible. This would avoid or mitigate the controversy surrounding the long delay in the introduction of regulation due to disagreement on exploitation of the seabed. Section 3.4 of this article exists to provide suggestions on how the Moon Agreement may be reformed to firstly encourage global participation and how the processes behind the ISA may be used to advance the interests of mankind.

To provide suggestions for the amendment of the Moon Agreement it must first be understood why reform is necessary. The primary reason that the Moon Agreement is ineffective in regulating celestial body exploitation is that it has low participation globally, and, as of September 2021, it has not been ratified by any state that engages in self-launched human spaceflight (USA, the Russian Federation, or the People's Republic of China). This has led to the agreement being widely regarded as the least impactful piece of Space law.[42] Low Participation in the Agreement stems from, among other things uncertainty surrounding the implementation of the agreement and CHM Principle. [43]

Another issue is clashing ideologies over commercial interests. This was illustrated recently when former US President, Donald Trump signed an Executive order in 2020 which emphasised that the United States does not view outer space as a global commons.[44] The interpretation from commercial actors is of course different to that of state parties, for example the COO of an energy company argued, when discussing the interest of human civilisation that:

> Benefits come in many ways, it doesn't necessarily come in sharing of immediate financial gain, if for example we are able to build off-world infrastructure and large space based solar power stations for powering the earth, creating desalinised water for billions of people, these are massive benefits for civilisation.[45]

The above further demonstrates that there exists a number of different, and often conflicting interpretations of what is in the interest of 'mankind'. Whilst the above quote is not necessarily incorrect, it stems from the perspective of a commercial actor. The interests of mankind cannot be summarised through the perspective of one company or one state, rather, the interests of mankind must be a combination of collaboration and compromise from all interested parties. The best approach to achieve that idea is through community consultation and transparency as the relevant agencies develop substantive processes to abide by. The United Nations may achieve a fair system through consultation and transparency that will allow for the creation of an authority similar to that of the International Seabed Authority. This is allowed for currently

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[42] J S Koch (2018). "Institutional Framework for the Province of all Mankind: Lessons from the International Seabed Authority for the Governance of Commercial Space Mining." *Astropolitics* **16**(1): 18.

[43] Ibid 7; Clashing ideologies and conflicting interests over commercial endeavours also led to the failure of the agreement to encourage participation.

[44] The Executive Order on "Encouraging International Support for the Recovery and Use of Space Resources". Sec 1.

[45] JS Koch (2018). "Institutional Framework for the Province of all Mankind: Lessons from the International Seabed Authority for the Governance of Commercial Space Mining." *Astropolitics* **16**(1): 15; from his personal correspondence with Shackelton Energy Company, COO Jim Keravala.

through Article 11(7) of the Agreement and would serve as an oversight body that may allow for a parallel system to exist.

The Parallel System as it exists will not be able to be transferred across easily to apply to celestial exploitation as a whole. Currently only three states have human spaceflight-capable programs, the United States, the Russian Federation, and the People's Republic of China. Whilst this is the case in 2021, commercial actors, such as SpaceX, Virgin Galactic, and Blue Origins are all likely to have significant spacefaring capabilities within the decade. SpaceX is already ahead of the competition and successfully won a contract with the United States government to create lunar-capable landers.[46] Additionally, the Chinese and Russian governments announced that they have signed an agreement to establish a lunar research base in cooperation. Until such time that other states, both developing or developed become capable of entering into space independent from pre-existing space farers, any celestial exploitation will be inevitably economically unequitable. As such, what must occur is to ensure that the Moon, or other Celestial bodies are used for scientific and peaceful purposes so that it may benefit mankind as a whole. Rather than the export of resources back to Earth, the interest of mankind into the future may be that precious elements in these bodies are used to allow for the further exploration of bodies far from Earth, thus allowing for the potential advancement of the species. Evidently, the Space Race to set up 'territory' on the Moon has begun again. Whilst the term 'celestial body' refers to any Moon, planet, or satellite (asteroid) other than the Earth, it is reasonable to say that the Moon and perhaps Mars (when referring to the Moon, please consider this as including Mars from herein) will become the first bodies in space to be exploited, and or settled. Exploitation on the Moon could very well be feasible within the next few decades and as such establishing regulation is worthwhile so as to avoid the tardiness associated with the International Seabed Authority and seabed exploitation.

The size and proximity of the Moon in comparison to other bodies may enable for a parallel system to be implemented in a manner that is within the interest of mankind, whilst the implementation on other celestial bodies presents significant issues due to the variety of different challenges, they present in reaching, dividing, and enforcing any regulation that exists. Further, a process where significant resources must be expended in reaching, establishing a base of operations, and exploiting resources from a body must not be so overregulated that it may repel the advancement of science, economic development, and the exploration of outer space. This article argues that the parallel system may be applied to the Moon, but not, as it stands, applied to other celestial bodies. In the case of the Moon, clear regulation surrounding it is vastly important because of the Moon's proximity to the Earth, and as such means that exploitation and settlement are but a matter of time. It is more than likely that the exploitation of resources on the Moon will only be suitable for usage on the Moon, and as a staging base to further explore the solar system until such time that the logistical challenges of bringing resources back to the Earth are solved. With present and near future technology, the purpose of the CHM principle must be to ensure that the Moon is used for peaceful and scientific purposes. Presently, the concern surrounding the principle should not be the division of economic gain, because, as it is and will be into the foreseeable future, it is unlikely that exploitation will become profitable beyond government contracts. As such, the primary way of achieving the interests of mankind presently is to ensure that celestial bodies are used for peaceful purposes, and that any scientific discoveries (that are not subject to intellectual property rights) are shared across mankind thus encouraging global cooperation. One way to provide for the CHM principle in practise may be that an Authority of sorts is set up to allow for the subdivision of land within the Moon and allocated on a case-by-case basis. In order to maintain the interest of mankind in doing so and avoiding discriminatory practises that may exist as a result of sovereign loyalties, the authority must not have any direct affiliation with a single state, or group of states. The Authority must ensure that its' decision

[46] C Davenport (2021) "Elon Musk's SpaceX wins contract to develop spacecraft to land astronauts on the moon" Washington Post (Webpage) <https://www.washingtonpost.com/technology/2021/04/16/nasa-lunar-lander-contract-spacex/>; other companies such as Boeing have also won contracts with the US government.

making is transparent and subject to appeals where wrongful actions may exist. In practise, the agencies that already exist for similar purposes allow, to some extent, the replication of the provisions that are found within the UNCLOS, reinforced by existing principles found within the Antarctic Treaty and Moon Agreement requiring that the 'area' is used for peaceful purposes. Ultimately, the interest of mankind is peaceful scientific cooperation as it expands into Space, irrespective of economic division, this may be reached through a transparent, and understanding decision making process to amend the Moon Agreement to allow for these changes. This would remove the economic burdens that would be placed on developed nations to encourage participation in the Moon Agreement.

IV – AUSTRALIA, THE MOON AGREEMENT AND THE ARTEMIS ACCORDS

This section discusses the interests of Australia relating to the Moon Agreement and the more recent Artemis Accords. The Accords are an American-led effort to return humans to the Moon by 2024 with the ultimate goal of expanding outer space exploration. Relevant to this article, section 10 of the Accords concerns the exploitation and ownership of outer space resources. This section discusses how the Accords and Moon Agreement contradict one another and how that may affect Australia's ability to navigate into celestial body exploitation. It will conclude by suggesting how Australia may navigate these challenges in a way that remains in line with its interests whilst maintaining Australia's obligations to international law.

The Artemis Accords

The Artemis Accords ("the Accords") is a multilateral agreement stemming from the United States' interests in the use of outer space. It particularly relates to the exploration and use of the Moon, Mars, comets and asteroids. Many of the provisions found within the Accords mirror those found in the Moon Agreement, however, there are also a number of provisions located within that are completely inconsistent with the Moon Agreement. Particularly, section 10 relates to the exploitation of 'space resources' stating that the 'extraction of space resources does not inherently constitute national appropriation.'[47] Article II of the OST states that Outer space… is not subject to national appropriation by claim of sovereignty..[48] Effectively, the treaty concerns itself with claims of sovereignty and does not expressly reference the extraction or exploitation of space resource. The United States is a party to the OST but not the Moon Agreement, as such, Section 10 only takes into account Article II of the OST but not the Moon Agreement's Article 11. As a result of the United States' position, section 10 is directly in contravention of article 11 of the Moon Agreement, this Article states that "neither the surface… nor any… natural resources in place shall become property of any state.. non-governmental entity or natural person… " [49] and as such provides for significant issues for Australia going forward.

Australia's signature to the Artemis Accords is to be expected. Following World War II, Australia has cooperated with the United States government in almost all aspects of foreign policy. In relation to Space, Australia first cooperated with the United States in 1960 through its signature of a bilateral agreement pertaining to space vehicle tracking. This agreement eventually led to the establishment of NASA's first deep-tracking station outside of the United States in South Australia. [50] Australia continues to act on behalf of NASA in monitoring its' property. Australia's interests both economically and miliarily have over the past 75 years often aligned with that of the United States. Further examples outside of the Space Sector clearly demonstrate Australia's interest in cooperating with the United states, for example. The

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[47] *The Artemis Accords: Principles For Cooperation In The Civil Exploration And Use Of The Moon, Mars, Comets, And Asteroids For Peaceful Purposes,* signed 13 October 2020, entered into force 13 October 2020, section 10.

[48] Article II – Outer Space Treaty.

[49] An explanation of Article 11 can be found in section I, part 2.6 of this article.

[50] Tronchetti and Liu (2021) "Australia Between the Moon Agreement and the Artemis Accords." Australian Institute of International Affairs; see also Tronchetti and Liu 'Australia's signing of the Artemis Accords: a positive development or a controversial choice?' (2021) 75(3) *Australian Journal of International Affairs*, 243.

existence of multilateral alliances such as ANZUS,[51] the QUAD,[52] FVEY,[53] and more recently the establishment of AUKUS[54] are all evidence of Australia's interest in the United States, additionally, Australia's signing on to the Artemis Accords clearly demonstrates Australia's contemporary interest in the United States' space industry.

The Moon Agreement and Australia

The preceeding sections discussed the important provisions found in the Moon Agreement relating to the common heritage of mankind principle. This section will provide suggestions in relation to Australia's interests. In order to provide reasonable suggestions on what Australia ought to do relating to the Moon Agreement, the motives behind signing the Agreement in the first instance must be established. Australia did not become a party to the Moon Agreement until 1986, despite the Agreement entering into force in 1984. Despite this considerable delay in signature, it appears that there was little to no meaningful consideration by the then Australian government of the agreement beyond its provisions relating to nuclear disarmament.

Dr Storr of the Law Faculty of the University of Technology Sydney has discussed the reasoning behind Australia's signature in considerable detail. Much of Storr's points stem from her analysis of the archival record of cabinet delibrations relating to the agreement. Of relevance to this article is the narrow-minded view the Hawke government seemingly took in their approach to nuclear disarmament.[55] The decision to sign the Agreement came from a time of increasing pressure surrounding nuclear policy in Australia. As a proponent of both nuclear-energy and non-proliferation, Hawke's government was forced to tread a difficult line. Despite an initial hardline approach from the Labor party, banning uranium mining altogether, there was an eventual loosening of the rules allowing for uranium mining to take off once again. This led to a split in the labor-left and the rise of the Nuclear Disarmament Party. In 1984, the NDP became a threat to the stability of the Hawke government, at this stage the labor government decided to explore all options relating to nuclear disarmament, a move that eventually resulted in the accession of Australia to the Moon Agreement where an electoral loss appeared increasingly likely.

Storr effectively argues that the implications of the common heritage for mankind principle in relation to outerspace resources were overlooked, yet, lead to Australia remaining formally bound to perform its obligations in good faith.[56] It does not appear that the Hawke government had any significant interest in the oversight of outer space resource by an international body. Whilst these obligations, and by proxy, inconsistencies currently continue to exist, it is in Australia's interests to figure out a way to move forward. To further elaborate, Section 10 of the Accords is in direct conflict with Article 11 and subsections (3) and (5)[57] due to the contradictory views relating to the ownership of natural resources in outer space, Article 11

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[51] Australia, New Zealand, United States Security Treaty

[52] The QUAD refers to the Quadrilateral Security Dialogue, this is a strategic dialogue between Australia, the United States, Japan and India.

[53] Five Eyes (FVEY) is an Intelligence sharing alliance comprising Australia, The United States, New Zealand, Canada, and the United Kingdom.

[54] This is a trilateral agreement and alliance comprising Australia, the United States and the United Kingdom. It was announced on 15 September 2021 and encourages Australia's development into nuclear powered submarines.

[55] C Storr (2021) "Why did Australia sign the Moon Treaty?" Lowy Institute (Webpage) https://www.lowyinstitute.org/the-interpreter/why-did-australia-sign-moon-treaty

[56] C Storr (2021) "Why did Australia sign the Moon Treaty?" Lowy Institute (Webpage) https://www.lowyinstitute.org/the-interpreter/why-did-australia-sign-moon-treaty

[57] *Agreement governing the Activities of States on the Moon and Other Celestial Bodies*, New York, United States of America, opened for signature 5 December 1979, UNTS 1363 (entered into force 11 July 1984), Art 11(3)(5).

seeks to ban the extraction of resources until an authority is created whilst section 10 of the Accords seeks to allow for and encourage the extraction and exploitation of space resources. [58]

A Way Forward

Australia's position on the the Moon Agreement and Artemis Accords is yet to be defined by any agency, department or government official.. This article provides suggestions as to why Australia needs to find a way to navigate this path in the near future, and how it may achieve this. Throughout this section, this article has established that Australia's interests have historically, and will continue to remain in line for the foreseable future with the United States of America and the United Kingdom among others. It has also established that Australia's consideration of the legal implications of the Moon Agreement in relation to asteroid mining was poor at best, and almost entirely done for the furtherance of electoral success in the 1980s. Australia's priorities have shifted away from Nuclear disarmament. Whilst resolving the conflicting provisions found within the Agreement and the Accords may not be a necessity in the coming years, Australia will need to clarify its position at some stage. It is better that it resolves its position now so that it may better plan, and implement statutory provisions and administrative processes in advance of it becoming an issue of contention when Australia reaches the Moon.

There is one practical approach to Australia's predicament and one idealistic approach. In an ideal world, in line with the interest of mankind, the Moon Agreement would be amended to prescribe what was suggested in section 3, that being the removal of reference to economic inequity in Article 11 of the Agreement. This would hopefully encourage participation on a global scale including parties to the Artemis Accord, without conflict occuring. However, the likelihood of this occuring, especially in the current political climate because of the geopolitical tensions such as the relationship between the US and China or Australia and China. In practice, the only reasonable approach Australia can take is to choose to leave the Moon Agreement or Accords. However, noting Australia's interest in lining up with the interests of US, it should take the steps to remove itself from being bound by the Moon Agreement any longer.

Exiting the Agreement

In order to lawfully withdraw from the Agreement Australia must abide by the Articles found within the *Vienna Convention on the Law of Treaties* (1969) ("the Vienna Convention"). Whilst it is not presently necessary to withdraw from the Agreement, it is important to note the steps required to do so when it does become necessary. If the goals of the Accords in reaching, and establishing a base on the Moon by 2024 are realised, then it will be within Australia's interests to resolve the conflicting relationship between the Accords and the Agreement. Articles 42 to 45 and 54 to 64 of the Vienna Convention provide a number of grounds to denounce or withdraw from an Agreement or Treaty. Articles 65 through to 72 then specify the relevant procedures that must be taken to exit from an Agreement and the consequences of doing so. Relevant to Australia's potential withdrawal from the Agreement is Article 54, where a party may withdraw from an Agreement so long as it is:

(a) in conformity with the provisions of the treaty; or

(b) at any time by consent of all the parties after consultation with the other contracting States.[59]

Paragraph (a) of Article 54 allows for the withdrawal from a treaty so long as it confirms with the relevant provisions, conveniently, the Agreement provides for, under Article 20 that:

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[58] *The Artemis Accords: Principles For Cooperation In The Civil Exploration And Use Of The Moon, Mars, Comets, And Asteroids For Peaceful Purposes,* signed 13 October 2020, entered into force 13 October 2020, section 10(1).

[59] *Vienna Convention on the Law of Treaties* (1969) Vienna, Austria, opened for signature 23 May 1969, UNTS 1155 (entered into force 27 January 1980) Art 54.

> Any State Party to this Agreement may give notice of its withdrawal from the Agreement one year after its entry into force by written notification to the Secretary-General of the United Nations. Such withdrawal shall take effect one year from the date of receipt of this notification.

The Agreement entered into force in July 1984, with Australia depositing the Agreement in 7 July 1986. As such, the first part of the Article, requiring a member to remain a party until one year after it was written into force is satisfied. Whilst Australia should begin to take steps to withdraw from the Moon Agreement, there will clearly need to be substantial consultation with the space industry, academics, State Parties and parties to the Accords.

4.5 Australia's Place in the Accords

Australia's economic and strategic interests align with the United States, however, whilst US support exists for Australia, Australia should aim to exercise independence in Space rather than be solely reliant upon the US and other parties to the Accords for support entering, exploring, and exploiting Space and its resources. As such, it is important that Australia continues to develop and fund the space sector domestically. Fortunately, Australia's space sector has been growing drastically over the past decade. With the recent (2018) founding of the Australian Space Agency, an agency which will coordinate domestic space Activities for Australia, Australia's domestic space capability has begun to grow. Further, launch licences have been granted to two non-governmental organisations within Australia, demonstrating the re-emergence of Australia's interests in becoming a hub for space activities.[60] Australia regulates domestic space industry through a number of statutory pieces, most significant is the *Space (Launches and Returns) Act 2018*, this provides licenses and requirements for the following:

- launching a space object from Australia
- returning a space object to Australia
- launching a space object overseas (for Australian nationals with an ownership interest)
- returning a space object overseas (for Australian nationals with an ownership interest)
- operating a launch facility in Australia[61]

Australia's licencing system is in depth and covers many Space Activities, it does currently provide for licencing requirements of celestial body exploitation. This is currently in line with the Moon Agreement, however, upon Australia's withdrawal, or change of interests, the legislation will need to be amended to provide for the lawfulness of celestial body exploitation and ownership under Australia's domestic law. It is worth noting that there is currently nothing stopping Australia legislating upon the exploitation of celestial resources, however, ownership of said resources would be contrary to the Moon Agreement.

Australia's Space Capabilities in 2021

Australia's space industry is currently small; however it is growing at a rate that significantly outstrips its international peers, the United Kingdom's space sector from 2016-2017 grew approximately 3%, whilst Canada, a nation most comparable to Australia had a growth of only 1%. Australia vastly outstrips these states with a growth of 17% per year since 2016. As

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[60] C. Porter MP & D Tehan MP "Commercial rocket launch permit granted for South Australia" *Australian Government, Department of Industry, Science and Technology* (2021) https://www.minister.industry.gov.au/ministers/porter/media-releases/commercial-rocket-launch-permit-granted-south-australia; see also: Australian Space Agency "Notice of Minister decisions about space activities" *Australian Government, Department of Industry, Science and Technology* (accessed 11 October 2021). https://www.industry.gov.au/regulations-and-standards/regulating-australian-space-activities/notice-of-minister-decisions-about-space-activities

[61] Part 3 ss 10-46Y *Space (Launches and Returns) Act 2018 (CTH)*; see also: *Space (Launches and Returns) (General) Rules 2019; Space (Launches and Returns)(High Power Rocket) Rules 2019; and Space (Launches and Returns)(Insurance) Rules 2019.*

of 2019, Australia's space sector was worth approximately $4.8 billion dollars, or 0.25% of its total GDP for the financial year of 2018-2019. For comparison, whilst the financial amount is small on the face of it, Australia's overall economic rate of growth for the same period was 4.9%. Whilst Australia's space sector is growing fast, it still has considerable lengths to go before it can legitimately be considered a competitor in the Space Sector. [62] Despite its small size, Australia has encouraged foreign investment and has granted launch licences to a number of companies, one such example is that of a Taiwanese space company called 'TiSpace' which it granted a licence to in August of 2021.[63] This is in conjunction with another company that was granted a launch facility permit named 'Southern Launch' which is an Australian owned and operated company. [64] Additionally, Australian universities launched a number of satellites from the United States in January of 2021, these were called the YUSAT and the IDEASSat CubeSat. [65] Australia certainly has a place in the space sector, and while its size in the sector is yet to be determined, the field is receiving investment from the government and private industry and is something for Australians to be excited about. In this context, it is timely for the government to continue to explore its position in relation to celestial exploitation.

V CONCLUSION

The law of space is an immensely complex area and like much of the international law surrounding the common heritage principle, a mess of competing interests and ideologies that has resulted in a useless Agreement. The Moon Agreement is at best aspirational and at its worst downright burdensome through Article 11 for any of the few states that are signatories. Ultimately, whilst the purpose of the Moon Agreement is important, it is a failure because of its vague terms, lack of participation and overall burden on participating states.

This article has provided suggestions as to how the Moon Agreement may be amended to encourage participation in it. These suggestions are to strip the Agreement of reference to economic inequity and inequality, to change the rules surrounding extraction so that they reflect the Outer Space Treaty, and to ensure that the common heritage of mankind principle exists within the Agreement to encourage the use of the Moon and other Celestial bodies for the purpose of human prosperity through peaceful and scientific advancement.

The exploitation of natural resources on the Moon likely will not create profit within the lifetime of the author of this article and certainly not within the lifetime of the creators of the Agreement. The Moon Agreement was clearly mistaken in its statement that the exploitation of the Moon was "about to become feasible."[66] Almost 40 years later there has been no such exploitation occurring in space and as such the proactive nature of the Agreement is more burdensome in its application of Article 11 than it has or ever will be beneficial.[67] To reach the 'final frontier' is an accomplishment that only a few states have achieved, it is economically detrimental, to reach space is incredibly expensive and currently not profitable, moreover, this obligation to set up an authority to divide the benefits of resources has resulted in less

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[62] Alpha Beta, *The economic contribution of Australia's space sector in 2018-19* (Report, February 2021) 19-20 <https://www.industry.gov.au/sites/default/files/2021-02/the-economic-contribution-of-australias-space-sector-in-2018-19.pdf >.

[63] C. Porter MP & D Tehan MP "Commercial rocket launch permit granted for South Australia" *Australian Government, Department of Industry, Science and Technology* (2021) <https://www.minister.industry.gov.au/ministers/porter/media-releases/commercial-rocket-launch-permit-granted-south-australia>

[64] Ibid.

[65] A. Alamalhodaei "Taiwan Innovative Space will conduct a test launch of its Hapith I rocket in Australia later this year" *TechCrunch* (Webpage, 24 August 2021) <https://techcrunch.com/2021/08/23/taiwan-innovative-space-will-conduct-a-test-launch-of-its-hapith-i-rocket-in-australia-later-this-year/>

[66] *Agreement governing the Activities of States on the Moon and Other Celestial Bodies*, New York, United States of America, opened for signature 5 December 1979, UNTS 1363 (entered into force 11 July 1984), Article 11 (5).

[67] Article 11 concerns the extraction of resources from outer space among other things.

than 10% of United Nations members agreeing to be bound by it. As discussed earlier, no state that is independently capable of launching and exploiting space is a party to it.

The Agreement as it stands is arguably an ineffective piece of international law, however, with amendments and clarification as to what the interest of mankind translates to it may amount to a more significant treaty. Firstly, as mentioned above the division of 'economic benefit' is presently not a viable solution as there is and likely will not be any potential for economic benefit from resource extraction in the foreseeable future due to technological constraints, as such, any obligation requiring the division of resources, or revenue stands only as a barrier to humankind's advancement. The article argues that the economic barrier is the core reason so few states have decided to become bound by the Agreement. Secondly, upon the removal of the economic barrier, all parties should proceed to in the creation of an Implementation Agreement that provides for an authority that could act similarly to the ISA. This would serve as an oversight board where mining activities are recorded for transparency. Rather than claiming sovereignty over land, the authority should be granted the right to inspect and lease land to corporations or states to the extent that they can exploit it, but the claim to the land remains with the authority that represents the interests of mankind. The Authority would also have a duty to ensure that the Moon and other celestial bodies were not weaponised and were used exclusively for scientific and peaceful purposes.

Ultimately the above recommendations are idealistic and may face practical barriers and difficulties. Implementation will be difficult because of the splintered, albeit unsurprising divergence of the United States' Artemis Accords, and the People's Republic of China and the Russian Federation's "International Lunar Research Station" it is unlikely that these three superpowers will cooperate in the Author's lifetime to the extent required to encourage them to agree to be bound by the Moon Agreement because of the extreme geopolitical tensions that presently exist between the states. Still, these amendments are worthwhile discussing as other middle powers may be encouraged to cooperate in the creation of an authority. With the creation of the authority, the removal of economic division and the clarification of the CHM principle, multilateral agreements like the Accords are not inherently in contravention of the Agreement. If the United States, China, or Russia do not sign the Agreement, they may continue to abide by the interests of mankind through the inception of complementary treaties and agreements in place, perhaps the interests of mankind can continue through science and peace.

Section IV discussed Australia's position between the Artemis Accords and the Moon Agreement. It ultimately argued that Australia should withdraw itself from the Moon Agreement. Australia's position is unique, no other state is a party to both pieces of law and as such there is no clear path Australia should take based on precedent. However, the Agreement, as illustrated throughout the article is a failure and as it exists currently places a burden on all of its member states. The Artemis Accords however, whilst primarily in the interest of the United States allows Australia to benefit from the success of the US. Australia's interests have aligned with the United States since the 20th century and continue to do so in 2021 and likely will into the future. Australia does not need to immediately withdraw from the Agreement, it has time to consider its position going forward and present an argument to other Agreement member states to amend the Agreement, were Australia to argue for the amendments that have been presented in section 3, it would be in a position to abide by obligations found in both agreements.

Australia has not yet defined its place in space and the following decades are imperative to decide what path it is to take. Australia launched its first space object in 1967, becoming the third nation ever to design and launch a satellite to orbit the Earth. Its' history is long but has stagnated considerably up until recently with the grant of a number of launch facility permits and launch licences to Australian companies. The developments of the country's space capabilities are exciting but without necessary funding and government support it may stagnate once again. Australia can become a leading nation in outer space with a combination of foreign cooperation and domestic innovation. The ultimate recommendation for this article

is that Australia must consider its position in international law and make a decision within the next decade, further, Australia's government and commercial actors should continue to fund and support Australia's growth in space. Australia is a mineral rich, economically wealthy and is in a geographically advantageous position to launch rockets into space. Additionally, it is a world-leading state in relation to mining on Earth, this combination of advantages present a fact that whilst a middle power, Australia and citizens stand to benefit significantly from space and its resources.

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Forging A Future For Nature: a comparative analysis of international, Commonwealth and ACT approaches to the law of biodiversity conservation

Natasha Nguyen*

Australia is one of the most ancient and naturally biodiverse places on Earth. However, unfolding in plain sight is an ecological extinction crisis characterised by the continual decline of Australia's biodiversity at the genetic, species, ecological community and area levels. Although Australia is a signatory to both the *World Charter for Nature* and the *Convention on Biological Diversity,* its implementation of environmental laws have not optimally curbed this trend of biodiversity loss. In the face of these environmental challenges, this article explores the interplay of biodiversity conservation laws applying in the ACT and the Commonwealth. This involves an examination of whether either of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) or *Nature Conservation Act* (ACT) favours more strongly the conservation paths advanced by the *World Charter for Nature* or the *Convention on Biological Diversity*. It offers a comparative analysis of these international and domestic laws, in addition to discussion of the current condition of biodiversity and the achievement of biodiversity outcomes at the ACT and federal levels. The article concludes with suggestions for reform to provide for more transparent, efficient and participatory systems of law that give full credit to environmental values and ensure the preservation of the natural environment for future generations to come.

I Introduction

'The human interaction with the landscape tells us the stories of where we have been, who we have been, and how we can choose to go forward'.[1] Humankind therefore has a fundamental duty to protect nature and its rich biodiversity. Although concern for the environment is not a new concept,[2] the discipline of environmental law has only emerged in the last 50 years.[3] Hence, there is a role for the law to provide structures of decision-making that give full credit to environmental values.[4] Accordingly, the 'sustainable' outcomes of these decisions should reflect an appropriate balance and integration of social and economic values.[5]

In consequence of Australia's geographical isolation, the unique proliferation of flora and fauna has profiled Australia as 'mega-diverse' with respect to biodiversity.[6] This terrestrial and aquatic biodiversity is characterised by globally distinct ecosystems, supporting between 600,000 and 700,000 native species – with 85 percent endemic to Australia.[7]

However, following European settlement, methods of land use and resource exploitation rapidly replaced the environmental management systems that had been developed by

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[1] Foundation for National Parks and Wildlife, 'Conservation', *Why Conservation?* (Web Page, 2019) <https://www.fnpw.org.au/about/why-conservation#:~:text=We%20believe%20in%20conservation%2C%20not,a%20better%20future%20for%20all>.

[2] See, eg, Richard Thackway, 'Significant Trends in Nature Conservation in Australia' (1997) 17(3) *Natural Areas Journal* 233, 234-235. See generally Tim Bonyhady, *The Colonial Earth* (Melbourne University Press, 2002).

[3] Gerry Bates, *Environmental Law in Australia* (LexisNexis Butterworths, 10th ed, 2019) 1.

[4] Ibid 3.

[5] Ibid.

[6] Rosemary Lyster et al, *Environmental and Planning Law in NSW* (Federation Press, 4th ed, 2016) 389.

[7] Department of Agriculture, Water and the Environment, *Australia's Sixth National Report to the Convention on Biological Diversity 2014-2018* (Report, 24 March 2020) 160.

indigenous peoples over thousands of years.[8] In this time, 13 percent of Australia's native vegetation has been converted for land use and a further 62 percent is subject to varying degrees of disturbance.[9] This has had significant effects upon Australia's biodiversity, which continues to decline.[10] Presently, there are more than 1700 nationally threatened species and ecological communities.[11] By contrast, 53 species are listed as threatened in the ACT.[12] Despite years of environmental regulation, Australia's accelerated rates of biodiversity loss are considered to be second in the world.[13] This represents a significant management challenge to securing the long-term viability of Australia's biodiversity.[14]

Globally, biodiversity continues to decline at the genetic, species, ecological community and area levels.[15] The pressures affecting these declines include over-exploitation, habitat clearance, agriculture, invasive species, disease, pollution, urban development, drought and climate change.[16]

A Legal Frameworks for Biodiversity Conservation

Following the *Stockholm Declaration on the Human Environment*,[17] the *World Charter for Nature* was an influential movement towards nature conservation.[18] This agreement posited a positive obligation for States,[19] and persons other than States,[20] to protect habitat and its constituent flora and fauna. It is guided by the principle that all forms of life are unique and warranting respect.[21]

Subsequent movements for environmental protection were, for example, formally recognised in the *Rio Declaration on Environment and Development*.[22] However, it was the *Convention*

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[8] *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 99-101 (Deane and Gaudron JJ).
[9] William Jackson et al, 'Overview' in Department of Agriculture, Water and the Environment, *Australia State of the Environment Report 2016* (Report, 2016) 14.
[10] Australian Bureau of Statistics, *Year Book Australia, 2009-10* (Catalogue No. 1301.0, 4 June 2010) 6-8 ('*Year Book Australia*').
[11] Department of Agriculture, Water and the Environment, *Threatened Species under the EPBC Act* (Web Page, 2021) <https://www.environment.gov.au/biodiversity/threatened/species>.
[12] Commissioner for Sustainability and the Environment, *ACT State of the Environment Report 2019* (Report, 13 February 2020) 206 ('*ACT SoE 2019*'); *Nature Conservation Threatened Native Species List 2020* (ACT).
[13] Note that Indonesia has the highest percentage in the world for biodiversity loss: see Anthony Waldron et al, 'Reductions in Global Biodiversity Loss Predicted from Conservation Spending' (2017) 551(7680) *Nature* 364, 365. See also Timothy Dickson and Katie Woolaston, 'The Balance of Environmental Protection and Economic Development in Federal Decision-making: An Investigation into Section 74A of the Environment Protection and Biodiversity Conservation Act 1999 (Cth)' (2021) 38(1) *Environmental and Planning Law Journal* 22, 23.
[14] Australian Panel of Experts on Environmental Law (APEEL), *Terrestrial Biodiversity Conservation and Natural Resource Management* (Technical Paper 3, 2017) 3.
[15] Stuart Butchart et al, 'Global Biodiversity: Indicators of Recent Declines' (2010) 328(5982) *Science* 1164, 1168; Gerardo Ceballos et al, 'Accelerated Modern Human-Induced Species Losses Entering the Sixth Mass Extinction' (2015) 1(5) *Science Advances* 1, 3-4.
[16] Sean Maxwell et al, 'The Ravages of Guns, Nets and Bulldozers' (2016) 536(7615) *Nature* 143, 144-145; Rachel Warren et al, 'Increasing Impacts of Climate Change Upon Ecosystems with Increasing Global Mean Temperature Rise' (2011) 106(2) *Climate Change* 141, 165-166.
[17] *Report of the United Nations Conference on the Human Environment,* UN Doc. A/Conf.48/14/Rev. 1 (16 June 1972) ('*The Stockholm Declaration on the Human Environment*').
[18] Ben Boer, 'Cultural and Natural Heritage' (1984) 1 *Environmental and Planning Law Journal* 112; D E Fisher, 'The Impact of International Law Upon the Australian Environmental Legal System' (1999) 16 *Environmental and Planning Law Journal* 372, 375.
[19] *World Charter for Nature,* GA Res 37/7, UN Doc A/RES/37/7 (adopted 28 October 1982) art 22.
[20] Ibid art 23.
[21] Ibid.
[22] Principle 7 of the *Rio Declaration* commits signatories to conserve, protect and restore the health and integrity of the Earth's ecosystem: see *Report of the United Nations Conference on Environment and Development,* UN Doc A/CONF.151/26/Rev.1 (vol 1) (12 August 1992) annex 1.

on Biological Diversity ('*Biodiversity Convention*'),[23] to which Australia is a signatory, that endorsed an 'ecosystems approach' to conservation management. It emphasises 'the preservation of habitat as integral to the survival of species, and forms the basis of the concept of protection of biological diversity'.[24] The Convention requires signatories to develop national programmes that promote both 'in-situ'[25] and 'ex-situ'[26] conservation, the sustainable use of biodiversity, and the recovery of threatened species or ecosystems.[27]

Given that human activity has compounded the effects of climate change and accelerated the rate of forced adaptation and extinction of species,[28] common conservation practices take the form of:

(1) legal frameworks that establish 'protected areas' reserved for conservation purposes; and

(2) the listing of species or ecological communities as 'threatened', triggering further conservation measures or regulation of damaging activities.[29]

Nonetheless, historic Australian governmental strategies have struggled to co-ordinate integrated approaches to biodiversity conservation, and policies have tended to prioritise procedure over outcomes.[30] Australia's large landmass and history of poor environmental stewardship further contribute to the governance challenge.[31] This includes inadequacies in resourcing, information on the state of the environment and long-term planning for biodiversity management.[32] The fragmentation of efforts to address biodiversity decline has failed to produce a sustained and coordinated conservation response.[33]

Although the national government bears ultimate responsibility for fulfilling Australia's international treaty obligations, it has limited the scope of its role to the oversight of 'matters of national environmental significance' (MNES) in its own legislation. This includes listed threatened species, ecological communities and world heritage sites.[34] At the state and territory level, this oversight relates to conservation within territorial bounds.[35] Protections for reserves

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[23] *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993) ('*Biodiversity Convention*').

[24] Bates (n 3) 351.

[25] '"In-situ conservation" means the conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings and, in the case of domesticated or cultivated species, in the surroundings where they have developed their distinctive properties': see *Biodiversity Convention* (n 23) art 2.

[26] '"Ex-situ conservation" means the conservation of components of biological diversity outside their natural habitats': see also Ibid art 2.

[27] Ibid arts 6-10.

[28] Bates (n 3) 349.

[29] Jan McDonald et al, 'Adaptation Pathways for Conservation Law and Policy' (2019) 10(1) *Wiley Interdisciplinary Reviews: Climate Change* 1, 2.

[30] On the failure or inadequacy of environmental responses by government, see Euan Ritchie et al, 'Continental-Scale Governance and the Hastening of Loss of Australia's Biodiversity' (2013) 27(6) *Conservation Biology* 1133, 1133-1135; Sarah Clement et al, 'Authority, Responsibility and Process in Australian Biodiversity Policy' (2015) 32(2) *Environmental and Planning Law Journal* 93, 103-114.

[31] APEEL*, Terrestrial Biodiversity Conservation and Natural Resource Management* (n 14) 3.

[32] Ibid.

[33] In relation to the systemic challenges to rural natural resource management and biodiversity protection, see, eg, Paul Martin and Jacqueline Williams, 'Next Generation Rural Natural Resource Governance: A Careful Diagnosis' in Volker Mauerhofer (ed), *Legal Aspects of Sustainable Development: Horizontal and Sectorial Policy Issues* (Springer Publishers, 2015) 607.

[34] Department of Agriculture, Water and the Environment, *Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)* (Web Page, 2021) <https://www.environment.gov.au/epbc>.

[35] McDonald et al, 'Adaptation Pathways for Conservation Law and Policy' (n 29) 2.

and listed species are further supplemented by other regulations including land use planning, tree protection and native vegetation clearance.[36]

Two Acts that give effect to the principles of the *World Charter for Nature* and *Biodiversity Convention*, are the ACT *Nature Conservation Act 2014 ('Nature Conservation Act')* and the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* ('*EPBC Act*'). Although these Acts share a similar listing regime,[37] the ACT legislation affords more general protections to native animals,[38] while the Commonwealth law protects only listed species.[39]

B Aims and Scope

This article critically evaluates and compares the Commonwealth and ACT approaches to biodiversity conservation with the international law impacting the Australian legal system. This is prefaced on the notion that the Commonwealth and ACT are jointly committed to maintaining high environmental standards, by ensuring that Australia complies fully with all of its international environmental obligations.[40] Although the scope of this research is limited to Commonwealth and ACT legislation, it is notable that future avenues of research could involve comparisons to the laws of other states and territories, which are beholden to the same commitment. This article will compare the *World Charter for Nature* and the *Biodiversity Convention,* as against the *Nature Conservation Act* and the *EPBC Act*. This treatment deciphers whether either Act favours more strongly the conservation paths advanced by the Charter or the Convention. Moreover, this article will assess potential reforms to contend with ongoing biodiversity decline.

This research is underlain by the notion that nature has a right to exist in its own right.[41] Support for this concept is embedded in ACT legislation – i.e. the pre-cautionary, inter-generational equity, conservation of biological diversity and ecological integrity principles.[42] In particular, the broader notion of 'ecologically sustainable development' (ESD), as it is enlivened in judicial consideration,[43] denotes that the law can be utilised as a tool to prevent irretrievable harms to ecosystems and achieve environmental justice.[44]

The novelty of this research lies in its comparative analysis of the ACT and Commonwealth schemes. Specifically, this article examines the achievements of these Acts in protecting threatened species and ecological communities, beside conservation outcomes in legislation,

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[36] Environmental Defenders' Office, *ACT Environmental Law Handbook,* ed Camilla Taylor (Environmental Defenders' Office (ACT), 3rd ed, 2015) 90. For applicable legislation in the ACT, see generally *Australian Capital Territory (Planning and Land Management Act 1988* (Cth); *Environment Protection Act 1997* (ACT); *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('*EPBC Act*'); *Planning and Development Act 2007* (ACT); *Water Resources Act 2007* (ACT); *Nature Conservation Act 2014* (ACT) *('Nature Conservation Act').*

[37] *EPBC Act* (n 36) pt 13. Cf *Nature Conservation Act* (n 36) ss 69, 111.

[38] *Nature Conservation Act* (n 36) ch 4.

[39] *EPBC Act* (n 36) ss 178, 181, 183, 207A, 209, 248.

[40] See eg, Fisher (n 18) 375-377; Bilateral Agreement made under s 45 of the Environment Protection & Biodiversity Conservation Act 1999 (Cth) relating to environmental assessment between the Commonwealth of Australia and the Australian Capital Territory (signed and entered into force 6 June 2014) 3.

[41] Georgina Mace, 'Whose Conservation?" (2014) 345 (6204) *Science* 1558, 1559-1560; Richard Pearson, 'Reasons to Conserve Nature' (2016) 31(5) *Trends in Ecology and Evolution* 366, 367.

[42] *Planning and Development Act 2007* (n 36) s 9.

[43] On the common law application of the principle of intergenerational equity in Queensland and New South Wales see *Gray v Minister for Planning* (2006) 152 LGERA 258; *New Acland Coal Pty Ltd v Ashman and Chief Executive, Department of Environment and Heritage Protection (No 4)* [2017] QLC 24; *New Acland Coal Pty Ltd v Smith* (2018) 230 LGERA 88; *Gloucester Resources Ltd v Minister for Planning* (2019) 234 LGERA 257.

[44] *Intergovernmental Agreement on the Environment* (1992) s 3.5.2, cited in Edward Cleary, 'Judicial Consideration of Intergenerational Equity in Australian Coal Mine Approval Litigation' (2021) 38 *Environmental and Planning Law Journal* 3, 6.

international instruments[45] and national targets.[46] In view of the *ACT State of the Environment Report 2019*[47] and the *Second Independent Review of the EPBC Act*,[48] the importance of biodiversity conservation research is evident, in that current regimes do not achieve the conservation outcomes promoted by the over-arching international documents.

The article will further adopt a 'future-thinking' approach,[49] by shifting focus from 'preserving "what is, or what was there" to "what more could be there"'.[50] Thus, I strive to ensure that current legislation optimally curbs biodiversity loss,[51] by espousing the view that 'the next generation of environmental laws will need to recognise explicitly the role of humanity as a trustee of the environment and its common resources…'.[52]

C Methodology and Overview

This article utilises a multi-faceted methodology. First, a doctrinal approach will enable examination of primary sources of law, including international conventions and legislation of the ACT and Commonwealth jurisdictions, to observe the operation of laws governing conservation.[53] Comparative legal research will also facilitate comparison of domestic legislation at the territory and federal levels with international documents.[54] In particular, a selective comparison of legislative provisions will allow the article to determine the extent of legal evolution in the conservation law of Australia, as compared to the principles of the *World Charter for Nature* and the *Biodiversity Convention*.[55] The article will additionally reflect on judicial consideration in case law and draw from commentary in authoritative or peer-reviewed texts and government reporting.[56]

Thus, I begin this article by exploring the international law on biodiversity protection. This treatment particularly examines and compares the provisions of the *World Charter for Nature* and the *Biodiversity Convention,* and assesses the legal effect of each instrument on Australian law.

In the following section, I then compare the biodiversity conservation law at the Commonwealth and ACT levels. This involves an exploration of the provisions of the *EPBC Act* and the *Nature Conservation Act* in respect of their objectives and protected area and listing regimes.

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[45] See, eg, *Biodiversity Convention* (n 23); *Convention on International Trade in Endangered Species of Wild Fauna and Flora,* opened for signature 3 March 1973, 993 UNTS 243 (entered into force 1 July 1975); *Convention on Migratory Species,* opened for signature 23 June 1979, 1651 UNTS 333 (entered into force 1 November 1983).

[46] *Biodiversity Convention* (n 23); Convention on Biological Diversity Secretariat, *Australia – National Targets* (Web Page, 2020) <https://www.cbd.int/countries/targets/?country=au>.

[47] *ACT SoE 2019* (n 12) 16, 204-273, 357-367.

[48] Graeme Samuel, *Independent Review of the EPBC Act – Final Report* (Final Report, October 2020) 26, 39-56, 191-192 (*'Second Independent Review of the EPBC Act')*. Note that there is a statutory provision for review of the EPBC Act at intervals of no more than 10 years since its commencement: *EPBC Act* (n 36) s 522A(2).

[49] Brian Preston, 'Benefits of Judicial Specialization in Environmental Law: The Land and Environment Court of New South Wales as a Case Study' (2012) 29(2) *Pace Environmental Law Review* 396, 440.

[50] Jean-Louis Martin et al, 'The Need to Respect Nature and its Limits Challenges Society and Conservation Science' (2016) 113(22) *Proceedings of the National Academy of Sciences* 6105, 6111.

[51] *Year Book Australia* (n 10) 6-8.

[52] Australian Panel of Experts on Environmental Law (APEEL), *A Blueprint for the Next Generation of Australian Environmental Laws* (Overview Paper, 2017) 1.

[53] Dennis Pearce et al ('Pearce Committee'), *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (1987) vol 3, 17, cited in Terry Hutchinson, 'Developing Legal Research Skills: Expanding the Paradigm' (2008) 32(3) *Melbourne University Law Review* 1065, 1068.

[54] Mark Van Hoecke, 'Methodology of Comparative Legal Research' (2015) 12 *Law and Method* 1, 21-23.

[55] Ibid.

[56] See, eg, *ACT SoE 2019* (n 12); *Second Independent Review of the EPBC Act* (n 48).

In order to understand how the *World Charter for Nature* and the *Biodiversity Convention* have influenced domestic protections for biodiversity, the third section compares each of the domestic instruments with each of the international instruments. In this section, I inspect the current condition of biodiversity in Australia and the comparative merits of domestic Acts in relation to the *World Charter for Nature* and the *Biodiversity Convention*. This discussion evaluates whether the *EPBC Act* or the *Nature Conservation Act* have achieved adequate outcomes and protections for Australian species and ecological communities.

Further, this article also adopts a reform-oriented paradigm to evaluate the inadequacies of existing biodiversity conservation frameworks and formulate practical solutions in key areas of weakness.[57] In this way, the article concludes with recommendations for reform that reflect the environmental principles of the *World Charter for Nature* and the *Biodiversity Convention*. This section considers outcomes-driven and measurement-based approaches to the drafting of environmental statutes and conservation planning. Amendments to the *EPBC Act* and the *Nature Conservation Act* will also be suggested to increase the efficacy of reserve systems and species listing approaches.

II International Obligations for the Protection of Biodiversity

In the mid-20th century, the scientific community observed an epochal shift away from the resilient Earth system of the Holocene era,[58] to the dawn of an unstable 'Anthropocene era'.[59] Humanity's impacts have continued to cause substantial changes to Earth's biosphere,[60] including:

> accelerated rates of world-wide biodiversity, soil, sedimentation and fresh water loss; growing global chemical consumption; changes to the global climate; a deterioration of the ozone layer; increased desertification; rising sea levels; and ever-increasing rates of human population and consumption of resources.[61]

These socio-ecological crises have no easily discernible solution.[62] Also known as 'wicked problems', these complex challenges have no universally accepted characterisation of their nature, cause, seriousness, or urgency.[63] Moreover, there is no agreed designation of what may be a *correct* authority or action to resolve these problems.[64] Nevertheless, the development of international environmental law has endeavoured to foster:

> …an understanding of the problems of environmental degradation and their causes, of the legal processes for addressing these problems, including the processes of law-making, compliance monitoring and dispute resolution, of the players who cause the problems and those who make the law to address the problems, and of the legal principles that form the foundation for the treaty law that now dominates the field.[65]

These global efforts help define the environmental rights and obligations of nations to each other.[66] In relation to biodiversity conservation, these efforts are reflected by the *World*

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[57] Pearce Committee (n 53) 1068.
[58] Bates (n 3) 53. See also Will Steffen et al, 'The Anthropocene: Conceptual and Historical Perspectives' (2011) 369(1938) *Philosophical Transactions of the Royal Society* 842.
[59] Louis Kotzé, 'A Global Environmental Constitution for the Anthropocene?' (2019) 8(1) *Transnational Environment Law* 11, 12.
[60] Anthony Barnosky et al, 'Approaching a State Shift in Earth's Biosphere' (2012) 486(7401) *Nature* 52, 57.
[61] Bates (n 3) 53, citing Hayley Stevenson, *Global Environmental Politics* (Cambridge University Press, 2017) 1.
[62] Ibid.
[63] Hayley Stevenson, *Global Environmental Politics* (Cambridge University Press, 2017) 142-148.
[64] Ibid 140.
[65] David Hunter et al, *International Environmental Law and Policy* (Foundation Press, 2nd ed, 2002) vi, quoted in Bates (n 3) 53.
[66] Kotzé (n 59) 12.

Charter for Nature and the *Biodiversity Convention*.[67] Hence, the following section sets out the objectives and substantive provisions of both the Charter and the Convention. I also explore the general principles and functions of each international agreement and examine how they provide necessary context for the high-level objectives of Australia's conservation regimes.

A The World Charter for Nature

Reflecting the concerns of the International Union for Conservation of Nature's (IUCN) *World Conservation Strategy* of 1980,[68] the *World Charter for Nature* was adopted in 1982.[69] Within the international system of environmental law,[70] the Charter is an avowedly influential ecological instrument that emphasises the protection of nature as an end in itself.[71]

In its title, the Charter employs the ecologically inclined notion of 'nature',[72] as opposed to the utilitarian term of 'environment' distinctive in other global environmental declarations.[73] This '*for* nature' proclamation is reinforced by the Charter's preamble, in that:

> Every form of life is unique, warranting respect regardless of its worth to man, and, to accord other organisms such recognition, man must be guided by a moral code of action…[74]

The Charter recognises a right to exist that is intrinsic to nature, irrespective of its perceived value to humans.[75] This understanding contrasts with the utilitarian construct of nature that derives an instrumental value from its functions[76] – for example, the 'services' that nature provides.[77]

The legislative intent of the *World Charter for Nature* is to protect nature for its own benefit. Hence, it moves beyond advancing the utilitarian human objectives pursued in other international instruments[78] that promote the 'human environment',[79] or reconcile

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[67] Note that the *World Charter for Nature* was adopted by a majority of 111 votes in favour by member states of the United Nations General Assembly (UNGA) in 1982, while the *Biodiversity Convention* was opened for signature on 5 June 1992 at the Rio 'Earth Summit', and remained open for signature until 4 June 1993, by which time it had received 168 signatures and was adopted by the United Nations Environment Program (UNEP): see Convention on Biological Diversity Secretariat, *History of the Convention* (Web Page, 31 August 2021) <https://www.cbd.int/history/>.

[68] Peter Jackson, 'A World Charter for Nature' (1983) 12(2) *Ambio* 133.

[69] The majority vote consisted of 111 votes in favour, 18 abstentions and a single dissenting vote from the United States: see 'World Charter for Nature' (1983) 10(2) *Environmental Policy and Law* 37, 41.

[70] Max Herriman et al, *Australia's Oceans Policy, International Agreements, Background Paper 2: Review of International Agreements, Conventions, Obligations and Other Instruments Influencing Use and Management of Australia's Marine Environment* (Report, October 1997) [18.8], cited in Only One Planet, *World Charter for Nature* (Web Page, 2021) <http://www.onlyoneplanet.com/World_charter_for_nature_1982.htm#:~:text=The%20World%20Charter%20for%20Nature%20is%20a%20non%2Dbinding%20international,provisions%20in%20a%20general%20way.>.

[71] Philippe Sands et al, *Principles of International Environmental Law* (Cambridge University Press, 3rd ed, 2012) 37.

[72] For the use of 'nature' in other global declarations, see, eg, *Harmony with Nature,* GA Res 64/169, UN Doc A/RES/64/169 (12 February 2010, adopted 21 December 2009).

[73] For the use of 'environment' in other global declarations, see, eg, Global Pact for the Environment (La Sorbonne, Paris, 24 June 2017) <https://www.iucn.org/sites/dev/files/content/documents/draft-project-of-the-global-pact-for-the-environment.pdf>; *Towards a Global Pact for the Environment,* GA Res 72/277, UN Doc A/RES/77/277 (14 May 2018, adopted 10 May 2018).

[74] *World Charter for Nature* (n 19) Preamble.

[75] Pearson (n 41) 367.

[76] John Vucetich et al, 'Evaluating Whether Nature's Intrinsic Value is an Axiom or Anathema to Conservation' (2015) 29(2) *Conservation Biology* 321, 322-323.

[77] The 'services' may include natural processes such as decomposition, pollination, water purification or climate regulation, or even the aesthetic value of nature to humans: see Pearson (n 41) 367.

[78] Kotzé (n 59) 29.

[79] See, eg, *The Stockholm Declaration on the Human Environment'* (n 17).

'environment and development' with anthropocentric concerns for 'sustainable development'.[80] This intent of the Charter is pertinent to the consideration of whether its adoption in domestic legislation should reflect a need to protect biodiversity for the benefit of human utility or to safeguard its right to exist in its own right.

The Charter's preamble further highlights the interdependency of humanity and nature, in that the continuance of life depends on 'the uninterrupted functioning of natural systems' and the 'maintenance of essential ecological processes and life support systems'.[81] It is premised on the idea that human development is only sustainable so long as ecological limits are respected.[82] It also recognises the need for environmental cooperation at all societal levels.[83] Although the preamble acknowledges the permanent sovereign rights of states over their resources, the emphasis of the Charter is to encourage a moral code of action to maintain ecological balance and integrity.[84]

The Charter notes that the degradation of natural systems is consequent of 'excessive consumption and misuse of natural resources' and the 'failure to establish an appropriate economic order' among people and States.[85] This acknowledges the damaging consequences of a prevailing neo-liberal economic order that is skewed towards nature's exploitation and mass-consumerism.[86] 'Competition for scarce resources creates conflicts', whereas the conservation of nature contributes to the maintenance of peace, stability and social order.[87]

Following from its preamble, the Charter then identifies 24 principles,[88] five of which set out general principles that guide human behaviour,[89] eight of which relate to functions,[90] and the remaining 11 which concern the implementation of the Charter.[91]

General Principles

Article 1 of the Charter provides that 'nature shall be respected and its essential processes shall not be impaired'. The following articles then propose that:

(1) The genetic viability of earth shall not be compromised;[92]

(2) All of nature shall be subject to principles of conservation, with special protections given to unique areas and species;[93]

(3) Nature shall be managed to maintain optimum sustainable productivity and preserve ecosystem integrity;[94] and

(4) Nature shall be secured against degradation by means of warfare or other activities.[95]

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[80] See, eg, *Report of the United Nations Conference on Environment and Development* (n 22).
[81] *World Charter for Nature* (n 19) Preamble.
[82] Louis Kotzé and Duncan French, 'The Anthropocentric Ontology of International Environmental Law and the Sustainable Development Goals: Towards an Ecocentric Rule of Law in the Anthropocene' (2018) 7(1) *Global Journal of Comparative Law* 5, 33.
[83] Ibid.
[84] Kotzé (n 59) 30.
[85] *World Charter for Nature* (n 19) Preamble.
[86] Kotzé and Duncan French (n 82) 34.
[87] *World Charter for Nature* (n 19) Preamble.
[88] Ibid.
[89] Ibid arts 1-5.
[90] Ibid arts 6-13.
[91] Ibid arts 14-24.
[92] Ibid art 2.
[93] Ibid art 3.
[94] Ibid art 4.
[95] Ibid art 5.

These principles potentially marked a '"paradigm shift in environmental law" to biocentrism' through the creation of responsibilities to respect nature, adhere to the Earth system's limits, and preserve its integrity.[96]

Functions

The Charter provides general emphasis that planning of social or economic development activities should be accompanied by a consideration of nature. The seven articles contained in this section pertain to recommended controls on economic development,[97] that allow for the conservation of natural resources,[98] and the avoidance of activities likely to cause irreversible damage to nature.[99] For example, art 10 implores that natural resources are not to be wasted and should be used with appropriate restraint.

Another key provision is art 11 which recommends the use of technology to take precautions against the environmental impact of activities. This includes requiring that activities likely to disturb nature shall be preceded by an assessment of their impacts.[100] A number of articles also advocate for more traditional methods of conservation relevant to soil,[101] water,[102] agriculture, grazing, forestry and fisheries practices.[103] The over-arching theme of the Charter's 'functions' is that human development should have minimal adverse effects to nature.[104]

1 Implementation

The 'implementation' section directs States to implement eleven types of activities that give effect to the general principles of the Charter.[105] These include:

(1) Enacting domestic and international environmental laws;[106]

(2) Disseminating knowledge of nature through education;[107]

(3) Increasing public participation in planning;[108]

(4) Creating funding and administrative programmes;[109]

(5) Supporting scientific research;[110]

(6) Implementing environmental monitoring;[111]

(7) Avoiding environmentally damaging military activities;[112]

(8) Encouraging cooperation among States, individuals and corporations;[113]

(9) Adopting administrative regulations for nature;[114]

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[96] Kotzé (n 59) 30.
[97] Harold Wood Jr, 'The United Nations World Charter for Nature: The Developing Nations' Initiative to Establish Protections for the Environment' (1985) 12(4) *Ecology Law Quarterly* 977, 980-981.
[98] *World Charter for Nature* (n 19) art 10(d).
[99] Ibid art 11(a).
[100] Ibid art 11(c).
[101] Ibid art 10(b).
[102] Ibid art 10(c).
[103] Ibid art 11(d).
[104] Ibid arts 11, 13.
[105] Wood Jr (n 97) 981.
[106] *World Charter for Nature* (n 19) art 14.
[107] Ibid art 15.
[108] Ibid art 16.
[109] Ibid art 17.
[110] Ibid art 18.
[111] Ibid art 19.
[112] Ibid art 20.
[113] Ibid art 21.
[114] Ibid art 22.

(10) Allowing citizens a means of redress for environmental damage;[115] and

(11) Reaffirming the duty of all persons as caretakers of nature.[116]

As per arts 14 and 24 of the Charter, a duty for all persons to act as caretakers of nature can be demonstrated through Australia's adoption of the *EPBC Act* and the *Nature Conservation Act*. Both Acts make provision for public participation in planning, environmental monitoring, biodiversity regulations and administrative review of decisions – in line with arts 16, 19, 22 and 23.

Although art 22 recognises the sovereignty of States over their natural resources, it nonetheless encourages States to give effect to the provisions of the Charter. This duty is further extended to 'persons other than States' in art 24. Further, art 23 supports the universal rights of persons to means of participation in environmental decision-making and redress in the case of environmental harms. For Australia, I argue that this establishes a guiding principle that it is the role of the State, as a caretaker of nature, to ensure adequate protections of nature.[117]

Legal Effect of the Charter

Despite its stridently 'pro-nature' approach, the *World Charter for Nature* is a *non-binding* international instrument and does not directly impose obligations on Australia.[118] Nevertheless, by virtue of its overwhelming endorsement by governments of the world at the time of its adoption, it cannot be relegated to a mere symbolic gesture.[119] The Charter is considered a 'historic landmark in the evolution of global ethics'.[120] Its strong sense of ecological integrity has been developed in other international agreements, including the *Biodiversity Convention* and the *Rio Declaration*, as per art 14 which contemplates that all principles of the Charter shall be '…reflected appropriately in the law and practice of each State, as well as at the international level'.

Significantly, the Charter moves beyond an 'anthropocentric and narrowly egocentric perspective' of nature and its relative international importance reinforces the need to consider Australia's biodiversity conservation regimes in light of the Charter's provisions.[121]

B Convention on Biological Diversity

Succeeding the *World Charter for Nature,* the *Biodiversity Convention* was concluded at the Earth Summit in 1992.[122] Australia ratified the Convention on 18 June 1993,[123] and hence became committed to advancing its three main objectives of: (1) conserving biological diversity; (2) sustainable use of biodiversity; and (3) fair use and equitable sharing of genetic resources.[124]

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[115] Ibid art 23.
[116] Ibid art 24.
[117] James May and Erin Daly, *Global Environmental Constitutionalism* (Cambridge University Press, 2015) 56; Rachel Pepper and Harry Hobbs, 'The Environment is All Rights: Human Rights, Constitutional Rights and Environmental Rights' (2020) 44(2) *Melbourne University Law Review* 1, 15-16; Sophie Tepper, 'Climate Change Risk and the Urban Landscape' (2020) 37(3) *Environmental and Planning Law Journal* 403, 408.
[118] Herriman et al (n 70) [18.8].
[119] Kotzé and French (n 82) 33.
[120] Brendan Mackey, 'The Earth Charter and Ecological Integrity – Some Policy Implications' (2004) 8(1) *World Views* 76, 85.
[121] Jurgen Moltmann, 'Reconciliation with Nature' (1991) 11(2) *World and World* 117, 121.
[122] The Convention was ratified with over 170 other countries. Note also that it was one of three international environmental agreements concluded at the Earth Summit – the other two agreements were the *Framework Convention on Climate Change* and the *Convention to Combat Desertification*.
[123] Annette Davison et al, 'Microorganisms, Australia and the Convention on Biological Diversity' (1999) 8(10) *Biodiversity and Conservation* 1399, 1402.
[124] *Biodiversity Convention* (n 23) art 1.

Described as a 'landmark' treaty,[125] this Convention has significantly enhanced the scope of international law to conserve Earth's biological diversity.[126] It is a 'framework convention' which proffers a degree of flexibility for States to determine how its provisions should be implemented.[127] In most instances, the articles of the Convention are prefaced with qualifying remarks such as 'in accordance with its particular conditions and capabilities' and 'as far as possible and appropriate'.[128] Although it has legal effect, The Convention relies primarily on non-obligatory instruments, in the form of 'targets', to achieve its objectives.[129] It is expected that States will put into practice these broadly framed provisions.[130]

1 Preamble

In its preamble, the *Biodiversity Convention* echoes the *World Charter for Nature,* recognising the 'intrinsic value' of biological diversity and affirming its importance to the 'life sustaining systems of the biosphere'.[131] This distinctively bio-centric preamble establishes the preservation of biological diversity as a crucial concern of humankind.

2 Principles and Scope

Article 3 sets out that although States have the sovereign right to exploit their own resources, they also have a responsibility to ensure that their activities do not damage environments beyond the limits of national jurisdictions.[132] Article 4 limits the application of the Convention's provisions to biodiversity found within the limits of each State's national jurisdiction.[133] Decisions of the Conference of the Parties (COP),[134] and reports of the Executive Secretary of the Convention on Biodiversity,[135] confirm a general expectation that state sovereignty must be balanced against responsibilities to protect biodiversity within national limits.[136] Article 6 further requires States to prepare a national blueprint on how the Convention's objectives will be achieved.[137]

3 Identification and Monitoring

Article 7 encompasses a duty of States to monitor biodiversity and limit the adverse impacts to those subjects being monitored.[138] The data derived from identification and monitoring

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[125] Lyle Glowka et al, *A Guide to the Convention on Biological Diversity* (IUCN Gland and Cambridge, 1994) 3.
[126] Emma Carmody, 'The Silence of the Plan: Will the Convention on Biological Diversity and the Ramsar Convention be implemented in the Murray Darling Basin?' (2013) 30(1) *Environmental and Planning Law Journal* 56, 63 quoting Alan Boyle and Patricia Birnie, *International Law and the Environment* (Oxford University Press, 2nd ed, 2002) 568.
[127] Glowka et al (n 125) 1.
[128] Carmody (n 126) 63.
[129] Stuart Harrop, ''Living In Harmony With Nature'? Outcomes of the 2010 Nagoya Conference of the Convention on Biological Diversity' (2011) 23(1) *Journal of Environmental Law* 117.
[130] Susan Bragdon, 'The Convention on Biological Diversity' (1996) 6(2) *Global Environmental Change* 177, 178.
[131] *Biodiversity Convention* (n 23) Preamble.
[132] Ibid art 3.
[133] Ibid art 4.
[134] See, eg, *Biodiversity Convention, COP 3, Decision III/9 – Implementation of Articles 6 and 8 of the Convention* (4-15 November 1996), which reaffirms the importance of the implementation of all parties of national strategies, plans and programmes for biodiversity conservation.
[135] *Report of the Executive Secretary of the Convention on Biological Diversity: Implementation of the Convention on Biological Diversity* (Background Paper 1, 2002) 4-5.
[136] Carmody (n 126) 64.
[137] *Biodiversity Convention* (n 23) art 6; Glowka et al (n 125) 29.
[138] *Biodiversity Convention* (n 23) art 7(a)-(d).

activities must also be maintained and organised.[139] In addition, a number of COP decisions have reiterated a need to implement art 7 on a national scale.[140]

4 In-Situ Conservation

Article 8 provides 13 subclauses related to environmental management. The relative strength of each subclause ranges from mandatory implementation of a particular action, to less strict requirements 'to promote' or 'to endeavour' to engage in a particular activity.[141]

The 'mandatory' category of activities comprises 10 subclauses, including a requirement to:

(1) Establish systems of protected areas;[142]

(2) Develop management guidelines for protected areas;[143]

(3) Regulate biological resources;[144]

(4) Rehabilitate ecosystems and promote species recovery;[145]

(5) Control risks associated with living modified organisms and biotechnology;[146]

(6) Control alien species that threaten biodiversity;[147]

(7) Respect, preserve and maintain knowledge and practices of Indigenous peoples;[148]

(8) Develop legislation to protect threatened species;[149]

(9) Manage adverse impacts on biodiversity;[150] and

(10) Cooperate and provide financial support for in-situ conservation.[151]

The remaining subclauses impose less stringent obligations on States to:

(1) Promote the protection of ecosystems and natural habitats;[152]

(2) Promote sustainable use of areas adjacent to protected areas;[153] and

(3) Endeavour to ensure that current uses are compatible with the Convention's objectives.[154]

Article 8 has also been discussed extensively in successive COP decisions, that remind the parties of the need for conservation practices.[155] In relation to Australia's biodiversity

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[139] Ibid art 7(d).
[140] See, eg, *Biodiversity Convention, COP 3, Decision III/10 - Identification, Monitoring And Assessment,* UNEP/CBD/COP/3/38 (4 to 15 November 1996); *Biodiversity Convention, COP 5, Decision V/7 - Identification, Monitoring and Assessment, and Indicators,* UNEP/CBD/COP/5/23 (15 to 26 May 2000); *Biodiversity Convention, COP 6, Decision VI/7 - Identification, Monitoring, Indicators and Assessments*, UNEP/CBD/COP/6/20 (7 to 19 April 2002).
[141] Note that Australian courts have interpreted the requirement 'to promote' as not giving rise to an obligation to 'look to the effect' of a particular action: see *New South Wales Council for Civil Liberties Inc v Classification Review Board (No 2)* (2007) 159 FCR 108.
[142] *Biodiversity Convention* (n 23) art 8(a).
[143] Ibid art 8(b)
[144] Ibid art 8(c).
[145] Ibid art 8(f).
[146] Ibid art 8(g).
[147] Ibid art 8(h).
[148] Ibid art 8(j).
[149] Ibid art 8(k).
[150] Ibid art 8(l).
[151] Ibid art 8(m).
[152] Ibid art 8(d).
[153] Ibid art 8(e).
[154] Ibid art 8(i).
[155] See *Biodiversity Convention, COP 2, Decision II/7 – Consideration of Articles 6 and 8 of the Convention,* UNEP/CBD/COP/2/19 (4 to 8 September 1995); *Biodiversity Convention, COP 3,*

conservation laws, arts 8(a), (b) and (k) provide basis for the 'protected area' and species listing regimes.

5 Sustainable Use of the Components of Biodiversity

Art 10 stipulates that each State must integrate the consideration of conservation and sustainable use of biological resources into the course of its national decision-making.[156] This should involve measures to prevent adverse impacts on biodiversity,[157] as well as public-private sector cooperation.[158] Customary and cultural uses of land that are compatible with conservation goals are preferable,[159] and States are encouraged to engage local populations to develop remedial action in degraded areas of biological diversity.[160] The implementation of art 10 has been discussed by the COPs, which have recommended an ecosystems-based framework to biodiversity conservation.[161]

6 Legal Effect of the Convention

Although the Convention is a legally-binding international agreement, it lacks the same specificity regarding how to achieve positive biodiversity outcomes, as was achieved by the *World Charter for Nature*. For example, although arts 5 to 10 contain a series of obligations directed towards activities that affect biodiversity, these provisions are expressed in 'relatively flexible language'.[162] Perhaps, the more 'idealistic' and broad approach of the *World Charter for Nature*, was a consequence of awareness by the States agreeing to it, that it would not be legally binding.

Decision III/9 - Implementation of Articles 6 and 8 of the Convention, UNEP/CBD/COP/3/38 (4 to 15 November 1996); *Biodiversity Convention, COP 7, Decision VII/13 – Alien species that threaten ecosystems, habitats or species (Article 8 (h)),* UNEP/CBD/COP/DEC/VII/13 (13 April 2004); *Biodiversity Convention, COP 7, Decision VII/16 – Article 8(j) and related provisions,* UNEP/CBD/COP/DEC/VII/16 (13 April 2004); *Biodiversity Convention, COP 8, Decision VIII/5 – Article 8(j) and related provisions,* UNEP/CBD/COP/DEC/VIII/5 (15 June 2006); *Biodiversity Convention, COP 8, Decision VIII/27 – Alien species that threaten ecosystems, habitats or species (Article 8 (h)): further consideration of gaps and inconsistencies in the international regulatory framework,* UNEP/CBD/COP/DEC/VIII/27 (15 June 2006); *Biodiversity Convention, COP 9, Decision IX/13 – Article 8(j) and related provisions,* UNEP/CBD/COP/DEC/IX/13 (9 October 2008); *Biodiversity Convention, COP 10, Decision X/43 – Multi-year programme of work on the implementation of Article 8(j) and related provisions of the Convention on Biological Diversity,* UNEP/CBD/COP/DEC/X/43 (29 October 2010); *Biodiversity Convention, COP 11, Decision XI/14 – Progress in the implementation of Article 8(j) and related provisions and its integration into the various areas of work under the Convention on Biological Diversity,* UNEP/CBD/COP/DEC/XI/14 (5 December 2012); *Biodiversity Convention, COP 12, Decision XII/12 – Article 8(j) and related provisions,* UNEP/CBD/COP/DEC/XII/12 (13 October 2014); *Biodiversity Convention, COP 13, Decision XIII/18 – Article 8(j) and related provisions,* CBD/COP/DEC/XIII/18 (17 December 2016); *Biodiversity Convention, COP 13, Decision XIII/19 – Article 8(j) and related Articles: other matters related to the programme of work,* CBD/COP/DEC/XIII/19 (12 December 2016); *Biodiversity Convention, COP 14, Decision 14/13 – Glossary of relevant key terms and concepts within the context of Article 8(j) and related provisions,* CBD/COP/DEC/14/13 (30 November 2018); *Biodiversity Convention, COP 14, Decision 14/14 – Other matters related to Article 8(j) and related provisions,* CBD/COP/DEC/14/14 (30 November 2018); *Biodiversity Convention, COP 14, Decision 14/17 – Integration of Article 8(j) and provisions related to indigenous peoples and local communities in the work of the Convention and its Protocols,* CBD/COP/DEC/14/17 (30 November 2018).

[156] *Biodiversity Convention* (n 23) art 10(a).

[157] Ibid art 10(b).

[158] Ibid art 10(e).

[159] Ibid art 10(c).

[160] Ibid art 10(d).

[161] See *Biodiversity Convention, COP 7, Decision VII/12 – Sustainable Use (Article 10),* UNEP/CBD/COP/DEC/VII/12 (13 April 2004).

[162] Fisher (n 18) 377.

Whether this Convention truly marks the same paradigm shift to 'biocentrism',[163] characteristic of the *World Charter for Nature,* is not so obvious. Consistent avoidance by the Charter of the term 'environment' in favour of the term 'nature',[164] is but one example of its acknowledgment of a non-anthropocentric and intrinsic value of nature.[165] By contrast, the Convention states that:

> Conscious of the intrinsic value of biological diversity and of the ecological, genetic, social, economic, scientific, educational, cultural, recreational and aesthetic values of biological diversity and its components.. [we] have agreed as follows…[166]

Although the non-anthropocentric value 'ecological' is expressed first, the Convention markedly balances the intrinsic value of nature against a range of anthropocentric values.[167] Compared to the Convention, the Charter places Earth-based principles at the fore, when weighing environmental protections against other needs.[168] Relevant to the influence of these documents on Australian law, the *World Charter for Nature* may be viewed to place the wellbeing of nature at the forefront of environmental decision-making; while the *Biodiversity Convention* provides greater scope to place other social or economic values above the environment.[169]

III Domestic Protections for Biodiversity

Australia's legal framework for biodiversity conservation consists of a hierarchy of instruments operating at the international, national, state and local levels.[170] International instruments, such as the *World Charter for Nature* and the *Biodiversity Convention*, set high-level objectives for Australian law. Below this, conservation laws adopt a 'two-pronged approach'.[171]

The first prong involves reserving areas of land for the purpose of protecting biodiversity,[172] although the objects of such reservations often include public recreation and enjoyment.[173] The 'protection and sound management of natural habitats is of fundamental importance'[174] to implementing comprehensive, adequate and representative reserve systems.[175]

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[163] Joshua Bruckerhoff, 'Giving Nature Constitutional Protection: A Less Anthropocentric Interpretation of Environmental Rights' (2008) 86(3) *Texas Law Review* 615, 618.
[164] See, eg, *World Charter for Nature* (n 19) arts 1, 5, 7, 11, 13, 15-21.
[165] Susan Emmenegger and Axel Tschentscher, 'Taking Nature's Rights Seriously: The Long Way to Biocentrism in Environmental Law' (1994) 6(3) *Georgetown International Environmental Law Review* 545, 571.
[166] *Biodiversity Convention* (n 23) Preamble.
[167] Given that the intrinsic and 'ecological' values of biodiversity are expressed first, this potentially emphasises their relative importance compared to other comparators. Indeed however, most of the values listed in the *Biodiversity Convention* are anthropocentric: see Ibid; Emmenegger and Tschentscher (n 165) 568.
[168] Peter Burdon, 'A Theory of Earth Jurisprudence' (2012) 37 *Australian Journal of Legal Philosophy* 28, 30-31, 50; Dickson and Woolaston (n 13) 24-25.
[169] Ibid.
[170] Jan McDonald et al, 'Promoting Resilience to Climate Change in Australian Conservation Law: The Case of Biodiversity Offsets' (2016) 39(4) *University of New South Wales Law Journal* 1612, 1616.
[171] Ibid 1617.
[172] Relevant legislation is at the territory and federal level: see, eg, *EPBC Act* (n 36); *Nature Conservation Act* (n 36). See also *National Parks and Wildlife Act 1972* (SA); *National Parks and Wildlife Act 1974* (NSW) pt 4; *Conservation, Forests and Lands Act 1987* (Vic); *Nature Conservation Act 1992* (Qld).
[173] Bates (n 3) 353.
[174] *Intergovernmental Agreement on the Environment* (n 44) sch 9.
[175] This covers 19.75 percent of the country (over 151.8 million hectares): see Natural Resource Management Ministerial Council, *Australia's Strategy for the National Reserve System 2009-2030* (2009) 4.

Reservations can be created under legislation,[176] and as at 30 June 2020, the National Reserve System of Australia (NRS) consisted of some 13,540 public and private areas.[177]

The second prong involves species-specific methods,[178] through the listing of threatened species and ecological communities.[179] These approaches provide broader protections for components of biodiversity that are not located within reserves or land subject to property agreements.[180] Moreover, complementary protections generally take the form of prohibitions on harming species or their habitats without an appropriate permit[181] or licence.[182] Approvals will usually only be granted once the impacts of actions are considered through environmental impact assessment (EIA) frameworks.[183]

This section will explore how the *World Charter for Nature* and the *Biodiversity Convention* have influenced domestic protections for biodiversity. This will first involve an examination of the operation of the *EPBC Act* at the federal level and then the *Nature Conservation Act* at the territory level. Although not within the scope of this research, note that other legislation, relevant for example to water,[184] native vegetation[185] or catchments,[186] also play a significant role in achieving biodiversity outcomes in Australia.[187]

A Environment Protection and Biodiversity Conservation Act 1999 (Cth)

The *EPBC Act* commenced on 16 July 2000, enabling the federal government to produce a national scheme of environmental, heritage and biodiversity protection.[188] In administering the *EPBC Act*, the Australian Government has limited its oversight to MNES.[189]

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[176] Bates (n 3) 353.
[177] Department of Agriculture, Water and the Environment, *National Reserve System* (Web Page, 2021) <https://www.environment.gov.au/land/nrs>.
[178] McDonald et al, 'Promoting Resilience to Climate Change in Australian Conservation Law: The Case of Biodiversity Offsets' (n 170) 1617.
[179] Relevant legislation is at the territory and federal level: see, eg, *EPBC Act* (n 36); *Nature Conservation Act* (n 36). See also *National Parks and Wildlife Act 1972* (n 172); *Flora and Fauna Guarantee Act 1988* (Vic); *Nature Conservation Act 1992* (n 172); *Threatened Species Protection Act 1995* (Tas); *Biodiversity Conservation Act 2016* (NSW); *Biodiversity Conservation Act 2016* (WA).
[180] Bates (n 3) 354.
[181] See *EPBC Act* (n 36) s 19; *Nature Conservation Act* (n 36) s 262.
[182] See *EPBC Act* (n 36) s 18. See also generally *Nature Conservation Act* (n 36) ch 6.
[183] See *EPBC Act* (n 36) s 527E, pts 7, 9; *Nature Conservation Act* (n 36) ss 268-269. For discussion of the inclusion of indirect influences or effects of an action with the meaning of 'impact': see *Minister for Environment and Heritage v Queensland Conservation Council Inc* (2004) 139 FCR 24, 38 (Black CJ, Ryan and Finn JJ).
[184] See, eg, *Water Act 2007* (Cth); *Water Resources Act 2007* (n 36). See also *Water Act 1989* (Vic); *Water Act 1992* (NT); *Water Management Act 1999* (Tas); *Water Management Act 2000* (NSW); *Water Act 2000* (Qld).
[185] See, eg, Council of Australian Governments (COAG), Standing Council on Environment and Water, *Australia's Native Vegetation Framework* (2012); ACT Government, *ACT Nature Conservation Strategy 2013–23* (2013). See also *Native Vegetation Act 1991* (SA); *Vegetation Management Act 1999* (Qld); *Nature Conservation Act* (n 36) ch 3; *Local Land Services Act 2013* (NSW) pt 5A; *Biodiversity Conservation Act 2016* (n 179) pt 12 div 7.
[186] See, eg, ACT Government, *ACT and Region Catchment Strategy* 2016–46 (2016). See also *Soil and Land Conservation Act 1945* (WA); *Conservation and Land Management Act 1984* (WA); *Catchment and Land Protection Act 1994* (Vic); *Water NSW Act 2014* (NSW); *Landscape South Australia Act 2019* (SA).
[187] McDonald et al, 'Promoting Resilience to Climate Change in Australian Conservation Law: The Case of Biodiversity Offsets' (n 170) 1617.
[188] Department of Agriculture, Water and the Environment, *About the EPBC Act* (Web Page, 2021) <https://www.environment.gov.au/epbc/about>.
[189] Council of Australian Governments (COAG), *Heads of Agreement on Commonwealth and State Roles and Responsibilities for the Environment* (1997).

1 Objectives

Broadly, the objectives of the *EPBC Act* include:

(1) Providing environmental protections relevant to MNES;[190]

(2) Promoting ESD;[191]

(3) Promoting biodiversity conservation;[192]

(4) Providing protections for heritage;[193]

(5) Promoting co-operation of governments, communities, land-holders and indigenous peoples in environmental management;[194]

(6) Assisting co-operative approaches to fulfilling Australia's international obligations;[195]

(7) Recognising the role of indigenous people in the conservation of Australia's biodiversity;[196] and

(8) Promoting use of indigenous peoples' knowledge of biodiversity.[197]

In enacting the ideals of the Charter and the Convention, this Act includes an express legislative intent to promote the conservation of biodiversity in s 1(3)(c). These protections include MNES, such as heritage places and listed threatened species and ecological communities.[198]

2 Commonwealth Protected Areas

The *EPBC Act* establishes the Commonwealth's authority over various types of protected areas.

(a) World Heritage

One example of a protected area relates to the declaration of 'world heritage properties' under s 14 of the *EPBC Act*. These properties are usually included in the World Heritage List,[199] but an unlisted property may also be declared 'world heritage' if a Commonwealth submission is made under art 11 of the *Convention Concerning the Protection of the World Cultural and Natural Heritage* ('*World Heritage Convention*').[200]

These provisions of the *EPBC Act* replaced the now repealed *World Heritage Properties Conservation Act 1983* (Cth). That Act was originally enacted to give the Commonwealth legal power to prevent the Tasmanian government from constructing a hydro-electric dam that would have had adverse effects on the Franklin River environment.[201] Following the case of *Commonwealth v Tasmania,*[202] the dam project finally ceased because the Tasmanian government did not succeed in arguing before the High Court that the legislation

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[190] *EPBC Act* (n 36) s 3(1)(a).
[191] Ibid s 3(1)(b).
[192] Ibid s 3(1)(c).
[193] Ibid s 3(1)(ca).
[194] Ibid s 3(1)(d).
[195] Ibid s 3(1)(e).
[196] Ibid s 3(1)(f).
[197] Ibid s 3(1)(g).
[198] Ibid pt 3 div 1.
[199] Presently, Australia has 20 properties on the World Heritage List: see Department of Agriculture, Water and the Environment, *Australia's World Heritage List* (Web Page, 2021) <https://www.environment.gov.au/heritage/places/world-heritage-list>.
[200] See *Convention Concerning the Protection of the World Cultural and Natural Heritage,* opened for signature 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975) ('*World Heritage Convention*') art 11.
[201] Bates (n 3) 358.
[202] (1983) 158 CLR 1 ('*Tasmanian Dams Case*').

was unconstitutional. This case importantly held that it is within the legislative power of the Commonwealth to give effect to international environmental conventions under s 51 (xxix) of the *Constitution* ('external affairs').[203]

Criminal and civil penalties may apply if a person takes an action that results or is likely to result in any significant impact on the world heritage values of a world heritage property.[204] This was tested in *Booth v Bosworth*,[205] where the Court considered whether the respondent's operation of electric grids that electrocuted a population of 'Spectacled Flying Foxes'[206] had a significant impact on the 'world heritage values' of the Wet Tropics World Heritage area.[207] Ultimately this argument was upheld by Branson J of the Federal Court, who granted an injunction restraining the action.[208]

Management of reserves includes the creation of 'management plans' which outline how conservation policies are to be implemented.[209] Plans must be prepared by the Minister for all world heritage properties entirely within Commonwealth areas.[210] Governments must also take reasonable steps to act in ways consistent with the *World Heritage Convention*, world heritage management principles[211] and management plans.[212]

(b) Ramsar Wetlands

Ramsar wetlands are another form of protected area designated by the Commonwealth under art 2 of the *Convention on Wetlands of International Importance Especially as Waterfowl Habitat* ('*Ramsar Convention*') for inclusion in the List of Wetlands of International Importance.[213] The Minister may declare a Ramsar wetland if they are satisfied that the wetland is or likely to be of international significance and its ecological character is under threat.[214]

Protections for Ramsar wetland also rely on mixed use of criminal and civil penalties. In *Minister for the Environment and Heritage v Greentree (No 3)* for example, the Federal Court imposed on the respondent farmer civil penalties totalling $450,000.00 for unlawful

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[203] Ibid 5. See also Murray Raff, 'Climate Litigation in Australia' (2021) 12(4) *ANU Centre for European Studies Briefing Paper Series* 1, 9-10.
[204] *EPBC Act* (n 36) ss 12, 15A. On the application of the *World Heritage Convention*, see generally David Haigh, 'World Heritage: Principle and Practice: A Case for Change' (2000) 17(3) *Environmental and Planning Law Journal* 199; David Haigh, 'Australian World Heritage, the Constitution and International Law' (2005) 22(5) *Environmental and Planning Law Journal* 385.
[205] [2001] FCA 1453 ('*The Flying Fox Case*').
[206] Note that the respondent's private land was within the Wet Tropics World Heritage Area: see Department of Agriculture, Water and the Environment, *Australia's World Heritage List* (n 199). The flying foxes played an important role in pollinating plants within the world heritage area, so loss of them affected the world heritage values of the area.
[207] Chris McGrath, 'The Flying Fox Case' (2001) 18(6) *Environmental and Planning Law Journal* 540, 542.
[208] *The Flying Fox Case* (n 205) [115].
[209] *EPBC Act* (n 36) Pt 15; Rachel Miller et al, 'Protecting Migratory Species in the Australian Marine Environment: A Cross-Jurisdictional Analysis of Policy and Management Plans' (2018) 5(229) *Frontiers in Marine Science* 1, 3, 10.
[210] *EPBC Act* (n 36) s 316(1).
[211] *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) ('*EPBC Regulations*') sch 5. For the extent of inquiry necessary to be undertaken by the Minister with respect to the impact of a proposed development activity on a World Heritage Area: see, eg, *Queensland Conservation Council Inc v Minister for the Environment and Heritage* [2003] FCA 1463.
[212] *EPBC Act* (n 36) s 22.
[213] *Convention on Wetlands of International Importance especially as Waterfowl Habitat*, opened for signature 2 February 1971, 996 UNTS 245 (entered into force 21 December 1975); *EPBC Act* (n 36) s 17(1).
[214] The international significance of the wetland may relate, for example, to its ecology, botany, zoology, limnology or hydrology: see *EPBC Act* (n 36) ss 17(2) and 17A.

clearance of a part of declared Ramsar wetlands known as the Gwydir Wetlands.[215] Relevant to management planning,[216] the Minister must make a plan for all listed Ramsar wetlands, consistent with the Australian Ramsar management principles.[217]

(c) Commonwealth Reserves

Commonwealth reserves may be declared over areas that are: (a) owned or held under lease by the Commonwealth; (b) in a Commonwealth marine area; or (c) outside Australia but in relation to which Australia retains obligations relating to biodiversity or heritage under an international convention.[218] If land[219] is already reserved for nature conservation under state or territory law, the Commonwealth cannot acquire the land to declare a Commonwealth reserve, without first attaining the consent of that State or Territory.[220]

Before a Commonwealth reserve is declared, the intention to claim a reserve must be publicly advertised.[221] It must also have a name, a stated purpose, identifiable geographical limits, and be assigned an IUCN[222] category prescribed by the *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) ('*EPBC Regulations*') – see Figure 1.[223]

10.03H IUCN categories for Commonwealth reserves

For paragraph 346(1)(e) of the Act, the categories in the following table are prescribed.

Item	IUCN category number	IUCN category
1	Ia	Strict nature reserve
2	Ib	Wilderness area
3	II	National park
4	III	Natural monument
5	IV	Habitat/species management area
6	V	Protected landscape/seascape
7	VI	Managed resource protected area

Figure 1. Table of IUCN Categories for Commonwealth Reserves[224]

When a Commonwealth reserve is declared, a 'usage right' related to the reserve area vests in the Director.[225] The Director must then prepare a 'management plan' for the reserved areas,[226] whereby activities affecting native and threatened species must comply with the management plan.[227] In the absence of a plan, the Director must exercise their powers in

[215] [2004] FCA 1317 [1]-[2] (Sackville J).
[216] Ibid ss 328-334.
[217] See *EPBC Regulations* (n 211) sch 6. Note also that state management plans and authorisation processes relevant to Ramsar wetlands can also be accredited under bilateral agreements: see *EPBC Act* (n 36) s 45(2).
[218] See *EPBC Act* (n 36) ss 24, 344, 345, 345A.
[219] Land in this context means the land of a State or self-governing Territory (except the Northern Territory) or the Northern Territory outside both Uluru-Kata Tjuta National Park and the Alligator Rivers Region (as defined by the *Environment Protection (Alligator Rivers Region) Act 1978* (Cth)): see Ibid s 344(2)(a)(i)-(ii).
[220] Ibid s 344(2).
[221] Ibid s 351.
[222] The IUCN is the International Union for Conservation of Nature: see International Union for Conservation of Nature, *IUCN* (Web Page, 2021) <https://www.iucn.org/>.
[223] *EPBC Act* (n 36) ss 346-347.
[224] *EPBC Regulations* (n 211) reg 10.03H.
[225] A usage right is an estate or a legal or equitable charge, power, privilege, authority license or permit: *EPBC Act* (n 36) s 350(7).
[226] Ibid s 366-367.
[227] Ibid Pt 12, s 354(1). For cases involving contraventions of s 354(1) or contrary activities to Commonwealth reserve management plans, see *Minister for the Environment and Heritage v Wilson* [2004] FCA 6; *Minister for the Environment and Heritage v Warne* [2007] FCA 599; *Minister for the Environment v Thermal Dell Pty Ltd* [2014] FCA 1442; *Minister for the Environment and Heritage v Karstens* [2015] FCA 649; *Minister for the Environment v Hansen* [2016] FCA 1146.

accordance with the reserve management principles of the IUCN category to which the reserve has been most recently assigned.[228]

While an area is being assessed for inclusion in a Commonwealth reserve, it is possible to declare it a 'conservation zone'. This enables preliminary protections for biodiversity before an area is officially included in a Commonwealth reserve.[229] It would also permit the regulation of activities within those zones,[230] although prior usage rights usually continue to take effect.[231]

Outside of reserve areas, the Minister may enter into a 'conservation agreement' with any person,[232] that results in a 'net benefit' to enhance the conservation of biodiversity.[233] Before entering into conservation agreements, the Minister must have due regard for the provisions of the *Biodiversity Convention* and the *National Strategy for the Conservation of Australia's Biological Diversity*.[234] Such agreements cannot be inconsistent with existing conservation plans.[235] Further, these agreements are enforceable[236] and not only legally binding on the parties to the contract, but also on 'successors' to any interest subject to the agreement.[237]

Currently, Australia boasts 65 Commonwealth protected areas.[238]

3 Native Wildlife and Threatened Species

In relation to threatened species, the *EPBC Act* performs two main functions. First, the Act regulates export trade in native wildlife and wildlife products.[239] Second, it provides legislative protection for threatened species or ecological communities contained in statutory lists.[240]

(a) Trade in Wildlife and Threatened Species

Trade in wildlife contributes to wildlife vulnerability.[241] Thus, the *Convention on International Trade in Endangered Species of Wild Fauna and Flora*,[242] has appended a list of species that are subject to its protective measures.[243] Restrictions on trade activities are enlivened in Pt 13A of the *EPBC Act*,[244] and the courts have generally recognised a need

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[228] *EPBC Act* (n 36) s 357. With respect to the Australia IUCN reserve management principles for each management category, see *EPBC Act* (n 36) s 348; *EPBC Regulation* (n 211) sch 8.
[229] *EPBC Act* (n 36) ss 390C, 390D, 390J.
[230] See *EPBC Regulations* (n 211) reg 13.02.
[231] *EPBC Act* (n 36) ss 390E, 390H.
[232] Ibid ss 305, 306, 306A, 307.
[233] Ibid s 305(2)(i).
[234] Ibid s 305(6). Note that the Minister must take into account these particular provisions of these two documents: see *Biodiversity Convention* (n 23) arts 8(j), 10(c), 18(4); Department of the Environment, Sport and Territories, *National Strategy for the Conservation of Australia's Biological Diversity* (1996) objective 1.8.2. Note also that there have been newer iterations to this Strategy: see Natural Resource Management Ministerial Council, *Australia's Biodiversity Conservation Strategy 2010-2030* (2010).
[235] *EPBC Act* (n 36) s 305(2)(ii).
[236] For example, by an application for injunction to the Federal Court: see Ibid s 476.
[237] Ibid s 307.
[238] This includes six Commonwealth National Parks, the Australian National Botanic Gardens and 58 Commonwealth Marine Parks: see Department of Agriculture, Water and the Environment, *National Parks* (Web Page, 2021) <https://www.environment.gov.au/topics/national-parks>.
[239] Bates (n 3) 397-402.
[240] *EPBC Act* (n 36) ss 178, 181.
[241] Bates (n 3) 398.
[242] This Convention has since been ratified in Australia: see *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (n 45).
[243] See Ibid apps I, II , III.
[244] *EPBC Act* (n 36) ss 303CC, 303CD, 303DD, 303EK.

to deter offenders of this kind.[245] As Deane J contended in *Ackroyd v McKechnie,*[246] interstate restrictions on trade may be valid if they 'go no further than is necessary for legitimate regulatory or conservational purposes'.[247] Thus, threatened species are protected against being traded.

(b) Threatened Species and Communities – Statutory Listing Regime

Before commencement of the *EPBC Act*, lists of threatened species, ecological communities and threatening processes were included under the now repealed *Endangered Species Protection Act 1992* (Cth).[248] Now, consistent with the international standard of the IUCN Red List,[249] the *EPBC Act* classes threatened species according to categories of 'extinct', 'extinct in the wild', 'critically endangered', 'endangered', 'vulnerable' or 'conservation dependent'.[250] Threatened ecological communities,[251] may also be listed as 'critically endangered', 'endangered' or 'vulnerable'.[252] This listing criteria is reflected in the *EPBC Act*[253] and the *EPBC Regulations*.[254]

While listed, the Minister must maintain 'approved conservation advice'[255] for each threatened species[256] or ecological community.[257] This advice sets out the grounds on which the subject is eligible to be included in a listed category, and any appropriate activities to prevent decline or support the recovery of that subject.[258] Threatened species and communities can be nominated for inclusion on these publicly available lists, which the Minister is responsible for updating.[259]

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[245] See *R v Robinson* (1992) 62 A Crim R 374; *Klein v R* (1989) 39 A Crim 332; *Spreitzer v R* (1991) 58 A Crim R 114, cited in Bates (n 3) 400.
[246] (1986) 66 ALR 287, 294 (Deane J).
[247] Prohibitions on interstate trade could be complicated by the freedom of trade provisions in s 92 of the *Constitution*: see Brian Preston, 'Section 92 and Interstate Trade in Wildlife: A Moral Question' (1987) 4 *Environmental and Planning Law Journal* 175, 176-178.
[248] *Endangered Species Protection Act 1992* (Cth) schs 1-2.
[249] The International Union for Conservation of Nature Red List of Threatened Species, founded in 1964, is the world's most comprehensive information source on the global extinction risk status of animal, fungus and plant species: see International Union for Conservation of Nature, *IUCN Red List of Threatened Species* (Web Page, 2021) <https://www.iucn.org/resources/conservation-tools/iucn-red-list-threatened-species>.
[250] *EPBC Act* (n 36) s 178(1). See also Department of Agriculture, Water and the Environment, *EPBC Act List of Threatened Fauna* (Web Page, 2021) <https://www.environment.gov.au/cgi-bin/sprat/public/publicthreatenedlist.pl>.
[251] Also defined as assemblages of natives species in particular areas of nature: see *EPBC Act* (n 36) s 528. See also Department of Agriculture, Water and the Environment, *EPBC Act List of Threatened Ecological Communities* (Web Page, 2021) <http://www.environment.gov.au/cgi-bin/sprat/public/publiclookupcommunities.pl>.
[252] *EPBC Act* (n 36) s 181.
[253] In relation to listing criteria for threatened species: see Ibid s 179. In relation to listing criteria for threatened ecological communities: see Ibid s 182.
[254] *EPBC Regulations* (n 211) reg 7.01-7.02.
[255] The Minister must provide have regard to such advice and provide approval in writing: see, eg, *Tarkine National Coalition Inc v Minister for Sustainability, Environment, Water, Population and Communities* [2013] FCA 694; *Tarkine National Coalition Inc v Minister for the Environment* [2015] FCAFC 89.
[256] Except one that is extinct or that is a conservation dependent species: *EPBC Act* (n 36) s 266B(1).
[257] Ibid s 266B.
[258] Ibid s 266B(2)(a)-(b).
[259] The Minister may amend any list referred to in ss 178, 181 or 183 of the *EPBC Act* (n 36): see Ibid s 184.

The lists can be varied and amended, following assessment or the Minister's consideration of advice from the Threatened Species Scientific Committee (TSSC).[260] The Minister also administers the list of key threatening processes,[261] which specifies the processes that could cause species to become eligible for a higher level of endangerment, or that adversely affect two or more threatened species.[262] For example, a recent addition to this list was the 'aggressive exclusion of birds from potential woodland and forest habitat by over-abundant noisy miners (*manorina melanocephala*)'.[263]

In addition, the Act confers on the Minister various other administrative responsibilities, including oversight of recovery plans, threat abatement plans, conservation orders or wildlife conservation plans.[264]

(i) Offences

Civil and criminal penalties may apply if a person takes any action that has, or is likely to have, a 'significant impact'[265] on a listed threatened species or ecological community.[266] In *Minister for Environment Heritage and the Arts v Lamattina*,[267] the respondent farmer was ordered to pay a pecuniary penalty of $220,000.00 for unlawfully clearing 170 eucalyptus trees which were likely to significantly impact the habitat nesting hollows of the listed *South-Eastern Red-Tailed Black-Cockatoo*. In *Minister for Sustainability Environment Water Population and Communities v De Bono*,[268] the respondent was ordered to pay a $150,000.00 civil penalty for clearing activities that significantly impacted a listed *eucalyptus microcarpa* ecological community.

B Nature Conservation Act 2014 (ACT)

The *Nature Conservation Act* commenced on 11 June 2015.[269] Note that a significant amendment, the *Nature Conservation Amendment Act 2016* (ACT), was passed to enable greater consistency across national listing regimes.[270] This Act is the chief legislation in the ACT for the protection of native species and the management of protected areas.[271]

1 Objectives

The main object of the *Nature Conservation Act* is to 'protect, conserve and enhance the biodiversity of the ACT'.[272] Conservation objectives also include 'protecting, conserving, enhancing, restoring and improving':

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[260] Ibid ss 178(4), 181(4), 184-187, 189-190, 194, 194E. With respect to the criteria for nominations: see *EPBC Regulations* (n 211) div 7.2. Note also that the TSSC is a body established under ss 502 and 503 of the *EPBC Act* (n 36).
[261] Department of Agriculture, Water and the Environment, *Listed Key Threatening Processes* (Web Page, 2021) <http://www.environment.gov.au/cgi-bin/sprat/public/publicgetkeythreats.pl>.
[262] *EPBC Act* (n 36) ss 183, 188.
[263] See Department of Agriculture, Water and the Environment, *Listed Key Threatening Processes* (n 259).
[264] *EPBC Act* (n 36) ss 270(1), 270A, 271(1), 285, 287-298, 464-465.
[265] On the assessment of 'significant impact' in relation to nationally protected Grey Box Woodlands and Grasslands, see *Henderson v Corporation of the City of Adelaide (No 2)* [2012] FCA 9.
[266] *EPBC Act* (n 36) ss 18, 18A, 19. In relation to other offence provisions related to taking, killing or injuring a threatened species for ecological community in a Commonwealth area, see also ss 196, 196A, 196B, 196C, 196D, 196E, 197, 198 207B.
[267] [2009] FCA 753 [19]-[80] (Mansfield J).
[268] [2012] FCA 643.
[269] Note that the *Nature Conservation Act* was passed by the ACT Legislative Assembly on 27 November 2014: see Environment, Planning and Sustainable Development Directorate, *Nature Conservation Act 2014* (Web Page, 2021) <https://www.environment.act.gov.au/nature-conservation/nature-conservation-act-2014>.
[270] Ibid.
[271] Ibid.
[272] *Nature Conservation Act* (n 36) s 6(1).

(1) Native species and their habitats;[273]

(2) Ecological communities;[274]

(3) Biodiversity at the community, species and genetic levels;[275]

(4) Ecosystems and their constituent processes;[276] and

(5) Ecological connectivity.[277]

Other objects that supplement conservation activities include:

(6) Promoting the maintenance of biodiversity at local, regional and national levels;[278]

(7) Promoting co-operation between indigenous people, communities and government;[279]

(8) Encouraging public participation;[280]

(9) Recognising the role of Aboriginal and Torres Strait Islander peoples in conservation and ecologically sustainable use of biodiversity;[281]

(10) Recognising a duty of environmental stewardship owed by landholders;[282]

(11) Ensuring public education and participation in policy development;[283] and

(12) Promoting the principles of ESD.[284]

2 ACT Protected Areas

Areas of public land may be reserved under the ACT's Territory Plan for a number of conservation purposes, including the establishment of a 'national park', 'nature reserve' and 'wilderness area'.[285] This is facilitated by the *Planning and Development Act 2007* (ACT), wherein the purposes of reservations may be determined by the management objectives for public land.[286]

The management objectives of national parks and national reserve include: (1) conserving the natural environment; and (2) providing for public use of the area for recreation, education and research.[287] The objects of wilderness areas expand this notion by limiting recreational use to ensure minimal disturbance to the environment.[288] Moreover, the entirety of Ch 8 of the *Nature Conservation Act,*[289] which mirrors the IUCN reserve management objectives, applies to reserve management and planning.[290]

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[273] Ibid s 6(2)(a)(i).
[274] Ibid s 6(2)(a)(ii).
[275] Ibid s 6(2)(a)(iii).
[276] Ibid s 6(2)(a)(iv).
[277] Ibid s 6(2)(a)(v).
[278] Ibid s 6(2)(b).
[279] Ibid s 6(2)(c).
[280] Ibid s 6(2)(d).
[281] Ibid s 6(2)(e).
[282] Ibid s 6(2)(f).
[283] Ibid s 6(2)(g).
[284] Ibid s 6(2)(h).
[285] *Planning and Development Act 2007* (n 36) s 315.
[286] Ibid ss 316-317.
[287] Ibid sch 3.
[288] Ibid.
[289] Ibid ss 173-174.
[290] Ibid pt 8.3.

3 Native Wildlife and Threatened Species

Furthermore, the *Nature Conservation Act* strives to protect, conserve and enhance biodiversity,[291] including native species and ecological communities.[292] The Conservator must have regard to the Act's objectives and is responsible for monitoring the state of nature, overseeing biodiversity management and providing information to the Commissioner for Sustainability and the Environment.[293]

(a) Statutory Listing

The Minister bears responsibility for making threatened native species and ecological communities lists.[294] Per this listing regime,[295] the 'national category' of threatened native species and ecological communities, is reminiscent of the *EPBC Act,* according to the categories of 'extinct', 'extinct in the wild', 'critically endangered', 'endangered', 'vulnerable' or 'conservation dependent'.[296] Species are also eligible for inclusion in a 'regional category', as 'regionally threatened', 'regionally conservation dependant' or 'provisional'.[297] In relation to threatened ecological communities, the Act specifies only the national category for listing, and differs slightly from the threatened species provisions with the inclusion of a 'provisional' category, in substitution for the 'conservation dependant' category.[298]

In addition, the Minister must make a protected native species list,[299] dividing native species into categories of 'restricted trade', 'rare' and 'data deficient'.[300] A native species has 'special protection status'[301] if it is a threatened native species or listed species under the *EPBC Act*.[302] For example, ACT species threatened on a national scale include the *Grassland Earless Dragon*, the *Striped Legless Lizard* and the *Pink-tailed Worm Lizard*.[303]

With the exception of provisional listings, the Scientific Committee must prepare a 'conservation advice' about each item included in a list.[304] This advice must set out the grounds on which the item is eligible for inclusion,[305] and anything else required by conservation advice guidelines.[306] Where it is appropriate, the Conservator may prepare a draft native species conservation plan in respect of nominated land areas.[307] Once this plan is in force, the Conservator is bound to take reasonable steps to implement it.[308]

(i) Offences

The *Nature Conservation Act* has a range of offences relevant to interference with native animals and plants,[309] including conduct that causes the death of any native animal and any

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[291] Ibid s 6.
[292] Ibid ss 11-17.
[293] Ibid s 21.
[294] Ibid ss 63, 69, 76.
[295] Being a list notified under Ibid s 91.
[296] Ibid s 63(2).
[297] Ibid s 63(3).
[298] Ibid s 69.
[299] Ibid ss 111-112.
[300] Ibid s 111(2).
[301] The Conservator may make a native species conservation plan for a species that has special protection status: see Ibid s 117(a).
[302] Ibid s 109. See also *EPBC Act* (n 36) s 528.
[303] See Department of Agriculture, Water and the Environment, *EPBC Act List of Threatened Fauna* (n 250).
[304] *Nature Conservation Act* (n 36) ss 90C, 90E.
[305] Eligibility for the threatened native species list is dealt with in s 64 and s64A. Eligibility for the threatened ecological communities list is dealt with in s70. Eligibility for the key threatening processes list is dealt with in s 77.
[306] *Nature Conservation Act* (n 36) ss 90B, 90C(3).
[307] Ibid ss 115-117.
[308] Ibid s 124.
[309] Ibid s 130. See also *Bannister v Bowen* (1985) 65 ACTR 3, cited in Bates (n 3) 418.

other acts that result in the injuring, taking[310] or selling of non-exempt native plants and animals.[311] Exceptions include authorisation by a license, declaration or management agreement.[312]

IV The Effect of Current Systems: EPBC Act v Nature Conservation Act

When assessing the achievement of biodiversity conservation outcomes, it is useful to examine the work of the Australian Panel of Experts on Environmental Law (APEEL), comprising of experts in 'environmental law, research, practice and design'.[313] The APEEL identifies a disparity between the drafting of environmental laws and the effectiveness of implementation.[314] Many principles listed in the *World Charter for Nature* and the *Biodiversity Convention* are relatively under-utilised, poorly defined or overridden by competing values in legislation.[315]

The Panel states that a number of institutional arrangements govern the uses of biological diversity,[316] including ecologically sustainable practices in national reserves, state forests, water catchments and on private properties.[317] Further, Australia's laws recognise the deep connections of Aboriginal and Torres Strait Islander peoples to nature and traditional 'country'.[318] Accordingly, 'co-management' arrangements are central to shaping a more equitable intercultural space for biodiversity conservation.[319]

National resource management arrangements have ranged from prescriptive regulation through to voluntary standards.[320] Formal arrangements have included EIA,[321] reserve systems, bioregional planning, species listing, prohibited activities and licences to use nature.[322] In contrast, voluntary approaches include Landcare groups,[323] private

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[310] See, eg, *Preston v Carnall* [2015] ACTSC 325.
[311] See generally, *Nature Conservation Act* (n 36) divs 6.1.2-6.1.3.
[312] See generally, Ibid pt 6.2. A license may include a nature conservation license under s 262 of the *Nature Conservation Act* (n 36), a public unleased land permit or a licence under s 303 of the *Planning and Development Act 2007* (n 36). A declaration may include a restricted activity under an activities declaration by the Conservator, dealt with by s 256 of the *Nature Conservation Act* (n 36). Management agreements may include a management agreement under s 310, a controlled native species management plan under s 158, a cultural resource management plan under s 168A, or a fisheries resource management plan: see also *Nature Conservation Act* (n 36).
[313] Australian Panel of Experts on Environmental Law (APEEL), *Our Panel* (Web Page, 2021) <http://apeel.org.au/expert-panel>.
[314] APEEL, *A Blueprint for the Next Generation of Australian Environmental Laws* (n 52) 4.
[315] Ibid.
[316] APEEL, *Terrestrial Biodiversity Conservation and Natural Resource Management* (n 14) 10.
[317] Ibid.
[318] Leanne Claire Cullen-Unsworth et al, 'A Research Process for Integrating Indigenous and Scientific Knowledge in Cultural Landscapes: Principles and Determinants of Success in the Wet Tropics World Heritage Area, Australia' (2012) 178(4) *The Geographical Journal* 351, 352. See also *Nature Conservation Act* (n 36) s 6(2)(e); *EPBC Act* (n 36) ss 3(1)(d), 3(1)(f)-(g).
[319] Rosemary Hill, 'Towards Equity in Indigenous Co-Management of Protected Areas: Cultural Planning by Miriuwung-Gajerrong People in the Kimberley, Western Australia' (2011) 49(1) *Geographical Research* 72, 83. See also *Biodiversity Convention* (n 23) art 8(j).
[320] APEEL, *Terrestrial Biodiversity Conservation and Natural Resource Management* (n 14) 10.
[321] Also known as 'Environmental Impact Assessment' (EIA).
[322] APEEL, *Terrestrial Biodiversity Conservation and Natural Resource Management* (n 14) 10.
[323] For the work of Landcare groups in Australia to increase biodiversity, eliminate invasive species and promote sustainable land-use practices, see Guy Fitzhardinge, 'Landcare and Private Conservation Trusts: Fertile Common Ground?' (2006) 7(1) *Ecological Management and Restoration* 3; Genevieve Simpson and Julian Clifton, 'Funding and Facilitation: Implications of Changing Government Policy for the Future of Voluntary Landcare Groups in Western Australia' (2010) 41(3) *Australian Geographer* 403; Shaun McKiernan, 'Managing invasive plants in a rural-amenity landscape: the role of social capital and Landcare' (2018) 61(8) *Journal of Environmental Planning and Management* 1419.

conservation agreements, environmental codes or consumer standards, and private philanthropy.[324]

Yet despite this abundance of environmental governance, the APEEL identifies the poor coordination and overlap of roles as problematic.[325] In particular, current conservation measures are ill-equipped to manage dynamic natural systems.[326]

In this section I explore whether the *EPBC Act* or the *Nature Conservation Act* favour more strongly the conservation paths advanced by the *World Charter for Nature* or the *Biodiversity Convention*. First, the section will determine the current condition of biodiversity at ACT and federal levels using the most recent State of the Environment ('*SoE*') reports. Then, I examine the achievement of biodiversity outcomes by the *EPBC Act* and the *Nature Conservation Act* beside the Charter and the Convention, by comparing their objectives, land reservation systems and finally, their classification and listing approaches.

A Australia's Biodiversity Profile

Every five years, the Australian Government comprehensively reviews the state of Australia's environment.[327] The latest national SoE report ('*Biodiversity SoE 2016*') was released in 2016.[328] The ACT has a similar reporting system which requires SoE reporting every four years.[329] The latest ACT SoE report ('*ACT SoE 2019*') was released in 2019.[330] Together, the *Biodiversity SoE 2016* and *ACT SoE 2019* provide detailed context for the current state of biodiversity in Australia and the ACT, and hence, the relative achievements of existing conservation regimes.

1 Biodiversity SoE 2016 – The State of Australian Biodiversity

The *Biodiversity SoE 2016* states that current understanding of the state of a majority of Australian species is limited by a lack of consistent national-level data.[331] This phenomenon was identified in every Australian jurisdiction.[332] Although information about the extent of vegetation communities was considered 'good', knowledge of their condition was limited.[333] Since the previous national report in 2011, understanding of the state of Australian mammal groups had improved by means of the significant reports, *Action Plan for Australian Mammals*[334] and *State of Australian Birds*.[335]

In relation to the *EPBC Act* listing regime, there are currently 92 listed threatened ecological communities.[336] Since 2011, there had been 45 new listings, with most being concentrated in south eastern Australia.[337] The overall number of listed threatened species had also increased by 154, to total 1918 species.[338] Because of the limited availability of information

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[324] APEEL, *Terrestrial Biodiversity Conservation and Natural Resource Management* (n 14) 10.
[325] Ibid.
[326] Ibid.
[327] Department of Agriculture, Water and the Environment, *State of the Environment (SoE) Reporting* (Web Page, 2021) <https://www.environment.gov.au/node/23077/backlinks>.
[328] See Ian Cresswell and Helen Murphy, 'Biodiversity' in Department of Agriculture, Water and the Environment, *Australia State of the Environment Report 2016* (n 9) iii-iv ('*Biodiversity SoE 2016*').
[329] *Commissioner for Sustainability and the Environment Act 1993* (ACT) s 19.
[330] See *ACT SoE 2019* (n 12).
[331] *Biodiversity SoE 2016* (n 328) 10.
[332] Ibid 14.
[333] Ibid 42.
[334] See John Woinarski et al, *The Action Plan for Australian Mammals 2012* (CSIRO Publishing, 2014).
[335] See, eg, Birdlife Australia, *The State of Australia's Birds 2015* (Report, 2015); Rob Clemens et al, *Australian Bird Index Phase 2 – Developing Waterbird Indices for National Reporting* (Report, October 2019).
[336] See Department of Agriculture, Water and the Environment, *EPBC Act List of Threatened Ecological Communities* (n 251).
[337] *Biodiversity SoE 2016* (n 328) 42.
[338] These species being both flora and a fauna: see Ibid; Department of Agriculture, Water and the Environment, *EPBC Act List of Threatened Fauna* (n 250); Department of Agriculture, Water and the

about the condition of Australian vegetation and species, the *Biodiversity SoE 2016* concluded that the status of biodiversity in Australia was poor and worsening.[339]

In northern Australia, mammal declines have continued,[340] while in southern and eastern regions, the number of species of conservation concern have increased.[341] Bird groups trended in overall decline, with particular groups including woodland-dependent mallee and carnivore species in the arid zone showing significant declines.[342] Trend analyses of eastern Australian inland waterbirds and some migratory shorebirds also indicated that major indices related to total waterbird abundance, breeding species richness and abundance, were well below long-term averages.[343] Limited information was available to assess the status of listed reptiles, amphibians and invertebrates, with the exception of a few high-profile species.[344] Lastly, jurisdictional reporting on the condition of aquatic species and ecosystems were generally assessed as poor to moderate – although the information available was also described as poor or limited.[345]

The inadequacy of long-term data and monitoring was also relevant to national deficits in the understanding of key pressures on biodiversity.[346] For example, the report identified that threats to biodiversity in the ACT were habitat loss, pest species and altered fire regimes.[347] Nature's connectivity was also being lost through developments and urban construction.[348] However, assessment of the distribution and abundance of species and the risks of fires were uncertain, due to limited data on the effects of these processes on biodiversity.[349]

2 ACT SoE 2019 – The State of ACT Biodiversity

The *ACT SoE 2019* found that a total of 52 species were listed as threatened under the *Nature Conservation Act*. Since then this has increased to 53.[350] During the reporting period (2015-16 to 2018-19), 17 of these species were listed as threatened, while seven were transferred to critically endangered status in alignment with their Commonwealth status.[351] These included the *Regent Honeyeater*, *Swift Parrot*, *Northern Corroboree Frog*, the locally extinct *Yellow-spotted Bell Frog*, *Canberra Spider Orchid*, *Brindabella Midge Orchid* and the *Kiandra Greenhood*.[352] In addition, the ecological communities of *Natural Temperate Grassland,*[353] *Yellow Box – Blakely's Red Gum Grassy Woodland*[354] and *High*

Environment, *EPBC Act List of Threatened Flora* (Web Page, 2021) <https://www.environment.gov.au/cgi-bin/sprat/public/publicthreatenedlist.pl?wanted=flora>.

339 *Biodiversity SoE 2016* (n 328) 42, 48-79.

340 Ibid 65, 68-69.

341 Ibid 59-62.

342 Ibid 71-72.

343 Ibid 87.

344 Ibid 74-79.

345 Ibid 80-86, 94-101.

346 Ibid 14.

347 Ibid. See also *ACT SoE 2019* (n 12) 209.

348 *Biodiversity SoE 2016* (n 328) 14.

349 Ibid; *ACT SoE 2019* (n 12) 229.

350 See *Nature Conservation Threatened Native Species List 2020* (n 12).

351 *ACT SoE 2019* (n 12) 208, 214.

352 Each of these species is concurrently listed as 'critically endangered' under the *EPBC Act*: see Department of Agriculture, Water and the Environment, *EPBC Act List of Threatened Fauna* (n 250); Department of Agriculture, Water and the Environment, *EPBC Act List of Threatened Flora* (n 338).

353 This ecological community is consistent with the 'Natural Temperate Grassland of the South Eastern Highlands' ecological community listed under the *EPBC Act*: see Department of Agriculture, Water and the Environment, *EPBC Act List of Threatened Ecological Communities* (n 251).

354 This ecological community is consistent with the 'White Box – Yellow Box – Blakely's Red Gum Grassy Woodland and Derived Native Grassland' ecological community listed under the *EPBC Act*: see Ibid.

Country Bogs and Associated Fens[355] were listed as threatened.[356] Moreover, listing of the 'loss of mature native trees (including hollow-bearing trees)' as a key threatening process in 2018,[357] was required to prevent adverse effects to the *Superb Parrot*, *Brown Treecreeper*, *Glossy Black-cockatoo* and *Little Eagle*.[358]

The report found that 141,000 hectares ACT land has conservation status.[359] Specific conservation measures have involved biodiversity offsetting of developments impacting Commonwealth-listed threatened species and communities.[360] Biodiversity offsetting is a tool that enables mitigation and compensation for residual harms associated with land development.[361] Since 2009, the area of environmental offsets in the ACT grew from 18 hectares to 1,865 hectares in 2019.[362]

Land offsets generally pertain to protection of *White Box*, *Yellow Box*, *Blakely's Red Gum Grassy Woodland*, *Natural Temperate Grassland*, the *Striped Legless Lizard*, *Golden Sun Moth*, *Pink-tailed Worm Lizard*, *Superb Parrot*, and *Button Wrinklewort*.[363] Almost all environmental offsets are delivered as direct land offsets, while indirect offsetting is generally regarded as a 'last resort'.[364] Indirect offsets have been established with respect to development of the Gungahlin and Molonglo Valleys.[365]

Gaps in knowledge remain a policy challenge in the ACT, given the administrative and resourcing difficulties of undertaking comprehensive monitoring. The *ACT SoE 2019* stated that it was not possible to accurately assess: (1) the current condition of conservation areas; (2) the distribution and abundance of species; or (3) the capacity of biodiversity offsets to ensure no net loss of biodiversity.[366]

Thus, positive conservation outcomes for Australian species and ecological communities have not been achieved by either of the Commonwealth or the ACT biodiversity regimes.

B Comparative Merits re the World Charter for Nature and Biodiversity Convention

I now analyse the achievements of the *EPBC Act* and the *Nature Conservation Act* beside the principles espoused in the *World Charter for Nature* and the *Biodiversity Convention*.

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355 This ecological community is consistent with the 'Alpine Sphagnum Bogs and Associated Fens' ecological community listed under the *EPBC Act*: see Ibid.

356 See *Nature Conservation Threatened Ecological Communities List 2020* (ACT); *ACT SoE 2019* (n 12) 219.

357 See *Nature Conservation Key Threatening Processes List 2018 (No 1)* (ACT); *ACT SoE 2019* (n 12) 222.

358 *Nature Conservation (Loss of Mature Native Trees) Conservation Advice 2018* (ACT). Note also that these named species are all listed as vulnerable in the ACT: see *Nature Conservation Threatened Native Species List 2020* (n 12).

359 This proportion is approximately 60 percent of the total land area of the ACT and is a significantly higher proportion compared to other jurisdictions: see ACT SoE 2019 (n 12) 223.

360 Ibid 12.

361 For further discussion of the function and purpose of biodiversity offsets, see Martin Fallding, 'Biodiversity Offsets: Practice and Promise' (2014) 31(1) *Environmental and Planning Law Journal* 11, 12-13; Brian Preston, 'Biodiversity Offsets: Adequacy and Efficacy in Theory and Practice' (2016) 33(2) *Environmental and Planning Law Journal* 93, 96-98.

362 *ACT SoE 2019* (n 12) 209.

363 Ibid 222; *EPBC Act* (n 36) ch 2 pt 3; *Planning and Development Act 2007* (n 36) ss 111B(1)-(2), 111F, 111M, 111N, 111V.

364 *ACT SoE 2019* (n 12) 222. For discussion of direct and indirect offsets, see Nigel Martin et al, 'Using Offsets to Mitigate Environmental Impacts of Major Projects: A Stakeholder Analysis' (2016) 179 *Journal of Environmental Management* 58.

365 Ibid 12.

366 Ibid 229, 284.

1 Conservation Objectives

Both the *World Charter for Nature* and the *Biodiversity Convention* provide eco-centric recognition of the intrinsic rights of nature to exist and regenerate its vital cycles.[367] The objectives of the *World Charter for Nature* include respect for nature, protecting all ecosystems and species and maintaining the integrity of ecosystems.[368] The language of the Charter is especially directive, for example in its statement that all areas of the Earth '*shall be*' subject to principles of conservation, and that ecosystems '*shall be*' managed to achieve optimum sustainable productivity.[369]

By contrast, the objectives of the *Biodiversity Convention* generally relate to the conservation and sustainable use of biodiversity and equitable sharing of the benefits accrued from genetic resources.[370] Unlike the mandatory expression of the Charter, the Convention accords States greater autonomy in their decision-making and relative priority that they might assign to nature, by directing the contracting parties to enact the Convention's provisions only 'as far as possible and as appropriate'.[371] This framework leaves it to the State parties to determine how most of its provisions should be implemented.[372]

In contrast to the binding nature of the Convention, the Charter is not binding on States, although it may represent a crystallisation of custom,[373] which may in turn impose obligations.[374] Without evidence to the contrary, the Charter should be viewed as an 'aspirational agreement' relating to its principles, rather than an obligation owed by the Australian Government.[375]

At the federal level, the multiplicity of the *EPBC Act's*[376] objects clauses obfuscates the relative importance of its different objectives.[377] Similar to the *Biodiversity Convention,* the Act includes verbs such as '*to promote*', '*further*' or '*provide for*', and therefore grants the federal government full discretionary authority regarding the kind and extent of conservation measures that it administers.[378] Although the Act's objectives incorporate a need to consider the biodiversity implications in decision-making, this does not correspond

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[367] Although these international documents may differ according to the relative priority to be assigned to nature's rights. See also Susana Borras, 'New Transition from Human Rights to the Environment to the Rights of Nature' (2016) 5(1) *Transnational Environmental Law* 113, 114.
[368] *World Charter for Nature* (n 19) arts 1-5.
[369] Ibid arts 2, 3.
[370] *Biodiversity Convention* (n 23) art 1.
[371] See generally Ibid arts 5-14.
[372] Freya Dawson, 'Analysing the Goals of Biodiversity Conservation: Scientific, Policy and Legal Perspectives' (2004) 21(1) *Environmental and Planning Law Journal* 6, 17.
[373] General Assembly Resolutions and advisory opinions have been highly persuasive in guiding decisions of the International Court of Justice and hence, indicating to State's the Court's views on international law: see Teresa Mayr and Jelka Mayr-Singer, 'Keep the Wheels Spinning: The Contributions of Advisory Opinions of the International Court of Justice to the Development of International Law' (2016) 76(2) *Heidelberg Journal of International Law* 425, 430.
[374] Though this question is beyond the scope of this paper, other authors have noted that this would be an interesting question worthy of further attention: see Annika Reynolds et al, 'Green Lawfare: Does the Evidence Match the Allegations? – An Empirical Evaluation of Public Interest Litigation under the EPBC Act from 2009 to 2019' (2020) 37(4) *Environmental and Planning Law Journal* 497, 511.
[375] Ibid.
[376] Phillipa McCormack; 'The Legislative Challenge of Facilitating Climate Change Adaptation for Biodiversity' (2018) 92 *Australian Law Journal* 546, 554.
[377] Allan Hawke, *Final Report of the Independent Review of the Environment Protection and Biodiversity Conservation*
Act 1999 (Final Report, October 2009) 17, 57 (*'First Independent Review of the EPBC Act')*; *Second Independent Review of the EPBC Act* (n 48) 74.
[378] See Australian Panel of Experts on Environmental Law (APEEL)*, The Foundations of Environmental Law: Goals, Objects, Principles and Norms* (Technical Paper 1, 2017) 3, 29-33.

with the achievement of any specified outcome.[379] For example, one object of the *EPBC Act* is 'to promote the conservation of biodiversity'. This creates a procedural purpose '*to promote*', rather than a substantive purpose '*to achieve*' an outcome.[380] In the view of the APEEL, the lack of clarity in defining the desirable outcomes of biodiversity conservation complicates the tasks of prioritising conservation efforts and selecting appropriate conservation tools.[381]

In contrast, the *Nature Conservation Act* promotes a 'shift in the scope of legal purposes for conservation',[382] where its singular 'primary object',[383] is followed by 'subsidiary objects' that define how the primary object can be achieved.[384] This definition aligns more closely with the views of the *World Charter for Nature,* which understands humans as a part of nature and places nature conservation as the paramount value of environmental legislation.[385]

The *Nature Conservation Act* was also the first statutory reference,[386] to the conservational significance of ecological connectivity, ecosystem processes, functions and landscapes.[387] Compared to other jurisdictions,[388] the Act allows conservation of native species redistributing from other jurisdictions under a 'provisional category'.[389] This provides broader protection for threatened species that are temporary residents.[390] Such measures reflect 'adaptive governance', which refers to the law's capacity to respond to dynamic, complex and uncertain systems.[391] Given the changing distributions and abundance of species under climate change, the principle of adaptive governance is recommended by the APEEL to increase the responsiveness of environmental management systems[392] – that which is lacking in the *EPBC Act*.[393]

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[379] *EPBC Act* (n 36) s 3(1)(c). See also Jeff Smith, 'Skinning Cats, Putting Tigers in Tanks and Bringing Up Baby: A Critique of the Threatened Species Conservation Act 1995 (NSW)' (1997) 14(1) *Envrionmental and Planning Law Journal* 17, 22-23.

[380] McCormack (n 376) 554; Susan Tridgell, 'Evaluating the Effectiveness of the Environment Protection and Biodiversity Conservation Act 1999 (Cth): 2008-2012' (2013) 30 *Environment and Planning Law Journal* 245, 249.

[381] APEEL, *Terrestrial Biodiversity Conservation and Natural Resource Management* (n 14) 30. See also Alejandro Camacho et al, 'Reassessing Conservation Goals in Climate Change' (2010) 26(4) *Issues in Science and Technology* 21, 21-22.

[382] McCormack (n 376) 551-552.

[383] *Nature Conservation Act* (n 36) s 6(1).

[384] Ibid s 6(2)(a)(i)-(vii).

[385] Kwaw Nyamekeh Blay and Ryszard Piotrowicz, 'Biodiversity and Conservation in the Twenty-First Century: a Critique of the Earth Summit 1992' (1993) 10(6) *Envrionmental and Planning Law Journal* 450, 452.

[386] This trend has since been continued in NSW: *Biodiversity Conservation Act 2016* (n 179) cl 1.3.

[387] On the importance of these concepts in facilitating biodiversity adaptation: see Michael Dunlop et al, *Climate-Ready Conservation Objectives: A Scoping Study* (Final Report, 2013) 3; Nicole Heller and Erika Zavaleta, 'Biodiversity Management in the Face of Climate Change: A Review of 22 Years of Recommendations' (2009) 142(1) *Biological Conservation* 14; Jonathan Mawdsley et al, 'A Review of Climate-Change Adaptation Strategies for Wildlife Management and Biodiversity Conservation' (2009) 23(5) *Conservation Biology* 1080.

[388] Cf *Biodiversity Conservation Act 2016* (n 179) cl 4.3(1)-(2); *Nature Conservation Act 1992* (n 172) s 160(7); *Threatened Species Protection Act 1995* (n 179) s 3.

[389] *Nature Conservation Act* (n 36) s 64(7).

[390] For example, migratory birds and other highly mobile species: see *ACT SoE 2019* (n 12) 213.

[391] Ahjond Garmestani et al, 'Can Law Foster Social-Ecological Resilience?' (2013) 18(2) *Ecology and Society* 37; Brian Chaffin and Lance Gunderson, 'Emergence, Institutionalization and Renewal: Rhythms of Adaptive Governance in Complex Social-Ecological Systems' (2016) 165 *Journal of Environmental Management* 81, 81-82.

[392] APEEL, *Terrestrial Biodiversity Conservation and Natural Resource Management* (n 14) 30.

[393] Sophie Whitehead, 'Rethinking Threatened Species Legislation in the Context of Climate Change' (2017) 34 *Environmental and Planning Law Journal* 94, 111.

2 Land Reservation Systems

The *World Charter for Nature* affirms the need to give special protection status to unique areas and habitats of rare or endangered species.[394] Article 8 of the *Biodiversity Convention* stipulates a need to establish systems of protected areas and conservation guidelines for biodiversity.[395] It is these particular articles of the Charter and the Convention,[396] that provide for the international legal legitimacy of land reservation and species-specific conservation efforts.[397]

Under both the *EPBC Act* and the *Nature Conservation Act*, land reservations can be established under different categories, that then guide the future planning and management of those reserves.[398] The Charter posits that States should inform conservation planning by closely monitoring the status of natural processes, ecosystems and species.[399] In addition, art 7 of the Convention creates an obligation for States to maintain data derived from identification and monitoring activities.[400]

At the federal level, planning of the NRS depends on mapping of landscapes to capture all levels of biodiversity across bioregions.[401] This reflects the *Biodiversity Convention's* consideration of biodiversity at three levels: (1) genetic, (2) species, and (3) ecosystem.[402] These maps replicate elements of biodiversity, including soil landscapes, land systems, vegetation communities, climate and terrain.[403] Effective mapping assists the creation of reservation targets and monitoring programs to build a comprehensive, adequate and representative (CAR) reserve system.[404] The CAR principles make certain that the proportion of ecosystems in protected areas adequately provide for the ecological integrity of species.[405] Interconnected reserve networks can also conserve a representative diversity of ecological communities and provide habitat for migratory species.[406]

Over 19 percent of Australia's total land area is protected under the NRS[407] – inclusive of ACT reserves.[408] The use of IUCN reserve categories ensures that protected areas are managed according to IUCN management objectives.[409] Under the *Biodiversity Convention,* Australia is committed to Aichi Target 11 that 'by 2020, at least 17 percent of terrestrial and inland water' will be protected in 'ecologically representative and well

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394 *World Charter for Nature* (n 19) arts 2-3, 6-9.
395 *Biodiversity Convention* (n 23) art 8(a)-(m).
396 Given its binding nature cf the *World Charter for Nature.*
397 McDonald et al, 'Promoting Resilience to Climate Change in Australian Conservation Law: The Case of Biodiversity Offsets' (n 170) 1617.
398 McDonald et al, 'Adaptation Pathways for Conservation Law and Policy' (n 29) 3.
399 *World Charter for Nature* (n 19) Ibid art 19.
400 See *Biodiversity Convention* (n 23) art 7(d).
401 Natural Resource Management Ministerial Council, *Directions for the National Reserve System – A Partnership Approach* (2005) 24.
402 *Biodiversity Convention* (n 23) arts 1-2.
403 Natural Resource Management Ministerial Council (n 401) 24.
404 Ibid 14, 24.
405 Task Force on Marine Protected Areas (TFMPA), *Understanding and Applying the Principles of Comprehensiveness, Adequacy and Representativeness for the NRSMPA* (Report, November 1999) 7; Daniel Beaver and Ghislaine Llewellyn, *Designing A Comprehensive, Adequate And Representative (CAR) Network Of Marine*
Protected Areas For Australia's Commonwealth Waters (Progress Report, 2009) 12.
406 Michael Dunlop et al, *The Implications of Climate Change for Biodiversity Conservation and the National Reserve System: Final Synthesis* (Final Report, September 2012) 47-52; Michael Dunlop, 'Strategy Conservation' (2013) 3(12) *Nature Climate Change* 1019, 1019-1020.
407 Department of Agriculture, Water and the Environment, *Protected Area Locations* (Web Page, 2021) <https://www.environment.gov.au/land/nrs/science/protected-area-locations>.
408 Which cover more than 60 percent of the Territory's land area: see *ACT SoE 2019* (n 12) 223.
409 Reserves in the ACT generally fall under the IUCN categories of *Wilderness Area*, *National Park* or *Habitat/Species Management Area*: see ACT Government, *Nature Conservation Act 2014 Q&As* (Report, June 2015) 5.

connected systems of protected areas'.[410] However, a 2017 report found that Australia is less than halfway to achieving this target, with some 1,691 ecosystems and 121 species of national significance lacking any representation in protected areas.[411] It was reported that only 36 of 85 Australian bioregions had fulfilled the requirements of Aichi Target 11.

The NRS further has limited adaptive capacity. It does not provide for climate change refugia; that is, areas where components of biodiversity can persist under changing climatic conditions.[412] The climate-driven redistribution of species has wide-ranging implications for human wellbeing and ecosystem function. However, the pace and magnitude of this shifting geography of life remains poorly understood.[413] Additionally, the native species, ecosystems and water resources of the Australian continent are particularly vulnerable to global warming.[414]

The fixed boundaries of protected areas do not account for climate-driven fluctuations in the distribution of species.[415] In both the *EPBC Act* and the *Nature Conservation Act,* future climate refugia of biodiversity is not a priority for inclusion in reserve systems.[416] This leaves many important regions outside of the protected areas, and hence, are more susceptible to destruction.[417] In order for Australia to optimise its protected area network in line with the Charter and the Convention,[418] it needs to expand into locations that overlap the distributional shifts predicted to occur with climate change.[419]

A further shortcoming of the federal and ACT reserve approaches is that the extent of protection is generally protection *from* harmful activities, rather than measures *for* the active improvement of biodiversity.[420] Even then, a protected area designation does not thoroughly safeguard a reservation from all potentially harmful activities. For example, where a proposed development triggers EIA measures, this appraisal does not necessarily prevent decisions being made that degrade the environment.[421] Neither Act contains express prohibitions on the approval of activities that cause significant adverse environmental

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[410] See *Biodiversity Convention, COP 10, Decision X/2 – The Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets,* UNEP/CBD/COP/DEC/X/2 (29 October 2010).

[411] MFJ Taylor, *Building Nature's Safety Net 2016: The State of Australian Terrestrial Protected Areas 2010-2016* (Report, 2017) 3, 15.

[412] Gunnar Keppel et al, 'Refugia: Identifying and Understanding Safe Havens for Biodiversity Under Climate Change' (2012) 21(3-4) *Global Ecology and Biogeography* 393, 394.

[413] Connor Gervais et al, 'Species on the Move around the Australian Coastline: A Continental-Scale Review of Climate-Driven Species Redistribution in Marine Systems' (2020) 27(14) *Global Change Biology* 3200, 3201.

[414] Victoria McGinness and Murray Raff, 'Coal and Climate Change: A Study of Contemporary Climate Litigation in Australia' (2020) 37(1) *Environmental and Planning Law Journal* 87, 89.

[415] April Reside et al, *Climate Change Refugia for Terrestrial Biodiversity* (Final Report, 2013) 2, 9-10. In relation to climate-driven changes in the distribution of Australian species: see generally, Linda Beaumont and Lesley Hughes, 'Potential Changes in the Distributions of Latitudinally Restricted Australian Butterfly Species in Response to Climate Change' (2002) 8(10) *Global Change Biology* 954; Johannes Overgaard et al, 'Sensitivity to Thermal Extremes in Australian Drosophila Implies Similar Impacts of Climate Change on the Distribution of Widespread and Tropical Species' (2014) 20(6) *Global Change Biology* 1738.

[416] McDonald et al, 'Adaptation Pathways for Conservation Law and Policy' (n 29) 2.

[417] With respect to the vulnerability of threatened species outside of Commonwealth and state/territory protected areas: see, eg, Ramona Maggini et al, *Protecting and Restoring Habitat to Help Australia's Threatened Species to Adapt to Climate Change* (Final Report, 2013) 39-40; Jennifer Cane et al, *Supporting Evidence-Based Adaptation Decision-Making in the Australian Capital Territory: A Synthesis of Climate Change Adaptation Research* (Report, 2013) 25; Victoria Graham et al, 'Prioritizing the Protection of Climate Refugia: Designing a Climate-Ready Protected Area' (2019) 62(14) *Journal of Environmental Planning and Management* 2588, 2599-2601.

[418] *World Charter for Nature* (n 19) arts 4, 9; *Biodiversity Convention* (n 23) art 8(a)-(e).

[419] Maggini et al (n 417) 39-40.

[420] McDonald et al, 'Adaptation Pathways for Conservation Law and Policy' (n 29) 3.

[421] *EPBC Act* (n 36) pt 3. A similar case applies to contemporary climate litigation: see McGinness and Raff (n 414) 99-116.

impacts.[422] Instead, the realisation of biodiversity outcomes are largely self-regulatory, conducive to the greater discretions afforded by the *Biodiversity Convention*.[423] Thus, these frameworks are underlain by an assumption that adherence to legal and procedural environmental requirements will push decision-makers towards better biodiversity outcomes,[424] but that assumption has sadly proven doubtful.

3 Threatened Species and Endangered Ecological Community Protection

The key feature of the *EPBC Act* and the *Nature Conservation Act* listing regimes is that listing will trigger the regulation of potentially harmful activities. This involves assessment of the impacts of proposed actions and conditional approvals that mitigate harmful impacts of activities.[425] In line with art 19 of the *World Charter for Nature,* these measures represent a national effort to monitor the status of ecosystems and species, enabling detection of threat and ensuring timely interventions.

At the federal level, the listing of species by the *EPBC Act* triggers the preparation of conservation advices, recovery plans, threat abatement plans and wildlife conservation plans[426] that identify the causes of species decline and guide future management.[427] In the ACT, the *Nature Conservation Act* has similar provisions for the creation of conservation advices, action plans and native species conservation plans.[428] Where there is an overlap of territory and nationally threatened items, it is possible to adopt an advice prepared by the Commonwealth.[429]

Article 3 of the Charter states that special protection should be given to representative samples of rare and endangered species. Under the Convention, Australia is committed to facilitating *in situ* protection of biodiversity.[430] This includes developing legislation to protect threatened populations of species.[431] However, Australia's approaches to the listing of threatened species and ecological communities have significant shortcomings.

Species listing is not precautionary, given that the regime is predicated on human intervention after harm or significant decline has occurred.[432] Where species and ecological communities are not listed, the *EPBC Act* affords limited protection for groups residing outside the NRS.[433] By comparison, the ACT *Nature Conservation Act* legislates protections

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[422] Brian Preston, 'Contemporary Issues in Environmental Impact Assessment' (2020) 37(4) *Environmental and Planning Law Journal* 423, 424.
[423] *Biodiversity Convention* (n 23) art 8.
[424] These legal and procedural requirement may include, for example, mechanisms of assessment and expert consultation: see Neil Craik, 'The Assessment of Environmental Impact' in Emma Lees and Jorge Vinuales (eds), *The Oxford Handbook of Comparative Environmental Law* (Oxford University Press, 2019) 880.
[425] See Murray Raff, 'Ten Principles of Quality in Environmental Impact Assessment' (1997) 14(3) *Environmental and Planning Law Journal* 207, 209-217.
[426] Note that wildlife conservation plans do not apply to listed threatened species (except conservation dependant species), but instead apply to any listed migratory or marines species that occurs in Australia or an external Territory, as well as species of cetacean that occurs in the Australian Whale Sanctuary: see *EPBC Act* (n 36) s 285(1)(a)-(d), (2).
[427] Ibid ch 5 pt 13 div 5; APEEL, *Terrestrial Biodiversity Conservation and Natural Resource Management* (n 14) 13.
[428] *Nature Conservation Act* (n 36) pts 4.4, 4.5, 5.3.
[429] Such an advice must correspond or substantially correspond with the requirements for a conservation advice mentioned in Ibid s 90C(3).
[430] *Biodiversity Convention* (n 23) arts 6, 8.
[431] Ibid arts 8(d), (f), (k).
[432]James Fitzsimons, 'Urgent Need to Use and Reform Critical Habitat Listing in Australian Legislation in Response to the Extensive 2019–2020 Bushfires' (2020) 37(2) *Environmental and Planning Law Journal* 143, 144, 151.
[433] McDonald et al, 'Adaptation Pathways for Conservation Law and Policy' (n 29) 3.

for listed native species and ecological communities, along with all native species.[434] The protected native species list is divided into categories that protect wild populations that are:

(1) likely to be negatively impacted by unrestricted trade in the species;

(2) not threatened species or given special protection status, but nonetheless are rare; and

(3) are ineligible for inclusion in any other category due to insufficient information about the species.[435]

This more expansive approach better represents the broader coverage of protections favoured by both the *World Charter for Nature* and the *Biodiversity Convention*. In particular, the listing of species under a 'data deficient' category,[436] accounts for situations where the potentially threatened class of fauna is at risk but, a lack of information prevents the species from listing in a threatened category. This contrasts with the *EPBC Act,* whereby listing largely depends on species being scientifically described.[437] This process is much more resource intensive than the *Nature Conservation Act*, where it demands complex preliminary scientific assessment and a high non-precautionary evidence base to support a threatened status.[438]

The choice of listings are largely discretionary with the national approach placing a high value on species rarity. This may depend on research preferences, funding, cultural priorities or the maintenance of iconic species.[439] The ACT approach to listings are equally influenced by factors such as preferences for particular species, improved knowledge or methodologies regarding species status and the number of taxa reviewed regularly.[440] Despite this, listed species and ecological communities continue to dominate the number of assessments carried out under both Acts.[441]

The *EPBC Act's* listing method also fails to reflect the dynamic and multi-scale processes of biodiversity.[442] This view of interconnected natural systems is affirmed by the *World Charter for Nature*, which advocates for a holistic approach to environmental management.[443] The *Nature Conservation Act* arguably moves beyond the *EPBC Act* in its consideration of 'ecological connectivity'.[444] This more holistic approach to listing of threatened species and ecological communities aims to account for the dynamism of species and ecosystem processes.[445]

Resourcing issues also hinder the effectiveness of both Acts. While considerable attention is given to the initial assessment and listing processes of the *EPBC Act,* very little attention

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[434] *Nature Conservation Act* (n 36) pt 5.2.
[435] See Ibid ss 110-112; *Nature Conservation Protected Native Species List 2015 (No 1)* (ACT).
[436] *Nature Conservation Act* (n 36) s 111(2)(c).
[437] *EPBC Act* (n 36) s 178; Sophie Lloyd, 'Reconsidering the Species-Specific Approach: Insects and the Environment Protection and Biodiversity Conservation Act' (2020) 37(2) *Environmental and Planning Law Journal* 242, 265.
[438] *Second Independent Review of the EPBC Act* (n 48) 44.
[439] Jan McDonald et al, 'Rethinking Legal Objectives for Climate-Adaptive Conservation' (2016) 21(2) *Ecology and Society* 25, 28-30; McDonald et al, 'Adaptation Pathways for Conservation Law and Policy' (n 29) 3.
[440] *ACT SoE 2019* (n 12) 214.
[441] Particularly as triggers of development impact assessments: see *Second Independent Review of the EPBC Act* (n 48) 44; *ACT Nature Conservation Strategy 2013–23* (n 185) 8-10.
[442] Whitehead (n 393) 100. See also, Karen Poiani et al, 'Biodiversity Conservation at Multiple Scales: Functional Sites, Landscapes, and Networks' (2000) 50(2) *BioScience* 133, 133, 139-140.
[443] *World Charter for Nature* (n 19) Preamble.
[444] *Nature Conservation Act* (n 36) ss 6(2)(v), 49(2)(c), 101(3)(c).
[445] See, eg, ACT Government, *Canberra Spatial Plan* (2004) 12, 23, 32, 72, 86; Department of Sustainability, Environment, Water, Population and Communities, *National Wildlife Corridors Plan* (2012); *ACT Nature Conservation Strategy 2013–23* (n 185) 14-15, 24.

is diverted towards management post-listing.[446] Article 17 of the Charter provides that States should furnish the necessary funds and programmes essential to conservation. Article 20 of the Convention similarly urges States to provide financial support and incentives for national activities that achieve biodiversity objectives. Relative to other States, Australian conservation efforts remain underfunded and hence, inadequately support the protection and recovery of threatened species.[447]

The high costs associated with recovering species and ecological communities means that recovery planning is limited by the availability of resources.[448] Listed threatened species are more likely to receive management and investment over their unlisted counterparts and often will experience greater beneficial outcomes if there is substantial investment.[449] However, biases in the selection of species for conservation funding means that certain species receive little attention regardless of their prospects for recovery.[450] This is particularly relevant to the recovery of under-represented species, including invertebrates, plants and fungi.[451]

Because listing and assessment processes are driven by 'charisma, body size and level of knowledge or appeal', funding for conservation is distributed inefficiently.[452] Cost-effective factors such as the genuine severity of threats, the recovery potential and comparative costs of conservation mechanisms, do not feature in this approach.[453] Australia's inefficient and biased allocation of conservation listing efforts prevents meaningful debate on the adequacy of available funds or the appropriate prioritisation of conservation efforts.[454]

Contrary to the monitoring obligations of the Charter and the Convention,[455] even where species have had the benefit of listing, there are significant data gaps in the status of Australia's biodiversity.[456] Listing regimes lack effective processes to measure the performance of conservation advices and recovery plans, or the extent to which existing

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[446] *Second Independent Review of the EPBC Act* (n 48) 44.
[447] Taylor (n 411) 3, 15; Anthony Waldron et al, 'Targeting Global Conservation Funding to Limit Immediate Biodiversity Declines' (2013) 110(29) *Proceedings of the National Academy of Sciences* 12144, 12146-12147.
[448] McDonald et al, 'Adaptation Pathways for Conservation Law and Policy' (n 29) 3.
[449] David Farrier et al, 'Threatened Species Listing as a Trigger for Conservation Action' (2007) 10(3) *Environmental Science and Policy* 219, 224-227; Paul Ferraro et al, 'The Effectiveness of the US Endangered Species Act: An Econometric Analysis Using Matching Methods' (2007) 54(3) *Journal of Environmental Economic and Management* 245, 255-256. Stephen Kearney et al, 'Estimating the Benefit of Well-Managed Protected Areas for Threatened Species Conservation' (2020) 54(2) *Oryx* 276, 281-282.
[450] Examples of bias in the listing of species pertain to the over-representation of mammals, birds and amphibians in species lists: see Jessica Walsh et al, 'Trends and Biases in the Listing and Recovery Planning for Threatened Species: An Australian Case Study' (2013) 47(1) *Oryx* 134, 140-141; Lloyd (n 437) 249-250.
[451] *Biodiversity SoE 2016* (n 328) v, 176; *ACT SoE 2019* (n 12) 264. For the conservation importance of under-represented species: see, eg, Neale Bougher and Teresa Lebel, 'Sequestrate (Truffle-Like) Fungi of Australia and New Zealand' (2001) 14(3) *Australia Systematic Botany* 439; George Schatz, 'Plants on the IUCN Red List: Setting Priorities to Inform Conservation' (2009) 14(11) *Trends in Plant Science* 638; Gary Taylor et al, 'Strategic National Approach for Improving the Conservation Management of Insects and Allied Invertebrates in Australia' (2018) 57(2) *Austral Entomology* 124.
[452] Walsh et al (n 450) 141.
[453] Erik Harvey et al, 'Recovery Plan Revisions: Progress or Due Process?' (2002) 12(3) *Ecological Applications* 682, 684; Farrier et al (n 449) 223, 226; Jeremy Simmonds et al, 'Vulnerable Species and Ecosystems are Falling Through the Cracks of Environmental Impact Assessments' (2019) 13(3) *Conservation Letters* 1, 7.
[454] Madeleine Bottrill et al, 'Is Conservation Triage Just Smart Decision Making?' (2008) 23(12) *Trends in Ecology and Evolution* 649; Walsh et al (n 450) 141.
[455] *World Charter for Nature* (n 19) art 19; *Biodiversity Convention* (n 23) art 7(d).
[456] *Biodiversity SoE 2016* (n 328) 10, 42-43; *ACT SoE 2019* (n 12) 264.

management alleviates threats to species.[457] Increased monitoring and reporting of the status of biodiversity would significantly improve Australia's capacity to report on the indicators and trends of threatened species and ecological communities.[458]

Finally, listing processes do not entirely halt potential harmful activities affecting a listed species or ecological community.[459] Most environmental outcomes of territory and federal developments are determined on a 'project-by-project' basis.[460] Hence, the cumulative environmental impacts of these activities are not systematically considered.[461] Even where protective conditions may be imposed on developers,[462] individual projects usually self-manage compliance with biodiversity objectives.[463] Failing to address the cumulative effects of developments will only allow ecological conditions to degrade.[464] For example, where there are multiple patches of land clearance, the cumulative effect of these activities may cause fragmentation of native vegetation and threaten their dependent species.[465] In this sense, Australia's laws again appear to stray away from recognition of ecological connectivity by the Charter and stipulations to facilitate the compatibility of land uses with biodiversity objectives by the Convention.[466]

V Forging a Future for Nature

At the Commonwealth level, there is increasing pressure to alter or replace the *EPBC Act*. On the one hand, the Act has been assailed for its ineffective prevention of biodiversity decline,[467] while on the other, it has been seen as unnecessarily impeding development.[468] Regardless, greater protection of Australia's biodiversity requires a firm commitment by all stakeholders and a suite of new environmental laws,[469] so that future generations can benefit from Australia's unique environment and heritage.[470]

Biodiversity decline at the territory level means that the *Nature Conservation Act* has also not escaped criticism.[471] Ongoing concerns include fears that development approvals will

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457 S. M. Davey, 'Reporting Australia's Forest Biodiversity II: Threatened Forest-Dwelling and Forest-Dependent Species' (2018) 81(4) *Australian Forestry* 214, 228.
458 Alejandro Ortega-Argueta et al, 'Compliance of Australian Threatened Species Recovery Plans with Legislative Requirements' (2011) 92(8) *Journal of Environmental Management* 2054, 2057.
459 APEEL, *Terrestrial Biodiversity Conservation and Natural Resource Management* (n 14) 13; *Biodiversity SoE 2016* (n 328) 24-27; *ACT SoE 2019* (n 12) 85.
460 APEEL, *Terrestrial Biodiversity Conservation and Natural Resource Management* (n 14) 13; *Second Independent Review of the EPBC Act* (n 48) 1, 18, 42-44.
461 *Second Independent Review of the EPBC Act* (n 48) 42.
462 Ibid; McDonald et al, 'Adaptation Pathways for Conservation Law and Policy' (n 29) 3.
463 *Second Independent Review of the EPBC Act* (n 48) 42.
464 Rebecca Nelson, 'Breaking Backs and Boiling Frogs: Warnings from a Dialogue Between Federal Water Law and Envrionmental Law' (2019) 42(4) *University of New South Wales Law Journal* 1179, 1204.
465 Megan Evans et al, 'The Spatial Distribution of Threats to Species in Australia' (2011) 61(4) *BioScience* 281, 285; Ayesha Tulloch et al, 'Understanding the Importance of Small Patches of Habitat for Conservation' (2016) 53 Journal of Applied Ecology 418, 419.
466 *World Charter for Nature* (n 19) Preamble; *Biodiversity Convention* (n 23) art 8(i).
467 Bates (n 3) 415. On the ineffective and inefficient operation of the *EPBC Act*: see, eg, Chris McGrath, 'Swirls in the Stream of Australian Environmental Law: Debate on the EPBC Act' (2006) 23(3) *Environmental and Planning Law Journal* 165, 169; Lloyd (n 437) 249-251; Dickson and Woolaston (n 13) 34-35; Kenny Ng, 'Towards an Outcomes-Driven Approach to Environmental Law: The Environment Protection and Biodiversity Conservation Act 1999 (Cth)' (2021) 38(3) *Envrionmental and Planning Law Journal* 223, 224-236.
468 Clement et al (n 30) 93-94.
469 *Second Independent Review of the EPBC Act* (n 48) 41-42, 45.
470 Lisa Cox, 'Australia Urged to Overhaul Environment Laws and Reverse 'Decline of Our Iconic Places'' *The Guardian* (online, 28 January 2021) <https://www.theguardian.com/australia-news/2021/jan/28/australia-urged-to-overhaul-environment-laws-and-reverse-decline-of-our-iconic-places>; Bates (n 3) 415; *Second Independent Review of the EPBC Act* (n 38) viii-ix.
471 *ACT SoE 2019* (n 12) 27, 207.

diminish the remnant habitat of species, and that listing regimes inadequately protect native species.[472] For example, there are limited protections for key sub-critical species that have not yet justified nomination for listing but are approaching that situation.[473]

Although Australia supported the *World Charter for Nature* and is a signatory to the *Biodiversity Convention*, its domestic biodiversity conservation laws do not reflect these commitments.[474] Despite various policy instruments, public programs and the substantial expansion of protected areas, national biodiversity is under increasing threat.[475]

To meet its international obligations, Australia needs more effective management of human behaviours.[476] Internationally, the Convention requires that States adopt strategies that are behaviourally conducive to biodiversity protection.[477] These outcomes are driven by ecological, industrial and social processes involving many people.[478] Successful biodiversity strategies necessitate effective behaviour-management activities, including protected area management, citizen education and research programs.[479] These environmental management strategies can drive different types of intervention, perhaps in novel and unique ways.[480]

The following section discusses wide-ranging and multi-pronged law reforms to achieve Australia's international biodiversity priorities.[481] First, the section explores the benefits of outcomes-driven approaches to environmental law. Then, I contend that this approach must be accompanied by measurable conservation objectives. Finally, the section concludes with recommendations for the reform of Australia's reserve systems and listing approaches.

A An Outcomes-Driven Approach to Statutory Objects Clauses

There is a need for clearer outcome objectives for environmental legislation.[482] Outcomes-based conditions are those which focus on achieving a specific environmental outcome, without prescribing how that outcome is to be achieved.[483] The APEEL proposes that the setting of hard outcomes, rather than merely steps thought appropriate to achieve them, can provide a baseline environmental standard and comparator.[484]

The benefits of outcomes-oriented laws may include:

(1) the implementation of assurance frameworks that require demonstrated progress towards specific outcomes;

(2) offering regulators a low-cost method of gaining compliance with regulatory goals via the encouragement of innovation in environmental management strategies; and

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[472] See Ibid 361-367. Current criticisms of *Nature Conservation Act* mirror also some of the criticisms of its predecessor, the *Nature Conservation Act 1980* (ACT): see, eg, ACT Flora and Flora Committee, Draft Submission to Department of the Environment, Climate Change, Energy and Water, *Review of the Nature Conservation Act 1980* 2-3; Friends of Grasslands, Submission to Department of the Environment, Climate Change, Energy and Water, *Review of the Nature Conservation Act 1980* (16 February 2011).

[473] Ibid.

[474] Paul Martin et al, 'Engagement: Australia's Weak Link in Biodiversity Protection' (2017) 34 *Environmental and Planning Law Journal* 383, 383-386.

[475] *Second Independent Review of the EPBC Act* (n 48) ii-iii, viii-ix, 40, 44.

[476] Martin et al (n 474) 395-396.

[477] *Biodiversity Convention* (n 23) arts 6, 11, 20.

[478] Martin et al (n 474) 387.

[479] *Biodiversity Convention* (n 23) art 12-13, 16-19.

[480] See, eg, Susan Michie et al, 'The Behaviour Change Wheel: A New Method for Characterising and Designing Behaviour Change Interventions' (2011) 6(1) *Implementation Science* 42.

[481] APEEL, *Terrestrial Biodiversity Conservation and Natural Resource Management* (n 14) 3.

[482] Ibid 29.

[483] See Department of Agriculture, Water and the Environment, *Outcomes-Based Conditions Policy* (Report, March 2016) 6-8.

[484] Ng (n 467) 225-226.

(3) building public confidence in environmental regulation through 'progress-tracking' and 'success-measuring' mechanisms.[485]

Laws need to be clearly defined in order to avoid strategic uncertainties when multiple principles can pull the interpretation of policies in different directions.[486] One example is the objective of ESD, where there is no agreement as to whether its interpretation should be more environmentally or economically inclined.[487] A lack of specificity and consistency among conservation objectives is also a challenge to coordinating uniform conservation action.

The efficacy of objects clauses can be improved by precisely identifying the purpose of an objects clause and drafting the clause to articulate that purpose. Then, the language of each object should be sufficiently specific to confine the interpretative bounds of that object. If there is potential that clauses may conflict, a mechanism within the objects clause, such as a designated priority between clauses, should resolve that conflict. Lastly, objects clauses must influence the exercise of discretionary powers under the statute, such as requiring a decision-maker's consideration of the clauses or indicating that decisions must achieve one or more particular objects.[488]

The Honourable Chief Justice Brian Preston[489] suggests that the objects clauses of environmental statutes are often drafted at a 'high level of generality and are hortatory and aspirational'.[490] The *Second Independent Review of the EPBC Act* critiqued the broadness of its objects for boasting little 'clout' and being 'uninspiring and perfunctory'.[491] Although the *EPBC Act* contains multiple objects clauses, it neither proffers clear explanation of its desired outcomes nor provides sufficient constraints on the exercise of discretion to limits the effect of development on nature.[492]

In relation to the drafting of biodiversity objectives, I arrive at the following proposals. Objects clauses should be drafted to focus on outcomes rather than processes, and where they may be multiple objects, explicit guidance must be provided as to their relative weight.[493] The number of objects should be limited to those necessary to give effect to the desirable outcomes of the statute.[494] Additional subsidiary objects should be used sparingly, only when they are required to clarify discrete outcomes of the statute in question.[495] Moreover, a national-level high priority assigned to an object, such as to 'conserve

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[485] Ibid 226; Department of Agriculture, Water and the Environment, *Outcomes-Based Conditions Policy* (n 483) 4, 10-11; Sharon Gilad, 'Process-Oriented Regulation: Conceptualization and Assessment' in David Levi-Faur (ed), *Handbook on the Politics of Regulation* (Edward Elgar Publishing, 2013) 429.

[486] Andrew Macintosh, 'The Impact of ESD on Australia's Environmental Institutions' (2015) 22(1) *Australasian Journal of Environmental Management* 33, 41-43; Brian Preston, 'The Australian Experience on Environmental Law' (2018) 35(6) *Environmental and Planning Law Journal* 637, 649.

[487] Macintosh (n 486) 41; Ng (n 467) 226. For the consideration of ecological sustainable development in case law: see, eg, *Telstra Corp Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256.

[488] Brian Preston, 'Internalising Ecocentrism in Environmental Law' (Wild Law Conference Speech, Griffith University, 16-18 September 2011); Brian Preston, 'Internalising Ecocentrism in Environmental Law' in Michelle Maloney and Peter Burdon (eds) *Wild Law – In Practice* (Routledge, 2014) 76–78; Preston, 'The Australian Experience on Environmental Law' (n 486) 649-650. In relation to judicial consideration of the influence of objects clauses to constrain the exercise of powers under an Act: see *Woollahra Municipal v Minister for the Environment* (1991) 23 NSWLR 710, 726 (Kirby P).

[489] The Honourable Justice Brian Preston is the Chief Judge of the Land and Environment Court in New South Wales.

[490] Preston, 'The Australian Experience on Environmental Law' (n 486) 649.

[491] *Second Independent Review of the EPBC Act* (n 48) 48, 76-77.

[492] Ibid 43, 48; Dickson and Woolaston (n 13) 23.

[493] Brian Preston, 'Adapting to the Impacts of Climate Change: The Limits and Opportunities of Law in Conserving Biodiversity' (2013) 30(5) *Environmental and Planning Law Journal* 375, 378. See also *EPBC Act* (n 36) s 3.

[494] APEEL, *The Foundations of Environmental Law: Goals, Objects, Principles and Norms* (n 378) 5.

[495] McCormack (n 376) 561.

biodiversity and reverse its state of decline' would be an outcomes-based approach to developing clear and specific parameters for biodiversity conservation.

In relation to the *Nature Conservation Act*, it has a singular over-arching objects clause to 'protect, conserve and enhance the biodiversity of the ACT'.[496] Indeed the *EPBC Act* could benefit from adopting a similar approach by nominating a primary objective guiding all its environment-related laws.[497] For example, an over-arching goal to 'ensure the extensive engagement of Australian communities to overturn the state of biodiversity decline' could improve national consistency in biodiversity decision-making.[498]

The *Nature Conservation Act* also provides a series of subsidiary objects in support of its primary object.[499] For example, the objective of 'protecting, conserving, enhancing, restoring and improving nature conservation' with respect to native species, ecological communities, biological diversity and ecosystems.[500] Although this does commit decision-makers to make efforts to improve the state of biodiversity in the ACT, I argue that there is scope for these objects clauses to be enhanced.

One means by which the objects of the *EPBC Act* and the *Nature Conservation Act* could be improved is by expressing all objects as 'directing principles'.[501] Directing principles are legally enforceable and guide the implementation of legislation.[502] For example, an objects clause could direct a decision-maker to consider the environmental principles of the *World Charter for Nature* and the *Biodiversity Convention*.[503] Directing principles could also be incorporated in objects regarding the engagement of the Australian public, Indigenous and scientific communities, government and business.[504] Mandatory consultation of these parties in decision-making would allow a concerted and culturally-conscious response to biodiversity declines.[505]

B Systems of Environmental Monitoring and Measurable Conservation Objectives

Both the Charter and the Convention recognise that the evaluation of conservation methods are crucial processes to effective conservation.[506] Thus, it is imperative that conservation objectives are qualitatively and quantitatively measured.[507] This is essential for supporting adequate resource allocation and public trust in conservation activities.[508] It also requires baseline data to inform the correct status and appropriate outcomes for protected matters.[509] When reinforced by accurate baseline data, an effective environmental

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[496] *Nature Conservation Act* (n 36) s 6(1).
[497] APEEL, *The Foundations of Environmental Law: Goals, Objects, Principles and Norms* (n 378) 5; McCormack (n 376) 561.
[498] McCormack (n 376) 561-562.
[499] *Nature Conservation Act* (n 36) s 6(2).
[500] Ibid ss 6(2)(a)(i)-(vii).
[501] McCormack (n 376) 561.
[502] Macintosh (n 486) 40-41; APEEL, *The Foundations of Environmental Law: Goals, Objects, Principles and Norms* (n 378) 3, 39.
[503] *World Charter for Nature* (n 19) arts 1-5; *Biodiversity Convention* (n 23) arts 3, 8.
[504] *EPBC Act* (n 36) ss 3(d)(g); *Nature Conservation Act* (n 36) ss 6(2)(b)-(g); Martin et al (n 474) 386-389.
[505] McCormack (n 376) 561; Martin et al (n 474) 389, 395-397.
[506] *World Charter for Nature* (n 19) art 19; *Biodiversity Convention* (n 23) art 7(d).
[507] Yinqiu Ji et al, 'Reliable, Verifiable and Efficient Monitoring of Biodiversity via Metabarcoding' (2013) 16(10) *Ecology Letters* 1245, 1245-1247.
[508] Timothy Tear et al, 'How Much Is Enough? The Recurrent Problem of Setting Measurable Objectives in Conservation' (2005) 55(10) *Bioscience* 835, 837-844; McCormack (n 376) 561.
[509] Department of Agriculture, Water and the Environment, *Outcomes-Based Conditions Policy* (n 483) 10.

management system can utilise quantitative thresholds that trigger the deployment of strong legal tools if the system is at risk of exceeding its thresholds.[510]

Both the *EPBC Act* and the *Nature Conservation Act* have been hindered by significant gaps in national data on biodiversity.[511] Much governmental activity pursued under the *EPBC Act* also remains obscure, including the content of pre-referral discussions and rationales for decision-making in EIA.[512] This lack of transparency creates difficulty in verifying the Act's contribution to biodiversity outcomes.[513] Thus, both Acts would benefit from the introduction of a requirement to include measurable objectives in all statutory instruments made under them.[514] This would apply to all conservation advices and plans generated at the Commonwealth[515] and territory[516] levels.

Measurable objectives could be incorporated into provisions of the *EPBC Act* that require conservation-related plans to 'state criteria against which achievement of objectives is to be measured'.[517] At the territory level, the *Nature Conservation Act* states that action plans *may* state requirements for monitoring species and habitats.[518] Similar discretion is afforded to the Conservator with respect to imposing monitoring requirements on native species conservation plans.[519] Hence, the *Nature Conservation Act* could benefit from mandatory provisions on conservation plans to state criteria against the achievement of measurable biodiversity outcomes – similar to the *EPBC Act*. This would also increase baseline and continuing data on the condition of biodiversity in the ACT.[520]

Currently, limited reporting and data restricts the development of a comprehensive understanding of the true extent of Australia's biodiversity loss.[521] Thus, specific performance indicators for both Acts could be improved in a 'SMART' (specific, measurable, achievable, relevant, and time-bound) manner to ensure that goals are clear and feasible.[522] By choosing indictors based on measurement endpoints and practical limitations, such as

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[510] Measurable thresholds as they relate to threatened or native species may include data regarding species abundance, distribution, migration patterns, etc.: see APEEL, *Terrestrial Biodiversity Conservation and Natural Resource Management* (n 14) 29-30; *Second Independent Review of the EPBC Act* (n 48) 6-8, 10, 24, 29, 57-72

[511] *Biodiversity SoE 2016* (n 328) 10, 42-43; *ACT SoE 2019* (n 12) 264.

[512] Tridgell (n 380) 258.

[513] See Ibid; Tear et al (n 508) 837-84.

[514] McCormack (n 376) 561.

[515] This includes conservation advices, recovery plans, threat abatement plans and wildlife conservation plans: see *EPBC Act* (n 36) pt 13 div 5.

[516] This includes conservation advices, action plans and native species conservation plans: see *Nature Conservation Act* (n 36) pts 4.4, 4.5, 5.3.

[517] See *EPBC Act* (n 36) ss 270(2)(b), 271(2)(b), 287(2)(b).

[518] *Nature Conservation Act* (n 36) ss 100(a)(i)(E), 108(1)(a)-(b).

[519] Ibid ss 23, 116(b)-(c).

[520] Renee Brawata et al, *Conservation Effectiveness Monitoring Program: An Overview* (Technical Report, April 2017) 12-13.

[521] NSW Young Lawyers Environment and Planning Committee and Animal Law Committee, Submission to the Environment and Communications References Committee, *Australia's Faunal Extinction Crisis* (17 August 2021) 14.

[522] The SMART framework has been applied as a performance indicator across various environmental policy areas: see, eg, Senate Standing Committee on Environment and Communications, Parliament of Australia, *Effectiveness of Threatened Species and Ecological Communities' Protection in Australia* (Report, August 2013) 75-76; Robert Watson et al, *Sustainable Development Goals and Targets for Australia* (MSI Report No. 14/3, August 2014) 46-49; Geoff Park, 'Do Farmers Love Brolgas, Seagrass and Coral Reefs? It Depends on Who's Paying, How Much, and for How Long' in Dean Ansell, Fiona Gibson and David Salt (eds), *Learning from Agri-Environment Schemes in Australia: Investing in Biodiversity and Other Ecosystem Services on Farms* (ANU Press, 2016) 53, 54-55.

data availability, governments can set clear objectives at the outset of planning and measure distance towards achieving targets.[523]

SMART objectives can also assist to ascertain whether current interventions are helping or hindering biodiversity adaptation to climate change, and whether they constitute efficient use of conservation funds.[524] Effective monitoring and analysis would also bridge the biodiversity data gaps identified in the *Biodiversity SoE 2016* and the *ACT SoE 2019*.[525] Comprehensive data would increase our knowledge of nature,[526] and enable proactive conservation mechanisms that intervene before biodiversity becomes threatened or incurs loss.[527]

C Increasing the Efficacy of Land Reservation Systems and Species Listing Approaches

Land reservation systems and species listing approaches should be reformed to enable responsiveness to dynamic natural systems.[528] Legal responses to climate-related threats to biodiversity can be optimised through adaptive governance.[529] This takes account of the *World Charter for Nature's* principles for safeguarding the long-term capacity of natural systems and initiating timely interventions to prevent adverse effects to nature.[530] This further reflects Australia's commitment to fulfil art 6 of the *Biodiversity Convention* to adapt existing national plans for the conservation of biological diversity.[531]

These measures would be premised on the particular susceptibility of Australian biota to the effects of climate change, due to high rates of species endemism and specialisation, narrow species ranges, and limited capacity for independent dispersals.[532] The ability of species to disperse may be restricted by human-altered landscapes, the availability of isolated habitats or the vast terrain of flat landscapes.[533] Only five percent of Australian land is more than 600 metres above sea level.[534] This limited topographic availability diminishes the capacity of many species to adapt independently. However, this context presents an

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[523] B. Essex et al, 'Proposal for a National Blueprint Framework to Monitor Progress on Water-Related Sustainable Development Goals in Europe' (2020) 65(1) *Environmental Management* 1, 1-2, 7.
[524] McCormack (n 376) 561.
[525] *Biodiversity SoE 2016* (n 328) 10, 42-43; *ACT SoE 2019* (n 12) 264.
[526] *World Charter for Nature* (n 19) art 18; NSW Young Lawyers Environment and Planning Committee and Animal Law Committee (n 521) 14; *Second Independent Review of the EPBC Act* (n 48) 23-25, 147-148.
[527] For the benefits of proactive conservation approaches: see Martin Drechsler et al, 'Does Proactive Biodiversity Conservation Save Costs?' (2011) 20(5) *Biodiversity and Conservation* 1045, 1046-1047, 1053-1054; Louisa Ponnampalam et al, 'Aligning Conservation and Research Priorities for Proactive Species and Habitat Management: The Case of Dugongs Dugong Dugon in Johor, Malaysia' (2015) 49(4) *Oryx* 743, 746-748; Brawata et al (n 520) 10; *Second Independent Review of the EPBC Act* (n 48) 25, 27, 54.
[528] Jan McDonald and Megan C. Styles, 'Legal Strategies for Adaptive Management under Climate Change' (2014) 26(1) *Journal of Environmental Law* 25, 28, 52-53.
[529] Phillipa McCormack, 'Conservation Introductions for Biodiversity Adaptation under Climate Change' (2018) 7(2) *Transnational Environmental Law* 323, 325-326.
[530] *World Charter for Nature* (n 19) arts 1-4, 8, 13, 16.
[531] *Biodiversity Convention* (n 23) arts 6, 8(a)-(f).
[532] Will Steffen et al, *Australia's Biodiversity and Climate Change: A Strategic Assessment of the Vulnerability of Australia's Biodiversity to Climate Change* (Report, August 2009) 8-9, 12, 15, 93, 111, 116, 178-179; McCormack, 'Conservation Introductions for Biodiversity Adaptation under Climate Change' (n 529) 324.
[533] Andrew A. Burbidge et al, 'Is Australia Ready for Assisted Colonization? Policy Changes Requires to Facilitate Translocations under Climate Change' (2011) 17(3) *Pacific Conservation Biology* 259, 259; McCormack, 'Conservation Introductions for Biodiversity Adaptation under Climate Change' (n 529) 324.
[534] Steffen et al (n 532) 15-16.

opportunity to introduce more climate-adaptive legal frameworks that can anticipate and respond to environmental changes.[535]

1 Land Reservation Systems

At the Commonwealth level, ensuring the completeness of NRS requires meeting the terms of the *Biodiversity Convention's* Aichi Target 11.[536] One of the most important conservation values of the NRS is the wide diversity of native ecosystems and habitat that it provides.[537] This value pertains to coverage of the underlying geographic diversity of the landscape, including the 'soils, geology, topography and micro-climate' which determine the distribution and variation of ecosystem types.[538] To the extent that NRS protected areas remain representative of Australia's biodiversity, the effects of climate are not likely to trigger changes in the species composition and ecosystem types in the next 50 years.[539]

However, there is scope to expand the NRS network to include future climate refugia.[540] Expansion of the NRS estate is plausible via acquisition of land for the public estate or the extension of protected area boundaries to private land reservations.[541] Enhancing the ecological connectivity of protected areas could also be facilitated through use of wildlife corridors and increased restrictions on land use.[542] Where certain areas are likely to be critical to the survival of species – being climate refugia in the event of extreme weather – the creation of 'moveable reserves' could be a viable approach at both Commonwealth and ACT levels.[543] Moveable reserves are those which have a temporary protection status and can be altered according to their location, in order to address variable conservation features.[544] For example, temporary protected areas could encompass fish recruitment or provide drought refuges for nomadic species.[545]

Climate-conscious selection criteria to target ecological diversity in the expansion of reserve systems could include:

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535 McDonald et al, 'Adaptation Pathways for Conservation Law and Policy' (n 29) 4.
536 Aichi Target 11 commits Australia to guaranteeing the protection of ecologically representative and well connected systems in at least 17 percent of terrestrial and inland water bodies: see Natural Resource Management Ministerial Council (n 401) 24; *Biodiversity Convention, COP 10, Decision X/2 – The Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets* (n 410); Taylor (n 411) 5-6, 16.
537 Michael Dunlop et al, *Implications for Policymakers: Climate Change, Biodiversity Conservation and the National Reserve System* (Report, September 2012) 9.
538 McDonald et al, 'Adaptation Pathways for Conservation Law and Policy' (n 29) 4.
539 Dunlop et al, *The Implications of Climate Change for Biodiversity Conservation and the National Reserve System: Final Synthesis* (n 406) 48-50; Alison Johnston et al, 'Observed and Predicted Effects of Climate Change on Species in Protected Areas' (2013) 3(12) *Nature Climate Change* 1055, 1058-1059.
540 See Joshua J. Lawler et al, 'Planning for Climate Change through Additions to a National Protected Area Network: Implications for Cost and Configuration' (2020) 375(1794) *Philosophical Transactions of the Royal Society B: Biological Sciences* 1, 3-6; Yadvinder Malhi et al, 'Climate Change and Ecosystems: Threats, Opportunities and Solutions' (2020) 375(1794) *Philosophical Transactions of the Royal Society B: Biological Sciences* 1, 4.
541 April Reside et al, 'Adapting Systematic Conservation Planning for Climate Change' (2018) 27(1) *Biodiversity and Conservation* 1, 14-15.
542 McDonald et al, 'Adaptation Pathways for Conservation Law and Policy' (n 29) 5; Jodi Hilty et al, *Guidelines for Conserving Connectivity through Ecological Networks and Corridors* (Best Practice Protected Area Guideline No. 30, 2020) 13-16.
543 Reside et al (n 541) 15.
544 Sílvia B. Carvalho et al, 'Conservation Planning under Climate Change: Toward Accounting for Uncertainty in Predicted Species Distributions to Increase Confidence in Conservation Investments in Space and Time' (2011) 144(7) *Biological Conservation* 2020, 2026-2028.
545 Robert L. Pressey et al, 'Conservation Planning in a Changing World' (2007) 22(11) *Trends in Ecology and Evolution* 583, 584; Robert L. Pressey and Madeleine Bottrill, 'Approaches to Landscape- and Seascape-Scale Conservation Planning: Convergence, Contrasts and Challenges' (2009) 43(4) *Oryx* 464, 468-469.

(1) Areas of habitat at risk of environmental degradation;

(2) Refuges from developmental or climatic disturbances;

(3) Areas of high connectivity between ecosystems and habitats;

(4) Areas that will reduce gaps between existing protected areas; and

(5) Areas that support co-dependent ecological processes.[546]

Finally, adaptive approaches to protected areas will also require active management and funding.[547] This could include offsetting climate-related declines of species using human interventions to restore degraded habitat, deter invasive species, treat disease, supplement feeding or create artificial habitat.[548] By expanding the NRS, the Commonwealth could aim to achieve a net coverage of protected areas that is similar to the ACT, which boasts conservation status for approximately 60 percent of its total land area.[549]

2 Threatened Species and Endangered Ecological Community Protection

Reform of the *EPBC Act* and the *Nature Conservation Act* could also introduce anticipatory listing categories to render 'the future actionable'.[550] This method would borrow some aspects of the listing category for data deficient native species already found in the *Nature Conservation Act*, but expand listing protections to species that are 'potentially at risk' or 'likely to be threatened' by climate change or other factors.[551]

In these cases, there is often insufficient scientific evidence about such species for them to be eligible for listing.[552] For example, a suite of Australian terrestrial and inland water bird species were found to be either sensitive or exposed to the effects of climate change.[553] However, without listing protections, there is currently no legal mechanism at the Commonwealth level to protect those species.[554] Thus, the benefit of anticipatory listing is that it seeks to identify and quantify both the present and future risks to species, with a goal to predict and prevent future decline.[555]

Furthermore, the *Nature Conservation Act* could be improved via the inclusion of critical habitat listing like the *EPBC Act*.[556] Although it is defined in the Dictionary to the *Nature Conservation Act*, there is little reference to critical habitat in the Act besides its

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[546] Dunlop et al, *Implications for Policymakers: Climate Change, Biodiversity Conservation and the National Reserve System* (n 537) 9.
[547] James Fitzsimons, 'Private Protected Areas in Australia: Current Status and Future Directions' (2015) 10(10) *Nature Conservation* 1, 18-19.
[548] Rachael Alderman and Alistair J. Hobday, 'Developing a Climate Adaptation Strategy for Vulnerable Seabirds Based on Prioritisation of Intervention Options' (2017) 140 *Deep-Sea Research II* 290, 290-291; McDonald et al, 'Adaptation Pathways for Conservation Law and Policy' (n 29) 5.
[549] *ACT SoE 2019* (n 12) 223.
[550] Ben Anderson, 'Security and the Future: Anticipating the Event of Terror' (2010) 41(2) *Geoforum* 227, 229; Irus Braverman, 'Anticipating Endangerment: The Biopolitics of Threatened Species Lists' (2017) 12(1) *Bio Societies* 132, 155.
[551] McDonald et al, 'Adaptation Pathways for Conservation Law and Policy' (n 29) 5. In relation to the *Nature Conservation Act's* data deficient listing category for protected native species: see *Nature Conservation Act* (n 36) ss 111(2)(c), 112(3)(a)-(b).
[552] See, eg, *Nature Conservation Act* (n 36) s 112(3).
[553] Stephen Garnett et al, *Climate Change Adaptation Strategies for Australian Birds* (Final Report, January 2013) 55-57.
[554] McDonald et al, 'Adaptation Pathways for Conservation Law and Policy' (n 29) 5. A number of species have been assessed for listing as threatened species by the TSSC under the *EPBC Act*, but were found to have insufficient information to determine that they were eligible for listing as threatened: see Department of Agriculture, Water and the Environment, *Data Deficient Species* (Web Page, 2021) <https://www.awe.gov.au/environment/biodiversity/threatened/nominations/data-deficient-species>.
[555] Braverman (n 550) 137.
[556] *EPBC Act* (n 36) ss 207A-207C.

consideration in action plans.[557] In contrast, the *EPBC Act* allows for the listing of habitat if it is critical to the survival of threatened species or ecological communities.[558] Moreover, the scope of critical habitat protection could be expanded to include future climate refugia and important ecological networks.[559] Already, there are pertinent examples in Australia of a willingness to expand habitat protection beyond a species' known habitat.[560] One example is the approach to critical habitat of the Tasmanian freshwater crayfish, which was recently redefined from 'all areas currently occupied by the species' to include habitat within the 'known' and 'likely' distribution of the species.[561]

Another way to address discrepancies between the Commonwealth and ACT listing regimes would be to integrate the threatened species and ecological communities lists across all national jurisdictions.[562] A single national threatened species list that would then serve to increase the efficiency of listing processes and avoid duplication of assessments or resource uses.[563] The promotion of information-sharing between all levels of government would further facilitate more effective use of conservation funding and allow for nationally-coordinated planning for the protection and recovery of listed species.[564]

VI Conclusion

If Australia is to remain '…one of the most ancient, naturally beautiful and biodiverse places on Earth', there is still much work to be done.[565] Our human existence is embedded in nature and thus we are intimately connected with the natural environment and its condition.[566] All elements of nature bear a significant importance to humans for their intrinsic value, such that the conservation of biodiversity is a fundamental human obligation.[567] Consequently, it is vital that environmental laws serve to protect these unique environments and reduce the human impacts on biodiversity.

Unfortunately, Australia's biodiversity continues to decline. The results of the *Biodiversity SoE 2016* and the *ACT SoE 2019* indicate that the condition of Australian biodiversity is considered poor and worsening.[568] Persistent problems that influence this decline include invasive species, agriculture, land clearing and the associated impacts of climate change.[569] Further, there is limited information to fully understand the impacts of pressures affecting biodiversity due to a lack of long-term data and environmental monitoring across Australian

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[557] Note that the only relevant mention of 'critical habitat' in the *Nature Conservation Act* is where it may require consideration in the drafting of an 'action plan', which is a document that may not be binding on decision makers: see *Nature Conservation Act* (n 36) ss 100(a), 101(3)(d); Fitzsimons, 'Urgent Need to Use and Reform Critical Habitat Listing in Australian Legislation in Response to the Extensive 2019–2020 Bushfires' (n 432) 147.

[558] *EPBC Act* (n 36) s 207A(1), (4).

[559] Cameron W. Barrows et al, 'Identifying Climate Refugia: A Framework to Inform Conservation Strategies for Agassiz's Desert Tortoise in a Warmer Future' (2016) 15(1) *Chelonian Conservation and Biology* 2, 3; Reside et al (n 541) 7-10; Hilty et al (n 542) 13-16.

[560] McDonald et al, 'Adaptation Pathways for Conservation Law and Policy' (n 29) 5.

[561] Ibid. See also Department of Primary Industries and Water, *Giant Freshwater Lobster Astacopsis gouldi Recovery Plan 2006-2010* (2006) 13. Cf Department of Environment and Energy, *Recovery Plan for the Giant Freshwater Crayfish (Astacopsis gouldi)* (2017) 6, 13.

[562] Walsh et al (n 450) 141.

[563] *First Independent Review of the EPBC Act* (n 377) 18, 28, 74-75.

[564] Ibid 18, 22, 28.

[565] APEEL, *A Blueprint for the Next Generation of Australian Environmental Laws* (n 52) 8.

[566] Ibid; Christopher D. Ives et al, 'Human-Nature Connection: A Multidisciplinary Review' (2017) 26-27 *Current Opinion in Environmental Sustainability* 106, 110-111; Victor Cazalis and Anne-Caroline Prévot, 'Are Protected Areas Effective in Conserving Human Connection with Nature and Enhancing Pro-Environmental Behaviours?' (2019) 236 *Biological Conservation* 548, 553-554.

[567] APEEL, *A Blueprint for the Next Generation of Australian Environmental Laws* (n 52) 8.

[568] See generally *Biodiversity SoE 2016* (n 328); *ACT SoE 2019* (n 12).

[569] Ibid.

jurisdictions. In order to contend with these issues, Australia needs a robust system of environmental laws that can respond to emergent and continuing threats to biodiversity.

We have seen that the Australian environmental law system is overlain by the international instruments of the *World Charter for Nature* and the *Biodiversity Convention*. These documents establish influential codes of conduct for the preservation of nature and have emphasised that the consideration of natural systems is essential to social and economic development.[570] At the Commonwealth and territory levels, the *EPBC Act* and the *Nature Conservation Act* are the principal statutes intended to give effect to these principles of international law. However, in the course of this article, I have observed that our biodiversity conservation laws have fallen short of these international standards.

My examination of the objects clauses of both Acts found that the *Nature Conservation Act* more closely emulated the *World Charter for Nature's* prioritisation of conservation as a paramount duty. By contrast, the objects of the *EPBC Act* were more akin to the *Biodiversity Convention,* which balances ecological values against other anthropocentric values such as the social or economic importance of nature. Where there were multiple objects clauses, there was further no explicit guidance as to the relative weight to be assigned to each object.

In relation Australia's land reservation areas, this research found that protected area networks at the Commonwealth level were not sufficient to meet the criteria of Aichi Target 11 under the *Biodiversity Convention*. While the total land area of protected area networks in the ACT were proportionally higher than those at the Commonwealth level, both regimes failed to account for distributional shifts of migratory species and climate change refugia.[571] In addition, passive management of protected areas has failed to assist conservation efforts due to a heavy reliance on self-regulation.

The classification and listing approaches of the *EPBC Act* and the *Nature Conservation Act* were also observed to inadequately provide for the *in situ* protection of biodiversity. When compared to the *EPBC Act,* the *Nature Conservation Act* uniquely provided scope for listing of species in 'provisional' and 'data deficient' categories. However, both Acts were hindered by insufficient funding and resourcing of conservation efforts, bias in the selection of listed species, biodiversity data gaps and an inability to address the cumulative impacts of developments.

In order to optimally curb biodiversity loss and achieve positive biodiversity outcomes, I make the following recommendations. Firstly, the adoption of an outcomes-driven approach to the drafting of environmental objects clauses could streamline the implementation of Australia's biodiversity laws. This could involve the setting of a singular conservation objective at the national-level to guide all biodiversity decision-making and the use of directing principles to guide the interpretation of objects clauses.

Second, the use of the SMART method to incorporate measurable objectives and performance indicators in conservation planning can facilitate the collection of comprehensive data on species and ecological communities. This in turn will benefit future management strategies as it will be possible to garner a more accurate assessment of the true condition of Australia's biodiversity.

Third, there is scope to expand the land area of protected area networks at the territory and Commonwealth levels. Such expansions or the use of moveable reserves must be actively managed and account for the protection of ecological corridors and future climate refugia.

Fourth, listing approaches for threatened species or ecological communities could be improved by including anticipatory listing of 'potentially at risk' species. This would also be supported by the extension of critical habitat listing to include future climate refugia and

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[570] Wood Jr (n 97) 980, 990.

[571] Over 19 percent of Australia's total land area is protected under the NRS, while ACT reserves cover more than 60 percent of the Territory's land area: see Department of Agriculture, Water and the Environment, *Protected Area Locations* (n 407); *ACT SoE 2019* (n 12) 223.

important ecological networks or corridors. Additionally, all national listing approaches could be standardised through the establishment of singular national threatened species and ecological communities lists.

Founded on the values of 'integrity, transparency and accountability', I have argued that the reform of Australia's environmental laws can enable the protection and conservation of our unique biodiversity.[572] In this way, we can work towards forging a future for nature and ensure that Australian laws better reflect the environmental principles espoused by the *World Charter for Nature* and the *Biodiversity Convention*.

[572] APEEL, *A Blueprint for the Next Generation of Australian Environmental Laws* (n 52) 8.

Evaluating The Consequences Of Criminalising Coercive Control In The Australian Capital Territory

Heidi Andriunas*

This article examines whether the Australian Capital Territory should consider the introduction of a standalone offence of coercive control. Recently, jurisdictions within Australia and overseas have criminalised, or considered criminalising, coercive and controlling behaviours. Tasmania, Scotland, England and Wales have all implemented coercive control offences. New South Wales and Queensland are currently conducting inquiries into the creation of an offence. As these jurisdictions begin to recognise family violence as a course of action in the criminal law, it is pertinent to consider whether the ACT should follow. This article evaluates this question through discussion of the potential consequences of criminalising coercive control and mitigation strategies for these. Additionally, it evaluates how an offence might be constructed in the ACT. The article ultimately concludes that a coercive control offence is necessary for the protection of victims of family violence in the ACT. However, it cannot operate in isolation, and must only be implemented if accompanied by extensive non-legislative activities.

Introduction

I Overview

The issue of family violence is serious. Its prevalence within Australia is appalling, with the Australian Bureau of Statistics documenting 17% of women and 6% of men as having experienced intimate partner violence from the age of fifteen.[1] Alarmingly, every nine days in Australia a woman is killed by her intimate partner.[2] The NSW Domestic Violence Death Review Team (NSW DVDRT) recently found that 'a number of its cases were not preceded by an evident history of physical abuse – instead homicides were preceded by histories of other forms of coercive and controlling behaviour.'[3] This troubling revelation suggests that more needs to be done to combat coercive control.

Current civil and criminal laws in the ACT do not provide adequate protection to victims of coercive control. Instead, this complex and concerning aspect of domestic and family violence has been historically overlooked by the law. Coercive control is characterised by violence, intimidation, isolation, subordination, and control.[4] It is encompassed by a broad range of behaviours such as control of financial resources, isolation from friends and family, deprivation of personal autonomy, and psychological manipulation.[5] In this way, coercive control entraps a person, causing significant loss of liberty, deprivation of substantive equality,[6] and consequences for health and wellbeing. Additionally, the concept of coercive control rejects the incident-based model of family violence, instead suggesting it is a persistent pattern of abuse – one that lies beyond the reach of criminal laws. Behaviours of coercive control appear innocuous to outsiders, particularly when viewed beyond the context of the

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1 Australian Bureau of Statistics, *Personal Safety, Australia* (Catalogue No 4906.0, 8 November 2017).

2 Australian Institute of Health and Welfare, *Family, Domestic and Sexual Violence in Australia: Continuing the National Story*, Report (2019) 62.

3 NSW Domestic Violence Death Review Team (NSW DVDRT), *NSW Domestic Violence Death Review Team Report 2017-2019,* Report (2020) 68.

4 Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press, 2007) ('Coercive Control').

5 Ibid.

6 Ibid 15.

relationship.[7] Consequently, the very nature of coercive control is pervasive, ongoing, and potentially deadly.[8]

Over the past two years, awareness of coercive control in Australia has been driven by the extensive public interest in the murder of Hannah Clarke by her former partner in early 2020.[9] The lack of a criminal law response to coercive control, combined with its serious impacts, has brought about support for its criminalisation within Australia.[10] To this end, both NSW and Queensland have begun considering whether coercive control should be criminalised, each conducting respective inquiries into the issue. As jurisdictions internationally and within Australia begin to recognise the serious harms and impacts of coercive control, it is pertinent to evaluate whether the Australian Capital Territory (ACT) should follow.

Despite this, criminalising coercive control comes with numerous challenges. There are concerns that a coercive control offence might 'open the floodgates' for prosecutions.[11] Some academics argue that the legal system does not have the capacity to respond to coercive control, and that if it is criminalised, the offence will not achieve its desired outcomes.[12] Moreover, there is potential for a coercive control offence to cause serious negative implications for female victims of family violence, namely through misidentification of victims and abuse of court processes.[13] Aboriginal and Torres Strait Islander people may also face disproportionate adverse impacts, furthering their existing overrepresentation in the Australian criminal justice system.[14] As such, implementation of a coercive control offence requires careful consideration of risks and possible mitigation strategies, in both legal and social contexts.

II Aim and Scope

This article analyses the key consequences of criminalising coercive control, evaluating whether an offence should be implemented in the ACT. Although coercive control has significant impacts for all Australian jurisdictions, this article will solely examine the implementation of an offence in the ACT. This is because significant inquiries have already been conducted, or are in process, in other Australian jurisdictions. As the ACT is yet to consider this issue, this article offers a novel analysis of criminalisation in this area.

Furthermore, whilst family violence impacts people of all genders, it has been shown that family violence is perpetrated predominantly by men against women.[15] Hence, this article focuses primarily on impacts for women, both in experiences of coercive control and in the implementation of an offence.

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[7] Sandra Walklate and Kate Fitz-Gibbon, 'The Criminalisation of Coercive Control: The Power of Law?' (2019) 8(4) *International Journal for Crime, Justice and Social Democracy* 94, 100.
[8] Evan Stark, 'Rethinking coercive control' (2009) 15(12) *Violence Against Women* 1509, 1522.
[9] Hayley Boxall and Anthony Morgan, *Experiences of coercive control among Australian women* (Australian Institute of Criminology statistical bulletin 30, March 2021) 2.
[10] Marilyn McMahon and Paul McGorrery, 'Criminalising Emotional Abuse, Intimidation and Economic Abuse in the Context of Family Violence: The Tasmanian Experience (2016) 35(2) *The University of Tasmania Law Review* 1, 3 ('The Tasmanian Experience').
[11] Ibid, citing John Stannard, 'Sticks, Stones and Words: Emotional Harm and the English Criminal Law' (2010) 74 *Criminal Law Review* 533, 555.
[12] Walklate and Fitz-Gibbon (n 7) 103-104; Walklate, Fitz-Gibbon and McCulloch, 'Is more law the answer? Seeking justice for victims of intimate partner violence through the reform of legal categories' (2018) 18(1) *Criminology & Criminal Justice* 115, 118.
[13] See, eg, Heather Nancarrow et al, *Accurately Identifying the "person most in need of protection" in domestic and family violence law* (Research Report, Issue 23, November 2020); Heather Douglas, 'Legal systems abuse and coercive control' (2018) 18(1) *Criminology & Criminal Justice* 84 ('Legal systems abuse').
[14] Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ARLC Report 133, December 2017) 93.
[15] Dale Bagshaw and Donna Chung, *Women, Men and Domestic Violence* (Report, 2000).

III Methodology

This article primarily concentrates on research for law reform purposes, combining doctrinal, comparative, and qualitative interdisciplinary methods, contributing to the 'new legal research environment.'[16] Undertaking qualitative research methods from both sociological and legal contexts assists in gaining a broader understanding of the law and its impacts through consideration of the wider issues of family violence. This allows for analysis of the content of the law, and how it contributes to resolving social issues of coercive control.

Doctrinal research was undertaken into existing coercive control laws in England and Wales, Scotland, and Tasmania. Reported cases relating to Tasmania's coercive control offences were located by utilising the Australasian Legal Information Institute (AustLII) databases' 'note up' function. Unreported cases were found through the Tasmanian Law Library database, by entering the relevant offence (either "emotional abuse or intimidation", "economic abuse", or "persistent family violence").

A comparative research methodology was employed to evaluate the effectiveness of coercive control legislation across jurisdictions. This was completed by engaging with interdisciplinary secondary source materials, which provided insight into benefits and consequences of criminalising coercive control. To find relevant secondary sources, legal databases such as Lexis Advance, Westlaw AU, Attorney-General's Information Service (Informit), HeinOnline, Proquest Central, and AustLII were searched using a combination of the following phrases: "coercive control", "criminalisation", "intimate partner violence", "criminal law", "domestic violence" and "domestic abuse".

IV Structure

This article is divided into five parts. The first part provided an overview of the aims and purposes. The second part offers a broad context and background to coercive control, examining the negative impacts of coercive control and presenting a brief overview of current reforms in NSW and QLD. The third part provides a detailed outline of existing legislative frameworks in Tasmania, England and Wales, and Scotland, and evaluates the implementation of the offences in each jurisdiction. The fourth part analyses outcomes of coercive control offences. This section evaluates potential consequences of coercive control legislation that have been previously identified by researchers, referencing the implementation of coercive control legislation in different jurisdictions. The fifth part evaluates the potential for a coercive control offence to be implemented in the ACT. Here, the article outlines reasons why an offence is needed in the ACT through evaluating the adequacy of current ACT family violence laws. The article then examines how an offence might be constructed in the ACT by assessing each element of a coercive control offence. Following this, the article considers non-legislative activities that would be required to support a coercive control offence.

COERCIVE CONTROL: CONTEXT AND BACKGROUND

I Impacts of coercive control

Victims of coercive control face numerous significant impacts as a result of a partner's abusive behaviours. Experiences of emotional and psychological abuse can lead to numerous adverse outcomes, including post-traumatic stress disorder,[17] depression and anxiety,[18] suicide,[19]

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[16] As described by Terry Hutchinson, 'Developing Legal Research Skills; Expanding the paradigm' (2008) 32 *Melbourne University Law Review* 1065.

[17] Mindy Mechanic, Terri Weaver and Patricia Resick, 'Mental health consequences of intimate partner abuse: A multidimensional assessment of four different forms of abuse' (2008) 14(6) *Violence Against Women* 634.

[18] Theo Vos et al, 'Measuring the impact of intimate partner violence on the health of women in Victoria, Australia' (2006) 84(9) *Bulletin of the World Health Organisation* 739, 741.

[19] Ibid 741.

homelessness,[20] and increased risk of substance abuse.[21] Victims may not even recognise that they are experiencing family violence, with some believing their experiences are 'part of ordinary relationship dynamics.'[22] For female victims with children, coercive control can have negative implications on the victim's relationship with her child, alongside the child themselves. Perpetrators of coercive control may attempt to prevent mothers from spending time with their children, leading to emotional and behavioural problems in children,[23] disempowerment, and loss of confidence and agency.[24]

Furthermore, coercive control causes 'entrapment', which has been described as 'the most devastating outcome of partner abuse.'[25] This can be exacerbated by the lack of self-trust a victim has after being subjected to emotional abuse by an intimate partner.[26] A victim's autonomy to 'say and do things and to meet their own needs without worry or fear' is also impacted.[27] As a result of entrapment, alongside loss of autonomy and self-identity,[28] victims are disempowered to leave abusive relationships.[29] These impacts arise both immediately after the abuse, and well into the victim's future following the end of the relationship.[30]

II Coercive control reforms in Australia

The legal system has been a key component of Australia's response to family violence over the last thirty years,[31] with domestic violence protection orders at the forefront.[32] However, recently various Australian states have begun to consider whether coercive control offences would be a desirable element of our family violence response. To this end, both NSW and QLD have begun the process of considering whether to incorporate an offence of coercive control into criminal law.

In late 2020, Anna Watson MP headed a NSW Bill to include an offence of coercive control in the *Crimes (Domestic and Personal Violence) Act*.[33] This bill, termed Preethi's Law, is named after Preethi Reddy, a Sydney dentist who was tragically murdered by her former partner. Anna Watson brought forth this bill to 'change the way we respond to domestic abuse and to

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[20] Australian Institute of Health and Welfare, *Specialist homelessness services annual report* (Web report, December 2020) <https://www.aihw.gov.au/reports/homelessness-services/specialist-homelessness-services-annual-report/contents/clients-who-have-experienced-family-and-domestic-violence>.

[21] Erin Straight, Felicity Harper and Ileana Arias, 'The impact of partner psychological abuse on health behaviours and health status in college women' (2003) 18(9) *Journal of Interpersonal Violence* 1035, 1050.

[22] NSW Domestic Violence Death Review Team (n 3) 69.

[23] Emma Katz, 'Beyond the Physical Incident Model: How Children Living with Domestic Violence are Harmed By and Resist Regimes of Coercive Control' (2015) 25 *Child Abuse Review* 46, 56.

[24] Ibid 57.

[25] ANROWS, *Defining and responding to coercive control* (Policy brief, 2021) 2 ('*Defining and responding to coercive control*'), citing Eve Buzawa, Carl Buzawa and Evan Stark, *Responding to domestic violence: The integration of criminal justice and human services* (SAGE Publishing, 5th ed, 2015) 106.

[26] Patricia Easteal, Submission No 2 to Parliament of NSW Joint Select Committee on Coercive Control, *Coercive Control in Domestic Relationships* (4 January 2021) 6.

[27] Emma Katz (n 23) 48, citing Nicole Westmarland and Liz Kelly, 'Why extending measurements of 'success' in domestic violence perpetrator programmes matters for social work' (2013) 43(6) *The British Journal of Social Work* 1092.

[28] Flora Matheson et al, 'Where did she go? The transformation of self-esteem, self-identity, and mental well-being among women who have experienced intimate partner violence' (2015) 25(5) *Women's Health Issues* 561, 568.

[29] Easteal (n 26) 6.

[30] Women's Aid Scotland, *Coercive Control* (Report, 2017) 2 <https://womensaid.scot/wp-content/uploads/2017/11/CoerciveControl.pdf>.

[31] Nancarrow et al (n 13) 14.

[32] Sally Goldfarb, 'Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse without Ending the Relationship?' (2008) 29 *Cardozo Law Review* 1487.

[33] *Crimes (Domestic and Personal Violence) Amendment (Coercive Control – Preethi's Law) Bill 2020*.

better define what constitutes domestic abuse to enable greater protection for victims and their children.'[34] Following the bill, NSW formed a Joint Select Committee for Coercive Control, which undertook an inquiry into whether coercive control should be criminalised. In June 2021, the committee released a report outlining the findings from the various submissions made to the inquiry, unanimously recommending the criminalisation of coercive control in NSW.[35] The government response to this report is due in December 2021.

Similarly, Queensland formed a taskforce in early 2021 for the purpose of determining whether coercive control should be made an offence.[36] This followed the murder of Hannah Clarke and her three children by her former husband, who had engaged in coercive and controlling behaviours prior to the homicide. Since Hannah's death, her parents have campaigned for greater awareness of coercive control, calling for Queensland to criminalise it.[37] Recently, the Queensland Taskforce has recommended the creation of a coercive control offence in Queensland in its first report reviewing the submissions to its inquiry.[38]

COERCIVE CONTROL LEGISLATION ACROSS NATIONAL AND INTERNATIONAL JURISDICTIONS

I The offences of economic abuse and emotional abuse or intimidation: Tasmania's novel non-physical family violence offences

A *Overview of the offences*

Tasmania is presently the only Australian jurisdiction to have criminalised coercive and controlling behaviour in the context of family violence. In 2004, Tasmania enacted the *Family Violence Act*,[39] which established two novel family violence offences, reflecting an unprecedented attempt to criminalise non-physical family violence. These offences formed part of numerous reforms aimed to better address family violence, and were developed in reaction to criticisms of Tasmania's family violence response.[40] With these reforms, Tasmania proposed to 'introduce a pro-arrest, integrated criminal justice response to family violence.'[41]

The offence of economic abuse states:

> **8. Economic abuse**

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[34] New South Wales, *Parliamentary Debates*, Legislative Assembly, 24 September 2020 (Anna Watson, Member for Shellharbour).

[35] Parliament of NSW Joint Select Committee on Coercive Control, *Coercive control in domestic relationships* (Report 1/57, June 2021) v.

[36] Women's Safety and Justice Taskforce, *Options for legislating against coercive control and the creation of a standalone domestic violence offence* (Discussion Paper 1, 27 May 2021).

[37] See, eg, Sarah Malik, 'Coercive control legislation could have saved Hannah's life: Sue and Lloyd Clarke', *SBS* (online at 1 July 2021) <https://www.sbs.com.au/topics/voices/relationships/article/2021/04/27/coercive-control-legislation-could-have-saved-hannahs-life-sue-and-lloyd-clarke>; Amanda Gearing, 'Queensland moves to criminalise coercive control after murder of Hannah Clarke and her children', *The Guardian* (online at 17 February 2021) < https://www.theguardian.com/society/2021/feb/17/queensland-moves-to-criminalise-coercive-control-after-of-hannah-clarke-and-her-children>; Rachel Riga, 'Hannah Clarke's parents push for coercive control to be made a crime one year on from horrific murders', *ABC News* (online at 19 February 201) < https://www.abc.net.au/news/2021-02-14/qld-hannah-clarke-domestic-violence-murder-anniversary-brisbane/13137484>.

[38] Women's Safety and Justice Taskforce, *Hear her voice: Addressing coercive control and domestic and family violence in Queensland,* (Report one, 2 December 2021) xlii.

[39] *Family Violence Act 2004* (Tas).

[40] Department of Justice and Industrial Relations (Tasmania), *Safe at home: a criminal justice framework for responding to family violence in Tasmania,* (Options paper, August 2003) 24 <https://www.safeathome.tas.gov.au/__data/assets/pdf_file/0008/567440/Options_Paper.pdf>.

[41] Ibid p 7, 2.1.

> A person must not, with intent to unreasonably control or intimidate his or her spouse or partner or cause his or her spouse or partner mental harm, apprehension or fear, pursue a course of conduct made up of one or more of the following actions:
>
> (a) coercing his or her spouse or partner to relinquish control over assets or income;
>
> (b) disposing of property owned –
>
> (i) jointly by the person and his or her spouse or partner; or
>
> (ii) by his or her spouse or partner; or
>
> (iii) by an affected child –
>
> without the consent of the spouse or partner or affected child;
>
> (c) preventing his or her spouse or partner from participating in decisions over household expenditure or the disposition of joint property;
>
> (d) preventing his or her spouse or partner from accessing joint financial assets for the purposes of meeting normal household expenses;
>
> (e) withholding, or threatening to withhold, the financial support reasonably necessary for the maintenance of his or her spouse or partner or an affected child.[42]

The offence of emotional abuse or intimidation states:

> **9. Emotional abuse or intimidation**
>
> (1) A person must not pursue a course of conduct that he or she knows, or ought to know, is likely to have the effect of unreasonably controlling or intimidating, or causing mental harm, apprehension or fear in, his or her spouse or partner.
>
> (2) In this section –
>
> *a course of conduct* includes limiting the freedom of movement of a person's spouse or partner by means of threats or intimidation.[43]

B *Case law*

Since enactment of the legislation, only three reported cases have mentioned either of these offences. These cases were all heard in the Tasmanian Magistrates Court, and mentioned the s 9 emotional abuse or intimidation offence. They include *K v K,*[44] *Howe v S,*[45] and *Police v Benjamin James Nunn.*[46] *K v K* only mentioned s 9 in passing, and did not discuss it, as the case focused on an application to revoke a family violence order. The other two cases discussed the requirements of the s 9 offence in greater detail.

In *Howe v S*, the defendant was charged under s 9, alongside two other charges relating to violations of a police family violence order.[47] In this case, the defendant allegedly threatened to take the victim's child to Melbourne, if she did not comply with his request to stay the night with him. This single conversation was relied upon by the prosecution to constitute a course of action for the purpose of the act. The court did not accept this conversation as meeting the

[42] *Family Violence Act 2004* (Tas) s 8.
[43] Ibid s 9.
[44] *K v K* [2012] TASMC 3.
[45] *Howe v S* [2013] TASMC 33.
[46] *Police v Benjamin James Nunn* [2021] TASMC 3.
[47] *Howe v S* (n 45).

requirements for the course of conduct,[48] and stated that the prosecution failed to submit that the intimidation by the perpetrator was unreasonable.[49]

In *Police v Benjamin James Nunn*, the defendant was charged with emotional abuse or intimidation for pouring petrol over a vehicle that the victim's child was in, and threatening to set the car on fire whilst the victim was watching.[50] Whilst the court accepted that the defendant's behaviour was aimed at the victim and caused her fear and apprehension,[51] the charge was dismissed due to the lack of a course of conduct.[52]

As demonstrated, both cases did not meet the requirements of the legislation as they lacked a course of conduct. Yet, family violence rarely occurs in single incidents.[53] It is likely that in both cases, the perpetrators were exerting other coercive and controlling behaviours that were not identified by the police and prosecutors. As a result, the criminal justice system failed to adequately respond to these incidents of family violence and provided limited protection to the victims.

C *Effectiveness of Tasmania's offences*

As demonstrated by the limited case law, the uptake of Tasmania's family violence offences has been slow if not virtually non-existent. During 2013-14 there were 2376 incidents of family violence recorded in Tasmania, with 1634 police family violence orders and 380 court issued family violence orders.[54] In that same year, only one charge of emotional abuse or intimidation was laid.[55] Moreover, from the time of enactment to 2015, only seven charges of emotional abuse or intimidation were made,[56] with only the two above mentioned cases making it to the Magistrate's court. The lack of success of these offences suggests there are deficiencies in either the construction or implementation of the offences.

1 Construction of the offences

(a) Short limitation periods

Flaws in the construction of the offences may contribute to the scarcity in prosecutions. Both offences initially had a limitation period of six months from the most recent incident, but this has now been extended to twelve months.[57] A short limitation period may reduce prosecutions,[58] especially where victims do not immediately report a perpetrator's behaviour. Notably, in the years since the amendment of the limitation period, higher numbers of charges have been reported.[59] Although, this could be attributed to increases in community and professional awareness. Despite this, these figures are still comparatively low when regarding the yearly number of family violence incidents.

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[48] Ibid 21.
[49] Ibid 23.
[50] *Police v Benjamin James Nunn* (n 46) 1.
[51] Ibid 45.
[52] Ibid 27.
[53] Walklate and Fitz-Gibbon (n 7) 101.
[54] Sentencing Advisory Council (Tas), *Sentencing of Adult Family Violence Offenders,* (Final Report No 5, October 2015) 9.
[55] Ibid 14.
[56] Ibid 14.
[57] *Family Violence Act 2004* (Tas) s 9A; *Family Violence Amendment Act 2015 (Tas)* s 5 brought this new limitation period into effect on 6 October 2015.
[58] Heather Douglas, 'Do we need a specific domestic violence offence?' (2015) 39 *Melbourne University Law Review* 434, 457.
[59] Women's Legal Service Tasmania, *Submission: Inquiry into Family, Domestic and Sexual Violence* (Submission, July 2020) 2.2 <https://womenslegaltas.org.au/wordy/wp-content/uploads/2020/08/Submission-240720-Inquiry-into-Family-Domestic-and-Sexual-Violence-Coercion-and-Control.pdf>.

(b) Broad vs narrow construction of the offences

The offence of economic abuse is narrowly construed, making it difficult to prove.[60] In contrast, the offence of emotional abuse or intimidation is broad but lacks specificity. This is illustrated by the course of conduct requirement in s 9, which is not specifically defined in the act. By not explicitly defining a course of conduct, courts are required to turn to existing case law to determine a definition, such as through stalking cases.[61] Interestingly, existing case law has determined that stalking could constitute a course of conduct (or even a threat or act of intimidation) in circumstances where the victim's freedom of movement is limited.[62]

With the narrow construction of s 8 and broad construction of s 9, the s 8 offence is rendered unnecessary, as any conduct that could be charged under s 8 would also qualify for s 9.[63] Marilyn McMahon and Paul McGorrery argue that the economic abuse offence is over-criminalisation, identifying merely three differences between both offences, being the section headings, the *mens rea,* and the proscribed behaviours.[64] Section headings have no relevance to the offences other than being a description of the section.[65] The *mens rea* of s 9 is easier to prove than s 8, as it includes the requirement that 'knows or ought to know' as opposed to strict intent.[66] The proscribed behaviours in s 9 include any behaviour that is likely to be unreasonably controlling or intimidating, or cause apprehension, mental harm or fear, whilst s 8 lists only five separate behaviours.[67] Moreover, in the five cases where economic abuse have been prosecuted to date, emotional abuse or intimidation was also charged.[68] This demonstrates that behaviour charged under the s 8 economic abuse offence may be better charged under the s 9 emotional abuse offence, effectively rendering s 8 unnecessary.

(c) The unreasonableness requirement

The s 9 offence requires that the perpetrator knows, or ought to know, that their behaviour would likely have the effect of unreasonably controlling, intimidating, causing mental harm to, or apprehension or fear in the victim.[69] Whilst this means that there is no requirement that the victim is actually controlled or intimidated, the language suggests there is some level of controlling or intimidating behaviour that would be considered reasonable.[70] Therefore, determining reasonableness requires an understanding of the relationship's context. As Paul McGorrery and Marilyn McMahon state, 'should a man who migrated from a patriarchal culture be subjected to a different standard when determining whether his conduct towards his wife was controlling or intimidating?'[71] As such, this requirement creates difficulties for courts in objectively determining what standards of reasonableness should be applied.

2 Implementation of the offences

In addition to flaws in their construction, further issues exist in the implementation of the offences, which contribute to a lack of prosecutions. These include the absence of specialised

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[60] Karen Wilcox, 'Island Innovation, Mainland Inspiration: Comments on the Tasmanian *Family Violence Act*' (2006) 32 *Alternative Law Journal* 213, 214.
[61] See, eg, *Thomas v Stewart* [2017] TASMC (unreported, 4 September 2017); *McLean v Rundle* [2011] TASMC (unreported, 4 November 2011).
[62] *Thomas v Stewart* [2017] (n 58), citing *Gunes v Pearson* (1996) 89 A Crim R 297, 306; *Howe v S* [2013] TASMC 33.
[63] McMahon and McGorrery, 'The Tasmanian Experience' (n 10) 18.
[64] Ibid 19.
[65] Ibid 19, citing *Acts Interpretation Act 1931* (Tas) s 6(4)(a).
[66] Ibid 19.
[67] Ibid 19.
[68] Kerryne Barwick, Paul McGorrery and Marilyn McMahon, 'Ahead of Their Time? The Offences of Economic and Emotional Abuse in Tasmania, Australia', in Marilyn McMahon and Paul McGorrery (eds) *Criminalising Coercive Control: Family Violence and the Criminal Law* (Springer, 2020) 145.
[69] *Family Violence Act 2004* (Tas) s 9.
[70] McMahon and McGorrery, 'The Tasmanian Experience' (n 10) 8, 14.
[71] Ibid 15.

professional training and limited community education regarding non-physical family violence.

Upon the introduction of the new Act, police officers in Tasmania received training on their new powers, but not on the specific offences of economic and emotional abuse.[72] This meant that officers lacked the necessary skills to identify non-physical family violence and investigate it. Investigation and obtaining evidence for a course of conduct offence is complex and time intensive.[73] Without the requisite knowledge and skills, it is likely near impossible for police officers to conduct an adequate investigation. Alongside this, identifying subtle behaviours and patterns of abuse is difficult, especially when police are only called in when an incident of physical violence has occurred. In these cases, it is probable that the physical violence will be charged whilst any non-physical family violence is overlooked. Consequently, it is easy to see how these offences are rarely charged.

Inadequate community awareness of non-physical family violence further exacerbates this. If victims or witnesses are not aware that something constitutes a criminal act, then it is unlikely they will make reports to police. Likewise, victims may only call police when an incident of physical violence or a threat has occurred, and then that behaviour will be solely focused on. A Tasmanian prosecutor has stated that in twenty cases involving the offences of economic or emotional abuse, all were preceded by physical assault.[74] Without adequate community awareness regarding the behaviours that constitute family violence, prosecutions are likely to remain low.

II England and Wales: The Offence of Controlling or Coercive Behaviour

A *Overview of the offence*

England and Wales introduced a new offence of controlling or coercive behaviour in December 2015 following consultation processes initiated by the Home Office in 2014, which found that the majority (85%) of respondents were in support of strengthened laws against domestic abuse.[75] This offence was further motivated by a report that found police had an inadequate understanding of domestic violence,[76] alongside concerns by the Law Commission regarding policing of domestic violence.[77] Reasons for the implementation of this offence include to close the gap that existed in law regarding coercive control, to send a message to abusers that their behaviour constitutes a serious offence, and to provide greater protection to victims.[78]

The introduction of s 76 of the *Serious Crime Act*[79] criminalises 'coercive or controlling behaviour in an intimate or family relationship.'[80] This offence states:

(1) A person (A) commits an offence if—

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[72] Barwick, McGorrery and McMahon (n 68) 151.
[73] Ibid 152.
[74] Ibid 150.
[75] Home Office, *Strengthening the law on domestic abuse – Summary of Responses* (Report, December 2014) 5 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/389002/StrengtheningLawDomesticAbuseResponses.pdf>.
[76] Vanessa Bettinson and Charlotte Bishop, 'Is the creation of a discrete offence of coercive control necessary to combat domestic violence?' (2015) 66(2) *Northern Ireland Legal Quarterly* 179, 179 citing Her Majesty's Inspectorate of Constabulary, *Everyone's Business: Improving the Police Response to Domestic Abuse* (Report, 2014).
[77] Ibid, citing Law Commission, *Reform of Offences Against the Person: A Scoping Consultation Paper* (Consultation Paper No 217, November 2014).
[78] Home Office, *Controlling or Coercive Behaviour in an Intimate or Family Relationship,* (Statutory Guidance Framework, December 2015) 3 ('Statutory guidance framework').
[79] *Serious Crime Act 2015* (UK).
[80] Ibid s 76.

(a) A repeatedly or continuously engages in behaviour towards another person (B) that is controlling or coercive,

(b) at the time of the behaviour, A and B are personally connected,

(c) the behaviour has a serious effect on B, and

(d) A knows or ought to know that the behaviour will have a serious effect on B.[81]

For A and B to be personally connected, they must either be in a personal relationship, live together and be members of the same family, or live together and have previously been in an intimate personal relationship.[82] Therefore, previous intimate partners who do not live together are excluded from this offence. For A's behaviour to have a serious effect, it must either cause B to fear that violence will be used against them on at least two occasions, or cause B serious alarm or distress that leads to a substantial adverse effect on their usual day-to-day activities.[83]

The Home Office has published statutory guidance surrounding investigation of this offence per s 77(1) of the Act. In this publication, coercive and controlling behaviour is defined, alongside numerous examples of relevant behaviours. Controlling behaviour is defined as being 'acts designed to make a person subordinate and/or dependant by isolating them from sources of support, expositing their resources … depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour.'[84] Coercive behaviour is defined as 'a continuing act or a patterns of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten the victim.'[85]

Alongside this, the College of Policing authorised professional practice on domestic abuse has produced principles regarding the new offence for police officers and the public in response to a recommendation by the HMIC.[86] This guide provides an explanation for identifying controlling and coercive behaviour, particularly in relation to distinguishing normal relationships from abusive ones. It states that normal relationships may sometimes involve one partner making a decision for the other or taking control of a situation, however, in abusive relationships when decisions are made by the abuser, if the victim does not follow those decisions, consequences occur.[87]

B *Analysing the offence*

In years prior to the introduction of the offence in England and Wales and since, significant legal discourse has occurred regarding the criminalisation of coercive control. Many academics have argued that there must be caution in implementing these offences, particularly as they may cause negative implications for victims. With the introduction of a coercive control offence in England and Wales, it is crucial to understand its strengths and weaknesses to evaluate its effectiveness.

1 Uptake of the offence

A coercive control offence may be redundant if it is not utilised. This has been seen in Tasmania's offences, which are rarely used, contributing no significant positive impacts to the protection of coercive control victims. Likewise, the uptake of the offence in England and Wales was initially slow. From April 2015 to March 2018, 314 offences had reached a first

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[81] Ibid s 76(1).
[82] Ibid s 76(2).
[83] Ibid s 76(4).
[84] Home Office, 'Statutory guidance framework' (n 78) 3.
[85] Ibid 3.
[86] College of Policing Authorised Professional Practice, *Major investigation and public protection,* 'Authorised professional practice on domestic abuse' (Web Page, 25 October 2021); HMIC, *Everyone's Business: Improving the Police Response to Domestic Abuse* (Report, 2014) 21.
[87] Ibid.

hearing at a Magistrates court.[88] However since, uptake has increased considerably, with 1177 offences reaching a first hearing at a magistrates' court from April 2018 to March 2019,[89] and 9,053 coercive control offences recorded by police in that same period.[90] Early research has indicated that the offence has a prosecution rate of 91%, however it is noted that this may be due to 'extreme diligence and/or caution by investigators and prosecutors during the early years of the offence being in operation.'[91] Still, these early results of the offence are impressive, and suggest it is an effective measure against coercive and controlling behaviours.

2 Limitations of the offence

Despite the positive uptake of the offence, it has numerous limitations. Firstly, the offence does not cover former intimate partners who do not live together. This is likely due to how the offence is operationalised. The home office definition of coercive control naturally excludes former intimate partners, as it focuses on abuse that occurs within the context of a current relationship. This is achieved by using phrases such as 'make a person … dependent' and 'depriving them of the means needed for independence, resistance, and escape'[92] in the definition of controlling behaviour. However, whilst former partners might not be controlled in that manner, they can still be subject to controlling and coercive behaviours. This can take the form of threats of violence towards the victim or their children or pets, or even through technologically assisted abuse. The home office considers behaviours such as threats to hurt or kill, threats to a child, threats to publish private information, assault, and criminal damage as being parts of a course of conduct that may amount to coercive control.[93] Additionally, they state that behaviours do not only occur at home, and that phones and social media may be utilised to cause a victim to fear violence.[94] Furthermore, serious issues may arise where a child is involved and contact is required between two former partners to exchange care of the child. This contact can present additional opportunities for exertion of coercive and controlling behaviours. Therefore, excluding former intimate partners from the offence is a significant limitation, and could cause victims of coercive control to be disallowed access to justice through the criminal justice system.

A further limitation is the victim focused nature of the offence, as it requires for the behaviour to have a 'serious effect' on the victim.[95] This means victims may be required to become heavily involved in court processes as witnesses for successful prosecution and sentencing of offenders. This is an unacceptable burden for victims, and may allow for further opportunities for a victim to be abused by the perpetrator.[96] Moreover, the adversarial nature of the court could exacerbate these issues, as victims may have to describe the abuse in detail, the impacts it has had on them, and be cross-examined about it. Being cross-examined about private aspects of a relationship and the abuse can be highly challenging. As such, the requirement

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[88] NSW Government, *Coercive Control* (Discussion Paper, October 2020) 15 ('*Coercive control discussion paper*').
[89] Ibid, citing Office of National Statistics, Domestic abuse and the criminal justice system – Appendix tables (2019) Table 15 <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/datasets/domesticabuseandthecriminaljusticesystemappendixtables>.
[90] Ibid, citing 6 Office for National Statistics. Domestic abuse in England and Wales: year ending March 2018 (2018) (accessed 21 September 2020) <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/domesticabuseinenglandandwales/yearendingmarch2018#domestic-abuse-related-offences-specific-crime-types>.
[91] Paul McGorrery and Marilyn McMahon, 'Prosecuting controlling or coercive behaviour in England and Wales: Media reports of a novel offence' (2021) 21(4) *Criminology and Criminal Justice* 566, 578 ('Prosecuting controlling or coercive behaviour in England and Wales').
[92] Home Office, 'Statutory guidance framework (n 78) 3.
[93] Ibid 4.
[94] Ibid 4.
[95] *Serious Crime Act 2015* (UK) s 76 (1)(c).
[96] Douglas, 'Legal Systems Abuse' (n 13).

that there be serious harm evidenced is a limitation of this offence, as is causes significant negative implications for victims.

Lastly, the drafting of the offence lacks specificity. This is particularly evident in the definition of a course of conduct. As seen in Tasmania, poor drafting of the meaning of a course of conduct can be a factor in potential under-utilisation. Furthermore, it may cause courts to apply the law inconsistently. This offence requires that there is 'repeated or continuous' behaviour,[97] however this phrase is not specifically defined by legislation. The statutory guidance framework provides some detail on what is meant by repeated or continuous behaviour, stating that 'continuously means on an ongoing basis.'[98] It further states that one or two isolated incidents would not satisfy the requirement.[99] This clarification by the home office is still quite vague and could be refined to aid courts in interpreting and applying the offence.

In summary, the limitations of England and Wales's offence casts significant doubts on its capacity to provide adequate protection and recourse to victims of coercive control.

III Scotland's Offence of Domestic Abuse

A Overview of the offence

In March 2017, Scotland introduced the *Domestic Abuse (Scotland) Bill,*[100] that proposed to criminalise coercive control. This bill was passed through Parliament unanimously in February 2018 and came into force in April 2019. When the bill passed, all members of Parliament gave a standing ovation to the survivors of domestic violence and advocates for the offence who were seated in the public gallery.[101] The bill was introduced in response to consultation undertaken by the Scottish government in 2015, which asked whether a specific offence of domestic abuse would improve responses to domestic violence within the criminal justice system.[102] From the responses to the consultation, 96% agreed that an offence of domestic violence would be beneficial.[103] The bill was drafted in consultation with policy experts from Scottish Women's Aid, alongside survivors of domestic violence, who had input into the language used.[104] The Scottish offence has recently been referred to as the new 'gold standard' of coercive control offences.[105]

The *Domestic Abuse (Scotland) Act*[106] criminalises 'abusive behaviour towards partner or ex-partner.'[107] The offence states:

> (1) A person commits an offence if–
>
> (a) the person ("A") engages in a course of behaviour which is abusive of A's partner or ex-partner ("B"), and
>
> (b) both of the further conditions are met.

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[97] *Serious Crime Act 2015* (UK) s 76 (1)(a).
[98] Home Office, 'Statutory guidance framework (n 78) 5.
[99] Ibid 5.
[100] *Domestic Abuse (Scotland) Bill 2017.*
[101] Marsha Scott in 'The Making of the New 'Gold Standard': The *Domestic Abuse (Scotland) Act 2018*' in Marilyn McMahon and Paul McGorrery (eds) *Criminalising Coercive Control: Family Violence and the Criminal Law* (Springer, 2020) 177, citing Louise Wilson and Craig Hutchinson, 'MSPs pass Domestic Abuse Bill', *BBC News* (online at 1 February 2018) <https://www.bbc.com/news/live/uk-scotland-scotland-politics-42858902>.
[102] NSW Government, *Coercive Control Discussion Paper* (n 88) 14; Scottish Government, *Equally Safe: Reforming the Criminal Law to Address Domestic Abuse and Sexual Offences* (Consultation Paper, March 2015) <https://spf.org.uk/wp/wp-content/uploads/2017/03/15-14.pdf>.
[103] Ibid 14.
[104] Scott (n 101) 183.
[105] Ibid 179.
[106] *Domestic Abuse (Scotland) Act 2018.*
[107] Ibid s 1.

(2) The further conditions are–

(a) that a reasonable person would consider the course of behaviour to be likely to cause B to suffer physical or psychological harm,

(b) that either—

(i) A intends by the course of behaviour to cause B to suffer physical or psychological harm, or

(ii) A is reckless as to whether the course of behaviour causes B to suffer physical or psychological harm.

The Act contains detailed explanations as to what constitutes abusive behaviour.[108] Behaviour that is directed at B that is violent, threatening or intimidating is abusive behaviour.[109] Additionally, behaviour directed at either B, B's child or another person that either has a purpose of causing one of the relevant effects or would be considered by a reasonable person to be likely to have one or more of the relevant effects is abusive behaviour.[110] The relevant effects include causing dependence, subordination or isolation, controlling day-to-day activities, depriving freedom of action, and frightening, humiliating, degrading or punishing B.[111] Violent behaviour includes both sexual and physical violence.[112] This offence is aggravated when a child is involved in any manner, such as by seeing, hearing, or being present during the behaviour, or if the behaviour is directed at them.[113] It is required that a reasonable person would consider the behaviour to be likely to adversely affect the child, who must be usually residing with either A or B or both.[114]

B *Evaluation of the domestic abuse offence*

Evaluation of the effectiveness of the Scottish offence may be limited due to its recent enactment. However, preliminary research suggests its uptake has been high, particularly in comparison to the English and Welsh offence.[115] The Scottish offence has been described by academics Evan Stark and Marianne Hester as being 'one of the most radical attempts yet to align the criminal justice response with a contemporary feminist conceptual understanding of domestic abuse as a form of coercive control.'[116]

The offence has numerous strengths. Firstly, formulation of the legislation reduces impacts on victims. By utilising the reasonable person test, the offence focuses on the perpetrator's actions instead of any effects on a victim. Additionally, the offence explicitly states that there is no requirement that the victim suffers harm,[117] or that the perpetrators behaviour actually has any of the relevant effects.[118] As a result, the victim is less involved with the court process and the potential for re-traumatisation is reduced.

Alongside this, the legislation acknowledges the harms endured by children who are present during domestic abuse. As Marsha Scott states, it 're-frames the experience of children and young people involved in domestic violence, constructing them as *experiencing* the abuse rather than merely *witnessing* it.'[119] The offence is aggravated not only when a child has behaviour directed at them by a perpetrator, but also when they see, hear, or are present

[108] Ibid s 2.
[109] Ibid s 2(2)(a).
[110] Ibid s 2(2)(b).
[111] Ibid s 2(3).
[112] Ibid s 2(4)(a).
[113] Ibid s 5.
[114] Ibid s 5(3).
[115] NSW Government, *Coercive Control Discussion Paper* (n 88) 15.
[116] Evan Stark and Marianne Hester, 'Coercive control: Update and review' (2019) 25(1) *Violence Against Women* 81.
[117] *Domestic Abuse (Scotland) Act 2018* s 4(1).
[118] Ibid s 4(2).
[119] Scott (n 101) 187.

during a perpetrator's behaviour.[120] There is no requirement that the child has to be aware of the behaviour or have an understanding of the nature of the behaviour, nor do they have to be adversely affected.[121] Theoretically, an offence may be aggravated if even a baby or toddler is in the same room, or if a perpetrator makes threats of violence towards a young child but does not follow through with them. It has been shown that children are negatively impacted by non-violent coercive control perpetrated against their mothers.[122] Therefore, the inclusion of children as victims of coercive control is a major strength of the Scottish offence.

In summary, the Scottish offence has the potential to greatly improve outcomes for victims of coercive control, advocating for the rights of children and women in the country. Despite this, there is still room for improvement. The domestic abuse offence only accounted for 4% of offences recorded by police as part of incidents of domestic abuse in 2019-2020.[123] Other offences such as the offence of breach of the peace, which includes crimes of threatening and abusive behaviour, and stalking, accounted for 26% of offences recorded.[124] However, the offence was enacted very recently, and it may be many years before the true effectiveness is known. Still, the offence's capacity to promote greater protection for victims is a positive impact that cannot be ignored, particularly given its comparative high uptake in its first year.

THE POTENTIAL POSITIVE AND NEGATIVE IMPLICATIONS OF COERCIVE CONTROL OFFENCES

I Benefits of a coercive control offence

An offence that encompasses physical and non-physical aspects of family violence would allow for the criminal justice system to better respond to complex issues of coercive control. It would acknowledge the serious impacts coercive control has on victims, and send a message to perpetrators that their behaviour is not acceptable. Likewise, criminalisation would 'provide women with better opportunities for recourse of the suffering they have endured.'[125]

By criminalising coercive control, the justice system will have the capacity to intervene in cases where physical violence is not present. Because coercive control is a precursor to physical violence, this may result in possible prevention of future violence and intimate partner homicide. Alongside this, criminalisation will provide a greater opportunity for community and professional education on coercive control. This may increase the general public's capacity to recognise situations of family violence. For victims, it may mean understanding that they are experiencing abuse and seeking help earlier.

II Overview of the negative implications

Despite these benefits, it is essential to recognise that an offence of coercive control will come with difficulties, both in its construction and implementation. As coercive control is a concept that describes the nature of family violence and its many impacts, it is not as dichotomous as existing criminal laws. Moreover, the criminal law predominately focuses on incidents.[126] Perpetrators of family violence may face charges of assault for incidents of physical violence, and these incidents can be reasonably easy to prove due to actual, physical evidence. On the contrary, the broad and contextual nature of coercive control makes it difficult to define, and hence there may be issues with translating this into law.[127] As coercive control encompasses both physical and emotional behaviour, and takes place as a course of conduct, it is difficult to

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[120] *Domestic Abuse (Scotland) Act 2018* s 5(2),(3).
[121] Ibid s 5(5).
[122] Katz (n 23) 56.
[123] Scottish Government, *Domestic abuse recorded by the police in Scotland, 2019-20* (Official statistics publication, June 2021) <https://www.gov.scot/publications/domestic-abuse-statistics-recorded-police-scotland-2019-20/pages/9/>.
[124] Ibid.
[125] InTouch Multicultural Centre Against Family Violence, *Criminalisation of Coercive Control: Should coercive control be a criminal offence in Victoria?* (Position paper, January 2021) 1.
[126] Walklate and Fitz-Gibbon (n 7) 100-101.
[127] Ibid 94.

construct legislation that encompasses its nature. This section will discuss the limitations in the construction and implementation of a coercive control offence, offering counter arguments and potential mitigation strategies for these issues.

III Over-criminalisation

The risk of overcriminalisation is a major challenge in creating a coercive control offence. There are concerns that if a coercive control offence is framed too broadly, behaviours that exist in ordinary relationships will become criminal. Indeed, it is not the role of the legal system to intervene in these relationships. However, it is necessary that the law intervenes in behaviour that causes significant impacts to victims, breaches human rights, and is a factor in intimate partner homicide.[128]

To prevent over-criminalisation, a coercive control offence will need to distinguish between behaviours that are normal in intimate relationships, and behaviours that would collectively form a course of abusive conduct.[129] However, distinguishing between these behaviours is fraught with problems, because considering whether behaviours are coercive or controlling depends on individual relationship dynamics.[130] To aid in distinguishing these, the offence should include provisions that relate to the intended impacts of the behaviour and their frequency. Additionally, it should include a non-exhaustive list of behaviours that exist in coercive and controlling relationships, akin to the list of family violence related behaviours in the ACT *Family Violence Act 2016*,[131] and the Commonwealth *Family Law Act 1975*.[132]

IV A course of conduct within incident based legal systems

Current criminal laws focus almost exclusively on singular incidents.[133] In contrast, an offence of coercive control would criminalise a course of conduct. For the concept of coercive control to translate into law, the legal system needs to be ready to evaluate courses of conduct instead of singular incidents. There are concerns that the legal system is not ready for nor capable of doing this.[134]

The current focus on single incidents of violence means that 'there is often insufficient regard for the context in which the violence and injury occurred'.[135] As a result, perpetrators can more easily present themselves as a victim,[136] particularly where there has been a retaliatory act of violence by a victim. In determining if a behaviour forms a part of a course of conduct, police need to be able to recognise the subtle processes that occur in relationships. Currently, no Australian jurisdiction possesses the police capability to identify and evaluate patterns of coercive control.[137] However, with adequate police training there is a chance this issue may be overcome.[138] Alongside this, current laws of stalking have been successfully prosecuted in the ACT,[139] suggesting that the legal system is capable of understanding courses of conduct.

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[128] Parliament of NSW Joint Select Committee on Coercive Control, *Coercive control in domestic relationships* (Report 1/57, June 2021) 1.
[129] Marilyn McMahon and Paul McGorrery, 'Criminalising Coercive Control: An Introduction' in Marilyn McMahon and Paul McGorrery (eds) *Criminalising Coercive Control: Family Violence and the Criminal Law* (Springer, 2020) 4 ('Criminalising Coercive Control: An Introduction').
[130] Walklate, Fitz-Gibbon and McCulloch (n 12) 121.
[131] *Family Violence Act 2016* (ACT) s 8. This will be discussed in more detailed in later sections of the thesis.
[132] *Family Law Act 1975* (Cth) s 4AB.
[133] Walklate and Fitz-Gibbon (n 7) 100.
[134] Walklate, Fitz-Gibbon and McCulloch (n 12) 118.
[135] Nancarrow et al (n 13) 104.
[136] Ibid.
[137] Ibid 26.
[138] Part 5 of this article contains further discussion of the importance of police training in mitigating implications of coercive control offences.
[139] See *R v NO* [2018] ACTSC 30.

Therefore, this concern may not be relevant, particularly as courts move towards deeper understandings of family violence.

V Misidentification of victims as perpetrators

A particularly troubling issue regarding criminalisation of coercive control is that female victims may be misidentified by police as perpetrators. Given the gendered nature of coercive control, it is a concern that a potential offence will be used against the people it aims to protect.[140] This issue is evident in domestic violence protection orders, where female victims have been subject to orders from abusive partners.[141] This section discusses the significant impacts faced by victims who have been misidentified, the factors that contribute to misidentification, and potential options for mitigation.

Female victims who are incorrectly identified as perpetrators face serious impacts. If arrested, victims could experience a loss of protection from abuse, as they may no longer feel they have safe access to the criminal justice system.[142] Victims can become hesitant in contacting police for help due to fears of being arrested again, and because of this, they may experience an escalation in violence from perpetrators.[143] Furthermore, arrests can increase the likelihood of victims being subject to domestic and family violence protection orders, which could have impacts on a victims safety.[144] If a perpetrator was to attempt to utilise the criminal justice system as a further means for abuse, a victim may become more likely to face further charges on the basis of a history of offending.[145] In addition, misidentification and criminalisation can have repercussions for employment, child custody arrangements, and housing.[146]

Numerous factors contribute to misidentification. These include cases where violence occurs by both parties, a lack of evidence relating to the family violence, or a misrepresentation by the perpetrator as being a victim.[147] Misidentification of victims is a particular challenge in cases that appear ambiguous due to violence on both sides. This is because of police difficulty in identifying the primary victim where a female victim has reacted violently towards an abuser.[148] However, violent or aggressive responses by victims are often a result of a partner's coercive and controlling behaviours.[149] As such, increased police awareness of these behaviours and understanding of the gendered nature of family violence may contribute to reduced misidentification of female victims.

This is demonstrated in England and Wales, which has been found to have a remarkably low number of women sentenced for their offence of controlling or coercive behaviour.[150] Of 107 offenders sentenced, 106 were male (99%).[151] Victims of these offences were also

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[140] Walklate and Fitz-Gibbon (n 7) 95.
[141] Alicia Jillard and Julia Mansour, 'Women victims of violence defending intervention orders' (2014) 39(4) *Alternative Law Journal* 235.
[142] Melissa Dichter, '"They Arrested Me – And I was the Victim": Women's Experiences with Getting Arresting in the Context of Domestic Violence' (2013) 23(2) *Women & Criminal Justice* 81, 84.
[143] Ibid 84.
[144] Heather Douglas and Robin Fitzgerald, 'Legal Processes and Gendered Violence: Cross-Applications for Domestic Violence Protection Orders' (2013) 36(1) *UNSW Law Journal* 56, 86.
[145] Julie Poon, Myrna Dawson, and Mavis Morton, 'Factors Increasing the Likelihood of Sole and Dual Charging of Women for Intimate Partner Violence' (2014) 20(12) *Violence Against Women* 1447, 1450.
[146] Lisa Young Larance and Susan Miller, 'In Her Own Words: Women Describe Their Use of Force Resulting in Court-Ordered Intervention' (2017) 23(12) *Violence Against Women* 1536, 1538.
[147] Nancarrow et al (n 13) 26.
[148] Jane Wangmann, 'Incidents v Context: How Does the NSW Protection Order System Understand Intimate Partner Violence?' (2012) 34 *Sydney Law Review* 695, 703.
[149] Nancarrow et al (n 13) 26-27; Hayley Boxall, Christopher Dowling and Anthony Morgan, 'Female perpetrated domestic violence: prevalence of self-defensive and retaliatory violence' (2020) 584 *Trends and Issues in Crimes and Criminal Justice* 1, 12.
[150] McGorrery and McMahon, 'Prosecuting controlling or coercive behaviour in England and Wales' (n 91) 579.
[151] Ibid 570.

overwhelmingly female (106 of 107).[152] Despite the gender-neutral nature of the offence, the police response has been highly gendered, with police being capable of correctly identifying the primary perpetrator. This can be attributed to training of police, who developed an understanding of the gendered nature of family violence.[153] As such, if an offence of coercive control is enacted alongside extensive training of police regarding coercive control,[154] then misidentification can be prevented.

VI Burdens on victims

The criminalisation of coercive control may require victims to become involved in court processes, particularly as witnesses. Engaging victims in court processes as witnesses could cause re-traumatisation, due to emotional costs and the need to extensively prepare for court.[155] Furthermore, reluctant victims may be urged by police officers to provide large amounts of evidence, and may even experience further control by the legal system itself.[156] On the other hand, when police do not believe victim's claims of abuse, they may be re-traumatised and disempowered to take further action.[157]

To mitigate these burdens, the employment of a perpetrator focused approach may be useful. The Scottish offence demonstrates this, and has been hailed by academics for its approach.[158] England and Wales, who do not adopt a perpetrator focused approach, have a high rate of guilty pleas (73%) for their offence of controlling or coercive behaviour.[159] Guilty pleas require less involvement by victims, and therefore burdens on victims may be significantly reduced.

VII Legal systems abuse

A highly concerning risk of a coercive control offence is that it might be utilised by perpetrators as an additional method for abuse of their current or former partners.[160] This behaviour has been described by Professor Heather Douglas, who refers to it as 'legal systems abuse.'[161] Perpetrators may engage in legal systems abuse to place pressure on victims to withdraw their own legal applications, to escape repercussions for their actions, or even to cause financial and emotional harm to victims.[162] This behaviour is often utilised to continue to control partners after separation, particularly due to the loss of opportunity to exert control that comes with the end of a relationship.[163] Responding to false or vexatious claims made by perpetrators can come at a significant personal cost for victims, who are required to dedicate time and money in defending themselves.[164] However, it must be considered whether an offence of coercive control would contribute to this, or whether it would work against legal systems abuse by changing perceptions of family violence.

Legislative actions that seek to criminalise coercive and controlling behaviours understand it as a pattern of abuse. If enacted alongside educational campaigns, a coercive control offence

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[152] Ibid.
[153] Ibid 579.
[154] See also Ellen Reeves, 'Family violence, protection orders and systems abuse: views of legal practitioners' (2020) 32(1) *Current Issues in Criminal Justice* 91, 107.
[155] Heather Douglas, Submission No 21 to Parliament of NSW Joint Select Committee on Coercive Control, *Coercive Control in Domestic Relationships* (26 January 2021) 9-10, citing Heather Douglas, 'Domestic and family violence, mental health and well-being and Legal Engagement' (2018) 25(3) *Psychiatry, Psychology and Law* 341.
[156] Ibid 10.
[157] ANROWS, *"A deep wound under my heart": Constructions of complex trauma and implications for women's wellbeing and safety from violence* (Research report, Issue 11, May 2020) 107.
[158] Stark and Hester (n 113).
[159] McGorrery and McMahon, 'Prosecuting controlling or coercive behaviour in England and Wales' (n 91) 576.
[160] Douglas, 'Legal systems abuse' (n 13) 84.
[161] Ibid.
[162] Nancarrow et al (n 13) 30.
[163] Douglas, 'Legal systems abuse' (n 13) 85.
[164] Ibid 92.

could effectively contribute to a change in professional and community understandings of family violence.[165] Therefore, by understanding both the context of family violence and its associated behaviours, instead of viewing it as single and discrete incidents, legal systems abuse may be reduced.[166] Whilst there is no guarantee that legislative reforms would lead to significant cultural change,[167] evidence from other jurisdictions is promising. As previously mentioned, offenders in England are overwhelmingly male, which recognises the gendered nature of family violence.[168] This was achieved through educating police to develop a thorough understanding of the patterns of abuse that take place in coercive control.[169] Therefore, there is tentative evidence that an offence of coercive control, if developed and implemented effectively, could contribute to cultural change.

Changes in understandings of coercive control would positively impact members of the legal profession. Lawyers who are more knowledgeable in behaviours and tactics exerted by perpetrators may be more capable of recognising clients engaging in legal systems abuse. Therefore, they may be more hesitant to represent them or assist them with their claims. This means perpetrators will have reduced options for legal representation, and their actions might be less successful. Furthermore, judges who have a greater capacity to recognise legal systems abuse will respond to perpetrators in a more appropriate manner, particularly in cross-applications for family violence orders.[170] Applications to declare a perpetrator as a vexatious litigant may be more likely to succeed, particularly where a judge has a greater understanding of coercive control and there is evidence that legal systems abuse has occurred. Alongside this, attempts at legal systems abuse could be used as evidence of coercive and controlling behaviour. This may assist victims in gaining recourse through the criminal law or in applications for family violence orders. Finally, victims who adequately understand coercive control may be more likely to recognise legal systems abuse as coercive control. This could cause them to report abuse to the police earlier than they otherwise would.

A coercive control offence may bring about more awareness to legal systems abuse by contributing to a greater understanding that using the legal system to exert control over a current or former partner is a family violence associated behaviour. Therefore, a coercive control offence may be useful in advocating for the recognition of legal systems abuse, and reducing its occurrence.

VIII Implications for Aboriginal and Torres Strait Islander Australians

Criminalising coercive control is likely to disproportionately impact Aboriginal and Torres Strait Islander people. Aboriginal and Torres Strait Islander people are already overrepresented in the criminal justice system,[171] representing more than 27% of the total adult prison population in Australia.[172] This is evident in existing domestic and family violence laws, in particular protection orders, which operate as entry points into the criminal justice system for these people.[173] Recent studies have indicated that domestic violence laws are a strong contributor to overrepresentation, with tougher penalties being imposed by courts on

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[165] Ibid 94.
[166] Australian Law Reform Commission, *Family violence: A national legal response* (ALRC Report 114, October 2010) 291.
[167] Douglas, 'Legal systems abuse' (n 13) 85.
[168] McGorrery and McMahon, 'Prosecuting controlling or coercive behaviour in England and Wales' (n 91) 579.
[169] Ibid.
[170] Douglas, 'Legal systems abuse' (n 13) 94.
[171] Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (n 14) 93.
[172] Australian Bureau of Statistics, *Prisoners in Australia* (Catalogue No 4517.0, 8 December 2017).
[173] Heather Douglas and Robin Fitzgerald, 'The Domestic Violence Protection Order System as Entry to the Criminal Justice System for Aboriginal and Torres Strait Islander People' (2018) 7(3) *International Journal for Crime, Justice and Social Democracy* 41, 50.

Aboriginal and Torres Strait Islander people.[174] They are more likely to receive prison or probation sentences as opposed to fines, and less likely to receive good behaviour orders.[175] Additionally, punishments relating to criminal offences have been shown to impact marginalised groups to a greater extent.[176] The harsher sentences placed on Aboriginal and Torres Strait Islander people has significant negative outcomes, with isolation from community and greater potential for re-entry into the system after release.[177]

An offence of coercive control is unlikely to escape the issues that existing domestic violence laws face regarding criminalisation of Aboriginal and Torres Strait Islander people. It may, in fact, exacerbate these issues and act as a further measure for marginalised groups to enter the criminal justice system. This includes Aboriginal and Torres Strait Islander women, who may be wrongly identified as perpetrators of violence.[178] Aboriginal and Torres Strait Islander people may also be resistant to intervention from police, particularly due to past experiences of systemic racism alongside a lack of cultural awareness by police officers.[179] They may experience difficulties in reporting violence to the police, due to distrust of police and the criminal justice system.[180] Alongside this, these women may be fearful of repercussions from the perpetrator and their family, be reluctant to engage in colonial justice systems that have been historically utilised as a means for oppression, be fearful about removal of children, and may have had previous negative experiences with police.[181]

An offence of coercive control needs to accept the differences that exist in Aboriginal and Torres Strait Islander communities, and should be implemented alongside policy reform to address these differences in needs. Negative implications for these minority groups can only be mitigated through extensive consultation with members of the community. Preventative measures targeted towards these communities must be considered when determining if a coercive control offence is necessary. Alongside this, before criminalising coercive control there must be specialised training for police regarding family violence in Aboriginal and Torres Strait Islander communities, so that police can change their responses to victims of family violence and engage in strategies to support them in a culturally appropriate way.[182]

IX Can the negative implications be overcome?

Through comprehensive engagement in mitigation strategies, alongside consultation with vulnerable communities, there is a strong potential for negative implications of coercive control offence to be overcome. As such, it can be argued that the benefits of a coercive control offence outweigh the consequences. The next section will further discuss this, paying particular attention to current laws in the ACT.

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[174] Hamish Thorburn and Don Weatherburn, 'Effect of Indigenous status of sentence outcomes for serious assault offences' (2018) 51(3) *Australian & New Zealand Journal of Criminology* 434, 450; Neil Donnelly and Suzanne Poynton, *Prison penalties for serious domestic and non-domestic assault* (Crimes and Justice Statistics Bureau Brief Issue paper no 110, October 2015) 12.

[175] Robin Fitzgerald, Heather Douglas and Lachlan Heybroek, 'Sentencing, Domestic Violence, and the Overrepresentation of Indigenous Australians: Does Court Location Matter?' (2019) 36(21-22) 10588, 10604.

[176] Christy Visher, Sara Debus-Sherrill and Jennifer Yahner, 'Employment After Prison: A Longitudinal Study of Former Prisoners' (2011) 28 *Justice Quarterly* 696.

[177] Ibid 10605, citing Martin Flynn, '*Fernando* and the Sentencing of Indigenous Offenders' (2004) 16(9) *Judicial Officers' Bulletin* 67.

[178] Nancarrow et al (n 13) 23.

[179] Ibid 27.

[180] Bee Cook, Fiona David and Anna Grant, *Sexual violence in Australia* (Research and public policy series no. 36, 1 June 2001) 23.

[181] ANROWS, *Innovative models in addressing violence against Indigenous women* (State of knowledge paper issue 8, August 2015) 13.

[182] Nancarrow et al (n 13) 27.

IMPLEMENTING A COERCIVE CONTROL OFFENCE IN THE ACT: ENSURING AN OFFENCE IS EFFECTIVE

I Why does the ACT need a coercive control offence?

There are numerous reasons why an offence of coercive control is needed in the ACT. These reasons are as follows:

1. The serious negative impacts of family violence are not being adequately addressed by existing civil and criminal laws, namely family violence orders ('FVO').
2. Coercive control has been found to be a precursor to intimate partner homicide,[183] and emotional abuse is correlated with escalating future violence.[184]
3. The patterns of abuse that take place in coercive and controlling relationships are out of reach of the criminal law, leaving victims unprotected and preventing perpetrators from being adequately punished for their behaviour.

Without adequate data on family violence and coercive control in the ACT, it is difficult to determine the impact of existing laws, and indeed, if a coercive control offence would positively impact those experiencing family violence in the ACT. However, evidence from across Australia demonstrates that coercive control poses a serious issue, being present in the vast majority of cases of intimate partner homicide. The NSW DVDRT found that in 111 of 112 cases of intimate partner homicides, the perpetrator had engaged in coercive and controlling behaviours.[185] Additionally, behaviours of stalking in a coercive and controlling relationship have been described as a precursor to non-fatal strangulation,[186] and emotional abuse in relationships is associated with a higher risk of escalating violence in the future.[187] Furthermore, 70% of domestic partner assaults reported to police occur alongside coercive control.[188] Therefore, implementing a coercive control offence may allow for the legal system to intervene in cases where there is a lack of physical violence earlier, potentially preventing future violence and intimate partner homicides.

Many women across Australia have experienced emotional abuse from intimate partners. This is apparent from the most recent Australian Bureau of Statistics Personal Safety Survey.[189] This survey found that 23% of women had experienced emotional abuse by a current or former partner since the age of 15.[190] Of those women who had experienced emotional abuse by a former partner, the types of behaviours most commonly reported included being verbally abused (63.4%) and being constantly insulted (59.4%).[191] Women also reported that their partners utilised controlling behaviours on them, including controlling or attempting to control their contact with family, friends, or community (50%), their movement or who they saw (46%), decisions about household money (38%), and controlling or attempting to control

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[183] NSW Domestic Violence Death Review Team (n 3) 325.; Jane Monckton Smith, 'Intimate Partner Femicide: Using Foucauldian Analysis to Track an Eight Stage Progression to Homicide' (2020) 26(11) *Violence Against Women* 1267.

[184] Sara Rahman, 'Assessing the risk of repeat intimate partner assault' (2019) 220 *BOSCAR NSW Crime and Justice Bulletins* 11.

[185] NSW DVDRT (n 3) 325.

[186] Martyna Bendlin and Louise Sheridan, 'Nonfatal Strangulation in a Sample of Domestically Violent Stalkers: The Importance of Recognizing Coercively Controlling Behaviour' (2019) 46(11) C*riminal Justice and Behaviour* 1528, 1538; Richard Standsfield and Kirk Williams 'Coercive Control Between Intimate Partners: An Application to Nonfatal Strangulation' (2018) *Journal of Interpersonal Violence* 105, 117.

[187] Rahman (n 184) 11.

[188] Evan Stark and Cassandra Weiner, Submission No 12 to Parliament of NSW Joint Select Committee on Coercive Control, *Coercive Control in Domestic Relationships* (26 January 2021) 6, citing Paige Hall Smith et al, 'A Population-Based Study of the Prevalence and Distinctiveness of Battering, Physical Assault, and Sexual Assault in Intimate Relationships' (2002) 8(1) *Violence Against Women* 1208.

[189] Australian Bureau of Statistics, *Personal Safety, Australia* (n 1).

[190] Ibid.

[191] Ibid.

them from working (22%).[192] These behaviours would be captured and prohibited by an offence of coercive control. Therefore, criminalising coercive control may put a stop to these behaviours earlier, intervening prior to escalation of violence or homicide.

Moreover, criminalising coercive control in the ACT would take a further step in acknowledging the serious wrongs of coercive and controlling behaviours within intimate relationships. Criminalising these behaviours 'provides the opportunity to promote a clear understanding of the lived experience of domestic violence and/or the abuse that many victims suffer.'[193] If current criminal laws do not capture the reality of family violence, then there is no real prohibition of the patterns of abuse that are ordinarily seen in family violence. Given the serious negative impacts of coercive control as discussed in earlier sections, criminalisation of behaviour causing such negative outcomes for victims is surely justified. This is particularly important because victims of coercive control have described their experiences of these behaviours as being more harmful than any physical abuse they have endured.[194] Perhaps, if victims know that these behaviours are illegal, they will be more likely to report them or seek assistance. Acknowledging these wrongs not only assists victims with validating their experiences but sends a clear message to perpetrators that their behaviour is not acceptable and will not be tolerated in the ACT.

II Do existing laws sufficiently address the issues of family violence and coercive control?

A *Criminal laws*

Present criminal offences in the ACT such as assault and stalking may be charged in cases of family violence. However, these do not adequately cover the scope of behaviours and patterns of abuse that exist in coercive control. An offence of coercive control in the ACT, if drafted appropriately, would capture and criminalise these behaviours.

The offence of stalking in the ACT prohibits stalking someone with the intent to cause apprehension of harm, fear of harm, cause harm or harass.[195] The proscribed behaviours must be engaged in on at least two occasions.[196]

This offence has been used against perpetrators of family violence, most notably in the case of *R v NO*.[197] In this case, the defendant was found guilty of stalking after tracking the victims location without consent through activation of location services on her phone, sending her numerous messages and phone calls regardless of her requests to stop, and accessing her emails without consent.[198] The victim stated that the defendant was 'controlling and that she was fearful of him.'[199] This same defendant was found guilty of charges of sexual assault in the second degree, sexual intercourse without consent, and an act of indecency.[200] Throughout the relationship, the perpetrator made comments such as 'your responsibility lies between these four walls' and attempted to reduce 'the victim's contact with her extended family.'[201] The defendant was charged with six months' imprisonment for the stalking charge.[202] This case illustrates a perpetrator who engages in patterns of abusive behaviour, with a victim who is unable to gain sufficient recourse due to a lack of criminal laws prohibiting coercive and controlling behaviours.

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[192] Ibid.
[193] Bettinson and Bishop, (n 76) 180-181.
[194] McMahon and McGorrery, 'Criminalising Coercive Control: An Introduction' (n 129) 14.
[195] *Crimes Act 1900* (ACT) s 35(1).
[196] Ibid s 35(2).
[197] *R v NO* [2018] ACTSC 30.
[198] Ibid 8.
[199] Ibid 14.
[200] *R v NO (no 2)* [2018] ACTSC 37, 1.
[201] Ibid 11.
[202] Ibid.

Stalking laws play an important role in the criminal justice system, particularly for people who are stalked by someone who is not a current or former partner. Although these laws are associated with family violence,[203] and have been prosecuted in the ACT in this regard,[204] they are not effective against preventing family violence. They do not provide victims with adequate recourse against harms done by perpetrators of coercive control. This is because stalking forms a larger part of the pattern of abuse.[205] As such, the ACT stalking offence is not adequate in addressing coercive control as a whole.

B *Family violence orders*

In 2016, the ACT enacted the new *Family Violence Act 2016*,[206] which was implemented as a part of broad reforms to address the significant issues of family violence. The Act aims to prevent and reduce family violence, protect victims and children, and encourage accountability for perpetrator's actions.[207] The legislation was enacted following the homicide of Tara Costigan, who was killed by her former partner just a day after taking a domestic violence order out against him. This homicide sparked multiple inquiries into the effectiveness of the ACT's response to family violence, all of which recommended that the previous Act, the *Domestic Violence and Protection Orders Act 2008*, be reformed.[208] A predominant concern of these inquiries was that non-physical violence was not being adequately recognised by legislation.[209]

The current *Family Violence Act* defines family violence as including behaviours of physical violence, sexual violence, emotional or psychological abuse, economic abuse, threatening behaviour, coercion, or any other behaviour that controls or dominates and causes the victim to feel fear for their own or another's safety or wellbeing.[210] The Act provides examples of these behaviours.[211] To ensure their safety from family violence, an affected person can apply for a family violence order (FVO).[212] In making an order, the court may consider a range of matters,[213] and must give paramount consideration to the safety of the victim and any involved children.[214] However, this is balanced with the requirement that the court must ensure conditions on a FVO's are 'the least restrictive on the personal rights and liberties of the respondent.'[215]

FVO's have become the most common response to family violence throughout Australia,[216] and there have been many claims that the focus on civil orders has practically decriminalised

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[203] Ann Burgess et al, 'Stalking Behaviours within Domestic Violence' (1997) 12 *Journal of Family Violence* 389.
[204] See, eg, *R v NO* [2018] ACTSC 30; *R v NO (no 2)* [2018] ACTSC 37, 77.
[205] Douglas, 'Do we need a specific domestic violence offence?' (n 58) 452; Stark and Hester (n 116) 89.
[206] *Family Violence Act 2016* (ACT).
[207] Ibid s 6.
[208] Lorana Bartels, Patricia Easteal and Shannon Dodd, *Review of the Implementation of the Family Violence Act 2016 (ACT)* (Report, 14 December 2020) 5.
[209] ACT Domestic Violence Prevention Council, *Findings and Recommendation from the Review of Domestic and Family Violence Deaths in the ACT – Public Report* (2016) Recommendation 23; ACT Community Services Directorate, *ACT Domestic Violence Service System: Final Gap Analysis Report* (2016) 36; Laurie Glanfield, *Report of the Inquiry: Review into the System Level Responses to Family Violence in the ACT* (2016) 21.
[210] *Family Violence Act 2016* (ACT) s 8(1).
[211] Ibid s 8.
[212] Ibid s 16, 21.
[213] Ibid s 14.
[214] Ibid s 36.
[215] Ibid s 37.
[216] Douglas, 'Do we need a specific domestic violence offence?' (n 58) 437-438 citing Sally Goldfarb, 'Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse without Ending the Relationship?' (2008) 29 *Cardozo Law Review* 1487.

domestic violence.[217] These claims are supported by arguments that offences for breaches of orders are prosecuted more regularly than criminal offences that could be applicable, such as assault or stalking.[218]

Many of the behaviours listed in the ACT *Family Violence Act* as family violence related behaviours fall under the definition of coercive control. Therefore, if a victim is able to obtain an FVO, the perpetrator will be prohibited from engaging in these behaviours. However, FVO's do not in themselves prohibit behaviour. Criminal liability arises when a breach of an order has been made. Furthermore, family violence orders do not provide victims with resource for the actions of a perpetrator prior to the commencement of the order, unless those actions are already covered by criminal laws. Likewise, breaches generally carry an inappropriately low penalty,[219] meaning that abuse goes without punishment.

Additionally, FVO's carry risks of legal systems abuse, particularly in cross-applications by perpetrators.[220] The low standard of proof in FVO applications, being only on the balance of probabilities, exacerbates this.[221] If a coercive control offence was created, the standard of proof would be beyond a reasonable doubt, which would minimise risks of legal systems abuse. Whilst FVO's are a crucial domestic and family violence response, they are not a complete or effective measure against coercive control.

II How should the ACT construct a coercive control offence?

This section considers different aspects of an offence of coercive control, drawing from various constructions of coercive control offences internationally and within Australia. It evaluates the benefits of different elements of a potential offence, determining which components would be the most effective in an offence in the ACT.

A Legislative definition of coercive control

Any legislative definition of coercive control needs to adequately capture the complexities of coercive control. In particular, it needs to acknowledge that whilst some patterns of behaviour may appear innocuous, in the context of a relationship these behaviours are an exertion of coercion and control by a perpetrator.[222]

Alongside this, a coercive control offence would criminalise a course of behaviour as opposed to a singular event. As such, careful consideration needs to be made to ensuring the course of conduct is adequately defined. Scotland's offence states that behaviours must occur on two or more occasions.[223] Conversely, England and Wales's offence requires 'repeated or continuous'[224] behaviour, which leaves the interpretation of this meaning up to judges.[225] The clarity in Scotland's offence lends to easier interpretation by legal professionals and judicial officers and may prevent confusion. Moreover, defining a specific number of occurrences of

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[217] Ibid 438, citing Heather Douglas and Lee Godden, 'The Decriminalisation of Domestic Violence: Examining the Interaction between the Criminal Law and Domestic Violence' (2003) 27 *Criminal Law Journal* 32.
[218] Douglas and Godden (n 214) 38.
[219] Heather Douglas, 'Not a Crime Like Any Other: Sentencing Breaches of Domestic Violence Protection Orders' (2007) 31 Criminal Law Journal 220, 221.
[220] Douglas, 'Legal systems abuse' (n 13) 86.
[221] *Family Violence Act 2016* (ACT) s 13.
[222] Charlotte Bishop and Vanessa Bettinson, 'Evidencing domestic violence, including behaviour that falls under the new offence of "controlling or coercive behaviour"' (2018) 22(1) *International Journal of Evidence and Proof* 3, 8.
[223] *Domestic Abuse (Scotland) Act 2018* s 10(4).
[224] *Serious Crime Act 2015* (UK) s 76.
[225] Vanessa Bettinson, 'A Comparative Evaluation of Offences: Criminalising Abusive Behaviour in England, Wales, Scotland, Ireland and Tasmania' in Marilyn McMahon and Paul McGorrery (eds) *Criminalising Coercive Control: Family Violence and the Criminal Law* (Springer, 2020) 200.

behaviour aligns with the ACT's current stalking law, which requires behaviour on two or more occasions.[226] Therefore, a specific approach like Scotland's would be preferred.

B Scope of relationships covered

Most jurisdictions that have criminalised coercive control prohibit behaviour against partners or ex-partners. This aligns with academic understandings of coercive control, which define it as occurring in intimate relationships.[227] The offence in England and Wales covers members of the same family who live together, but excludes ex-partners who do not live together.[228] The Scottish offence focuses on abuse between partners or ex-partners, and is aggravated when children are involved in the behaviour.[229]

Excluding ex-partners that do not live together fails to recognise the ongoing attempts at coercion and control by perpetrators after the end of a relationship. Research has shown that victims are 'most at need of protection' when leaving a relationship,[230] so drawing this arbitrary line doesn't make sense.[231] On the other hand, including members of the same family that are not intimate partners is not necessary, because coercive control is perpetrated almost exclusively by men against their female partners.[232] Therefore, it would be most effective for the ACT to implement an offence that covers both partners and ex-partners, but does not cover other relationships.

Alongside this, it would be worthwhile for the ACT to consider whether the involvement of children should be an aggravating factor in sentencing a coercive control offence, as it is in Scotland.[233] Because of the serious negative impacts children face when exposed to coercive control,[234] acknowledging this in a coercive control offence is important.

C Relevant behaviours

Behaviours that occur in coercive and controlling relationships may not appear to be obviously coercive or controlling to outsiders.[235] As mentioned previously, this is because these behaviours may only have the impact of coercion or control in the context of the relationship.[236] To this regard, some jurisdictions have provided non-exhaustive lists of behaviours that might be considered relevant,[237] whilst others have framed the behaviour requirement widely.[238]

It is important that behaviours included are not solely emotional or psychological. Stark and Hester have stated that 'the mistaken association of coercive control with "psychological abuse" … risks leaving "real" partner violence outside the crime's spectrum, not merely isolated assaults.'[239] As such, an offence of coercive control needs to include behaviours that are both physical and non-physical. Scotland's offence aligns most closely with academic

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[226] *Crimes Act 1900* (ACT) s 35(2).
[227] See, eg, Stark, *Coercive Control* (n 4).
[228] *Serious Crime Act 2015* (UK) ss 76(2)(b), 76(6).
[229] *Domestic Abuse (Scotland) Act 2018* s 5.
[230] Cassandra Weiner, 'From Social Construct to Legal Innovation: The Offence of Controlling or Coercive Behaviour in England and Wales' in Marilyn McMahon and Paul McGorrery (eds) *Criminalising Coercive Control: Family Violence and the Criminal Law* (Springer, 2020) 169 citing Deborah Tuerkheimer, 'Breakups' (2013) 25 *Yale Journal of Law and Feminism* 25, 82.
[231] Ibid 170.
[232] Stark, *Coercive Control* (n 4); Helen Reece, 'The end of domestic violence' (2006) 69(5) *Modern Law Review* 770, 791.
[233] *Domestic Abuse (Scotland) Act 2018* s 5.
[234] Katz (n 23) 56.
[235] Bishop and Bettinson (n 222) 9.
[236] Ibid.
[237] See, eg, *Domestic Abuse (Scotland) Act 2018* s 2; *Serious Crime Act 2015* (UK) s 76; Home Office, 'Statutory guidance framework' (n 78) 3.
[238] See, eg, *Family Violence Act 2004* (Tas) ss 8, 9.
[239] Stark and Hester (n 116) 86.

conceptions of behaviours in coercive control,[240] encompassing a range of physical, sexual, and psychological behaviours alongside their effects.[241] This offence has tentatively been found to be effective, with a high uptake in comparison to other jurisdictions,[242] and was received positively by academics for its comprehensive construction.[243] As such, a non-exhaustive list of behaviours in all these categories would be the most effective method for defining relevant behaviours.

D Impacts of relevant behaviours

The actual impacts of the prohibited behaviour on a victim might form part of the requirements of a coercive control offence. In England and Wales, actual harm must be caused by the perpetrator's behaviour,[244] whilst in Tasmania and Scotland, there is no need to prove that actual harm has occurred.[245] In Scotland, a reasonable person must consider the behaviour to be likely to cause one of the relevant effects of dependence, subordination, or isolation, among other things.[246]

The reasonable person approach reduces the need for a victim's involvement in court processes and may prevent re-victimisation as victims are less likely to be required to provide extensive evidence about impacts.[247] In contrast, the requirement that harm be done to a victim may cause significant barriers to justice. In England and Wales where harm is required, initial prosecutions were largely extreme cases involving physical violence,[248] meaning milder cases were likely missed. Therefore, requiring actual harm be done to a victim sets too high a threshold, and could cause significant negative impacts for victims. As such, an offence of coercive control should adopt a reasonable person test similar to Scotland's. Objective reasonable and ordinary person tests already exist in current ACT criminal laws, and because of this should not require significant judicial interpretation to prove.[249]

E Gendered nature of coercive control

Coercive control is a gendered issue, being predominantly perpetrated by men against women.[250] Despite this, a coercive control offence should be framed in a gender-neutral manner. Whilst this means there is the chance that female victims are misidentified by police officers, it is necessary to ensure that people from all situations are protected. Framing the offence in this way will recognise that coercive control can occur beyond heterosexual relationships and may very occasionally be perpetrated by women.

A gender-neutral offence has been shown to be effective in ensuring male perpetrators of coercive control are charged, and from preventing female victims from being misidentified. This is evident in England and Wales, with 99% of offenders being male despite their gender-

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[240] Bettinson (n 225) 214, citing Evan Stark, *Coercive Control* (n 4).
[241] *Domestic Abuse (Scotland) Act 2018* s 2.
[242] NSW Government, *Coercive Control Discussion Paper* (n 88) 15.
[243] Stark and Hester (n 116) 86; Scott (n 101) 177.
[244] *Serious Crime Act 2015* (UK) s 76.
[245] *Family Violence Act 2004* (Tas) ss 8, 9; *Domestic Abuse (Scotland) Act 2018* s 2.
[246] *Domestic Abuse (Scotland) Act 2018* s 4(1).
[247] Michele Burman and Oona Brooks-Hay, 'Aligning policy and law? The creation of a domestic abuse offence incorporating coercive control' (2018) 18(1) *Criminology and Criminal Justice* 67, 74.
[248] McGorrery and McMahon, 'Prosecuting controlling or coercive behaviour in England and Wales' (n 91) 579.
579.
[249] For an exploration of evaluating the difficulties in applying these tests, see Tony Nisbet and Ann-Claire Larsen, 'Normativity and the ordinary person formula: Comparing provocation and duress in Australia' (2019) 45(2) *University of Western Australia Law Review* 249; Eric Colvin, 'Ordinary and Reasonable People: The Design of Objective Tests of Criminal Responsibility' (2001) 27(1) *Monash University Law Review* 197.
[250] Stark, *Coercive Control* (n 4).

neutral offence.[251] This has been attributed to police education regarding the gendered nature of coercive control,[252] and demonstrates that a gender-neutral offence would still be effective in protecting women.

Therefore, a coercive control offence in the ACT should be framed in a gender-neutral manner, so that it is not exclusionary to male victims and those in same sex relationships. However, extensive training should be undertaken to ensure that police are knowledgeable about gendered aspects of coercive control and can correctly identify manipulative tactics employed by perpetrators.

F Limitation period

The Tasmanian offences of emotional abuse and intimidation and economic abuse initially had a limitation period of six months, but these have now increased this to twelve months.[253] Coercive control offences in England and Wales, and Scotland, currently have no limitation period. As previously noted, the Tasmanian offence faced significant challenges that can be partly attributed to short limitation periods.[254]

A limitation period would prevent victims from accessing justice in failing to recognise the nature of coercive control as a pattern abuse occurring over a long period of time.[255] Courts will be prevented from considering the entire course of conduct, and 'the full extent of the victims' experience will be obscured in the courtroom'.[256] Therefore, to implement the most effective offence in the ACT, a limitation period should not be included.

G Defences

The inclusion of a defence within the legislation would allow for a person to defend themselves where their behaviour might be considered reasonable,[257] or if their behaviour is not actually coercive or controlling despite appearing so.[258] There are limited circumstances where a person might need to engage in controlling behaviour, such as attempting to prevent their partner from self-destructive behaviour.[259]

England and Wales allow for an accused person to raise a defence when their behaviour is in all circumstances reasonable, and they are acting in the best interests of the victim.[260] Likewise, Scotland allows a defence if the accused shows that their behaviour was reasonable in the circumstances.[261] A similar defence of reasonableness would be useful if the ACT was the implement a coercive control offence. In NSW, various groups supported the inclusion of a defence of reasonableness in their submissions to the NSW inquiry into coercive control.[262] This defence would act as an important safeguard to ensure people are not sentenced when they have genuinely acted reasonably and in the best interests of the victim.

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[251] McGorrery and McMahon, 'Prosecuting controlling or coercive behaviour in England and Wales' (n 91) 579.
[252] Ibid 579.
[253] *Family Violence Act 2004* (Tas) s 9A; *Family Violence Amendment Act 2015 (Tas)* s 5 brought this new limitation period into effect on 6 October 2015.
[254] Douglas, 'Do we need a specific domestic violence offence?' (n 58) 457.
[255] Stark, *Coercive Control,* (n 4) 109.
[256] Bettinson (n 225) 205.
[257] See, eg, *Domestic Abuse (Scotland) Act 2018* s 6; *Serious Crime Act 2015* (UK) s 76(8).
[258] NSW Young Lawyers, *Submission to the Inquiry into coercive control in domestic relationships* (4 February 2021) 18 <https://www.parliament.nsw.gov.au/ladocs/submissions/70522/Submission%20-%20112.pdf>.
[259] Ibid 18.
[260] *Serious Crime Act 2015* (UK) s 76(8).
[261] *Domestic Abuse (Scotland) Act 2018* s 6.
[262] Parliament of NSW Joint Select Committee on Coercive Control, *Coercive control in domestic relationships* (Report 1/57, June 2021) 98.

H Penalties

The determination of which penalty should apply to an offence of coercive control is complicated, particularly because behaviours and impacts differ significantly between relationships. Maximum penalties for coercive control offences vary substantially across jurisdictions. In England and Wales, the offence of controlling or coercive behaviour carries a maximum penalty of 5 years imprisonment,[263] whereas the Tasmanian offences only carry a maximum penalty on 2 years imprisonment.[264] At the higher end, the Scottish offence has a maximum penalty of 14 years imprisonment.[265] This higher penalty recognises the severity of coercive and controlling behaviours, and the serious harms caused to victims.[266]

The offence of stalking in the ACT carries a maximum imprisonment of two years, and is increased to five years if the offender was contravening a court order or was in possession of an offensive weapon.[267] The offence of a contravention of a family violence order has a maximum penalty of 5 years imprisonment.[268] Considering the pervasive nature of coercive control, and the serious negative impacts it has on victims, it would be wise for the ACT to inflict a greater maximum penalty than these two offences. This would allow for greater judicial discretion when applying sentences, giving judges the capacity to the range of severity and behaviours that occur.[269] However, it is also important to recognise that harsh punishments, particularly long imprisonment, are not necessarily an effective measure against violence.[270]

III What non-legislative activities would be required to support a coercive control offence?

A coercive control offence cannot operate effectively unless it is implemented alongside non-legislative policy reforms and activities. An offence that is purely symbolic would not have a meaningful impact on coercive control.[271] Relying on the criminal law as a single means of addressing family violence ignores the associated social and cultural health issues and can have negative impacts for victims of abuse.[272] Therefore, non-legislative activities would have the effect of mitigating risks and ensuring that an offence achieves its desired outcomes.

Police officers and members of the community alike can have difficulties in identifying coercive and controlling behaviour because behaviours may align with ordinary expectations of men's behaviour.[273] Consequently, a crucial non-legislative action is to provide extensive funding and resources towards educating police officers on coercive control, alongside all other professionals who are involved in matters of family violence.

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[263] *Serious Crime Act 2015* (UK) s 76(11)(a).
[264] *Family Violence Act 2004* (Tas) ss 8, 9.
[265] *Domestic Abuse (Scotland) Act 2018* s 8(b).
[266] Bettinson (n 225) 213.
[267] *Crimes Act 1900* (ACT) s 35.
[268] *Family Violence Act 2016* (ACT) s 43.
[269] Bettinson (n 225) 214.
[270] See David Brown, 'The limited benefit of prison in controlling crime' (2010) 22(1) *Current Issues in Criminal Justice* 137.
[271] State of Victoria, *Victorian Royal Commission into Family Violence*: *Summary and recommendations* (Paper No 132, March 2016) 27 <http://rcfv.archive.royalcommission.vic.gov.au/MediaLibraries/RCFamilyViolence/Reports/RCFV_Full_Report_Interactive.pdf>.
[272] No To Violence, *Predominant Aggressor Identification and Victim Misidentification* (Discussion paper, 21 November 2019) 4, citing Leigh Goodmark, *Decriminalizing Domestic Violence: A Balanced Policy Approach to Intimate Partner Violence* (University of California Press, 2018).
[273] Michele Burman and Oona Brooks-Hay, 'Aligning policy and law? The creation of a domestic abuse offence incorporating coercive control' (2018) 18(1) *Criminology and Criminal Justice* 67, 75.

A *A holistic approach to addressing family violence*

In implementing their coercive control offence, Scotland undertook a multi-agency system-wide approach.[274] The Scottish legislation is supported by their four pillars approach to domestic violence prevention,[275] which involves legal protection, effective provision of services, prevention by stopping domestic abuse and reducing reoffending, and participation in systems by victims.[276]

Current ACT family violence response and management plans reflect this same approach. The ACT has prioritised primary prevention and improving support and service system responses in their fourth action plan to reduce violence against women and their children.[277] This involves educating ACT public service employees, with a focus on frontline staff such as teachers, nurses, and those who are regularly involved in family violence cases.[278] Additionally, the ACT is currently working on a new risk assessment and management framework for supporting an integrated domestic and family violence service system.[279] Furthermore, in undertaking reform processes that involve change on a systemic level, it is important that the government consults a varied range of women,[280] which the ACT has committed to do.[281]

Hence, the ACT already has measures in place to ensure continued improvement in family violence responses, demonstrating that structures already exist to support an offence of coercive control. Working towards an integrated approach between police, courts, and domestic violence support services would improve outcomes of a coercive control offence, as evidenced in Scotland. This ensures the criminal justice system is not solely relied upon, and the social and cultural issues associated with coercive control are acknowledged and addressed.

B *Community education campaigns*

Community education is essential for the success of a coercive control offence. Initiatives that aim to educate the community could cause a culture shift regarding public perceptions and understandings of coercive control.[282] Research has shown that female victims of coercive control are less likely to seek assistance if there has been no physical abuse.[283] As such, community education is essential so that victims and general members of the community alike can understand and identify coercive and controlling behaviours.

Tasmania's coercive control offences were enacted without a campaign of community engagement.[284] As a result, these offences had historically low rates of charges and prosecutions, particularly when compared to rates of family violence incidents. These offences

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[274] Ibid 75.
[275] ANROWS, *Defining and responding to coercive control* (n 25) 6.
[276] Scott (n 101) 181, citing Scottish Government and Convention of Scottish Local Authorities, *A Partnership Approach to Tackling Violence Against Women in Scotland: Guidance for Multi-Agency Partnerships* (2009).
[277] ACT Government, *Australian Capital Territory Response: Australian Government National Plan to Reduce Violence against Women and their Children 2010-2022* (Fourth Action Plan 2019-2022, 2019) 4 <https://www.communityservices.act.gov.au/__data/assets/pdf_file/0004/1451272/Implementation-of-the-4AP.pdf>.
[278] Ibid 5.
[279] ACT Government Community Services Directorate, *ACT Domestic and Family Violence Risk Assessment and Management Framework: Supporting an integrated domestic and family violence service system* (Draft framework, October 2020).
[280] ANROWS, *Defining and responding to coercive control* (n 25).
[281] ACT Government, *Australian Capital Territory Response: Australian Government National Plan to Reduce Violence against Women and their Children 2010-2022* (n 277) 4.
[282] Douglas, 'Legal systems abuse' (n 13) 94.
[283] Hayley Boxall and Anthony Morgan, *Experiences of coercive control among Australian women* (Statistical Bulletin 30, March 2021) 10.
[284] Barwick, McGorrery and McMahon (n 68) 149.

have seen more use in recent years[285], which could be partially attributed to current cultural changes in understandings of family violence.[286] However, community perceptions that family violence primarily involves physical violence remain,[287] alongside beliefs that physical violence is more severe than emotional abuse.[288] Yet, victims of family violence report that their experiences of coercive control are more severe than any physical abuse they have endured.[289] Addressing perceptions of family violence as a pattern of abuse as opposed to single incidents of violence may have impacts on earlier recognition of abusive behaviour, empowering victims to take action. As such, community education is essential to ensure effective implementation of a coercive control offence.

C *Training legal professionals and police*

There are numerous impactful benefits of engaging police in specialised coercive control training. Police training programs would result in police officers who are more responsive to coercive control, and who understand the complex relationship dynamics that occur in abusive relationships.[290] This could cause a reduction in missed cases of coercive control, as police officers focus on the greater context of incidents of family violence. In doing this, police may become more capable of capturing relevant evidence and bringing charges against perpetrators. With a thorough understanding of the behaviours associated with coercive control, police may develop the capacity to recognise subtle manipulative tactics employed by perpetrators. As a result, they may become more understanding of the difficulties victims face when discussing their abuse and engaging with police investigations.[291]

These benefits have been recently demonstrated in Scotland. In preparation for the enactment of Scotland's domestic abuse offence, funding was allocated for widespread training of police and first responders.[292] As a result, Scotland police are better equipped to identify coercive and controlling behaviours. The uptake of Scotland's offence has been substantial, and 96% of charges laid have been prosecuted,[293] suggesting that police are correctly identifying coercive control. A recent study found that training of police officers resulted in a 41% increase in coercive control offence arrests.[294] Therefore, the fast uptake of the Scottish offence can be attributed to the extensive education provided to police prior to the commencement of the legislation.

It is therefore necessary to provide adequate training for all professionals who are involved in matters of family violence. This includes police, judicial officers, lawyers, domestic violence crisis services, and women's aid organisations.

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[285] Women's Legal Service Tasmania (n 59) 2.2.
[286] For example, through media campaigns following the death of Hannah Clarke in QLD.
[287] NSW Government, *Coercive Control Discussion Paper* (n 88) 37.
[288] Kim Webster et al, *Australians' attitudes to violence against women and gender equality: findings from the 2017 National Community Attitudes towards Violence against Women Survey* (Research report, March 2018) 41.
[289] McMahon and McGorrery, 'Criminalising Coercive Control: An Introduction' (n 129) 14.
[290] McGorrery and McMahon, 'Prosecuting controlling or coercive behaviour in England and Wales' (n 91) 579.
579.
[291] Heather Douglas, 'Battered Women's Experiences of the Criminal Justice System: Decentring the Law' (2012) 20 *Feminist Legal Studies* 121, 132.
[292] Scotland Police, *Domestic Abuse Matters Scotland Evaluation Report* (Report, May 2020) 3.
[293] Crown Office and Procurator Fiscal Service (Scotland), *Domestic Abuse and Stalking Charges in Scotland 2019-20* (Report, 8 September 2020) 8. <https://www.copfs.gov.uk/media-site-news-from-copfs/1902-domestic-abuse-and-stalking-charges-in-scotland-2019-20>.
[294] Iain Brennan et al, 'Policing a new domestic abuse crime: effects of force-wide training on arrests for coercive control' (2021) *Policing and Society* (advance online publication) 1.

CONCLUSION

A number of significant consequences exist in creating an offence of coercive control. The complex nature of coercive control creates challenges in both construction and implementation of an offence. Risks of misidentification of victims, substantial burdens on victims, and the use of legal systems as a method for further abuse create difficulties in determining whether an offence would be worthwhile. Additionally, criminalisation may well contribute to the serious disproportionate issues that Aboriginal and Torres Strait Islander people encounter in the Australian criminal justice system. Nevertheless, through comprehensive understanding of the potential risks, alongside engagement with mitigation strategies, these consequences can be overcome.

Therefore, the evaluation provided in this article supports the conclusion that it is time for the ACT to consider criminalising coercive control. Acknowledging the wrongs of coercive and controlling behaviours validates the experiences of victims, and sends a clear message to perpetrators that their behaviour is unacceptable and will not be tolerated in the ACT. Indeed, it is surely justified to criminalise behaviours that cause considerable adverse effects for victims. By taking a proactive approach, greater protection is afforded to victims of family violence. Alongside this, early intervention could prevent further deaths of women in the ACT, like Tara Costigan, a Canberra woman who was tragically murdered by her ex-partner following experiences of emotional abuse.

However, it is crucial for the ACT to recognise that a coercive control offence cannot operate in isolation. The Territory must make a commitment to investing in system-wide reforms through multi-agency support services, community education campaigns, and extensive specialised training of police officers. In this way, a coercive control offence will achieve the result of providing better protection to victims of family violence without causing harmful consequences.

Locked Up And Drugged Up: Regulating The Use Of Chemical Restraint In Residential Settings

Mallory Comyn*

This article considers law regarding the use of chemical restraint in Australian residential settings, building on the Royal Commission into Aged Care Quality & Safety disclosures regarding the alarming extent of neglect and abuse in Australia's aged care facilities. It identifies international and domestic principles alongside benchmark overseas regimes

I Introduction

From its establishment in 2018 to its Final Report in May 2021, the Royal Commission into Aged Care Quality and Safety ('ACRC') revealed to the public the alarming extent of neglect and abuse in Australia's residential aged care facilities. Of particular concern were findings that people are being medicated so that 'everyone looks fine … they're all clean and tidy and they're not crying out.'[1] Medication is often used as a form of behavioural control rather than treatment (known as 'chemical restraint'), yet this was not the first-time concerns have been raised about this practice: coroner's courts have established that Australians have died as a result of chemical restraint.[2]

Though this issue is further clouded by the lack of comprehensive national data on the use of these practices,[3] evidence at the ACRC hearings revealed that family consent was typically not being sought before increasing or introducing new medications to care recipients,[4] that medication was provided without an official diagnosis of a mental health condition,[5] and that the staff in these facilities were not being trained to administer *pro re nata* (unscheduled) medication.[6] The scientific literature is also dominated by concerns about the range of

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[1] Transcript of Proceedings, *Royal Commission into Aged Care Quality and Safety* (Sydney Hearing, 15 May 2019) T1708.6-10 <https://agedcare.royalcommission.gov.au/media/10021> ('*ACRC Transcript*').

[2] Office of the State Coroner (Western Australia), *Annual Report* (Report, 30 June 2012) 70-2; Coroner's Court of Western Australia, *Inquest into the death of Antoinette Williams* (Inquest, 11 April 2014).

[3] Royal Commission into Aged Care Quality and Safety, *Restrictive practices in residential aged care* (Background Paper 4, 3 May 2019) 11 ('*Restrictive Practices*').

[4] Royal Commission into Aged Care Quality and Safety, *Final Report Volume 4A* (Final Report, 2021) 99.

[5] Ibid 115.

[6] Ibid 215, 218.

potential side effects.[7] On the more serious end, these medications have been shown to increase rates of falls,[8] cerebrovascular adverse effects,[9] and mortality.[10]

The nature of chemical restraint requires that research and doctrine is drawn from sources dealing with mental health disorders as well as other health-care settings such as hospitals. However, there is significant overlap between the circumstances and legal challenges faced by persons with mental health illness, cognitive disabilities and intellectual disabilities[11] such that these groups are comparable. Nevertheless, due to word length limitations, the policy suggestions here will be limited to residential aged care in Australia.

With several reports[12] being released in recent years on the conditions in residential aged care, particularly regarding the use of chemical restraint in these facilities, states are under increasing pressure to eliminate the use of chemical restraint against persons with disabilities as a violation of a person's human rights.[13] However, the author of this article was unable to identify any published study indicating that complete elimination of chemical restraint is a viable alternative.[14] This suggests that there is a genuine need for original research exploring solutions for this problem, not only because, even where legislation exists to prevent abuse, it may not be compliant with to Australia's obligations under the *Convention of the Rights of*

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[7] See generally A R Atti et al., 'A systematic review of metabolic side effects related to the use of antipsychotic drugs in dementia' (2014) 26(1) *International Psychogeriatrics* 19; Anna Song Beeber et al., 'Potential Side Effects and Adverse Events of Antipsychotic Use for Residents with Dementia in Assisted Living: Implications for Prescribers, Staff and Families' (2021) *Journal of Applied Gerontology* 1-8; Silvio Caccia, 'Safety and Phamacokinetics of Atypical Antipsychotics in Children and Adolescents' (2013) 15 *Paediatric Drugs* 217; Shan Xing and Todd Lee, 'Increased Risk of Diabetes Among 6-24-Year-Olds Using Second Generation Antipsychotics' (2017) 27(9) *Journal of Child and Adolescent Psychopharmacology* 782; Liesbeth Aerts et al., 'Why Deprescribing Antipsychotics in Older People with Dementia in Long-term Care is not Always Successful: Insights from the HALT Study' (2019) 34(11) *International Journal of Geriatric Psychiatry* 1572.

[8] See generally Yu-Jung Wei et al., 'Fall and Fracture Risk in Nursing Home Residents with Moderate-to-Severe Behavioral Symptoms of Alzheimer's Disease and Related Dementias Initiating Antidepressants or Antipsychotics' (2017) 72(5) *Journals of Gerontology: Medical Sciences* 695, 697-700.

[9] See generally Vikrant Mittal et al., 'Risk of Cerebrovascular Adverse Events and Death in Elderly Patients with Dementia When Treated with Antipsychotic Medications: A Literature Review of Evidence' (2011) 26(1) *American Journal of Alzheimer's Disease and Other Impairments* 10, 11-7.

[10] See generally Philip S Wang et al., 'Risk of Death in Elderly Users of Conventions vs. Atypical Antipsychotic Medications' (2005) 353(22) *The New England Journal of Medicine* 2335, 2338-9.

[11] See, eg, Trine Lise Bakken and Heidi Sageng, 'Mental Health Nursing of Adults with Intellectual Disabilities and Mental Illness: A Review of Empirical Studies 1994-2013' (2016) 30(2) *Archives of Psychiatric Nursing* 286, 286-7.

[12] See eg, ICAC South Australia, *Oakden: A Shameful Chapter in South Australian History* (Final Report, 28 February 2018) ('The Oakden Report'); Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Report, 2014) ('*Equality, Capacity and Disability*'); Kate Carnell and Ron Paterson, *Review of National Aged Care Quality Regulatory Processes* (Report, October 2017); Australian Law Reform Commission, *Elder Abuse – A National Legal Response* (Final Report, 14 June 2017) ('*Elder Abuse*').

[13] See, eg, Committee on the Rights of Persons with Disabilities, *Report on the Committee on the Rights of Persons with Disabilities,* UN GAOR, 72nd sess, Supp No 55, UN Doc A/72/55 (25 March 2015 – 2 September 2017) annex I, [10]-[11]; Committee on the Rights of Persons with Disabilities (n 12) [42]; Tina Minkowitz, 'The United Nations Convention on the Rights of Persons with Disabilities and the Right to be Free from Nonconsensual Psychiatric Interventions' (2007) 34(2) *Syracruse Journal of International Law and Commerce* 405; Laura Davidson, 'A Key, Not a Straitjacket: The Case for Interim Mental Health Legislation Pending Complete Prohibition of Psychiatric Coercion in Accordance with the Convention on the Rights of Persons with Disabilities' (2020) 22(1) *Health and Human Rights Journal* 163; Centre for the Human Rights of Users and Survivors of Psychiatry, *Why Mental Health Laws Contravene the CRPD – An Application of Article 14 with Implications for the Obligations of States Parties* (Report, 16 September 2011).

[14] Tahani Hawsawi et al., 'Nurses' and Consumers' Shared Experiences of Seclusion and Restraint: A Qualitative Literature Review' (2020) 29 *International Journal of Mental Health Nursing* 831, 832.

Persons with Disabilities ('CRPD'),[15] but also because the concerning levels of chemical restraint abuse necessitate a response.

This article takes an interdisciplinary approach to the research question, combining doctrinal research, legal and regulatory theory, as well as insights from empirical and scientific studies on chemical restraint. Working within a reformist paradigm of legal research, this article draws its primary sources from both Australian and Canadian case law and tribunal decisions to provide the doctrinal context required to answer the following questions. First, the judicial interpretation of the issues presented by chemical restraint is important because the law, as a form of communication, provides direct insights into the social response to pertinent issues,[16] in this case, how the norms embodied in the CRPD have been implemented in practice. Second, this can be subjected to the lens of regulatory theory to provide a critical perspective[17] and contextual frame[18] for the issue of chemical restraint and how it can be viably regulated.

To justify this comparative approach, there is a long tradition of comparing Australian and Canadian law as these jurisdictions provide a suitable balance of similarity and dissimilarity for comparative purposes.[19] The issue of chemical restraint is topical in both jurisdictions. Both jurisdictions are federations that have received English law, meaning that there are similar institutions, battles between federal and provincial governments, and extra layers of complexity to ratifying and implementing international agreements.[20]

However, measures that have been effective in one context cannot be simply transplanted to another. For example, a key difference is that Australia does not have a federal bill or charter of rights. In Canada, as will be discussed below, the *Charter of Rights and Freedoms* ('the *Charter*')[21] plays a significant part in determining how chemical restraint is practised and regarded. However, the reality of the Canadian restraint experience is unlikely to be so different that Australia could afford to ignore the lessons learned.

Though doctrine and theory are necessary to understand the substantive law on chemical restraint, alone such a methodology cannot deal with the broader context, both social and scientific, that this practice occurs in.[22] As empirical research is beyond the scope of this article, secondary resources are drawn from a wide variety of sources to form a part of the evidence base for its reform suggestions. Research into this area acknowledges that there are several terms that have the same meaning as 'chemical restraint', which include 'forced medication', 'forced sedation', 'emergency sedation' and 'emergency tranquilisation'. When searching databases for both scientific and legal articles, a variety of terms were used to access a broader range of literature.

Structure

This article begins with a discussion of theories of disability in Part II. This part outlines the main conceptualisations of 'disability' from the past few centuries, before evaluating the ethical implications of chemical restraint, drawing on the work of Michel Foucault, Immanuel Kant and others. Part III addresses some of the key regulatory challenges for chemical

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[15] Yvette Maker and Bernadette McSherry, 'Regulating restraint use in mental health and aged care settings: Lessons from the Oakden scandal' (2019) 44(1) *Alternative Law Journal* 29, 31-2; *Convention on the Rights of Persons with Disabilities,* opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) ('*CRPD*').

[16] Mary Donnelly, 'Changing Values and Growing Expectations: The Evolution of Capacity Law' (2017) 70(1) *Current Legal Problems* 305, 308.

[17] Terry Hutchinson, 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law' (2015) 8(3) *Erasmus Law Review* 130, 132.

[18] Ibid 138.

[19] Mathias Siems, *Comparative Law* (Cambridge University Press, 2nd ed, 2018) 18.

[20] Steven Hoffman, Lathika Sritharan and Ali Tejpar, 'Is the UN Convention on the Rights of Persons with Disabilities Impacting Mental Health Laws and Policies in High-Income Countries? A Case Study of Implementation in Canada' (2016) 16(28) *BMC International Health and Human Rights* 1, 2.

[21] *Canada Act 1982* (UK) c 11, sch B pt I s 1 ('*Canadian Charter of Rights and Freedoms'*).

[22] Hutchinson (n 17) 138.

restraint, focusing on how regulation must be built on a strong legal foundation to ensure coherence, particularly in light of the ethical dilemmas posed in Part II. Part IV presents a comparative doctrinal overview of case law and tribunal decisions from both Australia and Canada to examine how these countries are implementing the new norms introduced by the CRPD. This significance of these doctrinal trends for regulation of aged care is explored in Part V. This part evaluates a model for chemical restraint regulation within the norms imposed by the CRPD. It argues that while the CRPD is unable to truly address the root cause of legal disability, it remains relevant as an aspirational target. The part then concludes with a few key policy recommendations. Part VI concludes the article, drawing together the arguments from the previous part.

II THEORIES OF DISABILITY

This part outlines the evolution of the concept of 'disability', and what this has meant for persons with disabilities who encounter the medical field. Part A begins by discussing the history of disability and forced treatment, with particular attention paid to the work of Michel Foucault. Part B concerns the different conceptualisations of 'disability' that have evolved over the past few decades. Part C argues that chemical restraint presents a Kantian 'antinomy' — a diabolical ethical dilemma such that the solution to prevent abuse is not as simple as banning the practice entirely.

A *The Theories of Disability*

The concept of what constitutes 'disability' has changed significantly over the last few centuries, beginning with a pre-Enlightenment 'spiritual' model, to a post-Enlightenment medical model, and finally, the modern social model.[23] Most Western conceptions of disability have centred around disability as a 'deviance' from social norms of behaviour. Responses to disability centre around 'fixing' this deviation, based on normative judgements of what it means to be 'human.' Under traditional moral philosophy the human capacity for free, rational and moral choice has been the centre of personhood.[24] For persons with intellectual and cognitive disabilities, rationality-based personhood has been, and continues to be, used to deny the full array of rights ascribed to others. This is often in an attempt to force treatment that may resolve the 'deviance' under the guise of such treatment being in a person's 'best interests'.

This presumption is a legacy of previous conceptualisations of disability. The spiritual model was underpinned by the idea of disability as both a misfortune that deserved a compassionate response, and a manifestation of evil.[25] The aim was to drive out that evil so as to cleanse a person of their disability.[26] This aim persisted under the medical model, except that the religious imperative was replaced by a scientific lens: disability could be explained by medical (ie biological) defects that could be cured.[27] Under this model, the locus of the disability is within the individual,[28] who can therefore be 'fixed'. The medical model ultimately failed on two grounds: it led to a number of cruel, inefficient treatments being practised on persons with disabilities (discussed below), while at the same time, many medical practitioners ignored the consequences.

In contrast, the social model of disability has gained popularity in recent decades, with its biggest achievement being the coming into force of the CRPD,[29] which introduced the social

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[23] Henri-Jacques Stiker, *A History of Disability* (University of Michigan Press, 1997) 117-22, cited in Daniel G Atkins and Robert L Hayman Jr, 'Disability and the Law: An Essay on Inclusion, from Theory to Practice' (2017) 23(2) *Widener Law Review* 167, 168-70.

[24] Michael Robertson, Kirsty Morris and Gary Walter, 'Overview of Psychiatric Ethics V: Utilitarianism and the Ethics of Duty' (2007) 15(5) *Australasian Psychiatry* 402, 406.

[25] Atkins and Hayman Jr (n 23) 168.

[26] Ibid.

[27] Stiker (n 23) 18, cited in Atkins and Hayman Jr (n 23) 168.

[28] Atkins and Hayman Jr (n 24) 170.

[29] *CRPD* (n 15).

model paradigm to international law.[30] The social model explains that disability is the gap between a person's abilities and what society expects a person to do[31] wherein 'disability' should be contrasted with 'impairment' as two distinct concepts. The former is structural, as well as culturally and historically specific, and the latter is individual and private.[32] Therefore, '[t]he problem is not the person with disabilities; the problem is the way that normalcy is constructed to create the "problem" of the disabled person.'[33] This model argues that instead of trying to force a person to live in a world not built for them, it is the environment that should change.

While this model has been important in improving the political visibility of persons with disabilities, it is not without its flaws: the social model risks insinuating that impairment is irrelevant[34] and, in practice, removing all socially imposed barriers to full participation would be almost impossible.[35] The CRPD does not address these concerns either, as it does not provide an answer about what States should do when social intervention does not 'make rights real'[36] for a person with disabilities.

Despite its impracticalities, the social model is useful to reveal the complexities of the impairment/disability dynamic. This dynamic has been the subject of study under critical disability theory, which has emerged as a mode of challenging traditional, ableist conceptions of disability. Critical Disability Theory explores how labels such as disabled/abled and impaired/non-impaired have 'obscured connections between people with and without impairment'[37] by drawing on the work theorists such as Foucault to dissect disability in terms of its connection to knowledge and power.[38]

Foucault's theories offer particular insight into the ways that being designated as 'disabled' has enabled the maltreatment of persons with disabilities for centuries: the sharpening distinction between normal and abnormal in medical knowledge caused the 'systemic closure of opportunities for agency' for persons with disabilities,[39] who were then transformed from 'human beings into human subjects'.[40] The work of Foucault focuses on the creation of this human subject, by examining how knowledge and discourse 'systematically form the objects of which they speak'[41] in addition to how power itself is both productive as well as dynamically linked to fields of knowledge.[42] For example, medical knowledge creates the categories of normal/abnormal, which in turn informs how certain people are to be treated by the law and medical professionals. Foucault also wrote of 'subjugated knowledge' such as that held by a psychiatric nurse which is excluded from the formal discourse, described as a 'whole set of

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[30] Peter Bartlett, 'The United Nations Convention on the Rights of Persons with Disabilities and Mental Health Law' (2012) 75(5) *Modern Law Review* 752, 758-759.
[31] Atkins and Hayman Jr (n 23) 171.
[32] Tom Shakespeare, 'The Social Model of Disability' in Lennard J. Davis (ed), *The Disability Studies Reader* (Routledge, 5th ed, 2017) 195, 197.
[33] Jay Dolmage, 'Disabled Upon Arrival: The Rhetorical Construction of Disability and Race at Ellis Island' in Lennard J Davis (ed), *The Disability Studies Reader* (Routledge, 5th ed, 2017) 43, 65.
[34] Shakespeare (n 32) 199.
[35] Ibid 554.
[36] Bartlett (n 30) 759.
[37] Nick Watson, 'Theorising the Lives of Disabled Children: How Can Disability Theory Help?' (2012) 26 *Children and Society* 192, 197.
[38] Ibid.
[39] Bill Hughes, 'What Can a Foucauldian Analysis Contribute to Disability Theory?' in Shelley Lynn Tremain (ed), *Foucault and the Government of Disability* (University of Michigan Press, 2015) 83.
[40] Michel Foucault, 'The Subject and Power' in Hubert Dreyfus and Paul Rabinow (eds) *Michel Foucault: Beyond Structuralism and Hermeneutics* (University of Chicago Press, 1983) 208 ('The Subject and Power').
[41] Michel Foucault, *The Archaeology of Knowledge* (Routledge, 1972) 49 ('The Archaeology of Knowledge').
[42] Scott Yates, 'Truth, Power, and Ethics in Care Services for People with Learning Disabilities' in Shelley Lynn Tremain (ed), *Foucault and the Government of Disability* (University of Michigan Press, 2015) 65, 67.

knowledges that have been disqualified as inadequate to their task or insufficiently elaborated: naïve knowledges, located low down on the hierarchy, beneath the required level of cognition of scientificity.'[43]

From a purely Foucauldian perspective, even though he never explicitly addresses disability/impairment,[44] both the social model and the medical model of disability are coercive: power and knowledge are used to demand the correct performance of a person's social roles, while also controlling a person who does not have the desired physiological traits.[45] In the past, methods of doing so have included electroconvulsive shock therapy, deep sleep therapy and the introduction of psychotropic medication, all of which are 'treatments' that became popular at the height of the medical model.[46] The treatments were designed to 'fix' the impairment and to normalise the person, yet often had severe side effects in trying to do so.

The social model is also coercive in that it discursively equates disability with oppression: [47] oppression creates disability such that this model attaches persons with disabilities with an 'oppressed' identity.[48] It becomes impossible to find a person with a disability that is not oppressed to some degree.[49] That is not to say that the social model should be rejected: Foucault recognised that '[d]iscourse transmits power and produces power; it reinforces it, but it also undermines and exposes it, renders it fragile and makes it possible to thwart it.'[50] By limiting disability to being socially constructed, the social model asks society to question social conventions and environmental designs that it takes for granted, but it also denies that impairment is an observable attribute of an individual that forms an essential aspect of their existence.[51] This disregards the lived experience of people with disabilities. Such experience should itself be considered as a 'subjugated knowledge'[52] that must be brought to the forefront of all discussions concerning disability policy.

B *Disability and Control*

Theorists stress the importance of respect for autonomy because patients and residents in residential and healthcare settings will inevitably 'occupy a subordinate position to their healthcare provider.'[53] In the past, the subordinate position occupied by persons with disabilities and other minorities[54] has resulted in barbaric treatment, either under the guise of scientific advancement or because such treatments were seen to be in the person's 'best interests'. Tracing the history of treatments such as electroconvulsive shock therapy ('ECT'), deep sleep therapy ('DST') and psychotropic medication, in light of their effects of disability rights, is useful to understand the rhetoric surrounding modern chemical restraint.

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[43] Michel Foucault, 'Two Lectures' in Colin Gordon (ed) *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977* (Pantheon, 1980) 81; Barry Allan, 'Foucault's Nominalism' in Shelley Lynn Tremain (ed), *Foucault and the Government of Disability* (University of Michigan Press, 2015) 101 ('*Two Lectures*').
[44] Hughes (n 39) 81.
[45] Krzysztof Pezdek and Lotar Rasiński, 'Between Exclusion and Emancipation: Foucault's Ethics and Disability' (2017) 18 *Nursing Philosophy* 1, 3.
[46] Stiker (n 24) 121-2, cited in Atkins and Hayman Jr (n 24) 169.
[47] Shakespeare (n 32) 199.
[48] Yates (n 42) 68.
[49] Shakespeare (n 32) 199.
[50] Michel Foucault, *The History of Sexuality: Volume one: An Introduction,* tr Robert Hurley (Random House, 1978) 100-1.
[51] Michael Palmer and David Harley, 'Models and Measurement in Disability: An International Review' (2012) 27 *Health and Policy Planning* 357, 358.
[52] Foucault, 'Two Lectures' (n 43) 81, cited in Allan (n 43) 101.
[53] M Carmela Epright, 'Coercing Future Freedom: Consent and Capacities for Autonomous Choice' (2010) 38(4) *Journal of Law, Medicine and Ethics* 799, 802.
[54] See, generally Fabrizio Turoldo, 'Relational Autonomy and Multiculturalism' (2010) 19(4) *Cambridge Quarterly of Healthcare Ethics* 542.

Introduced to Australia in 1941,[55] ECT has been the subject of increasingly tight regulation, following the lead of the United States.[56] ECT can be administered in a modified and unmodified form, with unmodified ECT labelled 'particularly barbaric'[57] because it does not involve anaesthesia or muscle relaxants. ECT, like chemical restraint, is a subject of debate because of its lack of long-term research, risk of brain injury, and the idea that the benefits outweigh any risks attached.[58]

DST was used in conjunction with ECT. It was a practice where patients were sedated for a duration of between two weeks[59] and one month[60] using a cocktail of medications to keep a patient unconscious.[61] DST appeared on the public radar in Australia in 1967 when the Sydney Morning Herald revealed concerning reports of the level of medications given to a 23 year old woman who died at Chelmsford Private Hospital while receiving the treatment.[62] Similar to the history of uncovering the aged care quality issues, the Chelmsford Royal Commission brought public attention to the practice.[63] Justice Slattery, in the Royal Commission reports, was severely critical of the behaviour of medical professionals at Chelmsford: many doctors were aware of the dangers of DST at the time it was being practised, proving that safeguards have little benefit where medical professionals are not willing to report colleagues.[64]

The events at Chelmsford brought public attention to abusive practices against vulnerable people, but they were far from an isolated incident. Other Australian institutions for vulnerable people have also been characterised by disease, neglect, overcrowding and abuse.[65] A key part of the process to close such institutions, both in Australia and abroad, was the introduction of psychotropic medications.[66] Arguably, these medications had some positive effect on the daily lives of people with mental disabilities: because they were able to induce 'socially acceptable behaviour'[67] such that institutionalisation rates decreased, psychotropic medication may have played a part in the emergence of new philosophies about what was possible for healthcare.[68] However, another way of looking at this is that psychotropic medication created the possibility of restraining a person's behaviour without the need for physical restraints, thus resulting in the advent of chemical restraint and its abuse. From a Foucauldian lens, 'power' — in this case, that of the medical field and the professionals that

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[55] Patrick Clarke, 'Hip Hip Hooray, ECT turns 80!' (2019) 27(1) *Australasian Psychiatry* 53, 53.
[56] Ibid 55.
[57]Symposium, 'International Human Rights Law and the Institutional Treatment of Persons with Mental Disabilities: The Case of Hungary' (2002) 21(3) *New York Law School Journal of International and Comparative Law* 339, 354.
[58] John Read et al., 'Should We Stop Using Electroconvulsive Therapy?' (2019) 364 *British Medical Journal* 1, 1-3.
[59] Merrilyn Walton, 'Deep sleep therapy and Chelmsford Private Hospital: Have We Learnt Anything?' (2013) 21(3) *Australiasian Psychiatry* 206, 206.
[60] Robert Kaplan, 'Deep Sleep Therapy in Australia' (2013) 21(5) *Australasian Psychiatry* 505, 505.
[61] Walton (n 59) 206.
[62] Ibid
[63] *Medical Board of Australia v Woollard* [2017] WASCA 64, [140].
[64] Walton (n 59) 211.
[65] David Richmond, *Inquiry into Health Services for the Psychiatrically Ill and Developmentally Disabled* (Final Report, 1983); Criminal Justice Commission, *Report of an Inquiry Conducted by the Honourable D G Stewart into Allegations of Official Misconduct at the Basil Stafford Centre* (Final Report, 11 April 1995); https://disability.royalcommission.gov.au/system/files/exhibit/EXP.0003.0002.0001.pdf
[66] Meghan Gallahger, 'No Means No, or Does It? – A Comparative Study of the Right to Refuse Treatment in a Psychiatric Institution' (2016) 44(2) *International Journal of Legal Information* 137, 154-155.
[67] William Gronfein, 'Psychotropic Drugs and the Origins of Institutionalisation' (1985) 32(5) *Social Problems* 437, 443.
[68] Ibid 450.

work in this area — creates the field of possible action,[69] such that chemical restraint becomes a viable option.

C *Antinomy of Restraint: Enhancement Technologies, Liberty and Autonomy*

Enhancement technologies are 'the application of biotechnological devices aimed at augmenting human physical and mental traits'[70] with the aim to 'preserve and augment the vitality of the body and to enhance the happiness of the soul'.[71] These technologies are the subject of much debate: from a conservative bioethical position, enhancement technologies threaten the foundation of what it means to be human[72] but from a post humanist position, a 'human' is a constantly evolving subject, such that enhancement technologies are the next form of evolution.[73] Dignity is a central part of the discussion, often drawing from the Kantian concept of dignity grounded in reason and moral agency. From a conservative perspective, enhancements are a threat to human dignity: it is the acceptance of limitation that defines humanity such that '[w]ith biotechnical interventions … we cannot really own the transformations nor experience them as genuinely ours.'[74] For the post-humanist, dignity is expressed through human action[75] such that enhancements might make people more efficient or 'capable of independent initiative'.[76] Neither of these perspectives are necessarily wrong: they are an 'antinomy in which the concepts of human nature, human goods and flourishing vie with progress and choice, with no way to compare the opposing metaphors.'[77]

Patrick Kermit employs the idea of 'Kantian antinomies' in his exploration of the use of Cochlear implants.[78] These antinomies are mutually exclusive concepts that can each be, simultaneously, true.[79] Antinomies contain a thesis and an antithesis that can argue their own consistency by demonstrating that the other is inconsistent[80] thus both statements are 'true'. In relation to understanding 'truth', Foucault's focus on discourse as 'games of truth'[81] reveals how particular objects or concepts are 'systematically form[ed]'[82] by the discourse around them. 'Truth' has an ethical dimension, such that where it can be proved that a 'truth' is only, for example, a social convention, then this creates a powerful argument for altering society because it implies the space for liberation.[83] Returning then to the social model's impairment/disability divide, it is clear that 'disability' is a discursively created concept, as are

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[69] Foucault, 'The Subject and Power' (n 40) 220.
[70] Kurt Zemlicka, 'The Rhetoric of Enhancing the Human: Examining the Tropes of 'The Human' and 'Dignity' in Contemporary Bioethical Debates over Enhancement Technologies' (2013) 46(3) *Philosophy & Rhetoric* 257, 256.
[71] Leon Kass, 'Beyond Therapy: Bioetechnology and the Pursuit of Happiness' (Discussion Paper, President's Council on Bioethics, 2003) < https://bioethicsarchive.georgetown.edu/pcbe/background/kasspaper.html>.
[72] Zemlicka (n 70) 266.
[73] Ibid; John Harris, *Enhancing Evolution: The Ethical Case for Making Better People* (Princeton University Press, 2007) II.
[74] Kass (n 71). 'We must move from the hubristic attitude of the powerful designer to look the proposed improvements as they impinge upon the nature of the one being improved.'
[75] Zemlicka (n 70) 276.
[76] Nick Bostrom, 'Dignity and Enhancement' in President's Council on Bioethics (ed), *Human Dignity and Bioethics: Essays Commissioned by the President's Council on Bioethics* (President's Council on Bioethics, 2008) ch 8 < https://bioethicsarchive.georgetown.edu/pcbe/reports/human_dignity/>.
[77] Zemlicka (n 70) 269.
[78] See Patrick Kermit, 'Deaf or deaf? Questioning Alleged Antinomies in the Bioethical Discourses on Cochlear Implantation and Suggesting an Alternative Approach to d/Deafness' (2009) 11(2) *Scandinavian Journal of Disability Research* 159 ('Deaf or deaf?').
[79] Harry James Moore, 'Antinomism in Twentieth-Century Russian Philosophy: The Case of Pavel Florensky' (2021) 73(1) *Studies in East European Thought* 53, 55-7.
[80] Kermit, 'Deaf or deaf?' (n 78) 167.
[81] Michel Foucault, 'The Ethics of the Concern of the Self as a Practice of Freedom' in Paul Rabinow (ed), tr Robert Hurley, *Ethics: Subjectivity and Truth* (The New Press, 1997) 281, 282.
[82] Foucault, *The Archaeology of Knowledge* (n 42) 49.
[83] Kermit, 'Deaf or deaf?' (n 78) 167-8

the behaviours of concern that necessitate chemical restraint as a response. However, impairment is not: it is a natural state that results from biology.

ECT, DST and chemical restraint are all attempts at correcting biology. In the most basic sense, they should be considered enhancement technologies, however they are often also criticised for their impact, perceived or real, on a person's autonomy.[84] Focusing on chemical restraint, as an enhancement technology that alters a person's neurochemistry, the technique can be theorised in two opposing ways: either as a rights violation or as a mode of upholding a person's rights. If one of these is ontologically 'the truth' then this would carry weight for future disability policy, the dispute being whether or not to chemically restrain a person exhibiting behaviours of concern. However, if both are 'true', then there is no simple solution to the use of chemical restraint.[85]

1 *Chemical Restraint as a Rights Violation*

Beginning with the proposition that chemical restraint is a rights violation, the obvious place to start is with the CRPD as a source of human rights. The CRPD reinforced that persons with disabilities bear the same rights as all other people;[86] forced treatment is therefore banned under the CRPD. The Committee in its General Comment on Article 12 explained that 'forced treatment by psychiatric and other health and medical professionals is a violation of the right to equal recognition before the law and an infringement of the rights to personal integrity (art. 17); freedom from torture (art. 15); and freedom from violence, exploitation and abuse (art. 16).'[87] By overriding the decisions and wishes of persons with disabilities, only where this would not be done for persons without a disability, this is discriminatory and a violation of their rights to 'the full and equal enjoyment of all human rights and fundamental freedoms.'[88]

From a theoretical point of view, chemical restraint is also damaging because it contributes to forced normalisation of persons with disabilities: liberal societies valorise freedom of the individual, and society is structured around this ideal, with the individual striving for autonomy in all decisions.[89] It follows that the right to choose what happens with one's own body is fundamental,[90] even more so when considering that that chemical restraint does not cure a person's impairment, and that psychotropic medication can have serious side-effects[91] to the extent that chemical restraint can result in early death.[92] These points, taken together with the legal considerations under the CRPD, support the claim that chemical restraint is a rights violation.

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[84] See above n 13.

[85] Karen Nakamura, *Deaf in Japan: Signing and the Politics of Identity* (Cornell University Press, 2006) 144; Patrick Kermit, 'Enhancement Technology and Outcomes: What Professionals and Researchers Can Learn from Those Skeptical About Cochlear Implants' (2012) 20 *Health Care Analysis* 367, 370. To briefly give an analogy, Cochlear implants are at the centre of an ethical debate for Deaf people: when these devices were approved for implantation in children, Cochlear implants are able to treat a condition that was once untreatable, but they also cause damage to a minority culture 'which rejects the notion that treatment is desirable': If there were no difference between being deaf and Deaf, then there would be no debate over the ethics of Cochlear implants. The same can be said for chemical restraint because there is an ethical debate about 'forced normalisation' of persons seen as 'deviant': at 370.

[86] CRPD (n 15) art 1.

[87] Committee on the Rights of Persons with Disabilities (n 12) [42].

[88] CRPD (n 15) art 1.

[89] Fiona Kumari Campbell, 'Legislating Disability: Negative Ontologies and the Government of Legal Identities' in Shelley Lynn Tremain (ed), *Foucault and the Government of Disability* (University of Michigan Press, 2015) 108, 110.

[90] See, for example, *Wallace v Kam* (2013) 250 CLR 375.

[91] See above n 7.

[92] See above n 10.

2 *Chemical Restraint as a Method of Upholding Rights*

The antithesis of the above proposition is that chemical restraint instead upholds a person's rights, in a way that can be described 'empowerment by protection'. There are two arguments that lend support to this antithesis: the first is based on a social argument about a person's ability to participate in society, and the second is based on a relational conception of autonomy, which is to be contrasted with the traditional individualist approach.[93] Beginning again with the obligations under the CRPD, the CRPD enforces an individualist approach to autonomy, in that autonomy is 'the freedom to make one's own choices.'[94] Further, while it is true that the CRPD reinforces the rights of persons with disability not to be subjected to forced interventions, the CRPD also requires States to take effective and appropriate measures to 'enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life.'[95]

Empowerment is a way that this full inclusion and participation can be achieved, in that the theory of empowerment works to reduce the effects of social or personal blocks that prevent a person from exercising power over their own lives.[96] Yet, full participation in society is premised on an ability to adhere to social norms, [97] and this dynamic is recognised by the Committee on the Rights of Persons with Disabilities.[98] While this normative standard is the exact critique that the social model makes, this assumes that Western liberal societies are much more heterogenous than they actually are.[99] The real concern is not difference itself, but where the line should be drawn in restricting difference.[100]

This 'line' is critical for persons with cognitive and intellectual impairments that cause behaviours of concern, because these behaviours will limit a person's ability to fully participate in society: these can be 'personal' blocks (ie 'impairment'-based) rather than social ones (ie 'disability'-based). For example, if someone without the 'excuse' of an intellectual disability kicked or punched another person, this would be dealt with in the criminal justice system, which blocks a person from full participation in their community. It is easily accepted that such behaviours are 'where the line is drawn' when it comes to restricting difference. If there is no way of managing such behaviour,[101] then such behaviour will result in social isolation.

This is particularly important for persons with cognitive or intellectual disabilities, for whom denying dependence on social networks is to deny the reality of their daily existence. Yet, this is not what the CRPD intends: liberal autonomy, such as that which is upheld by the CRPD,[102] is challenged, for example, by the prevalence of delusions[103] and anosognosia (the clinical

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[93] Rosie Harding, 'Legal Constructions of Dementia: Discourses of Autonomy at the Margins of Capacity' (2012) 34(4) *Journal of Social Welfare and Family Law* 425, 427.
[94] CRPD (n 15) art 3(a).
[95] Ibid arts 26–29.
[96] Malcolm Payne, *Modern Social Work Theory* (Palgrave Macmillan, 3rd ed, 2005) 295.
[97] Simon Foley, 'Normalisation and Its Discontents: Continuing Conceptual Confusion over Theory/Praxis Issues Regarding the Empowerment of People with Intellectual Disability' (2016) 41(2) *Journal of Intellectual and Developmental Disability* 177, 182.
[98] Committee on the Rights of Persons with Disabilities, *General Comment No 6: On Equality and Non-discrimination,* UN Doc CRPD/C/GC/6 (26 April 2018) 2, [9].
[99] Foley (n 97) 182.
[100] Ibid.
[101] See, eg, Joyce B Wale, Gary S Belkin and Robert Moon, 'Reducing the Use of Seclusion and Restraint in Psychiatric Emergency and Adult Inpatient Services—Improving Patient-Centred Care' (2011) 15(2) *The Permanente Journal* 57, 60. Studies have shown that there is always a risk of significantly aggressive or violent persons, even when nonpharmacological interventions have been attempted: at 60.
[102] Harding (n 93) 428.
[103] See generally Madia Lozupone et al., 'Delusions in Dementias' in Colin R Martin and Victor R Preedy (eds), *Genetics, Neurology, Behaviour, and Diet in Dementia* (Academic Press, 2020) ch 41, 647.

inability to be aware of one's disease or impairment)[104] in some persons with cognitive impairments:[105] exercising an autonomous choice to refuse chemical restraint becomes literally impossible when a person is unable to understand the full facts of their own condition. Empowerment is therefore reliant on protecting a person, where autonomy is instead 'created by, dependent on, and exercised through relationships with other people.'[106] The relationships that people form are an intrinsic part of perceiving events: no one is ever truly able to make a completely autonomous choice, separate from the broader web of influence the person lives in. One such choice that may need to be made is the choice to control a person's behaviour via medication.

Therein lies the problem: as long as unconditional individualist autonomy and unconditional participation remain goals of a liberal society, disability will always have to be managed.[107] 'Empowerment' on these assumptions without management through protective policies and actions is not possible. That is not to say that there are no socially created barriers for persons with cognitive and intellectual disabilities that ought to be acknowledged.[108] If anything, this operates to strengthen the social model's societal critiques, in that the very foundation of liberal societies is disabling to people with cognitive and intellectual impairments: freedom is both limited by, and given by, the same social structures.[109] Yet, the CRPD operates to reinforce the same structures, by presuming an aspiration for all persons with disabilities for full autonomy, while ignoring the objective impacts of impairment on a person's ability to do so: this is the idea of leaving a person 'rotting with their rights on'.[110] On this view, fully unconditional participation or autonomy is an impossible goal for certain people without the use of chemical restraint.

3 *Chemical Restraint as an Ethical Antinomy*

Both of these perspectives have merit and can demonstrate flaws in the other. The first is based on several Articles of the CRPD,[111] such that there is a valid claim that chemical restraint is rights violation. The second argues that full social participation, also guaranteed under the CRPD,[112] is dependent on the ability to participate in society that, for some, can only be achieved with pharmacological intervention. Thus, chemical restraint is best regarded as a theoretical antinomy, to which the practical policy answer is highly dependent on a realist interpretation of the situation at hand requiring the use of restraint. While this argument is likely to be contentious, and would be rejected on the basis of the social model, it is also pragmatic to understand that a significant cultural shift will be required to change prescribing and administration habits in health care,[113] but simultaneously, it would be discriminatory to deny people medication if that were to improve their health outcomes. Therefore, rather than arguing that the practice must be banned outright, it is more useful to discuss ways in which the practice can be regulated to reduce the potential that it will be abused, such that the benefits no longer outweigh the risks.

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[104] E Mak et al., 'Clinical Associations of Anosognosia in Mild Cognitive Impairment and Alzheimer's Disease' (2015) 30(12) *International Journal of Geriatric Psychiatry* 1207, 1207.
[105] See generally ibid.
[106] Harding (n 93) 430.
[107] Kumari Campbell (n 89) 111.
[108] Jonas-Sebastien Beaudry, 'Welcoming Monsters: Disability as a Liminal Legal Concept' (2017) 29(2) *d*291, 316.
[109] Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton University Press, 1995) 7.
[110] Paul Appelbaum and Thomas Gutheil, '"Rotting with Their Rights On": Constitutional Theory and Clinical Reality in Drug Refusal by Psychiatric Patients' (1979) 7(3) *Journal of the American Academy of Psychiatry and Law* 306.
[111] See above n 87.
[112] See above n 95.
[113] Rory Sheehan et al., 'Psychotropic Prescribing in People with Intellectual Disability and Challenging Behaviour' (2017) 358 *British Medical Journal* 1, 2.

III CHALLENGES FOR CHEMICAL RESTRAINT REGULATION

This part discusses the issue of regulating chemical restraint, primarily how agencies and institutions can be structured for the development of personal and interpersonal rights.[114] Part A examines the experiences of staff and patients, as Foucault's source of 'subjugated knowledge'[115] to determine what are the key challenges for regulating chemical restraint. It discusses barriers to eliminating restraint at the industry level down to the experiences of nurses and patients. Part B outlines the key challenges for regulation, with a focus on how regulation should be structured to create a coherent system.

Traditional regulatory theory focuses on the ability of agencies to efficiently allocate scarce resources to achieve goals and safeguard minimum standards, with dispute resolution on the basis of rights left to the judiciary.[116] Yet, this results in a fragmented approach because the case law will only address certain time periods, environments or persons.[117] By leaving rights ultimately to the judiciary, this misses valuable opportunities for regulation to be the preferred method of 'organising social relations.'[118] Taken together, case law and regulation can serve 'to constitute market relations, to provide the frameworks for rights and processes that allow markets to work, and to protect markets from fragmentation.'[119] For this article, the market is residential settings, and the framework is that which will decide if chemical restraint has a place in modern disability policy. Any such framework is dependent on whether the risks of chemical restraint can be adequately minimised compared to its benefits.

A *The Experiences of Staff and Patients*

There is increasing pressure to eliminate the use of all restrictive practices in Australia[120] based on a number of programs internationally that have been able to successfully reduce the rates of restraint use.[121] However, no published studies have managed to present a viable model eliminating all use of seclusion and restraint.[122] The disregarded 'subjugated knowledges'[123] of those involved in chemical restraint incidents should therefore be examined to understand why these elimination attempts have failed.

Care workers recognise that there is a tension between human rights and duty of care[124] when restraint practices are used but a majority do not believe that it would be possible to maintain a safe environment if restraints were eliminated.[125] Restraint removal is also associated with

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[114] Hanoch Dagan and Roy Kreitner, 'The Other Half of Regulatory Theory' (2020) 52(2) Connecticut Law Review 605, 605.
[115] Foucault, *The Subject and Power* (n 40) 208.
[116] Dagan and Kreitner (n 114) 609.
[117] Ani B Satz, 'Overcoming Fragmentation in Disability and Health Law' (2010) 60(2) *Emory Law Journal* 277, 278.
[118] Robert Baldwin, Martin Cave and Martin Lodge, 'Why Regulate?' in Robert Baldwin, Martin Cave and Martin Lodge (eds), *Understanding Regulation* (Oxford Scholarship Online, 2015) 15, 22.
[119] Ibid.
[120] Australian Health Ministers' Advisory Council, *National Principles to Support the Goal of Eliminating Mechanical and Physical Restraint in Mental Health Services* (15 December 2016) < https://www.mentalhealthcarersnsw.org/wp-content/uploads/2017/05/National-Principles-to-Support-the-Goal-of-Eliminating-Restraint.pdf>
[121] See, for example: Len Bowers et al., 'Reducing Conflict and Containment Rates on Acute Psychiatric Wards: The Safewards Cluster Randomised Control Trial' (2015) 52 *International Journal of Nursing Studies* 1412; Sandra A Barton, Rebecca Johnson and Lydia V Price, 'Achieving Restraint-Free on an Inpatient Behavioral Health Unit' (2009) 47(1) *Journal of Psychosocial Nursing* 34.
[122] Hawsawi et al., (n 14) 832.
[123] Foucault, *The Subject and Power* (n 40) 208.
[124] Susan Koch, Rhonda Nay and Jacinda Wilson, 'Restraint removal: Tension Between Protective Custody and Human Rights' (2006) 1(3) *International Journal of Older People Nursing* 151, 157.
[125] Eimear Muir-Cochrane, Deb O'Kane and Candice Oster, 'Fear and Blame in Mental Health Nurses' Accounts of Restrictive Practices: Implications for the Elimination of Seclusion and Restraint' (2018) 27 *International Journal of Mental Health Nursing* 1511, 1513.

heightened levels of work and stress.[126] For nurses, the risk of personal physical and psychological injury during care presents a significant challenge to reducing restraint: for example, in one study implementing an initiative to reduce restraint, it was found that though the number of restraint incidents went down, the level of staff injury remained relatively level, indicating that there is always a risk of significantly violent or agitated persons causing injury.[127] Beyond concerns for personal safety, some nurses still feel vulnerable to accusations of negligence should a patient, staff member or visitor be injured, if that injury could have been prevented through restraint.[128] One nurse framed this as balancing a 'duty of care to 30 people or human rights for one.'[129]

The reactions of people who have been restrained are also complex, but overwhelmingly, the responses to restrictive practices are negative, namely that these events cause an immediate escalation of distress,[130] as well as embarrassment,[131] fear,[132] and anger.[133] However, there have been instances where people who have been forcibly medicated have reported positive effects[134] such as feeling calmer,[135] improved mental state,[136] and liking the sleep-inducing effect that medication has.[137] Some patients also prefer medication over seclusion[138] which, as an alternative to chemical restraint, can cause feelings of loneliness and distrust.[139] This supports the conclusion that there is a risk of poor outcomes and compliance with healthcare plans where people feel they are not involved in their own treatment.[140] Overall, many view chemical restraint in any instance as 'a form of abuse'[141] and emphasise that medication should be used as a last resort. However, there is also evidence to suggest that time assuages anger about restraint incidents, when the person understands why restraint was clinically necessary[142] but this is dependent on the person's trust in their care team.[143]

There are several studies[144] that show the importance of the therapeutic care relationship in helping a person understand a restraint incident. From a Foucauldian perspective, where the relationship between the patient and the care provider is itself a power dynamic, this relationship will influence whether a restraint incident is perceived as positive or negative: for

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[126] J Murray and C Cott, 'Nursing Staff Perceptions of the Use and Reduction in the Use of Physical Restraints' (1998) 22(1) *Perspectives* 2, cited in Koch, Nay and Wilson (n 124) 155.
[127] Wale, Belkin and Moon (n 101) 60.
[128] Koch, Nay and Wilson (n 124) 155.
[129] Muir-Cochrane, O'Kane and Oster (n 125) 1514.
[130] B Christopher Frueh et al., 'Special Section on Seclusion and Restraint: Patients' Reports of Traumatic or Harmful Experiences Within the Psychiatric Setting' (2005) 56(9) *Psychiatric Services* 1123, 1130.
[131] William M Greenberg, Lanna Moore-Duncan and Rachel Herron, 'Patients' Attitudes Toward Having Been Forcibly Medicated' (1996) 24(4) *Bulletin of the American Academy of Psychiatry and the Law* 513, 517.
[132] Ibid.
[133] Ibid.
[134] Ibid.
[135] Eline Veltkamp et al., 'Patients' Preferences for Seclusion or Forced Medication in Acute Psychiatric Emergency in the Netherlands' (2008) 59(2) *Psychiatric Services* 209, 210.
[136] Camilla Haw et al., 'Coercive treatments in forensic psychiatry: a study of patients' experiences and preferences' (2011) 22(4) *Journal of Forensic Psychiatry & Psychology* 564, 572.
[137] Ibid 574.
[138] Ibid 578.
[139] T Hoekstra, HHGM Lendemeijer and MGMJ Jansen, 'Seclusion: The Inside Story' (2004) 11 *Journal of Psychiatric and Mental Health Nursing* 276, 281-2.
[140] Shaghayegh Vahdat et al., 'Patient Involvement in Health Care Decision Making: A Review' (2014) 16(1) *Iranian Red Crescent Medical Journal* 1, 5.
[141] Haw et al., (n 136) 580.
[142] Hoekstra, Lendemeijer and Jansen (n 139) 281; Veltkamp et al., (n 135) 210.
[143] Ibid.
[144] See generally Celene YL Yap et al., 'Don't Label Me: A Qualitative Study of Patients' Perceptions and Experiences of Sedation During Behavioural Emergencies in the Emergency Department' (2017) 24(8) *Academic Emergency Medicine* 957; Hoekstra, Lendemeijer and Jansen (n 139).

example, where psychiatric patients are given the opportunity to 'debrief' with workers after a seclusion event, and are able to understand why a restrictive practice occurred, this has been shown to assist with the coping process.[145] Yet, residential aged care facilities are seen as the place where people go to die.[146] This view serves to uphold an organisational and societal culture that aged care is only about meeting minimum standards over a person's last few years.[147] Inside these residential facilities, mistreatment is rampant and is often blamed on resource constraints[148] that flow on to affect staff levels, organisational culture and training.

Beginning at the top level, the aged care industry itself has a poor reputation and therefore struggles to attract the 'right' kind of employee.[149] Resource constraints have a direct impact: the sector is viewed as underfunded,[150] 'less glamorous' than other nursing sectors,[151] more stressful due to unsustainable high resident to staff ratios[152] and lacking in career development opportunities that marks aged care as a 'dead end career'.[153] The introduction of 'zero hour' contracts to residential aged care as well as lower wages than the acute care sector makes the industry less attractive to qualified nurses.[154] This itself decreases the industry's reputation because it is then seen as requiring less complex skills, with little incentive to continue training.[155]

The reputation feeds the organisational culture at individual institutions. Several studies promote the need for attitudinal changes in health care settings[156] but in practice this is difficult because the industry's poor reputation means that 'workers are often frustrated and demotivated doing roles that they deem "beneath them"'.[157] Residential settings must develop policies that cultivate an organisational culture of respect for the people in their care. Even something as simple as fostering positive relationships between care workers and the people in their care has been shown to increase autonomous participation for people in residential care.[158]

Organisational culture is dependent on its policies, and this can either solidify or break interpersonal care relationships. Nurses have complained that when a restraint practice is banned, it has not been replaced with any other form of intervention, which has led to 'staff

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[145] Hoekstra, Lendemeijer and Jansen (n 139) 281. See generally Fiona Whitecross, Amy Seeary and Stuart Lee, 'Measuring the Impacts of Seclusion on Psychiatry Inpatients and the Effectiveness of a Pilot Single-Session Post-Seclusion Counselling Intervention' (2013) 22 *International Journal of Mental Health Nursing* 512.

[146] Benyamin Schwarz et al., 'The Last Habitat: Living and Dying in Residential Care Facilities' (2018) 32(3-4) *Journal of Housing for the Elderly* 337, 340.

[147] Joseph E Ibrahim et al., 'Meeting the Needs of Older People Living in Australian Residential Aged Care: A New Conceptual Model' (2020) 39 *Australasian Journal on Aging* 148, 148.

[148] See, eg, Uniting Care, Submission No AWF.650.00093.0001 to Royal Commission on Aged Care Quality and Safety (December 2019).

[149] Commonwealth, *Parliamentary Debates,* Committee on Community Affairs, 28 September 2016 (Graeme Prior) 25.

[150] Senate Community Affairs References Committee, *Future of Australia's Aged Care Sector Workforce* (20 June 2017) [3.62]-[3.66].

[151] Commonwealth, *Parliamentary Debates,* Committee on Community Affairs, 23 February 2017, 46 (Melanie Birks).

[152] Senate Community Affairs References Committee (n 150) [3.17]-[3.31].

[153] Jewish Care Victoria, Submission No 109 to the Senate Community Affairs References Committee, Parliament of Australia, *Future of Australia's Aged Care Sector Workforce* (1 March 2016) 4.

[154] Senate Community Affairs References Committee (n 150) [3.43]-[3.61].

[155] Ibid [3.34]-[3.36], [3.48].

[156] See, for example, Pat Mayers et al., 'Mental Health Service Users' Perceptions and Experiences of Sedation, Seclusion and Restraint' (2010) 56(1) *International Journal of Social Psychiatry* 60, 70; Wale, Belkin and Moon (n 101) 60-61.

[157] Jewish Care Victoria (n 153) 4.

[158] Hedman et al., 'Caring nursing homes to promote autonomy and participation' (2019) 26(1) *Nursing Ethics* 280, 287-9.

being knocked out [and] broken bones.'[159] Others have stated that removing other types of restraint simply leads to increased chemical restraint,[160] though there is a concerning lack of knowledge about restraint, its effects, and alternative practices available.[161] Nurses, generally, are likely to report feeling undertrained to sufficiently care for persons with intellectual disabilities.[162] The lack of training has been shown to contribute to a lack of empathy and understanding for the distress of people being restrained[163] but nurses still feel as if reducing restraint is impossible without increased staffing measures.[164] Fundamentally, if the people who are the ones using chemical restraint do not believe it can be eliminated, then efforts to do so will almost certainly fail.

B *Challenges for Regulation*

From a regulatory perspective, chemical restraint and residential settings present a number of risks to be managed: it is a 'social practice' that creates 'social effects of concern' that therefore must attract regulatory attention.[165] The CRPD further justifies regulating chemical restraint,[166] providing the new normative basis for regulation designed to achieve equality for persons with disability. Regulatory quality further depends on the policy objectives — in this case, preventing the abuse of chemical restraint — and balancing different benchmarks of success, which are likely to be contentious issues as different stakeholders will have different values and priorities.[167] Despite the controversial nature of allowing chemical restraint at all,[168] anticipatory risk regulation is likely to be the proper response to the dangers of chemical restraint abuse: an ideal regime should be structured to foster the relationship between residential facilities and residents in a manner that supports the foundational rights of persons with disabilities,[169] such as those presented by the CRPD.

Any such regime must be responsive to the changing political and social environment around residential facilities, particularly how actors will respond to attempts to regulate them.[170] Julia Black and Robert Baldwin offer five key factors influencing the success of responsive risk-regulation: '(1) the behavior, attitudes, and cultures of regulatory actors; (2) the institutional setting of the regulatory regime; (3) the different logics of regulatory tools and strategies (and how these interact); (4) the regime's own performance over time; and, finally, (5) changes in each of these elements.'[171] Risk regulation also poses a number of additional questions, including: 1) whether regulation should err on the side of caution and risk 'over-regulating' the issue;[172] 2) whether regulation should be 'blame-oriented' or with a greater focus on

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[159] Muir-Cochrane, O'Kane and Oster (n 125) 1517.
[160] Ibid.
[161] Rhonda Nay and Susan Koch, 'Overcoming Restraint Use: Examining Barriers in Australian Aged Care Facilities' (2006) 32(1) *Journal of Gerontological Nursing* 33, 36.
[162] Sharna Lewis and Biza Stenfert-Kroese, 'An Investigation of Nursing Staff Attitudes and Emotional Reactions Towards Patients with Intellectual Disability in a General Hospital Setting' (2010) 23 *Journal of Applied Research in Intellectual Disabilities* 355, 360.
[163] Muir-Cochrane, O'Kane and Oster (n 125) 1516.
[164] See generally Nay and Koch (n 161) 37.
[165] Benedict Sheehy and Donald Feaver, 'Designing Effective Regulation: A Normative Theory' (2015) 38(1) *UNSW Law Journal* 392, 395.
[166] Ibid 396.
[167]Robert Baldwin, Martin Cave and Martin Lodge, 'What is Good Regulation?' in Robert Baldwin, Martin Cave and Martin Lodge (eds), *Understanding Regulation* (Oxford Scholarship Online, 2015) 25, 35.
[168] See above n 19.
[169] Dagan and Kreitner (n 114) 632.
[170] John Braithwaite, 'Limits on Violence; Limits on Responsive Regulatory Theory' (2014) 36(4) *Law and Policy* 432, 432.
[171] Julia Black and Robert Baldwin, 'Really Responsive Risk-Based Regulation' (2010) 32(2) *Law & Policy* 181, 186.
[172] Robert Baldwin, Martin Cave and Martin Lodge, 'Regulating Risks' in Robert Baldwin, Martin Cave and Martin Lodge (eds), *Understanding Regulation* (Oxford Scholarship Online, 2015) 83, 95.

'collective or corporate design';[173] and 3) how to reduce risks when risks have to be traded off against other goals.[174]

These sociological factors and theoretical questions determine the strategies used to ensure compliance. Braithwaite presents these strategies via a regulatory pyramid comprising strategies arrayed hierarchically with the least interventionist options forming the base.[175] These strategies should align with the normative characterisation of the problem to be regulated.[176] For example, risk-based approaches may attempt to modify behaviour via performance standards.[177]

All of these components of a regulatory system are difficult to effectively design in the context of chemical restraint, because the practice is influenced by a broad range of social, institutional and economic factors. The research outlined above indicates that some of the key challenges to effective regulation of restraint that emerge in this area are: 1) lack of resources, 2) lack of oversight, and 3) negative beliefs about vulnerable people. This indicates that there is a mismatch between the normative foundation of the existing regulation for chemical restraint, and the positive elements of the regulatory system.[178]

A useful comparative regime is OH&S, because the regime rests on an analogous logic to residential facilities: 'Because employers control the conditions of employment, the onus of protecting workers from occupational disease and injury was to rest with them as well.'[179] OH&S is underpinned by a variety of laws that create the foundational rights for workers, such that a significant part of OH&S regulatory work is 'to secure relational justice, [so] it naturally aspires to provide satisfactory responses to relational wrongs.'[180] Regulation, then, does not work alone: as the law is how regulation is upheld, and is what dictates the 'fundamental rights' that any proposed regime relies on, the law around chemical restraint, disability, and rights needs to be evaluated before a firm answer can be given about the place of chemical restraint in residential facilities.

IV JUDICIAL TREATMENT OF CHEMICAL RESTRAINT

This part outlines the judicial treatment of chemical restraint in both Australia and Canada, with Part A devoted to Australian case law and tribunal decisions and Part B concerning Canada. Part C compares the doctrine of both countries, to identify commonalities between the ways the two nations approach the issues raised by chemical restraint and the norms imposed by the CRPD. The purpose of this overview is to scrutinise the sources of power that contribute to the normalisation of chemical restraint, in violation of the obligations under the CRPD. In determining these patterns — being the way that the law creates the 'conditions of legitimate interaction among individuals'[181] — it becomes possible to see how decisions and judgments should be considered as a reflection of modern social issues.

A *Australia*

To begin with, the 2009 Vic MHRB case of 09-085[182] is pertinent because it discusses the high threshold for justifying the forced administration of medication for a beneficial purpose despite serious side-effects. 'P' was under a community treatment order that allowed for involuntary administration of medication to reduce sexual disinhibition, along with treatment

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[173] Ibid 97.
[174] Ibid 97-8.
[175] Braithwaite (n 170) 432.
[176] Benedict Sheehy and Donald Feaver, 'Designing Effective Regulation: A Positive Theory' (2015) 38(3) *UNSW Law Journal* 961, 989.
[177] Ibid 977.
[178] Ibid 962.
[179] Nicholas A Ashford and Charles C Caldart, *Technology, Law and the Working Environment* (Island Press, rev ed, 1996) 184.
[180] Dagan and Kreitner (n 114) 643.
[181] Ibid 619.
[182] *09-085* [2009] VMHRB 1 ('*09-085*').

for schizophrenia. Injections of the hormone drug Depo Provera resulted in severe osteoporosis, but when the dosage was reduced on three separate occasions, P's treating team noted a return of sexual disinhibition or inappropriate sexualised behaviour.[183] P appealed the extension of his community treatment order and argued that the involuntary administration of the drug constituted cruel, inhuman and degrading treatment under s 10(b) of the *Charter*[184] and s 19A of the *Mental Health Act 1986* (Vic).[185]

The Board noted that the impacts of P's medication were 'far more intense than would be routinely provided to involuntary patients'[186] and commented that '[i]n the Board's view, [P's treating teams] had at all times attempted to act in P's best interests.'[187] Nonetheless, the complexity of P's case posed a challenge for the Board when considering adverse side effects when weighed against the therapeutic benefits.[188] In reaching its decision, the Board acknowledged the 'inherent conflicts between a patient's right to, and the state's responsibility to provide, treatment for the mental illness and protection of the person's individual human rights.'[189] Ultimately, it found that the high threshold – where the involuntary administration could 'no longer be justified in a free and democratic society'[190] and where the treatment could constitute cruel, inhuman or degrading treatment[191] – had not been met. Despite the physical harm the medication was causing, the reality of dealing with severe behaviours of concern created a 'delicate'[192] balance for the Board to consider.

The challenge of balancing rights and protection caused by severe behavioural issues were further considered in *Re Sally*.[193] This case concerned a child who 'at the age of 11 years old has been unable to be successfully managed within the community even though management has included what is little short of a chemical straight jacket.'[194] Sally was moved repeatedly between juvenile justice detention and residential care, but when her mental health unit unexpectedly decided to discharge her, the Director General of the Department of Community Services made an urgent ex parte application for orders including the forced administration of sedative medication. Slattery J considered the rights under the *Convention on the Rights of the Child* ('CROC')[195] as a 'relevant although not a conclusive consideration',[196] in that though the CROC is not incorporated into domestic law, the ratification of the CROC gives rise to an expectation that decisions will be made with regards to those rights.[197] While acknowledging

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[183] Ibid [134].
[184] *Charter of Human Rights and Responsibilities Act 2006* (Vic).
[185] *09-085* (n 192). P argued that the State was required to show that, even where a treatment was a medical necessity, a treatment's characterisation as 'therapeutic' did not automatically prevent the conduct from being cruel, inhuman or degrading: at [121], [143].
[186] Ibid [143]. Part of the argument was that humiliation was an element of cruel, inhuman or degrading treatment. The Board disregarded P's evidence that he felt humiliated as a result of the treatment, as the Board was unable to accept that this 'subjective sense was any greater than it would expect for any involuntary patient … and especially when the treatment involves the [unwanted] prescription of medications': at [132].
[187] *09-085* (n 182) 137].
[188] Ibid [139], [143]. The Board noted that considerable care would have to be taken by the treating teams to prevent the clinical balance shifting to the side effects outweighing the therapeutic benefits, even though '[t]his responsibility is onerous, and will potentially become increasingly onerous': at [139], [142].
[189] Ibid [181].
[190] Ibid [187].
[191] Ibid [168].
[192] Ibid [139].
[193] [2009] NSWSC 1141 ('*Re Sally*').
[194] Ibid [18].
[195] *Convention on the Rights of the Child,* opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).
[196] *Re Sally* (n 193) [*58*].
[197] Ibid, referring to *Director General, Department of Community Services v Thomas* [2009] NSWSC 217, [37] (Bereton J). In this judgment, Bereton J explained that there are several reasons why children's rights under the CRC are 'relevant, but not conclusive' including that ratification 'creates a legitimate

that restricting the liberty of a child should only be done with great caution[198] and though Article 37 of the CRC emphasises the child's dignity and the need to use detention/restrictions of liberty as a last resort for a short period of time, Slattery J found that there was simply no reasonable alternative available and the orders were made.[199]

The notion that there is 'no reasonable alternative' to chemical restraint is a common theme in Australian case law. For example, in the case of *Re EUY,*[200] a case concerning an ex-nurse who now resided in an aged care facility and who's family strongly opposed the use of sedative medications on her, the South Australian Civil and Administrative Tribunal noted that '[i]t is not obvious on the evidence before me, but it is possible that her level of anxiety and distress is compounded by some remaining understanding that she has a cognitive impairment and is residing in an aged care facility. This is very regrettable and no doubt distressing for EUY.'[201] Nonetheless, even orders that were 'clearly intrusive and restrictive of EUY's rights and personal autonomy' were 'clearly necessary'.[202]

Even where necessity is a defining factor in a case, Australian courts do consider the seriousness of interfering with a person's liberty, but professional support is often a key element in findings for allowing restrictive practices. For example, in *Re Thomas*[203] the orders sought for indefinite detention of a 16-year-old with involuntary sedation, were 'radical' and Brereton J 'approached the application with scepticism.'[204] Nevertheless, necessity won, because Brereton J saw 'no practical alternative' because other attempts had failed and had no realistic prospect of success, and because there was 'strong professional support for such a regime.'[205] In *M v Mental Health Review Tribunal,*[206] which concerned forced medication by depot injection, Lindsay J encouraged the applicant to willingly accept the aid of the doctors and nurses, who 'can see in him a goodness which all hope[d] to nurture.'[207]

There are two significant counter examples. The first is found in *KMD v The Mental Health Review Tribunal & Anor,*[208] in which Barr J overturned a Tribunal decision where the appellant had been the subject of an order for involuntary treatment involving the administration of antipsychotic medication to which she did not consent.[209] Barr J acknowledged that '[t]his decision may be seen as unsatisfactory by the dedicated psychiatrists and other mental health professionals who stand ready to assist the appellant and treat her serious delusional disorder'[210] but 'irrespective of the views held by the medical professionals as to the appellant's best interests'[211] there had been insufficient evidence before the Tribunal to make the original orders. As of writing, this decision has not been cited in any subsequent judgments.

The second is *obiter* in *PBU v Mental Health Tribunal,*[212] where in Bell J summarised the objectives and principles of the *Mental Health Act* as being 'intended to alter the balance of power between medical authority and persons having mental illness in the direction of

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expectation that decisions will be made having regard to the principles espoused in *CROC*' and the existence of a treaty obligation alone (that is, without legislation implementing it locally) allows a court to take such a treaty into account in the development of the common law'.

[198] *Re Sally* (n 193) [57].
[199] Ibid [18]-[66].
[200] [2019] SACAT 51.
[201] Ibid [132].
[202] Ibid [136].
[203] [2009] NSWSC 217; 41 Fam LR 220.
[204] Ibid [39].
[205] Ibid [40].
[206] [2015] NSWSC 1876.
[207] Ibid [72].
[208] [2020] NTSC 13; 351 FLR 324.
[209] Ibid [1].
[210] Ibid [60].
[211] Ibid [60].
[212] [2018] VSC 564 ('*PBU*').

respecting their inherent dignity and human rights.'[213] In this decision, Bell J further criticised the Tribunal for employing a best-interests approach, finding that VCAT had been wrongfully influenced by best-interest considerations, which were not a part of the statutory criteria, instead of the correct 'least-restrictive' test.[214] More broadly, this decision adds to the evidence of a pattern of paternalism reflected in tribunal and judicial errors of law when it comes to orders involving involuntary medication and applying statutory criteria. If, as was the case in *PBU,* Tribunal members with legal training are misapplying tests for legal capacity, then the question arises as to whether medical professionals are doing the same.[215]

There are further challenges to consistent application because chemical restraint is practised across a number of industries. In *HZC,*[216] the NSW Civil and Administrative Tribunal considered that there are 'sound reasons why it would be in the best interests of people with whom restrictive practices are being used in New South Wales, for there to be some consistency in the way the definitions[217] are applied throughout the quality and safeguards arena and within the Tribunal.'[218] *Re KF; Re ZT; Re WD*[219] further illustrates the complexity of the law around restraint practices. In this case, the South Australian Administrative Appeals Tribunal had to interpret a number of Acts[220] in order to determine the legality of consenting[221] to restraining the three applicants. In this decision and in *HZC,*[222] the Tribunal considered it to be appropriate that consistency was maintained with the definitions of restrictive practices in the NDIS Act and Rules.[223] In *Re KF; Re ZT; Re WD,* the Tribunal noted at several points the inconsistency across sectors,[224] even observing that the inconsistencies are something that

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[213] Ibid [67].
[214] *PBU* (n 212) [101], [241].
[215] Christopher James Ryan, 'Is Legislative Reform Translating into Recovery-Oriented Practice and Better Protection of Rights?' (2019) 53(5) *Australian & New Zealand Journal of Psychiatry* 382, 382.
[216] [2019] NSWCATGD 8 ('*HZC*').
[217] *JXC v Mental Health Tribunal* [2018] NTSC 62, [37]-[38]; *WRM* [2011] QCAT 109, [21]-[22]; *09-085* (n 182) [126]. Difficulties in accurately applying the law are compounded by practical difficulty in separating symptom from behaviour, and ambivalence about questioning medical decisions about prescriptions. In *JXC v Mental Health Tribunal,* it was unclear whether JXC's behaviour was linked to mental illness, or just erratic behaviour. The Tribunal set aside the Community Management Order, 'however tempting or convenient, to continue involuntary treatment': at [47]. In a different approach, the Queensland Tribunal in *WRM* acknowledged that medication (Xanax, prescribed PRN) was for both controlling behaviour and for treatment: at [21]-[22]. The Board in *09-085* noted 'the fact that, with psychiatric illnesses, it can be very difficult to be certain about the relationship between observed signs and symptoms and any underlying illness pathology': at [126].
[218] *HZC* (n 216) [45].
[219] [2019] SACAT 37 (*'Re KF; Re ZT; Re WD'*).
[220] *Guardianship and Administration Act 1993* (SA); *Consent to Medical Treatment and Palliative Care Act 1995* (SA); *Consent to Medical Treatment and Palliative Care Regulations 2014* (SA); *Advance Care Directives Act 2013* (SA)*; Advance Care Directives Regulations 2014* (SA)*; Mental Health Act 2019* (SA).
[221] In the case of Ms ZT and Mr WD, an order was necessary to authorise the use of restrictive practices, particularly because the practices were not being supervised by a health practitioner. All three were adults living in fully supported disability facilities in South Australia, and all were diagnosed with 'significant intellectual disability' meaning that they could not 'make decisions about their own safety and welfare or manage their own affairs' (at [10]). In order for a person's representative to consent to medical treatment on a person's behalf, the Tribunal had to determine whether the restrictive practices to manage behaviour of the three adults could be authorised by 1) the informal carers; 2) with the consent of a 'person responsible' under the *Consent Act;* or 3) with the consent of a guardian appointed by the Tribunal.
[222] *HZC* (n 216).
[223] *Re KF; Re ZT; Re WD* (n 219) [70]-[71]; Ibid [45].
[224] At [36], the Member observed 'there is a lack of consistency in SA between the various legislative definitions of 'mental incapacity' or impaired decision making *[sic]* capacity, which may merit the attention of Parliament.' At [40], the Tribunal noted 'that the regulation of restrictive practices in South Australia up to now has been reasonably informal in some sectors and has perhaps led to an inconsistency in approach to the use of, and authorisation for, those practices.' The Tribunal went on to

'may merit the attention of Parliament'.[225] The Tribunal commented that the CRPD is a 'a set of best practice principles that should guide policy development, funding decisions and the administration and provision of disability services in SA.'[226] In both cases, the Tribunals went beyond their dispute resolution function to comment on the scope of the problem of regulating restraint practices, particularly referencing the CRPD as a guide. Yet, as was discussed in Part II, the Committee's interpretation on the CRPD requires that restrictive practices are not to be used, as it is a violation of several human rights.

Australian case and tribunal law that addresses the deeper issues raised by chemical restraint and human rights is scarce. These judgments and decisions represent an implicit acceptance of chemical restraint, and other forced interventions, as being in a person's best interests, despite references to the need to uphold the values of the CRPD. On reading the case and tribunal law, it is evident that courts and tribunals place great value on protection of vulnerable populations, even to the detriment of equal recognition of that person's rights. Though not all of these cases concern elderly people, the cases discussed above and below, taken together, present a larger doctrinal picture of implicit paternalism when it comes to people with disabilities.

B *Canada*

Canadian case law indicates that the protectionist and paternalistic paradigm is still widely adhered to, though steps are being taken to change this.[227] Several cases have challenged the authorities that allow people to be chemically restrained against their will. However, the 'goals'[228] of the Canadian system result in attempts to balance protecting a person from the effects of their impairment, while also protecting the public from people who can be a danger to themselves or others.[229]

The guiding benchmark for Canadian courts is the *Charter,* which mirrors many international human rights obligations: s 7 of the *Charter* guarantees that 'everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.' Canadian courts have held that s 7 would be infringed by state action that has the likely effect of seriously impairing a person's health.[230] Yet, when this was challenged in the case of *Conway v Fleming,*[231] a case which concerned a claim for battery where a patient was chemically restrained and involved a *Charter* challenge under s 7, the trial judge found that the involuntary chemical restraint of Mr Conway was

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explain that the authorisation of restrictive practices across mental health, aged care and disability are overseen by different regulatory bodies and ruled by different legislative models (at [41]), and that there is 's an inconsistency between definitions in South Australian legislation and in policy documents in use in South Australia, and a further inconsistency between the various definitions of restrictive practices in use in South Australia and the definition of restrictive practices under the NDIS Act and Rules' (at [42]).

[225] *Re KF; Re ZT; Re WD* (n 219) [36].

[226] Ibid [24].

[227] See The Right Honourable Beverly McLachlan, P.C., 'Medicine and the Law: the Challenges of Mental Illness' (Speech, University of Alberta and University of Calgary, February 17 and 18, 2005). For example, in 2005, the Chief Justice of the Canadian Supreme Court Beverley McLachlin, delivered a speech in which she laid out the challenge of balancing the rights of persons with mental illness, wherein she said: 'Failure to treat may well result in permanent impairment of their right to be free from physical detention and their right to have a mind free from debilitating delusions, terrifying hallucinations and irrational thoughts. Although respecting a mentally ill person's decision to refuse treatment formally accords them equally treatment with non-mentally ill patients, abandoning such people to the torments of their illness, mental and physical deterioration, substance abuse and perhaps suicide surely does not respect their inherent dignity as human beings'.

[228] *R v Conway* [2010] SCC 22, [88].

[229] *Winko v Forensic Psychiatric Institute* [1999] 2 SCR 625, [20].

[230] *Chaoulli v Quebec* (*Attorney General*) [2005] 1 SCR 791, [123].

[231] [1996] 62 ACWS (3d) 585 ('*Conway*').

lawful both at common law and under the *Mental Health Act*.[232] On appeal, Chadwick J acknowledged that every person has a right to liberty and security of person,[233] and that security of person is linked to some aspects of personal autonomy,[234] the use of the chemical restraint against Mr. Conway 'would be in accordance with the principles of fundamental justice'[235] both under the common law and under the *Charter*.

Another *Charter* challenge concerning chemical restraint was *Mullins v Levy,*[236] where a patient was medicated against his will for five days. The trial judge concluded that though Mr Mullin's liberty had indeed been restricted, Mr Mullins still had to prove that the restriction was contrary to the principles of fundamental justice.[237] On appeal, Mr Mullins alleged that his rights against cruel and unusual punishment (s 12 of the *Charter*) and his right to security of person (s 7 of the *Charter*) had been violated. Mr Mullins alleged that he was tackled by security, taken to a 'quiet room' and injected with medication that rendered him 'helpless'.[238] The trial judge found that this did not amount to punishment because the intention was to aid him, a conclusion with which Kirkpatrick JA agreed.[239] As with Mr Conway, Mr Mullins was unable to prove that the restraint did not 'accord with the principles of fundamental justice.'[240]

These principles of fundamental justice were discussed in *Howlett v Karunaratne*,[241] a case concerning a 79-year old woman who, while suffering from a mental health condition, refused to be medicated against her will. McDermid DCJ held that, 'assuming, for the purpose of this analysis, that [the plaintiff] will be deprived of the right to security of her person' in determining whether the forced medication violated the principles of fundamental justice, this involved considering that fundamental justice incorporates both the procedural and substantive issues.[242] Similarly, McDermid D.C.J stated that 'it is generally accepted as a fundamental principle of our society that the State has an obligation to care for disabled persons who are through no fault of their own, unable to care for themselves.'[243] Consequently, because the plaintiff's procedural rights were 'fully protected'[244] and the treatment would be given with the best interests of the plaintiff in mind,[245] there would be no 'infringement of the right to security of the person contrary to the principles of fundamental justice.'[246]

When deciding whether or not the involuntary medication constituted cruel and unusual treatment or punishment, counsel for the appellant relied on the case of *Rogers v Commissioner of the Department of Mental Health,*[247] to submit that the administration of

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[232] Ibid [280]-[281]. This was framed as both '*a right and a duty* to restrain Conway' (at [280]) in those circumstances, and Mr Conway's argument that the chemical restraint violated ss 1, 12 and 15(1) of the Charter was unsuccessful (at [284]).
[233] *Canada Act 1982* (UK) c 11, sch B pt I s 7 ('*Canadian Charter of Rights and Freedoms')*
[234] *Rodriguez v British Columbia (Attorney General*) [1993] 3 SCR 519, 391.
[235] *Conway* (n 231) [10].
[236] [2009] 304 DLR (4th) 64 ('*Mullins*').
[237]In the judgment, his Honour noted that '[u]ltimately, the trial judge concluded that, although Mr. Mullins' liberty was clearly curtailed, it was incumbent on Mr. Mullins to establish that the deprivation was contrary to the principles of fundamental justice': at [68] citing *R v Beare* [1988] 2 SCR 287, [401].
[238] *Mullins* (n 236) [20]-[21].
[239] Ibid [76].
[240] Ibid [79].
[241] [1988] 9 ACWS (3d) 218 ('*Howlett*').
[242] Ibid [30].
[243] Ibid [32].
[244] Ibid [34].
[245] Ibid [33].
[246] Ibid [37].
[247] (1983) 458 NE (2d) 308. Counsel relied on the following statement: 'We conclude that only if a patient poses an imminent threat of harm to himself or others, and only if there is no less intrusive alternative to anti-psychotic drugs, may the Commonwealth invoke its police powers without prior court approval to treat the patient by forcible injection of anti-psychotic drugs over the patient's objection. No other State interest is sufficiently compelling to warrant the extremely intrusive measures necessary

drugs would 'inevitably flow' from a finding of incompetency[248] because there was a State interest in permitting this to be done.[249] McDermid DCJ held that, though in this particular incident the facts of the case did not constitute cruel and unusual punishment because the treatment was not 'grossly disproportionate … in her circumstances or so excessive as to outrage standards of decency', treatment without consent 'may very well be 'cruel and unusual' especially if it is administered not for the benefit of the patient but for the 'benefit of the government agency.'[250] Chemical restraint has been held to constitute treatment where it was employed for a 'health related purpose'[251] meaning that this door may still be open for future cases.

In all the above cases, the claimants alleged they did not consent to being given medication, despite the facts indicating that there were severe behavioural issues at hand. Consent is a central theme in the debate about chemical restraint: an action is (typically) not an assault if consent has been given. However, in the circumstances of persons with cognitive and intellectual disabilities, consent can be difficult to gain, and competency can be difficult to establish.

This was a central issue in *Fleming v Reid,*[252] which concerned whether a mental health patient had the right to specify if they did or did not wish to receive psychotropic medication if they were to become incompetent. The Ontario Court of Appeal found that '[f]ew medical procedures can be more intrusive than the forcible injection of powerful mind-altering drugs'[253] and that to deprive people of the right to make decisions when they are competent would be a violation of their Charter rights to security of the person.[254] Importantly, the Court held that this was not a reasonable or justifiable restriction on a person's liberty: 'a competent patient's right to be free from non-consensual invasions of his or her person is not diminished by subsequent incompetency or subordinated to his or her "best interests" where the prior competent wishes of the patient are known.'[255] Regulatory changes followed this decision[256] and, in the case of *Conway v Jacques,*[257] the Court held that where no competent wishes were expressed, the substitute decision-maker must take into account the person's values and beliefs, as well as any wishes expressed while incompetent, before making a decision in the patient's best interests.[258]

Despite these positive changes, the Canadian case law also shows that there is an overarching belief that involuntary medication and other non-consensual interventions are often in a person's best interests, regardless of their wishes. Though *Fleming* elevated competent refusal of treatment to the status of a constitutional right,[259] paternalistic language persists in other

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for forcible medication with anti-psychotic drugs. Any other result also would negate the Legislature's decision to regulate strictly the use of mind-altering drugs as restraints': at 321.

[248] *Howlett* (n 250) [42].

[249] Ibid.

[250] Ibid [44].

[251] *T (S M) v Abouelnasr* [2008] 171 CRR (2d) 344, [54].

[252] [1991] 82 DLR (4th) 298.

[253] Ibid [42].

[254] Ibid [61].

[255] Ibid [50].

[256] Simon Verdun-Jones and Michelle Lawrence, 'The Charter Right to Refuse Psychiatric Treatment: A Comparative Analysis of the Laws of Ontario and British Columbia Concerning the Right of Mental-Health Patients to Refuse Psychiatric Treatment' (2013) 46 *University of British Columbia Law Review* 489. After the decision in *Fleming,* Ontario enacted the *Health Care Consent Act* which expressly required that the wishes regarding treatment, admission to a care facility or personal assistance services of people (above 16 years of age) made while competent had to be adhered to. It also created the Consent and Capacity Board, which reviews decisions regarding capacity, and cannot make decisions based on what it perceives to be the person's best interests: at 505-6.

[257] [2005] 250 DLR (4th) 178.

[258] *Health Care Consent Act* (1996) s 21(2); Ibid [30].

[259] Katherine Brown and Erin Murphy, 'Falling Through the Cracks: The Quebec Mental Health System' (2000) 45 *McGill Law Journal* 1037, 1065.

judgments for those who do not meet the 'competent' standard. For example, the Tribunal in *Re C (B.W.)* stated that:

> The evidence established that BWC's treatment providers are trained professionals who have used a number of strategies including seclusion and chemical restraints to manage his behaviour. These resources are not available to BWC if he is not in the custody of a psychiatric facility … Outside of hospital BWC would not have the benefit of trained professionals to redirect him. Nor would he have the strategies such as seclusion and chemical restraints available to manage his behaviours.[260]

There was similar commentary in the case of *A H v Fraser Health Authority*[261] which concerned non-consensual interventions for a First Nations woman, though this was described as 'intrusive support and assistance.'[262] The Court believed that Ms H was likely to have an 'ongoing relationship'[263] with the respondents, regardless of her wishes. Additionally, the Court considered that even though records indicate that the plaintiff 'was pressured or cajoled and she gave in' to taking medication, the Court was not 'persuaded that A.H. was forcibly administered treatment. It is at least as likely that she consented, after being urged to do so.'[264] Ms H was clearly overwhelmed by the authorities around her, such that it is questionable whether or not she truly consented.

Chemical restraint poses issues for effective regulation because it is often used in emergency situations, which may amplify the pressure put on vulnerable people in that situation. The nature of the emergency turns the act of chemically restraining a person from an assault into a legally-defensible action,[265] however Canadian courts have intervened to provide remedies where chemical restraint has been a 'particularly shocking and egregious'[266] violation of procedural requirements. This is even so where a patient may have lost their right to refuse treatment under legislation due to a lack of mental competency or because they are 'acting out' in a dangerous manner.[267]

The structure of procedural safeguards is then important to understand. With the importance of consent in mind, each jurisdiction has its own way of establishing decision-making authority for those who are deemed unable to consent, and each jurisdiction contains a provision exempting emergency situations from the need to obtain consent before administering medication. For example, Ontario has created a legislative version[268] of a 'Ulysses contract', a means where a person with an illness can outline the nature of the treatment they would like to receive, should their illness worsen to the point that they cannot act for themselves.[269] Traditionally, these have been binding agreements between a patient and a psychiatrist, but the Ontario iteration involves invoking 'powers of attorney for personal care'[270] which include the power to use reasonable force to take a person to a place of care, or restrain them during the care or treatment.[271] Presumably, this could be extended to a decision to chemically restrain a person: the person could express an opinion about what medication they would prefer or what they would prefer be done to them after the incident.

This is not a widespread practice yet, even though these contracts would be better aligned with the requirements under the CRPD. The substitute decision-making regime remains predominant in Canada, though some jurisdictions are moving towards modified versions.

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[260] *Re C (B W)* (2015) CarswellOnt 20117, [35] ('*Re C*').
[261] (2019) BCSC 227 ('*AH*').
[262] Ibid [73].
[263] Ibid.
[264] Ibid [170].
[265] *Conway* (n 231) [80].
[266] *R v Webers* [1994] 95 CCC (3d) 334, [43].
[267] Ibid [39].
[268] *Substitute Decisions Act,* SO 1992, c 30, s 46 ('*Substitute Decisions Act*').
[269] Tom Walker, 'Ulysses Contracts in Medicine' (2012) 31 *Law and Philosophy* 77, 77.
[270] *Substitute Decisions Act* (n 287) s 46.
[271] Ibid s 50(2)(2).

The CRPD requires states to move towards a supported model of decision-making,[272] but this is not without its difficulties: where communication with an affected person is not possible even with appropriate supports, 'previously expressed wishes, abiding values, and experience in similar situations' should be used to determine decisions.[273]

C *Analysis*

Doctrine should be regarded as a reflection of social issues, and though most case law in this area concerns people with mental illnesses, rather than disability *per se,* the themes that emerge from the cases above are still applicable to disability more broadly. Firstly, the delineation of these two categories is not entirely clear. For example, there is evidence that people with intellectual disabilities are at a significantly increased risk of developing mental illness.[274] Secondly, from a sociological perspective, both cohorts have been subjected to attempts to 'normalise' their behaviour,[275] such that the attitudes displayed in these cases are still reflective of broader attitudes towards those that do not fit society's norms. These 'normalising trends' deserve particular attention in the light of the introduction of the social model of disability to the law.

Primarily, the language used in the judgments and legislation above reflects the larger cultural discourses happening with the uncomfortable transition to the social model. A paternalistic view is a clear commonality between both Canada and Australia: for example, the Australian case of *Re EUY*[276] and the Canadian case of *Howlett v Karunaratne*[277] both involve similar factual circumstances, of elderly women who do not wish to be medicated. Both authorities arrived at the same conclusion: that intervention was inevitable and necessary, because of the fundamental duty society owes to protect vulnerable people.

The cases and legislation reviewed also serve to reinforce notions that non-consensual interventions are therapeutic, even with the risks associated. For example, the Depo-Provera injections in the Victorian Mental Health Review Board case of 09-085[278] have been the subject of a class action in Canada[279] because of significant and potentially irreversible bone mineral density damage, and yet, the 'reward' outweighed the risk because, according to the Tribunal, behavioural modification was necessary to prevent P's sexual disinhibition from becoming a further threat. In Canada, there is a similar trend to refer to the intention behind the treatment, such as in *Howlett,*[280] to rationalise the use of forced treatment.

That is not to say that no change in judicial sentiment towards people with disabilities can be seen in either country. This is a 'punishment to protection'[281] paradigm, which is clearly much better for the welfare of persons with disability. Yet, overall, the judgments appear to quietly reject the social model and the norms presented by the CRPD: there is no large difference between the cases examined dating before and after the introduction of the CRPD in 2008, noting that the ratification was preceded by years of negotiations. For example, in *Mullins v Levy,* a Canadian 2009 case regarding forced medication was decided almost identically to *Conway v Fleming* in 1999*,* in that both instances of forced treatment were held to comply

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[272] CRPD (n 15) art 12.
[273] Nicholas Caivano, 'Conceptualizing Capacity: Interpreting Canada's Qualified Ratification of Article 12 of the UN/Disability Rights Convention' (2014) 4(1) *Western Journal of Legal Studies* 1, 5.
[274] See generally Jason Buckles, Ruth Luckasson, and Elizabeth Keefe, 'A Systematic Review of the Prevalence of Psychiatric Disorders in Adults with Intellectual Disability, 2003-2010' (2013) 6(3) *Journal of Mental Health Research in Intellectual Disabilities* 181.
[275] See the discussion in section II.
[276] *Re EUY* (n 200).
[277] *Howlett* (n 250).
[278] *09-085* (n 182).
[279] 'Action Collective Canadienne Concernant Depo-Provera', *Depo-Provera Canada* (Web Page) < https://www.depoprovera.ca/?>. Note that Depo-Provera is also used as a form of contraception.
[280] [1988] 64 OR (2d) 418.
[281] See Claire Spivakovsky, 'From Punishment to Protection: Containing and Controlling the Lives of People with Disabilities in Human Rights' (2014) 16(5) *Punishment & Society* 560.

with the 'fundamental principles of justice'.[282] In Australia, all of the case law and tribunal decisions above were decided after the introduction of the CRPD, yet, as already explained in Part A, there is a consistent pattern of paternalism that goes against the aims of the CRPD.

It appears that paternalism and the 'othering' of persons with disability is embedded so deeply within the legal system that the CRPD and the social model have not been able to take root, such that the aspirations of the CRPD are not being met. This is because the judicial interpretation of restricting liberty shows a disinclination to leave people 'suffering', where there appears to be a ready solution.[283] Such an approach would align with the 'empowerment by protection' paradigm introduced in Part II, but it is likely that regulation will also have to address persistent paternalism where this becomes overpowering.[284] Nonetheless, since regulation is dependent on its legal foundations, the fact that courts are not willing to meet the standards set by the CRPD poses a challenge for coherent regulation based on the CRPD.

V A REGULATORY MODEL FOR IMPLEMENTING THE CRPD

Australia's ratification of the CRPD creates obligations under the Convention that cannot be ignored, and the CRPD therefore must influence regulation of matters affecting persons with disabilities. This part deals with regulating the use of chemical restraint in light of the theory presented in section II and III, and the doctrine in section IV. Part A elucidates the CRPD's difficulties in removing the cause of legal disability because it serves to reinforce individualistic ideals. Part B proposes a new minimum standard for chemical restraint, based on an empowerment by protection paradigm. Part C proposes a risk-based framework for chemical restraint before concluding with selected policy suggestions for residential aged care.

A *The CRPD and Legal Disability*

In section III, it was explained that regulation can be successful where, when aiming to structure interpersonal relations with a certain goal, there is a solid foundation of rights to build on. Though the CRPD is well-suited to influence states in making structural changes based on positive rights,[285] it does not form a sufficient basis for removing impediments to full social participation for people with disabilities because it still upholds the valorised atomistic individual as the pinnacle of what humans are to achieve. Further, rights should not be conceptualised in a manner that is divorced from the realities on the ground, because this risks regulatory failure where regulatory standards are impossible for staff to meet. As a result, the discussion around chemical restraint has reached a point where there is tension between a number of competing priorities: most notably, the protection of persons who are identified as 'vulnerable' as well as the persons who work and live with them, and their inherent rights equal to others.

However, this does not mean that all attempts at improvements in the lives of persons with disabilities must be abandoned: if anything, the CRPD's idealism can be maintained as an aspiration. To this end, in section II, the idea of empowerment by protection was introduced, which for the purposes of regulation will involve a balancing of rights and values. The CRPD is particularly well-suited for an empowerment paradigm because it 'relocates' power from the medical field and other institutions to persons with disabilities as it reinforces that persons with disabilities are inherently equal to others. Recall that, as was discussed in section II from a Foucauldian lens, power is dynamically linked to knowledge,[286] yet a whole 'set of knowledge [has been] disqualified'[287] purely because it belongs to the 'wrong' group. The CRPD forces states to question taken-for-granted power structures that can be a barrier to agency.[288] In

[282] *Mullins* (n 236) [90]; *Fleming* (n 261) [10].
[283] See, eg, *Re C* (n 260); *Howlett* (n 241).
[284] See, eg, *AH* (n 261)
[285] Andrew Molas, 'Defending the CRPD: Dignity, Flourishing, and the Universal Right to Mental Health' (2016) 20(8) *International Journal of Human Rights* 1264, 1267.
[286] Yates (n 42) 67.
[287] Foucault, 'Two Lectures' (n 43) 81, cited in Allan (n 43) 101.
[288] Hughes (n 39) 83.

this light, the next section examines how chemical restraint might be conceptualised as a 'minimally sufficient action' compatible with empowerment by protection, rather than a tool of convenience and, at worst, oppression.

B *Chemical Restraint as a 'Minimally Sufficient Action' Instead of a 'Last Resort'*

It is a fundamental fact that people have different levels of capabilities, and this warrants different treatment in recognition of these differences: this is equitable, rather than equal, treatment. However, this can be misappropriated by paternalism and negative perceptions about people with disabilities, resulting in abuse. This is the case with chemical restraint where the 'last resort' requirement present in legislation appears to have been used inappropriately to the detriment of people with disabilities: it is possible that the 'last resort' is not a high enough standard to restrict the use of the forced medication to truly appropriate circumstances. Re-framing when it may be appropriate to chemically restrain a person would introduce a higher bar for health and care workers to meet before forcibly medicating a person.

Creating a new normative standard for when chemical restraint is appropriate requires utilising a mix of theoretical approaches. To reiterate, empowerment theory works to reduce the effects of social or personal blocks to exercising power in one's own life.'[289] The Canadian approach claims to uphold the ideals of fundamental justice, such that at times, it is appropriate to chemically restrain a person against their will where it serves an appropriate purpose. These two concepts can form the normative basis for regulating chemical restraint, at a standard higher than as a 'last resort': where chemical restraint is the minimally sufficient method capable of reducing a person's personal or social blocks to exercising power *and* where its use does not violate a fundamental principle of justice,[290] then the practice may be used.

Examples may be useful to illustrate this idea. Where chemical restraint allows a person to calm down enough to have a conversation with their treating practitioner, this is arguably the ideal outcome of medicating a person: it is a 'rights violation' *for* empowerment in that it may ignore their explicit requests not to be medicated, but it enables a person to better exercise their personal capabilities by stabilising their emotional state. On the other hand, where an adult in aged care is medicated so as to be 'clean and tidy and … not crying out',[291] this does not serve the person in improving their capability to exercise their power to make autonomous choices: instead, this is representative of a falsely-benign social norm that requires people with disabilities to outwardly perform the expectations of society[292] with little respect for benign difference. On a similar issue, where wandering by a person with dementia could instead be solved with environmental factors that address unmet needs, this is the minimally sufficient action that recognises that behaviour should *not* be chemically restrained without first attempting to recognise in what exclusionary structures[293] the person is living.

C *A Risk-Based Chemical Restraint Regulatory Framework*

Recall that the central question of this article is whether chemical restraint has a place in modern disability policy and, specifically, aged care. Even if the CRPD is unable to fully remove impediments to full participation for persons with disabilities, this does not mean that the question of efficient regulation can be disregarded based on an inability to reach the ideals

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[289] Malcolm Payne, *Modern Social Work Theory* (Palgrave MacMillan Press, 3rd ed, 2005) 295. See also Martha Nussbaum, 'Human Rights and Human Capabilities' (2007) 20 *Harvard Human Rights Journal* 21. A similar approach is the 'capabilities approach' theorised by Martha Nussbaum, which Capability theory urges action with the goal of making people 'able to function in a variety of areas of central importance': at 21.

[290] See *Howlett* (n 241). In determining whether forced medication violated the principles of fundamental justice, this involved considering that fundamental justice incorporates both procedural and substantive issues, including a generally accepted obligation to protect people who are unable to protect themselves: at [30]. [32].

[291] ACRC Transcript (n 1).

[292] Sandra Fredman, 'Providing Equality: Substantive Equality and the Positive Duty to Provide' (2005) 21(2) *South African Journal on Human Rights* 163, 165-6.

[293] Beaudry (n 108) 316.

under the CRPD. Any affirmative answer to the question must be conditional on having an effective framework that protects people from abuse: given that legislation already requires that chemical restraint is used as a last resort, there is clearly a compliance issue such that the current framework is insufficient. The new benchmark outlined above for appropriate restraint use is useless without compliance, as well as an understanding of what barriers to compliance exist, namely: perceived safety and legal issues; resource constraints and organisational culture; lack of education about consequences of, and alternatives, to restraint; persistent paternalistic beliefs towards older people; inadequate review; and communication barriers.[294]

These criteria, taken as a whole, present a risk-based framework that can be used to control the risk that chemical restraint will be abused.[295] Each of those factors could together form 'a portfolio of harm-mitigation projects, each one aimed at a carefully identified and delineated concentration'.[296] These regulatory focal points would still allow for flexibility in strategy that is responsive to the individual circumstances of the regulated institutions[297] but could also provide the basis for analysing individual risk scores for different residential facilities.[298]

This suggestion has a caveat: it should be noted that different residential facilities will have different risk profiles, and this should be given significant weight in developing a facility's risk score. Simply labelling a particular facility as 'high risk' and targeting that facility for action can lead to the misapplication of scarce resources, because certain facilities will be more amenable to different types of intervention than others.[299] Therefore, a risk score based on the above list does not provide much information about the costs of securing compliance[300] and in enforcing the ultimate policy goal of reducing the risk of abuse. This will be heavily influenced by the individual residential facility.

That is not to place all the blame on the individual facility. Regulation exists in a broader societal context: it is well-established that residential facilities are viewed in a negative light,[301] but elderly people are also viewed as burdensome.[302] This is likely because of a greater social discomfort with more than just disability, but with ageing and mortality: 'the last stage of life is … where the darkest human fears reside, the dying are hard to associate with, and their care is separated both organisationally and professionally.'[303] To put it starkly, for a liberal society, the obsession with autonomy places dependency on the same trajectory as death.[304]

For these reasons it is difficult to displace the negative connotations associated with residential facilities, wherein they are viewed as a 'last stop' rather than a full, valuable stage of a person's life. These perceptions are linked with the organisation's culture as well as the attitudes of those working in these spaces: with society lowering the value of this life-stage, and the people in it, this allows for paternalism to override dignity, because there is a broader perception that there is no dignity in dependency. An empowerment by protection paradigm could challenge this notion: if all people are dependent on one another such that autonomy can be exercised through social relationships,[305] then dignity in dependence is inherent.

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[294] Royal Commission into Aged Care Quality and Safety, *Restrictive Practices* (n 3) 10.
[295] Robert Baldwin, Martin Cave and Martin Lodge, 'Risk Based Regulation' in Robert Baldwin, Martin Cave and Martin Lodge (eds), *Understanding Regulation* (Oxford Scholarship Online, 2015) 281, 281.
[296] Malcolm K Sparrow, *The Character of Harms: Operational Challenges in Control* (Cambridge University Press, 2008) 154.
[297] Black and Baldwin (n 171) 182.
[298] Ibid 188.
[299] Ibid 190-1.
[300] Ibid 193.
[301] Schwarz et al., (n 146) 340.
[302] Liz Lloyd, *Health and Care in Ageing Societies: A New International Approach* (Policy Press, 2012) 116.
[303] Ibid.
[304] Ibid 115.
[305] Harding (n 93) 430.

Considering that a central purpose of the CRPD is to change social structures to reflect such inherent dignity for persons with disabilities, and that chemical restraint practices have been abused by those who were supposed to protect vulnerable people, policy in this area must recognise that while persons with disabilities may have different needs, it should not be taken for granted that the benefits of chemical restraint automatically outweigh the significant risks. Yet, where people's needs are not met, this significantly increases the risk that chemical restraint becomes inevitable: regulation should therefore be focused on reducing the risk that restraint is ever needed.

1 *Policy Suggestions to Reduce Restraint Abuse*

This final section offers suggestions to reduce the risk of chemical restraint abuse, based on the empowerment by protection paradigm. To reiterate, this suggests that changes should be made to remove both personal and societal blocks to full social participation: the following suggestions have been chosen as approaches that can address the key issues identified by the ACRC as barriers to eliminating restraint use.[306] Nonetheless, any changes will be only a stopgap solution to a system that is unable to adequately address the root of legal disability. Nonetheless, improvements can be made to residential facilities with the aim of reducing the likelihood that chemical restraint will be needed while also providing a strict safeguard framework for the practice.

First, one simple improvement would be to standardise chemical restraint definitions and practices across sectors. Along with the ACRC's Final Report, other key reports[307] note that restrictive practices are used across a wide range of settings,[308] and argue that there should be consistency in the way the sectors covering vulnerable people are regulated.[309] The Australian Law Reform Commission has twice recommended a national policy framework designed to combat elder abuse,[310] and to standardise the use of restrictive practices across the country.[311] Further, stakeholders have identified that reducing restrictive practices is challenged by 'the lack of uniform legislative controls and reporting requirements and the absence of equivalent key players across all jurisdictions'.[312] Therefore, the key benefits of standardising the sectors dealing with vulnerable people are to prevent chemical restraint from being a matter of discretion, while also reducing the complexity of the legal framework.[313]

Second, inconsistencies in definitions and practices contribute to the problem of defining the scope of abuse. There is a reluctance to define medication prescribed by practitioners as

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[306] Royal Commission into Aged Care Quality and Safety, *Restrictive Practices* (n 3) 10.

[307] See above n 12. The Oakden Report was an investigation launched after concerns were raised about treatment of elderly people at the Oakden Older Persons Mental Health Service. The 2017 Review of National Aged Care Quality Regulatory Processes, building on the work of the Oakden Report, examined why Commonwealth processes failed to detect the abuses at Oakden. Also in 2017, the Australian Law Reform Commission released the Elder Abuse – A National Legal Response report, which examined safeguards designed to protect the elderly. The ALRC also wrote the *Equality, Capacity and Disability* Report, which discussed the use of restrictive practices across Australia.

[308] Australian Law Reform Commission, *Equality, Capacity and Disability* (n 12) ch 8, 257 [8.68].

[309] Australian Law Reform Commission, *Elder Abuse* (n 12) 147.

[310] Ibid 144.

[311] See generally Australian Law Reform Commission, *Elder Abuse* (n 12) ch 8.

[312] Offices of the Public Advocate (SA and Vic), Submission 95 to Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (June 2014) 35 [8.3].

[313] For example, Victoria, Queensland and Tasmania have controlled restrictive practices through disability legislation (see: *Disability Act 2006* (Vic); *Disability Services (Restrictive Practices) and Other Legislation Amendment Act 2014* (Qld); *Disability Services Act 2011* (Tas)) but in New South Wales, restricted practices may be authorised under the *Guardianship Act 1987* (NSW) with guidelines available for Behavioural Support Planning (see eg, NSW Government, *Behaviour Support in Out-of-Home Care,* Policy Guidelines, 10 October 2020). Mental Health and Aged Care have their own guidelines for restrictive practices. Chemical restraint is no longer specifically mentioned in the *Aged Care Act 1997* (Cth).

chemical restraint.[314] Yet evidence given at the ACRC alleged that that antipsychotics are given to residents without psychotic symptoms[315] and on average, the rates of medication in residential facilities are significantly higher than in the general population.[316] This prescription blind spot is reflected in the *Aged Care Act*, which specifically excludes medication prescribed by a doctor as chemical restraint.[317] Inappropriate pharmacy practices should be included within the ambit of the official definitions of chemical restraint, such that safeguards then apply.

Third, when it comes to the designs of residential aged care, it has been noted that the designs of these facilities are often not conducive to managing behaviours of concern. For example, there have been concerns about the lack of 'circulation space for reducing the likelihood of aggressive incidents, [and] accessible outside areas for regular physical exercise [as well as] … insufficient natural light for maintaining normal sleep/wake cycles'.[318] One study implemented a 'multisensory environment as a nonpharmacological intervention for people with behavioural and psychological symptoms of dementia'[319] and saw significant improvements in communication between participants and their caregivers as well as significantly reduced behavioural concerns.[320] This supports the idea that residential facilities must be seen as more than a place to die, but instead, as a place wherein a fully valued life stage can take place.

Though person-centred institutional designs do improve behaviour in residential facilities, the research outlined in section III indicates that nurses feel that reducing restraint is impossible without increased staffing measures because of threats to safety.[321] Therefore, to address this, mandated minimum nurse to resident ratios could be legislated across the Commonwealth.[322] When nurses have more time for each resident, this enables them to form better therapeutic relationships with those in their care, which as was explained in section III, will have flow on effects for fostering autonomy for persons in residential settings.[323] However, when restraint may be inevitable, the Ulysses contract used in Canada would be a beneficial protection for people in residential or in-home care, in order to promote respect for a person's wishes and preferences.

Above all, it is important to include persons with cognitive and intellectual disabilities, their family members and care workers in the rule-making process.[324] This involves asking what the persons who are being chemically restrained require from the residential settings they reside

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[314] Royal Commission into Aged Care Quality and Safety, *Restrictive Practices* (n 3) 5.
[315] Royal Commission into Aged Care Quality and Safety, *Final Report: Vol 2* (Final Report, 26 February 2021) 106.
[316] See generally R E Brimelow et al., 'Prescribing of Psychotropic Drugs and Indicators for Use in Residential Aged Care and Residents with Dementia' (2019) 31(6) *International Psychogeriatrics* 837, 837-8.
[317] The Quality of Care Principles 2014 (Cth) set out the standards required for aged care facilities. Section 15E(2) defines chemical restraint as a practice or intervention that is, or that involves, the use of medication or a chemical substance for the primary purpose of influencing a care recipient's behaviour, but does not include the use of medication prescribed for the treatment of, or to enable treatment of, the care recipient for a diagnosed mental disorder or a physical illness or condition, or as end of life care.
[318] Gerard J Byrne, 'Prescribing Psychotropic Medications in Residential Aged Care Facilities' (2020) 212(7) *Medical Journal of Australia* 1, 1.
[319] Cheryl K Riley-Doucet and Karen S Dunn, 'Using Multisensory Technology to Create a Therapeutic Environment for People with Dementia in an Adult Day Centre' (2013) 6(4) *Research in Gerontological Nursing* 225, 225.
[320] Ibid 231.
[321] Koch, Nay and Wilson (n 124) 157.
[322] Australian Nursing & Midwifery Federation, 'A Plan for 'Care, Dignity and Respect' for Older Australians' (Media Release, 1 March 2021) <https://www.anmf.org.au/media-releases/entry/media_210301>.
[323] Hedman et al. (n 158) 287-9.
[324] Dagan and Kreitner (n 114) 649.

in, and how the law can be used to provide access to justice for a vulnerable section of society that is often 'out of sight, out of mind'. By putting these experiences at the forefront of reform discussions, this also begins to visibly respect the lived experience of person with disabilities and their care workers, rather than attempting to solve the problem from an arm's length, academic position.

Many of these changes will require significant political will to occur. Though it is generally accepted that society has a duty to its most vulnerable, this has not been followed by the requisite planning, funding[325] or oversight to make this obligation a reality. The revelations of the ACRC showed the extent to which Australia has failed its vulnerable population: chemical restraint is too often the outcome of a negligently underfunded and overworked system. By introducing new standards and empowerment-oriented policy, it is possible to begin to rectify this situation, even if change is not going to happen quickly. This is not an excuse to aim low, but instead, an opportunity to evaluate the ways in which policy can further the overarching goals of the CRPD.

VI CONCLUSION

The central question of this article was whether chemical restraint has a legitimate place in modern disability policy, specifically in aged care facilities. Chemical restraint is the continuation of a long history of controlling people who fall outside of the norm: ECT, DST and chemical restraint via psychotropic medications have all been used on persons with disability without their consent, often to horrific ends. From a Foucauldian perspective, these practices are a mode of controlling those who fall outside of the norm. For this reason, the power structures that enable these practices must be examined and questioned, rather than simply taken on face value as a necessity, particularly when the consequences are potentially so severe.

The use of chemical restraint poses a difficult regulatory question because it involves competing imperatives, presenting a 'Kantian antinomy' as discussed in section II. On one hand, the CRPD, as the main source of rights to answer this question, would appear to require states to ban the use of all restraint practices as forced interventions, while also requiring states to take positive steps to ensure that persons with disabilities are able to enjoy the full spectrum of human rights available to others.[326] Chemical restraint is also often practised without consent, potentially constituting a violation of that person's rights as well as their autonomy.[327] On the other hand, attention must also be paid to protection values, not only of the person restrained, but of the other people around them.

This ethical dilemma means that regulation must balance a number of competing priorities. These were identified as challenges for regulation in section III. In particular, studies show that nonpharmacological interventions can fail to reduce aggressive or violent behaviours of concern,[328] and when other modes of restrictive practices are taken away, nurses are more likely to turn to chemical restraint anyway.[329] In any case, this author has found no studies that have presented a viable alternative model.[330]

Though the CRPD has been in force since 2008, the judiciary appears to concur with staff who practice chemical restraint. The doctrine outlined in section IV showed that there has been a quiet rejection of the new norms under the CRPD. Regulation is therefore difficult because

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[325] Carsten Colombier, 'Drivers of Health-Care Expenditure: What Role Does Baumol's Cost Disease Play?' (2017) 98(5) *Social Science Quarterly* 1603, 1604. Baumol's cost disease, an economic model design explains why aged care funding is particularly difficult: residential services heavily rely on labour-intensive services which limits opportunities for increased efficiency from technological advancement.

[326] CRPD (n 15) art 1.

[327] See above n 12.

[328] Wale, Belkin and Moon (n 101) 60.

[329] Muir-Cochrane, O'Kane and Oster (n 125) 1517.

[330] Hawsawi et al. (n 14) 832.

there appears to be reluctance to leave people 'rotting with their rights on'[331] such that regulation must strike a balance between protection and the aspirational goals of the CRPD.

Such a framework should be based on an 'empowerment by protection' paradigm, which does not deny that certain people require different treatment but emphasises this treatment should never be a form of oppression. Several policy suggestions were outlined in section IV, with the aim of preventing the need to use chemical restraint in the first place. Particular emphasis should be given to improving the capacity of nursing staff to provide genuine care to people in residential facilities, such that these places become more than a place to die. However, where chemical restraint must be used, it should be done so in a way that the risk does not outweigh the benefits: it may be that such a scenario is quite rare in practice.

Fundamentally, the way chemical restraint is practised against vulnerable people is always going to be reflective of societal values: for many, the ACRC revelations were the first major public acknowledgment of the neglect occurring in residential facilities, chemical restraint being just one problem of the dozens identified. This is not a new problem, but the solutions to chemical restraint abuse must be innovative if Australia is going to successfully reduce the use of the practice. Regulation of this area should be underpinned by high aspirations: the CRPD calls for states to recognise the inherent dignity in persons with disabilities, and it is time that Australia begins to properly do so.

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[331] Appelbaum and Gutheil (n 110).

A Case for Recognition: A Fiduciary Relationship Between the Crown and Indigenous Australians

John O'Connell*

This article provides insights into how Indigenous Australians have unsuccessfully attempted to utilise fiduciary law principles to gain greater recognition of their unique status in Australian society. It contrasts these unsuccessful attempts against the greater success that indigenous Canadians have enjoyed. It goes on to contrast the fiduciary law regimes in Australia and Canada, highlighting the stark differences between the two jurisdictions, particularly in the context of judicial decision-making about the recognition of a fiduciary obligation owed to indigenous peoples. The article contends that the success that indigenous Canadians have enjoyed, with favourable judicial decisions recognising such a fiduciary obligation owed to them by the Crown, is in part due to Canada's progressive approach to constitutional recognition of indigenous Canadians, in particularly section 35 of the Canadian Constitution. Section 35 recognises the rights and treaties of indigenous Canadians. The article contends that if Australia was to take a similarly progressive approach to indigenous constitutional recognition, courts would have greater flexibility to make decisions recognising a broad fiduciary relationship between the Crown and indigenous Australians. This article also addresses some of the challenges that such a course of action would give rise to and provides an overview of what constitutional and fiduciary recognition of indigenous Australians could look like in the future.

Introduction

'For the king ought not to be under man but under God, and under the law'

History has remembered Chief Justice Edward Coke's courageous and controversial disagreement with King James I in a multifarious and eclectic fashion. Some say that during this encounter Coke's timidity was palpable and that he recanted his 'treacherous' words soon after uttering them.[1] Others say that he, in typical English lawyer fashion, boldly appealed to Magna Carta for justification of his comments and for defence against the king's raised arm.[2] Whether Coke almost lost his head for his verbal challenge to the king's unfettered power or not is a mystery that will likely remain unknown forever. What is more certain is that this short encounter depicted by contemporary legal historians is used today as justification for the principle that the Crown is 'under the law' and therefore bound by it. To assert the opposite is a flagrant disregard for the rule of law and a notion that is entirely unacceptable in the contemporary Australian legal system.

This article takes as an unequivocal starting point that the Crown is under the law and embarks upon its analysis with this as an underlying theme. The question that this article asks and answers is; what is the law by which the Crown is bound? Specifically, what is the state of fiduciary law in Australia (compared with Canada) and can it, with the help of constitutional law reform, be used to bind the Crown to act in a fiduciary capacity with respect to Indigenous Australians?

This article consists of three parts. Part 1 is an analysis of the current state of fiduciary law in Australia. It will argue that fiduciary law in this country is unlikely to be effective as a means of furthering indigenous rights and interests unless indigenous constitutional recognition is successfully implemented in this country. Part 1 will also outline the indefinability of fiduciary

[1] Geoffrey Robertson, *The Tyrannicide Brief* (Vintage Books, 2005), 26.
[2] Augusto Zimmermann, 'Sir Edward Coke and the Sovereignty of the Law' (2017) 17(1) *Macquarie Law Journal* 127, 129.

relationships whilst pointing to two fundamental principles that assist in recognising when such relationships arise. These fundamental principles are undertaking[3] and reliance.[4] The part will demonstrate that whilst Australian fiduciary law principles are flexible, Australian fiduciary law precedents are rigid and unlikely to shift without a broad systemic change such as the implementation of indigenous constitutional recognition.

Part 2 will consist of a similar analysis to Part 1 except within the Canadian context. It will argue that indigenous constitutional recognition and the recognition of a fiduciary relationship between the Crown and indigenous peoples go hand in hand. It will demonstrate the flexibility that has been employed by Canadian courts at the level of principle when dealing with matters involving indigenous rights and interests. It will also point to specific precedents that have discussed the interrelated nature of indigenous constitutional recognition and the protection of indigenous interests through fiduciary law principles.

Part 3 will highlight the differences between the two jurisdictions discussed and analysed in the two preceding parts. It will outline what Australia can learn from Canada with respect to these issues. The primary lesson being that indigenous constitutional recognition may be a useful and effective means of protecting indigenous rights and interests. However, as will be seen such a course of action is not without its challenges. This part will also provide a focused outline of what such development, both constitutional and fiduciary, might look like in the future.

1 – Fiduciary Law in Australia

In this part, I will argue that the two most fundamental principles of the fiduciary relationship are 1) undertaking and 2) reliance. I will discuss the most relevant precedents in Australian fiduciary law so as to assist with the comparative analysis that will be undertaken in Part 2 of this article. This case law analysis will be confined to the most relevant High Court and State Supreme Court precedents and will demonstrate that the fiduciary law in Australia is largely based on the two fundamental principles; undertaking and reliance.[5] I will demonstrate that the fiduciary law in Australia confines fiduciary obligations to negative, as opposed to positive duties[6] and is largely confined to relationships with an economic element.[7] Having outlined the precedents relevant to fiduciary law generally, I will provide a focused case analysis of fiduciary law cases involving indigenous litigants. Finally, I will answer the question, whether Australian courts can, given the current state of fiduciary law in this country, find a fiduciary relationship between the Crown and Indigenous Australians.

PRINCIPLES OF AUSTRALIAN FIDUCIARY LAW

Fiduciary law is a difficult area of law, so the delineation of firm underlying principles is a challenging endeavour. It has been said that the principles of fiduciary law have been characterised by 'disagreement, uncertainty and controversy.'[8] Indeed, Paul Miller, professor of law at the University of Notre Dame, contends that the 'dominant academic view is [that] the fiduciary relationship is indefinable.'[9] The High Court of Australia has made similar comments. Dawson and Toohey JJ stated in *Breen v Williams* that 'the law has not, as yet, been able to formulate any precise or comprehensive definition of the circumstances in which a person is constituted a fiduciary in his or her relations with another.'[10] Consequently, it is no

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[3] James Edelman, 'When Do Fiduciary Duties Arise?' (2010) 126 *Law Quarterly Review* 302, 311; *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 42, 96.
[4] *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1, 16.
[5] *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 42, 96.
[6] *Breen v Williams* (1996) 186 CLR 71, 113.
[7] *Paramasivam v Flynn* (1998) 90 FCR 489, 504.
[8] Lionel Smith, 'Fiduciary Relationships: Ensuring the Loyal Exercise of Judgement on behalf of Another' (2014) 130 *Law Quarterly Review* 608, 608.
[9] Paul Miller, 'The Fiduciary Relationship' in Andrew Gold and Paul Miller (eds), *Philosophical Foundations of Fiduciary law* (Oxford University Press, 2014), 65.
[10] *Breen v Williams* (1996) 186 CLR 71, 92.

easy task to outline such principles with clarity.[11] However, it is possible to provide a cursory outline of some of the fundamental and underpinning notions of fiduciary law. In the analysis that will follow, particular attention will be given to the principles that are most relevant to the current inquiry; that is a potential fiduciary obligation owed by the Crown to indigenous peoples. I contend that the most important principles of the fiduciary relationship in Australia are: 1) the fiduciary undertaking and 2) the reposing of trust and confidence in the fiduciary and consequent power of that fiduciary. This second principle can usefully be termed 'reliance.' Other ancillary fiduciary notions like vulnerability and the higher expectations placed on fiduciaries flow from these two fundamental principles.[12]

Importantly, it is not the case that the presence of these two fundamental principles unequivocally necessitates the finding of a fiduciary relationship. Indeed, sometimes one or more of these principles is missing, or other principles are present, and a fiduciary relationship will nonetheless exist.[13] The most that can be said is that the presence of these two principles *point to* the existence of a fiduciary relationship.

The Fiduciary Undertaking

James Edelman has spilt much ink on positing and defending his contention that the fiduciary undertaking is a fundamental principle of fiduciary law. For Edelman, the fiduciary 'undertaking to act in a particular manner' is a necessary condition of the creation of a fiduciary relationship.[14] This is not a novel argument. Mason J's landmark decision in *Hospital Products Ltd v United States Surgical Corporation* (*Hospital Products*)[15] which, despite being a dissenting judgment, has subsequently been applied in several later fiduciary law cases, stated that the 'critical feature' of the fiduciary relationship is that the fiduciary 'undertakes or agrees to act for or on behalf of or in the interests of another person.'[16]

The notion of the fiduciary undertaking is important and relevant to the current inquiry because, if Edelman and Mason J are correct, to find a fiduciary relationship between the Crown and Indigenous Australians, there must first be a finding that the Crown has made an undertaking to act in a fiduciary capacity with respect to Indigenous Australians.

Settled fiduciary law concepts, such as the constructive trust, demonstrate that such an undertaking need not be express and may be imposed rather than voluntarily assumed. Nonetheless, for a fiduciary relationship to be recognised between the Crown and Indigenous Australians, a notion of undertaking, implied or express, actual or constructive, must be established. As will be explained later, the notion of undertaking is fundamental in determining the nature and scope of any potential fiduciary obligation owed by the Crown to Indigenous Australians.[17]

Reliance: Trust and Confidence & Power

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[11] Stephen Gageler, 'Expansion of the Fiduciary Paradigm into Commercial Relationships: The Australian Experience' in Peter Devonshire and Rohan Havelock (eds), *The Impact of Equity and Restitution in Commerce* (Hart Publishing, Oxford, 2018), 165, 168.

[12] James Edelman, 'When Do Fiduciary Duties Arise?' (2010) 126 *Law Quarterly Review*, 302, 310; James Edelman, 'The Importance of the Fiduciary Undertaking' (Speech delivered at the Conference on Fiduciary Law, University of New South Wales, 22 March 2012) <https://www.supremecourt.wa.gov.au/_files/UNSW%20Conference%20of%20Fiduciary%20Law%2022%20Mar%202013%20Edelman%20J.pdf>.

[13] James Edelman, 'The Importance of the Fiduciary Undertaking' (Speech delivered at the Conference on Fiduciary Law, University of New South Wales, 22 March 2012) <https://www.supremecourt.wa.gov.au/_files/UNSW%20Conference%20of%20Fiduciary%20Law%2022%20Mar%202013%20Edelman%20J.pdf>.

[14] James Edelman, 'When Do Fiduciary Duties Arise?' (2010) 126 *Law Quarterly Review*, 302, 311.

[15] *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 42.

[16] Ibid 96.

[17] James Edelman, 'The Role and Status of the Law of Obligations: Common Callings, implied terms and lessons for fiduciary duties' (Speech delivered at the University of Alberta and DePaul University Conference, Chicago, 18 July 2013).

Another fundamental principle of the fiduciary relationship is the trust and confidence that a beneficiary reposes in the fiduciary. In another landmark fiduciary law case, *United Dominion Corporation Ltd v Brian Pty Ltd*,[18] the notion of the reposing of trust and confidence in the fiduciary was characterised as 'necessary.'[19] This necessary element has its origins in broader equitable principles. Equity, as the mother of fiduciary law, has greatly influenced the development of fiduciary law principles. For example, the trustee-beneficiary relationship, a fundamental relationship of equity, was and is the archetypical example of the fiduciary relationship.[20] In such a relationship, the trustee, 'determines whether, when, how, and how far the beneficial interest of the *cestui* is to be served.'[21] It is the power of the trustee, with respect to the beneficiary's interests, that imposes the notion of trust and confidence. The trust and confidence of the beneficiary, on the one hand, and the power of the fiduciary, on the other hand, are two sides of the same coin. The power of the trustee necessitates the trust of the beneficiary, and the trust reposed in the fiduciary is what gives the fiduciary his/her power. Again, this notion of power is contained in Mason J's oft-quoted dictum. He says the 'critical feature' of the fiduciary relationship is that the fiduciary undertakes to exercise 'power or discretion which will affect the interests of another person in a legal or practical sense.'[22]

Early 20th century American jurist Cardoza CJ remarked, that 'the level of conduct for fiduciaries' is to be 'kept at a higher level than that trodden by the crowd.'[23] This dictum provides an insight into both of the two fundamental principles of the fiduciary relationship, outlined above. Cardoza CJ's 'higher standard' is a consequence of 1) the undertaking that the fiduciary makes and consequent responsibility he/she assumes and 2) the trust and confidence that the beneficiary reposes in the fiduciary, who consequently holds power. In the context of a potential fiduciary relationship between the Crown and Indigenous Australians, these two fundamental principles arguably already exist. Firstly, the Crown, by virtue of its initial possession and retention of land or perhaps by an implied assumption of responsibility in relation to Indigenous Australians more broadly, may be taken to have made an undertaking.[24] Secondly, the power of the Crown in relation to Indigenous Australians and the consequent trust and confidence that Indigenous Australians repose in the Crown, is also arguably justifiable on colonisation grounds. Consequently, contemplating these two principles it appears that there is scope for the finding of a fiduciary relationship between the Crown and Indigenous Australians at the level of principle. Perhaps this is why other common law jurisdictions, such as Canada, have been able to do so. Canada's approach will be discussed at length in Part 2. Nonetheless, as will be seen in the Australian context, this same development is not as suitable at the level of precedent.

Fiduciary law precedents in Australia confine fiduciary obligations to negative, as opposed to positive, duties and to the protection of economic rights, rather than personal or human rights.[25] The barriers posed by these broad precedents are exacerbated by the specific precedents that have been established in cases where indigenous litigants have unsuccessfully pleaded that a fiduciary obligation was or is owed by the Crown.

EXISTING AUSTRALIAN FIDUCIARY LAW PRECEDENTS

As has been seen, the task of reaching firm conclusions about the nature and extent of fiduciary relationships in Australian law, at the level of principle, is a difficult task. This task is no less

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[18] *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1, 16.
[19] Ibid.
[20] Stephen Gageler, 'Expansion of the Fiduciary Paradigm into Commercial Relationships: The Australian Experience' in Peter Devonshire and Rohan Havelock (eds), *The Impact of Equity and Restitution in Commerce* (Hart Publishing, Oxford, 2018), 165, 166.
[21] Paul Miller, 'The Fiduciary Relationship' in Andrew Gold and Paul Miller (eds), *Philosophical Foundations of Fiduciary law* (Oxford University Press, 2014), 65, 78.
[22] *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 42, 96.
[23] *Meinhard v Salmon* 164 NE 545 (1928) 546.
[24] *Mabo v State of Queensland (No 2)* (1992) 175 CLR 1, 166 (Dawson J).
[25] *Breen v Williams* (1996) 186 CLR 71, 113; *Paramasivam v Flynn* (1998) 90 FCR 489, 504.

arduous at the level of precedent. This is, in part, due to the uncertainty that attends to this complex area of law and the disparate views that Australian jurists have offered.

The following case law analysis is limited in scope. It will largely be confined to the most prominent and pertinent High Court and State Supreme Court authorities. These include some of the several Australian cases that have addressed broad fiduciary law principles as well as a few cases that have dealt explicitly with fiduciary law in relation to Indigenous Australians. A selection of these cases will be used to come to some conclusions about the current state of fiduciary law in this country.

Hospital Products[26] provides a good starting point for the analysis of Australian fiduciary law precedents. Mason J stated that the 'critical feature' of the fiduciary relationship is 'that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense.'[27] As discussed, this statement of principle does not necessarily constitute a barrier to the finding of a fiduciary relationship between the Crown and Indigenous Australians. However, the same cannot be said of other High Court authorities.

Breen v Williams,[28] whilst not a case brought by Indigenous Australians, is an example of a precedent that has, perhaps inadvertently, placed the finding of a fiduciary relationship between the Crown and Indigenous Australians further out of reach. This case was concerned with whether a doctor owed a fiduciary obligation to his patient to provide access to the patient's medical records. Gaudron and McHugh JJ clearly stated that, 'the law of this country does not … impose positive legal duties on the fiduciary to act in the interests of the person to whom the duty is owed.'[29] This precedent, relying on previous cases, expressly excluded from the notion of the fiduciary duty, a positive duty to act in the interests of a beneficiary. Consequently, fiduciary obligations in Australia are confined to negative duties; that is duties to refrain from acting to the beneficiary's detriment. In the commercial context, an example of such a negative duty is the fiduciary duty not to obtain an improper profit or not to put oneself in a position of conflict. The former is stated in *United Dominions Corporation Ltd v Brian Pty Ltd*[30] as the 'duty to *refrain* from pursuing, obtaining or retaining for itself or himself any collateral advantage in relation to the proposed project without the knowledge and informed consent of the beneficiary.'[31]

In *Paramasivam v Flynn*[32] the Full Federal Court expressed reluctance to extend fiduciary obligations beyond the protection of economic rights. In that case, one of the legal issues was whether the parental relationship was fiduciary in nature. Whilst the court unsurprisingly found that the parental relationship was protected by law (criminal and family law), it did not go so far as to recognise the relationship as fiduciary in nature.[33] This was, in part, due to the desire of the court to keep fiduciary relationships confined to the economic sphere.

Stephen Gageler makes the interesting point that, in Australia, fiduciary law is rightly confined to the sphere of commercial relationships because whilst there is an expectation of loyalty between fiduciaries in commercial dealings, commercial relationships also demand a measure of self-interest, subject, of course to whatever contractual duties are imposed by the parties. Consequently, in the commercial context fiduciary 'loyalty' or good faith can be limited by justifiable consideration of commercial self-interest. However outside of the commercial context bright lines, that can confine the scope of the fiduciary relationship, are more difficult to ascertain. This is because outside the commercial context any amount of self-interest in fiduciary relations would likely be deemed 'unacceptable'. This fear of the unlimited extension

[26] *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 42.
[27] Ibid 96.
[28] *Breen v Williams* (1996) 186 CLR 71.
[29] Ibid 113.
[30] *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1.
[31] Ibid 13.
[32] *Paramasivam v Flynn* (1998) 90 FCR 489.
[33] Ibid 506.

of the fiduciary relationship has acted as one of the rationales for confining fiduciary law to the commercial sphere and is an obvious obstacle to the extension of fiduciary law into non-commercial areas like indigenous rights. This is perhaps why in 'Anglo-Australian law the interests which the equitable doctrines … have hitherto protected are economic interests.'[34]

When it comes to Indigenous Australian cases *Mabo v The State of Queensland* (*Mabo*)[35] is a useful place to begin. The decision of Toohey J in *Mabo* expressed the opinion that the Crown owes a fiduciary obligation to Indigenous Australians. In accordance with the latter of the two fundamental fiduciary principles outlined in Part 1, Toohey J said that 'the fiduciary relationship arises … out of the *power* of the Crown to extinguish traditional title by alienating the land.'[36]

The arguments contained in Toohey J's decision were not echoed by the rest of the bench in *Mabo* nor in any subsequent cases. In fact, in *Wik Peoples v The State of Queensland*[37] Brennan J dismissed the notion stating, 'I am unable to accept that a fiduciary duty can be owed by the Crown to the holders of native title in the exercise of a statutory power to alienate land.'[38] Brennan J came to this conclusion on the basis that the discretionary power granted by the relevant statute to affect native title interests precluded the finding of a fiduciary obligation. The relevant discretion would lose its content if a fiduciary obligation that purported to limit that statutory discretion, was superimposed on it. Consequently, he found that there was 'no foundation for imputing to the Crown a fiduciary duty.'[39]

Several years later in *Cubillo and Gunner v Commonwealth* (*Cubillo*)[40] the Full Federal Court declined to find a fiduciary duty owed to Indigenous Australians. *Cubillo* was brought by Lorna Cubillo and Peter Gunner who alleged that they had been forcibly removed from their families and taken to 'aboriginal institutions' to be raised away from their communities, tribes and culture.[41] In this case, the Full Federal Court found that the Crown did not owe a fiduciary duty to Cubillo or Gunner on two separate bases. Firstly, that the actions taken by the Crown in that case were not shown to be outside of the powers granted by the relevant statute. If the conduct was not a breach of the statute, it could not be a breach of any potential fiduciary duty, because 'any fiduciary obligation must accommodate itself to the terms of the statute.'[42] And again, 'a fiduciary obligation cannot modify the operation or effect of statute: to hold otherwise, would be to give equity supremacy over the sovereignty of Parliament.'[43] The second basis for declining to make a finding of a fiduciary relationship was consistent with the reasoning in *Paramasivam*. Sackville, Weinberg and Hely JJ stated that it would be improper to find that a fiduciary duty is owed in circumstances where the common law, for example through the law of tort, already covered the field in terms of the duties owed in the circumstances of any particular relationship.[44]

The closest that the Australian judiciary has come to finding a fiduciary relationship between the Crown and Indigenous Australians has been in *Trevorrow v State of South Australia* (*Trevorrow*).[45] This case involved very similar facts to *Cubillo*, although in *Trevorrow* the actions of the Crown were found not to comply with the obligations under the statute and therefore the finding of a breach of fiduciary obligation *was* open to the court, without the

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[34] Ibid 504.
[35] *Mabo v The State of Queensland (No 2)* (1992) 175 CLR 1.
[36] Ibid 203.
[37] *Wik Peoples v The State of Queensland* (1996) 187 CLR 1.
[38] Ibid 96.
[39] Ibid 97.
[40] *Cubillo and Gunner v Commonwealth* (2001) 112 FCR 455.
[41] Ibid 493.
[42] *Paramasivam v Flynn* (1998) 90 FCR 489.
[43] *Cubillo and Gunner v Commonwealth* (2001) 112 FCR 455, 577; *Tito v Waddel (No 2*) [1977] CH 106, 139.
[44] *Cubillo and Gunner v Commonwealth* (2001) 112 FCR 455, 577-8.
[45] *Trevorrow v State of South Australia* (2007) 98 SASR 136.

court having to overturn *Cubillo*. Gray J, at trial, awarded Bruce Trevorrow $525,000 in damages for the defendant's misfeasance in public office, negligence, false imprisonment and breach of fiduciary duty, stating that the fiduciary relationship arose by operation of the relevant statute which imposed duties of guardianship upon the State of South Australia.[46]

South Australia appealed this decision. The appellate court in *State of South Australia v Lampard-Trevorrow*[47] (*Trevorrow Appeal*) found that, whilst the State of South Australia had breached its statutory duty and therefore, remained liable for the tortious claims, it was not liable under fiduciary law. The *Trevorrow Appeal* did not comment on the existence of a fiduciary relationship but stated that South Australia's actions did not constitute a breach of the duties contained in any potential fiduciary relationship.[48] This decision seems to have marked the end of attempts, to plead the existence of a fiduciary relationship between the Crown and Indigenous Australians. Consequently, the landscape of the precedents governing this area of law are not particularly favourable to indigenous litigants. As mentioned, at the level of principle, there is more flexibility, however at the level of precedent, there is more rigidity and Australian courts have been reluctant to find a fiduciary obligation owed to Indigenous Australians.

Having outlined the principles and precedents that govern Australian fiduciary law and its interactions with Indigenous Australians it is now possible to answer the question posed at the outset of this part: can Australian courts recognise a fiduciary relationship between the Crown and Indigenous Australians?

CAN AUSTRALIAN COURTS RECOGNISE A FIDUCIARY OBLIGATION?

The short answer to this question is that it is unlikely unless there is a systemic or paradigmatic shift such as the implementation of indigenous constitutional recognition. Given the current state of the principles and precedents of Australian fiduciary law it is unlikely that anything will change in the sphere of judicial decision-making.

It should be clear from the above analysis that there is a general reluctance to extend the principles of fiduciary law. Gaudron and McHugh JJ in *Breen v Williams* exemplified this reluctance when they stated, 'in our view, there is no basis upon which this Court can hold that Dr Williams owed Ms Breen a fiduciary duty to give her access to the medical records. She seeks to impose fiduciary obligations on a class of relationship which has not traditionally been recognised as fiduciary in nature and which would significantly alter the already existing complex of legal doctrines.'[49] This reluctance is also evident in several of the aforementioned Australian cases.

The two loose principles (undertaking and reliance) outlined above and more importantly, the inherent uncertainty in Australian fiduciary law principles provides a potential avenue for alteration and extension of the fiduciary relationship. As mentioned, the notion of undertaking can be implied through an interpretation of what responsibilities the Crown may have assumed upon colonisation and the notion of trust and confidence, as well as the consequent power of the Crown, arguably flows from such a finding. Thus, at the level of principle, Australian courts may be able to extend the fiduciary relationship into novel areas precisely because of a *lack* of settled principles.[50] However, there is understandable reluctance to extend a principle that may subsequently be widely and irresponsibly applied.[51] By contrast, at the

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[46] Ibid 347.
[47] *State of South Australia v Lampard-Trevorrow* (2010) 106 SASR 331.
[48] Ibid 402.
[49] *Breen v Williams* (1996) 186 CLR 71, 110.
[50] Stephen Gageler, 'Expansion of the Fiduciary Paradigm into Commercial Relationships: The Australian Experience' in Peter Devonshire and Rohan Havelock (eds), *The Impact of Equity and Restitution in Commerce* (Hart Publishing, Oxford, 2018), 165, 181.
[51] *Breen v Williams* (1996) 186 CLR 71, 110; *Paramasivam v Flynn* (1998) 90 FCR 489, [72]; *Cubillo and Gunner v Commonwealth* (2001) 112 FCR 455, [461]; *State of South Australia v Lampard-Trevorrow* (2010) 106 SASR 331, [337].

level of precedent, flexibility in fiduciary law is more difficult to ascertain. As has been demonstrated, the existing precedents in this area of law make extension unlikely, if not impossible.

Following the current Australian legal precedents in this area, courts cannot, in the absence of a substantial systemic change, such as indigenous constitutional recognition, recognise a fiduciary duty between the Crown and Indigenous Australians. The current state of the relevant precedents means that the recognition of a fiduciary relationship between the Crown and Indigenous Australians will not be achieved through novel interpretation of existing precedents but rather will require a more concerted reform project. A comparative analysis with the Canadian jurisdiction, which has recognised indigenous rights and treaties in its constitution, will explain that if the same course is taken in Australia in relation to constitutional recognition, there may be a possibility for the extension of the fiduciary law to include the relationship between the Crown and Indigenous Australians.

2 – Fiduciary Law in Canada

In this part, I will outline the current state of Canadian fiduciary law principles and precedents. I will demonstrate that Canadian principles and precedents in the area of fiduciary law are distinct from those of the Australian legal system. Most relevantly, the confining of fiduciary relationships to the commercial or economic sphere, a hallmark of Australian fiduciary law, has been rejected in Canada. To establish the relevance of certain precedents, I will provide another case law analysis, highlighting the landmark cases in Canada that found that a fiduciary relationship existed between the Crown and Indigenous Canadians. As will be seen in *R v Sparrow*,[52] the fiduciary relationship found to exist in Canadian law, relies heavily on constitutional justification, in particular s 35(1) of the Canadian constitution.[53] In this part, I will also discuss how Canadian courts have come to interpret s 35(1) of the Canadian constitution, in the years following the Canadian Supreme Court decision in *R v Sparrow*.

EXISTING FIDUCIARY LAW GENERAL PRINCIPLES AND PRECEDENTS

In the Canadian context, as in Australia, there are several important cases that are relevant to any inquiry into the current state of Canadian fiduciary law and how it deals with Indigenous Canadians. These cases have largely been decided in the Supreme Court of Canada. This part is not intended to be an exhaustive analysis of all the relevant precedents in the area of Canadian fiduciary law but rather a focused survey of the fiduciary law cases in Canada that will assist in comparing Canada's approach with the approach taken in Australia.

The first important Canadian fiduciary law decision is *Frame v Smith*.[54] This case was about whether a non-custodial parent was owed a fiduciary obligation by the other parent to have access to their children. The Court rejected the argument that a fiduciary relationship existed, but the dissent of Wilson J was to become influential in later cases in the years that followed. Wilson J, in contrast to the majority, rejected the notion, still the orthodox position in Australia, that fiduciary duties could only protect economic interests. He stated that it 'would be arbitrary in the extreme' for fiduciary law to protect material interests but 'afford no protection to human and personal interests.'[55]

Wilson J pointed to English authorities to justify his dissent.[56] He cited, among others, a House of Lords decision, *Reading v Attorney-General*.[57] This case involved an English soldier who served in Egypt during the war. The soldier was given favourable treatment by the local Egyptian guards because he wore an English army uniform. The soldier used this favourable treatment to obtain a profit by smuggling items across borders. The court found that the soldier owed the Crown a fiduciary duty and was liable to account for profits. Wilson J said

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[52] *R v Sparrow* [1990] 1 SCR 1075.
[53] *Canada Act 1982* (UK) c 11, sch B, s 35(1) ('*Canadian Constitution*').
[54] *Frame v Smith* [1987] 2 SCR 99.
[55] Ibid [68].
[56] Ibid [62].
[57] *Reading v Attorney-General* [1951] AC 507.

that the interest that had been infringed by the soldier's actions was not a strictly legally recognised interest but was nonetheless protected by fiduciary law principles. He said, 'the Crown's interest was a practical or even a moral one, namely that its uniform should not be used in corrupt ways.'[58]

Wilson J's dissent is particularly relevant to the comparative inquiry being undertaken in this article because, as has been seen in Part 1, the confining of fiduciary law to the economic or commercial sphere represents a significant barrier to the finding of a fiduciary relationship between the Crown and Indigenous Australians. Wilson J's dissent in *Frame v Smith*, as well as his citation of English jurisprudence, was dealt with in detail by McLachlin J in a later case, *Norber v Wynrib*.[59]

This case was concerned with a doctor-patient relationship. Dr Wynrib induced Ms Norber to engage in sexual activity with him in exchange for prescription drugs. In this case the Supreme Court found that a fiduciary relationship existed between the parties and that Dr Wynrib had breached his fiduciary duty by his unconscionable conduct.[60] In making this finding McLachlin J discussed Wilson J's dissent in *Frame v Smith*, stating 'that fiduciary duties are not confined to the exercise of power which can affect the legal interests of the beneficiary, but extend to the beneficiary's vital non-legal or practical interests.'[61] McLachlin J went on to state 'that [the present case] is not concerned with the protection of what has traditionally been regarded as a legal interest. It is, however concerned with the protection of interests, both societal and personal, of the highest importance.'[62] McLachlin J also went on to affirm Wilson's statement that the protection of economic interests, without protection of 'human or personal interests would … be arbitrary in the extreme.'[63] He stated that the 'principles alluded to by Wilson J in *Frame v Smith* are principles of general application … they are capable of protecting not only narrow legal and economic interests but can also serve to defend fundamental human and personal interests.'[64] In relation to the confining of fiduciary law to economic interests McLachlin J stated that, the 'closed, commercial view of fiduciary obligations is neither defended nor reconciled with the authorities, including those of this court.'[65]

Interestingly, Australian courts have rejected the notion that a fiduciary relationship exists between a doctor and patient. In *Breen v Williams* the question was whether a patient had the right to access their own medical records on the basis that a fiduciary obligation was owed to a patient by his/her doctor. This argument was rejected; however, the court also took the opportunity to state, in line with existing authority, that fiduciary relationships are confined to the commercial sphere. Dawson and Toohey JJ stated that a fiduciary obligation may arise where a doctor places 'himself in a position with potential for a conflict of interest - if, for example, the doctor has a financial interest in a hospital or a pathology laboratory.'[66] However, as the facts of the case and the particulars of the purported breach lacked any commercial element, the court decided not to find a fiduciary relationship between doctor and patient. Arguably, the same result would have been found if *Norber v Wynrib*[67] had come before an Australian court, because that case also lacked any commercial element. It was concerned primarily with a 'moral' breach rather than a commercial one. This points to the different ways in which Canadian courts have conceived of fiduciary relationships compared with Australian courts.

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[58] *Frame v Smith* [1987] 2 SCR 99, [62].
[59] *Norber v Wynrib* [1992] 2 SCR 226.
[60] Ibid 283-284.
[61] Ibid 276.
[62] Ibid 276.
[63] Ibid 277.
[64] Ibid 289.
[65] Ibid 283.
[66] *Breen v Williams* (1996) 186 CLR 71, 94.
[67] *Norber v Wynrib* [1992] 2 SCR 226.

Wilson J's dissent in *Frame v Smith* was also approved by Sopinka and La Forest JJ in *LAC Minerals Ltd v International Corona Resources*.[68] This case concerned duties of confidentiality between potential joint venturers. Important commercial information was disclosed during negotiations and the question for the court was whether the parties owed fiduciary obligations, including a duty of confidentiality, to one another. Whilst the question in this case *was* economic or commercial in character, it nonetheless elucidated some fundamental principles and importantly once again affirmed Wilson J's dissent. Sopinka and La Forest JJ approved of the enunciation of the principles of fiduciary law found in Wilson J's dissent in *Frame v Smith*.[69] After applying these principles to the case before them, they concluded that the categories of fiduciary relationships are not closed but should be 'reserved for situations that are truly in need of the special protection that equity affords.'[70] As the following analysis will demonstrate, the relationship between the Crown and Indigenous Canadians was decided by the courts to be one such situation.

FIDUCIARY LAW AND INDIGENOUS CANADIANS

Any discussion of the legal and equitable rights of Indigenous Canadians needs begin with a discussion of s 35(1) of the Canadian constitution. This section has been very influential in the furtherance of indigenous rights in Canada.[71] Section 35(1) of the *Constitution Act 1982* provides that 'the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.'[72] This simple yet powerful provision of the Canadian constitution has been instrumental in the furtherance of indigenous rights in Canada, including the Canadian judicial system's recognition of a fiduciary relationship between the Crown and Indigenous Canadians.[73] This constitutional imperative should be borne in mind, throughout the case law analysis that will form the bulk of this section.

The landmark case in this area of fiduciary law is *Guerin v The Queen*.[74] This case involved the surrender of native land to the Crown by a group of Indigenous Canadians on certain terms that were to be agreed by the parties. However, during the transaction the Crown withheld information relevant to the transaction and in doing so secured more favourable terms.[75] One question for determination was whether the Crown owed a fiduciary duty to native title holders and if so whether the Crown's conduct was in breach of that duty. The Supreme Court of Canada found that there *was* a fiduciary obligation owed by the Crown. The decision was based primarily on s 18 of the *Indian Act*.[76] Section 35(1) of the Canadian constitution, which, as will be seen, played a pivotal role in later cases, did not feature in this landmark case. Rather this decision justified the finding of a fiduciary relationship with reference to statute. Specifically, Wilson J stated,

> Section 18(1) of the Indian Act confers upon the Crown a broad discretion in dealing with the surrendered land … after the Crown's agents had induced the Band to surrender its land on the understanding that the land would be leased on certain terms, it would be unconscionable to permit the Crown simply to ignore these terms. Equity will not countenance unconscionable behaviour in a fiduciary whose duty is that of utmost loyalty to his principal. … the Crown breached the fiduciary obligation it owed to the Band and it must make good the loss suffered in consequence.[77]

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[68] *LAC Minerals Ltd v International Corona Resources* [1989] 2 SCR 574.
[69] Ibid 598.
[70] Ibid 596.
[71] Kirsty Gover, 'The Honour of the Crowns: State-Indigenous Fiduciary Relationships and Australian Exceptionalism' (2016) 38(1) *Sydney Law Review* 339, 355.
[72] *Canada Act 1982* (UK) c 11, sch B, s 35(1).
[73] *R v Sparrow* [1990] 1 SCR 1075, 1108; *Mabo v The State of Queensland (No 2)* (1992) 175 CLR 1, 166.
[74] *Guerin v The Queen* [1984] 2 SCR 335.
[75] Ibid 336.
[76] *Indian Act*, RSC 1952, s 18(1).
[77] *Guerin v The Queen* [1984] 2 SCR 335, 337.

Whilst constitutional factors were not considered in this case, subsequent decisions *were* justified on constitutional grounds. The two most relevant cases of this sort were *R v Sparrow*[78] and *R v Adams*.[79]

R v Sparrow was concerned with the constitutional validity of an enactment that purported to infringe on the rights of a group of Indigenous Canadians. The law purported to make it unlawful for persons to fish with a net larger than a prescribed size. The question for the court was whether this provision was inconsistent with s 35(1) of the Canadian constitution and therefore invalid by virtue of the operation of s 52(1) of the Canadian constitution. Section 52(1) states 'the Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.'[80]

The court invalidated the impugned law and made a finding that a fiduciary relationship existed between the Crown and Indigenous Canadians. The court stated that s 35(1) of the Canadian constitution requires the government 'to act in a fiduciary capacity with respect to aboriginal peoples and so import some restraint on the exercise of sovereign power.'[81] This notion echoes the comments of Dawson J in *Mabo v The State of Queensland (No 2)*[82] when he stated, whilst undertaking a comparative analysis with respect to Canada, that the 'responsibility [to act in a fiduciary capacity] is said to arise out of the Crown's historic powers over, and assumption of responsibility for, those aboriginal peoples and out of the recognition and affirmation of existing aboriginal rights contained in s. 35(1) of the Canadian Constitution.'[83]

Relatedly, the court in *R v Sparrow* also grounded its finding of a fiduciary relationship on the unique status of indigenous peoples and the Crown's historic assumption of power and responsibility. The Court said the '*sui generis* nature of Indian title and the historic powers and responsibilities assumed by the Crown constitute the source of … a fiduciary obligation. '[84] The Court went on to say that,

> the government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the government and aboriginals is trust-like, rather than adversarial and the contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship. [85]

R v Sparrow established a fiduciary relationship between the Crown and Indigenous Canadians and subsequent cases adopted and applied the test in *R v Sparrow* to invalidate other acts of the Crown that purported to infringe upon indigenous rights. In this way, aboriginal rights have taken a place of prominence in the Canadian legal system. As *R v Adams* found, the protection of aboriginal rights has the capacity even to bind the Parliament.

R v Adams was a very similar case to *R v Sparrow*. It involved an Indigenous Canadian who was charged with an offence of fishing without a license. This license was 'only available on application for the exercise of ministerial discretion.'[86] The question for the court was whether this administrative decision-making process was inconsistent with s 35(1) of the Canadian Constitution. The court concluded 'that the regulations did not provide sufficient direction to those exercising the discretion to fulfil the Crown's fiduciary duty to the aboriginal peoples.'[87] Lamer CJ stated that 'in light of the Crown's unique fiduciary obligations towards aboriginal

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[78] *R v Sparrow* [1990] 1 SCR 1075.
[79] *R v Adams* [1996] 3 SCR 101.
[80] *Canada Act 1982* (UK) c 11, sch B, s 52(1).
[81] *R v Sparrow* [1990] 1 SCR 1075, 1077.
[82] *Mabo v State of Queensland (No 2)* (1992) 175 CLR 1.
[83] Ibid 166.
[84] *R v Sparrow* [1990] 1 SCR 1075, 1108.
[85] Ibid.
[86] *R v Adams* [1996] 3 SCR 101, 101.
[87] Ibid 104-105.

peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights.'[88] He continued that if the Parliament purports to do so, 'the statute will be found to represent an infringement of aboriginal rights.'[89] *R v Sparrow* and *R v Adams*, especially the former, laid the foundation for the constitutional analysis that would become orthodox in constitutional invalidity matters related to indigenous rights.

Now that it was been demonstrated that a fiduciary relationship between the Crown and Indigenous Canadians was found by Canadian courts to exist, it will be useful to look at how this finding was refined in later constitutional cases. Particular attention will be given to how s 35(1) has been interpreted.

How have Canadian courts interpreted s 35(1)?

This section will analyse the relevant case law that has interpreted s 35(1) of the Canadian constitution. It will be seen that, with the exception of *Guerin v The Queen*,[90] courts deciding indigenous rights cases invariably employed s 35(1) to justify and rationalise their decisions to find a fiduciary relationship between the Crown and Indigenous Canadians. As has been seen, this is most obvious in *R v Sparrow* and in fact, later cases applied what became known as the *Sparrow* test, to determine the constitutional validity of laws and regulations that purported to infringe upon indigenous rights. However, courts in later cases also, paradoxically, used the principle that the Crown owed indigenous peoples a fiduciary obligation (which was justified by s 35(1) in *R v Sparrow*) to inform the content and scope of the interpretation of s 35(1). As will be seen, it is possible to 1) use constitutional justification to find the existence of a fiduciary relationship, as was done in *R v Sparrow*, and 2) use the fiduciary relationship (justified on constitutional grounds) to inform the constitutional interpretation that follows. The two interpretative actions are not mutually exclusive.

The Sparrow test

The test formulated in *R v Sparrow* was used to determine the constitutional validity, with reference to s 35(1), of an impugned law. The test has three limbs; 1) whether the practice, custom or tradition, that is purportedly infringed, is an existing aboriginal right, 2) if so, whether the impugned law constitutes a *prima facie* infringement of that right and 3) if so, whether the *prima facie* infringement is justified.[91] The third limb of the test, namely the 'justification limb' consists of two further limbs. Firstly, whether the government in imposing the infringement, was acting pursuant to a valid legislative objective and secondly, and most relevantly for present purposes, whether the infringement is consistent with the fiduciary duty owed by the Crown to Indigenous Canadians?[92] This test was subsequently applied in three important cases: *R v Van der Peet*, [93] *R v NTC Smokehouse Ltd*[94] and *R v Gladstone*.[95]

R v Van der Peet concerned s 27(5) of the *British Columbia Fishery (General) Regulations*. These regulations purported to infringe on the right of indigenous peoples to sell fish on a non-commercial basis. The court found that the right to sell fish, was an existing aboriginal right (the first limb) and that the regulation purported to infringe on that right (second limb) and that the regulation was unjustified because it was not consistent with the fiduciary obligations that the Crown owed to Indigenous Canadians (third limb). Consequently, the law was found to be of no force and effect pursuant to s 52(1) of the Canadian Constitution by virtue of its inconsistency with s 35(1) of the Canadian Constitution.

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[88] Ibid 132.
[89] Ibid.
[90] *Guerin v The Queen* [1984] 2 SCR 335.
[91] *R v Sparrow* [1990] 1 SCR 1075, 1094.
[92] Ibid 1109.
[93] *R v Van der Peet* [1996] 2 SCR 507.
[94] *R v NTC Smokehouse Ltd* [1996] 2 SCR 672.
[95] *R v Gladstone* [1996] 2 SCR 723.

Throughout its reasoning the court stated that; 'because of [the] fiduciary relationship … treaties, s. 35(1) and other statutory and constitutional provisions protecting the interests of aboriginal peoples, must be given a generous and liberal interpretation.'[96] This 'generous and liberal interpretation' does however, have its limits. The court also stated that s 35(1),

> does not oust the federal power to legislate with respect to aboriginals, nor does it confer absolute rights. Federal power is to be reconciled with aboriginal rights by means of the doctrine of justification. The federal government can legislate to limit the exercise of aboriginal rights, but only to the extent that the limitation is justified. [97]

R v NTC Smokehouse Ltd[98] had a very similar factual matrix to the previous case and the court came to a similar conclusion. The first two limbs were made out easily. In relation to the third limb of the test, whether the infringement was justified, the court imported a purposive notion stating that, the law, as well as being consistent with the fiduciary duty of the Crown, must also 'establish that [it] was enacted for a compelling and substantial purpose.'[99] This served to give greater clarity to the notion of the 'valid legislative objective' contained in the *Sparrow* test.[100]

R v Gladstone applied the same test but found that the impugned law in that case was not inconsistent with s 35(1) and was therefore not constitutionally invalid. This case imported a notion of proportionality asking if there had been 'as little infringement as possible in order to effect the desired result.'[101] The court found that the infringement was proportionate and therefore constitutionally valid.[102] This notion of proportionality further refined the *Sparrow* test providing greater certainty in relation to matters of constitutional validity by virtue of inconsistency with section 35(1) of the Canadian Constitution.

These cases from *Guerin* to *Gladstone*, and the myriad of cases that I have not mentioned here, serve to outline the orthodox interpretation that Canadian courts have given to constitutional inquiries involving s 35(1). It has been seen that the fiduciary relationship found to exist in *R v Sparrow* finds justification in s 35(1) but also informs how s 35(1) is to be interpreted when it comes to inquiries about the constitutional validity of enactments. On the one hand s 35(1) of the Canadian Constitution, requires the government 'to act in a fiduciary capacity with respect to aboriginal peoples and so import some restraint on the exercise of sovereign power.'[103] However, on the other hand, the interpretation that courts have given to s 35(1) involves an inquiry about whether the law is consistent with the fiduciary obligation already found to be owed by virtue of, *inter alia*, s 35(1).[104]

Canadian courts have successfully found that the Crown owes a broad fiduciary duty to Indigenous Canadians. This has not been accomplished in Australia. This part has demonstrated that Canadian courts have freed themselves from the narrow economic view of the fiduciary obligations and have been able to broaden fiduciary principles to the recognition of indigenous rights. It has also provided some examples of how s 35(1) has been interpreted in light of the finding in *Guerin* that the Crown owes a fiduciary obligation to Indigenous Canadians.

The private law of fiduciary obligations and the public law of constitutional recognition and interpretation need not be confined to separate and distinct areas of operation. The current state of the law in Canada attests to this fact. By highlighting some of the benefits and limitations of the Canadian approach, a useful model for dealing with these issues in Australia

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[96] *R v Van der Peet* [1996] 2 SCR 507, [24].
[97] Ibid [231].
[98] *R v NTC Smokehouse Ltd* [1996] 2 SCR 672.
[99] Ibid [97].
[100] *R v Sparrow* [1990] 1 SCR 1075, 1079.
[101] *R v Gladstone* [1996] 2 SCR 723, [55].
[102] Ibid [55].
[103] *R v Sparrow* [1990] 1 SCR 1075, 1077.
[104] *R v NTC Smokehouse Ltd* [1996] 2 SCR 672, [97].

can be ascertained. Part 3 will outline what Australia can learn from Canada when it comes to recognising a fiduciary relationship between the Crown and Indigenous Australians.

3 – Reform Inquiry

WHAT CAN AUSTRALIA LEARN FROM CANADA?

The most relevant lesson that Australian courts can draw from the Canadian experience is that indigenous constitutional recognition may facilitate the protection of indigenous rights. One manifestation of this potential protection may be the effect that indigenous constitutional recognition could have on the extension of fiduciary law principles. This extension might consist of the recognition of a special relationship between the Crown and Indigenous Australians. *R v Sparrow* is a significant Canadian decision that supports this contention. Dickson CJ and La Forest J state in that case, 'that the words "recognition and affirmation" incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power.'[105] They go on to say, 'that recognition and affirmation requires sensitivity to and respect for the rights of aboriginal peoples on behalf of the government.'[106] Interestingly, in the same judgment Dickson CJ and La Forest J state that the recognition of a fiduciary relationship, first achieved in *Guerin v The Queen* 'grounds a general guiding principle for s 35(1).'[107] Consequently, it appears that although s 35(1) is used as *justification* for the finding of a fiduciary relationship in *R v Sparrow*, it is also true that in *Guerin v The Queen*, the court found that a fiduciary relationship existed between the Crown and Indigenous Canadians independent of any constitutional justification. The fiduciary finding was then subsequently used to inform or 'ground' the interpretation of the words 'recognised and affirmed' in s 35(1) of the Canadian Constitution. So, whilst it may be inaccurate to assert that constitutional recognition in Canada *resulted in* the courts finding a fiduciary relationship (because such a relationship had already been found to exist in *Guerin v The Queen* independent of any constitutional justification) it is nonetheless accurate to state that constitutional recognition in Canada played a part in defining the content and scope of that fiduciary relationship. In fact, in contrast to *Guerin v The Queen*, constitutional recognition in some cases, namely *R v Sparrow*, *was used* as justification for the finding of a fiduciary relationship.[108]

It has been seen that the Canadian approach to the finding of a fiduciary relationship was based, at least as evidenced by *R v Sparrow*,[109] on indigenous constitutional recognition. The recent argument in the Australian polity over what form such recognition could and should take in Australia, goes to the heart of what consequences would flow from that recognition and how effective it would be in achieving its goals. One thing to keep in mind when dealing with these issues, is that any constitutional recognition would not involve a process of 'creation' but rather would involve 'recognition' of existing well-established indigenous rights and interests.[110] This is clarified by the use, in s 35(1) of the Canadian Constitution, of the word 'existing.' Whatever form indigenous constitutional recognition in Australia may take, the Canadian approach demonstrates that it need not be complicated in order to achieve substantial developments. Indeed, s 35(1) of the Canadian constitution is very simple in its wording. It states, 'the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.'[111] These 17 words have altered the legal landscape in Canada dramatically, especially in the area of fiduciary law. The significant impact that this simple provision has made, supports the argument that indigenous constitutional recognition in this country need not be extravagant. With minimal constitutional intervention, courts in

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[105] *R v Sparrow* [1990] 1 SCR 1075, 1109.
[106] Ibid 1119.
[107] Ibid 1108.
[108] Ibid 1109 & 1119.
[109] Ibid.
[110] Benjamen Franklen Gussen, 'A Comparative Analysis of Constitutional Recognition of Aboriginal Peoples' (2017) 40(3) *Melbourne University law Review* 1, 16.
[111] *Canada Act 1982* (UK) c 11, sch B, s 35(1).

Australia through a natural and organic process of constitutional interpretation, may alter the legal landscape with respect to indigenous rights, including in the fiduciary law space.

There is obvious and understandable fear about how significant any changes in this area might be if constitutional recognition were to gain traction and be implemented through a referendum. The notion that nothing would change if indigenous constitutional recognition were successful is inaccurate. The potential changes to many areas of law including property, contract, administrative law and of course fiduciary law could be significant. This is because, if indigenous constitutional recognition was implemented, litigants in legal actions involving indigenous rights would likely seek to justify their legal positions on constitutional grounds citing the newly implemented indigenous constitutional recognition as justification. The consequences of this are unknowable. It is the 'unknown' associated with law reform that incites scepticism, reluctance, and fear. This scepticism represents a significant barrier to reform.[112]

BARRIERS TO REFORM

Scholars have called s 35(1) of the Canadian Constitution 'a force that changes everything.'[113] A similar constitutional amendment in Australia, recognising the rights and interests of Indigenous Australians, could be similarly described. Peter Grose has dryly remarked that constitutional recognition is 'not something used to maintain the status quo.'[114] The fear of alteration of the status quo is perhaps accentuated by the liberal interpretation that Canadian courts have given to s 35(1). In *R v Van der Peet*, the court stated that 'because of [the] fiduciary relationship … treaties, s. 35(1) and other statutory and constitutional provisions protecting the interests of aboriginal peoples, must be given a *generous and liberal interpretation*.'[115] The notion of generous and liberal constitutional interpretation is capable of inciting fear. However, Australia, having the benefit of assessing the situation in Canada, can draw on that experience and devise suitably Australian ways of dealing with and interpreting indigenous constitutional recognition. This may serve to limit or extend its application where necessary.

Whist reform in this area will likely effect significant change, the idea that constitutional recognition, however construed, will result in an impermissible and unprincipled extension of existing legal and equitable principles currently governing indigenous rights may also be inaccurate and exaggerated. Canadian courts when recognising the relevance of s 35(1) for the protection of indigenous rights and the finding of a fiduciary relationship, where quick to place limitations on its application. For example, after Dickson CJ and La Forest J in *R v Sparrow* stated that s 35 'imports some restraint on the exercise of sovereign power.' They went on to say in the very next sentence that the 'rights that are recognised and affirmed are not absolute. Federal legislative powers continue.' The mechanism that has been employed in Canada to limit the unprincipled and uncontrolled extension of indigenous rights is the constitutional doctrine of justification. This doctrine states that federal legislative power will only be rendered invalid if its purported exercise represents an unjustified infringement of aboriginal rights. Using this doctrine, Canadian courts have been able to exercise a supervisory role over legislative action with respect to Indigenous Canadians by balancing competing interests. This balancing exercise employs criteria like whether the legislative act is pursuant to a valid legislative objective or whether it is consistent with the fiduciary duty owed by the Crown to indigenous peoples.

In the Australian context a similar doctrine could be employed. Historically, Australian courts have preferred the doctrine of proportionality when determining the constitutional validity of

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[112] *Breen v Williams* (1996) 186 CLR 71, 110; *Paramasivam v Flynn* (1998) 90 FCR 489, [72]; *State of South Australia v Lampard-Trevorrow* (2010) 106 SASR 331, [337].

[113] Peter Grose, 'Developments in Recognition of Indigenous Rights in Canada: Implications for Australia' (1997) 4(1) *James Cook University Law Review* 68, 77.

[114] Ibid 75.

[115] *R v Van der Peet* [1996] 2 SCR 507, [24].

existing laws or regulations.[116] The concept of proportionality is similar to the concept of justification, in that they are both directed towards an analysis of the impugned law to determine its validity from a quasi-normative point of view.[117] Both concepts allow the court to employ their powers to limit or extend interpretation of any potentially unconstitutional law to facilitate development of the law in line with community and societal expectations. [118]

One scholarly opinion that has addressed the fear and reluctance surrounding indigenous constitutional recognition and its implications has suggested that a useful way forward is to characterise any indigenous constitutional recognition in a limited fashion. Kirsty Gover has suggested that indigenous constitutional recognition and any fiduciary relationship that is subsequently found to exist should be construed as nothing more than providing the 'rules of engagement.'[119] These reforms could then be used simply 'to urge the parties to deal with one another reasonably and in good faith and to comment on instances of procedural unfairness.'[120] This approach would serve to limit the application of any constitutional or fiduciary law reforms by placing limits on their application at the outset. This approach would also quell fears that have been voiced about the creation in Australia of positive fiduciary obligations, [121] which have not yet been recognised by Australian courts.[122]

Currently, Australian fiduciary law confines the obligations owed by fiduciaries to negative duties. Even if fiduciary law principles were extended to include a special relationship between the Crown and Indigenous Australians, this fundamental principle, of fiduciary obligations being confined to negative obligations, could be safeguarded through clear judicial interpretation. Although Canada has extended fiduciary law to a great extent, recognising a fiduciary relationship in Australia does not mean that the extension of fiduciary principles needs to be as extensive as in Canada. Ensuring that any proposed extension does not purport to impose positive duties on the fiduciary is another way to limit the application of any potential extension of fiduciary law that might arise as a consequence of indigenous constitutional recognition. This may or may not be possible, depending on the specific wording of the proposed constitutional recognition. It is therefore difficult to predict how limiting indigenous fiduciary duties to negative duties would work in practice before any actual indigenous constitutional recognition is implemented. Nonetheless, a broad potential model for what extension of existing fiduciary principles may look like, will be proposed in the third section of this part.

One's view of the judiciary and one's faith in the justices of our High Court will inform one's opinion about whether these suggestions are permissible safeguards or not.[123] A defence or critique of the High Court's 'judicial activism' in the last 50 to 100 years would be able to inform a response to this question but that is most certainly not a task that will be undertaken

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[116] *McCloy v New South Wales* (2015) 257 CLR 178, [2]; *JT International SA v Commonwealth* 250 CLR 1, [337]-[338]; *Maloney v The Queen* [2013] HCA 28; 252 CLR 168, [166].

[117] Beverley McLachlin, 'Proportionality, Justification, Evidence and Deference: Perspectives from Canada' (Speech delivered to the Hong Kong Court of Final Appeal Judicial Colloquium, 24 September 2015), <https://www.hkcfa.hk/filemanager/speech/en/upload/144/Proportionality,%20Justification,%20Evidence%20and%20Deference%20-%20Perspectives%20from%20Canada.pdf>, 13.

[118] Benjamen Franklen Gussen, 'A comparative Analysis of Constitutional Recognition of Aboriginal Peoples' (2017) 40(3) *Melbourne University law Review* 1, 37; Lisa Di Marco, 'A Critique and Analysis of the Fiduciary Concept in *Mabo v Queensland* (1994) 19(4) *Melbourne University Law Review* 868, 885.

[119] Kirsty Gover, 'The Honour of the Crowns: State-Indigenous Fiduciary Relationships and Australian Exceptionalism' (2016) 38(1) *Sydney Law Review* 339, 367.

[120] Ibid.

[121] Camilla Hughes, 'The Fiduciary Obligations of the Crown to Aborigines: Lessons from the United States and Canada' (1993) 16(1) *University of New South Wales Law Journal* 70, 95.

[122] *Breen v Williams* (1996) 186 CLR 71, 113.

[123] Peter Grose, 'Developments in Recognition of Indigenous Rights in Canada: Implications for Australia' (1997) 4(1) *James Cook University Law Review* 68, 74.

in this article. What can be said is that feedback in Canada with respect to indigenous constitutional recognition and its implications and consequences has been broadly positive.[124]

PROPOSED SCOPE AND CONTENT OF THE RECOGNITION

If constitutional recognition were to result in the extension of Australian fiduciary law to recognise a fiduciary obligation owed by the Crown to Indigenous Australians, the content and scope of that relationship would need to be clearly defined, so far as it is possible given the indefinable and elusive nature of the fiduciary relationship.[125] Clear demarcations would help to quell fears, previously mentioned, about the unprincipled and uncontrolled extension of fiduciary law principles.

As has been discussed, it would be prudent to confine any fiduciary relationship to include only negative duties, in line with existing Australian fiduciary law principles. This would require the Crown to refrain from acting to the detriment of indigenous peoples in the making of laws and in administrative decision making that affects indigenous peoples but would not impose any positive duty on the Crown to act for the benefit of indigenous individuals or groups. Such a model would be less susceptible to uncontrolled extension and would remedy fears about the potentially detrimental implications that a lack of confinement might have on the fundamental principles and doctrines of the fiduciary law and our legal system, more broadly.

Confining any potential fiduciary relationship to negative duties would be a useful limitation but would nonetheless allow for significant protection of indigenous interests. Scholars have argued that a potential fiduciary relationship between the Crown and Indigenous Australians should recognise and protect indigenous autonomy and self-government.[126] For such a proposal to be successfully initiated and implemented, recognition of the existing organisational systems of indigenous cultures would need to be widespread. A lack of knowledge and respect for indigenous systems and cultural mores would de-legitimise any attempt to protect indigenous self-government.[127] To achieve something of this magnitude concerted efforts from various disciplines would be required. Education would be a useful starting point but more fundamentally mutual respect between Indigenous and non-indigenous Australians would need to ground any efforts. Questions of how to heal the wounds of the past and to begin to seek out a unified future is well and truly a task that goes beyond the academic sphere. Nonetheless, indigenous self-government represents a useful conceptual starting point for beginning to inform the content of any potential fiduciary obligation that might be found to exist. [128] Specifically, the content of the potential fiduciary obligation would include a notion that the Crown would be required to act in a fiduciary capacity with respect to Indigenous Australians when it comes to legislative or administrative infringements on existing aboriginal rights or interests that directly affect indigenous individuals or groups. This could be further refined to apply only to situations where a right of autonomy or self-government is concerned. Even if the content of the potential fiduciary obligation were confined only to these types of situations, there would already be substantial changes in the way indigenous interests are recognised and protected in Australia.

The proposed content of any obligation is not very informative unless a definitive *scope* can be placed on that obligation. As has already been mentioned, confining the scope of any potential

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[124] Kirsty Gover, 'The Honour of the Crowns: State-Indigenous Fiduciary Relationships and Australian Exceptionalism' (2016) 38(1) *Sydney Law Review* 339.

[125] Paul Miller, 'The Fiduciary Relationship' in Andrew Gold and Paul Miller (eds), *Philosophical Foundations of Fiduciary law* (Oxford University Press, 2014), 65; *Breen v Williams* (1996) 186 CLR 71, 92.

[126] Camilla Hughes, 'The Fiduciary Obligations of the Crown to Aborigines: Lessons from the United States and Canada' (1993) 16(1) *University of New South Wales Law Journal* 70, 85-86.

[127] Peter Grose, 'Developments in Recognition of Indigenous Rights in Canada: Implications for Australia' (1997) 4 *James Cook University Law Review* 68, 83.

[128] Lisa Di Marco, 'A Critique and Analysis of the Fiduciary Concept in *Mabo v Queensland*' (1994) 19(4) *Melbourne University Law Review* 868, 883.

fiduciary relationship could be managed effectively by the courts in their process of judicial interpretation of discrete questions of fact and law upon application to the court by an affected party. It is impossible to give any specific answers when it comes to the scope within which courts will confine any potential fiduciary duty. Much will depend on the court hearing the particular matter, the particularities of the judge or judges hearing that matter and the facts of the particular case. However, as has been said, the constitutional principle of justification or a notion of proportionality are useful limiting factors. The doctrine of proportionality could be employed by judicial decision makers with respect to purported infringements upon indigenous rights and interests by virtue of a breach of the fiduciary duty owed by the Crown. This would provide some certainty about the scope of any potential fiduciary obligation. For example, if purported breaches of fiduciary obligation were permissible on public policy grounds or on the grounds that such measures were justified or proportionate to the aim being sought, then courts would have principled justification for dismissing those purported breaches as, for example, reasonable administrative action or on grounds of parliamentary sovereignty. In employing this kind of quasi-constitutional interpretative structure with respect to potential breaches of fiduciary obligation, courts would be able to reconcile any potential fiduciary obligation with notions of parliamentary sovereignty and representative government. [129]

As has been said, the precise content and scope of any potential fiduciary relationship that could arise as a consequence of indigenous constitutional recognition is unknowable. The above analysis merely consists of a few ideas that could usefully be employed when thinking about what a potential fiduciary relationship would look like.

There are some important lessons that can be taken from the Canadian experience when it comes to indigenous constitutional recognition and the content and scope of any potential fiduciary relationship that could be found as a consequence. Indigenous constitutional recognition, if not a direct cause of the finding that Canadian courts have made about the existence of a fiduciary relationship between the Crown and indigenous Canadians, has certainly been useful in determining the content of that fiduciary relationship. If indigenous constitutional recognition can be successfully implemented in Australia, the chances of finding a fiduciary relationship between the Crown and Indigenous Australians are enhanced. What the relationship would look like is a difficult question to answer. In this part, I have sought to provide some general principles about the content and scope of such a relationship. The normative inquiry about whether such constitutional or fiduciary recognition is a 'good' or a 'bad' development or reform is a question for another time and another author. Opinions about that inquiry will depend on a myriad of interdisciplinary questions. Such questions are outside of the scope of this article. What can be said with a degree of certainty is that the experience in Canada, with respect to indigenous constitutional recognition and fiduciary law extension, provides a case study for Australia to learn from in a real and tangible way.

Conclusion

Jeremy Bentham reportedly once stated that 'the power of the lawyer is the uncertainty of the law.' It is common ground that the rule of law relies on the certainty of the law by which people are to be bound. Consequently, uncertainty in the law, whilst providing lawyers with potency, leaves citizens impotent against arbitrary government. For this reason, certainty is a desirable ideal towards which our legal system should strive but something that can be as elusive as it is desirable, and as fragile as it is stabilising.

As has been seen, in this area of law, uncertainty abounds. The future will hopefully bring clarification to many of the issues raised in this article. I have argued and defended the notion that if indigenous constitutional recognition is successful in Australia, the fiduciary law may be one means by which indigenous rights and interests can be protected.

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[129] Camilla Hughes, 'The Fiduciary Obligations of the Crown to Aborigines: Lessons from the United States and Canada' (1993) 16(1) *University of New South Wales Law Journal* 70, 92 and 94.

Edward Coke's words, mentioned at the outset of this article and for which he risked losing his head, were in a certain sense, a push for greater certainty in the 15th Century English legal system. His courageous contribution in that historical moment, has arguably provided significant benefits for future generations, including today's generation. However, today presents us with other challenges. Arbitrary and tyrannical governance, akin to King James I's rule, are not immediate and pressing issues in this country, but rather other matters, equally important, require our attention and action. The healing of past wounds that have been inflicted on Indigenous Australians represents one of these pressing issues. The ideas contained in this article about how constitutional recognition and fiduciary law may be used as avenues for redress for Indigenous Australians, can serve to facilitate a continuing process of reconciliation, healing and progress.

Indigenous constitutional recognition is a topical issue today and many proffer opinions, from a moral point of view, about the benefits and detriments of its success. This article represents a short and focused analysis of some of the legal issues that the moral arguments of public figures on all sides of the debate might benefit from keeping in mind. This article, in some sense, is a prediction of the future. Only time will tell if its questions, inquiries, analyses, and conclusions are accurate. Its legitimacy and relevance, as with all academic literature, will be a matter for history to judge.

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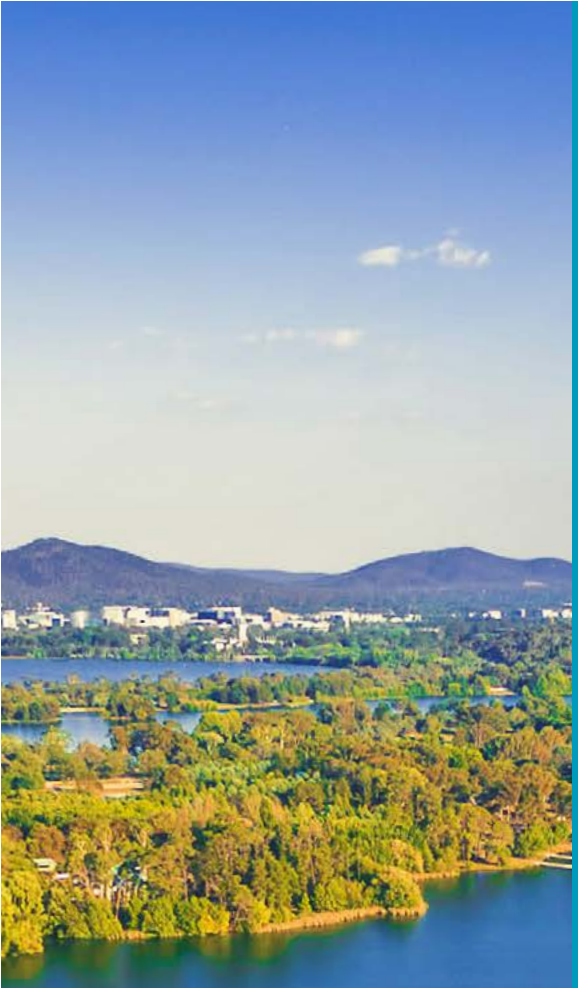

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