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BOOK REVIEW

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TRANSNATIONAL REGULATORY LAW: DOMESTIC IMPLEMENTATION, TRANSPARENCY AND SCRUTINY

Abstract

Transnational regulatory networks have been subject to a substantial degree of research attention in recent decades. However, less attention has been given to how domestic implementation of their work affects national law-making processes. This article addresses this topic through a case study of the Australian medical devices regulatory scheme. It finds that the Australian medical devices scheme implements decisions made by a transnational network, and that the implementation techniques used avoid — in some important respects — domestic transparency and parliamentary scrutiny processes. This article also offers reform suggestions for aligning the implementation of transnational regulatory networks' actions with domestic democratic law-making imperatives.

I Introduction

The Australian Parliament in the 1990s developed a system for transparency and scrutiny of treaty-making. These developments were prompted by concerns that Parliament's role in relation to treaties was insufficient and the government's treaty-making actions generally lacked transparency.[1] The concerns were addressed in 1996 by establishing a parliamentary committee, the Joint Standing Committee on Treaties ('JSCOT'), and the publication of National Interest Analyses.[2] The implementation of these transparency and scrutiny measures has resulted in the Australian government's treaty actions being more open and accountable.

More recently, however, it has become apparent that the Australian government's international commitments often occur without treaty action and that these commitments circumvent the transparency and scrutiny measures developed in the 1990s. Andrew

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1 Senate Legal and Constitutional References Committee, Parliament of Australia, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties* (Report, November 1995) 191–201, 238–47, 300–4 ('*Trick or Treaty?*').

2 Commonwealth, *Parliamentary Debates*, House of Representatives, 2 May 1996, 233 (Alexander Downer, Minister for Foreign Affairs).

Byrnes has revealed how Australian governments commonly make non-binding agreements that do not have treaty status and are not subject to the parliamentary scrutiny and transparency requirements — yet are significant for Australia at the international level and can affect the rights and interests of Australian citizens and residents.[3] While it is not possible to quantify the extent of these kinds of agreements as there is no register of them, there are views expressed in international law scholarship that they are increasingly important and use of them is proliferating.[4]

This article examines the concerns initially expressed by Byrnes from a different perspective. Rather than examining the bilateral Memoranda of Understanding ('MOU') agreed to by the Australian government and its agencies, this article focuses on government agencies' engagement with transnational regulatory networks. These networks of domestic agencies work together to resolve common regulatory problems in a consistent manner. The members of the network can ensure that domestic laws are consistent across the network by agreeing to particular international standards being adopted in each country. The administrative agencies can then include the standard in their regulations. In this way, the standards agreed to by the network become directly implemented into domestic law.

I examine these aspects of transnational law-making through a case study of Australia's therapeutic goods regulatory scheme for medical devices. These laws regulate a broad range of products used in modern medical practices, such as hip prostheses, breast implants, and transvaginal mesh implants. The case study highlights that Parliament has regularly inquired into and examined medical devices regulation, but there is no systemic check on the transnational law-making processes that are commonly accepted to be the primary influence on Australia's medical devices laws. The case study in Part III of this article reveals that there was no review of the processes or decisions made by the transnational network that influenced Australian legislation and regulations. Parliament has inquired into problems that have been identified with medical devices on numerous occasions, but these inquiries have not included examining the transnational networks, and the processes and decision-making of standard-setting organisations whose standards have been incorporated into Australian law. As the actions at the international level have not involved treaties, the systemic form of review provided by JSCOT was not engaged.

In this article, I argue that the development of Australia's medical devices legislative framework reveals ways in which domestic law-making based on the work of transnational networks can circumvent transparency requirements and parliamentary scrutiny systems. The case study on medical devices exposes important gaps in our law-making institutional arrangements. It reveals how Australian laws regulating an

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3 Andrew Byrnes, 'Time to Put on the 3-D Glasses: Is There a Need to Expand JSCOT's Mandate to Cover "Instruments of Less than Treaty Status"?' (2015) 22(22) *Australian International Law Journal* 1, 2–3.

4 David Mason, Wendy Lacey and Elizabeth Toohey, 'Australian Treaty Practice' in Donald R Rothwell and Emily Crawford (eds), *International Law in Australia* (Lawbook, 3rd ed, 2017) 49, 68. See also ibid 4–5.

important aspect of our health system have been made in a manner that is not transparent and have not been exposed to the general, systemic forms of parliamentary scrutiny. While regulatory systems are highly complex and specific, the problems raised in this article regarding medical devices regulation are also likely to occur in other regulatory systems that rely on the same law-making techniques. I suggest potential reforms to address these gaps through analysing the currently operative transparency and parliamentary scrutiny requirements and offering some proposals for adjustments to be made to them. The problems that I expose have been raised in United States scholarship regarding transnational networks and their effect on US administrative law,[5] but there has been no equivalent study to my knowledge about transnational networks in the Australian context. This article is intended to address this gap in Australian scholarship.

This article is structured as follows. Part II explains transnational networks primarily by reference to the scholarship examining them. It examines their significance for modern forms of government and the potential problems that have been identified in relation to domestic public law. Part III is a case study of medical devices regulation, starting with the development of transnational networks and then moving to the implementation of its decisions in Australian law. Part III includes an analysis of the ways in which the implementation of the medical devices transnational network's decisions into Australian law have been mentioned in parliamentary reports, but have also circumvented the systemic forms of transparency and scrutiny that are established by Australian laws, and carried out by parliamentary committees. Part IV examines considerations relevant to potential reforms.

II Transnational Regulatory Networks

The development of transnational networks and the law-making processes that such networks commonly rely on raises questions about democratic deliberation. The primary deliberation for these laws occurs in the transnational network rather than in domestic institutions. Australian administrative officials may participate in the deliberations of the network, but the decisions are collectively made.

A similar concern was considered in the 1990s reforms that resulted in the transparency and scrutiny scheme for treaties. The prior absence of such measures raised concerns of a democratic deficit.[6] In its report, the Senate Legal and Constitutional References Committee rejected this concern due to decisions to enter into treaties being made by the elected government, and if implementation into Australian law is necessary the implementation is carried out by Parliament.[7] The Committee regarded the pre-reform arrangements for entering into treaties as being democratic but also recognised that the processes could be improved. However, the democratic aspects of treaty-making and implementation referred to by the Senate

5 See below Part II.

6 *Trick or Treaty?* (n 1) 229–34.

7 Ibid 246.

Legal and Constitutional References Committee are not the case for transnational networks and the implementation of their decisions. Australia's representatives in these networks are usually unelected administrative officials and, as we will see in the medical devices case study for this article, implementing their decisions relies heavily on incorporating by reference private international standards. Accordingly, questions about democratic deficits are more directly engaged for transnational law-making than for treaties. Questions about transparency and parliamentary scrutiny have greater democratic significance for transnational law-making than for treaties.

The scholarship on transnational networks identifies their development and expansion as occurring in the 1990s[8] — coincidentally the same decade that the scrutiny and transparency measures for treaties were developed in Australia. The most well-known contribution to that scholarship, Anne-Marie Slaughter's *A New World Order*, recognised the development of networks of administrative officials, courts, or parliaments.[9] Other works of that period and since have focused on networks of regulatory agencies.[10] The important feature of these networks is that domestic regulatory agencies join international committees that are established by administrative arrangements rather than treaties.[11] This article focuses on the transnational network for medical devices. The Australian government is represented in this network by the Therapeutic Goods Administration ('TGA'). The network, founded in 1993, initially had the title the Global Harmonization Task Force ('GHTF').[12] In 2011, the network was transformed into a new organisation, the International Medical Device Regulators Forum ('IMDRF').[13]

The scholarship on transnational networks highlights that a common reason for establishing them is for the harmonisation of regulatory laws — establishing consistent approaches in different countries to particular regulatory problems.[14]

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8 Anne-Marie Slaughter, *A New World Order* (Princeton University Press, 2004) 9.

9 Ibid 1–3, 14–15.

10 David Zaring, 'International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations' (1998) 33(2) *Texas International Law Journal* 281 ('International Law by Other Means'); Kal Raustiala, 'The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law' (2002) 43(1) *Virginia Journal of International Law* 1. For more recent scholarship, see: Tim Legrand, 'Transgovernmental Policy Networks in the Anglosphere' (2015) 93(4) *Public Administration* 973; Peter Drahos, 'Regulatory Globalisation' in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (Australian National University Press, 2017) 249.

11 Zaring, 'International Law by Other Means' (n 10) 287; Raustiala (n 10) 4; Slaughter (n 8) 33–4.

12 'GHTF History', *International Medical Device Regulators Forum* (Web Page) <http://www.imdrf.org/ghtf/ghtf-history.asp>.

13 'About IMDRF', *International Medical Device Regulators Forum* (Web Page) <http://www.imdrf.org/about/about.asp>.

14 Zaring, 'International Law by Other Means' (n 10) 326; Raustiala (n 10) 56–8; Slaughter (n 8) 59, 63.

There are different forms of harmonisation. In his analysis of harmonisation of laws among European Union Member States, Stephen Weatherill refers to harmonisation as taking maximum and minimum forms.[15] The difference between them is whether domestic agencies have scope for adjusting or fine-tuning the particular standard for its domestic effect.[16] This article examines a form of maximum harmonisation, where international standards are implemented directly into domestic law.

The simplest, most direct means of implementation is incorporation by reference,[17] where laws or documents are incorporated into legislation and take legal effect as part of that legislation. The legislation, commonly a regulation, simply identifies the other law or document as being part of the regulation. The incorporated law or document is given legal effect as part of the regulation despite the law or document not actually being included within the regulation, a schedule to the regulation, or its accompanying explanatory material. Standards set by international and domestic private standard-setting organisations are commonly incorporated by reference into regulations.[18] The reference to the standard in the regulation is enough to give the otherwise voluntary standard the status of Australian law. A person or organisation seeking to comply with the regulation will have to look up the standard to ascertain and comply with their legal obligations under the regulation. When the standards that are incorporated by reference are made by private standard-setting organisations, members of the public will usually have to purchase the standard in order to understand the legal effect of the regulation.[19] The relevance of incorporation by

15 Stephen Weatherill, 'The Fundamental Question of Minimum or Maximum Harmonisation' in Sacha Garben and Inge Govaere (eds), *The Internal Market 2.0* (Hart Publishing, 2020) 261, 265–8.

16 Ibid.

17 The term 'incorporation' is used here with the meaning it has for domestic regulations rather than its meaning with regard to the relationship between international and domestic law. For its meaning in the latter context, see: Campbell McLachlan, *Foreign Relations Law* (Cambridge University Press, 2014) 85–9; Annemarie Devereux and Sarah McCosker, 'International Law and Australian Law' in Donald R Rothwell and Emily Crawford (eds), *International Law in Australia* (Lawbook, 3rd ed, 2017) 23, 24–6.

18 See, eg: *Consumer Goods (Quad Bikes) Safety Standard 2019* (Cth) reg 9; *National Greenhouse and Energy Reporting (Measurement) Determination 2008* (Cth) regs 1.19E, 2.24, 2.26; *Civil Aviation Safety Regulations 1998* (Cth) reg 21.172 (definition of 'LSA standards'). For general issues regarding incorporation by reference, see Andrew Edgar, 'From Court Rules to Globalised Standards: Incorporation by Reference in Commonwealth Regulations' [2021] (101) *AIAL Forum* 49.

19 Concerns relating to access and purchase of standards made by standard-setting organisations is beyond the scope of this article. The limitations on access to standards has been criticised in reports and legal scholarship dealing with incorporation by reference: see, eg: Nina A Mendelson, 'Private Control over Access to the Law: The Perplexing Federal Regulatory Use of Private Standards' (2014) 112(5) *Michigan Law Review* 737; Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Parliamentary Scrutiny of Delegated Legislation* (Report, 3 June 2019) 50–3 [3.64]–[3.75].

reference for the work of transnational networks is that the network can agree to an international standard or standards, and the domestic agencies can simply incorporate them by reference into their regulations.

When the work of these transnational networks is directly implemented into domestic law, the domestic law can be understood as a form of transnational law. One common method for this form of transnational law is for the network to agree that particular standards developed by international standard-setting organisations are the accepted laws that should be adopted in the member agencies' domestic regulations. In this way, the decisions of transnational networks working with international standard-setting organisations become domestic law. The transnational networks are not merely working to influence domestic policies — their work is directly implemented in domestic law. This kind of transnational regulatory practice has led scholars to recognise the breaking down of the traditionally sharp distinction between the realms of domestic and international in the law.[20]

Concerns have arisen since the initial scholarship on transnational networks that the results of their work can undermine domestic transparency, public participation, and accountability systems. Slaughter recognised these concerns in her work[21] and the concerns have also been recognised in Richard Stewart's global administrative law scholarship.[22] Stewart highlights that domestic implementation of norms determined at the international level may not be subject to domestic procedures in the manner that is otherwise the case. Stewart stated:

> While such implementation is in many cases subject to domestic administrative law procedures and judicial review, the substantive norm was adopted through supranational processes that are not. Further, the value of these procedures may be undermined by officials' professional and personal pre-commitment to the global norms.[23]

Stewart's concerns relate to domestic implementation in the US and the effectiveness of the regulation-making procedures in the *Administrative Procedure Act*.[24] These administrative law concerns have not been addressed in Australian legal scholarship and will be examined in Parts III and IV of this article. The equivalent processes in Australia for regulation-making are included in the *Legislation Act 2003* (Cth)

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20 See, eg, Terence C Halliday and Gregory Shaffer, 'Transnational Legal Orders' in Terence C Halliday and Gregory Shaffer (eds), *Transnational Legal Orders* (Cambridge University Press, 2015) 3, 3.

21 Slaughter (n 8) 221–4.

22 Richard B Stewart, 'The Global Regulatory Challenge to US Administrative Law' (2005) 37(4) *New York University Journal of International Law and Politics* 695, 705–9.

23 Ibid 707.

24 5 USC § 553 (1946).

('*Legislation Act*') which provides for consultation, explanatory statements, and parliamentary scrutiny of regulations.[25]

Before moving on to the medical devices network and its influence on Australian laws, it should be pointed out that the TGA is not the only Commonwealth regulatory scheme that is linked into a transnational network. There are two that are worth mentioning, financial and aviation networks, due to being well established and because they have been referred to internationally as important examples of transnational law-making.[26] The first is the Commonwealth's financial laws. Australia is a member of the Financial Stability Board, an intergovernmental organisation established in 2009 in response to the Global Financial Crisis. As a member of the Financial Stability Board, the Commonwealth is obliged to implement international financial standards.[27] The most well-known are the prudential standards developed by the Basel Committee on Banking Supervision implemented by regulations made by the Australian Prudential Regulatory Authority.[28] The second is aviation regulatory laws. Australia's airworthiness standards are closely tied to US and European Union regulations. Regulations on the airworthiness of small aircraft from both jurisdictions are adopted in Australian regulations.[29] The US regulator, the Federal Aviation Administration, established a committee made up of aviation agencies from Brazil, Canada, China, Europe and New Zealand when working on their airworthiness regulations for small aircraft[30] and its regulations rely heavily on private international standards.[31]

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25 *Legislation Act 2003* (Cth) ss 15J, 17, 38, 42 ('*Legislation Act*').

26 Regarding financial transnational networks, see: Slaughter (n 8) 42–3; David Zaring, *The Globalized Governance of Finance* (Cambridge University Press, 2019) 14–21, 24–8; Stavros Gadinis, 'The Financial Stability Board: The New Politics of International Financial Regulation' (2013) 48(2) *Texas International Law Journal* 157. Regarding aviation networks, see: George A Bermann, 'Regulatory Cooperation with Counterpart Agencies Abroad: The FAA's Aircraft Certification Experience' (1993) 24(3) *Law and Policy in International Business* 669; Slaughter (n 8) 59–60; Ron Bartsch, *International Aviation Law: A Practical Guide* (Routledge, 2nd ed, 2018) 244–5.

27 Financial Stability Board, *Charter of the Financial Stability Board*, 25 September 2009, art 5(1)(c).

28 *Banking Act 1959* (Cth) s 11AF. See generally Vivienne Bath, 'Australia and International Commercial Law' in Donald R Rothwell and Emily Crawford (eds), *International Law in Australia* (Lawbook, 3rd ed, 2017) 343, 347–9.

29 *Civil Aviation Safety Regulations 1998* (Cth) reg 23.001(1).

30 *Revision of Airworthiness Standards for Normal, Utility, Acrobatic, and Commuter Category Airplanes*, 81 Fed Reg 13452, 13458–9 (14 March 2016).

31 *Accepted Means of Compliance; Airworthiness Standards: Normal Category Airplanes*, 14 CFR § 23 (2018).

III Medical Devices Case Study

A *The Medical Devices Transnational Regulatory Network*

The TGA's membership of the medical devices transnational network reveals issues that can arise in transnational law-making. This case study highlights the primary steps involved in this form of law-making process. Officials from domestic regulators work together in the network to agree on common standards regulating a particular global problem or product that is used globally. A common method chosen by the network is to agree to the use of standards made by a private international standard-setter. The network agrees that each of them will domestically adopt the private international standard-setter's standards. These steps can be seen in the background to the current Australian laws on medical devices.

The founding members of the GHTF were Canada, the European Union, Japan and the US.[32] Australia joined in 1993. The successor organisation, the IMDRF, now also includes members from Brazil, China, Russia, Singapore and South Korea. The TGA represents the Australian government on the IMDRF,[33] as well as participating in other transnational networks.[34]

The harmonisation goal of the medical devices network has been implemented partly through the use of standards made by private international standard-setting organisations, and in particular the International Organization for Standardization ('ISO'). The ISO has participated in the medical devices network since the 1990s, with the relationship being formalised in an MOU.[35] The ISO is the primary international standard-setting organisation. Its members are national standard-setting organisations,[36] which for Australia is Standards Australia.[37] International standard-setting organisations such as the ISO are commonly referred to as private

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32 'GHTF History' (n 12).

33 Therapeutic Goods Administration, 'International Medical Device Regulators Forum (IMDRF)', *Australian Government Department of Health and Aged Care* (Web Page) <https://www.tga.gov.au/international-medical-device-regulators-forum-imdrf>.

34 Therapeutic Goods Administration, 'International Activities', *Australian Government Department of Health and Aged Care* (Web Page) <https://www.tga.gov.au/international-activities>.

35 See International Organization for Standardization and International Electrotechnical Commission, *Using and Referencing ISO and IEC Standards for Technical Regulations* (Report, September 2007) 14 ('*Using and Referencing ISO and IEC Standards*').

36 Craig N Murphy and JoAnne Yates, *The International Organization for Standardization (ISO): Global Governance through Voluntary Consensus* (Routledge, 2009) 26–32 ('*International Organization for Standardization*').

37 'What We Do', *Standards Australia* (Web Page, 2022) <https://www.standards.org.au/about/what-we-do>.

organisations.[38] In the ISO's case, that is confirmed by the ISO referring to itself as an 'independent, non-governmental organization' and due to it being funded by its members and the sale of its standards.[39]

One of the primary standards for medical devices that has been adopted in Australia and other countries, ISO 13485 Medical Devices — Quality Management Systems, has been developed by the ISO with contributions from the medical devices network.[40] The ISO's committee responsible for ISO 13485, Technical Committee TC 210, states in its current business plan that the Committee develops this standard in collaboration with the IMDRF.[41] ISO 13485 was developed following a shift in the 1980s in the form of standards made by the ISO. Rather than making standards for the output of a manufacturing process, these standards were made to control manufacturing processes themselves.[42] The initial standards made in this form applied across different industries. However, in the 1990s standards also began to be made for particular industries.[43] ISO 13485 was one of the industry-specific standards made by the ISO in this period. As well as being an industry-specific standard, ISO 13485 also states that it is a process-based standard based on the generally applicable ISO 9001 Quality Management Systems — Requirements.[44] ISO 13485 sets out requirements for management, processes, resources, and documentation for the purposes of ensuring that medical devices are manufactured to a high quality.[45]

38 See, eg: JoAnne Yates and Craig N Murphy, *Engineering Rules: Global Standard Setting Since 1880* (Johns Hopkins University Press, 2019) 1 ('*Engineering Rules*'); Tim Büthe and Walter Mattli, *The New Global Rulers: The Privatization of Regulation in the World Economy* (Princeton University Press, 2011) 5.

39 'About Us: Structure and Governance', *ISO* (Web Page) <https://www.iso.org/structure.html>. See also Murphy and Yates, *International Organization for Standardization* (n 36) 25, 42–3.

40 *Using and Referencing ISO and IEC Standards* (n 35) 14–15; 'GHTF History' (n 12).

41 International Organization for Standardization, *ISO/TC 210: Quality Management and Corresponding General Aspects for Medical Devices* (Strategic Business Plan, 12 April 2018) 2–3 [2.1] <https://isotc.iso.org/livelink/livelink/fetch/2000/2122/687806/ISO_TC_210__Quality_management_and_corresponding_general_aspects_for_medical_devices_.pdf?nodeid=1161663&vernum=-2>.

42 See Yates and Murphy, *Engineering Rules* (n 38) 298.

43 See generally: Rich Basler and Raymond Pizinger, 'The Arrival of ISO 13485:2003: New Standard Shifts Quality System' (January/February 2004) *Medical Product Outsourcing* 66–7; Yates and Murphy, *Engineering Rules* (n 38) 304.

44 'ISO 13485:2016(en) Medical Devices: Quality Management Systems', *ISO* (Web Page, 2016) [0.3]–[0.4] <https://www.iso.org/obp/ui#iso:std:iso:13485:ed-3:v1:en>.

45 Ibid [4.1.1]–[4.1.5], [6.1].

ISO 13485 has been adopted in legal form by prominent members of the medical devices network: the European Union;[46] Canada;[47] Singapore;[48] and Australia.[49] While the US has been involved in the medical devices network from its inception, direct legal adoption of ISO 13485 has not occurred there. The current regulation in the US[50] is based on, and implements, ISO 13485 but does not incorporate it by reference.[51]

B *Domestic Implementation*

The medical devices provisions of the *Therapeutic Goods Act 1989* (Cth) ('*Therapeutic Goods Act*') are expressly based on the scheme developed by the medical devices network. In the second reading speech for the inclusion of the medical devices part of the *Therapeutic Goods Act* in 2002,[52] Trish Worth stated that

> [t]he amendments provided for in this bill are necessary to allow the introduction of a world leading, internationally harmonised framework for the regulation of medical devices in Australia. The legislation adopts the global model developed by the Global Harmonisation Task Force, comprising the regulators of Europe, the USA, Canada, Japan and Australia. The amendments will allow better protection of public health, while also facilitating access to new technologies.[53]

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46 *Council Directive 93/42/EEC of 14 June 1993 concerning Medical Devices* [1993] OJ L 169/1, arts 3, 5; *Commission Implementing Decision (EU) 2020/437 of 24 March 2020 on the Harmonised Standards for Medical Devices Drafted in Support of Council Directive 93/42/EEC* [2020] OJ L 90I/1.

47 *Medical Devices Regulations*, SOR/98-282, s 32(2)(f).

48 *Health Products (Medical Devices) Regulations 2010* (Singapore) regs 33(c)(i), 34(c)(i), 35(c)(i).

49 *Therapeutic Goods (Conformity Assessment Standard for Quality Management Systems) Order 2019* (Cth) ord 5, sch 1 ('*2019 Order*').

50 *Quality System Regulation*, 21 CFR § 820 (1996).

51 *Medical Devices; Current Good Manufacturing Practice (CGMP) Final Rule; Quality System Regulation*, 61 Fed Reg 52602, 52603, 52605 (7 October 1996).

52 *Therapeutic Goods Amendment (Medical Devices) Act* 2002 (Cth). The 2002 amendments to the *Therapeutic Goods Act 1989* (Cth) were not the first provisions dealing with transnational regulatory measures. The *Therapeutic Goods Amendment Act 1997* (Cth) added provisions to implement a treaty with the European Community regarding conformity assessments of medical devices manufactured in each jurisdiction: see *Agreement on Mutual Recognition in relation to Conformity Assessment, Certificates and Markings between Australia and the European Community*, signed 24 June 1998, [1999] ATS 2 (entered into force 1 January 1999) Sectoral Annex on Medical Devices. See also Department of the Parliamentary Library (Cth), *Bills Digest* (Digest No 158 of 1996–97, 27 June 1997) 2–3.

53 Commonwealth, *Parliamentary Debates*, House of Representatives, 14 February 2002, 191 (Trish Worth, Parliamentary Secretary to the Minister for Health and Ageing) ('Medical Devices Second Reading Speech'). See also Senate Community Affairs References Committee, Parliament of Australia, *The Regulatory Standards for the Approval of Medical Devices in Australia* (Report, November 2011) 8 [2.24] ('*Regulatory Standards*').

The medical devices regulatory scheme established by the *Therapeutic Goods Act* is complex. The *Therapeutic Goods Act* requires compliance with 'essential principles'[54] which are 15 principles dealing with different aspects of the safety of medical devices included in regulations.[55] The essential principles are stated at a high level of generality. For example, principle 1(a) refers to medical devices being designed in a way that ensures

> the device will not compromise the clinical condition or safety of a patient, or the safety and health of the user or any other person, when the device is used on a patient under the conditions and for the purposes for which the device was intended …[56]

As recognised by the medical devices network, the essential principles are not intended to operate as standards. They require supplementation by detailed standards.[57] The *Therapeutic Goods Act* enables regulations to be made that identify applicable standards[58] and states that compliance with them is a legally accepted means for compliance with conformity assessment procedures.[59] The *Therapeutic Goods Act* includes criminal offences and civil penalties for manufacturers that fail to comply with conformity assessment procedures[60] and provides an exception to such provisions when the particular medical device complies with standards that have been recognised by the medical devices provisions of the *Therapeutic Goods Act* and relevant regulations.[61]

These standards are currently included in sch 1 of the *Therapeutic Goods (Conformity Assessment Standard for Quality Management Systems) Order 2019* (Cth) ('*2019 Order*') and have been included in precursor regulations dating back to 2003. The *2019 Order* incorporates by reference ISO 13485:2016 (with other ISO standards) and previous versions of this standard were included in earlier regulations.[62] The Explanatory Statements for these regulations refer to the medical devices network

54 *Therapeutic Goods Act 1989* (Cth) s 41MA(1)(b) ('*Therapeutic Goods Act*').

55 Ibid s 41CA; *Therapeutic Goods (Medical Devices) Regulations 2002* (Cth) sch 1 ('*Medical Devices Regulations*').

56 *Medical Devices Regulations* (n 55) sch 1, cl 1(a).

57 International Medical Device Regulators Forum, *Optimizing Standards for Regulatory Use* (Final Report, 5 November 2018) 9.

58 *Therapeutic Goods Act* (n 54) ss 41DA, 41DC, 41DD.

59 Ibid s 41D.

60 Ibid ss 41ME, 41MEA.

61 Ibid s 41MG.

62 *2019 Order* (n 49) sch 1; *Conformity Assessment Standards Order (Standard for Quality Management Systems and Quality Assurance Techniques) 2008* (Cth) sch 1 ('*2008 Order*'); *Conformity Assessment Standards Order No 1 of 2005* (Cth) sch 1 ('*2005 Order*'); Delegate for the Minister of Health and Ageing (Cth), 'Conformity Assessment Standards Order No 1' in Commonwealth, *Commonwealth Gazette*, No GN 9, 5 March 2003, 757, 758–9 ('*2003 Order*').

encouraging domestic agencies to use ISO 13485 in their regulatory laws,[63] or that adopting it in Australia is necessary to ensure international best practice and to align Australia's laws with other countries in the network.[64] The Explanatory Statement for the *2019 Order* states that ISO 13485:2016 is not available for free, is subject to copyright, and provides the ISO website where it can be purchased.[65] The Explanatory Statement also states that ISO 13485 can be viewed at the TGA's offices in the Australian Capital Territory.

The development of ISO 13485 and its implementation in domestic regulations highlights one form in which transnational networks implement their harmonisation objectives.[66] Regulators from different countries may work together to seek harmonised regulations but implementing their goals at the international level is difficult as such networks operate outside of existing international institutions and have no network-level administrative capacity. International standard-setting organisations such as the ISO can then be seen as a helpful institution for transforming network policy into standards that can be applied by industry. Standard-setting organisations provide the administrative capacity to enable the transnational network's policies to be implemented into a set of standards.

It is then a relatively simple administrative process for domestic agencies to adopt the international standards in their regulations. When domestic regulatory agencies work together to develop common policies on a particular matter, the next step is to consider implementation into binding laws. The crucial last step is incorporation by reference into the domestic regulations of each country. While there may be no particular legal requirement for the participating countries to incorporate the recognised private international standard into their regulations, there is a strong incentive. It would defeat the purpose of transnational cooperation if the participating regulators do not incorporate them by reference into domestic laws.

C *Domestic Transparency and Parliamentary Scrutiny of the Medical Devices Scheme*

The Australian international law literature on the relationship between international and domestic law focuses on governments making decisions to enter into

63 Explanatory Statement, Conformity Assessment Standards Order No 1 of 2005 (Cth) 3 ('Conformity Assessment Standards Explanatory Statement 2005').

64 Replacement Explanatory Statement, Therapeutic Goods (Conformity Assessment Standard for Quality Management Systems) Order 2019 (Cth) 3–4, 9 ('Therapeutic Goods Replacement Explanatory Statement 2019'); Explanatory Statement, Conformity Assessment Standards Order (Standard for Quality Management Systems and Quality Assurance Techniques) 2008 (Cth) 3.

65 Therapeutic Goods Replacement Explanatory Statement 2019 (n 64) 4.

66 See Sidney A Shapiro, 'International Trade Agreements, Regulatory Protection, and Public Accountability' (2002) 54(1) *Administrative Law Review* 435, 436; Slaughter (n 8) 59.

treaties[67] and if implementation is necessary it is commonly referred to as a matter for Parliament[68] or regulations.[69] Transnational law-making highlights a different set of institutions and officials participating in the decisions to enter into the transnational network and a reduced role for Parliament in implementing the decisions, as is often thought to be the case. In this Part, I explain Parliament's role in relation to international treaties and their implementation in domestic primary and delegated legislation in order to contrast it with Parliament's involvement in the transnational aspects of the medical devices laws.

There is now a developed system for parliamentary scrutiny of treaty-making. A National Interest Analysis is tabled in Parliament with the treaty and is published on the Australasian Legal Information Institute ('AustLII'). This informs parliamentarians and the public of the background and characteristics of the treaty, any consultation that has been held, and implementation plans. The parliamentary scrutiny committee, JSCOT, receives submissions, holds public hearings, including questioning government officials, and publishes a report.[70] While there have been some criticisms of whether these developments provide a sufficient check on government action,[71] the adequacy of the government's consultation processes, and the information provided to JSCOT[72] — they provide the basic structure of a transparency and scrutiny system.

However, the actions in the medical devices case study are not to enter into or amend a treaty and accordingly fall outside of the requirements for treaties. The transnational governance highlighted in the case study is to join a transnational network and then implement the decisions made there. This kind of executive action is common in bilateral agreements that are non-binding and for which the

67 The formal decisions to enter into treaties are made by the Governor-General and the Executive Council: see Anne Twomey, 'Procedure and Practice of Entering and Implementing International Treaties' (Background Paper No 27, Parliamentary Research Service, Parliament of Australia, 9 February 1995) 4–5. See also: Mason, Lacey and Toohey (n 4) 50; McLachlan (n 17) 126–9.

68 McLachlan (n 17) 156 [5.20]; James Crawford and Ivan Shearer, 'Reflections on the Occasion of the Third Edition of "International Law in Australia"' in Donald R Rothwell and Emily Crawford (eds), *International Law in Australia* (Lawbook, 3rd ed, 2017) xiii, xvi.

69 Anne Twomey, 'Federal Parliament's Changing Role in Treaty Making and External Affairs' (Research Paper No 15, Parliamentary Library Information and Research Services, Parliament of Australia, 7 March 2000) 24 ('Federal Parliament's Changing Role').

70 See, eg: Joint Standing Committee on Treaties, Parliament of Australia, *Film Co-Production: Malaysia; Radio Regulations: WRC-19; Tax Information Exchange: Timor-Leste* (Report No 195, May 2021) 2 [1.9]–[1.11]; Hilary Charlesworth et al, 'Deep Anxieties: Australia and the International Legal Order' (2003) 25(4) *Sydney Law Review* 423, 441.

71 See, eg: Charlesworth et al (n 70) 443–4; Madelaine Chiam, 'Evaluating Australia's Treaty-Making Process' (2004) 15(4) *Public Law Review* 265, 265–9.

72 Twomey, 'Federal Parliament's Changing Role' (n 69) 33.

parliamentary scrutiny and transparency mechanisms do not apply.[73] There are many examples of the Commonwealth entering into treaties when joining international organisations,[74] however, they are different to the transnational networks in which Australian government agencies' participation does not require a treaty. Yet, international organisations and transnational networks have similar general characteristics. For both there is Australian government action at the international level and decisions made at that level may require domestic legal implementation.

As we have seen, the medical devices transnational networks were not established by treaty and the TGA's participation in them was not authorised by a treaty. The GHTF was established in January 1993 prior to the transparency and scrutiny requirements becoming operative but even if these requirements had commenced by then, the treaty processes would not have applied to the TGA's participation in the GHTF. The GHTF was replaced by the IMDRF by way of an announcement by the newly established organisation,[75] which meant that the transparency and scrutiny requirements for treaties were not applicable.

This indicates that transnational networks do not engage Parliament's transparency and scrutiny requirements for treaties in the way that would occur for Australia's participation in international organisations established by binding international law. However, that does not mean that Parliament has had no role in relation to medical devices laws. The process for making the Australian legislation for medical devices indicates the ways in which this occurs.

The parliamentary process for amendments to the *Therapeutic Goods Act* relating to medical devices included information about the provisions being influenced by the medical devices transnational network, at that time the GHTF. The information was included in the Explanatory Memorandum for a Bill that was introduced in 2001 but lapsed[76] and was included again in the Explanatory Memorandum for the 2002 Bill that was passed by Parliament.[77] Reference to the GHTF was also

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73 Byrnes (n 3) 4–5; Mason, Lacey and Toohey (n 4) 67.

74 See, eg: *Articles of Agreement of the International Monetary Fund*, opened for signature 27 December 1945, [1947] ATS 11 (entered into force 27 December 1945); *Convention on the Organisation for Economic Co-Operation and Development [OECD], and Supplementary Protocols 1 and 2*, opened for signature 14 December 1960, [1971] ATS 11 (entered into force 30 September 1961); *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, [1995] ATS 8 (entered into force 1 January 1995).

75 'Ottawa, Canada Meeting Outcome Statement', *International Medical Device Regulators Forum* (Web Page, 7 October 2011) <https://www.imdrf.org/documents/ottawa-canada-meeting-outcome-statement>.

76 Explanatory Memorandum, Therapeutic Goods Amendment (Medical Devices) Bill 2001 (Cth) 1–2.

77 Explanatory Memorandum, Therapeutic Goods Amendment (Medical Devices) Bill 2002 (Cth) 1–2 ('Therapeutic Goods Amendment Explanatory Memorandum 2002').

included in the Bills Digest prepared by parliamentary staff for the 2001 Bill[78] and in the second reading speech in the House of Representatives.[79] This information was provided for parliamentarians, however it was very brief and was provided as part of background information. The information provided did not include the network's reasons for its recommendations and who participated in developing them. The primary explanation of the network's significance was that its work should be understood to be 'internationally accepted best practice'.[80]

As the administrative steps for joining the transnational network and contributing to its decisions did not involve binding treaty actions, JSCOT did not review any of these actions. However, the medical devices networks have been recognised in treaties that have included provisions for medical devices. This recognition was referred to in some of the documentation for the particular treaties but, again, did not involve scrutiny of the actual network and its decisions.

This can be seen in the 2016 amendment to the *Singapore–Australia Free Trade Agreement* which includes an annex dealing with medical devices.[81] This part of the agreement incorporates the GHTF definition of 'medical device' and obliges the parties to contribute to international fora:

> The Parties shall seek to collaborate through relevant international initiatives, such as those aimed at harmonisation, as well as regional initiatives that support of those international initiatives, as appropriate, to improve the alignment of their respective regulations and regulatory activities for medical devices.[82]

A National Interest Analysis was prepared for the amendment which included a brief mention of medical devices without referring to the harmonisation provisions or the medical devices network.[83] JSCOT reported on the amendment but that report did not extend to the medical devices aspect of the treaty.[84] This example indicates

78 Department of the Parliamentary Library Information and Research Services (Cth), *Bills Digest* (Digest No 149 of 2000–01, 7 June 2001) 3.

79 Medical Devices Second Reading Speech (n 53) 191. Note that the medical devices networks were also referred to in the background documents for amendments to the *Therapeutic Goods Act* enacted in 2021: Explanatory Memorandum, Therapeutic Goods Amendment (2020 Measures No 2) Bill 2020 (Cth) 113–15; Department of Parliamentary Services (Cth), *Bills Digest* (Digest No 45 of 2020–21, 2 February 2021) 5.

80 Therapeutic Goods Amendment Explanatory Memorandum 2002 (n 77) 1.

81 *Agreement to Amend the Singapore–Australia Free Trade Agreement*, signed 13 October 2016, [2017] ATS 26 (entered into force 1 December 2017) ch 5, Sectoral Annex on Medical Devices.

82 Ibid art 8.

83 National Interest Analysis, *Agreement to Amend the Singapore–Australia Free Trade Agreement*, [2017] ATNIA 9 [20].

84 Joint Standing Committee on Treaties, Parliament of Australia, *Singapore Free Trade Agreement*: *Amendment; Defence Supplies and Services: Japan* (Report No 172, August 2017).

that while the transnational network's actions may surface in Australia's treaties, that does not mean that its decisions are transparent or scrutinised in Australia's treaty processes.

Other Commonwealth parliamentary committees have referred to the medical devices transnational network in their inquiries. The Senate Community Affairs References Committee has held inquiries into Australia's medical devices regulatory system in relation to devices that have harmed patients, such as hip prostheses, breast implants, and transvaginal mesh implants. In some of these inquiries, the Committee's reports have explained the transnational nature of the Australian medical devices regulatory system.[85] But that is not the case for all of these inquiries.[86] This indicates that medical devices networks have been recognised and referred to in committee inquiries into the medical devices regulatory scheme generally. However, this has been as part of the background of the regulatory scheme and peripheral to the primary issues examined in the inquiry, such as the particular medical devices that have been problematic and the administrative aspects of the scheme. As such, while the influence of the medical devices transnational network has been referred to and recognised in parliamentary committee inquiries, there has been no specific analysis of its decisions or decision-making processes.

The medical devices legislation is a complex but important part of Australia's health system. That makes the legislation very likely to be subject to some degree of transparency and parliamentary scrutiny. We have seen different ways in which this has occurred. While the transnational aspects of the legislative scheme may not directly be subject to the treaty scrutiny system, the transnational features have been referred to in more general forms of parliamentary scrutiny. This raises a question as to whether more systemic scrutiny of Australian agencies' actions on the international stage is necessary. Transnational networks' actions may be thought to not require such scrutiny as their decisions do not have any legal status. However, there are reasons for systemic scrutiny that I will consider in Part IV.

D *Transparency and Parliamentary Scrutiny of Regulations*

The medical devices transnational network's goal of harmonising the domestic regulatory schemes of its members was intended to be implemented through their reliance on common standards, in particular ISO 13485 and other ISO standards. Reliance on internationally developed standards is a common feature of transnational networks' actions. The adoption of such standards into Australian medical

85 *Regulatory Standards* (n 53) 7–9 [2.18]–[2.28], 97–8 [5.8]; Senate Community Affairs References Committee, Parliament of Australia, *The Role of the Therapeutic Goods Administration regarding Medical Devices, Particularly Poly Implant Prothese (PIP) Breast Implants* (Report, 31 May 2012) 9 [2.14].

86 See, eg: Senate Community Affairs Legislation Committee, Parliament of Australia, *Therapeutic Goods Amendment (2016 Measures No 1) Bill 2016 [Provisions]* (Report, 27 March 2017); Senate Community Affairs References Committee, Parliament of Australia, *Number of Women in Australia Who Have Had Transvaginal Mesh Implants and Related Matters* (Report, 28 March 2018).

devices regulations raises a question as to whether this aspect of the transnational law-making system is transparent and scrutinised by the relevant parliamentary committee, the Senate Scrutiny of Delegated Legislation Committee. The answer is that there is minimal scrutiny of standards adopted in regulations.

Just as questions were raised in the 1990s regarding transparency and parliamentary scrutiny for the government's actions regarding treaties, there is a history of questions being raised about the transparency and parliamentary scrutiny of regulations. However, the concerns stretch back much further to the 1930s and the initial parliamentary scrutiny requirements that were established then.[87] Transparency requirements are now included in the *Legislation Act*, which has provisions for consultation and for explanatory statements to be provided for each regulation.[88] Regulations are tabled in Parliament and subject potentially to disallowance.[89] Parliamentary scrutiny is provided by the Senate Scrutiny of Delegated Legislation Committee.[90]

The implementation of the transnational network's scheme for medical devices highlights that the Australian agency relied on regulations to implement the detailed standards. The ISO standards were included in Australian regulations through being incorporated by reference. Regulations that include standards that are incorporated by reference are subject to the transparency and parliamentary scrutiny system. The text of the regulation is subject to the consultation requirements and parliamentary scrutiny set out in the *Legislation Act*, but the incorporated standard included within the regulation is not required to be included in those processes. That means that the incorporated standard is not required by the *Legislation Act* to be provided to those who seek to make submissions in consultation processes or to Parliament for scrutiny, notwithstanding that the standard becomes Australian law due to being incorporated by reference into the regulation.

The Commonwealth legislation that controls regulation-making includes requirements relating to the form of incorporation by reference[91] and information on how to access the law or document.[92] However, these requirements for incorporation by reference are not directed to ensuring transparency and parliamentary scrutiny. They are directed to providing for legal certainty by enabling persons and organisations who are required to comply with the incorporated standard to know the details of the standard and how to access it.

87 See Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (LexisNexis Butterworths, 5th ed, 2017) 60.

88 *Legislation Act* (n 25) ss 3(b), 15J, 17.

89 Ibid ss 38, 42.

90 Senate, Parliament of Australia, *Standing Orders and Other Orders of the Senate* (at July 2021) ord 23.

91 That is, whether the regulation incorporates a particular version of the standard or the standard with subsequent changes that are made to it: *Legislation Act* (n 25) s 14(2).

92 *Legislation Act* (n 25) s 15J(2)(c).

The Commonwealth regulations that contain the standards which medical device manufacturers must comply with have incorporated by reference ISO 13485 since the medical devices scheme was established in 2002.[93] Some aspects of the standard are briefly described in the explanatory statements for these regulations, including changes that have been made to the standard since the previous regulation incorporating it.[94] However, the text of the standard was not included with the regulations, their explanatory statements, or tabled separately in Parliament.[95]

That means that while ISO 13485 has been incorporated by reference into Australian law for two decades, the actual standard has not been exposed to public or parliamentary scrutiny as is required for other aspects of Commonwealth regulations. Parliament has power to require documents such as standards that are incorporated by reference in regulations to be made available to the Parliament.[96] However there is no evidence of that occurring for ISO 13485 or, to my knowledge, any other private standard incorporated by reference in Commonwealth regulations. The implementation of the medical devices transnational network's program in Australian primary legislation and regulations has therefore occurred without explanation of the substantive features of that program or the important details of the particular standards by which medical device manufacturers ensure they comply with Australian legal requirements. The medical devices network is referred to in numerous parliamentary documents relating to medical devices policies and laws, but its actions and influence on Australian law have circumvented the primary schemes for transparency and parliamentary scrutiny. The treaty requirements were avoided as the medical devices network's actions are non-binding and not treaties. The implementation of the details of the program through incorporation by reference of private standards into regulations avoids the primary features of the transparency and scrutiny requirements for regulations.

IV Reform Options and Considerations

As we have seen, the medical devices case study highlights that while the transnational network has been referred to in many different parliamentary materials, its decision-making processes and reasons for decisions are not captured by the current systemic transparency and scrutiny mechanisms. The question then is how Commonwealth transparency and parliamentary scrutiny requirements can be adapted to include them. Australian agencies that participate in such networks are

93 *2019 Order* (n 49) sch 1; *2008 Order* (n 62) sch 1; *2005 Order* (n 62) sch 1; *2003 Order* (n 62) sch 1.

94 See, eg: Therapeutic Goods Replacement Explanatory Statement 2019 (n 64) 9; Conformity Assessment Standards Explanatory Statement 2005 (n 63) 2–3.

95 Parliament has specific power to require documents such as standards that are incorporated by reference in regulations to be made available to the public: *Legislation Act* (n 25) s 41. However, that has not occurred for ISO 13485 or, to my knowledge, any other private standard incorporated by reference in Commonwealth regulations.

96 *Legislation Act* (n 25) s 41.

not necessarily secretive about their membership and contributions to transnational networks. The TGA, for example, has a webpage acknowledging its role in the IMDRF.[97] However, that is not the same as the transparency and scrutiny provided by Parliament, the primary democratic institution. The question is: how can Commonwealth transparency and parliamentary scrutiny measures be adapted to include transnational law-making?

It is helpful to distinguish the establishment of transnational networks and their decision-making from domestic implementation of their decisions. In his article focusing on MOUs, Byrnes recommended publishing the text of MOUs in a public register, reporting to Parliament of instruments that are less than treaty status, and broadening JSCOT's remit to include MOUs.[98] His focus on MOUs does not quite fit the activities of transnational networks as they are less formal than agreements made in the form of MOUs. However, Byrnes' reform proposals suggest that some reforms could be developed and adjusted to fit the nature of transnational networks.

It would be possible to treat participation of a Commonwealth agency in a transnational network as requiring express authorisation in legislation establishing the agency. For example, the Australian Accounting Standards Board is subject to a statutory provision authorising it 'to participate in and contribute to the development of a single set of accounting standards for world-wide use' and is authorised to 'make or formulate an accounting standard by issuing the text of an international accounting standard'.[99] This requirement for statutory authority could be used more broadly. It would be the appropriate place to include safeguards such as requiring agencies to provide an explanatory statement of their transnational activities on a regular basis, for example in annual reports, and provide that statement to Parliament. Parliamentary scrutiny, either by committees with subject matter responsibilities or JSCOT, could then be extended to review the explanatory statements and the activities. Such measures would support transparency and parliamentary scrutiny of an agency's membership of a transnational network by requiring them to report on the policy development activities of the network.

Transnational networks are also designed to have their decisions and activities implemented in domestic legislation in order to enable harmonisation of the domestic laws of different countries. The medical devices case study highlights that this may require primary legislation, such as the amendments to the *Therapeutic Goods Act* made in 2002,[100] and more commonly implementation in regulations, including through incorporation by reference of private international standards. It would be possible for transparency to be provided by requiring an explanation of the decisions made by the transnational network that are being implemented. For implementation

97 Therapeutic Goods Administration, 'International Medical Device Regulators Forum (IMDRF)', *Australian Government Department of Health and Aged Care* (Web Page) <https://www.tga.gov.au/international-medical-device-regulators-forum-imdrf>.

98 Byrnes (n 3) 14.

99 *Australian Securities and Investments Commission Act 2001* (Cth) ss 227(1)(d), (4).

100 *Therapeutic Goods Amendment (Medical Devices) Act 2002* (Cth).

in primary legislation, this would be subject to scrutiny by the Senate Standing Committee for the Scrutiny of Bills.

More substantive changes would be required for transparency and parliamentary scrutiny for regulations incorporating by reference international standards. As explained in Part III(D), the current provisions for incorporation by reference provide for legal certainty and access to incorporated standards rather than transparency and parliamentary scrutiny of the processes and substantive decisions underpinning the standards. This indicates that the existing transparency and scrutiny measures could be adjusted to include the decisions of the transnational network and the incorporated standard.

There are three changes that could accommodate transnational law-making practices within the Commonwealth's transparency and parliamentary scrutiny of regulations requirements. One would be to require agencies to include in explanatory statements for regulations an explanation of the transnational network's decisions that underpin the regulation and the manner in which they are implemented within the regulation. This would require amending s 15J(2) of the *Legislation Act*, which provides for the content of explanatory statements for regulations. A second change would be to include standards that are incorporated by reference into regulations to be included in the parliamentary scrutiny of regulations for their compatibility with human rights. This could be done by an express requirement for scrutiny of such regulations by the Parliamentary Joint Committee on Human Rights and for statements of compatibility with human rights that are included in explanatory statements for regulations to extend to any standard that is incorporated by reference with the regulation. The third would be to require the incorporated international standard to be provided with the text of the regulation for public consultation[101] and for its automatic tabling in Parliament with the regulation rather than on request of members of Parliament.[102] This would expose the incorporated standard to public consultation, general scrutiny by Parliament, and more focused scrutiny by the Senate Standing Committee for the Scrutiny of Delegated Legislation.

The purpose of these suggested reforms is to address the concerns that transnational law-making affects the current procedures and institutions that make parliamentary and administrative law-making democratically legitimate. While it is possible that different reforms than those proposed could better achieve this purpose, the important point is to recognise that changes are required to reconcile recent developments regarding transnational networks and transnational law-making to Australia's democratic institutions.

101 See *Legislation Act* (n 25) s 17.

102 Ibid ss 38, 41.

V Conclusion

The medical devices case study in this article described an elaborate transnational scheme for harmonising domestic laws. The implementation of the network's plans and goals in Australia's and other countries laws has facilitated the trade of medical devices. However, little attention has been given to how this transnational scheme and others like it, affect domestic law-making processes designed for democratic deliberation and scrutiny.

In this article I have attempted to explain the primary features of transnational networks through the case study of medical devices laws. I have highlighted how this form of law-making circumvents transparency and scrutiny processes and institutions that provide the democratic basis for Australian laws. This suggests that some reforms would help to reconcile the Commonwealth domestic law-making processes to transnational law-making. There seems to have been no attempt to improve the transparency and scrutiny system for MOUs following Byrnes' analysis of them. The same fate is likely to be the case for the reforms suggested in this article. However, if Commonwealth agencies continue to rely on MOUs and transnational networks in the long term, the issues raised in Byrnes' article and this article are likely to be raised by those concerned about the relationship between governments' international and domestic law-making activities.

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THE NATURE AND PURPOSE OF COMPLAINANT INTOXICATION EVIDENCE IN RAPE TRIALS: A STUDY OF AUSTRALIAN APPELLATE COURT DECISIONS

Abstract

This article reports the findings of a qualitative analysis of 102 Australian appellate court decisions involving conviction appeals from rape/sexual assault trials, where there was evidence that the complainant was intoxicated at the time of the alleged offence. We found little evidence that statutory provisions designed to break the traditionally assumed nexus between alcohol (and other drug) consumption and consent to sex are influencing trials. It appears to be the case that complainant intoxication evidence is still more likely to impede rather than support the prosecution's ability to prove the element of non-consent — because it is engaged by the defence to: suggest consent based on a 'loss of inhibition' narrative; and/or challenge the credibility of the complainant as a witness and the reliability of their account.

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I Introduction

Alcohol and/or other drug ('AOD') consumption is strongly associated with sexual violence crimes,[1] including rape.[2] This is an association with direct implications for the ability of victims of sexual violence to obtain justice through complaint and criminal prosecution of the alleged offender.[3] Evidence that the complainant was intoxicated at the time of the alleged offence has long been recognised as one of the barriers to successful prosecution in rape trials — including because decision-makers can be influenced by an asserted or assumed nexus between intoxication and consent ('intoxication/consent nexus'), which has a long history.[4] As has occurred with many of the rape myths that have tradition-

1 Studies have estimated that AOD consumption is a factor in some 50–80% of rapes: Tina Zawacki et al, 'Perpetrators of Alcohol-Involved Sexual Assaults: How Do They Differ from Other Sexual Assault Perpetrators and Nonperpetrators?' (2003) 29(4) *Aggressive Behavior* 366, 367; Denise Lievore, 'Prosecutorial Decisions in Adult Sexual Assault Cases' (Trends and Issues in Crime and Criminal Justice No 291, Australian Institute of Criminology, 2 January 2005); Baroness Vivien Stern, *The Stern Review: A Report by Baroness Vivien Stern CBE of an Independent Review into How Rape Complaints Are Handled by Public Authorities in England and Wales* (Report, Home Office (UK), 2010) 110–11; Andrea Finney, 'Alcohol and Sexual Violence: Key Findings from the Research' (Findings No 215, Home Office (UK), 15 March 2004) 2; Antonia Abbey, 'Alcohol's Role in Sexual Violence Perpetration: Theoretical Explanations, Existing Evidence and Future Directions' (2011) 30(5) *Drug and Alcohol Review* 481; Kathryn Graham et al, '"Blurred Lines?" Sexual Aggression and Barroom Culture' (2014) 38(5) *Alcoholism: Clinical and Experimental Research* 1416.

2 We use the term 'rape' generally in this article noting that some jurisdictions (such as New South Wales) have changed the name of the primary sexual violence offence to 'sexual assault': see, eg, *Crimes Act 1900* (NSW) s 61I.

3 We locate this article (and the larger project of which it is a part) in the context of a body of socio-legal criminalisation research that attempts to evaluate the operational effects of progressive criminal law reform — designed to address the historical inadequacies of the justice system's response to gendered violence, including domestic and family violence, and sexual violence. For a recent example, see Heather Douglas, *Women, Intimate Partner Violence, and the Law* (Oxford University Press, 2021).

4 Natalie Taylor, 'Juror Attitudes and Biases in Sexual Assault Cases' (Trends and Issues in Crime and Criminal Justice No 344, Australian Institute of Criminology, 15 August 2007) 3–4; Anna Carline, Clare Gunby and Stuart Taylor, 'Too Drunk To Consent? Exploring the Contestations and Disruptions in Male-Focused Sexual Violence Prevention Interventions' (2018) 27(3) *Social and Legal Studies* 299; Heather D Flowe and John Maltby, 'An Experimental Examination of Alcohol Consumption, Alcohol Expectancy, and Self-Blame on Willingness To Report a Hypothetical Rape' (2018) 44(3) *Aggressive Behavior* 225, 226; 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 (NCAS)* (Research Report, Australia's National Research Organisation for Women's Safety, March 2018).

ally hampered justice for victim-survivors of sexual violence,[5] law-makers have attempted to legislate for the disruption of this problematic approach to complainant intoxication. In Australia, most jurisdictions have added a provision to the element of non-consent in the offence of rape that seeks to reorient the significance of complainant intoxication away from carrying an assumption of consent, and towards being characterised as evidence of *non-consent*.[6]

In Australia, little attention has been paid to the nature and impact of intoxication evidence in rape trials, including the operation of provisions which purport to shape how complainant intoxication evidence can impact rape trials.[7] Filling this gap in the

5 Australian Institute of Family Studies and Victoria Police, *Challenging Misconceptions about Sexual Offending: Creating an Evidence-Based Resource for Police and Legal Practitioners* (Commissioned Report, September 2017); Dame Elish Angiolini, *Report of the Independent Review into the Investigation and Prosecution of Rape in London* (Report, 30 April 2015); Olivia Smith, *Rape Trials in England and Wales: Observing Justice and Rethinking Rape Myths* (Palgrave Macmillan, 2018); Lori Haskell and Melanie Randall, *The Impact of Trauma on Adult Sexual Assault Victims* (Report, 2019); Elisabeth McDonald, *Rape Myths as Barriers to Fair Trial Process: Comparing Adult Rape Trials with Those in the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, 2020).

6 All Australian jurisdictions (except Queensland and Western Australia) have adopted provisions on the relationship between complainant intoxication and consent. See, eg: *Crimes Act 1900* (ACT) s 67(1)(g); *Crimes Act 1900* (NSW) s 61HJ(1)(c); *Criminal Code Act 1983* (NT) s 192(2)(c); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(d); *Criminal Code Act 1924* (Tas) s 2A(2)(h); *Crimes Act 1958* (Vic) s 36(2)(e). Although not the focus of this article, legislation (whether general or specific to sexual offences) excludes or limits the ability of rape defendants to raise exculpatory evidence of their own intoxication. For example, s 61HK(5)(b) of the *Crimes Act 1900* (NSW) expressly provides that a defendant's intoxication cannot be taken into account in determining whether the fault element for sexual assault is proved (ie knowledge that the other party was not consenting). See also: *Criminal Code 2002* (ACT) s 33; *Criminal Code Act 1983* (NT) s 43AU; *Criminal Code Act 1899* (Qld) s 348A; *Criminal Law Consolidation Act 1935* (SA) ss 268(2)–(3); *Criminal Code Act 1924* (Tas) s 14A; *Crimes Act 1958* (Vic) s 36B. In Western Australia the Court of Appeal held that for the purpose of the mistake of fact defence in s 24 of the *Criminal Code Act Compilation Act 1913* (WA), intoxication cannot be taken into account when assessing the reasonableness of the defendant's belief: *Aubertin v Western Australia* (2006) 33 WAR 87, 96–7 [44] (McLure JA, Roberts-Smith JA agreeing at 89 [1], Buss JA agreeing at 103 [72]).

7 The Victorian Law Reform Commission's report on Sexual Offences in 2004 briefly discussed a selected instance in which a trial judge's directions appeared not to follow the approach to complainant intoxication evidence expected by s 36(2)(e) of the *Crimes Act 1958* (Vic): Victorian Law Reform Commission, *Sexual Offences* (Final Report No 78, July 2004) 353–4 [7.44]–[7.45]. However, the Commission did not undertake any further detailed or systematic analysis, and their recommendations did not touch on this issue. A 2016 study by Emma Henderson and Kirsty Duncanson included an examination of two cases where there was evidence of complainant intoxication, and found that rape myths continue to exert influence despite Victoria's statutory provisions on consent and jury directions: Emma Henderson and Kirsty Duncanson, 'A Little Judicial Direction: Can the Use of Jury Directions Challenge Traditional

research literature is essential because court proceedings are a critical phase in the criminal justice system's response to rape victims, and the practices and outcomes of trials have wider communicative effects and influences on decisions made at key attrition points (ie reporting, police investigation and prosecution decisions). Given the frequency with which rape is associated with intoxication, it is essential to evaluate whether existing rules (and practices) on intoxication evidence contribute to the delivery of justice to sexual violence victim-survivors.[8]

As the first stage in a larger empirical examination of intoxication evidence in rape trials,[9] this article engages with appellate judgments as a valuable source for gaining insights about how complainant intoxication evidence features in rape trials.[10]

Consent Narratives in Rape Trials?' (2016) 39(2) *University of New South Wales Law Journal* 750, 769–73. See also: Rachael Burgin, 'Communicating Consent: Narratives of Sexual Consent in Victorian Rape Trials' (PhD Thesis, Monash University, 2019); Anastasia Powell et al, 'Meanings of "Sex" and "Consent": The Persistence of Rape Myths in Victorian Rape Law' (2013) 22(2) *Griffith Law Review* 456. In respect of New Zealand, see Sarah Croskery-Hewitt, 'Rethinking Sexual Consent: Voluntary Intoxication and Affirmative Consent to Sex' (2015) 26(3) *New Zealand Universities Law Review* 614; McDonald (n 5). Recently, both the New South Wales Law Reform Commission and Victorian Law Reform Commission have considered complainant intoxication evidence, including recommendations for a new jury direction that it should not be assumed that a person consented because that person consumed alcohol or other drugs: New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) 175 [8.119]; Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (Report, September 2021) 441 [20.48] ('*Improving the Justice System Response to Sexual Offences*'). For the implementation of these recommendations in New South Wales see *Criminal Procedure Act 1986* (NSW) s 292E(b). In Victoria, while the amending Bill has been passed to implement this change by inserting s 47G(c) into the *Jury Directions Act 2015* (Vic), the new provision has not yet come into force: see *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 48.

8 The catalyst and foundation for this study was an Australian Institute of Criminology funded study of intoxication and the criminal law: Julia Quilter et al, *'Intoxication' and Australian Criminal Law: Implications for Addressing Alcohol and Other Drug-Related Harms and Risks* (Report, Criminology Research Advisory Council, May 2018) (Grant: CRG 20/14–15).

9 The project, 'Intoxication Evidence in Rape Trials: A Double-Edged Sword?', is funded by an Australian Research Council Discovery Project grant (DP200100101). See 'DP200100101: University of Wollongong (Funded by Australian Research Council)', *Australian Research Council* (Web Page) <https://dataportal.arc.gov.au/RGS/Web/Grants/DP200100101>. This project responds to the call for 'greater and more systematic' empirical research '[g]iven the discrepancy between community attitudes about sexual offending and sexual offence legislation': Natalia Hanley et al, 'Improving the Law Reform Process: Opportunities for Empirical Qualitative Research?' (2016) 49(6) *Australian and New Zealand Journal of Criminology* 546, 560.

10 Jonathan Crowe and Bri Lee have previously analysed rape trial appellate decisions in their study of the mistake of fact excuse in Queensland rape and sexual assault law: See Jonathan Crowe and Bri Lee, 'The Mistake of Fact Excuse in Queensland Rape Law: Some Problems and Proposals for Reform' (2020) 39(1) *University of Queensland Law Journal* 1.

Part II of this article discusses legislative guidance on complainant intoxication in Australia. Part III outlines the research design of this study. Part IV considers the meaning of 'intoxication' and discusses the relevance and implications of the different ways complainant intoxication evidence is presented at trial. Part V analyses the significance of complainant intoxication evidence for the Crown's ability to prove non-consent and the complainant's perceived credibility and reliability.

II Background

A *Legislative Guidance on Complainant Intoxication*

Since 1980, multiple legislative amendments have been made in all Australian jurisdictions,[11] including to: (1) substantive offence definitions (eg a broader definition of sexual intercourse and changes to fault elements);[12] (2) criminal procedure and evidentiary rules, with the aim of addressing the influence of rape myths (eg removing mandatory corroboration warnings, jury directions on delay in complainant reporting, and jury directions on differences in complainant evidence);[13] and, (3) protect victims from system abuse (eg rape shield laws which restrict the use of sexual reputation and history evidence,[14] and provisions for evidence to be given by alternative means such as audio-visual link).[15] The barrier to justice for complainants presented by intoxication was not a focus of early reform or research attention during the 1980s in Australia. However, in the 1990s, reformers and researchers began to pay more attention to the question of intoxication.

In 1991, as part of the first attempt to articulate a positive conception of consent, Victoria passed the *Crimes (Rape) Act 1991* (Vic), amending the *Crimes Act 1958* (Vic). The new provisions included, for the first time in Australia, an express statement about the relevance of complainant intoxication evidence.[16] In its current form, s 36(2)(e) provides that '[c]ircumstances in which a person does not consent to an act include … the person is so affected by alcohol or another drug as to be incapable of consenting to the act'.[17]

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11 Australian Women Against Violence Alliance, 'Sexual Violence: Law Reform and Access to Justice' (Issues Paper, 17 May 2017) 12–13; Victorian Law Reform Commission, *Sexual Offences* (Interim Report, 8 May 2003) 145 [4.4].

12 See, eg, *Crimes Act 1900* (NSW) ss 61HA, 61HK.

13 See, eg, *Jury Directions Act 2015* (Vic) ss 52, 54D.

14 See, eg, *Evidence Act 1929* (SA) s 34L.

15 See, eg, *Evidence Act 1939* (NT) s 21A(2).

16 *Crimes Act 1958* (Vic) s 36(d), as amended by *Crimes (Rape) Act 1991* (Vic) s 3.

17 *Crimes Act 1958* (Vic) s 36(2)(e). The *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) was passed in the Victorian Parliament on 30 August 2022 and received assent on 6 September 2022. This Act implements a number of the recommendations contained in the Victorian Law Reform Commission's 2021 report, *Improving the Justice System Response to Sexual Offences* (n 7). This includes replacing s 36(2)(e) of the *Crimes Act 1958* (Vic) with an identical

In New South Wales, the landmark *Heroines of Fortitude* report[18] was the first study to recognise questioning about AOD use as a problematic feature of rape trials.[19] The report found that 60% of complainants were asked questions about drinking on the day of the offence, and 44% about their drinking/drug use habits.[20] This was the third most common theme of questioning after lying (84%)[21] and lack of resistance (70%).[22] However, this aspect of complainants' experiences in criminal trials was not analysed in detail and no specific recommendations were made.

By the mid 2000s, New South Wales considered further statutory reform based on the Victorian model of a legislated positive definition of consent, including identifying the complainant's intoxication as a vitiating factor.[23] This type of provision was first added to the *Crimes Act 1900* (NSW) by the *Crimes Amendment (Consent — Sexual Assault Offences) Act 2007* (NSW): 'The grounds on which it may be established that a person does not consent to a sexual activity include … if the person has sexual intercourse while substantially intoxicated by alcohol or any drug'.[24] On 1 June 2022, a new version of this provision (which closely resembles the Victorian provision) came into operation with the commencement of the *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* (NSW), which overhauled the New South Wales law on proving non-consent.[25] Section 61HJ(1)(c) of the *Crimes Act 1900* (NSW) now states: 'A person does not consent to a sexual activity if … the person is so affected by alcohol or another drug as to be incapable of consenting to the sexual activity'.[26]

provision to be located in a new s 36AA(1)(g): see *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic) s 5. The commencement date of the new provision is subject to proclamation, or alternatively on 30 July 2023, if it does not come into operation before that date: at s 2.

18 New South Wales Department for Women, *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault* (Report, November 1996).

19 See ibid 161–3.

20 Ibid 161.

21 Ibid 169.

22 Ibid 170.

23 Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: The Way Forward* (Report, December 2005) 34, 37–8.

24 *Crimes Act 1900* (NSW) s 61HA(6)(a), as inserted by *Crimes Amendment (Consent — Sexual Assault Offences) Act 2007* (NSW) sch 1 item 1. In 2018 the relevant section was moved to *Crimes Act 1900* (NSW) s 61HE(8)(a) (since repealed).

25 The *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* (NSW) was the Government's response to the New South Wales Law Reform Commission (n 7).

26 Our recent transcript analysis of Victorian rape trials, including the operation of Victoria's complainant intoxication provision, suggests that the change in wording in New South Wales is unlikely to have any discernible effect on the role of complainant intoxication evidence in proving the element of non-consent: see Julia Quilter et al, 'Intoxication Evidence in Rape Trials in the County Court of Victoria: A Qualitative Study' (2022) 46(2) *University of New South Wales Law Journal* (forthcoming).

The following Australian legislatures have also added provisions on complainant intoxication to legislation on consent.

State/Territory	Content of Provision
Australian Capital Territory	'[A]a person does not consent to an act … if the person … is incapable of agreeing to the act because of intoxication'.[27]
Northern Territory	'Circumstances in which a person does not consent to sexual intercourse … include circumstances where … the person is asleep, unconscious or so affected by alcohol or another drug as to be incapable of freely agreeing'.[28]
South Australia	'[A] person is taken not to freely and voluntarily agree to sexual activity if … the activity occurs while the person is intoxicated (whether by alcohol or any other substance or combination of substances) to the point of being incapable of freely and voluntarily agreeing to the activity'.[29]
Tasmania	'[A] person does not freely agree to an act if the person … is asleep, unconscious or so affected by alcohol or another drug as to be unable to form a rational opinion in respect of the matter for which consent is required'.[30]

In Queensland and Western Australia, statutory provisions on the meaning of consent/non-consent contain no reference to complainant intoxication.[31] These two states are still included in the present study because their inclusion may yield insights about the significance (or otherwise) of the presence or absence of an

27 *Crimes Act 1900* (ACT) s 67(1)(g), as amended by *Crimes (Consent) Amendment Act 2022* (ACT) s 5.

28 *Criminal Code Act 1983* (NT) s 192(2)(c).

29 *Criminal Law Consolidation Act 1935* (SA) s 46(3)(d).

30 Criminal Code Act 1924 (Tas) s 2A(2)(h).

31 *Criminal Code Act 1899* (Qld) s 348; *Criminal Code Act Compilation Act 1913* (WA) s 319(2). In 2020 the Queensland Law Reform Commission considered whether s 348 should be amended to include an express reference to situations where the complainant is affected by alcohol or another drug. The Commission concluded that no such change was required because such situations are already sufficiently addressed by the fact that 'section 348(1) requires that "consent" be given "by a person *with the cognitive capacity* to give the consent"' — and that this provision already 'allows evidence that the complainant was … affected by alcohol or drugs to be taken into account by a trier of fact when considering whether a complainant had the cognitive capacity to give consent': Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) vii, 122 (emphasis in original). In 2022 the Queensland Women's Safety and Justice Taskforce recommended that a provision on complainant intoxication should be added to the s 348(2) list of circumstances in which consent cannot be freely and voluntarily agreed, as part of an expanded list modelled on s 61HJ of the *Crimes Act 1900* (NSW): see Women's Safety and Justice Taskforce, *Hear Her Voice: Women and Girls' Experience across the Criminal Justice System* (Report No 2, 1 July 2022) vol 1, 216. The Law Reform Commission of Western Australia is currently undertaking a review of sexual offence and consent laws, and a final report is due in July 2023: 'Project 113: Sexual Offences',

express reference to complainant intoxication in statutory guidance on the meaning of consent and non-consent.

III Research Design

A *Aims*

The primary objective of the study on which this article reports was to investigate what recent Australian appellate court decisions reveal about how evidence of complainant intoxication operates in rape trials. Specifically:

1. How is 'intoxication' defined in the courtroom and what types of evidence are relied upon to establish complainant intoxication?

2. For what purpose(s) is complainant intoxication considered relevant?

3. What is the visibility and impact of statutory provisions which attempt to shape the manner in which intoxication evidence influences the conduct of rape prosecutions?

B *Method*

The study dataset consists of all decisions of the highest criminal appellate court in each state and territory[32] and the High Court of Australia in the period from 2010–19 involving an appeal against conviction on a rape charge[33] and where intoxication of the complainant formed part of the evidence in the case (n = 102).[34] A full

WA.gov.au (Web Page, 13 September 2022) <https://www.wa.gov.au/government/publications/project-113-sexual-offences>; John Quigley and Simone McGurk, 'Two Major Reviews To Examine WA's Sexual Offence Laws' (Media Statement, Government of Western Australia, 8 February 2022).

32 Australian Capital Territory Court of Appeal, New South Wales Court of Criminal Appeal, Northern Territory Court of Criminal Appeal, Queensland Court of Appeal, South Australian Court of Appeal, Tasmanian Court of Criminal Appeal, Victorian Court of Appeal and Western Australian Court of Appeal.

33 Rape charges for the purpose of this study relates to the primary rape offence (or its aggravated version) in each Australian state/territory: *Crimes Act 1900* (ACT) s 54; *Crimes Act 1900* (NSW) ss 61I, 61J; *Criminal Code Act 1983* (NT) s 192; *Criminal Code Act 1899* (Qld) s 349; *Criminal Law Consolidation Act 1935* (SA) s 48; *Criminal Code Act 1924* (Tas) s 185; *Crimes Act 1958* (Vic) s 38; *Criminal Code Act Compilation Act 1913* (WA) ss 325–6.

34 With respect to this dataset, the case of *R v Lazarus* involved two New South Wales Court of Criminal Appeal decisions. The first one, *Lazarus v The Queen* [2016] NSWCCA 52 ('*Lazarus (2016)*'), resulted in a retrial being ordered, and the second one, *R v Lazarus* (2017) 270 A Crim R 378 ('*Lazarus (2017)*'), involved an appeal by the Crown against an acquittal, which was dismissed. For the purposes of the case numbers reported in this article, this case has been counted just once. Likewise, any case with a related High Court appeal has only been counted once.

list of the cases is contained in the Appendix. A ten-year timeframe constitutes a significant review period, during which the relevant provisions relating to intoxication have been in operation.

To ensure a comprehensive inclusion of all publicly available judgments handed down in the review period (whether reported or not), the primary mechanism for identification of relevant cases was online searching using the web-based open access Australasian Legal Information Institute ('AustLII') database.[35] Secondary searches were conducted using LexisNexis and BarNet Jade and relevant court websites.[36] We searched each of the nine Australian jurisdictions in turn, for the identified time frame. The primary search term was 'intoxication', with variations employed to maximise search accuracy.[37] Search results were filtered to ensure that the case involved: a charge of rape (alone or with other charges); and evidence of intoxication of the complainant in some way.[38]

The collected cases were then subjected to qualitative content analysis drawing on an approach developed in previous research on intoxication evidence in criminal matters.[39] We analysed the cases in relation to three factors: (1) types of evidence of intoxication before the court; (2) language used to define/describe intoxication; and, (3) purpose(s) for which complainant intoxication was engaged.

C *Limitations*

In a context where opportunities for empirical analysis of how rape trials are conducted are limited, appellate judgments are an accessible data source (being public domain documents) that offer valuable insights into selected trial phenomena — in this case, complainant intoxication evidence. In addition, appellate court decisions are

> an authoritative voice of 'knowledge' on the nature and relevance of intoxication for criminal law purposes, and … deserving of scholarly attention. Their public pronouncements are designed not only to influence future criminal

35 See 'All Databases', *AustLII* (Web Page) <http://www.austlii.edu.au/databases.html>.

36 See: 'Lexis Advance®', *LexisNexis* (Web Page) <https://www.lexisnexis.com.au/en/products-and-services/lexis-advance>; 'Home', *BarNet Jade* (Web Page) <https://jade.io/>. For an example of the case database available on court websites, see 'CaseLaw', *Supreme Court Library Queensland* (Web Page) <http://www.sclqld.org.au/caselaw/>.

37 Search terms used in combination with 'intoxication' included 'victim' and 'offence element'. Alternative search terms were used to pick up cases where intoxication was in issue even if the word was not used in the judgment (eg 'drugs', 'alcohol' and 'intoxicating substances').

38 In some instances, the word 'intoxication' (or a variation) was used in a case, but a closer review confirmed that it did not involve complainant intoxication evidence. These cases were excluded.

39 Quilter et al (n 8); Julia Quilter and Luke McNamara, 'The Meaning of "Intoxication" in Australian Criminal Cases: Origins and Operation' (2018) 21(1) *New Criminal Law Review* 170.

> law enforcement and court room practices, but also to communicate with and educate the wider community about the significance of alcohol and drug use for the criminal law.[40]

Nonetheless, we acknowledge that a study based on appellate judgments has limitations. First, appellate court decisions are not representative of criminal trials generally. Conviction appeals are, by definition, cases in which the defendant was found guilty at trial, and so the study sample does not include cases in which the accused was acquitted at trial.[41] Secondly, the contents of appellate court judgments are shaped, to a large extent, by the appeal grounds and the submissions and arguments of counsel, as well as by the stylistic preference of their judicial authors. For example, not all judgments contain extracts of transcripts from witness examination and cross-examination, and/or the trial judge's directions. It is important to recognise that appellate judgments offer only a partial window into how complainant intoxication evidence features in rape trials.[42]

The sample size provides a robust basis for qualitative analysis, noting that it represents all conviction appeals during the review period that met the criteria for inclusion in the study.

D *Overview of Cases*

Table 1: Conviction Appeals in Australian Courts in Rape Cases Involving Complainant Intoxication Evidence, 2010–19

Jurisdiction	**Number of Cases**
Australian Capital Territory	3
New South Wales	20
Northern Territory	1
Queensland	21
South Australia	16
Tasmania	3
Victoria	27
Western Australia	11
Total	**102**

40 Luke McNamara et al, 'Evidence of Intoxication in Australian Criminal Courts: A Complex Variable with Multiple Effects' (2017) 43(1) *Monash University Law Review* 148, 150.

41 Our sample of appellate decisions does include two Crown appeals against an acquittal: *Lazarus (2017)* (n 34); *R v Wait* [2011] SASCFC 91 ('*Wait*').

42 For the purpose of the larger project of which this study is a part (see above n 9), the authors have been given access to trial transcripts for a sample of rape trials in two Australian jurisdictions to date. In addition, we plan to undertake interviews with prosecutors and defence counsel who have rape trial experience.

Before turning to outline the main findings of this qualitative study, we offer a brief overview of some of the features of the cases in this dataset. Table 1 summarises the number of cases per jurisdiction. Most of the complainants were female (93%). All but two[43] of the defendants were male (98%). In 79% of cases, the location of the alleged rape was a home or other private location (such as a hotel room, office or boat). The remaining cases were in a variety of public places (such as a park, alley or nightclub toilet) and five of the rapes occurred in taxis.[44] Alcohol was the intoxicating substance in 89% of cases, either alone or in combination with other drugs. Eleven cases involved drugs only. Conviction appeals were upheld in 27% of cases.[45]

IV Defining, Evidencing and Describing 'Intoxication'

From the cases in this study's dataset, we identified six sources of evidence about the complainant's intoxication:

1. self-assessment by the complainant;
2. witness or defendant observation;
3. police observation;
4. CCTV footage (and other technology);
5. blood alcohol concentration ('BAC'); and
6. expert evidence about AOD effects.

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43 The case of *R v O'Loughlin* [2011] QCA 123 ('*O'Loughlin*') involved a female defendant and the case of *R v C, J* [2015] SASCFC 100 involved two defendants, including one who was female.

44 An additional case involved a taxi driver; however, the defendant drove the taxi to his house, took the complainant inside to sexually assault her, and then put her back into the taxi to take her home: *R v Rahmanian* [2010] SASC 137 ('*Rahmanian*').

45 *Lazarus (2017)* (n 34) was not included in this calculation, since it resulted in appellate confirmation of an acquittal, rather than the overturning of a conviction. Nor was the case of *Wait* (n 41), which involved a successful Crown appeal against a judge directed trial verdict of acquittal. We did include three cases in which the court upheld a conviction appeal against a rape conviction, and substituted a verdict of guilty to a lesser offence: *MM v The Queen* [2018] NSWCCA 158 ('*MM*'); *Arroyo v The Queen* [2010] NTCCA 9 ('*Arroyo*'); *R v Vecchio* [2016] QCA 71 ('*Vecchio*'). We have not attempted to analyse the relationship (if any) between the approach to complainant intoxication evidence and the outcome of the appeal. In a number of instances, an appeal against conviction was upheld on grounds unrelated to evidence of the complainant's intoxication.

A *Complainant Self-Assessment*

It was common for complainants to give evidence about the level of their own intoxication. There was considerable diversity in terms of how complainants explained (or how they were invited by counsel to explain) their level of intoxication. A number of these approaches were familiar and predictable, such as the complainant's attempts to remember and describe the *volume of alcohol* consumed. For example: 'she had drunk three cans of a vodka energy drink, a Midori and a "Cowboy shot"'.[46] A variation to this approach was evidence about the *period of time* over which alcohol was consumed. For example: 'She had been drinking (champagne) for many hours.'[47]

During examination-in-chief or cross-examination, a number of complainants were asked to (retrospectively) rate their level of intoxication at the time in question on a scale of one to 10. For example: 'By the time you went to bed, if nought is not intoxicated at all and 10 is very intoxicated, on that scale of nought to 10 how affected by alcohol did you feel.'[48] The complainant answered: 'I'd say, yeah, nine, eight or nine.'[49] As we have explained elsewhere,[50]

> [a]lthough NRSs [numerical rating scales] are widely regarded as valid as a self-report mechanism for assessing pain,[51] their use for the self-assessment of intoxication levels is more contentious, particularly for criminal law purposes.[52]

While there is evidence of NRSs having some utility in assessing generic *degrees* of intoxication,[53] such scales are insensitive to the wide spectrum of alcohol and other drug effects covered by the term 'intoxicated'. The World Health Organization's

46 *Sharma v The Queen* [2011] VSCA 356, [5]. See also: *Knezevic v Western Australia* [2017] WASCA 97, [30] ('*Knezevic*'); *Omot v The Queen* [2016] VSCA 24, [70] ('*Omot*'); *R v Fuller* [2015] SASCFC 71, [20] ('*Fuller*'); *Day v The Queen* [2017] NSWCCA 192, [10]; *R v De Silva* [2018] QCA 274, [8].

47 *Singh v Western Australia* [2012] WASCA 262, [10] ('*Singh*'). See also: *R v Butler* [2011] QCA 265, [4]; *Rahmanian* (n 44) [11]; *Ganiji v The Queen* [2019] NSWCCA 208, [21].

48 *Fuller* (n 46) [20].

49 Ibid. See also: *Vecchio* (n 45) [7], [21]; *Jones v The Queen* [2010] NSWCCA 117, [16]; *Cook v Western Australia* [2010] WASCA 241, [23] ('*Cook*').

50 See Quilter and McNamara (n 39) 181.

51 See Mark P Jensen and Paul Karoly, 'Self-Report Scales and Procedures for Assessing Pain in Adults' in Dennis C Turk and Ronald Melzack (eds), *Handbook of Pain Assessment* (Guilford Press, 3rd ed, 2010) 19, 26–7.

52 Quilter and McNamara (n 39) 181.

53 Sarah Callinan, 'Alcohol's Harm to Others: Quantifying a Little or a Lot of Harm' (2014) 3(2) *International Journal of Alcohol and Drug Research* 127, 132; Elizabeth Manton et al, 'Alcohol's Harm to Others: Using Qualitative Research to Complement Survey Findings' (2014) 3(2) *International Journal of Alcohol and Drug Research* 143, 146.

International Classification of Diseases, Tenth Revision[54] recognises that intoxication is not a single-symptom condition and that the signs and dysfunctional behaviour upon which a diagnosis may be based can include, 'disturbances in the level of consciousness, cognition, perception, affect, or behaviour that are of clinical importance'.[55] It follows that NRSs are likely to be an unhelpful guide to the nuanced and discrete intoxication-related issues on which a criminal court may be required to adjudicate — including whether the complainant consented, or whether their testimony is reliable.

Another noteworthy feature of the cases in this study's dataset was the diversity of language used by complainants to describe their level of intoxication. Colloquial language is often used in everyday communication to convey intoxication, or degrees thereof — such as 'drunk', 'pissed', 'wasted' or 'legless'.[56] Despite the relative formality of the courtroom and the criminal trial, colloquial language was used often in many of the cases in the dataset. For example: 'heaps intoxicated';[57] 'a little bit tipsy';[58] 'pretty drunk';[59] 'a little bit stoned';[60] and 'out of it'.[61] Complainants also used a variety of other phrases and analogies to describe their recollection of how intoxicated they were at the time. For example: 'I was jelly I guess';[62] 'felt paralysed';[63] 'everything was like a dream', 'completely fucked off';[64] 'felt like [she] was dying';[65] 'wobbly';[66] 'felt like a rag doll';[67] 'happy drunk'; [68] and 'really like chilled and light'.[69]

Sometimes, understandably, complainants struggled to find the language to convey how they felt at the relevant time. For example, 'I, I was drunk yeah, and I was

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54 World Health Organization, *The ICD-10 Classification of Mental and Behavioural Disorders: Diagnostic Criteria for Research* (1993) <https://apps.who.int/iris/bitstream/handle/10665/37108/9241544554.pdf>.

55 Ibid 49 [G2].

56 See Harry Gene Levine, 'The Vocabulary of Drunkenness' (1981) 42(11) *Journal of Studies on Alcohol* 1038.

57 *Fuller* (n 46) [20].

58 *Ewen v The Queen* (2015) 250 A Crim R 544, 558 [57] ('*Ewen*').

59 *R v MCS* [2018] QCA 184, [16] ('*MCS*'); *Paite v Tasmania* (2019) 30 Tas R 73, 94 [74] ('*Paite v Tasmania*').

60 *DJK v Tasmania* [2017] TASCCA 17, [71] ('*DJK v Tasmania*').

61 *R v Cashion* (2013) 115 SASR 451, 453 [9] ('*Cashion*').

62 *Lazarus (2017)* (n 34) 382 [13].

63 *Di Giorgio v The Queen* [2016] VSCA 335, [8] ('*Di Giorgio*').

64 *Vecchio* (n 45) [10].

65 *R v Duckworth* [2016] 1 Qd R 297, 312 [38].

66 *R v Bevinetto* [2019] Qd R 320, 324 [9] ('*Bevinetto*').

67 *Hofer v The Queen* [2019] NSWCCA 244, [137] ('*Hofer*').

68 *Arroyo* (n 45) [23].

69 *DJK v Tasmania* (n 60) [71].

pretty out of it I guess and just very I don't know, drunk is the only way I can think to describe it.'[70] Some complainants turned to descriptions of their motor skills or physical capacity to perform (or fail to perform) certain functions. Many were everyday things such as the ability to walk, talk, dance or text (where typographical errors were used to indicate intoxication).[71] Other functions included an ability to 'enter the gate security code and use the key',[72] or being 'so drunk that she could not hold the cigarette in her lips'.[73] At times, complainants tried to convey their level of intoxication through perceived links with mental effects and sensations, for example: 'out of it';[74] '"getting really dizzy" … and feeling sleepy';[75] and 'in and out of consciousness'.[76]

B *Third Party Observation*

A number of cases involved evidence from witnesses other than the complainant about the complainant's apparent level of intoxication. This evidence related to the their level of intoxication at various points including: prior to the rape (evidence from witnesses or the defendant); at the time of the sexual intercourse (typically evidence from the defendant), or afterwards (evidence from police, medical professionals or witnesses/friends/family). Third party evidence from witnesses and defendants tended to employ similar methods of intoxication assessment and articulation to those discussed above in relation to complainants. In doing so, their evidence focused on: observable behaviours of the complainant (rather than how the complainant was 'feeling'); and/or descriptions of the number of drinks consumed by the complainant (particularly when the witness had been drinking with the complainant), including the period during which they had been drinking. These witnesses usually placed reliance on adjectival descriptions. For example, one witness noted that the complainant was 'buzzed and having a good time but with her wits about her'.[77]

Another version of third party evidence was an account of the amount of alcohol consumed by the witness and the complainant, where they had been drinking together at a similar rate.[78] This was coupled with an account of how intoxicated the witness felt and an assumption/assertion that the complainant must have been

70 *Lazarus (2017)* (n 34) 382 [18].

71 *Agresti v The Queen* (2017) 13 ACTLR 1, 6 [17] ('*Agresti*'); *Lazarus (2017)* (n 34) 382 [15]–[16]; *Rosenburg v The Queen* [2016] NSWCCA 292, [21] ('*Rosenburg*'); *Paite v Tasmania* (n 59) [6].

72 *R v Teece* [2019] QCA 246, [24] ('*Teece*').

73 *Hofer* (n 67) [18].

74 *Vecchio* (n 45) [8].

75 *Knezevic* (n 46) [31].

76 *Hofer* (n 67) [7].

77 *MAM v Western Australia* [2018] WASCA 35, [20] ('*MAM*').

78 See *Lazarus (2016)* (n 34) [42].

feeling the same way.[79] The latter step is, of course, problematic, including because of what is known about individual differences in the effects of AOD consumption. In some cases, witnesses and defendants seemed to be regarded as having 'standing' or some kind of lay expertise to offer opinions about the complainant's level of intoxication.[80] Yet, in doing so, witnesses tended to fall back on motor skill-focused clichés of how a 'drunken' person may act (such as whether they were stumbling or slurring their words);[81] or physical and mental capacities including 'slumped against a brick wall' and 'very disoriented and unresponsive'.[82]

A small number of cases included evidence from police officers — typically where the officer had observed the complainant in the aftermath of the rape. For example, in *MAM v Western Australia*,[83] Martin CJ noted that 'Detective Senior Constable Geary, who attended upon the complainant when she arrived at the police station … described her condition at that time as "considerably disorientated", and from his observation, intoxicated'.[84] In another case, the police officer who attended shortly after the rape at the complainant's house said that 'she appeared "very intoxicated" and was "having trouble verbalising", but she gave him a coherent account of what she said had happened'.[85] The officer also reported that 'she appeared intoxicated but was sobbing and distressed'.[86] Such cases appear to involve an implied recognition of the 'expertise' of police in assessing intoxication. However, research suggests that police may be less adept at such assessments than is often presumed.[87]

C *Technology*

In some cases, evidence that the complainant was intoxicated took the form of CCTV video footage from around the time in question — such as from cameras inside or outside a bar, on the street or in a taxi. For example:

> The Crown relied upon the CCTV footage showing the complainant at the rear door before leaving through it with the appellant and what the Crown submitted the jury would infer from her movements at that time, including her momentary stagger and her leaning on the wall for support, as to her state of intoxication.[88]

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79 Ibid.

80 For an example of this type of evidence being presented in court, see *Vecchio* (n 45) [21].

81 See, eg, ibid [20], [24].

82 *Wan v The Queen* [2019] NSWCCA 86, [9] ('*Wan*').

83 *MAM* (n 77).

84 Ibid [22].

85 *Paite v Tasmania* (n 59) 107 [122].

86 Ibid [139]. See also *Omot* (n 46) [45].

87 Lauren A Monds et al, 'Police as Experts in the Detection of Alcohol and Other Drug Intoxication: A Review of the Scientific Evidence within the Australian Legal Context' (2019) 38(2) *University of Queensland Law Journal* 367, 388.

88 *Lazarus (2016)* (n 34) [41].

In another case, the Crown relied on a video recording taken of the offending and placed a 'heavy emphasis on the depictions of the complainant in the … [v]ideo, suggesting at one point that he was "like a lifeless object"'.[89]

In some cases, the relevant 'technological' evidence was a record of text messages sent by the complainant during the relevant time (namely, before or just after the rape). In these instances, reliance was placed on the combination of the content of the message and the prevalence of spelling errors (or failure to correct predictive text errors) to support the assertion that the complainant was intoxicated. For example, in one case the complainant texted a friend (who was not out with her), 'shooters, I am rebut fucked likeg [sic] need to go home'.[90]

In addition to what is known about the dangers of regarding CCTV images as objective evidence of truth,[91] in the context of rape trials, these findings prompt a question: how does the trier of fact assess the relevance of footage of a person's physical appearance on a CCTV video (or their impaired texting capacity) to important questions such as whether the Crown has proven the element of non-consent? We return to this question in Part V below.

D *Biological Detection and Expert Evidence*

BAC testing has become recognised as a high-quality method of assessing intoxication, widely used by legislatures for the purpose of defining intoxication-based driving offences. By contrast, BAC evidence was rare in the rape cases in this study's dataset, but it did feature in some cases as a form of evidence about the complainant's intoxication.[92]

While cautious about extolling the virtue of BAC as a qualitatively 'better' form of intoxication evidence (noting that it 'works' in the driving context because BAC levels have been legislatively endorsed and widely accepted as proxies for deemed impairment of driving capacity) — we note that a flow-on effect of the absence of BAC evidence in most cases in our study is that expert medical/pharmacological evidence was also generally absent. To put that another way, one of the apparent benefits of having BAC readings admitted as evidence is that, in such cases, an expert was more likely to be called to interpret the BAC evidence and express a view about a person's capacities at that level of intoxication. In the cases we reviewed, expert evidence was more readily called when intoxication was by way of

89 *Wan* (n 82) [38]. See also: *Tabbah v The Queen* [2017] NSWCCA 55, [166] ('*Tabbah*'); *Vecchio* (n 45) [49]; *MM* (n 45) [46]; *MAM* (n 77) [28]; *Rosenburg* (n 71) [55].

90 *Agresti* (n 71) 6 [16].

91 Althea Gibson, 'On the Face of It: CCTV Images, Recognition Evidence and Criminal Prosecutions in New South Wales' (PhD Thesis, University of Technology Sydney, April 2017) 10.

92 *R v Makary* [2019] 2 Qd R 528, 537 [22] ('*Makary*'); *Keogh v The Queen* [2018] VSCA 145, [23] ('*Keogh*'); *Rosenburg* (n 71) [27]; *Tabbah* (n 89) [80].

drugs (eg doxylamine).[93] Further, where an expert opinion was sought and admitted, the expert evidence related primarily to the implications of intoxication for a complainant's memory and the reliability of their evidence.[94]

For example, in one case, a pharmacologist gave evidence that at BACs 'from 0.14 percent and certainly above 0.2 percent, memory fragmentation, whereby a memory of an event is only partial, can occur'.[95] In another, the doctor who conducted the forensic examination of the complainant gave evidence that the estimated level of intoxication (BAC in the range of 0.12–0.36 percent) 'could have affected the higher parts of the brain including judgment and memory and that this would lead to fragmented memory but not reconstruction'.[96] In other cases, the expert evidence stated that at the estimated BAC at the time in question (in the range of 0.13–0.165 percent) a 'reasonable degree of impaired concentration and decision making abilities can be expected',[97] and '[a]t a blood alcohol level of 0.184 a person unused to alcohol would lose visual perception, would have focusing difficulties and would have difficulty in comprehension'.[98] Later in this article, we return to the potential for such evidence to improve decision-making in rape trials.[99] In no case in this study's dataset did an expert express an opinion about the effect of any level of intoxication on the complainant's capacity to consent per se. However, in the case of *R v C, J*,[100] a pharmacologist was shown a video of the offending and opined that the complainant was

> totally unresponsive to what was happening. Her eyes appeared closed, her arms and legs appeared not to move. In a normal sleep, the body would respond even if that person remained asleep. Her condition is inconsistent with a normal sleep.[101]

Expert evidence might explain the effects of certain drugs on cognitive capacities. For example, in *Wan v The Queen*,[102] a clinical and forensic toxicologist explained the effect of doxylamine:

> It would have a significant effect on your cognitive capacity, on your ability to have communication in a meaningful way. It would have significant effect on your motor capability, maybe unable to walk around and stand upright. It would

93 *Wan* (n 82).

94 See below Part V(B).

95 *Bandao v The Queen* [2018] NSWCCA 181, [18].

96 *MCS* (n 59) [48].

97 *Keogh* (n 92) [23].

98 *Makary* (n 92) 537 [22].

99 See below Part V.

100 [2015] SASCFC 100.

101 Ibid [10].

102 *Wan* (n 82).

> have a significant effect [on] your ability to remember what happened while you were on this medication.[103]

However, in only one case did an expert's evidence even touch on consent, and the nature of that mention was that the expert 'could not venture an opinion as to whether that had deprived the complainant of the capacity to consent'.[104]

E *Multiple Sources, Sometimes in Conflict*

Typically, the cases analysed involved a number of different sources of evidence. At times, these sources were in conflict — but not simply in ways that might be expected in an adversarial system (eg the complainant's versus defendant's version). For example, in *R v Vecchio*,[105] the complainant gave evidence that she was 'just so out of it',[106] yet other witnesses, including her mother, suggested that her level of intoxication was 'fine'.[107] Meanwhile, other witnesses, including one of the defendants, said the complainant was 'vomiting'[108] and 'kept passing out'.[109] While such variation is not unique to rape trials, given the imprecise and lay language in which intoxication evidence is framed, and the potential legal importance of such evidence, this compounds an already difficult task for juries.

F *Judicial and Lawyers' Language*

Although not a form of evidence, the language in which lawyers and judges talk about intoxication is also an important part of the criminal trial (eg questions asked in examination and cross-examination, closing statements, summing up, and jury directions). To the modest extent possible via analysis of appellate court judgments, we also analysed the terminology used by judges and lawyers. This revealed that the tendency to express degrees of intoxication via imprecise and vernacular language was not limited to complainants and other witnesses. Trial judges, appeal judges, and sometimes lawyers, when attempting to say something meaningful about the degree of the complainant's intoxication, used language that was rarely illuminating. For example, 'the complainant became overwhelmed by alcohol',[110] the complainant was in an 'impaired state of consciousness',[111] and the complainant was 'inebriated at the time'.[112]

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103 Ibid [18].

104 *Mitic v The Queen* [2011] VSCA 373, [24] ('*Mitic*').

105 *Vecchio* (n 45).

106 Ibid [8].

107 Ibid [22], [23], [28], [39].

108 Ibid [25], [41], [42].

109 Ibid [41].

110 *Costa v Western Australia* [2019] WASCA 200, [64] ('*Costa*').

111 *Hofer* (n 67) [190].

112 *MCS* (n 59) [169].

More common was the use of various adverbs in an attempt to capture and convey a sense of the *extent* of the complainant's intoxication, including 'extremely intoxicated',[113] 'very intoxicated',[114] 'noticeably intoxicated',[115] 'highly intoxicated',[116] 'grossly intoxicated',[117] 'heavily intoxicated',[118] and 'extreme intoxication'.[119] Although generally more refined than the colourful vernacular used by some witnesses, such phrases remain imprecise and opaque, and do not always align with relevant legislative language (such as 'so affected … as to be incapable of consenting' in New South Wales and Victoria).[120] Where used by trial judges, such terms may simply add another layer of complexity and potential confusion, without meaningfully assisting in the task of translating intoxication evidence into a form required for relevant decisions.

G *Implications*

Overall, our analysis of how complainant intoxication evidence is communicated in the courtroom suggests that juries (or judges in judge alone trials) will often be left with the formidable task of 'translating' the available evidence about the complainant's intoxication — and the language in which this information is summarised by lawyers and judges — into answers to important questions, How intoxicated was the complainant? Did it rise to the level expressed in the applicable legislation on complainant intoxication — '*so affected* by alcohol or another drug *as to be incapable* of consenting/freely agreeing' (Victoria, New South Wales and Northern Territory);[121] 'intoxicated … *to the point of being incapable* of freely and voluntarily agreeing' (South Australia);[122] '*so affected* by alcohol or another drug as to be *unable to form a rational opinion* in respect of the matter for which consent is required' (Tasmania);[123] or 'incapable of agreeing to the act because of intoxication' (Australian Capital Territory)?[124] Given the complainant's intoxication, could they have consented? Did they consent? In light of their intoxication, is the complainant a credible witness? Is the complainant's evidence reliable?

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113 *Singh* (n 47) [25]; *Fuller* (n 46) [5].

114 *Paite v Tasmania* (n 59) 107 [120].

115 *Di Giorgio* (n 63) [6].

116 *MM* (n 45) [55].

117 *Tabbah* (n 89) [166].

118 *Agresti* (n 71) 36 [157]; *R v Crafter* [2019] SASCFC 25, [9] ('*Crafter*').

119 *Hofer* (n 67) [145].

120 *Crimes Act 1900* (NSW) s 61HJ(1)(c); *Crimes Act 1958* (Vic) s 36(2)(e).

121 *Crimes Act 1900* (NSW) s 61HJ(1)(c) (emphasis added); *Criminal Code Act 1983* (NT) s 192(2)(c) (emphasis added); *Crimes Act 1958* (Vic) s 36(2)(e) (emphasis added).

122 *Criminal Law Consolidation Act 1935* (SA) s 46(3)(d) (emphasis added).

123 *Criminal Code Act 1924* (Tas) s 2A(2)(h) (emphasis added).

124 *Crimes Act 1900* (ACT) s 67(1)(g), as amended by *Crimes (Consent) Amendment Act* 2022 (ACT) s 5.

These are difficult questions to answer, and our analysis suggests that the sorts of evidence about complainant intoxication that typically feature in rape trials are often poorly adapted to the task — both because of imprecision and the general absence of guidance about how intoxication affects cognitive functions like decision-making, consent formation, and memory. The exceptions to this situation of information deficit were the rare instances in which the available evidence about the complainant's intoxication included a BAC reading or estimate *and* expert evidence from a toxicologist or other scientific expert about the effects of intoxication at the level experienced by the complainant. However, as noted above,[125] even evidence of this sort did not touch on the specific issue of consent — which is a central point of contention in most rape trials.

In previous research on criminal trials more generally, we have shown that juries are often asked to make difficult decisions about the relevance of intoxication (including defendant intoxication where such evidence is admissible) based on 'common knowledge' rather than scientific evidence.[126] As explained by Mariana Valverde, common knowledge 'is not some kind of average of what people know. It is not descriptive but imperative; it is the knowledge we all ought to have.'[127] It is akin to the things we are all assumed to know about a subject.

Popular conceptions of intoxication, culturally embedded attitudes, as well as assumptions about the relationship between AOD consumption and 'availability' for sex, may be especially dangerous in rape trials given the long and entrenched history, and resilience, of myths and stereotypes about rape complainants.[128] These include cultural 'understandings' that alcohol consumption is indicative of an intention to engage in voluntary sex; men and women who consume alcohol are more likely to be interested in and willing to consent to sex, or easier to seduce; and that an intoxicated complainant is less credible.[129] If critical decisions in rape trials about whether a complainant was relevantly intoxicated are routinely made on the basis of imprecise evidence and 'common knowledge', what are the implications for the operation of legislation that is designed to break the intoxication/consent nexus, and recast complainant intoxication evidence as a strength (rather than a weakness) of the Crown case? It is to this question that Part V of this article turns.

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125 See Part IV(D) above.

126 McNamara et al (n 40) 168; Quilter and McNamara (n 39) 174.

127 Mariana Valverde, *Law's Dream of a Common Knowledge* (Princeton University Press, 2003) 224.

128 Julia Quilter, 'Re-Framing the Rape Trial: Insights from Critical Theory about the Limitations of Legislative Reform' (2011) 35(1) *Australian Feminist Law Journal* 23.

129 Emily Finch and Vanessa E Munro, 'The Demon Drink and the Demonized Woman: Socio-Sexual Stereotypes and Responsibility Attribution in Rape Trials Involving Intoxicants' (2007) 16(4) *Social and Legal Studies* 591; Heather D Flowe and Anna Carline, 'Alcohol and Remembering Rape: Setting the Scene' in Heather D Flowe and Anna Carline (eds), *Alcohol and Remembering Rape: New Evidence for Practice* (Palgrave Macmillan, 2021) 1, 7.

V The Significance of Complainant Intoxication Evidence

Recognition that there may be a relationship between the complainant's intoxication and the Crown's obligation to prove non-consent has a long history. Traditionally, such evidence was most likely to *weaken* the Crown case because the (problematic) relationship that was evoked by such evidence was an assumed or asserted nexus between the complainant's intoxication and the likelihood that they consented.[130] Legislation of the sort discussed in Part II of this article is designed to disrupt this traditional nexus — by recharacterising the significance that the court should attach to the complainant's intoxication as not a 'weakness', but a potential *strength* of the Crown case. Far from being synonymous with consent, the trier of fact is invited to approach the complainant's intoxication as evidence that they did *not consent*. What does this study's dataset of appellate decisions reveal about whether this statutory recalibration of the significance of complainant intoxication evidence has been operationalised?

We approached this question via two of lines of inquiry (recognising that, depending on the appeal grounds, not all appellate judgments were equally illuminating on these matters). First, we read the appellate decisions for insights into how complainant intoxication evidence was positioned at trial — whether by the prosecutor, defence counsel or the judge. Secondly, we analysed the appellate judgments for what they revealed about how the appeal judges regarded complainant intoxication evidence.

A *Complainant Intoxication and Non-Consent*

The following three main themes emerged from our analysis of appellate decisions in this study's dataset.

1 *Intoxication/Consent Nexus Remains*

First, despite the 'corrective' intentions behind provisions such as s 36(2)(e) of the *Crimes Act 1958* (Vic),[131] it is clear that defence lawyers in some cases continue to engage the intoxication/consent nexus; that is, they rely on evidence of the complainant's intoxication to support an assertion that consent was present. For example, in one case, the defence submitted that 'the complainant's intoxication "has removed the complainant's inhibitions, or inflamed her passion, or reduced her power of self-control"'.[132] In another case, the defendant complained that there was a misdirection on intoxication because

> at no stage … did the [trial] Judge address the critical question on the defence case which was whether the complainant had lost her inhibitions and was now

130 See above n 4.

131 See above Part II(A).

132 *Makary* (n 92) 538 [31]. See also: *Ewen* (n 58) 576 [164]; *Collins v The Queen* (2018) 265 CLR 178, 184 [14].

> either unwilling or unable, as a result of intoxication or for some other reason, to positively admit her conduct.[133]

In another, the submission was 'that if the complainant could not remember other aspects of the evening, then it was reasonably possible that she had, in a waking state, consented to the sexual encounter with the applicant but had subsequently forgotten it'.[134]

2 *Inadequacies of Complainant Intoxication Statutory Provisions and Judicial Attitudes*

Secondly, these defence attempts are not necessarily in vain. None of the variously expressed statutory provisions on complainant intoxication completely foreclose such strategies. Further, the cases we analysed revealed that some judges — at both trial and appellate levels — remained open to assertions and submissions that attempted to frame the complainant's intoxication as a weakness in the Crown case on non-consent, but we detected considerable variation. This was manifested in one of two ways: (1) adopting the view that an extremely high level of intoxication was required to suggest non-consent; or (2) embracing loss of inhibition (and, specifically, inclination to consent to sex) as one of the attributes of intoxication. Illustrating the first category, in the 2011 decision of *Mitic v The Queen*,[135] the Victorian Court of Appeal cited the following statement from the 1993 decision of *R v Francis*[136] from the Queensland Court of Appeal:

> It is not correct as a matter of law that it is rape to have [sexual intercourse with] a woman who is drunk who does not resist because her submission is due to the fact that she is drunk. The reason why it is not is that that at least includes the case where the [intercourse] is consensual notwithstanding that the consent is induced by excessive consumption of alcohol. The critical question in this case was whether the complainant had, by reason of sleep or a drunken stupor, been rendered incapable of deciding whether to consent or not.[137]

To the extent that this passage appears to evoke the concept of 'drunken consent' — that is, the idea that consent 'given' while intoxicated may still qualify as consent — it may seem inconsistent with the tenor of Victoria's statutory provision on complainant intoxication.[138] However, it is important to appreciate the high threshold set by s 36(2)(e) of the *Crimes Act 1958* (Vic) — 'so affected … as to

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133 *Crafter* (n 118) [71].

134 *Cordeiro v The Queen* [2019] NSWCCA 308, [71] ('*Cordeiro*'). This submission was rejected on appeal: at [72]. See also *Ewen* (n 58) 576 [164].

135 *Mitic* (n 104).

136 [1993] 2 Qd R 300.

137 *Mitic* (n 104) [24], citing *R v Francis* [1993] 2 Qd R 300, 305 [30].

138 *Crimes Act 1958* (Vic) s 36(2)(e).

be incapable of consenting'[139] — which appears to leave considerable room for 'drunken consent' assertions. We return to this question below. A high threshold was also set in the Queensland case of *R v Teece*:[140]

> While the complainant gave evidence of having consumed six drinks during the night and feeling tipsy, there was no evidence that her intoxication was such that she *passed out or could not control her actions*. Her evidence was that she decided to go to bed because she was tipsy, demonstrating, as the respondent submitted, an awareness of her state and level of comprehension.[141]

The second category is illustrated, for example, by a case in which the trial judge told the jury that '[i]t is a common experience that intoxication may reduce a person's inhibitions, may cause them to be more relaxed and outgoing and, in certain circumstances, it may cause them to do things they would not do if they were not intoxicated' — and the South Australian Court of Criminal Appeal found no fault in these directions.[142]

However, in other cases, appellate judges expressed scepticism about the viability of the defendant's assertion that a highly intoxicated woman had consented to having sex with him.[143] The Tasmanian case of *Paite v Tasmania*[144] provides an illustration of the range of judicial opinions on the relevance of complainant intoxication evidence that still exist — on this occasion, within the same bench. The majority rejected a line of argument that relied on the intoxication/consent nexus:

> What is implicit in the appellant's contentions is the suggestion that, perhaps affected by alcohol, the complainant agreed to sexual intercourse, but then quickly regretted her actions and made, and persisted with, a false complaint of rape. In our respectful opinion, it would be wrong to doubt the credibility of the complainant's account based on a generalised notion that alcohol has such an effect. There was no evidence that alcohol may have affected the complainant in that way and, because of the way in which the trial was conducted, it was not a proposition which was put to her so as to give her an opportunity to respond to it.[145]

In the same appeal, the dissenting judge considered that evidence of the complainant's intoxication should have led the jury to have reasonable doubt about whether the Crown had proven the element of non-consent:

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139 Ibid. Though note that in *Mitic* (n 104) there was no discussion of the potential relevance of s 36(2)(e).

140 [2019] QCA 246.

141 Ibid [24] (emphasis added).

142 *Crafter* (n 118) [72], [77].

143 *Makary* (n 92) 547 [71]; *Tabbah* (n 89).

144 *Paite v Tasmania* (n 59).

145 Ibid 108 [124] (Pearce J and Martin AJ).

> Even making due allowance for the possibility that a combination of intoxication and distress could account for the complainant's behaviour and demeanour as she arrived at her residence and subsequently, the possibility of initial alcohol induced euphoria turning into ex post facto regret for her conduct looms in my mind sufficiently to raise a reasonable doubt as to her assertion of lack of consent.[146]

3 *Complainant Intoxication Statutory Provisions Not Utilised in Crown Cases*

Thirdly, to the extent that we could discern, with appellate judgments as our source material,[147] the relevant statutory provisions on complainant intoxication were not a prominent touchstone for how the Crown case on non-consent was presented. In fact, the cases in which intoxication was asserted as strong evidence of non-consent were instances in which the complainant was intoxicated to the point of being unconscious or asleep, or very nearly so. For example, in *R v Crafter* ('*Crafter*'),[148] the Crown argued that the complainant was 'unconscious, either asleep or passed out from the alcohol' when the rape commenced, and therefore was 'incapable of freely and voluntarily' consenting.[149] In *Cordeiro v The Queen*,[150] the Crown's position was that the complainant was unconscious, 'asleep and not alert and responding … and was therefore unable to give consent'.[151] In another case, the complainant was described in terms which suggested she was nearly unconscious or asleep, for example, 'lolling back in the car seat with her eyes half-closed in a state of grossly compromised consciousness'.[152] In most Australian jurisdictions, evidence that the complainant was asleep or unconscious is a separate expressly listed statutory factor negating consent.[153]

In some cases, evidence of a complainant's intoxication was engaged by the Crown indirectly, in support of an old-fashioned (and, arguably, problematic) approach to proving non-consent: to explain the complainant's inability to physically resist. For example, '[t]he complainant gave evidence that, due to her level of intoxication, she

146 Ibid 92 [59] (Estcourt J).

147 The second phase of our larger project, based on analysis of trial transcripts, will allow deeper assessment of how Crown prosecutors engage complainant intoxication evidence in rape trials.

148 *Crafter* (n 118).

149 Ibid [82], [86].

150 *Cordeiro* (n 134).

151 Ibid [55]. See also *Bevinetto* (n 66) 326–7 [26].

152 *Tabbah* (n 89) [166]. See also *Makary* (n 92) 546 [68].

153 *Crimes Act 1900* (ACT) ss 67(1)(m)–(n); *Crimes Act 1900* (NSW) s 61HJ(1)(d); *Criminal Code Act 1983* (NT) s 192(2)(c); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(c); *Criminal Code Act 1924* (Tas) s 2A(2)(h); *Crimes Act 1958* (Vic) s 36(2)(d).

was unable to *"fight"*, and simply leant back in the seat' of the taxi where she was sexually assaulted.[154]

Our analysis raises a question as to what additional 'benefit' is being derived from the discrete complainant intoxication provisions that are a prominent feature of consent legislation in most Australian jurisdictions.[155] Unless they are being engaged in cases where the complainant was intoxicated, but not asleep or unconscious — and in their own right (as opposed to cases like *Tabbah v The Queen* ('*Tabbah*')[156] where intoxication evidence operates indirectly to explain why the complainant did not act in the way traditionally expected of a 'genuine' rape victim) — their utility may be questionable. Worse, their existence on the statute books may give the mistaken impression that the concept of consent has been effectively 'modernised' and that the intoxication/consent nexus has been broken.

B *Complainant Intoxication and Credibility/Reliability*

While our primary objectives in this study were to better understand the forms of evidence that are relied on in rape trials to establish the complainant's intoxication, and whether such evidence was employed to engage relevant statutory guidance on the concept of consent (see Part I(A) above), we also sought to identify other ways in which complainant intoxication evidence might impact on the conduct and outcome of rape trials. We hypothesised that the veracity of the complainant's account of events might be challenged via assertions that intoxication renders a person a less credible and reliable witness due to AOD-related memory impairment.[157] We found that this strategy was employed by the defence in a number of cases — revealing another way in which complainant intoxication evidence can be engaged to the Crown's disadvantage. The typical focus centered on another asserted nexus: intoxication and impaired memory. For example, in *DJK v Tasmania*,[158] the defence closing address included the following:

> How much did the cannabis, on someone who's 20 kilos less, affect her ability to recall, her ability to know what was happening to her that night? What effect did it have on her, and is that something that you can use or that you certainly

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154 *Tabbah* (n 89) [26] (emphasis in original). See also *Hofer* (n 67) [191], where the Crown relied on the level of intoxication to prove non-consent by noting that the 'incontestable evidence that the applicant had plied each of these young women with alcohol evinced his intent, from the outset, to reduce their capacity for resistance'.

155 Although we did not attempt systematic cross-jurisdictional comparative analysis, we did not observe significant differences in how complainant intoxication evidence was treated across Australia's eight jurisdictions, irrespective of the presence (or form) or absence of a statutory provision on complainant intoxication.

156 *Tabbah* (n 89).

157 Analysis of the cases in our dataset was concerned with qualitative assessments of a complainant's credibility, rather than technical applications of the rules governing the admissibility of credibility evidence. See, eg, *Evidence Act 1995* (Cth) pt 3.7.

158 *DJK v Tasmania* (n 60).

> need to as far as my address to you is, consider in terms of whether you can believe the account that she gave.[159]

In *Crafter*, the defence closing address stated:

> Of course, the other effect of alcohol, and this members of the jury if you like, could I commend to you as deserving of your critical attention in this case, is the effects of alcohol on the capacity of people to remember.
>
> Now there is some evidence in this case from [the complainant] that even she recognised that on other occasions when she had been drinking it would have an impact on her memory. She conceded that she understood the concept of blacking out, and that is a very important issue in this case members of the jury, because during the course of the evidence and in particular the evidence of [the complainant], you might have heard numerous answers where in response to questions put, not only by me, but more particularly by the learned prosecutor, their answers were 'I can't remember'. 'I can't remember'. My learned instructing solicitor went through part of the transcript. I suggest there was at least 80 times where her answers were 'I can't remember.' 'I don't remember'. Now there is nothing insidious or wrong about that as such, because you would all know members of the jury that if you drink alcohol to a certain point, the memory is impacted and sometimes can be impacted to the point where you genuinely do not remember what you said or did the night before.
>
> … So bringing it home to [the complainant] when she gives her evidence here the [sic] two days ago, she may well have been telling you what she believed to be the absolute truth. It is your job to determine not whether she was telling you what she believed to be the truth, but to determine whether what she was telling you was accurate or reliable such that you can act upon it beyond a reasonable doubt.
>
> … So your job in this case is to look very carefully at her evidence, particularly with respect to the allegation that she wasn't consenting, and to determine whether it is accurate and reliable to the point where you can act on it beyond a reasonable doubt. It is not the defence case, it was never put to her at any stage that she was lying. I mean obviously if you thought she was lying that would be the end of it but it's not the defence case she was lying. It's the defence case that what she says and where she tries to suggest she was not consenting, you shouldn't accept that and you should at least have a reasonable doubt about it.[160]

Note that the asserted effects of alcohol are supported not by expert evidence, but by common knowledge, which the jury is taken to already hold. The apparent legitimacy of this approach was endorsed by the trial judge in the same case:

159 Ibid [75].

160 Ibid [74].

> It is common experience that intoxication can have an adverse bearing on a witness's recollection of events. It is also a common experience that intoxication can affect a person's subsequent recall of relevant events. Because intoxication can affect or alter a person's state of mind, the intoxication of a witness is relevant to your consideration of their evidence and your assessment of their credibility and most importantly, their reliability.[161]

This case was not atypical, but nor was it necessarily representative of the judicial approaches we observed in terms of the credibility and reliability implications of a complainant's intoxication. We identified three approaches in the appellate judgments we examined. First, some judges endorsed the proposition that intoxication necessarily impacts adversely on a witness' reliability and credibility, and that it is important to direct the jury to this effect.[162] In the South Australian case of *R v Daniel*,[163] Sulan J (with whom David J agreed) concluded that:

> In my view, the direction failed to adequately instruct the jury that, in considering the reliability of the complainant's evidence, and whether they could be satisfied beyond reasonable doubt of the appellant's guilt upon her evidence, her state of intoxication was relevant. It was relevant to her perception, and to her recall of the events. It was also relevant, when considering her credibility.
>
> In restricting his direction to the question of whether the complainant might have lost her inhibitions, but has now forgotten, or is now unwilling to admit her conduct, the trial judge failed to give a sufficient direction about the relevance of the complainant's state of intoxication.[164]

In *Costa v Western Australia*,[165] the Western Australian Court of Appeal observed that '[t]he complainant's limited recollection of the events … and her memory being

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161 Ibid [72].

162 Although s 165 of the Uniform Evidence Law, which deals with unreliable evidence and warnings to the jury, makes no express reference to intoxication or AOD effects, s 165(1)(c) is sufficiently broad in its terms as to include intoxication under 'evidence the reliability of which may be affected by age, ill health (whether physical or mental), injury or the like': *Evidence Act 1995* (Cth) s 165(1)(c); *Evidence Act 2011* (ACT) s 165(1)(c); *Evidence Act 1995* (NSW) s 165(1)(c); *Evidence (National Uniform Legislation) Act 2011* (NT) s 165(1)(c); *Evidence Act 2001* (Tas) s 165(1)(c); *Evidence Act 2008* (Vic) s 165(1)(c). See, eg, *R v Moffatt [No 3]* [1999] NSWSC 233, [80]. The *Victorian Criminal Charge Book* contains a summary of 'non-listed categories' of unreliable evidence recognised by the case law, including '[e]vidence of a witness who was alcohol or drug-affected at time of the events, whether voluntarily or by the alleged actions of the accused (*R v Maple* [1999] VSCA 52; *Hudson v The Queen* [2017] VSCA 122)': Judicial College of Victoria, *Victorian Criminal Charge Book* (online at 28 August 2022) Part 4: Evidentiary Directions, '4.22 Unreliable Evidence Warning' [4.22.21].

163 (2010) 207 A Crim R 449 ('*Daniel*').

164 Ibid 462 [50]–[51] (Sulan J, David J agreeing at [112]).

165 *Costa* (n 110).

in "pictures", provides grounds for approaching the complainant's evidence with some caution'.[166]

In a second 'intermediate' category were judgments which adopted the position that, while relevant to assessing the veracity of their account, a complainant's intoxication should not be given undue weight or be regarded as determinative. For example, in *Bakshi v The Queen*,[167] the Victorian Court of Appeal characterised the fact that the complainant was 'obviously affected by alcohol on the night in question' as evidence 'that might be thought to cast some doubt upon the complainant's credibility', [168] but pointed to other 'significant features of the complainant's account which gave her evidence a ring of truth'.[169]

In some cases, we identified a third approach: evidence of the complainant's intoxication was regarded as having the potential to make them *more* credible and reliable, because it could explain 'flaws' in their account. For example, in *Tabbah* the New South Wales Court of Criminal Appeal said that

> although cross-examination of the complainant was firm and extensive, no 'knock-out blow' was landed. In particular, many of the inconsistencies and gaps in recollection on her part could be amply explained by her gross intoxication, the evidence for which came from many sources: the complainant herself, Ms Hart, the second taxi driver, the finding of the shoe on the garbage bin, and the CCTV from the second taxi.[170]

In another case, the South Australian Court of Criminal Appeal said:

> [T]he issues surrounding the reliability of the complainant's evidence were not sufficient to preclude satisfaction of the appellants' guilt to the requisite standard. They were matters to be considered in assessing whether the charges had been proved to the requisite standard, but did not *per se*, preclude a finding of guilt. Further, the inconsistencies identified on the evidence could all be explained by the complainant's youth, *intoxication at the time*, sense of shame, his fear of not being believed, and the nature of the ordeal he had endured as a teenage boy of 14 years of age.[171]

R v Cashion[172] was another South Australian Court of Criminal Appeal decision, addressing the appellant's ground of appeal that the complainant's evidence was

166 Ibid [213].

167 [2018] VSCA 83.

168 Ibid [87].

169 Ibid [84]. See also: *Omot* (n 46); *Roberts v The Queen* (2012) 226 A Crim R 452; *Cook* (n 49); *Rosenburg* (n 71) [47]; *Duckworth* (n 65); *Keogh* (n 92); *Fuller* (n 46).

170 *Tabbah* (n 89) [169]. See also: *MCS* (n 59) [169]; *O'Loughlin* (n 43); *Hofer* (n 67).

171 *R v Compton* (2013) 237 A Crim R 177, 219 [162] (emphasis added).

172 *Cashion* (n 58).

'so lacking in detail',[173] so as to produce a reasonable doubt as to the reliability and credibility of her evidence. The Court held that

> [t]he appellant's criticism of C's testimony concerning the offences of rape fails to have regard to C's evidence that she was seriously affected by drugs given to her by the appellant. C testified that the appellant and David Cashion had given her alcohol and cannabis with pills crushed on top. She was carried into the bedroom by the appellant.[174]

One of the possible explanations for the diversity of approaches we have described here is that, as noted above, rape trials (and appeals) rarely have the benefit of expert evidence on AOD effects. This is a significant omission — particularly given that there is an emerging body of literature which suggests that 'common knowledge' conceptions of the intoxication/memory relationship may be inaccurate.[175] Intoxication due to AOD use can have widely varying effects on the encoding and recall of memory, depending heavily on the type(s) or combination of drugs involved and the degree of intoxication.[176] Alcohol is the drug that has been most widely researched in relation to its effects upon memory, and the available scientific literature broadly indicates that intoxication can impact upon the *completeness* of an individual's memory but does not appear to decrease the *correctness* of the information that is reported.[177] A recent study specifically involved participants encoding a hypothetical rape scenario while they were either sober or alcohol intoxicated.[178] The authors reported that while intoxication decreased the completeness of the participants' recall, there were no alcohol-related effects on recall errors and no evidence that intoxicated women were more prone to incorporating misleading information into their statements.[179]

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173 Ibid 457 [31].

174 Ibid 457 [33].

175 See, eg, Heather D Flowe et al, 'Impact of Alcohol on Memory: A Systematic Review' in Heather D Flowe and Anna Carline (eds), *Alcohol and Remembering Rape: New Evidence for Practice* (Palgrave Macmillan, 2021) 33.

176 Ibid 51.

177 See Theo Jores et al, 'A Meta-Analysis of the Effects of Acute Alcohol Intoxication on Witness Recall' (2019) 33(3) *Applied Cognitive Psychology* 334, 340. See also Lilian Kloft et al, 'Hazy Memories in the Courtroom: A Review of Alcohol and Other Drug Effects on False Memory and Suggestibility' (2021) 124(1) *Neuroscience and Biobehavioral Reviews* 291, 298.

178 Heather D Flowe et al, 'An Experimental Examination of the Effects of Alcohol Consumption and Exposure to Misleading Postevent Information on Remembering a Hypothetical Rape Scenario' (2019) 33(3) *Applied Cognitive Psychology* 393.

179 Ibid 405. See also Heather D Flowe et al, 'Alcohol and Remembering a Hypothetical Sexual Assault: Can People Who Were under the Influence of Alcohol During the Event Provide Accurate Testimony?' (2016) 24(8) *Memory* 1042.

VI Conclusion

There is still much to be learned about how intoxication evidence operates in rape trials and whether the objectives of statutory reform directed at breaking the AOD consumption/assumed consent nexus are being achieved.[180] The insights presented in this article — based on analysis of Australian appellate court decisions over a 10-year period — suggest that there may be a considerable gap between aspiration and reality when it comes to attempts to transform complainant intoxication from a common barrier to conviction (and a contributor to distress and disappointment for victim- survivors) to a component of a strong Crown case. The larger project of which this article is a part of began with the working hypothesis that complainant intoxication evidence may be a 'double-edged sword' — *capable* of supporting the Crown case in relation to proof of non-consent, but also a potential basis for the defence to challenge the veracity of the complainant's account. In this way, we anticipated that the gains delivered by statutory corrections on the intoxication/consent nexus might be counterweighted by assumptions (uninterrupted by statutory reform) about an intoxication/unreliability (impaired memory) nexus.

The findings from this study of appellate decisions offer support for this hypothesis, although not consistently or universally across the 102 cases in the dataset. In conclusion, we offer five observations.

First, provisions like s 36(2)(e) of the *Crimes Act 1958* (Vic) do not appear to have deterred defence strategies based on the problematic traditionally assumed nexus between intoxication and consent. In short, it is still the case that complainant intoxication evidence can loom as a Crown case *weakness*.

Secondly, there is little evidence that Crown Prosecutors are relying on these statutory provisions to position complainant intoxication evidence as a *strength*. In the cases we examined, the complainant's AOD consumption was most likely to feature in the Crown's case on non-consent where the evidence was that the complainant was AOD-affected to the point of being asleep or unconsciousness. It is *these states* that are unambiguously regarded as incompatible with consent (as

180 Effective 1 June 2022, the *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* (NSW) sch 2 sub-div 3 added a new direction related to complainant intoxication to the *Criminal Procedure Act 1986* (NSW). Section 292E(b) now provides for the following direction: 'It should not be assumed that a person consented to a sexual activity because the person — … consumed alcohol or another drug'. Under a new s 292, the trial judge *may* give this direction (and other directions relate to consent) '(a) if there is a good reason to give the consent direction, or (b) if requested to give the consent direction by a party to the proceedings, unless there is a good reason not to give the direction'. The Victorian Law Reform Commission has recommended the adoption of a similar direction: *Improving the Justice System Response to Sexual Offences* (n 7) ch 20. It remains to be seen how this direction will be used in sexual assault trials in New South Wales, and whether it contributes to eroding the traditionally assumed nexus between AOD consumption or intoxication and consent to sex.

they should be),[181] but it follows that complainant intoxication *per se* may not often be considered for its capacity to evidence non-consent, notwithstanding statutory guidance about its relevance.

Thirdly, our analysis detected another way in which complainant intoxication evidence can be engaged so as to challenge the Crown's case: by suggesting that it weakens the witness's credibility and/or reliability. On this issue we were struck by the range of appellate court approaches — from endorsement of the view that an intoxicated complainant's evidence has inherent reliability deficits, to more careful and nuanced assessment of what intoxication means for the complainant's credibility and reliability. Given that this is *not* a matter on which legislatures have provided statutory guidance, it would be desirable if appellate courts endeavoured to do so, with a view to achieving greater case-to-case consistency, and alignment with what is known in the scientific and social scientific literature about AOD effects on memory and recall.

Fourthly, without wanting to oversimplify the nature of the problems that still surround complainant intoxication in rape trials, there does appear to be a relationship between the *form* which evidence of the complainant's intoxication usually takes, and the continuation of problematic assertions and assumptions about how such evidence should be read and applied. Lay self-assessment, colloquial and imprecise descriptions, observation of demeanour and motor functionality — evidence in these terms is typically not well adapted to fair and sound interpretation of what a complainant's intoxication *means* for determining the accused's criminal responsibility. Ironically, it can exacerbate rather than neutralise intoxication-related rape myths by requiring triers of fact to default to 'common knowledge' about the implications of AOD consumption when answering crucial trial questions including consent and reliability. The solution is not simply to hand over decisions about the nature and significance of intoxication evidence to experts, but it seems likely that judges and juries would be aided if expert evidence about AOD effects was more consistently admitted in rape trials, and that this be reflected in the guidance offered by appellate courts.[182]

Finally, the analysis of cases undertaken for this study provides another reminder that broader cultural questions around masculinity, and entitlement to sex in particular, need to be asked and confronted. Our dataset reveals a disturbing variety of contexts

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181 In the cases in this study, this applied equally in those jurisdictions that have a specific statutory provision on asleep or unconscious, and those that do not.

182 An option worthy of further consideration is an amendment to s 79 of the Uniform Evidence Law setting out that 'specialised knowledge' includes a reference to specialised knowledge of AOD effects on memory; that is, an approach that mirrors the treatment of 'specialised knowledge of child development and child behaviour (including specialised knowledge of the impact of sexual abuse on children and their development and behaviour during and following the abuse)': *Evidence Act 1995* (Cth) s 79(2)(a); *Evidence Act 2011* (ACT) s 79(2)(a); *Evidence Act 1995* (NSW) s 79(2)(a); *Evidence (National Uniform Legislation) Act 2011* (NT) s 79(2)(a); *Evidence Act 2001* (Tas) s 79(2)(a); *Evidence Act 2008* (Vic) s 79(2)(a).

in which men took advantage of highly intoxicated women to have sex. It seems inconceivable that anyone could have thought the woman would be consenting in the circumstances, such as: asleep in bed (where there was no previous relationship); out on the street late at night and heavily intoxicated; and drunk, disoriented and vomiting in a park. Related to previous findings about the predatory use of alcohol by men,[183] we note the absolute opportunism displayed in many of these cases — in which men felt entitled to sex with vulnerable women. No amount of 'perfecting' the statutory rules or appellate jurisprudence governing rape trials can be expected to transform attitudes and behaviours that have long and embedded histories, but this should not deter continued reform efforts to deliver justice to victims of sexual violence.

183 Liz Wall and Antonia Quadara, 'Under the Influence? Considering the Role of Alcohol and Sexual Assault in Social Contexts' (ACSSA Issues No 18, Australian Centre for the Study of Sexual Assault, 2014); Liz Kelly, Jo Lovett and Linda Regan, 'A Gap or a Chasm? Attrition in Reported Rape Cases' (Research Paper No 293, 2005). The dataset for this study contained a number of cases demonstrating such behaviour. See, eg: *Hofer* (n 67) [135]; *Cordeiro* (n 134) [26].

Appendix A

A *Australian Capital Territory*

O'Rafferty v The Queen [2014] ACTCA 35
Agresti v The Queen [2017] ACTCA 20; (2017) 13 ACTLR 1
Aroub v The Queen [2018] ACTCA 13

B *New South Wales*

Jones v The Queen [2010] NSWCCA 117
Ewen v The Queen [2015] NSWCCA 117; (2015) 250 A Crim R 544
Jeffreys v The Queen [2015] NSWCCA 132
KA v The Queen [2015] NSWCCA 111; (2015) 251 A Crim R 308
Darby v The Queen [2016] NSWCCA 164
Lazarus v The Queen [2016] NSWCCA 52
Rosenburg v The Queen [2016] NSWCCA 292
R v Lazarus [2017] NSWCCA 279; (2017) 270 A Crim R 378
Day v The Queen [2017] NSWCCA 192
Bell v The Queen [2017] NSWCCA 207
Tabbah v The Queen [2017] NSWCCA 55
Bandao v The Queen [2018] NSWCCA 181
MM v The Queen [2018] NSWCCA 158
Mulholland v The Queen [2018] NSWCCA 299; (2018) 100 NSWLR 477
Wan v The Queen [2019] NSWCCA 86
Smith v The Queen [2019] NSWCCA 162
Hofer v The Queen [2019] NSWCCA 244
Rao v The Queen [2019] NSWCCA 290
Cordeiro v The Queen [2019] NSWCCA 308
Xu v The Queen [2019] NSWCCA 178
Ganiji v The Queen [2019] NSWCCA 208

C *Northern Territory*

Arroyo v The Queen [2010] NTCCA 9

D *Queensland*

R v Almotared [2011] QCA 128
R v Butler [2011] QCA 265
R v O'Loughlin [2011] QCA 123
R v Elomari [2012] QCA 27
R v Lee [2012] QCA 239
R v McGuire [2013] QCA 290
R v Burton [2014] QCA 37
R v Bonner [2015] QCA 80
R v Davidson [2015] QCA 30
R v Duckworth [2016] QCA 30; (2016) 256 A Crim R 537; [2016] 1 Qd R 297

R v Vecchio [2016] QCA 71
R v Collins [2017] QCA 113; (2017) 266 A Crim r 564 ; [2018] 1 Qd R 364
R v Schafer [2017] QCA 208
R v Bevinetto [2018] QCA 219; [2019] 2 Qd R 320
R v RBA [2018] QCA 338
R v De Silva [2018] QCA 274
R v Makary [2018] QCA 258; [2019] 2 Qd R 528
R v MCS [2018] QCA 184
R v Sollitt [2019] QCA 44
R v Butterworth [2019] QCA 94
R v Teece [2019] QCA 246

E *South Australia*

R v Rahmanian [2010] SASC 137
R v Daniel [2010] SASCFC 62; (2010) 207 A Crim R 449
R v Bazan [2010] SASCFC 50; (2010) 272 LSJS 522
R v Higgs [2011] SASCFC 108; (2011) 111 SASR 42
R v Sierke [2011] SASCFC 53
R v Wait [2011] SASCFC 91
R v Compton [2013] SASCFC 134; (2013) 237 A Crim R 177
R v Cashion [2013] SASCFC 14; (2013) 115 SASR 451
R v Fuller [2015] SASCFC 71
R v C, J [2015] SASCFC 100
R v Perara-Cathcart [2015] SASCFC 103
R v Kennedy [2017] SASCFC 170
R v Moores [2017] SASCFC 95; (2017) 268 A Crim R 106; (2017) 128 SASR 340
R v Partington [2018] SASCFC 113; (2018) 132 SASR 11
Ekisa v The Queen [2019] SASCFC 159
R v Crafter [2019] SASCFC 25

F *Tasmania*

Wilson v Tasmania [2017] TASCCA 11
DJK v Tasmania [2017] TASCCA 17
Paite v Tasmania [2019] TASCCA 5; (2019) 30 Tas R 73

G *Victoria*

R v Simon [2010] VSCA 66
Halamboulis v The Queen [2011] VSCA 449
Khan v The Queen [2011] VSCA 286
Mitic v The Queen [2011] VSCA 373
Neal v The Queen [2011] VSCA 172; (2011) 213 A Crim R 190; (2011) 32 VR 454
Sharma v The Queen [2011] VSCA 356
Sibanda v The Queen [2011] VSCA 285; (2011) 213 A Crim R 303; (2011) 33 VR 67
NJ v The Queen [2012] VSCA 256; (2012) 229 A Crim R 448; (2012) 36 VR 522
Roberts v The Queen [2012] VSCA 313; (2012) 226 A Crim R 452

Niaros v The Queen [2013] VSCA 249
Rana v The Queen [2014] VSCA 198
Theodoropoulos v The Queen [2015] VSCA 364; (2015) 257 A Crim R 390; (2015) 51 VR 1
Cox v The Queen [2015] VSCA 28
Wahi v The Queen [2015] VSCA 132
Jurj v The Queen [2016] VSCA 57
Omot v The Queen [2016] VSCA 24
Di Giorgio v The Queen [2016] VSCA 335
Van Der Zant v The Queen [2016] VSCA 138
Inia v The Queen [2017] VSCA 49
Gul v The Queen [2017] VSCA 153
Bullmore v The Queen [2017] VSCA 41
Keogh v The Queen [2018] VSCA 145
Bakshi v The Queen [2018] VSCA 83
Howard v The Queen [2018] VSCA 273
Perryman v The Queen [2019] VSCA 252
Jacobs (a Pseudonym) v The Queen [2019] VSCA 285
Bolton v The Queen [2019] VSCA 21

H *Western Australia*

Cook v Western Australia [2010] WASCA 241
Miles v Western Australia [2010] WASCA 93
Johnston v Western Australia [2010] WASCA 121
Narkle v Western Australia [2011] WASCA 160
Grubisic v Western Australia [2011] WASCA 147; (2011) 210 A Crim R 457; (2011) 41 WAR 524
Singh v Western Australia [2012] WASCA 262
Munmurrie v Western Australia [2013] WASCA 167
Knezevic v Western Australia [2017] WASCA 97
MAM v Western Australia [2018] WASCA 35
Costa v Western Australia [2019] WASCA 3; [2019] WASCA 200
KNY v Western Australia [2019] WASCA 89

Yee-Fui Ng and Stephen Gray***

DISADVANTAGE AND THE AUTOMATED DECISION

Abstract

Automated decision-making is becoming increasingly prevalent in Australia. Familiar examples include MyGov for tax and social security benefits, and the use of SmartGates when arriving in Australia. Yet vulnerable populations have been detrimentally affected by the Australian government's use of automated processes. This is illustrated by the Robodebt debacle, where errors of methodology of government decision-making resulted in incorrect or inflated debt calculations for over 470,000 individuals. This article focusses on the impact of automated decision-making on vulnerable individuals. It will closely examine automated decision-making in the context of social security, focussing on the Robodebt and ParentsNext programs, as well as the recent incursions of automated decision-making into income management for vulnerable youth and changes proposed under the National Disability Insurance Scheme. Further, this article will also consider the related issues raised by automated decision-making in the context of criminal justice, from the investigatory stage — including facial recognition technology and police databases to identify offenders — through to sentencing. Finally, this article will develop guiding principles to protect the rights of vulnerable populations. These include safeguards at all stages of the automated decision-making process, including the design, implementation and evaluation of new technologies.

I Introduction

Like many societies worldwide, Australia is inching into territory once occupied only by science fiction writers — what Simon Chesterman called the 'robot century'.[1] From our romantic lives[2] to our shopping habits, our biometrics

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1 Simon Chesterman, 'The Robot Century' (Blog Post, 25 January 2021) <https://simonchesterman.com/2021/01/25/the-robot-century/> ('The Robot Century').

2 David Tuffley, 'Love in the Time of Algorithms: Would You Let Artificial Intelligence Choose Your Partner?', *The Conversation* (online, 18 January 2021) <https://theconversation.com/love-in-the-time-of-algorithms-would-you-let-your-artificial-intelligence-choose-your-partner-152817>.

and our criminal records, electronic information about our personal characteristics, life histories and preferences is captured by governments or private corporations.[3] It may then be used for an increasing range of purposes, and to make increasingly significant decisions, of which the average citizen remains mostly unaware.[4] Some of these purposes are clearly benign and beneficial, bringing economic benefit and augmenting human potential.[5] Others raise issues that impact on fundamental rule of law values, including transparency and consistency, and equality before the law.[6] There is a question as to whether it is possible to design guiding principles which will enable us to disentangle the various complex and competing considerations at stake, in deciding whether the benefits of a particular form of decision-making outweighs its dangers. The difficulties of such a task are obvious — but without any attempt, we forfeit the chance to walk with open eyes into a new era of automated decision-making, and instead stumble 'zombie-like' into it,[7] blind.

While other literature in this field has focussed on the effects of automated decision-making on rule of law or public law values,[8] or on discrete aspects of decision-making such as social security law,[9] we consider the particular implications of this fast-developing field for one group of citizens: the vulnerable, or those 'able to be cast as outsiders rather than as rights-bearing citizens'.[10] Vulnerable persons are simultaneously most likely to be adversely affected by automated decision-making, due partly to the superficially neutral but practically discriminatory assumptions built

3 Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (Hachette, 2019) 11.

4 Ibid. According to Shoshana Zuboff, ordinary life is now so deeply immersed and saturated in the machinery of surveillance capitalism, and our dependency on it so total, that it 'produces a psychic numbing that inures us to the realities of being tracked, parsed, mined, and modified'.

5 See 'Singapore's Approach to AI Governance', *Personal Data Protection Commission Singapore* (Web Page, 21 June 2022) <https://www.pdpc.gov.sg/help-and-resources/2020/01/model-ai-governance-framework>.

6 Monika Zalnieriute, Lyria Bennett Moses and George Williams, 'The Rule of Law and Automation of Government Decision-Making' (2019) 82(3) *Modern Law Review* 425, 427.

7 Philip Alston, *Report of the Special Rapporteur on Extreme Poverty and Human Rights*, 74th sess, Agenda Item 70(b), UN Doc A/74/493 (11 October 2019) 21 [77] ('*Report of the Special Rapporteur*').

8 See, eg: Zalnieriute, Bennett Moses and Williams (n 6); Will Bateman, 'Algorithmic Decision-Making and Legality: Public Law Dimensions' (2020) 94(7) *Australian Law Journal* 520.

9 Terry Carney, 'Artificial Intelligence in Welfare: Striking the Vulnerability Balance?' (2020) 46(2) *Monash University Law Review* 23 ('Artificial Intelligence in Welfare'); Asher Wright and Yee-Fui Ng, 'Services Australia's Single Touch Payroll Program: The Enduring Legacy of Robodebt, or a Fundamentally Different System?' (2022) 33(2) *Public Law Review* 127.

10 Carney, 'Artificial Intelligence in Welfare' (n 9) 25.

into machine algorithms, and also — due in part to lack of literacy or IT skills — are least likely to be able to challenge such decisions.

We argue that automated decision-making needs to take particular account of the interests of the vulnerable by paying close attention to the guiding principles of empowerment, harm minimisation and transparency. We contend that guiding principles need to be built into any analysis of whether to adopt a new form of automated decision-making, or to continue its use. This requires more than a simple checklist, but rather a substantial consideration of the real and potential effects of the proposal upon the vulnerable.

Our analysis proceeds in four stages. First, Part II considers definitional issues, and in particular, what automated decision-making actually is, and what forms of it are relevant for the purposes of this article. This Part also briefly outlines accepted understandings of vulnerability. Part III then evaluates automated decision-making in the context of social security, focussing on the government programs Robodebt and ParentsNext, as well as the recent incursions of automated decision-making into income management for vulnerable youth and changes proposed under the National Disability Insurance Scheme ('NDIS'). Part IV considers the issues raised by automated decision-making in the context of criminal justice, from the investigatory stage, including facial recognition technology and police databases to identify potential offenders, through to sentencing. Finally, Part V proposes key elements we suggest are necessary to protect the vulnerable in the context of automated decisions.

II Definitions

A *Automated Decision-Making*

Automated decision-making involves the operation of artificial intelligence ('AI'). 'AI is a compendious and fluid term' that can be classified depending on the type of model or process used.[11] Although there are narrower definitions,[12] this article takes an expansive view of AI to encompass a wide-ranging constellation of technologies, from the more basic expert systems that merely automate decision-making, to the more sophisticated forms of machine learning systems that can make predictions or decisions using machine or human-based inputs.[13] Expert systems are

11 Terry Carney, 'Automation in Social Security: Implications for Merits Review?' (2020) 55(3) *Australian Journal of Social Issues* 260, 261 ('Automation in Social Security').

12 For example, the OECD definition of 'AI system' confines it to machine learning systems. See OECD, *Recommendation of the Council on Artificial Intelligence* (22 May 2019) art I: '[a]n AI system is a machine-based system that can … make predictions, recommendations, or decisions'.

13 This broader approach is consistent with that taken by Australian law reform bodies and scholars. See, eg: Australian Human Rights Commission, *Human Rights and Technology* (Final Report, 1 March 2021) 37 ('*AHRC Final Report*'); Carney, 'Automation in Social Security' (n 11).

rule-based deterministic systems that follow 'a series of pre-programmed rules written by humans', while predictive machine learning systems deploy 'rules that are inferred by the system from historic data'.[14] Expert systems such as Robodebt use pre-programmed rules to reach a decision, such as that a person is eligible for a benefit.[15] Governments have used various forms of such systems since the 1980s.[16] Indeed some decisions on benefits or fines are rule-based, and leave no discretion to the decision-maker, making them more suitable for automation. On the other hand, an example of a predictive system that determines whether a person is likely to be a recidivist, or commit a further crime in the future, is the United States' sentencing tool called the Correctional Offender Management Profiling for Alternative Sanctions ('COMPAS').[17] This type of decision is more problematic from a rule of law point of view, and doubts have arisen in the context of both criminal sentencing and the calculation of tax benefits, about whether a decision made without human input constitutes a legal 'decision' at all.[18]

As Tania Sourdin has proposed, one way of classifying types (or taxonomies) of decisions made using AI involves three main categories: (1) the 'supportive' (helping and advising people involved in the system); (2) the 'replacement' (replacing functions previously carried out by humans); and (3) the 'disruptive' (a completely different form of decision-making).[19] Following Sourdin's taxonomy, Monika Zalnieriute, Lyria Bennett Moses and George Williams propose a spectrum moving from AI-assisted decisions, 'where automation plays a supporting role' to AI-made decisions, where decisions 'are made entirely by machines'.[20]

Forms of AI such as facial recognition technology are types of AI-assisted or 'supportive' technology, as a surveillance program or police database may be programmed to identify individuals regarded as suspect, or people fitting a profile considered suspicious.[21] This then supports the human 'decision' to arrest, search or charge. At the other end of the spectrum, an AI system may identify relevant

14 *AHRC Final Report* (n 13) 37.

15 Yee-Fui Ng et al, 'Revitalising Public Law in a Technological Era: Rights, Transparency and Administrative Justice' (2020) 43(3) *University of New South Wales Law Journal* 1041, 1068.

16 Nigel Stobbs, Dan Hunter and Mirko Bagaric, 'Can Sentencing Be Enhanced by the Use of Artificial Intelligence?' (2017) 41(5) *Criminal Law Journal* 261, 270.

17 Zalnieriute, Bennett Moses and Williams (n 6) 437.

18 Yee-Fui Ng and Maria O'Sullivan, 'Deliberation and Automation: When Is a Decision a Decision?' (2019) 26(1) *Australian Journal of Administrative Law* 21, 26–31; Ng et al (n 15) 1058.

19 Tania Sourdin, 'Judge v Robot? Artificial Intelligence and Judicial Decision Making' (2018) 41(4) *University of New South Wales Law Journal* 1114, 1117 ('Judge v Robot?').

20 Zalnieriute, Bennett Moses and Williams (n 6) 432.

21 Jake Goldenfein, 'Australian Police Are Using the Clearview AI Facial Recognition System With No Accountability', *The Conversation* (online, 4 March 2020) <https://theconversation.com/australian-police-are-using-the-clearview-ai-facial-recognition-system-with-no-accountability-132667>.

information based on predetermined criteria, such as the likelihood of compliance with a payment plan, 'and then make a decision based upon that information without engaging a human decision-maker', such as whether an applicant qualifies for a welfare benefit.[22]

B *Vulnerability*

Various definitions or taxonomies of the 'vulnerable' have also been proposed. One strand of literature contends that vulnerability is a universal human condition, with all humans being prone to chronic and episodic dependency,[23] and 'governments therefore have a responsibility to respond affirmatively to that vulnerability by ensuring that all people have equal access to the societal institutions that distribute resources'.[24] Another strand argues that some people or groups should be seen as especially vulnerable, and should therefore be entitled to special protection of the state.[25] Both strands of literature, however, can and do advocate for state action to protect vulnerable populations.

'Vulnerability is typically associated with victimhood, deprivation, dependency, or pathology.'[26] Other indicators of vulnerability include: (1) age; (2) low income; (3) unemployment; (4) having 'long-term disabilities'; (5) having 'a lower educational attainment'; (6) being a 'rural dweller …'; and (7) belonging to an 'ethnic minority …'.[27] Vulnerability has been characterised as a 'multidimensional concept', which may be focussed on both the changeable, individual characteristics of people, as well as on external factors.[28] For instance, people may be 'inherently' vulnerable (for example if they are mentally ill), or vulnerable in a 'situational' context (suffering from poverty), or in a 'pathogenic' manner (as a result of discriminatory or defective policies or laws)[29] — although, once again, these categories overlap. There are two overlapping senses of vulnerability: (1) consent-based; and (2) fairness-based.[30] Consent-based vulnerability will arise where people have

22 Zalnieriute, Bennett Moses and Williams (n 6) 432.

23 Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20(1) *Yale Journal of Law and Feminism* 1, 9; Jonathan Herring, *Vulnerable Adults and the Law* (Oxford University Press, 2016) 7–15.

24 Nina A Kohn, 'Vulnerability Theory and the Role of Government' (2014) 26(1) *Yale Journal of Law and Feminism* 1, 3.

25 See generally Jennifer Collins, 'The Contours of Vulnerability' in Julie Wallbank and Jonathan Herring (eds), *Vulnerabilities, Care and Family Law* (Routledge, 2015) 22.

26 Fineman (n 23) 8.

27 Tania Sourdin and Mirella Atherton, 'Vulnerability and Dispute Resolution in the Banking and Finance Sector' (2019) 9(1) *Social Business* 69, 73.

28 Ibid.

29 Wendy Rogers, Catriona Mackenzie and Susan Dodds, 'Why Bioethics Needs a Concept of Vulnerability' (2012) 5(2) *International Journal of Feminist Approaches to Bioethics* 11, 23–5.

30 Philip J Nickel, 'Vulnerable Populations in Research: The Case of the Seriously Ill' (2006) 27(3) *Theoretical Medicine and Bioethics* 245, 247–9.

diminished autonomy and are less able to safeguard their own interests (ie unable to fully consent).[31] Fairness-based vulnerability will arise among those people who are powerless in society and thus unable to protect their basic rights, therefore requiring special protections (ie to ensure fairness).[32]

Another related concept is that of disadvantage. Disadvantage is traditionally associated with poverty, but also has links to broader notions of deprivation (exclusion from the minimum acceptable standard of living in a society), low capabilities and functioning, and social exclusion from participation and social connections.[33] Disadvantage can be a result of problems linked to vulnerability, 'such as unemployment, discrimination, poor skills, low incomes, poor housing, high crime, bad health and family breakdown', which are mutually reinforcing and may have a compounding effect.[34]

We acknowledge the complexities and nuances of the literature. Our purpose is to consider the impacts of automated government decision-making on these populations.

III Automated Decision-Making in Social Security

The Australian government has been enthusiastic about the adoption of digital technologies in the sphere of social security. The Department of Human Services has proclaimed that it is 'continuing to transform its services by moving towards digital service delivery'.[35]

The historical design of Australian social security with its 'rigid eligibility categories and tight arithmetic logic' is conducive to the expert system form of automated decision-making, meaning that 'Australia has led the world' in the adoption of information technology in social security.[36] The first generation of rule-based AI

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31 Ibid.

32 Ibid.

33 Rosalie McLachlan, Geoff Gilfillan and Jenny Gordon, 'Deep and Persistent Disadvantage in Australia' (Staff Working Paper, Productivity Commission, July 2013) 5; Amartya Sen, 'A Sociological Approach to the Measurement of Poverty: A Reply to Professor Peter Townsend' (1985) 37(4) *Oxford Economic Papers* 669, 670.

34 Social Exclusion Unit, *Breaking the Cycle: Taking Stock of Progress and Priorities for the Future* (Report, Office of the Deputy Prime Minister (UK), September 2004) 3 [3].

35 Department of Human Services, Submission No 66 to Senate Community Affairs References Committee, Parliament of Australia, *Design, Scope, Cost-Benefit Analysis, Contracts Awarded and Implementation Associated with the Better Management of the Social Welfare System Initiative* (2017) 1.

36 Terry Carney, 'Social Security Law: What Does the Politics of "Conditional Welfare" Mean for Review and Client Representation?' (2011) 46(3) *Australian Journal of Social Issues* 233, 236 ('Social Security Law').

involving the coding of simple legal rules with deductive reasoning steps has been increasingly widely adopted in the Australian social security context.[37] By contrast, machine learning technologies have not yet made any incursions into the Australian welfare system, compared to their use in other comparable liberal democracies.[38] The government has made legislative changes to enable the use of automated decision-making in social security determinations, including by inserting deeming provisions that deem decisions made by a computer to be made by the Departmental Secretary.[39]

This article will examine four aspects of automation of social security law: (1) the Robodebt saga; (2) the ParentsNext program; (3) income management for vulnerable youth; and (4) under the NDIS — and analyse these within the context of broader trends of social welfare policy in Australia.

A *Automated Debt Recovery: The 'Robodebt' Saga*

The catastrophic implementation of Centrelink's online compliance initiative (known by the derogatory moniker 'Robodebt') is the most visible recent example of automated decision-making by the Australian government. It involved a 'data matching method' for issuing and pursuing social security overpayment debts, extrapolating from the Australian Taxation Office's ('ATO') data 'the total amount and period over which employment income was earned and applying … that average to every separate fortnightly rate calculation period'.[40] From 2016, the automated system

> *automatically* issued letters to targeted welfare recipients asserting that they owe a debt for every case where they could not disprove the possible over-payment, effectively shifting the onus of proof from the department to the individual.[41]

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37 See Carney, 'Artificial Intelligence in Welfare' (n 9).

38 For example, AI risk assessment tools that identify child welfare cases with a high probability of serious child injury or death are utilised in several US states: Virginia Eubanks, *Automating Inequality: How High-Tech Tools Profile, Police, and Punish the Poor* (St Martin's Press, 2018) 127.

39 *Social Security (Administration) Act 1999* (Cth) s 6A. The *Social Services and Other Legislation Amendment (Omnibus) Act 2020* (Cth) sch 1 makes a minor amendment to ensure that offences in the Act are against the Human Services Department, rather than an individual agency officer, to facilitate online service delivery. For discussion on deeming provisions, see Ng and O'Sullivan (n 18).

40 Ng et al (n 15) 1068.

41 Ibid (emphasis in original). See also 'Acceptable Evidence for Verifying Income when Investigating Debts 107-02040020', *Services Australia* (Web Page) <https://operational.servicesaustralia.gov.au/public/Pages/debts/107-02040020-01.html>.

These errors resulted in inaccurate debt calculations for more than 470,000 welfare recipients.[42] As Yee-Fui Ng argues:

> these large-scale incorrect calculations have reduced public trust in computer-supported government decision-making and led to grave repercussions for vulnerable low-socioeconomic debtors, including individuals experiencing severe mental health issues …[43]

The Robodebt debacle thus highlights the issues that arise if the design of AI technology is deficient, with poor use of data points in its income averaging calculations. It also illustrates the issues of legality in the irrational methodology of decision-making and accountability where Centrelink sought to shift the onus of proof, as well as the lack of transparency which led to recipients being unaware that the decision was automated and assuming that it had been checked and was accurate.[44] These issues were ventilated by a parliamentary committee[45] and the Commonwealth Ombudsman,[46] which raised various issues of procedural fairness and transparency.

In 2019, the basis for raising debts under the Robodebt program was held to be unlawful. In a test case by a debtor subject to a Robodebt, the Davies J of the Federal Court in consent orders in *Amato v Commonwealth* (*'Amato'*)[47] held that automated decisions made on the basis of income averaging alone (the Robodebt method) were irrational and therefore unlawful.[48] In *Prygodicz v Commonwealth [No 2]*

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42 'Income Compliance Program Refunds', *Services Australia* (Web Page, 22 August 2022) <https://www.servicesaustralia.gov.au/individuals/subjects/information-about-refunds-income-compliance-program> ('Income Compliance Program Refunds').

43 Yee-Fui Ng, 'The Rise of Automated Decision-Making in the Administrative State: Are Kerr's Institutions Still "Fit for Purpose"?', *Australian Public Law* (Forum Post, 20 August 2021) <https://www.auspublaw.org/blog/2021/08/the-rise-of-automated-decision-making-in-the-administrative-state-are-kerrs-institutions-still-fit-for-purpose>.

44 Ng et al (n 15) 1068–70; Wright and Ng, 'Services Australia's Single Touch Payroll Program: The Enduring Legacy of Robodebt, or a Fundamentally Different System?' (n 9) 142; Paul Henman, 'Of Algorithms, Apps and Advice: Digital Social Policy and Service Delivery' (2019) 12(1) *Journal of Asian Public Policy* 71, 76–7.

45 Senate Community Affairs References Committee, Parliament of Australia, *Design, Scope, Cost-Benefit Analysis, Contracts Awarded and Implementation Associated with the Better Management of the Social Welfare System Initiative* (Report, June 2017) ix, 32–4, 107.

46 Commonwealth Ombudsman, *Centrelink's Automated Debt Raising and Recovery System: A Report about the Department of Human Services' Online Compliance Intervention System for Debt Raising and Recovery* (Investigation Report No 2, April 2017); Commonwealth Ombudsman, *Centrelink's Automated Debt Raising and Recovery System* (Implementation Report No 1, April 2019).

47 Order of Davies J in *Amato v Commonwealth* (Federal Court of Australia, VID611/2019, 27 November 2019).

48 Ibid 6 [9].

('*Prygodicz*'),[49] the Commonwealth agreed to settle a class action brought on behalf of 600,000 persons affected by Robodebt for $112 million, without any admission of liability.[50] The settlement agreement was approved by the Federal Court in June 2021.[51] The primary claims in *Prygodicz* were based on unjust enrichment and negligence.[52] However, as noted by Murphy J: 'In the course of the proceedings the Commonwealth admitted that it did not have a proper legal basis to raise, demand or recover asserted debts which were based on income averaging from ATO data.'[53]

In approving the class action settlement, Murphy J found that the applicant would have had good prospects of proving the debts issued were ultra vires and unlawfully imposed if the matter had proceeded to trial.[54] Further, Murphy J commented that due to the 'asymmetry in resources, capacity and information that existed between' the vulnerable social security recipients and the Commonwealth, the Commonwealth should have ensured that it had a proper basis to raise, demand and recover social security debts.[55] Accordingly, Murphy J declared that a decision that the applicant owed a debt under s 1223 of the *Social Security Act 1991* (Cth) was not validly made where the Robodebt income averaging method was utilised as the sole methodology.[56]

Following these cases, the Government agreed that from July 2020, it would refund all repayments of debts imposed using income averaging information from the ATO,[57] thereby refunding 470,000 unlawful debts.[58] In addition, Centrelink announced that it will no longer raise debts solely on the basis of the erroneous income averaging utilised in Robodebt, although the income averaging method is still utilised as one of the data points in raising debts.[59]

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49 (2021) 173 ALD 277.

50 Ibid 281 [8].

51 Ibid 282 [14].

52 Ibid 279–80 [3].

53 Ibid 280 [4].

54 Ibid 311–12 [145].

55 Ibid 280–1 [7].

56 Ibid Annexure C.

57 'Income Compliance Program Refunds' (n 42).

58 'Justice for Hundreds of Thousands of People Affected by Robo-Debt', *Victoria Legal Aid* (Web Page, 29 May 2020) <https://www.legalaid.vic.gov.au/justice-hundreds-thousands-people-affected-robo-debt>.

59 'Media Hub: Online Income Compliance Programme Update', *Services Australia* (Web Page, 19 November 2019) <https://mediahub.servicesaustralia.gov.au/media/online-income-compliance-programme-update/>.

As Murphy J stated during the *Prygodicz* proceedings, the Robodebt debacle has been 'a very sorry chapter in Australian public administration'.[60] It represented a monumental failure of AI design and implementation, with incorrect debts levied on hundreds of thousands of alleged debtors. These governmental errors in automated decision-making have led to stress, anxiety, stigma, and even suicides within the vulnerable populations of alleged debtors.[61] Despite this, there is nothing in the *Amato* and *Prygodicz* decisions that would preclude the future use of automated decision-making in a welfare context, as long as decisions are made utilising a more accurate methodology.

B *ParentsNext Program and the Targeted Compliance Framework*

The ParentsNext program is a pre-employment program for young, at-risk, sole parents who receive parenting payments.[62] The program requires its participants to complete activities in a participation plan determined by a ParentsNext provider, with the aim of reducing welfare dependency, increasing female employment, and helping to close the gap for Indigenous employment.[63] Half of the households that receive Parenting Payment live in poverty, with an over-representation of single mothers in this cohort being at risk of financial stress.[64]

The ParentsNext program has been imposed in a punitive fashion through a targeted compliance framework involving automated sanctions that applied to more than 75,000 welfare recipients of parenting payments.[65] These automated sanctions include payment suspensions that are automatically triggered by a person receiving demerit points, leaving some families without money for daily essentials.[66] Approximately one in five participants in the program were subject to an automated sanction.[67] An intensive version of the ParentsNext program specifically targets regions with high concentrations of Aboriginal and Torres Strait Islander populations.[68] The Senate

60 Luke Henriques-Gomes, 'Robodebt Responsible for $1.5bn Unlawful Debts in "Very Sorry Chapter", Court Hears', *The Guardian* (online, 7 May 2021) <https://www.theguardian.com/australia-news/2021/may/07/robodebt-responsible-for-15bn-unlawful-debts-in-very-sorry-chapter-court-hears>.

61 Tom Stayner, 'Mothers Whose Sons Took Their Lives after Robodebts Detail Anguish in Heartbreaking Letters', *SBS News* (online, 18 August 2020) <https://www.sbs.com.au/news/mothers-whose-sons-took-their-lives-after-robodebts-detail-anguish-in-heartbreaking-letters>.

62 Carney, 'Artificial Intelligence in Welfare' (n 9) 37.

63 Senate Community Affairs References Committee, Parliament of Australia, *ParentsNext, Including Its Trial and Subsequent Broader Rollout* (Report, March 2019) 1.

64 Ibid 1 [1.5].

65 Ibid 2–3.

66 Ibid 55.

67 Ibid 13 [1.52].

68 Ibid 29 [2.54].

Community Affairs References Committee found that the program was causing 'anxiety, distress and harm' for many parents, including women escaping violence.[69]

The automation of sanctions in the ParentsNext program has created significant issues for those who were targeted by the scheme. The design of the sanctions system requires onerous and continuous digital reporting by recipients and generates demerit points for failing to self-report within the same day, creating an intense burden on the vulnerable sole parents on these programs.[70] As opposed to reporting to a human, who is able to discuss and review a recipient's individualised circumstances, the ParentsNext program automatically issued 'dubious demerit points unable to be [immediately] reviewed or corrected until they crystallised into a formal sanction'.[71] In addition, the targeted sanctions system resulted in Jobactive Employment Service providers (the private-sector providers tasked with operational responsibility for the ParentsNext system) taking the responsibility of compliance away from skilled caseworkers who assessed individual needs, and instead giving it to clerical staff who were only trained to apply rigid rules and were unskilled in applying discretion.[72] Due to this faulty system, Centrelink had to withdraw 50,000 warning strikes or potential suspensions.[73] Therefore, the implementation of automated sanctions prioritised the efficiency of cost-cutting, at the expense of the accuracy of decisions and protection of vulnerable single parents.

C *Income Management of Vulnerable Youth*

Income management is a controversial welfare policy that involves mandatory quarantine of a proportion of a person's welfare payments and imposing prohibitions on how those funds could be used (such as bans on purchasing drugs or alcohol). This has the stated aim of reducing violence or harmful behaviour and encouraging socially responsible behaviour.[74] Income management in Australia was implemented in three waves: the first wave targeted Indigenous welfare recipients as part of the 2007 Northern Territory Emergency Response; the second wave involved specific categories that 'automatically applied to welfare recipients residing in government targeted geographical locations'; and the third wave introduced the cashless debit card.[75] As of June 2020, approximately 37,000 Australians had been placed on

69 Ibid 71 [4.1].

70 Carney, 'Artificial Intelligence in Welfare' (n 9) 38.

71 Ibid 40.

72 Ibid.

73 Ibid.

74 Shelley Bielefeld, 'Cashless Welfare Transfers for "Vulnerable" Welfare Recipients: Law, Ethics and Vulnerability' (2018) 26(1) *Feminist Legal Studies* 1, 2.

75 Ibid 2–3. See also Stephen Gray, 'The Healthy Welfare Card: Indigenous Empowerment or "Remote Control"?' in Claire Spivakovsky, Kate Seear and Adrian Carter (eds), *Critical Perspectives on Coercive Interventions: Law, Medicine and Society* (Routledge, 2018) 135.

income management programs, mostly on a compulsory basis.[76] In August 2022, the incoming Labor Government introduced legislation to wind down the cashless debit card, but left the longer-standing 'Basics Card' in place.[77]

Despite the increasing use of income management, the evidence of its effectiveness in achieving positive outcomes is unclear.[78] In fact, some studies have shown that income management is not an effective means for reducing alcohol and drug abuse, does not achieve its objectives, and has had 'a negative effect on the autonomy, wellbeing, and financial management capacity of many of those forced onto the program'.[79]

Although much of income management is not yet automated, automated decision-making has been applied to vulnerable welfare recipients. In particular, it has been applied to disengaged youth living at home and young people receiving payments such as Special Benefit or Youth Allowance due to it being unreasonable for them to live at home.[80] This may reflect a possibility of further automation in the future.

The automation of income management for vulnerable youth was introduced in 2013, where the individualised social worker referrals 'were superseded by Centrelink data-mining software which automatically set in motion the *application* of income management to anyone meeting the "trigger payment" conditions'.[81] This automation has been criticised by the Commonwealth Ombudsman, who identified failures in the automated decision-making process. The Ombudsman found that the automation of decisions to extend vulnerable youth welfare payments beyond 12 months fettered the discretion of the decision-maker (which was an automated

76 Philip Mendes et al, 'Is Conditional Welfare an Effective Means for Reducing Alcohol and Drug Abuse? An Exploration of Compulsory Income Management across Four Australian Trial Sites' (2021) 56(2) *Australian Journal of Political Science* 153, 154.

77 See Social Security (Administration) Amendment (Repeal of Cashless Debit Card and Other Measures) Bill 2022 (Cth). For discussion, see Elise Klein, 'Has Labor Learnt from the Failure of the Cashless Debit Card?', *The Conversation* (online, 4 August 2022) <https://theconversation.com/has-labor-learnt-from-the-failure-of-the-cashless-debit-card-188065>.

78 Philip Mendes, Jacinta Waugh and Catherine Flynn, 'Income Management in Australia: A Critical Examination of the Evidence' (2014) 23(4) *International Journal of Social Welfare* 362, 370.

79 Philip Mendes et al (n 76) 166. See J Rob Bray et al, *Evaluating New Income Management in the Northern Territory* (Final Evaluation Report, September 2014) xxii.

80 Commonwealth Ombudsman, *Administration of Income Management for 'Vulnerable Youth': Department of Human Services* (Report No 1, February 2016) 6 [1.3], 12 [3.10]–[3.11] ('Ombudsman Report').

81 Terry Carney, 'Vulnerability: False Hope for Vulnerable Social Security Clients?' (2018) 41(3) *University of New South Wales Law Journal* 783, 813 (emphasis in original) ('Vulnerability').

system) by removing any capacity for discretion.[82] The Department of Human Services agreed to remove this aspect of automated decision-making.[83]

Further, the Ombudsman found that the automated decision-making process failed to give sufficient consideration to mandatory subjective legislative criteria that can only be made by a qualified decision-maker based on individual circumstances.[84] The Ombudsman found that this failure may 'exacerbate mental health issues or housing instability'.[85] However, Centrelink rejected the Ombudsman's recommendations to reinstate 'personal assessment and reasoned decision-making', claiming that the 'existing procedures and staff training would ensure that all criteria were fully considered',[86] meaning that this form of automated decision-making still exists.

D *The National Disability Insurance Scheme*

The NDIS provides funding of $22 billion annually to approximately 500,000 Australians with permanent and significant disability, including 'intellectual, physical, sensory, cognitive and psychosocial disability'.[87] It provides eligible participants with individualised resource packages 'under a personal plan geared to the needs of their particular disability', with the aim of maximising participant control.[88] The requirement to 'tailor … entitlements to the specific needs, living circumstances and preferences of the person' would imply social caseworker facilitation, rather than 'administrative routinisation … or digitisation and automation'.[89] However, the scheme has been criticised as undermining this vision and 'instead applying bureaucratic, standardised administrative logics', due to the imperatives of cost-cutting and meeting completion targets.[90]

In part, these shortcomings arise from the 'insurance' approach enshrined at the heart of the NDIS. According to Bruce Bonyhady, a foundational advocate of the NDIS, an insurance approach requires that 'expenditure is factored in over the life of an individual, and Scheme sustainability is measured by calculating the total future

82 Ombudsman Report (n 80) 18 [3.42].

83 Ibid 35.

84 The subjective criteria included whether being subject to income management might place a person's mental, physical or emotional wellbeing at risk: see ibid 13 [3.13]–[3.14].

85 Ombudsman Report (n 80) 14 [3.21].

86 Carney, 'Vulnerability' (n 81) 813. See also ibid 54–5.

87 'What is the NDIS?', *NDIS* (Web Page, 14 September 2021) <https://www.ndis.gov.au/understanding/what-ndis>.

88 Terry Carney et al, 'National Disability Insurance Scheme Plan Decision-Making: Or When Tailor-Made Case Planning Met Taylorism and the Algorithms' (2019) 42(3) *Melbourne University Law Review* 780, 782.

89 Ibid 783.

90 Ibid 780.

costs of all those who are insured'.[91] In theory, an insurance approach minimises overall costs by investing in short-term capacity-building for affected individuals, resulting in their long-term improvement.[92] As a result, in calculating whether proposed supports are 'reasonable and necessary' under the scheme, the decision-maker must consider, amongst other matters: 'whether there is evidence that the support will substantially improve the life stage outcomes for, and be of longterm benefit to, the participant';[93] and 'whether funding or provision of the support is likely to reduce the cost of the funding of supports for the participant in the long term'.[94] In practice, this means that funding may be denied to people with deteriorating or terminal conditions who are assessed as not likely to 'get better' as a result of funding. For example, in 2018 a scientist with a deteriorating motor neurone disability was denied funding for wheelchair and home modifications because he was assessed as having a poor life expectancy.[95]

Partially because of this approach, the digitisation of disability entitlements has proceeded apace. The government is introducing a disability app for NDIS participants to claim expenses,[96] and has trialled blockchain technology for NDIS participants' budgets.[97]

More controversially, the National Disability Insurance Agency was developing a mechanism dubbed 'robo-planning'. This mechanism would involve independent assessors determining whether people with disabilities are eligible for funding and the amount they receive based on a computer algorithm. This algorithm would then recommend a 'personalised budget' before a disabled person sees a human to plan their support program.[98] This went beyond the recommendation of the Auditor-

91 Bruce Bonyhady, 'Reducing the Inequality of Luck: Keynote Address at the 2015 Australasian Society for Intellectual Disability National Conference' (2016) 3(2) *Research and Practice in Intellectual and Developmental Disabilities* 115, 116–17.

92 Ibid 117.

93 *National Disability Insurance Scheme (Supports for Participants) Rules 2013* (Cth) r 3.1(b).

94 Ibid r 3.1(c).

95 Melinda James and Gavin Coote, 'Concerns about "Overloaded" NDIS Following Leading Scientist's Fight for Special Wheelchair', *ABC News* (online, 10 March 2018) <http://www.abc.net.au/news/2018-03-10/concerns-about-motor-neurone-disease-ndis/9533350>.

96 Stilgherrian, 'NDIS Sidesteps Blockchain in Government Kitchen Sink Debt-Chasing App', *ZDNet* (online, 12 April 2021) <https://www.zdnet.com/article/ndis-gets-a-government-app-with-blockchain-but-no-ethics/>.

97 'Blockchain Case Study: Commonwealth Bank and the NDIS', *Digital Transformation Agency* (Web Page) <https://www.dta.gov.au/help-and-advice/technology/blockchain/do-you-need-blockchain/blockchain-case-studies/blockchain-case-study-commonwealth-bank-and-ndis>.

98 Stilgherrian (n 96).

General to implement data matching to combat fraudulent claims,[99] as it would incorporate AI within the decision-making processes, rather than using the data merely as a measure to detect fraudulent claims.

Bonyhady has raised concerns that the government was 'removing the individualised nature of the NDIS and replacing it with an algorithm which will see many individuals receiving less support'.[100] Following discussions with the state and territory disability Ministers, the federal government decided to scrap the independent assessor process and work on a new model of assessment.[101]

The proposed robo-planning algorithm would have introduced an expert system into an area which ordinarily relies on tailor-made responses and would be the first example of automated decision-making intruding into the disability sector in determining benefits. This is alongside the potential for further data-mining technologies to be used to detect fraudulent claims — taking a step closer towards the Robodebt 'minefield'. It is a positive step that the federal government has decided not to go down this path. However, close attention needs to be paid to the new model that will be developed in its stead.

E *Implications of Automation in Social Services*

The use of automation in welfare sits alongside a broader trend towards punitive tendencies in social welfare policy in Australia. Social welfare policy is predicated on two main interpretations of social disadvantage: the individualistic or behaviouristic interpretation and the structuralist approach.[102] The individualistic or behaviouristic approach attributes a person's poverty and unemployment to personal characteristics, such as incompetence, immorality or laziness.[103] By contrast, the structuralist approach, which is based on social democratic philosophy, requires guarantees of social rights, including income security 'outside the operations of the labour

99 Australian National Audit Office, *National Disability Insurance Scheme Fraud Control Program* (Auditor-General Report No 50, 2019) 11, 41–2.

100 Bruce Bonyhady, 'An Analysis of the NDIA's Proposed Approach to Independent Assessments: A Response to the National Disability Insurance Agency (NDIA) Consultation' (Consultation Paper, Melbourne Disability Institute, February 2021). See also Denham Sadler, '"Robo-Planning" Will "Blow-Up" NDIS: Key Architect', *InnovationAus* (online, 26 April 2021) <https://www.innovationaus.com/robo-planning-will-blow-up-ndis-key-architect/>.

101 Nas Campanella, Leonie Thorne and Celina Edmonds, 'NDIS Minister Says Independent Assessments Model Is "Dead", in Win for Disability Advocates', *ABC News* (online, 9 July 2021) <https://www.abc.net.au/news/2021-07-09/ndis-disability-independent-assessments-model-dead-after-meeting/100277324>; 'Independent Assessments', *Parliament of Australia* (Web Page) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/National_Disability_Insurance_Scheme/IndependentAssessments>.

102 Carney, 'Automation in Social Security' (n 11).

103 Philip Mendes, 'Compulsory Income Management: A Critical Examination of the Emergence of Conditional Welfare in Australia' (2013) 66(4) *Australian Social Work* 495, 495.

market'.[104] The structuralist approach recognises 'that blaming the poor for their plight reflects a lack of compassion and is unlikely to improve their prospects'.[105]

In Australia, there was a fundamental shift in social security policy during the conservative Howard Government from a structural to an individualistic approach to social disadvantage.[106] The Howard Government strongly promoted a contractual or conditional mode of welfare involving 'mutual obligations', where social security payments provided to persons unemployed and above the working age involved return responsibilities for the recipient, such as actively looking for work.[107] This, coupled with the politics of 'welfare blame' (based on the individualistic approach that blames individuals for their social disadvantage), led to punitive sanctions for breaches of compliance requirements.[108]

Alongside the move towards a quid pro quo system for welfare benefits, the Australian social security system has also moved 'towards greater paternalism and away from honouring the Henderson Poverty Report's endorsement in the 1970s of autonomy in social security'.[109] In this vein, social security payments are increasingly imposed subject to 'conditional welfare' restrictions — that is, restrictions on the permissible expenditure of social security payments for certain categories of recipients, such as income management for vulnerable people.[110]

The increasingly widespread use of automation in governmental welfare programs points to the broader issue of the 'digital welfare state'.[111] The focus on punishing welfare non-compliance via automated systems reflects the State's individualistic/behaviouristic approach to disadvantage, to the detriment of vulnerable participants. Former United Nations Special Rapporteur on extreme poverty and human rights, Philip Alston, warned about the risks of the digital welfare state, where 'digital data and technologies … are used to automate, predict, identify, surveil, detect, target and punish'.[112] In a targeted welfare system, a heavy-handed approach that adopts automated systems, rather than personalised processes with appropriate oversight,

104 Ibid 496.

105 Ibid.

106 Ibid 495.

107 Peter Yeend, 'Mutual Obligation/Work for the Dole', *Parliament of Australia* (E-Brief, 15 June 2004) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/archive/dole>.

108 Terry Carney and Gaby Ramia, 'Welfare Support and "Sanctions for Non Compliance" in a Recessionary Work Labour Market: Post-Neoliberalism or Not?' (2010) 2(1) *International Journal of Social Issues* 277.

109 Carney, 'Vulnerability' (n 81) 784–5. See also Commission of Inquiry into Poverty, Parliament of Australia, *Poverty in Australia* (Parliamentary Paper No 210, April 1975) 304.

110 Carney, 'Social Security Law' (n 36) 235.

111 *Report of the Special Rapporteur* (n 7) 3[3].

112 Ibid.

adversely affects vulnerable people the most as these groups are most likely to be in the cohort of social security recipients.

Two main issues arise out of automated decision-making in welfare. The first is the enactment of harsh rules with very little or no discretion. The second is the use of computerised systems to implement said rules, which further exacerbates the harshness and reduces the possibility of accountability. It is more difficult to review automated decisions due to the opacity of AI.[113] Although the use of AI itself is not to blame, it makes it practically and politically easier to impose these systems on vulnerable populations. At a broader level, the implementation of automated systems as a cost-cutting measure — coupled with the individualist interpretation of social disadvantage — pushes social security mechanisms towards a more punitive approach and away from an individualised and tailored approach that accounts for the personal circumstances of vulnerable social security recipients.[114]

IV Automated Decision-Making in the Criminal Justice System

While the use of AI in the criminal justice system is relatively new, it raises a pertinent concern to criminologists. The use of AI may reinvigorate the debate on whether people choose to commit crime, or whether criminals are born not made — and to the extent that they are 'born', whether it ought to be possible to predict criminal propensity, whether by DNA profiling, crime data analysis or indeed by the discredited measurement of skulls.[115] More recent discussions have proceeded in the awareness of the disturbing risk that allowing courts to take genetic or related factors into account might 'diminish any notion of personal responsibility and enhance a fatalistic attitude'.[116] Nevertheless, research raising dangerous ethical possibilities continues to be pursued, at least in some parts of the world. For example, in China, research based on still facial images of 1,856 real persons — with half of these persons convicted of criminal offences — suggested that physical features such as lip curvature, eye inner corner distance and nose-mouth angle could be used to predict criminality.[117]

It is important to understand at the outset of this discussion that the criminal justice system impacts disproportionately on the vulnerable and disadvantaged.

113 Ng et al (n 15) 1041, 1052–4, 1073.

114 Simone Jane Casey, 'Towards Digital Dole Parole: A Review of Digital Self-Service Initiatives in Australian Employment Services' (2002) 57(1) *Australian Journal of Social Issues* 111.

115 Clive Coleman and Clive Norris, *Introducing Criminology* (Willan Publishing, 2000) 24.

116 Justice Michael Kirby, 'The Future of Criminal Law' (1999) 23(5) *Criminal Law Journal* 263, 271.

117 Aleš Završnik, 'Criminal Justice, Artificial Intelligence Systems, and Human Rights' (2020) 20(5) *ERA Forum* 571.

In Australia, the most egregious example is the impact on Indigenous Australians. The Royal Commission into Aboriginal Deaths in Custody report of 1991[118] highlighted the problem of Indigenous Australians being incarcerated at a rate many times higher than non-Indigenous Australians, with the rate of over-incarceration increasing in more recent years.[119] Indigenous Australians are over-represented at even higher rates in juvenile detention, making up approximately 96% of juveniles in detention in the Northern Territory.[120] One of the main causes of over-incarceration is the operation of police discretion. The Australian Law Reform Commission cited evidence in its 2017 report that 'Aboriginal and Torres Strait Islander young people are more likely to be arrested than their non-Indigenous counterparts even after other factors such as the offence, offending history and background factors are taken into account'.[121]

It is also frequently argued that Indigenous Australians are treated disproportionately harshly in sentencing — or, more subtly, that factors such as any prior record, together with the refusal of courts to take routine account of systemic deprivation and historical disadvantage in sentencing Indigenous Australians, have disproportionate and discriminatory impact on this vulnerable and disadvantaged group.[122] It is important, therefore, that forms of AI that are being introduced into the criminal justice system do not perpetuate or accentuate this disadvantage.

Forms of AI exist or are proposed at various stages of the criminal justice system, from the use of surveillance technology to identify possible criminal offending, to the use of automated profiling systems in police investigation, as well as its application to elements of the trial process itself, and finally to its controversial recent application, in sentencing. This article argues that these AI systems do indeed operate in a disproportionate and potentially discriminatory way against vulnerable people, including particularly Indigenous Australians. Special attention therefore needs to be paid to guiding principles in the development of this form of decision-making, to ensure that the rights and interests of vulnerable people are protected.

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118 *Royal Commission into Aboriginal Deaths in Custody* (Final Report, 15 April 1991).

119 Australian Bureau of Statistics, 'Prisoners in Australia, 2016' (Catalogue No 4517.0, 8 December 2016); Australian Law Reform Commission, *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Final Report No 133, 22 December 2017) 21 ('*ALRC Final Report*').

120 Stephen Gray, 'Scoring the Intervention: Fail Grades on Closing the Gap, Human Rights' (2016) 8(23) *Indigenous Law Bulletin* 10, 13.

121 *ALRC Final Report* (n 119) 453.

122 Thalia Anthony, Lorana Bartels and Anthony Hopkins, 'Lessons Lost in Sentencing: Welding Individualised Justice to Indigenous Justice' (2015) 39(1) *Melbourne University Law Review* 47, 75.

A *Police Investigations: Facial Recognition Technology*

Perhaps the best-known recent debate about the application of AI to the criminal justice process concerns facial recognition technology ('FRT'). This technology analyses an individual's geometric facial features, comparing an algorithm created from the captured image with existing data derived from a driver's licence, social media account, or police database.[123] It is increasingly being trialled or deployed in various contexts around Australia, including at airports,[124] banks and shopping centres,[125] as well as by private companies such as 7-Eleven Australia, which reportedly uses it for 'customer feedback'.[126] Additionally, Australian police agencies have reportedly used a private facial recognition service called 'Clearview AI', which looks for a match with an uploaded image of a person's face, through searching its database of several billion images collected from the web.[127] Police agencies initially denied they were using the service until a list of Clearview AI's customers was stolen and distributed online, showing both federal and state police.[128] No regulator exists to scrutinise or test the reliability or suitability of private technologies such as this, with the only testing apparently having been done in the United States by the company itself.[129] In late 2021, however, the Australian Information Commissioner, Angelene Falk, issued a determination that Clearview AI had breached the *Privacy Act 1988* (Cth), ordering the company to cease collecting facial images and biometric templates, and to destroy those it had

123 Joe Purshouse and Liz Campbell, 'Privacy, Crime Control and Police Use of Automated Facial Recognition Technology' (2019) 43(3) *Criminal Law Review* 188, 188.

124 Niamh Kinchin, 'AI Facial Analysis is Scientifically Questionable: Should We Be Using It for Border Control?', *The Conversation* (online, 24 February 2021) <https://theconversation.com/ai-facial-analysis-is-scientifically-questionable-should-we-be-using-it-for-border-control-155474>.

125 Liz Campbell, 'Why Regulating Facial Recognition Technology Is So Problematic: And Necessary', *The Conversation* (online, 26 November 2018) <https://theconversation.com/why-regulating-facial-recognition-technology-is-so-problematic-and-necessary-107284>.

126 Rick Sarre, 'Facial Recognition Technology Is Expanding Rapidly across Australia: Are Our Laws Keeping Pace?', *The Conversation* (online, 10 July 2020) <https://theconversation.com/facial-recognition-technology-is-expanding-rapidly-across-australia-are-our-laws-keeping-pace-141357>.

127 Jake Goldenfein, 'Australian Police Are Using the Clearview AI Facial Recognition System with No Accountability', *The Conversation* (online, 4 March 2020) <https://theconversation.com/australian-police-are-using-the-clearview-ai-facial-recognition-system-with-no-accountability-132667>.

128 Ibid. See also Ryan Mac, Caroline Haskins and Logan McDonald, 'Clearview's Facial Recognition App Has Been Used by the Justice Department, ICE, Macy's, Walmart and the NBA', *Buzzfeed News* (online, 28 February 2020) <https://www.buzzfeednews.com/article/ryanmac/clearview-ai-fbi-ice-global-law-enforcement>.

129 Ibid.

already collected.[130] It is unclear whether this has yet occurred or whether police have ceased using the service.

Following a Council of Australian Governments ('COAG') agreement in 2017,[131] the federal government embarked on a process designed to legalise the collection and sharing of facial images and other identity information among government agencies Australia-wide. As Sarah Moulds points out, it also legalised some sharing with private organisations.[132] The package of legislation, known as the 'identity matching laws', aimed to set up a national 'hub' for the sharing of such information under the scrutiny of the Department of Home Affairs.[133] Its aims included identifying missing individuals, including in times of disaster or emergency, as well as combating identity crime and promoting community safety.[134] The Identity-Matching Services Bill 2019 (Cth) was subjected to scrutiny by the Parliamentary Joint Committee on Intelligence and Security, which produced a report in 2019 recommending significant changes to the proposed laws, including greater protection for individual privacy and human rights.[135]

These concerns are well-founded. They mirror the views expressed by the Human Rights Law Centre, which argued that the scheme could be used to identify any Australian, regardless of whether they were suspected of a crime. The Australian Human Rights Commission ('AHRC') has argued that the facial-matching software used could discriminate against particular racial or gender groups.[136] While it appears that the proposed legislation has now lapsed, in July 2021 the federal government announced an Intergovernmental Agreement on data sharing, which commits '[a]ll jurisdictions … to share data across jurisdictions as a default position, where it can be done securely, safely, lawfully and ethically'.[137]

In the United Kingdom, facial recognition technology has been used by police for some years, reportedly to monitor public spaces on a 'trial' basis. A system known

130 'Clearview AI Breached Australians' Privacy', *Office of the Australian Information Commissioner* (Web Page, 3 November 2021) <https://www.oaic.gov.au/updates/news-and-media/clearview-ai-breached-australians-privacy>.

131 Sarah Moulds, 'Who's Watching the "Eyes"? Parliamentary Scrutiny of National Identity Matching Laws' (2020) 45(4) *Alternative Law Journal* 266, 267.

132 Ibid; Department of Parliamentary Services (Cth), *Bills Digest* (Digest No 21 of 2019–20, 26 August 2019) 2, 3.

133 See: Identity-Matching Services Bill 2019 (Cth) cl 19; Explanatory Memorandum, Identity-Matching Services Bill 2019 (Cth) 2. See also Australian Passports Amendment (Identity-Matching Services) Bill 2019 (Cth).

134 Moulds (n 131) 267.

135 Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Identity-Matching Services Bill 2019 and the Australian Passports Amendment (Identity-Matching Services) Bill 2019* (Report, October 2019).

136 Moulds (n 131) 268.

137 National Cabinet, *Intergovernmental Agreement of Data Sharing between Commonwealth and State and Territory Governments* (9 July 2021) 1.

as 'Neoface' was first used by Leicestershire Police in 2014 — and again by other police forces at various carnivals and music festivals over the next four years — but no results of the 'trial' have been published.[138] The use of this technology was challenged on a human rights basis in *Wood v Commissioner of Police for the Metropolis*,[139] with the United Kingdom Court of Appeal finding that the police surveillance of a campaigner against the arms trade was in breach of art 8 of the *European Convention on Human Rights* ('*ECHR*').[140] A European Commission expert body recommended the banning or curbing of such technologies in June 2019.[141] In July 2019, the United Kingdom Information Commissioner's Office began an investigation into the use of FRT by law enforcement. However, despite the privacy and human rights concerns, the United Kingdom resisted pressure to enact statutory rules governing the deployment of FRT.[142]

In August 2020, a significant decision from the United Kingdom Court of Appeal changed the terms of this debate. *Bridges v CC South Wales Police*[143] concerned the lawfulness of the use of live automated facial recognition technology by the South Wales Police Force. The trial involved the use of a system called 'AFR Locate' (in fact, a development of Neoface),[144] which utilised surveillance cameras to capture digital images of members of the public. These were then compared to digital images of people on a police watchlist.[145] The watchlist included people with outstanding warrants, people who had escaped from custody, people suspected of crimes, missing persons, or people simply of interest to the police — including individuals regarded as vulnerable.[146] When the software identified a possible match, a police officer (or 'system operator') would compare the digital images to determine if a match had in fact been made.[147] The general public would be alerted to use of AFR

138 Purshouse and Campbell (n 123) 190.

139 [2009] EWCA Civ 414.

140 *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) ('*ECHR*').

141 Elizabeth Denham, 'Live Facial Recognition Technology: Data Protection Law Applies', *Wired Gov* (Blog Post, 9 July 2019) <https://www.wired-gov.net/wg/news.nsf/articles/Blog+Live+facial+recognition+technology+data+protection+law+applies+10072019091000?open>; High-Level Expert Group on Artificial Intelligence, 'Policy and Investment Recommendations for Trustworthy AI' (26 June 2019) 20 [12.4] <https://digital-strategy.ec.europa.eu/en/library/policy-and-investment-recommendations-trustworthy-artificial-intelligence>.

142 Purshouse and Campbell (n 123) 203.

143 [2020] EWCA Civ 1058 ('*Bridges*').

144 Ibid [10].

145 Ibid [8].

146 Ibid [13].

147 Ibid [15].

technology at events where it was used. Images would be deleted from the system after (at most) 31 days.[148]

Bridges challenged the use of the technology on the basis that it contravened arts 8, 10 and 11 of the *ECHR*, as well as European data protection law, and s 149 of the *Equality Act 2010* (UK).[149] The Court of Appeal accepted that South Wales Police's use of the technology was an interference with Bridges' rights under art 8(1) of the *ECHR*, and was not 'in accordance with the law' for the purpose of art 8(2) of the *ECHR*. The Court's conclusion that there was an insufficient legal framework for the use of the technology was on the basis that too much discretion was left to individual police officers, and that '[i]t is not clear who can be placed on the watchlist nor is it clear that there are any criteria for determining where AFR can be deployed'.[150] It also considered that the use of the technology was in breach of public sector equality duties, in that the police had not done everything reasonable to be satisfied that the software used did not have a racial or gender bias.[151]

Thus, it is clear that police use of FRT in investigating crime or identifying suspects raises a significant set of privacy and human rights issues. In 2021, the AHRC Final Report on Human Rights and Technology recommended a moratorium on the use of FRT until legislation can be passed regulating its use and expressly protecting human rights.[152] Therefore, FRT needs to be carefully deployed in high stakes situations that impact upon a person's fundamental rights of life, liberty or property, such as in criminal investigations, in order to avoid wrongful arrests and detention.[153] Accordingly, FRT should only be deployed when the accuracy of the technology is confirmed for its intended purpose, and when there are strong legislative guidelines regulating its use, as well as the ability for individual appeals over errors from the use of this technology.

B *Police Powers and the Automated Decision*

As is well-known, police are entrusted with broad powers in the course of their overall duty to uphold and enforce the law. Their powers include the power to stop and question individuals suspected of involvement in crime, powers of entry, search and seizure, the power to take steps to prevent the commission or continuation of an offence, and the power of arrest. In making such decisions, police in recent years have turned increasingly to 'tools' which promise to identify those considered at increased risk of criminal behaviour, hence theoretically saving police time and

148 Ibid [18]–[19].

149 Ibid [32], [52].

150 Ibid [91]. See also Paul Schwartfeger, 'Automating Bias?' (2020) (August) *New Law Journal* 15.

151 *Bridges* (n143) [201].

152 *AHRC Final Report* (n 119) 115–16, 120.

153 Daniel E Ho et al, 'Evaluating Facial Recognition Technology: A Protocol for Performance Assessment in New Domains' (2021) 98(4) *Denver Law Review* 753, 754–6.

scarce resources.[154] On occasions, these 'tools' have included forms of automated decision-making.

One example of such a tool is the 'Suspect Target Management Plan' ('STMP') developed by New South Wales Police in order to 'identify, assess and target people "suspected of being recidivist offenders or responsible for emerging crime problems"'.[155] First developed in 1999, with a later iteration in 2005, it uses a 'quantitative risk assessment tool, designed to identify individuals' risk of re-offending'.[156] Once placed on the plan, an individual will be targeted by New South Wales Police officers, including by attending the person's 'house on a regular basis, and using police powers of stop and search, and move on directions, whenever police encounter the individual'.[157] A suspicion exists that the plan involves 'the use of particular algorithms, or risk assessment tools, to calculate a person's risk of offending or re-offending'.[158] However, it is impossible to know the extent to which automated decision-making forms part of the STMP, as the policy and operational arrangements surrounding the STMP are not made publicly available.

There is evidence that the 'STMP disproportionately targets young people, particularly Aboriginal and Torres Strait Islander people', and that it 'has the effect of increasing vulnerable young people's contact with the criminal justice system'.[159] The plan lacks a statutory basis, with the result that the STMP 'may be inadvertently diminishing police understanding of the lawful use of [their] powers'.[160] It is true that criticism of the police for targeting Indigenous people is not new. It was a major focus of the 1991 Royal Commission into Aboriginal Deaths in Custody, as noted above, and so may be said to pre-date the use of forms of automated decision-making. However, the introduction of forms of automated decision-making into the process by which police target, arrest, and charge people represents a disturbing new element. There is no transparency in either the algorithms used to identify people as targets, or in the very existence of automation as part of the decision-making process. The secrecy surrounding the STMP 'poses significant risks to effective and fair policing', and 'may in particular intensify the conditions that escalate conflict between young Aboriginal and Torres Strait Islander peoples and police'.[161]

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154 For example, as Vicki Sentas and Camilla Pandolfini point out, the Suspect Target Management Plan in New South Wales 'seeks to effectively target command resources' to address crime problems: Vicki Sentas and Camilla Pandolfini, *Policing Young People in NSW: A Study of the Suspect Targeting Management Plan* (Report, Youth Justice Coalition New South Wales, 2017) 5 [1.4] quoting New South Wales Ombudsman, *The Consorting Law: Report on the Operation of Part 3A, Division 7 of the Crimes Act 1900* (Report, April 2016) 118.

155 Ibid 1, 5.

156 Ibid 5.

157 Ibid.

158 Ibid 6.

159 Ibid 1.

160 Ibid 1.

161 Ibid 29.

Another example of police use of predictive risk assessment tools is a Queensland Police Service trial 'using artificial intelligence (AI) to determine the future risk posed by known domestic violence perpetrators'.[162] Relying on an algorithm developed using Queensland Police Service administrative data, the tool is designed to identify people regarded as 'high risk', and ensure police visit them at home before domestic violence or other crimes are committed. As with the STMP in New South Wales, there is a 'lack of transparency in the specific kinds of data analysed'.[163] More disturbingly, there is a concern that the use of AI 'could reinforce existing biases in the criminal justice system', creating 'an endless feedback loop between police and those members of the public who have the most contact with police', that is to say, Aboriginal and Torres Strait Islander people.[164] In other words, the use of forms of AI does not merely reinforce existing biases. It potentially aggravates them, because the system identifies and then further targets particular vulnerable individuals, increasing the likelihood of escalating conflict and ultimately more serious consequences.

C *Sentencing and the Automated Decision*

So far in Australia, there is little evidence that AI has become directly involved in the criminal sentencing process, with academic discussion mainly concerned with predictions about possible impacts of AI on the judicial function in the future.[165] In the United States, however, automated decision-making has become far more directly and practically enmeshed with criminal sentencing. The decision-making tool, COMPAS, is used in various United States jurisdictions to predict which convicted offenders pose the highest risk of re-offending.[166] COMPAS gives an individual a 'score' or risk assessment using an algorithm which processes or interprets the individual's personal characteristics and history, including criminal history, education, employment, age and substance abuse history, as well as criminal associates, pro-criminal attitudes and an 'antisocial personality'.[167]

However, it is not known how, precisely, the COMPAS risk assessment tool performs this task. This is because the tool itself, and the algorithm on which it is

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162 Heather Douglas and Robin Fitzgerald, 'QLD Police Will Use AI To "Predict" Domestic Violence before It Happens: Beware the Unintended Consequences', *The Conversation* (online, 17 September 2021) <https://theconversation.com/qld-police-will-use-ai-to-predict-domestic-violence-before-it-happens-beware-the-unintended-consequences-167976>.

163 Ibid.

164 Ibid.

165 See, eg, Sourdin, 'Judge v Robot?' (n 19) 1115–16.

166 Zalnieriute, Bennett Moses and Williams (n 6) 437.

167 Hannah Bloch-Wehba, 'Access to Algorithms' (2020) 88(4) *Fordham Law Review* 1265, 1288–9.

based, remains a trade secret.[168] Nevertheless, in *State of Wisconsin v Loomis*,[169] the Supreme Court of Wisconsin approved the use of such tools, providing the judge did not fully delegate their decision-making function, and still considered the defendant's arguments on the question of future re-offending.[170]

Zalnieriute, Bennett Moses and Williams argue that the use of risk assessment tools such as COMPAS violates the principle of equality before the law. This is not because such tools explicitly use race or other impermissible characteristics in the calculation of risk, but rather because of 'the fact that automation can infer rules from historical patterns and correlations' in order to produce 'racially or otherwise biased assessments'.[171] An investigation by ProPublica in 2016 found that African-Americans were more likely than Caucasians to be given a false positive score. This result appears to flow, not from the explicit use of race as a variable, but from other information which itself may be the product of racial biases, such as numbers of Facebook 'likes', or the number of times a defendant has been stopped and questioned by police.[172] This form of decision-making is the product of a system that lacks transparency, denies defendants the opportunity to participate in the findings and processes of the court, and over which humans exercise insufficient supervisory control.[173]

In contrast, Nigel Stobbs, Dan Hunter and Mirko Bagaric argue that a broader use of automated decision-making could actually lead to improvements in current sentencing practice, which they consider to be unduly reliant on the inconsistent or even capricious decisions generated by human judges.[174] Such decisions, they argue, are particularly lacking in objectivity when they are the product of the intuitive or instinctive synthesis method of sentencing, which 'neither requires (nor permits) judges to set out with any particularity the weight (in mathematical or proportional terms) accorded to any particular consideration'.[175] Such sentences lack transparency, even to the point of amounting to arbitrary detention, and can lead to unpredictability and numerical inconsistency in sentencing, again perhaps to the point of eroding public confidence in the administration of justice.[176] They argue further that there is no evidence that increased discretion leads to greater fairness,

168 Zalnieriute, Bennett Moses and Williams (n 6) 437.

169 881 NW 2d 749 (Wis, 2016).

170 Ibid [56].

171 Zalnieriute, Bennett Moses and Williams (n 6) 452.

172 Ibid, citing Michal Kosinski, David Stillwell and Thore Graepel, 'Private Traits and Attributes Are Predictable from Digital Records of Human Behavior' (2013) 110(15) *Proceedings of the National Academy of Sciences* 5802.

173 Zalnieriute, Bennett Moses and Williams (n 6) 453.

174 Stobbs, Hunter and Bagaric (n 16) 265. See also Tania Sourdin, *Judges, Technology and Artificial Intelligence* (Edward Elgar, 2021) 72, 78–9 ('*Judges, Technology and Artificial Intelligence*').

175 Stobbs, Hunter and Bagaric (n 16) 265.

176 Ibid 266–7.

and that there is in fact evidence that discretion leads to sentencing decisions being impacted by subconscious bias, such as bias against Indigenous defendants or in favour of those with an attractive appearance.[177] This argument is supported by Aleš Završnik, who considered that human decision-making is 'often flawed', with 'stereotypical arguments and prohibited criteria such as race, sexual preference or ethnic origin often creeping … into judgments'.[178]

The difficulty with an automated sentencing process determined by a computer algorithm, as Stobbs, Hunter and Bagaric acknowledge, is that while the various considerations to be factored into sentencing are well-known, the precise weight to be accorded to each of those in an individual case is not easily discernible. Stobbs, Hunter and Bagaric assert that this considerable difficulty may be overcome by systematic research involving reading a large number of sentencing decisions in each jurisdiction, and then breaking them down in order to ascertain the precise weight accorded to various aggravating or mitigating circumstances.[179]

Thus, the form of automated decision-making proposed by Stobbs, Hunter and Bagaric goes considerably further than the COMPAS tool currently in use in the United States. In fact, the authors consider the risk assessment tool to measure the chance of future offending could be an 'additional feature' incorporated into the overall automated sentencing process.[180] The authors acknowledge the limited studies into the effectiveness of such tools, and the significant reservations regarding their accuracy.[181] However, with considerable confidence, the authors assert the possibility of crime predictive tools being 'far more accurate than unstructured judicial observations, so long as they are adapted to the local population in which they are to be used'.[182]

This confidence is arguably misplaced. Studies on the accuracy of COMPAS have produced mixed results.[183] For instance, Julia Dresel and Hany Farid found that COMPAS was only as accurate as an online poll of 400 random people without criminal or legal training,[184] while Zhiyuan Lin et al found that the COMPAS algorithm could perform better than a human when feedback on whether the person

177 Ibid 268.

178 Aleš Završnik, 'Algorithmic Justice: Algorithms and Big Data in Criminal Justice Settings' (2021) 18(5) *European Journal of Criminology* 623, 633.

179 Stobbs, Hunter and Bagaric (n 16) 271–2.

180 Ibid 272–3.

181 In China, a 'social credit' system has become more inextricably linked to judicial decision-making, with social credit data increasingly likely to be used 'to determine both credibility and outcomes': Sourdin, *Judges, Technology and Artificial Intelligence* (n 174) 75, 228.

182 Ibid 274.

183 Ibid 73–4.

184 Julia Dressel and Hany Farid, 'The Accuracy, Fairness, and Limits of Predicting Recidivism' (2018) 4(1) *Science Advances* eaao5580:1–5, 2.

had in fact reoffended was removed, as such data may not be available in real life.[185] At any rate, risk assessment tools already in use have been shown to operate in a discriminatory or unequal way against minority groups, despite the absence of any explicitly discriminatory criteria in the algorithm.[186] It is difficult to see how the algorithm itself could be made 'free of the discrimination that permeates the present sentencing regime',[187] given that the algorithm incorporates the same variables and criteria. It may also incorporate criteria likely to operate in an indirectly discriminatory way. For example, it may include a criterion that residents from a particular area have been convicted of crimes more than residents from another area, without acknowledging that those residents are more often from a marginalised group.[188]

Moreover, the algorithms appear to be written without the involvement of legally trained individuals, and thus the translation of rules into code may not reflect the correct interpretation of complex legislation, statutory presumptions, and case law.[189] The same criticism of 'intuitive sentencing' regimes administered by human judges may be made to an even greater degree of automated sentencing regimes, given the confidentiality of the algorithms on which they are based. Judges are public figures, subject to considerable scrutiny, unlike the anonymous programmers who have produced an algorithm.[190] An algorithm needs to be kept up-to-date to reflect changes in law and policy, which is something unlikely to occur in a program developed by a private company and sold to a decision-making authority.[191]

It is true that it is theoretically possible that 'all integers of the algorithm should be known to the court', as well as to the parties and the wider community.[192] However, this is unlikely in practice given that the algorithms currently in use, and the information on which they are based, have been developed by private companies for private profit. The assertion that an algorithm would somehow produce an 'objective' assessment of the multiple varying sentencing factors is reminiscent of the notion that a utilitarian calculus or an economic theory of law might produce mathematically precise and justifiable decisions. It is easy to assert in theory, but

185 Zhiyuan 'Jerry' Lin et al, 'The Limits of Human Predictions of Recidivism' (2020) 6(7) *Science Advances* eaaz0625:1–8, 1.

186 Zalnieriute, Bennett Moses and Williams (n 6) 452.

187 Stobbs, Hunter and Bagaric (n 16) 274.

188 Richard Berk and Jordan Hyatt, 'Machine Learning Forecasts of Risk to Inform Sentencing Decisions' (2015) 27(4) *Federal Sentencing Reporter* 222, 225.

189 Justice Melissa Perry, 'iDecide: Administrative Decision-Making in the Digital World' (2017) 91(1) *Australian Law Journal* 29.

190 For commentary on the scrutiny of judges: see, eg, Chief Justice Gerard Brennan, 'The Role of the Judge' (Speech, National Judicial Orientation Programme, 13 October 1996) 1 [5].

191 Deirdre K Mulligan and Kenneth A Bamberger, 'Procurement as Policy: Administrative Process for Machine Learning' (2019) 34(3) *Berkeley Technology Law Journal* 773, 817.

192 Stobbs, Hunter and Bagaric (n 16) 274.

seemingly impossible to show how it would work in the human world of judicial decision-making.

V Guiding Principles for Ensuring Automated Decision-Making Protects Vulnerable Populations

The use of AI in government and judicial decision-making can 'improve efficiency, certainty, predictability and consistency'.[193] However, as seen from the discussion of social security and criminal justice above, when used as a decision-making tool, AI has some key differences from human decision-making that must be considered. The first is the issue of transparency: due to the 'black box' nature of the system itself, as well as due to proprietary interests in the AI, which can protect the inner workings as trade secrets, the reasoning behind the decision is not always discoverable.[194] The second consideration relates to issue of algorithmic bias, where the training of machine learning programs has the possibility of ingraining existing biases in the AI (or even creating new ones).[195] Third, the issues of privacy and data protection must be considered due to the new challenges AI systems present.[196]

It is clear that automated government decision-making has advanced at a rapid pace in recent decades. The new public management ('NPM') movement that has swept through many Western democracies worldwide from the late 1970s has been responsible for an augmentation in AI technologies towards 'digital era governance'.[197] NPM involves inserting business-like principles into government, leading to a focus on performance and consequently the measuring, monitoring and auditing of agency outcomes.[198] This has translated into administrators being focussed on

193 Ng et al (n 15) 1049.

194 Andrew D Selbst and Solon Barocas, 'The Intuitive Appeal of Explainable Machines' (2018) 87(3) *Fordham Law Review* 1085, 1094.

195 Australian Human Rights Commission, *Using Artificial Intelligence To Make Decisions: Addressing the Problem of Algorithmic Bias* (Technical Paper, November 2020) ('*Using Artificial Intelligence to Make Decisions*'); UK Centre for Data Ethics and Innovation, *Review into Bias in Algorithmic Decision-Making* (November 2020) 119.

196 Sourdin summarises these issues as fairness, transparency and explainability, responsibility and accountability; robustness and reliability; privacy and trust; and safety and security: *Judges, Technology and Artificial Intelligence* (n 174) 237. In comparison, Paul Henman identifies issues of accuracy, bias and discrimination; legality, due process and administrative justice; responsibility, accountability, transparency and explainability; and power, compliance and control: Paul Henman, 'Improving Public Services Using Artificial Intelligence: Possibilities, Pitfalls, Governance' (2020) 42(4) *Asia Pacific Journal of Public Administration* 209.

197 Michael Veale and Irina Brass, 'Administration by Algorithm? Public Management Meets Public Sector Machine Learning' in Karen Yeung and Martin Lodge (eds), *Algorithmic Regulation* (Oxford University Press, 2019) 121, 122.

198 Paul Henman and Michael Adler, 'Information Technology and the Governance of Social Security' (2003) 23(2) *Critical Social Policy* 139, 148.

case numbers and targets, rather than the impacts of AI on vulnerable populations. Digitised administration may also 'be used to install new political or ideological agendas, such as job shedding, replacement of skilled with un/semi-skilled staff, enhanced managerial control of workers, and increasing surveillance and control of citizens'.[199] As a result, new technologies in government have been deployed in ways that sometimes detrimentally affect vulnerable populations. Targeted governmental intervention for vulnerable populations in Australia has been problematic. The focus on vulnerability is 'susceptible to abuse by powerful interests intent on increasing coercive, surveillance, discipline and disentitlement for those designated as "vulnerable"'.[200] It can expose vulnerable populations to invasive and paternalistic interventions.[201] This can be seen in the area of social security, where coercive paternalistic interventions that have proved to be deeply detrimental to welfare recipients have been imposed in the name of protecting the vulnerable.[202]

The use of AI in the welfare state has supported the 'informatisation' of organisations, including the surveillance of claimants through data matching procedures to identify welfare fraud and over-payments, as well as the monitoring and measuring of departmental staff rates of processing cases.[203] As Paul Henman argues: 'algorithms constitute a particular, predictive way of thinking about the practice of government, a practical way of governing the future in the present, and the present in the future'.[204] Nevertheless, the use of AI for vulnerable populations could be a positive force, as it may enhance customer service through the creation of a 'one stop shop' in welfare service provision by bringing together disparate information and organisations.[205] Expert systems can also improve customer service by 'helping claimants and advocates … better understand the reasons for an administrative decision', ensuring that 'claimants receive their full entitlement to benefit', and enhancing the accountability of welfare organisations.[206]

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199 Paul W Fay Henman, 'Administrative Justice in a Digital World: Challenges and Solutions' in Marc Hertogh et al (eds), *The Oxford Handbook of Administrative Justice* (Oxford University Press, 2021) 459, 473.

200 Bielefeld (n 74) 1–2.

201 Herring (n 23) 35.

202 See, eg, Andrew Forrest, *The Forrest Review: Creating Parity* (2014) 103, where it is argued that there should be 'a cashless welfare card system, not just for vulnerable first Australians, but for vulnerable people across Australia'. See also Explanatory Memorandum, Social Security Legislation Amendment (Debit Card Trial) Bill 2015 (Cth) 3, which states the restriction on welfare recipients using the cashless debit card on alcohol, gambling and illegal drugs 'is to ensure that vulnerable people are protected from abuse of these substances, and associated harm and violence'.

203 Henman and Adler (n 198) 147–8.

204 Paul Henman, 'Governing by Algorithms and Algorithmic Governmentality: Towards Machinic Judgement' in Marc Schuilenburg and Rik Peeters (eds), *The Algorithmic Society: Technology, Power and Knowledge* (Routledge, 2021) 19, 23.

205 Henman and Adler (n 198) 148.

206 Ibid 149.

This promise has not been realised, however, as digital welfare systems have 'tended to reinforce the knowledge barriers' between the department and the claimant.[207] Paul Henman and Michael Adler's survey of 13 OECD countries (including Australia) has found that the computerisation of social security has 'decreased the simplicity of social security policy … decreased the number of staff … and local offices … and decreased the personal contact between claimants and staff'.[208] They thus concluded that 'computer technologies are more likely to be used to control rather than to empower staff and claimants'.[209]

An even longer-standing bias lies against people involved with the criminal justice system, which has always operated disproportionately against the vulnerable and disadvantaged, including Aboriginal and Torres Strait Islander people. The increased use of forms of AI at various stages of the criminal justice system carries a strong risk that these existing biases will be aggravated. Police use of automated 'tools' to identify and target particular individuals seems likely to further stigmatise and criminalise those people, while the use of algorithmic tools in sentencing also carries the risk of aggravating existing biases in the system. The punitive nature of both the criminal justice and welfare systems points towards 'a long tradition of linking crime and poverty (and more recently, welfare) in the discourses and practices of the state', thus leading to a 'convergence' of the welfare and criminal justice systems.[210]

Given these deep-seated troubling issues, in order to protect vulnerable populations, we argue that three main guiding principles are required to provide particular protection to disadvantaged populations: the principles of empowerment, harm minimisation, and transparency. Although these broad normative principles are desirable for government policy-making more generally, in the area of automated decision-making these are particularly salient, and we will highlight the particular implications these principles have for these systems.

First, the principle of empowerment requires that automated decision-making promotes the autonomy and capabilities of vulnerable people. Second, the principle of harm minimisation suggests a protective approach should be adopted in the design and implementation of AI systems, including non-discrimination and reducing algorithmic bias. Third, the principle of transparency requires that AI systems provide meaningful information about their design and the basis for decisions, to enable the public to challenge and seek legal redress for harmful AI decisions.

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207 Ibid.

208 Ibid 157.

209 Ibid 159.

210 Zoe Staines et al, 'Governing Poverty: Compulsory Income Management and Crime in Australia' (2021) 29(4) *Critical Criminology* 745, 747.

D *The Principle of Empowerment*

According to an 'ethics of vulnerability' framework, the aim of governmental interventions is to support and foster autonomy and promote capabilities, rather than increase powerlessness and 'at worst … compound vulnerability or create new forms of pathogenic vulnerability'.[211] Promotion of empowerment could be achieved by 'increasing self-esteem, skill levels [and] financial management' in order to open up options for people rather than constraining them.[212] AI systems properly deployed are good at optimisation and are able to improve coordinative processes between government authorities and vulnerable populations, as well as enhance government service provision to individuals.

In order to promote the dignity and empowerment of people affected by AI systems, the design phase of new technologies should incorporate elements of co-design and consultation with those affected to ensure their needs are taken into account, with multiple feedback loops and adaptation based on the feedback.[213] Further, there should be meaningful community engagement with those affected before, during and after the technology is deployed, and vulnerable populations should be provided with the ability to assess and potentially reject the use of AI systems.[214]

Beyond consulting with affected populations, in order to allow broader public policy participation in the design of AI systems, there needs to be 'input and oversight by stakeholders with both substantive and technological capacity at multiple points over the design and implementation timeline'.[215] Thus, stakeholders with policy and technical expertise, as well as affected populations, would be able to collaboratively provide input about technical choices that have broader policy and political implications. This should be combined with regular periodic reviews by these communities of expertise and lived experience to ensure that AI systems continue to meet broader public policy goals.[216]

E *The Principle of Harm Minimisation*

Where AI systems make errors based on poor design or faulty data, these mistakes are compounded over hundreds of thousands of decisions. The broad-scale and inflexible implementation of deficient technologies has the potential to cause great

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211 Catriona Mackenzie, 'The Importance of Relational Autonomy and Capabilities for an Ethics of Vulnerability' in Catriona Mackenzie, Wendy Rogers and Susan Dodds, *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford University Press, 2013) 33, 40.

212 Henman and Adler (n 198) 150.

213 Carney, 'Artificial Intelligence in Welfare' (n 9).

214 Meredith Whittaker et al, *AI Now Report 2018* (Report, AI Now Institute, December 2018) 22.

215 Deirdre K Mulligan and Kenneth A Bamberger, 'Saving Governance-By-Design' (2018) 106(3) *California Law Review* 697, 772.

216 Ibid.

harm to vulnerable populations. Accordingly, the principle of harm minimisation is a protective approach that seeks to ensure that the design of AI systems is non-discriminatory and free from bias. This principle also considers the impact on vulnerable populations through an AI impact assessment, and ensures a careful approach to rolling out and auditing new technologies.

Despite the promises of efficiency and cost-effectiveness, machine learning algorithms can be trained on datasets that contain human bias,[217] thus resulting in predictions that are tainted with unfair discrimination.[218] For instance, a United States study has shown that facial recognition technologies generate a disproportionate number of false positives up to 10 of 100 times more among African and Asian faces than for Caucasians.[219] As academics at New York University noted, '[g]iven the deep and historical racial biases in the criminal justice system, most law enforcement databases are unlikely to be "appropriately representative"'.[220]

Accordingly, the AHRC has made recommendations to combat algorithmic bias.[221] First, they suggested that the collection and utilisation of more appropriate data to train the machine learning programs will improve accuracy.[222] In particular, more data should be acquired on under-represented minority groups.[223]

Second, the AHRC recommended that data is pre-processed in order to mask protected attributes.[224] This may reduce the risk of discrimination.[225] However, even when racial data is not used as an input, the creation of proxies for race from certain data points is still a fundamental issue when seeking to remove algorithmic bias in this manner.[226]

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217 Australian Human Rights Commission and World Economic Forum, 'Artificial Intelligence: Governance and Leadership' (White Paper, January 2019) 9 ('Artificial Intelligence: Governance and Leadership').

218 Ibid.

219 Natasha Singer and Cade Metz, 'Many Facial-Recognition Systems Are Biased, Says US Study', *New York Times* (online, 19 December 2019) <https://www.nytimes.com/2019/12/19/technology/facial-recognition-bias.html>.

220 Whittaker et al (n 214) 16.

221 'Using Artificial Intelligence to Make Decisions' (n 195) 22–30.

222 Ibid 24–5.

223 Ibid 25.

224 Ibid.

225 Ibid.

226 Issie Lapowsky, 'Crime-Predicting Algorithms May Not Fare Much Better than Untrained Humans', *WIRED* (online, 17 January 2018) <https://www.wired.com/story/crime-predicting-algorithms-may-not-outperform-untrained-humans>.

The principle of harm minimisation also suggests there should be an AI impact assessment for both rule-based and machine learning systems[227] that assesses the benefits, risks and safety of AI from a legal, technical and ethical perspective, as well as consultation with stakeholders affected by the use of those technologies. These assessments would prompt agencies to consider the political consequences of algorithmic design and implementation.

To further minimise harm, in the implementation phase, new technologies should be rolled out in a careful manner, with a human 'in the loop' to provide and maintain oversight at key phases.[228] This should include a testing process and incremental rollout of the technology. The technology should be piloted on a contained sample prior to implementation to ensure that it meets its design criteria. Further, there should be evaluation of the effectiveness and efficiency of the technology once it is deployed. Government agencies should monitor outcomes through regular, periodic audits of a sample of automated decisions to check that the automated technology is working consistently with its design criteria, checking especially for error rates, bias, and unanticipated effects on individuals. There should be periodic independent reviews on the effectiveness, performance, accuracy, and security of automated decisions.

F *The Principle of Transparency*

Government transparency is a democratic ideal based on the concept 'that an informed citizenry is better able to participate in government; thus providing an obligation on government to provide public disclosure of information'.[229]

A major challenge associated with automated decision-making is its opacity. AI-made decisions may be inscrutable due to the complexity and sophistication of the technology, which involves rules that are so numerous, intricate and interdependent that they defy practical inspection.[230] The inherent difficulty in understanding an algorithm is classified as a 'technical black box'.[231]

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227 See Alessandro Mantelero, 'AI and Big Data: A Blueprint for a Human Rights, Social and Ethical Impact Assessment' (2018) 34(4) *Computer Law and Security Review* 754.

228 Richard M Re and Alicia Solow-Niederman, 'Developing Artificially Intelligent Justice' (2019) 22(2) *Stanford Technology Law Review* 242, 282.

229 Chris Draffen and Yee-Fui Ng, 'Foreign Agent Registration Schemes in Australia and the United States: The Scope, Risks and Limitations of Transparency' (2020) 43(4) *University of New South Wales Law Journal* 1101, 1106–7, citing Daniel J Metcalfe, 'The History of Government Transparency' in Padideh Ala'i and Robert G Vaughn (eds), *Research Handbook on Transparency* (Edward Elgar, 2014) 247, 249.

230 Selbst and Barocas (n 194) 1094.

231 Han-Wei Liu, Ching-Fu Lin and Yu-Jie Chen, 'Beyond *State v Loomis*: Artificial Intelligence, Government Algorithmization and Accountability' (2019) 27(2) *International Journal of Law and Information Technology* 122, 135.

Achieving algorithmic transparency would require clarity on the 'fact, extent and operation of automation in decision-making'.[232] The lack of awareness by individuals subject to Robodebt notices that the decisions were automated meant that they were less likely to question the determinations issued. In this vein, art 15 of the *General Data Protection Regulation* requires data controllers to provide data subjects with information about the existence of automated decision-making, 'meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject'.[233] However, commentators have debated the scope of this 'right to explanation', including what might constitute meaningful information to satisfy this disclosure requirement.[234]

There are several types of information that may provide meaningful transparency in the context of AI systems. The first relates to whether the explanation is about individualised reasons for the specific decision, for example 'the weighting of features, machine-defined case-specific decision rules, information about reference or profile groups'.[235] Alternatively, this relates to the general operation of the AI system (or 'system functionality') — that is, 'the logic, significance, envisaged consequences, and general functionality' of a system.[236] These categories of information may overlap, particularly in machine learning systems, where machine-defined case-specific rules form part of the model.[237] It is also important to consider the temporal aspect of an explanation, that is, whether the explanation should be provided — 'before or after automated decision-making'.[238]

A fulsome explanation that would satisfy the dictates of transparency would require all elements of disclosure, that is, both individualised information about the particular decision and generalised information about the operation of the AI system. Further, where machine learning is utilised, there should be

> accurate documentation of the decision logic, including the principles behind the machine learning model, training and testing processes; and a statement of

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232 Ng et al (n 15) 1052. See also Toby Walsh et al, *Closer to the Machine: Technical, Social, and Legal Aspects of AI* (Report, Office of the Victorian Information Commissioner, August 2019) 50.

233 *Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation)* [2016] OJ L 119/1, art 15(1)(h).

234 Andrew D Selbst and Julia Powles, 'Meaningful Information and the Right to Explanation' (2017) 7(4) *International Data Privacy Law* 233, 239.

235 Sandra Wachter, Brent Mittelstadt, and Luciano Floridi, 'Why a Right to Explanation of Automated Decision-Making Does Not Exist in the General Data Protection Regulation' (2017) 7(2) *International Data Privacy Law* 76, 78.

236 Ibid.

237 Selbst and Powles (n 234).

238 Ibid 238.

> reasons should be logged for all predictions or decisions at the point in time that they are made.[239]

Providing individualised reasons for automated decisions fulfils dignitary goals of recognising the personhood and autonomy of those affected by automated decisions, particularly vulnerable people.[240] In the context of vulnerable populations, there should be a user friendly non-technical explanation for the reasons for the decision that is 'comprehensible by a lay person'.[241] Individualised reasons also fulfil a justificatory purpose, as these provide the necessary information and evidence to enable affected individuals to challenge government decisions, which will in turn ensure that public sector decisions are made based on 'legally acceptable reasoning and are legitimized by acceptable process or oversight'.[242]

On the other hand, systemic or aggregate transparency about the operation of AI systems fulfils a different goal, which is an instrumental one of ensuring that automated decisions are accurate, rational and non-discriminatory.[243] The ability to scrutinise any faults in AI systems will enable more accountable government decision-making and lead to corrections of algorithmic design.[244] The provision of both individualised and generalised disclosure for automated decisions for both technical and non-technical audiences will thus enable government decision-making to be subject to scrutiny by a wider range of stakeholders.[245]

In temporal terms, at the very outset of the development of technology, there needs to be formal openness about the code itself, as well as publicity about the political nature of the questions resolved by design choices, which can often by obscured by the translation of rules into code.[246] Following the automated decision, there should also be *ex post* disclosure to affected individuals that the decision has been automated, including advising them of their potential avenues of challenge. This is particularly important for vulnerable populations, who may not otherwise understand how they may challenge an automated decision.

In short, there is a need for continued vigilance in evaluating the impact of new technologies, particularly on vulnerable populations. Our guiding principles provide a basis for safeguarding the rights of vulnerable populations through *empowerment*

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239 Ng et al (n 15) 1075.

240 Margot E Kaminski, 'Binary Governance: Lessons from the GDPR's Approach to Algorithmic Accountability' (2019) 92(1) *Southern California Law Review* 1529, 1534.

241 *AHRC Final Report* (n 119) 62.

242 Kaminski (n 240) 1534.

243 Ibid.

244 Ibid 1578.

245 Danielle Keats Citron, 'Technological Due Process' (2008) 85(6) *Washington University Law Review* 1249, 1284.

246 Mulligan and Bamberger (n 191) 772.

by incorporating their needs and feedback throughout the AI process, *harm minimisation* by ensuring that AI decisions are non-discriminatory and free of algorithmic bias, implemented carefully and regularly audited, and *transparency*, which allows people to understand the basis of AI decisions and enables legal challenge of harmful AI decisions.

VI Conclusion

It is undeniable that whatever our concerns and fears, the AI horse has left its computer-generated stable and bolted into the centre of our lives. Increasingly, all manner of decisions are made by algorithms, which reach conclusions — or at the very least proposals — which are rarely questioned in practice.[247] Given the reality of the 'robot century', it is redundant to question the overall benefits AI may bring — its potential to improve predictability, consistency and address the well-known (and easily, in this context, forgotten) shortcomings in human decision-making, in addition to its obvious benefits in efficiency. Thus, it is important to recognise the abundance of opportunities presented by technological developments to streamline and enhance the efficiency and consistency of government decision-making and service delivery. Technology has significantly contributed to the nature and practice of the welfare state,[248] as well as the surveillance and punishment of crime.

However, as this article has shown, the use of automated decision-making in social security and criminal justice, with its 'technocratic predictive logic',[249] risks perpetuating, intensifying and institutionalising discrimination and bias by adopting blanket rules over sections of the population that are particularly vulnerable. As Zoe Staines et al explain:

> [W]hile the social security system increasingly recoils and punishes, seeking to push its dependents into waged labor, the criminal justice system intensifies its focus on the poor and unruly and simultaneously ignores the infractions of the powerful.[250]

It is true that many of the problems arising from the use of AI in decision-making have been recognised by governments in recent times. The problem of algorithmic bias, for example, has been carefully outlined in a 2020 publication by the AHRC, which more recently again reported on human rights and technology.[251] Chesterman

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247 Simon Chesterman, 'Artificial Intelligence and the Problem of Autonomy' (2020) 1(2) *Notre Dame Journal on Emerging Technologies* 210, 239–40.

248 Henman and Adler (n 198) 139.

249 Paul Henman, 'Targeted! Population Segmentation, Electronic Surveillance and Governing the Unemployed in Australia' (2004) 19(2) *International Sociology* 173, 173.

250 Staines et al (n 210) 755.

251 *Using Artificial Intelligence to Make Decisions* (n 195); *AHRC Final Report* (n 119).

goes further, arguing that the 'past few years have seen a proliferation of guides, frameworks and principles'.[252] These include soft norms developed by Singapore, Australia and New Zealand, texts by the European Union, the G7, and the OECD, as well as a set of principles known as the Rome Call for AI Ethics, endorsed by the Pope.[253]

Given all the soft law-generating activity, one might expect greater legal recognition of the necessity to ensure that decisions made by AI are consistent with broad principles such as transparency, accountability, non-discrimination and privacy, not to mention the existing law. It is arguable that, in fact, there are some signs the opposite may occur; for example, in a concerning decision in *Pintarich v Deputy Commissioner of Taxation*,[254] the Full Federal Court raised a fundamental question of whether decisions made by automated systems are decisions at all, and hence within the scope of judicial review.[255]

In this context, it is important to ensure not just that government pays lip service to AI frameworks, but that it pays real respect to them in daily practice. It is easy to be distracted by the superficial glamour and cost-saving potential of a newly developed algorithm, particularly when slickly presented by its proponents, and when the career advancement of senior public servants hinges on its swift implementation. The vulnerable, in such a game, are easy targets. For this reason, our article has focussed particularly on the impact of automated decision-making on the vulnerable, arguing that given the government's significant coercive powers, it is imperative to ensure that new technologies protect individual rights. This article has proposed a guiding framework on issues that government agencies should consider in the design, implementation and evaluation of new technologies to protect vulnerable populations. These safeguards will ensure that the design and implementation of AI in government promote empowerment of vulnerable populations, minimise harm, and are transparent, thus enabling legal redress.

A consistent, considered approach to AI will enable the criminal justice system and the Commonwealth government to 'reap the benefits of new technologies while minimising its attendant risks, as well as protect the individual rights and freedoms that are fundamental to our democracy'.[256] We have allowed the Trojan Horse of AI within our gates; it is important that the horse be tamed and put to use, rather than trample on the rights of the vulnerable, potentially running amok.

252 Chesterman, 'The Robot Century' (n 1).

253 Ibid.

254 (2018) 262 FCR 41.

255 Ibid. See also Ng and O'Sullivan (n 18) 27.

256 Ng et al (n 15) 1077.

*Anthony Gray**

THE DEFENCE OF SUPERIOR ORDERS (AND RELATED DEFENCES) IN AUSTRALIAN MILITARY LAW

Abstract

A soldier ordered by a commanding officer to commit acts which may be unlawful is in an invidious position. If they fail to obey the command, they are liable to be convicted of a serious crime. If they obey, but their actions are subsequently found to be unlawful, they are also liable to be convicted of a serious crime. Not surprisingly, the law has struggled to grapple with this conundrum, at times protecting the obedient soldier, at other times punishing them. The relevant provision of the *Rome Statute of the International Criminal Court* ('*Rome Statute*'), focusing on whether the order was 'manifestly unlawful', represents an uneasy compromise. This article charts the development of this concept in international law and its reception into Australian domestic law. It also critiques the doctrine for failing to reflect the realities of an obedience imperative within military ranks, its uncertain meaning and its embrace of negligence to effectively gauge criminality, before proposing improvements in this difficult area. The focus should be on a reasonable soldier, to take specific account of the peculiarities of a military environment, rather than a reasonable person. Specifically, this article proposes necessary clarification of the meaning of 'manifest illegality', with a specific list of factors to be considered. No other article of which the author is aware attempts such a list.

I Introduction

A paradox of military law relates to the position of a member of the defence force (whom I will refer to for convenience as a 'soldier') ordered to engage in activity that is, or may be, unlawful. The context in which such an order might be given will often be challenging, involving active combat, situations where time is of the essence, and situations of great peril. Soldiers will often be required to make decisions quickly, and with incomplete or misleading information available to them. A soldier faced with a potentially unlawful order is in an extremely difficult situation. As will be seen, failure to comply with an order of a superior officer is attended with heavy criminal sanction in Australian law. There is an essential

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expectation in this context that commands will be obeyed, and, for some, the quid pro quo of that obedience expectation provides legal impunity to the one who obeys.[1]

On the other hand, as the law now stands, if the soldier does as instructed, their conduct may amount to a war crime or other crime against international law, for which they may be held personally liable.[2] While international criminal law recognises possible criminal liability of superior officers for conduct of those whom they command, this is in addition to, not in lieu of, personal liability among those who committed the conduct in question.[3] Subordinate soldiers in this predicament who are subsequently charged with an offence may raise the defence commonly known as 'superior orders' in seeking to explain, excuse, and/or justify their act by the fact they were ordered by their superior officer to commit it.

It is also potentially implicated by the findings of the *Afghanistan Inquiry Report* prepared by the Inspector-General of the Australian Defence Force ('*Brereton Report*').[4] The *Brereton Report* 'found that there is credible information of 23 incidents in which one or more non-combatants or persons *hors-de-combat*[5] were unlawfully killed by or at the direction of members of the Special Operations Task Group', such as to suggest the war crime of murder may have been committed.[6] The

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1 APV Rogers, *Law on the Battlefield* (Manchester University Press, 1996) 143 who, after describing expectations of unquestioning obedience, adds '[i]n return for this unswerving obedience the soldier needs the protection of the law so that he does not afterwards risk his neck for having obeyed an order which later turns out to be unlawful'.

2 This stark choice was summarised by Albert Venn Dicey, *An Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, 1959) 303. Dicey stated:

> the position of a soldier is in theory and may be in practice a difficult one. He may, as it has been well said, be liable to be shot by a court-martial if he disobeys an order, and to be hanged by a judge and jury if he obeys it.

Further complications may arise in that, if a subordinate obeys an order, for example to kill another, their actions would be judged by a civil jury. However, if the subordinate disobeys the order, their actions would be judged by a court-martial. It is James Stephen's opinion that the jury and the court martial may differ regarding what is 'reasonable necessity' and, ultimately, the lawfulness of such an order: James Fitzjames Stephen, *A History of the Criminal Law of England* (Macmillan, 1883) 205.

3 For further information on the theory of command responsibility, see: Guénaël Mettraux, *The Law of Command Responsibility* (Oxford University Press, 2009); *Criminal Code Act 1995* (Cth) s 268.115.

4 Inspector-General of the Australian Defence Force, *Afghanistan Inquiry Report* (Report, 10 November 2020) ('*Brereton Report*').

5 The ICRC International Humanitarian Law Database — Customary International Humanitarian Law rule 47 defines hors de combat as: a person who (a) is in the power of an adverse party; (b) defenceless due to unconsciousness, illness or wounds; or (c) clearly expresses intent to surrender; provided they are non-hostile and do not attempt to escape: 'Rules', *International Humanitarian Law Databases* (Web Page) <https://ihl-databases.icrc.org/en/customary-ihl/v1>.

6 *Brereton Report* (n 4) 28–9.

Brereton Report also found evidence that junior soldiers may have been ordered by patrol commanders to shoot a prisoner to 'achieve the soldier's first kill', a practice known as 'blooding'.[7] The *Brereton Report* suggested these incidents were contrary to Law of Armed Conflict.[8]

The *Brereton Report* suggested why soldiers have complied with these orders:

> Subordinates complied for a number of reasons. First, to a junior Special Air Service Regiment trooper, the patrol commander is a 'demigod', and one who can make or break the career of a trooper, who is trained to obey and to implement their superior commander's intent. Secondly, to such a trooper, who has invested a great deal in gaining entry into Special Air Service Regiment, the prospect of being characterised as a 'lemon' and not doing what was expected of them was a terrible one, which could jeopardise everything for which they had worked.[9]

This extract reflects a strong culture of obedience within defence ranks, and the difficult, if not impossible, choices faced by a junior soldier when ordered to do something illegal.

This article is structured as follows. Part II considers the historical development of the law relating to the defence of superior orders internationally, and its current status in Australian and international law. One complication is that the use of the phrase 'defence of superior orders' can suggest there is one discrete defence. The reality is that, in this area of law, there are three possible defences applicable where a soldier obeys an order and thereby commits a crime. The first is the defence of superior orders strictly so-called. The other defences are duress and mistake (of fact or law). Each defence is separately recognised in relevant international instruments, which will be the subject of further discussion. The difficulty is that, depending on the factual scenario, any, or several of these defences might be applicable.[10] There are some exceptional circumstances where a version of the defence is not available, but others may still be relied upon.[11] To keep the discussion manageable, this article will focus primarily on the defence of superior orders per se, on the assumption that it is a discrete defence on its own, primarily because it is recognised as a distinct

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7 Ibid 29.

8 Ibid.

9 Ibid 31 (emphasis omitted).

10 David Daube, *The Defense of Superior Orders in Roman Law* (Clarendon Press, 1956) 6–7: '[d]uress plays a part in many cases of superior orders, so much so that it is difficult to keep apart this problem … Similarly … he who follows superior orders commonly acts from error …'. This leads some to conclude that there is no defence of superior orders per se; rather it is manifestation of a mistake or duress defence: Yoram Dinstein, *The Defence of 'Obedience to Superior Orders' in International Law* (Oxford University Press, 2012) 88.

11 For example, the defence of superior orders cannot apply to genocide or crimes against humanity.

defence in international law and Australian law. However, the reality is that in many of these factual situations, other defences like duress and mistake of fact or law may also apply. For example, the fact that an inferior officer was ordered to do something by a superior officer may have placed the inferior officer under 'duress'. In acting out the order, which turned out to be unlawful, the ordered soldier may have been acting in a situation recognised by the law as a 'mistake'. The defence of superior orders may also arise in such a situation. It is thus necessary to discuss each defence, but keeping in line with the scope of this article, discussion of duress and mistake will be brief.

Of course, there is a theme uniting these defences, this being 'exonerating conditions'.[12] In the context where a soldier has prima facie committed an offence, and raises a defence, this raises the issue of *culpability*. This concept has significant historical support. David Daube notes both Auctor and Cicero ascribe the defence of superior orders to the issue of exoneration.[13] Auctor notes the doctrine relates to shifting of *culpa*, or *causa*,[14] important principles of Roman law. This is referred to in *De Regulis* where it is stated 'he causes loss who orders it to be caused; but he is without blame, culpa, who is under the necessity of obeying'.[15] Culpability is fundamental to criminal liability.[16] The High Court of Australia ('High Court') has acknowledged this, favouring 'closer correlation between moral culpability and legal responsibility'.[17]

In the defence of superior orders case, the soldier argues they are not culpable, because they were following directions of a superior, and this should exonerate them from criminality because it would not be reasonable to convict them, as they simply complied with their legal obligations to obey an order they did not believe

12 This is the essence of a defence in criminal law: Kenneth Campbell, 'Offence and Defence' in H Dennis (ed), *Criminal Law and Justice: Essays from the W G Hart Workshop* (Sweet and Maxwell, 1987) 73, 73.

13 Daube (n 10) 9.

14 As opposed to shifting the crime itself, favoured by Cicero: ibid 9–10.

15 Ibid 23.

16 'Crime does and should mean condemnation and no court should have to pass that judgment unless it can declare the defendant's act was *culpable*. This is too fundamental to be compromised': American Law Institute, *Model Penal Code* (1962) § 2.05 cmt (1) (emphasis added) ('*Model Penal Code* (US)') ; *R v Martineau* [1990] 2 SCR 633, 645 (Lamer CJ, for Dickson CJ, Wilson Gonthier and Cory JJ). See also *Callaghan v The Queen* (1952) 87 CLR 115, 121 (Dixon CJ, Webb, Fullagar and Kitto JJ) ('*Callaghan*'): 'fault so blameworthy as to be punishable as a crime'.

17 *Wilson v The Queen* (1992) 174 CLR 313, 327 (Mason CJ, Toohey, Gaudron and McHugh JJ) ('*Wilson*'). See also *Miller v The Queen* (2016) 259 CLR 380, 419 (Gageler J) ('*Miller*'); *Clayton v The Queen* (2006) 231 ALR 500, 522 (Kirby J dissenting) ('*Clayton*').

was unlawful.[18] In the case of the duress defence, the soldier argues they are not culpable, because they effectively had no choice other than to do what they did.[19] It can be seen how this defence could overlap with the defence of superior orders, because the fact they 'effectively had no choice' might reflect that a superior had ordered them to do what they did, and they were liable to commit a crime if they refused, though it can clearly also arise in other factual scenarios. If a soldier effectively had no choice other than to do what they did, the argument is they are not culpable, and should not be convicted of an offence. Hypothetically, in the case of mistake of fact or law, the soldier argues they were mistaken as to the factual scenario, believing what they did was justified based on their mistake (e.g., a civilian was an enemy combatant). Alternatively, the soldier argues that they were mistaken as to the legal scenario, believing their superior had a legitimate basis for the order made, though it was subsequently determined they did not. Again, the argument is that the mistake the soldier admittedly made is of such magnitude as to affect their *culpability*. It exonerates what would otherwise be criminal activity.[20]

Part III will highlight deficiencies in existing law, including: recognition of the obedience imperative; weaknesses in the manifest illegality test; and use of negligence as a basis for determining criminality. Part IV suggests reforms that might better balance the competing interests, including greater acknowledgement of peculiarities unique to the military context. This would be manifested by focusing on the reasonable soldier, not the reasonable person. The court could utilise a list of specific factors in considering whether the illegality of an order would have been recognised by a reasonable soldier. The difficulty of regulating this area, given the myriad of scenarios, is acknowledged. Part V concludes the article.

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18 Lydia Ansermet argues the rationale for the defence of superior orders is that 'a defendant unable to ascertain the wrongfulness of his conduct was never *culpable* to begin with': Lydia Ansermet, 'Manifest Illegality and the ICC Superior Orders Defense: *Schuldtheorie* Mistake of Law Doctrine as an Article 33(1)(c) Panacea' (2014) 47(5) *Vanderbilt Journal of Transnational Law* 1425, 1460 (emphasis added).

19 Brian Myers, 'The Right to Kill or the Obligation to Die: The Status of the Defence of Duress following New Zealand's Implementation of the Rome Statute of the International Criminal Court' (2005) 2(2) *New Zealand Yearbook of International Law* 127, 161: 'The fundamental issue lies with whether we believe that an accused that acts under duress is morally blameworthy. If … duress eliminates free choice … it must follow that the accused is not deserving of any criminal conviction'.

20 George P Fletcher, *Rethinking Criminal Law* (Little Brown, 1978) 736–7; Kumaralingam Amirthalingam, 'Ignorance of Law, Criminal Culpability and Moral Innocence: Striking a Balance Between Blame and Excuse' [2002] (July) *Singapore Journal of Legal Studies* 302, 309: 'By evaluating the mistake in terms of its effect on moral blameworthiness … a defence of reasonable mistake or ignorance of law can be justified'.

II Historical Development

A *Period until the End of World War II ('WWII')*

From earliest days, doubt surrounded the legal position of a subordinate directed to implement 'unlawful' commands. At various times, three different positions have been taken. The first is that the individual subordinate soldier has no personal responsibility for such acts (sometimes referred to as *respondeat superior*).[21] A second is the soldier individual is fully personally responsible for such acts (sometimes referred to as *absolute liability*).[22] A middle position acknowledges the possibility the subordinate *could* be personally liable for implementation of such orders, but permits circumstances where a defence is available (for example *non-manifest illegality*).[23] This can operate so the subordinate has no liability at all (ie superior orders acts as a complete defence), or that superior orders are relevant in mitigation of penalty.[24]

In *Keighly v Bell*,[25] Willes J stated:

> a soldier, acting honestly in the discharge of his duty — that is, acting in obedience to the orders of his commanding officers — is not liable for what he does, unless it be shown that the orders were such as were obviously illegal.[26]

In *R v Smith*,[27] the court stated:

> it is monstrous to suppose that a soldier would be protected if he carried out any act that he was ordered to by his superior officer, where the order was grossly illegal. … The second proposition made is that a soldier is only bound to obey lawful orders, and will be responsible if he obeys an order not strictly legal.

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21 The term *respondeat superior* means 'let the master answer', and finds application in vicarious liability, where an employer is sometimes liable for the acts of an employee that cause loss to third parties. However, parallels in a non-military context are inexact. While vicarious liability sometimes makes an employer liable for what an employee did, it does not generally absolve the employee of personal responsibility for what occurred: Lewis Klar, 'Vicarious Liability' in Carolyn Sappideen and Prue Vines (eds), *Fleming's the Law of Torts* (Lawbook, 10th ed, 2011) 438. This contrasts with the way *respondeat superior* has been applied to the military, which *did* absolve subordinates of personal responsibility: Dinstein (n 10) 8.

22 Dinstein (n 10) 8.

23 Ibid.

24 Ibid 8–9.

25 (1866) 4 F & F 763; 176 ER 781.

26 Ibid 800 [805]. See also Frederick Pollock, *The Law of Torts: A Treatise on the Principles of Obligations Arising from Civil Wrongs in the Common Law* (Steven and Sons, 1887) 80.

27 (1900) 10 CTR 773 (Supreme Court).

> That is an extreme proposition which the Court cannot accept … especially in time of war immediate obedience … is required …
>
> I think it is a safe rule to lay down that if a soldier honestly believes he is doing his duty in obeying the commands of his superior officer, and if the orders are not so manifestly illegal that he must or ought to have known that they were unlawful, the private soldier will be protected by the orders of his superior officer.[28]

This concept of 'manifest illegality' would assume importance in subsequent cases.

Despite these precedents, the view developed in international law that it was a good defence for a soldier accused of wrongdoing to demonstrate that they acted pursuant to superior orders. Lassa Oppenheim concluded, '[i]f members of the armed forces commit violations *by order* of their Government, they are not war criminals and may not be punished by the enemy'.[29] Oppenheim wrote a chapter of the *British Manual of Military Law* (1914 and 1917 editions) reflecting this position.[30] In the early 1940s, scholarly opinion was divided about the superior orders defence. Some argued it 'repugnant' to make soldiers personally liable for carrying out orders, because they could not be expected to know international law, and if they refused to obey orders, they risked death.[31] Hans Kelsen argued military discipline risked being undermined if subordinates were expected to question the legality of superior commands.[32] However, others argued the defence of superior orders should be considered, but only as a mitigating factor in sentencing.[33] Oppenheim's book, *International Law, A Treatise: Disputes, War and Neutrality* edited by Hersch Lauterpacht, stated the fact that an officer committed a war crime pursuant to superior orders should not absolve individuals of responsibility.[34] A revised version of article 443 of the *British Manual of Military Law* reflected this position.[35]

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28 Ibid 776.

29 Lassa Francis Oppenheim, *International Law, A Treatise: War and Neutrality* (Longmans, Green, 2nd ed, 1912) vol 2, 310 (emphasis in original).

30 United Kingdom War Office, *British Manual of Military Law* (HM Stationary Officer, 6th ed, 1914) ch 4, art 443.

31 Clyde Eagleton, 'Punishment of War Crimes by the United Nations' (1943) 37(3) *American Journal of International Law* 495, 497.

32 Hans Kelsen, 'Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals' (1943) 31(5) *California Law Review* 530, 556–8.

33 Charles Cheney Hyde, 'Punishment of War Criminals' (1934) 37(1) *Proceedings of the American Society of International Law* 49.

34 Lassa Francis Oppenheim, *International Law, A Treatise: Disputes, War and Neutrality* (Longmans, Green, 6th ed, 1944) 453–4.

35 Jackson Maogoto, 'The Superior Orders Defence: A Game of Musical Chairs and the Jury is Still Out' (2007) 10 *Flinders Journal of Law Reform* 1, 9.

B *Nuremberg Trials*

World War II ('WWII') forced international law to reconsider the defence. The Nuremberg trials involved many leaders within the Nazi regime who raised the defence of superior orders. Article 8 of the articles drawn up for the trials recognised a possible superior orders defence in mitigation of penalty.[36] This places it close to *absolute liability* of subordinates above. The exceptional nature of these trials and the 'most egregious' level of offending concerned is noteworthy.[37] There was significant concern that these individuals should not avoid punishment by claiming they were obeying Hitler's orders.[38] The Nuremberg Military Tribunal ('Tribunal') stated the appropriate test in determining liability of the subordinates was whether 'moral choice was in fact possible'.[39] This choice may be impossible where the subordinate was faced with the choice of being killed or carrying out orders. This principle was applied in *Einsatzgruppen*. The Tribunal held the accused had moral choice, and they were convicted of murder. The Tribunal conflated the superior orders defence with duress, although there is no necessary correlation.[40] The *Einsatzgruppen* judgment related to individuals who executed Nazi opposers.[41] The defendants argued that they were forced, by the threat of their death, to follow orders.[42] These claims were rejected, based on insufficient evidence. There was little evidence those charged had tried to resist orders, they were 'reasoning agents', and the defence of superior orders was unavailable where orders given were 'obviously illegal'.[43]

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36 *Text of the Nürnberg Principles Adopted by the International Law Commission*, UN Doc A/CN.4/L.2 (1950).

37 Mark J Osiel, *Obeying Orders: Atrocity, Military Discipline & the Law of War* (Transaction Publishers, 2002) 42, 83 ('*Obeying Orders*').

38 See Mark WS Hobel, '"So Vast an Area of Legal Irresponsibility"? The Superior Orders Defense and Good Faith Reliance on Advice of Counsel' (2011) 111(3) *Columbia Law Review* 574, 585.

39 *Text of the Nürnberg Principles Adopted by the International Law Commission*, UN Doc A/CN.4/L.2 (1950) principle IV; *France v Goring* [1946] 22 IMT 203. There is debate whether 'moral choice' test complements, or is antagonistic towards, art 8. For a view that it differs from art 8 see Sunita Patel, 'Superior Orders and Detainee Abuse in Iraq' (2007–2008) 5 *New Zealand Yearbook of International Law* 91, 97. For a contrary view see Dinstein (n 10) 150. The 'moral choice' test relates to culpability, not merely sentencing: Sienho Yee, 'The *Erdemovic* Sentencing Judgment: A Questionable Milestone for the International Criminal Tribunal for the Former Yugoslavia' (1997) 26(2) *Georgia Journal of International and Comparative Law* 263, 288.

40 See Andrew Bowers, 'A Concession to Humanity in the Killing of Innocents: Validating the Defences of Duress and Superior Orders in International Law' [2003] (15) *Windsor Review of Legal and Social Issues* 31, 42–6.

41 *Einsatzgruppen Case (United States v Ohlendorf) (Judgment)* (Nuremberg Military Tribunal, Case No 9, 1950) VI 411.

42 Ibid 470, 480.

43 Ibid 470.

Subsequently in the *Hostages Case*, it was determined a subordinate would only be liable where they were either aware of the unlawfulness of orders or should reasonably have been so aware.[44]

C *Subsequently*

In the case of *Kinder*, where the defendant complied with a superior order to kill a Korean civilian, a defence of superior orders failed, because a person of 'ordinary sense and understanding' would have realised the order was unlawful.[45] The United States Air Force Board of Review again emphasised soldiers were reasoning agents who could discern lawful commands from flagrantly unlawful ones.[46] It took into account the soldier's age, education and military experience.[47] A similar approach was adopted in *Calley*, who claimed a superior ordered him to kill unarmed South Vietnamese civilians.[48] On appeal, a majority (Darden CJ dissenting) rejected the argument a lower standard ought to be used by considering whether someone of the 'commonest understanding' would realise the order was illegal.[49] This would take into account the defendant's age, rank, education, training and military experience.[50] Chief Justice Darden expressed concern about convicting an individual of a serious criminal offence based on negligence standards, particularly where obedience to commands was culturally fundamental.[51]

Rule 916(d) of the *Manual for Courts-Martial United States* provides a defence of superior orders, unless the member knew the orders were unlawful or a person of ordinary sense and understanding would have so known.[52] Article 90 of the *Uniform Code of Military Justice* states someone who wilfully refuses to obey a lawful order of a superior commissioned officer shall be punished by death (if during war).[53]

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44 *Hostages Case (United States v Wilhelm List) (Judgment)* (Nuremberg Military Tribunal, Case No 7, 1950) XI 1230, 1271 ('*Hostages Case*').

45 *United States v Kinder*, 14 CMR 742, 777–8 (United States Air Force Board of Review, 1954) ('*Kinder*').

46 Ibid 776.

47 Ibid 774.

48 *United States v Calley*, 46 CMR 1131, 1184 (United States Army Court of Military Review, 1973) ('*Calley CMR*').

49 *United States v Calley*, 22 USCMA 534, 542 (United States Court of Military Appeals, 1973) ('*Calley USCMA*').

50 Ibid.

51 Chief Justice Darden concluded the defence of superior orders 'ought not to be restricted by the concept of a fictional reasonable man so that, regardless of his personal characteristics, an accused judged after the fact may find himself punished for either obedience or disobedience, depending on whether the evidence will support the finding of simple negligence on his part': ibid 545–6. The objective standard has been criticised: Patel (n 39) 119.

52 Joint Service Committee on Military Justice, *Manual for Courts-Martial United States* (2019) pt IV, r 916(d).

53 10 USC § 890 (1950).

Section 2.10 of the *Model Penal Code* (US) provides a defence based on execution of a superior's orders, provided the subordinate was unaware of the illegality.[54] It makes no reference to reasonable persons. Section 2.09 provides a duress defence, including to murder.[55] The *British Military Manual of Military Law* adopts the concept of 'manifestly illegal'.[56]

The *Statute of the International Criminal Tribunal for the Former Yugoslavia* ('*ICTY Statute*') provides the defence of superior orders mitigates punishment, but does not absolve guilt, for criminal behaviour.[57] The defence does not apply if the accused knew or had reason to know orders were unlawful.[58] In *Prosecutor v Erdemovic* ('*Erdemovic*'), the accused pleaded guilty to killing of at least 70 Muslim civilians during the civil war.[59] He claimed he initially refused to kill, but was told that if he did not, he would be murdered.[60] He believed his wife and child would be victimised.[61] Erdemovic knew the orders were illegal and initially refused to carry them out.[62] The contention on appeal was that he had no real choice but to fulfil the illegal orders.[63] Members of the International Criminal Tribunal for the Former Yugoslavia ('International Criminal Tribunal') determined the superior orders defence could be utilised with a duress or mistake defence.[64] A majority adopted the common law position that duress was not a defence to murder,[65] while civil law jurisdictions permit duress to apply.[66] The International Criminal Tribunal took into account Erdemovic's age (23), that he was a low-ranking officer who had chosen to serve in

54 *Model Penal Code* (US) (n 16) § 2.10.

55 Ibid.

56 United Kingdom Defence Ministry, *British Manual of Military Law* (HM Stationary Officer, 12th ed, 1972) 23.156.

57 SC Res 827, UN Doc S/RES/827 (25 May 1993), as amended by SC Res 1877, UN Doc S/RES/1877 (7 July 2009) art 7(4) ('*ICTY Statute*').

58 *Prosecutor v Erdemovic (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-22, 7 October 1997) [15], [50] (Judge Cassese, dissenting on other grounds) ('*Erdemovic Appeal*').

59 Ibid [8].

60 Ibid.

61 Ibid.

62 Ibid.

63 Ibid [12].

64 Ibid [15] (Judge Cassese), [59] (Judge Stephen) (both dissenting on other grounds).

65 Ibid [75], [88] (Judges McDonald and Vohrah). See also: at [12] (Judge Li). Relevant authorities from the United Kingdom include: *DPP for Northern Ireland v Lynch* [1975] AC 653 ('*Lynch*'); *Abbot v The Queen* [1977] AC 755 ('*Abbot*'); *R v Howe* [1987] AC 417 ('*Howe*'); *R v Gotts* [1992] 2 AC 412 ('*Gotts*'). In the related context of the defence of 'necessity', see *R v Dudley* [1884] 14 QBD 273 ('*Dudley*').

66 *Erdemovic Appeal* (n 58) [59] (Judges McDonald and Vohrah). See Suzannah Linton, 'Case Analysis: Reviewing the Case of Dražen Erdemović: Unchartered Waters at the International Criminal Tribunal for the Former Yugoslavia' (1999) 12(1) *Leiden Journal International Law* 251, 258.

a unit because he believed it was not involved in combat, the fact he harboured no animosity towards other ethnicities, his plea of guilty to the offence, his willingness to assist authorities, and the fact he was remorseful.[67] He was jailed for five years.[68]

D *Rome Statute*

The *Rome Statute of the International Criminal Court* ('*Rome Statute*') re-established a superior orders defence, broader than Nuremberg Articles or the *ICTY Statute*.[69] This was a return to the situation prior to WWII.[70] Article 33 states the fact a crime was committed by a person pursuant to a superior order does not generally relieve the person from criminal responsibility, unless:

> (a) The person was under a legal obligation to obey orders of the Government or the superior in question;
>
> (b) The person did not know that the order was unlawful; and
>
> (c) The order was not manifestly unlawful.[71]

Element (b) represents an exception to the general principle that ignorance of the law does not excuse illegal conduct. These requirements are cumulative, meaning for the defence to apply all three elements must exist. The requirement that the act not be 'manifestly unlawful' is not defined, and open to interpretation.[72] The defence of superior orders cannot apply to genocide or crimes against humanity.[73]

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67 *Prosecutor v Erdemovic (Sentencing Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-96-22-T, 5 March 1998) 13–16 ('*Erdemovic Trial*').

68 Ibid 22 [23].

69 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 28 ('*Rome Statute*'); Massimo Scaliotti, 'Defences before the International Criminal Court: Substantive Grounds for Excluding Criminal Responsibility — Part I' (2001) 1(1–2) *International Criminal Law Review* 111, 139.

70 For the position of various delegations see Scaliotti (n 69) 135–42.

71 *Rome Statute* (n 69) art 33.

72 Carmel O'Sullivan, *Killing on Command: The Defence of Superior Orders in Modern Combat* (Palgrave Macmillan, 2016) 52.

73 The division between genocide, crimes against humanity, and war crimes, has been criticised on the basis there is often similarity in gravity of the harm to victims: Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Beck, 2nd ed, 2008) Margin No. 30 [587]. Ziv Bohrer notes some junior officers may be unaware activity amounts to either genocide or a crime against humanity, and it is not fair to bar them from the superior orders defence in some situations: Ziv Bohrer, 'The Superior Orders Defense: A Principal-Agent Analysis' (2012) 41(1) *Georgia Journal of International and Comparative Law* 1, 71.

It is unclear where the burden of proof lies for art 33,[74] and whether it is legal or evidentiary. The way the defence is expressed, in its departure from general rules of liability, suggests the defendant bears at least an evidentiary onus.[75] Arguably the statute is silent as to whether the superior's command was 'avoidable'.[76] There is uncertainty regarding whether this is a mistake of law or fact defence.[77] As a result, it has been criticised.[78]

Further possible defences in this context include art 31(1)(d), regarding actions committed under duress of imminent death or serious injury, where the person acts reasonably and necessarily to avoid the threat.[79] This could apply where the injury intended is not worse than the harm sought to be avoided. This utilitarian requirement has been criticised.[80] This is difficult to apply in a situation like *Erdemovic*, where the accused admitted they killed at least 70, but claimed if they had refused to do so, they would have been killed. In such scenario, art 31(1)(d) would probably not apply as a defence, because it could not be said the intent of the accused in killing was 'less worse' than the danger sought to be avoided. This Article does not specifically exclude murder, which is a point of difference from *Erdemovic*, and the common law.

Article 32(1) provides a defence of mistake of fact, and art 32(2) likewise provides for a defence of mistake of law, if the mistake relates to the mental element required for the crime, or the situation discussed in art 33.[81] Article 30 defines the mental element in terms of intent and knowledge.[82] Intent is defined as where, in relation to conduct, they intend to do the act; and in relation to consequence, means for it to occur or knows it will likely occur.[83] Knowledge means awareness of the existence of certain circumstances.[84]

74 Patel (n 39) 103.

75 Scaliotti (n 69) 125.

76 Ansermet (n 18) 1452.

77 Stanley Yeo argues it is a mistake of law defence: Stanley Yeo, 'Mistakenly Obeying Unlawful Superior Orders' (1993) 5(1) *Bond Law Review* 1, 2. Jeanne Bakker argues it is a mistake of fact defence: Jeanne L Bakker, 'The Defense of Obedience to Superior Orders: The Mens Rea Requirement' (1989) 17(1) *American Journal of Criminal Law* 55, 68–9.

78 See, eg, Dinstein (n 10) xx–xxii.

79 *Rome Statute* (n 69) art 31(1)(d). See generally Bowers (n 40) 37–42.

80 Scaliotti (n 69) 156.

81 *Rome Statute* (n 69) art 32(1)–(2).

82 Ibid art 30.

83 Ibid.

84 Ibid.

E *Australian Law*

The Australian *Manual of Military Law* previously recognised a superior orders defence.[85] Now, s 14 of the *Defence Force Discipline Act 1982* (Cth) provides that a person is not liable to conviction of a service offence because of an act or omission that 'was in execution of the law' or 'was in obedience to' a 'lawful order' or 'an unlawful order that the person did not know, and could not reasonably be expected to have known, was unlawful'.[86] This is similar to the standard 'manifest illegality', as applied by international tribunals.[87] It casts an *evidentiary* onus upon an accused.[88]

Several provisions impose criminal liability upon members of the defence force who fail to carry out a superior's orders. Section 15F establishes an offence for soldier to not use 'utmost exertions' to implement a superior's orders (carrying a maximum penalty of 15 years' imprisonment).[89] A defence of reasonable excuse applies, but carries a legal onus — the soldier must prove the excuse on the balance of probabilities.[90]

Section 27 states a soldier commits an offence if they disobey a lawful command (carrying a maximum penalty of two years' imprisonment).[91] No defence of reasonable excuse exists. The command must be lawful.[92] A similar provision exists regarding lawful direction by a person in command of a ship, aircraft or vehicle and

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85 '[M]embers of the armed forces who commit … violations of the recognized rules of warfare as are ordered by their Government or by their commander are not war criminals': Australian Military Board, *Manual of Military Law* (1941) art 443. This was referred to by Toohey J in *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 683.

86 *Defence Force Discipline Act 1982* (Cth) s 14.

87 This provision does not expressly utilise the concept of 'manifest illegality', but a reading of the Explanatory Memorandum, Defence Force Discipline Bill 1982 (Cth) 36 [134(h)], 35 [131(b)] suggests the contrary. It states eight factors to be taken into account in interpreting s 14. One is that '[t]here is a requirement to maintain consistency with international law and any commitments of Australia to international conventions where the defence of obedience to superior orders is relevant': 37 [134(h)]. It also refers approvingly to British service law that a member cannot be convicted for obeying a superior order 'unless the order was clearly unlawful': 35 [131(b)]. This suggests Parliament intended this provision to have a similar meaning to the concept of 'manifest illegality' that had by then been accepted in international law.

88 *Defence Force Discipline Act 1982* (Cth) s 10: *Criminal Code Act 1995* (Cth) s 13.3.

89 *Defence Force Discipline Act 1982* (Cth) s 15F(1).

90 Ibid s 15F(2).

91 Ibid s 27(1).

92 Ibid s 27(1)(a).

pertains to when the person ordered does not comply.[93] A defence of reasonable excuse applies, carrying a *legal* onus.[94]

Division 268 of the *Criminal Code Act 1995* (Cth) implements the *Rome Statute*.[95] Section 268.116 provides a defence of superior orders.[96] It does not apply to genocide or crimes against humanity.[97] It potentially applies to war crimes.[98] The defence is available if:

(a) the war crime was committed pursuant to a superior's order;

(b) the person was under legal obligation to obey;

(c) they did not know the order was unlawful;[99] and

(d) it was not manifestly unlawful.[100]

Consider (c) and (d) in relation to the *Brereton Report*. Firstly, the report alleges an individual murdered another in circumstances amounting to a war crime, and they placed material on the deceased's body to make it appear they were an armed enemy combatant.[101] Of course, if the person were such combatant, the killing would not be a war crime. The suggestion is the person was *not* an enemy combatant, but the soldier who conducted the killing 'staged' the scene to make it look like it.[102] These allegations have not been tested but, if proven true, are an example where the defence of superior orders could not apply. This is because the soldier's

93 Ibid s 28(1).

94 Ibid s 28(3). It is an offence for a defence force member to fail to comply with a lawful general order, unless they can show they neither knew of, nor could reasonably have known of, the existence of the order: s 29.

95 *Criminal Code Act 1995* (Cth) div 268; Justice Paul Brereton, 'The International Law of Armed Conflict: The Australian Application' (2021) 27 *James Cook University Law Review* 1, 25.

96 Ibid s 268.116.

97 See ibid s 268.116(1). 'Crimes against humanity', which includes the concept of 'other inhumane acts', is broad and uncertain: Brad Copelin, 'Defending the Indefensible: The Defence of Superior Orders for War Crimes' (2009) 6(1) *Australian Army Journal* 37, 42.

98 *Criminal Code Act 1995* (Cth) s 268.116(3).

99 Clearly from this wording Parliament does not intend guilty knowledge to be an element of crimes for which s 268.116 could operate as a defence, because, if it did, requirement (c) would be superfluous. The *Criminal Code Act 1995* (Cth) s 5.2 defines the fault element of intent to mean intention to engage in conduct, intention with respect to circumstances that are believed to exist or believed will exist, and intention as to result. Knowledge of unlawfulness is unnecessary.

100 *Criminal Code Act 1995* (Cth) s 268.116(3).

101 *Brereton Report* (n 4) 73.

102 Ibid.

behaviour, in staging the scene to make the deceased appear to be a combatant, suggests knowledge their actions were illegal. Even if the soldier argued they were ordered by superiors to 'stage' the victim as a combatant, proving element (d) would be difficult. The *Brereton Report* suggests possible improper behaviour in the use of unapproved ammunition by soldiers.[103] However, if ordered by a superior, it is doubtful it would be a war crime, depending on the interpretation of s 268.57 of the *Criminal Code Act 1995* (Cth).[104] This may be an example of an order not manifestly unlawful.

The accused bears an evidentiary burden regarding the above elements. They must produce some evidence that each element exists, but not on the balance of probabilities. The command responsibility doctrine, where superior officers may sometimes be held liable for misdeeds of subordinates, appears in s 268.115 of the *Criminal Code Act 1995* (Cth).[105] This does not necessarily impact on subordinate liability, since both commander and subordinate may face legal liability over one event.

Division 268 does not specifically implement *Rome Statute* provisions on duress and mistake of law. This may be because it deals with many situations, including international law and other criminal offences, and the fact the *Criminal Code Act 1995* (Cth) already generally provided for these defences, prior to the insertion of div 268.[106] Section 10.2 of the *Criminal Code 1995* (Cth) provides a general defence of duress. This applies where a person reasonably believes: (a) a threat will be carried out if they do not commit the offence; (b) there is no reasonable way the threat can be dissipated; and (c) the conduct is a reasonable response to the threat.[107] Mistake of fact, not law, is a legislated defence.[108] It may sometimes overlap with a defence of superior orders.[109] Duress and mistake defences are not, as s 268.116 is, limited to war crimes.[110] The defences do not exclude application to alleged murder.[111]

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103 Ibid 107.

104 *Criminal Code Act 1995* (Cth) s 268.57. This section creates a war crime of using particular kinds of bullets.

105 Ibid s 268.115; Anthony Gray, 'The Command Responsibility Doctrine in Australian Military Law' (2022) 45(3) *University of New South Wales Law Journal* 1251.

106 The general position in the *Criminal Code Act 1995* (Cth) is that, where a defence is raised, the accused bears an evidentiary onus, not legal onus, unless otherwise specified: s 13(3).

107 *Criminal Code Act 1995* (Cth) ss 10.2(2)(a)–(c).

108 Ibid ss 9.1, 9.3.

109 Ibid s 268.116.

110 Of course, both the duress and mistake of fact defence require reasonableness, and this will effectively limit their application to genocide and crimes against humanity.

111 See also *Defence Act 1903* (Cth) pt IIIAAA regarding callouts and superior orders.

Some criminal codes provide a defence of superior orders,[112] but it is not recognised at common law.[113] There is recognition of a duress defence in jurisdictions with criminal codes,[114] and at common law.[115] In summary, Australian law reflects competing principles in international law in requiring soldiers obey orders, but also expecting them (sometimes) to reject unlawful orders.

F *Summary*

The historical record embraces all three theories on the legal position of subordinate officers ordered by superiors to commit unlawful acts. As discussed, they are that the subordinates bear no personal responsibility for actions committed pursuant to the order of a superior, that the subordinate is fully personally responsible for acts committed to such order, and that the subordinate could be personally liable if they carried out orders that were manifestly unlawful. The earliest relevant case law suggests the subordinate soldier is personally liable for carrying out clearly illegal orders. In the early 20th century, soldiers enjoyed immunity from prosecution. The World Wars resulted in pressure to hold those responsible for criminal actions to account. The Nuremberg Articles indicated almost absolute liability of subordinates, with the 'defence' of superior orders only permitting penalty mitigation. The tribunal equated this 'defence' with the concept of duress, unduly narrowing its scope. The *ICTY Statute* was interpreted similarly in *Erdemovic*. Subsequent case law suggested a softening of this position, permitting a defence (going to culpability not just sentence mitigation) where the illegality of the relevant orders was not 'manifest'. Questions subsequently arose regarding application of this test. Some authorities considered whether soldiers knew the illegality of certain actions.[116] This could require evidence of actual knowledge. However, courts favoured a negligence 'should have known' standard.[117] Relatedly, different views appeared

112 *Criminal Code Act 1899* (Qld) s 31(1)(b) provides for a complete defence of compliance with orders that a person is bound by law to obey unless the illegality of the orders is manifest. See also *Criminal Code Act 1924* (Tas) s 38; *Criminal Code Act 1913* (WA) s 31(1)(b).

113 *A v Hayden [No 2]* (1984) 156 CLR 532, 540 (Gibbs CJ), 550 (Mason J), 562 (Murphy J), 581–2 (Brennan J), 593 (Deane J); *White v Director of Military Prosecutions* (2007) 231 CLR 570, 592 (Gummow, Hayne and Crennan JJ) ('*White*').

114 *Criminal Code Act 1899* (Qld) ss 31(1)(c)–(d); *Criminal Code Act 1924* (Tas) s 20; *Criminal Code Act 1913* (WA) ss 32, 23A.

115 *R v Brown* [1968] SASR 467 ('*Brown*'); *R v Smyth* [1963] VR 737 ('*Smyth*').

116 *Model Penal Code* (US) (n 16) § 2.10.

117 *Hostages Case* (n 44) 1271; *Kinder* (n 45) 777–8; *Calley USCMA* (n 49) 1184. Confusingly, some passages within the same judgment appear to refer to both: consider this passage from the *High Command Case (United States v Wilhelm von Leeb) (Judgment)* (Nuremberg Military Tribunals, 1949) XII 74 ('*High Command Case*') stating that a field commander

> cannot be charged under International Law with criminal participation in issuing orders which are not obviously criminal or which they are not shown to have known to be criminal under International Law. Such a commander

regarding whether an objective test, focusing on what a 'reasonable person' would have known, was preferred, or whether a subjective test, focusing on the individual soldier and their characteristics, should be favoured.[118] The relevance of whether the subordinate could have avoided the orders was also raised.[119] The *Rome Statute* softened the Nuremberg position and the *ICTY* approach, at least where the order was not 'manifestly illegal'. It separated the defence of superior orders from other defences, including duress, further departing from the Nuremberg applications. However, it framed duress narrowly, applying a utilitarian lens, and remained silent on its ambit regarding the crime of murder. Australia largely adopted the *Rome Statute*, including the defence of superior orders based on 'manifest illegality'.

III Critique of Current Law

A *Defence of Superior Orders Inadequately Recognises the Special Need for Obedience within the Military*

One criticism of the current law is that it does not fully take into account the unique features of military culture. By failing to adequately take these elements into account, possibly because of a desire to apply civil law principles to the military,[120] the law places soldiers in an unreasonable, if not impossible, situation. One such aspect is the need for strict obedience to superiors within the military as a condition of its functionality.

The need for a disciplined military was recognised in *Grant v Gould*, where Lord Loughborough stated, 'there is nothing so dangerous to the civil establishment of a state, as a licentious and undisciplined army; and every country which has a standing army in it, is guarded and protected by a mutiny act'.[121] Then Chief Justice of the United States Supreme Court John Marshall recognised obedience within the

> cannot be expected to draw fine distinctions and conclusions as to legality in connection with orders issued by his superiors. He has the right to presume, in the absence of specific knowledge to the contrary, that the legality of such orders has been properly determined before their issuance.

The first sentence in this sentence refers to whether an order is 'obviously criminal', suggesting a negligence, ought to have known standard. However, the third sentence apparently contradicts this, stating that the obedient solider is effectively only liable if he has specific knowledge as to the illegality of the orders.

118 *Kinder* (n 45).

119 *High Command Case* (n 117) 27.

120 See Matthew Groves, 'The Civilianisation of Australian Military Law' (2005) 28(2) *University of New South Wales Law Journal* 364.

121 (1792) 2 H BL 69; 126 ER 434, [99] 450.

military as 'indispensably necessary'.[122] Similar sentiments have been expressed by the Canadian Supreme Court.[123]

The High Court has reflected on the particularities of military environments, including systems of hierarchical command;[124] as well as the need for efficiency, good order, and discipline.[125] The High Court recognised soldiers must act with 'due despatch and decisiveness', and that this will be aided where their legal position is clear.[126] Six members noted in *Haskins v Commonwealth*:

> Obedience to lawful command is at the heart of a disciplined and effective defence force. To allow an action … to be brought … against another where that other was acting in obedience to orders … implementing disciplinary decisions that, on their face, were lawful orders would be deeply disruptive of what is a necessary and defining characteristic of the defence force. It would be destructive of discipline because to hold that an action lies would necessarily entail that a subordinate to whom an apparently lawful order was directed must either question and disobey the order, or take the risk of incurring … liability.[127]

The *Law of Land Warfare* partly acknowledges this, stating obedience to lawful orders is expected among military ranks, and it is often unrealistic to expect subordinates to consider the legality of orders given.[128] It acknowledges laws of war are 'controversial'.[129] It may be unrealistic to expect soldiers to disobey superior

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122 See, eg: *Little v Barreme*, 6 US 170, 179 (1804) (Marshall CJ). See also *Martin v Mott*, 25 US 19, 30 (1827) (Story J). It has been stated that:

> The first duty of a soldier is obedience, and without this there can be neither discipline nor efficiency in an army. If every subordinate officer and soldier were at liberty to question the legality of the orders of the commander, and obey them or not as they may consider them valid or invalid … the precious moment for action would be wasted in wordy conflicts between the advocates of conflicting opinions.

Calley USCMA (n 49) 543.

123 See, eg: *R v Finta* [1994] 1 SCR 701, 777, 828–9 ('*Finta*'). See also Cameron Moore, *Crown and Sword: Executive Power and the Use of Force by the Australian Defence Force* (ANU Press, 2017) 125.

124 See, eg: *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 562 (Brennan and Toohey JJ) ('*Re Tracey*'); *White* (n 113) 588 (Gleeson CJ); *Private R v Cowen* (2020) 271 CLR 316, 392 [193]–[194] (Edelman J).

125 *Re Tracey* (n 124) 538 (Mason CJ, Wilson and Dawson JJ).

126 *Groves v Commonwealth* (1982) 150 CLR 113, 133 (Stephen, Mason, Aickin and Wilson JJ).

127 (2011) 244 CLR 22, 47–8 [67] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). To like effect 'this is in reality the only way in which a military unit can effectively operate': *Finta* (n 123) 828.

128 Department of the Army, *The Law of Land Welfare* (FM 27-10, 18 July 1956) para 509(b).

129 Ibid.

orders, because their training leads them to obey unquestioningly.[130] The fact this continues to be a strong influence on the behaviour of soldiers is reflected in the *Brereton Report* which explained allegedly criminal behaviour of some soldiers in Afghanistan in reference to the culture of obedience.[131]

O'Sullivan documents how military training encourages unquestioning obedience, including being separated from civilians, deliberate disorientation, and inculcating values of team loyalty.[132] Their training involves rote learning, to allow them to respond quickly to challenging situations.[133] What soldiers see in training and in combat may dehumanise and desensitise them to brutality. While arguably necessary to make them effective, it can reduce capacity to question the legality of orders.[134] It can also be dangerous for a subordinate to refuse to carry out superior orders.[135] The subordinate may not be in a good position to assess the lawfulness of an order, because they may have limited information. For example, they may not be aware of atrocities elsewhere, or be aware of the 'bigger picture' of particular battles.[136]

Other scholars have reflected on the difficult situation of combat, and that a person's mental faculties may be impeded during such situations, leading them to make

130 Copelin (n 97) 39 who, after acknowledging current army recruitment training regimes convey ADF members need not follow illegal orders, states:

> This appears to directly contradict the basic principles of military discipline. The aim and purpose of all forms of discipline, even the most basic foot drill, is 'to instil instinctive obedience and reaction to words of command'. Essentially, soldiers are trained to do what they are told, when they are told, instinctively, without questioning the command.

This is acknowledged in Explanatory Memorandum, Defence Force Discipline Bill 1982 (Cth). Discussing the defence of superior orders in s 14, the Explanatory Memorandum notes that relevant to its interpretation is 'maintenance of military discipline and effectiveness requires unhesitating compliance with orders': 36 [134(a)].

131 *Brereton Report* (n 4) 31.

132 O'Sullivan (n 72) 80–1.

133 Ibid 84–5.

134 Ibid chs 4–5; Sara Mackmin, 'Why Do Professional Soldiers Commit Acts of Personal Violence that Contravene the Law of Armed Conflict?' (2007) 7(1) *Defence Studies* 65; Peter Rowe, 'Military Misconduct during International Armed Operations: 'Bad Apples' or Systemic Failure?' (2008) 13(2) *Journal of Conflict and Security Law* 165. There are some claims training is changing, and recruits may have increased awareness about possible illegality of superior orders: Rhonda M Wheate and Nial J Wheate, 'Lawful Dissent and the Modern Australian Defence Force' [2003] (160) *Australian Defence Force Journal* 20, 22.

135 Mark J Osiel, 'Obeying Orders: Atrocity, Military Discipline and the Law of War' (1998) 86(5) *California Law Review* 939, 967 ('Atrocity, Military Discipline and the Law of War'); Osiel, *Obeying Orders* (n 37) 64–5.

136 Osiel, 'Atrocity, Military Discipline and the Law of War' (n 135) 967.

sub-optimal decisions.[137] In this context, it is difficult to expect subordinates to determine whether an order they are being given is unlawful, and disobey it.

Thus, any legal test in this context must take into account the peculiar dynamics within military that explains the readiness of soldiers to follow orders without question. O'Sullivan suggests that the standard to be applied to a test of 'manifestly unlawful' should be that of a reasonable soldier, not a reasonable person.[138] This takes account of the special features of the military environment in its assessment of 'reasonableness'. O'Sullivan also states how military culture makes it less likely a soldier will disobey a superior's orders, so the application of a reasonable person standard in terms of disobedience is unfair.[139]

In Part IV, I outline how the law might best account for these unusual features.

B *'Manifest Unlawfulness' in the Context of the Defence of Superior Orders is Problematic*

This test is vague.[140] It is not defined in the *Rome Statute*, and liable to interpretations. It 'lacks any discernible judicial direction'.[141] At least two aspects create uncertainty: (1) the meaning of 'manifest unlawfulness'; and (2) the practical ability of a subordinate to know whether an order is unlawful. A commonly cited explanation of 'manifest unlawfulness' is one that

> should fly like a black flag above a given order, as a warning reading 'Prohibited!' Not mere formal illegality, hidden or half-hidden, not the kind of illegality discernible only to the eyes of legal experts, but a flagrant and manifest breach of the law, certain and necessary illegality appearing on the face of the order itself; the clearly criminal character of the order or of the acts ordered, an illegality clearly visible and repulsive to heart, provided the eye is not blind and the heart is not stony and corrupt — that is the extent of 'manifest illegality' required to

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137 Richard A Gabriel, *No More Heroes: Madness and Psychiatry in War* (Hill & Wang, 1987) 142; Osiel, *Obeying Orders* (n 37) 53. Osiel adds 'law's promise to prevent atrocity becomes chimeral if it refuses to confront the psychological reality and the moral reorientation of the battlefield': 162–3.

138 O'Sullivan (n 72) 75–6.

139 Ibid 166:

> the law's presumption that the reasonable person will identify and disobey an illegal order does not match the behaviour of the average person in practice. The soldier is even more likely to obey than the average person. Accordingly, soldiers are more prone to obedience than the law recognises.

the legal standard of 'reasonableness' is based upon the presumption that the reasonable person will identify and disobey a clearly illegal order. There is a disparity between the legal ideology and behaviour in practice and this disparity is substantially more pronounced for the reasonable soldier: at 173–4.

140 Osiel, 'Atrocity, Military Discipline and the Law of War' (n 135) 969–70; Osiel, *Obeying Orders* (n 37) 71–2.

141 Samuel White, 'A Shield for the Tip of the Spear' (2021) 49(2) *Federal Law Review* 210, 224.

> release a soldier from a duty of obedience and make him criminally responsible for the acts.[142]

This passage reflects two points of uncertainty. First, it is not clear in international law whether the soldier must know the order is illegal (suggested by the above test) to establish manifest illegality, or whether it is sufficient they *ought* to have known it (suggested by *Finta*, *Calley* and *Kinder*). The *Rome Statute* expressly distinguishes whether a person knows of the illegality from questions of manifest illegality.[143]

Elsewhere, courts interpreting manifest illegality have generally settled upon an objective standard familiar in non-criminal law — whether a reasonable person would have been aware of the illegality.[144] It reflects difficulties that would otherwise exist with a purely subjective view. It is difficult to prove what another person knew. Thus, courts have permitted an inference that a person knew, where an 'ordinary person' would have known.[145] I will discuss the difficulties with the use of negligence here presently. For now, the point is that courts have reached conflicting positions on whether it is necessary the accused know of the illegality, or whether it is sufficient they ought to have known.

Second, reference to 'average person' is unclear — is this an average *person* or an average *soldier*?[146] What, if any, relevance does the particular soldier's characteristics have, in deciding? Some argued that the subjective characteristics of the soldier, including experience, training, rank and age are relevant.[147]

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142 *Attorney-General of the Government of Israel v Eichmann*, 36 ILR 275, 277 (Supreme Court of Israel, 1962), cited in Samuel White (n 141) 225; *Finta* (n 123) 834 (Cory J for Gonthier and Major JJ, Lamer CJ agreeing at 818): 'one that offends the conscience of every reasonable, right-thinking person; it must be an order which is obviously and flagrantly wrong. The order cannot be in a grey area or be merely questionable'.

143 *Rome Statute* (n 69) art 33(1)(b)–(c).

144 *The Queen v Brocklebank* (1996) CMAC 383, 51–2 (Weiler JA).

145 Dinstein (n 10) 29: 'the law contrives an objective test which will facilitate the task of ascertaining his subjective knowledge'.

146 Samuel White (n 141) 225.

147 Monu Bedi, 'Entrapped: A Reconceptualization of the Obedience to Orders Defense' (2014) 98(6) *Minnesota Law Review* 2103, 2129. Yeo (n 77) 17 suggested the following factors should be taken into account:

(a) the relative ranks of the superior and the recipient of the order;
(b) the age; rank, experience, intelligence and training of the subordinate;
(c) whether the subordinate had good grounds to consider the order lawful, and whether he or she might consider that the superior had such grounds of which he or she was unaware;
(d) whether the subordinate had time to clarify in his or her own mind, given the circumstances, whether the order was unlawful; and
(e) whether there was a situation of emergency at the time when the order was given.

The majority in *Finta* (n 123) 838 referred to rank as relevant. Paul Eden rejected an objective test in such circumstances: Paul Eden, 'Criminal Liability and the Defence of Superior Orders' (1991) 108(4) *South African Law Journal* 640, 653–4.

Mark Osiel argued that the 'manifest unlawfulness' test might have unintended consequences.[148] Sometimes subordinates must be able to assess a given situation carefully, including understanding likely consequences of actions, in determining their legality.[149] However, the manifest illegality doctrine discourages subordinates from undertaking this enquiry, encouraging them to simply obey orders lawful on their face.[150]

It is argued that 'discoverability' of illegality is relevant — whether a person in the subordinate's position would have been put on notice to investigate possible illegality, how easy it would have been for them to have discovered it, and their awareness of its likely harm to others.[151] Whether the situation was emergency or routine might be relevant.[152] However, the law does not currently expressly refer to such factors, so courts might utilise them or not.

It is unclear whether all orders to commit war crimes are 'manifestly unlawful', or whether behaviour needs to reach levels of gross immorality.[153] Some argued whether something is a war crime is sometimes contentious.[154] One example is s 268.57 of the *Criminal Code Act 1995* (Cth), involving the use of prohibited bullets (maximum 25 years' imprisonment).[155] Another relates to s 268.58, 'outrage to personal dignity' (maximum 17 years' imprisonment).[156] Section 268.35 creates a crime of attacking civilians not directly involved in hostilities (maximum imprisonment for life).[157] Section 268.40 creates a war crime of killing or injuring a person *hors de combat* within international law.[158] Section 268.38 creates a war crime of launching an attack which will knowingly cause incidental death or injury to civilians, where they know that will be 'excessive' given the 'concrete and direct military advantage' expected.[159]

148 Osiel, 'Atrocity, Military Discipline and the Law of War' (n 135) 971.

149 Ibid.

150 Ibid.

151 Ansermet (n 18) 1458–9.

152 Bohrer (n 73) 53.

153 See ibid 15.

154 See, eg, Martha Minow, 'Living Up to Rules: Holding Soldiers Responsible for Abusive Conduct and the Dilemma of the Superior Orders Defence' (2007) 52(1) *McGill Law Journal* 1, 9: 'Sorting out lawful military orders from unlawful ones is difficult under the best of circumstances.' See also Osiel, 'Atrocity, Military Discipline and the Law of War' (n 135) 978: 'Many key issues in the law of armed conflict remain unclear, as all students of the subject acknowledge.' Cf the dissenting opinion of La Forest J (L'Heureux-Dube and McLachlin JJ agreeing at 876) in *Finta* (n 123) 730.

155 *Criminal Code Act 1995* (Cth) s 268.57.

156 Ibid s 268.58.

157 Ibid s 268.35.

158 Ibid s 268.40.

159 Ibid s 268.38.

Subordinates may be unclear whether bullets are prohibited,[160] and whether activity will outrage a victim's personal dignity.[161] A soldier may not know whether targets are civilians, or whether a person falls within the *hors de combat* definition. *Protocol I* of the *Geneva Conventions* refers, inter alia, to whether a person has 'clearly expressed an intention to surrender' or is 'incapable of defending himself [or herself]'.[162] Given an international conflict and language differences, it may be unclear whether a person expressed intention to surrender. A soldier may not know whether a person can defend themselves, whether they are *hors de combat*, and thus whether killing them would amount to a war crime. A soldier may not have information to determine whether incidental death/injury to civilians will outweigh expected military advantage or know the latter.

The asymmetrical nature of modern warfare exacerbates this.[163] Sometimes, activities that might otherwise be war crimes might be 'reprisals',[164] about which the subordinate may be unaware.[165] Soldiers are often not well trained in the obedience to orders defence, and the standards that courts use to assess their conduct.[166] Alternative tests are available.[167] Arguments about the uncertain nature of 'manifest illegality' are reinforced in empirical work involving military recruits. Individuals were asked how they would define an unlawful order. Of those surveyed, 27% said they would refer to their personal views of immorality and humanity; 30% said they would do so based on common sense, experience and instinct.[168] Such yardsticks are subjective, and a questionable basis of determining criminality of acts. In summary,

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160 Charles Garraway, 'Superior Orders and the International Criminal Court: Justice Delivered or Justice Denied' (1999) 81(836) *International Review of the Red Cross* 785, 792–3.

161 *McCall v McDowell*, 15 F Cas 1235, 1241 (1867):

> Between an order plainly legal and one palpably otherwise — particularly in time of war — there is a wide middle ground, where the ultimate legality and propriety of orders depends or may depend upon circumstances and conditions of which it cannot be expected that the inferior is informed or advised.

162 *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) art 41(2).

163 O'Sullivan (n 72) 63.

164 See: Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge University Press, 2005) vol 1, r 145; Andrew D Mitchell, 'Does One Illegality Merit Another? The Law of Belligerent Reprisals in International Law' (2001) 170(1) *Military Law Review* 155.

165 Bakker (n 77) 68–9.

166 Bedi (n 147) 2139–40.

167 For example, Osiel, *Obeying Orders* (n 37) 136 suggested a test whether the defendant's error regarding legality of the orders given to them was reasonable, all relevant facts considered. He suggested that the test is whether 'a reasonable soldier … would have recognised as unlawful': at 326. Osiel suggested a multi-factor test is useful, but does not nominate the factors: at 360.

168 Wheate and Wheate (n 134) 24.

uncertainty attends interpretation of 'manifest illegality'. When the consequences of rule breach here include significant penalty, this is unsatisfactory.

C *Use of Negligence to Determine Criminal Liability Problematic*

Under current laws, soldiers can be convicted of a criminal offence, with no defence, for following a superior's order, where the soldier's action is criminal, even if they did not know such, if the court concludes they ought to have known. The laws include: *Defence Force Discipline Act 1982* (Cth) s 14; *Criminal Code Act 1995* (Cth) s 268.116; and *Defence Act 1903* (Cth) s 51Z. These laws all provide defences to what otherwise would be criminal behaviour, where the soldier 'could not reasonably be expected to know' the illegality (*Defence Force Disciplinary Act 1982* (Cth)) or order was not 'manifestly unlawful' (*Defence Act 1903* (Cth) and *Criminal Code Act 1995* (Cth)). Similarly in international law, courts have accepted negligence standards in interpreting 'manifestly unlawful' — whether the soldier ought to have known the order was illegal. Satisfaction of this test renders a soldier guilty of serious crimes, those requiring intent. Osiel confirmed that

> evidence concerning unreasonableness is used circumstantially to ascertain the accused's actual knowledge of what he was doing. From what others would have known, an inference is drawn as to what the accused himself knew or intended. In this way, evidence of unreasonableness supports a *mens rea* of knowing or intentional wrongdoing. It thereby permits conviction for murder … evidence of what a reasonable person would think can impugn the credibility of the defendant's professed mistake. In cases such as those involving rape, torture, murder and armed robbery, the unreasonableness of the soldier's mistake has been so egregious as to eliminate any credible claim that he was mistaken at all. Hence, finding the defendant's act manifestly illegal establishes a conclusive presumption of the defendant's awareness of the unlawfulness of his orders.[169]

It is problematic to impose criminal punishment on a person who was (merely) negligent. Negligence is a non-criminal law concept, used to determine whether a defendant should compensate a plaintiff for loss/injury the former allegedly caused the latter. It is for purposes of compensation, not punishment. Admittedly, the soldier committed the act with intent; they knew the act they were committing. However, they argue they were unaware of its illegality. Effectively, the law is removing a defence to what would otherwise be criminal,[170] if the accused was negligent. The law effectively applies a non-criminal concept to determine criminal liability. The folly of this was noted by Darden CJ in *Calley*.[171] His Honour favoured a liberal interpretation of defence of superior orders; rather than whether the soldier ought to have known of the order's illegality (negligence standard).[172] His Honour favoured

169 Osiel, 'Atrocity, Military Discipline and the Law of War' (n 135) 977–8 (emphasis in original) (citations omitted).

170 Of course, unless another recognised defence in criminal law applies.

171 *Calley USCMA* (n 49).

172 Ibid 546.

a test based on the 'apparent and palpable to the commonest understanding' of the illegality.[173] The precise formulation settled upon matters less than evident concern simple negligence standards in this context. He argued that his test

> recognizes that the essential ingredient of discipline in any armed force is obedience to orders and that this obedience is so important it should not be penalized unless the order would be recognized as illegal, not by what some hypothetical reasonable soldier would have known, but also by 'those persons at the lowest end of the scale of intelligence and experience in the services.' This is the real purpose in permitting superior orders to be a defense, and it ought not to be restricted by the concept of a fictional reasonable man so that, regardless of his personal characteristics, an accused judged after the fact may find himself punished for either obedience or disobedience, depending on whether the evidence will support the finding of simple negligence on his part. … [T]he standard of a 'reasonable man' is used in other areas of military criminal law … But in none of these instances do we have the countervailing consideration of avoiding the subversion of obedience to discipline in combat …[174]

This passage evinces concern with the use of a negligence test to determine criminal liability, a concern that I share. Members of the High Court elsewhere have expressed concern with imposition of criminal punishment for negligence.[175]

Arguably, something higher than a finding that the soldier 'should have known' the order was illegal is necessary — perhaps 'criminal negligence'. There is an Australian precedent for reading into a statute apparently creating criminal liability for negligence a requirement of 'criminal negligence'. A unanimous High Court in *Callaghan v The Queen*[176] read into the definition of a crime apparently based on lack of reasonable care that the conduct the subject of charge must be 'so blameworthy as to be punishable as a crime',[177] higher than the blameworthiness required for civil liability, on the basis that the civil/criminal distinction must be maintained. I agree.

As discussed, it is orthodox in criminal law that a person should be held to account in criminal law only where they are culpable, and only to that extent.[178] This explains defences like insanity, self-defence and compulsion, reflecting criminal law should not punish a person who, respectively, lacks the mental element required to commit a crime, or effectively had no choice other than to do what they did.

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173 Ibid.

174 Ibid 546.

175 *He Kaw Teh v The Queen* (1985) 157 CLR 523, 535–6 (Gibbs CJ, Mason J agreeing at 546).

176 (1952) 87 CLR 115.

177 Ibid 121 (Dixon CJ, Webb, Fullagar and Kitto JJ).

178 *Wilson* (n 17) 327 (Mason CJ, Toohey, Gaudron and McHugh JJ); *Miller* (n 17) 419 (Gageler J). The Canadian Supreme Court recognised it as a principle of fundamental justice.

As noted, culpability is relevant presently because there are questions over culpability of a subordinate who, though they are now said to have committed a crime in doing so, argue they were so directed by a superior, whose commands they had been trained to follow.[179] Arguably the culpability of a subordinate who, in so doing, commits a crime, is substantially less than one who committed this act independently. Further, arguably (possible) reduction in penalty in circumstances of the former situation does not fully reflect the significant difference in culpability of offenders in the situations.

In conclusion, the manifest illegality test should not embrace a negligence standard. Current law here is unsatisfactory because it does not take sufficient account of dynamics within the military, particularly the strength of obedience imperatives, uncertain because of the prime importance of the manifest illegality test, and unfair because it can mean imposition of serious criminal sanction upon a person based on negligence.

IV Improvements to Defence of Superior Orders and Related Defences

A *Re-Drafting the Defence of Superior Orders*

A response to the ambiguous concept of 'manifest illegality', and the shadow it casts over the superior orders defence, is more of a guidance as to the relevant factors in determining whether an order was manifestly illegal. The *Rome Statute*, and by logical extension national law implementing it, could be improved by including factors that the decision maker should take into account in determining whether an order was manifestly illegal. These factors are highly situation specific. The suggested factors are:

1. Soldier's age;[180]

This was a factor, together with others, referred to in *United States v Calley* as relevant to manifest illegality:

> In determining whether or not Lieutenant Calley had knowledge of the unlawfulness of any order … you may consider all relevant facts … including Lieutenant Calley's rank; educational background; OCS schooling; other training … his experience on prior operations involving contact with hostile and friendly … [civilians]; his age; and any other evidence tending to prove … that … [he] knew the order under was unlawful…[181]

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179 Patrick White, 'Defence of Obedience to Superior Orders Reconsidered' (2005) 79(1) *Australian Law Journal* 50, 53: 'it is difficult to find much that is morally blameworthy in a soldier trusting in his or her superiors and obeying their commands'.

180 Age is a proxy for experience and knowledge (including knowledge of orders that are, or may reasonably be considered, unlawful).

181 *Calley USCMA* (n 49) 542.

2. Extent to which soldier had combat experience;[182]

This factor derives support from the *Defence Force Discipline Act 1982* (Cth), that in determining the culpability (if any) of a soldier, their experience in the particular area of focus is relevant.[183] It was mentioned in jury's instructions in *Calley*.[184]

3. Soldier's training, including on defence of superior orders;[185]

Rhonda Wheate and Lieutenant Nial J Wheate noted, in the case of the Vietnam massacres, American soldiers had received one hour's training in laws of war.[186] In contrast, training at the ADF Academy today on these matters is thorough.[187] It was a factor referred to in *Calley*.[188] Patel argues American troops involved in mistreatment of detainees during Iraq had been inadequately trained in relevant legal obligations,[189] and this is relevant to culpability.

4. Extent to which soldier was trained to obey orders;[190]

That a fundamental aspect of a soldier's training is to inculcate the importance of following orders quickly and unquestioningly obey is well documented.[191]

5. Soldier's general educational background;[192]

6. Soldier's rank;[193]

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182 The more experience a soldier has in the combat space, the more willing they might be to challenge orders.

183 *Defence Force Discipline Act 1982* (Cth) s 11(2)(a).

184 *Calley USCMA* (n 49) 547.

185 This derives support from *Defence Force Discipline Act 1982* (Cth), which permits a court to consider the reasonableness of the actions of a soldier accused of a criminal offence having regard to their training and experience: ibid s 11(2)(a).

186 Wheate and Wheate (n 134) 21.

187 Ibid 22.

188 *Calley USCMA* (n 49) 547.

189 Patel (n 39) 123.

190 Where a soldier has been subject to extensive training designed to get them to follow orders unquestioningly, this is relevant to a fair consideration of the extent to which illegality might be 'manifest' to them.

191 O'Sullivan (n 72) chs 4–5; Mackmin (n 134) 81.

192 Rowe (n 134) referred to research indicating low levels of education among many in the UK army (42% with literacy standards below that expected of 5–6 year olds): at 174, citing The Basic Skills Agency, *Army Basic Skills Provision: Whole Organisation Approach, Lessons Learnt* (2007).

193 Rowe (n 134) 172: 'The higher a soldier is up the chain of command will generally determine how much he can ask questions of instructions given to him. His scope to do so may be very limited if he is at the bottom of this chain.'

This was alluded to by Cory J (for Gonthier and Major JJ) in the Canadian Supreme Court in *R v Finta* as relevant;[194] the lower the rank of the soldier, the more likely they will feel compelled to comply with a superior's order. They are less likely to have exercised moral choice in doing what they did. It was referred to in *Calley* and *R v Brocklebank*.[195]

Ziv Bohrer discussed three reasons for its relevance:

> In the military … general policies are determined by high-ranking officials. Thus, obligating high-ranking soldiers to disobey orders that violate administrative and negligence legal norms will allow the lawmaker to retain sufficient control over the policies of the military. Secondly, because high-ranking soldiers are military professionals, they can be expected to familiarize themselves with the reasonable practices and administrative procedures that govern their profession. Third, administrative and disciplinary sanctions have greater deterrent effect when carried out against a low-ranking soldier who views military service as a short and temporary experience. Therefore, high-ranking soldiers should be instructed to only obey such legal orders (i.e., to disobey such illegal orders), whereas low-ranking subordinates should be instructed to obey all such orders.[196]

7. Rank of superior who issued order;

This factor is supported by survey of military recruits which showed that, when asked whether they would question the legality of a superior's orders, several indicated the rank of the one issuing would cause them hesitation before questioning legality.[197]

8. Whether or not the order was conveyed during emergency, especially the extent to which there was time for the soldier to consider the lawfulness of the order they were given;

Ansermet suggested the amount of time that the soldier had to evaluate the lawfulness of the order was relevant.[198] Osiel agreed.[199] This makes sense; if issued during an emergency, the soldier would have less time to consider the legality of the order or

194 *Finta* (n 123) 838.

195 (1996) 134 DLR (4th) 377.

196 Bohrer (n 73) 56 (citations omitted).

197 Wheate and Wheate (n 134) 27.

198 Ansermet (n 18) 1456.

199 Osiel, 'Atrocity, Military Discipline and the Law of War' (n 135) 1095:

> If I suspect that the order is illegal, my proper course depends on how much time is available for deliberation. If there is no time to deliberate, then I must obey the order immediately. I can be confident the very exigency of my circumstances will protect me against liability if the order ultimately proves unlawful, for my conduct has been reasonable.

make reasonable inquiries to satisfy themselves. The Explanatory Memorandum, Defence Force Discipline Bill 1982 (Cth) acknowledges this is relevant.[200] Bohrer added that in emergency, discretionary norms are more likely applicable, complicating matters for a subordinate soldier.[201]

9. Extent to which legality of the order was discoverable, or doubtful;[202]

This idea is Ansermet's,[203] which in turn refers to the work relating to culpability in German criminal law, known as *Schuldtheorie*, under which a defence of mistake of law is available, but only where the mistake was unavoidable.[204] In determining the avoidability, it is relevant to consider whether, with sufficient effort, the person seeking to rely on the defence could have discovered truth (here illegality of the order they were given). If that were discoverable by inquiry, the fact that the soldier failed to pursue it suggests the defence is unavailable.

10. (Relatedly) extent to which soldier had, or had access to, information to permit them to determine lawfulness of order;

The Explanatory Memorandum, Defence Force Discipline Bill 1982 (Cth) discussing relevant factors to the defence of superior orders in s 14 of the *Defence Force Discipline Act 1982* (Cth), noted some laws of war are 'obscure' and uncodified.[205]

11. Extent to which there was ambiguity on lawfulness.[206]

There is often uncertainty whether particular action is legal. This grey area is larger in military context than general criminal law context.[207] For example, some conduct is only considered unlawful if the gains expected from the activity are disproportionate to its risks.[208] It may be difficult for a soldier to accurately assess this,

200 Explanatory Memorandum, Defence Force Discipline Bill 1982 (Cth) 36 [134(d)].

201 Bohrer (n 73) 57.

202 The more clear-cut the illegality, or the greater the ease by which its unlawfulness might have been discovered, the more likely it will be 'manifest'.

203 Ansermet (n 18) 1458–9.

204 Ibid 1437.

205 Explanatory Memorandum, Defence Force Discipline Bill 1982 (Cth) 37 [135].

206 This factor specifically acknowledges sometimes ambiguity lies in whether orders are lawful.

207 See, eg: Williams Hays Parks, 'The Law of War Adviser' (1980) 31 (Summer) *JAG Journal* 1, 27; Osiel, 'Atrocity, Military Discipline and the Law of War' (n 135) 969. The law is not settled regarding aspects of the customary law of war, and that this should be taken into account in interpreting the defence of superior orders: Explanatory Memorandum, Defence Force Discipline Bill 1982 (Cth) 37 [135].

208 See, eg, *Criminal Code Act 1995* (Cth) ss 268.38(1)(c), (2)(c).

particularly at junior levels.[209] This might be exacerbated by other factors such as an emergency. Others involve administrative norms or negligence type offences.[210] Some offences involve questions as to whether a soldier's behaviour humiliates, degrades or violates another's dignity,[211] the meaning of which is contested. Soldiers might find it difficult to determine legality of particular bullets.[212] Particularly in situations where civilian courts are considering behaviour that occurred in military context, decision makers must remember this, so a specific factor is suggested.

Application of standards is to a reasonable *soldier*, not a reasonable *person*. This is to take specific account of the military context, and its idiosyncrasies. An argument might be made for further factors to be considered. These have been provided as a basis for discussion.

There is obviously upside and downside in enumerating factors. The upside is that the decision-making body's deliberations will be more transparent. It will state clearly which of the above factors have been utilised, their relative weight, and how they are counter-balanced by others. Soldiers will have better idea how their behaviour will be assessed. The downside is lack of flexibility, given the factors are stated expressly, which is potentially confining, though an 'any other relevant factors' element might counteract this. It would be difficult for the lawmaker to clarify how a court might weigh the factors.

One issue with the current approach is potential inconsistency in approach regarding how 'manifest illegality' will be determined. Osiel noted this in relation to cases involving Vietnam.[213] In *Calley*, the United States Court of Military Appeals provided the jury with specific matters, including Calley's rank, educational background, training, experience in combat and in relations with the enemy, age and other evidence showing that he knew the order was illegal.[214] In contrast, the jury in *United States v Griffin* was not given such details, they were simply informed an order to kill in the factual scenario was manifestly illegal in law.[215] Further,

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209 Bohrer (n 73) 68; William J Fenrick, 'The Rule of Proportionality and Protocol I in Conventional Warfare' (1982) 98 (Fall) *Military Law Review* 91, 108–9.

210 Bohrer (n 73) 55:

> Orders can also be illegal because they violate either administrative legal norms or negligence offences. Obligating subordinates to disobey illegal orders that violate such laws raises unique concerns. First, since these laws are often discretionary in nature, a legal policy that instructs subordinates to disobey an order that violates such laws will delegate extensive discretion to the subordinate, which will in turn increase the likelihood mistakes will occur.

211 *Criminal Code Act 1995* (Cth) s 268.58(1)(a); Patel (n 39) 117.

212 Patel (n 39) 117.

213 Osiel, 'Atrocity, Military Discipline and the Law of War' (n 135) 1002. See also Aubrey M Daniel III, 'The Defense of Superior Orders' (1973) 7(3) *University of Richmond Law Review* 477, 500–2.

214 *Calley USCMA* (n 49) 542.

215 *United States v Griffen*, 39 CMR 586 (United States Army Board of Review, 1969).

in *Hutto*, a superior orders defence was successful,[216] but unsuccessful in *Calley*. They were based on the same orders. Possibly the fact Calley was a lieutenant while Hutto was a sergeant was relevant, but this is speculative. As shown, some apply a reasonable person test; others apply a reasonable soldier test. It is unclear the extent to which individual characteristics of the soldier concerned are relevant. Assessment of manifest illegality is uneven, unpredictable, and potentially unjust.[217]

Bohrer made the point that

> case law of many legal systems clearly shows that the case-by-case discretion made possible by current legal uncertainty leads to substantial legal inconsistencies when evaluating crimes of obedience, and causes similar cases to be treated differently. …
>
> Judges necessarily vary in their assessments, and thus similar cases are often not treated similarly, which creates a fairness problem. This variation reduces the likelihood of developing clear rules ex ante. As such, a fair-notice problem is created as well. Moreover, since such a policy fails to create clear instructions for soldiers, it leads to inefficiencies. …
>
> [W]e should also not allow courts or states unfettered discretion to regulate crimes of obedience on a case-by-case basis. Justice and efficiency demand that courts, states and soldiers be guided by clear rules set ex ante.[218]

The expression of specific factors for decision makers to consider will assist.

This relates to the rule of law. Lord Bingham articulated sub-rules of the rule of law.[219] One required the law be as accessible, clear and predictable as possible, so individuals could understand legal consequences of their actions.[220] Another required discretion, including that pertaining to judicial processes, be confined.[221] Lord Bingham suggested the looser the discretion given, the more likely power would be exercised arbitrarily, contrary to the rule of law.[222] It has been demonstrated the lack of definition of manifest illegality, or express indication of relevant factors, produces uneven application of the law. This does not foster clear and predictable legal outcomes.

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216 Douglas Robinson, 'Army Clears Hutto in Deaths at Mylai' (15 January 1971) *The New York Times* 15.

217 Patel (n 39) 118: 'the assessment of manifest illegality is completely subjective and different judges may decide differently based on the same set of facts … what is obvious, palpable or manifest to one person, may not be so to another'.

218 Bohrer (n 73) 46–7, 50 (citations omitted). Bohrer favoured soldiers being given specific rules about unlawful behaviour.

219 Lord Bingham, 'The Rule of Law' (2007) 66(1) *Cambridge Law Journal* 67.

220 Ibid 69–70.

221 Ibid 72.

222 Ibid.

The argument against listing a range of factors is inflexibility — the range of cases discussed has demonstrated many factual scenarios in which this defence has been considered. Arguably, decision makers need flexibility to respond to the wide range of scenarios, which is reduced when required to consider lists of factors. This can be ameliorated by including something like 'any other relevant factor' in the list. Concededly, a list of factors does not eliminate discretion — different decision makers will consider some factors more important than others and does not provide decision makers with guidance as to which are most important, and how to weigh them in given cases. On balance, an approach that specifically identifies and expresses factors relevant to manifest illegality is favoured, for the transparency and greater guidance it provides decision makers.

B *Interpretation of Duress*

As discussed, just as culpability is relevant to how the manifest illegality test should be applied, it is also relevant to situations where duress exists. There have been instances where the subordinate reasonably believed if they did not carry out the orders of the superior, they would be killed. Then, it has been argued that the subordinate is not culpable and should not suffer punishment.[223] Though cogent arguments support this, duress is rarely successfully argued in international criminal law.[224] It is not clear in the *Rome Statute*, and its Australian adoption, whether duress is available to murder charges. The common law position in the United Kingdom is that it is not. This was applied in *Erdemovic*, regarding the Statute of the International Criminal Tribunal for the Former Yugoslavia.[225]

There are questions about culpability in such a situation. Some argued that Erdemovic should not have been punished at all because the duress to which they were subject meant they were not, or not sufficiently, culpable.[226] As noted above, the majority found duress not a defence to murder. Judge Cassese (dissenting) stated:

> the purpose of criminal law, including international criminal law, is to punish behaviour that is criminal, i.e., morally reprehensible or injurious to society, not to condemn behaviour which is 'the product of coercion that is truly irresistible' or the choice of the lesser of two evils. No matter how much mitigation a court allows an accused, the fundamental fact remains that if it convicts him, it regards his behaviour as criminal, and considers that he should have behaved differently.[227]

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223 Geert-Jan Alexander Knoops, *Defences in Contemporary International Criminal Law* (Martinus Nuhoff Publishers, 2nd ed, 2008) 53. See also Bakker (n 77) 67.

224 Jennifer Bond and Meghan Fougere, 'Omnipresent Threats: A Comment on the Defence of Duress in International Criminal Law' (2014) 14(3) *International Criminal Law Review* 471, 484.

225 *Erdemovic Appeal* (n 58).

226 Bowers (n 40) 53.

227 *Erdemovic Appeal* (n 58) [48] (emphasis omitted) (citations omitted).

Recall the Nuremberg trials considered whether the accused had 'moral choice'. It is doubted whether Erdemovic had moral choice other than to do what he did. It seems unreasonable to expect a person to relinquish their own lives to save others. Judge Rumpff noted:

> In the application of our criminal law in the cases where the acts of an accused are judged by objective standards, … one can never demand more from an accused than that which is reasonable, and reasonable in this context means, that which can be expected of the ordinary average person … It is generally accepted, … that for an ordinary person in general his [or her] life is more valuable than that of another. Only they who possess the quality of heroism will intentionally offer their lives for another. Should the criminal law then state that compulsion could never be a defence to a charge of murder, it would demand that a person who killed another under duress, whatever the circumstances, would have to comply with a higher standard than that demanded of the average person. … [S]uch an exception to the general rule which applies in criminal law, is [not] justified.[228]

The common law has traditionally held that, while duress absolves liability for some alleged criminal activity,[229] it is not available as a defence to murder.[230] It is difficult to explain what unites the offences for which duress is unavailable, but they are typically serious. Regarding the traditional exception around murder, for which duress is unavailable as a defence, such unavailability has been explained as being based on revulsion towards taking life,[231] and that punishment should attend such action. The idea was expressed the law expected a person to die themselves rather

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228 *State v Goliath* [1972] SALR 465, 480, quoted in National Criminal Justice Reference Service, 'Duress, Coercion and Necessity' (Working Paper No 5, 1978) 23 [2.53]. Law is based on what society can reasonably expect of its members. It should not set intractable standards of behaviour which require mankind to perform acts of martyrdom, and brand as criminal any behaviour falling below those standards: ibid [47] (Cassese J, dissenting). Dinstein (n 10) 152: 'in many cases it is impossible, from a moral viewpoint, to expect a person to choose death. … [T]he person acts in such cases with no option: we resign ourselves in advance to his taking the course that will save his life. … [H]e has no moral choice'.

229 See, eg, *R v Crutchley* (1831) 5 Car & P 133; 172 ER 909.

230 *R v Tyler* (1838) 8 Car & P 616; 173 ER 643 (Lord Denman CJ); *Smyth* (n 115) 738 (Sholl J); *Brown* (n 115) 485 (Bray CJ, Bright and Mitchell JJ).

231 *Howe* (n 65) 439 (Lord Griffiths), 456 (Lord Mackay, Lord Brandon agreeing at 438); *Gotts* (n 65) 425 (Lord Jauncey).

than kill an innocent,[232] however unrealistic this seems.[233] There may be concern that, if permitted here, the defence could be manipulated, for example unreal threats manufactured in order to justify murder,[234] or it involves questions courts cannot reasonably answer.[235]

Though some have criticised the doctrine in its entirety,[236] its rationale is clear; it is inappropriate to visit criminal liability upon a person where the relevant acts were not a product of their free will.[237] Geert-Jan Alexander Knoops noted:

> The moral justification for imposing punishment and criminal liability is the presumption that the individual has the ability and appropriate possibility to choose otherwise, and therefore actors may be exonerated because of compulsion [duress] … Juridically, the mental and moral ability to refrain from acting wrongly is therefore a *conditio sine qua non* to impose criminal liability and thus, from both the legal-philosophical and neurobiological perspective, the role of free moral choice is essential in attributing criminal responsibility.[238]

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232 Matthew Hale, *Historia Placitorum Coronae: The History of the Pleas of the Crown* (1736) vol 1, 51:

> if a man be desperately assaulted, and in peril of death, and cannot otherwise escape, unless to satisfy his assailant's fury he will kill an innocent person then present, the fear and actual force will not acquit him of the crime and punishment of murder, if he commit the fact; for he ought rather to die himself, than kill an innocent …

But Hale permitted a wartime exception:

> when a person is under so great a power, that he cannot resist or avoid, the law in some cases allows an impunity for parties compelled, or drawn by fear of death, to do some acts in themselves capital, which admit no excuse in the time of peace: at 49.

See *Dudley* (n 65) 287: 'To preserve one's life is generally speaking a duty, but it may be the plainest and the highest duty to sacrifice it.'

233 Sir Francis Bacon expressed a different view:

> So if divers be in danger of drowning by the casting away of some boat or barge, and one of them get to some plank, or on the boat's side to keep himself above water, and another to save his life thrust him from it, whereby he is drowned, this is neither se defendendo nor by misadventure, but justifiable.

Sir Francis Bacon, *A Collection of Some Principal Rules and Maximes of the Common Laws of England* (1630) 29–30, quoted in *Dudley* (n 65) 285.

234 Stephen (n 2) 107–8.

235 *Lynch* (n 65) 702 (Lord Kilbrandon).

236 *Howe* (n 65) 436 (Lord Bridge): 'the defence of duress … is difficult to rationalise or explain by reference to any coherent principle of jurisprudence'.

237 *Lynch* (n 65) 690 (Lord Simon); *Brown v United States*, 256 US 335, 343 (1921) (Holmes J): 'Detached reflection cannot be demanded in the presence of an uplifted knife'.

238 Knoops (n 223) 53, quoted in Myers (n 19) 167.

Clearly this rationale can apply to offences including murder. At one point the House of Lords accepted duress as a defence for murder in the second degree.[239] In *Director of Public Prosecutions for Northern Ireland v Lynch* ('*Lynch*'), a majority of the House of Lords recognised self-preservation instincts were natural and ought to be recognised in law.[240] The Law Commission recommended the defence of duress be recognised as available for all crimes.[241] It is so available in the *Model Penal Code* (US).[242] However, the House of Lords subsequently over-ruled *Lynch*, returning to the position that duress could not be a defence to a murder charge.[243]

There is nothing special about a murder charge justifying an exception and not permitting a duress defence. None of the iterations of the defence of superior orders explained above makes exception for murder. Where it applies, the defence of superior orders can apply to excuse killing another. There is often overlap between a superior orders and duress defence. Thus, it is unwise to insist duress not be available to a murder charge where, on identical facts, a soldier could rely on a superior orders defence.

Sometimes, it is suggested while duress should not be a defence to a murder charge, it might be utilised to reduce the penalty for a convicted accused. This was the view in *Erdemovic*, and some House of Lords decisions.[244] However, this compromise is awkward. Duress applies where the will of a person is overborne. In such a situation, if the law recognises this as a defence, it is a complete defence, so the person is not criminally responsible for their acts, because they did not act in accordance with free will. It seems impossible to both accept that the lack of free will does not absolve a person of criminal responsibility, but also accept it makes what the person did 'less bad'.[245]

This finding means that a court interpreting art 31(1)(d) of the *Rome Statute* and s 10.2 of the *Criminal Code Act 1995* (Cth) should not read into it an exception for murder, as occurred in *Erdemovic*.

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239 *Lynch* (n 65) 675–6 (Lord Morris), 683 (Lord Wilberforce), 715 (Lord Edmund-Davies, Lord Simon dissenting at 697, Lord Kilbrandon dissenting at 703).

240 Ibid 671 (Lord Morris). Lord Wilberforce concluded there was no principled reason why duress defence was inapplicable to murder: at 681.

241 The Law Commission, *Criminal Law Report on Defences of General Application* (Report, 28 July 1977) 7–8.

242 *Model Penal Code* (US) (n 16) § 3.02(1)(a).

243 *Howe* (n 65); *R v Z* [2005] 2 AC 467.

244 *Howe* (n 65) 436 (Lord Bridge); *Gotts* (n 65) 424 (Lord Jauncey), 442 (Lord Lowry).

245 Myers (n 19) 161:

> The fundamental issue lies with whether we believe that an accused that acts under duress is morally blameworthy. If we accept the logic that duress eliminates free choice and therefore negates the ability of the accused to behave correctly, then it must follow that the accused is not deserving of any criminal conviction, regardless of whether the conviction is only accompanied by a token sentence.

The way in which art 31(1)(d) requires the decision maker to consider whether the accused intends to cause greater harm than the one they seek to avoid is also problematic. Either the will of a person is overborne or not.[246] It is not reasonable to expect an accused faced with such dire situation to make a utilitarian decision as to the lesser of two evils. The law should not impose unreasonable demands upon a person. It is unreasonable to expect a person to be able to weigh these complex matters, often in short time. It is unreasonable to expect a person to choose harm to themselves, where another choice would or might have harmed more people. As Cassese J noted in *Erdemovic*, this third element in art 31(1)(d) places intolerable strain upon courts.[247] It should be discarded.

C *Mistake of Fact*

Section 9.1 of the *Criminal Code Act 1995* (Cth) states a person is not liable for a criminal offence with a fault element other than negligence where under mistaken belief about facts, and existence of that belief negates the fault element of the offence.[248] This is similar to art 32(1) of the *Rome Statute*. Section 9.1(2) states that the court *may* take into account whether the mistaken belief was reasonable in the circumstances.[249] As an example of how this section might apply in the military context, s 268.24 creates the offence of wilful killing.[250] It requires that a person has killed another person, where that person is owed protection under the *Geneva Conventions* or *Protocol 1*, where the person knows of, or is reckless to the fact the person is so owed.[251] A defence of mistake might apply — the accused might argue they were mistaken whether the person was owed such protections, and this might occur with a superior orders defence — perhaps the soldier's superior officer ordered them to kill on the basis the victim was not owed such protections, and the soldier, acting under that impression, committed the killing. In such a case, the superior officer's mistake translates to the officer who committed the killing.

'Reckless' here is loosely defined in s 5.4 of the *Criminal Code Act 1995* (Cth) being whether the person was aware of a substantial risk the circumstance exists (eg victim is owed Convention protection), and it is unjustifiable in the circumstances to take the risk.[252]

246 O'Regan also referred to the 'sorry history of the doctrine of proportionate response in both self-defence and provocation' as a basis for rejecting its use in the context of duress: RS O'Regan, 'Duress and Murder' (1972) 35(6) *Modern Law Review* 596, 605.

247 '[T]here are enormous, perhaps insurmountable, philosophical, moral and legal difficulties in putting one life in the balance against that of others … how can a judge satisfy himself [sic] that the death of one person is a lesser evil than the death of another?': *Erdemovic Appeal* (n 58) [42].

248 *Criminal Code Act 1995* (Cth) s 9.1.

249 Ibid s 9.1(2).

250 Ibid s 268.24.

251 Ibid s 268.24(1).

252 Ibid s 5.4 (definition of 'recklessness').

For similar reasons given earlier for interpreting 'manifest illegality' to require something more than negligence on the soldier's part in their lack of awareness of illegality — and to avoid undue repetition — the mistake of fact defence in s 9.2 of the *Criminal Code Act 1995* (Cth) should not be negated simply because the mistake the soldier made regarding facts was 'unreasonable'. Something more should be required to deny the defence. This might be criminal negligence.

D *Standard of Proof*

Presumption of innocence is axiomatic in criminal law.[253] A corollary is that it is for the prosecution to prove elements of the alleged offence to the criminal standard of beyond reasonable doubt. Courts have sought to reconcile these fundamental principles with legislation which apparently casts onus of proof upon an accused, for example regarding a defence. Typically, courts have effected this reconciliation by concluding, where an onus is upon an accused, for example regarding a defence, the accused bear an evidentiary onus *only*, not a legal onus.[254] Otherwise, the unwelcome spectre arises an accused could be convicted of a criminal offence despite reasonable doubt.[255]

This is generally reflected in the *Criminal Code Act 1995* (Cth).[256] However, the *Rome Statute* is silent as the standard of proof for the defences discussed here.[257] A recent International Criminal Court decision acknowledges this, but it refers to the prosecution's onus to establish proof of guilt beyond reasonable doubt. Respectfully, the International Criminal Court must resolve the extent to which (if at all) the defence has an onus regarding possible defences. Any such onus must be evidentiary only. This is what has occurred elsewhere — it is a practical way to resolve potential conflict between presumption of innocence, which art 66 of the *Rome Statute* enshrines, and a statutory provision which apparently casts onus upon an accused.

253 *Woolmington* v *DPP* [1935] AC 462, 481 (Viscount Sankey) (except insanity and statutory exceptions); *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) art 11(1); *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14(2).

254 See, eg, *R v Oakes* [1986] 1 SCR 103 ('*Oakes*'); *R v Director of Public Prosecutions*; *Ex parte Kebilene* [2000] 2 AC 326, 344–5 (Lord Bingham, Laws J agreeing at 346, Sullivan LLJ agreeing at 357), 379–80 (Lord Hope); *R v Lambert* [2002] 2 AC 545, 563 (Lord Slynn), 571 (Lord Steyn), 586–9 (Lord Hope), 600–2 (Lord Clyde).

255 *Oakes* (n 254) 132–3 (Dickson CJ, Chouinard, Lamer, Wilson and Le Dain JJ).

256 *Criminal Code Act 1995* (Cth) s 13.3.

257 *Prosecutor v Ongwen (Trial Judgment)* (International Criminal Court, Trial Chamber IX, Case No ICC-02/04-01/15, 4 February 2021) [2455], [2588].

V Conclusion

Throughout history, the law has struggled for consistency on consequences of a soldier obeying an order and thereby doing something illegal. Initially the law made the soldier personally liable, but in the early 20th century the soldier had impunity. The World Wars moved the law towards a position a soldier may be liable if the order given them was 'manifestly illegal'. While this compromise was understandable, difficulties remain. The law is insufficiently cognisant of the difficult position of the soldier, steeped in obedience training, yet now asked to (sometimes) disobey instructions. The circumstances in which the soldier should disobey orders are unclear; this is compounded by other factors, like short time frame in which events might occur, and that the soldier may have incomplete information. There is clear variety in the factors decisions makers will take into account in applying the test. Further, there is concern with imposing criminal liability based on simple negligence, developed in a non-criminal realm. The article suggested specific improvements to the law here. The law should be applied to a reasonable soldier, not a reasonable person, given the peculiarities of the military context. A list of factors was given to apply the manifest illegality test. Presently, the approach is inconsistent and unpredictable. It was also suggested the law require greater culpability than negligence before determining a soldier's defence of superior orders is lost. In the context of the related defence of duress, the article determined the law should permit a duress defence to a murder charge. It also concluded courts and tribunals should interpret the mistake defence consistently with the principles suggested in the superior orders defence, and clarify that, if an accused is ever subject to an onus of proof, it should be evidentiary only.

Wendy Elizabeth Bonython and Bernadette McShane***

TIME TO REFORM THE REFORMS? LOSS OF CONSORTIUM ACTIONS IN SOUTH AUSTRALIA AND QUEENSLAND

Abstract

Contemporary actions for loss of consortium — an action historically brought by a husband against a tortfeasor to recover damages for tortious wrongs committed against his wife — are doctrinally inconsistent with contemporary tort law, and inherently gendered in principle and application. Loss of consortium claims were an early target for reform as part of the feminist legal project. Australian jurisdictions have approached this reformation in two ways — either by abolishing the action or expanding a plaintiff's right to standing and access to this claim. All Australian jurisdictions *except* for South Australia and Queensland abolished the actions (abolitionist jurisdictions). Conversely, statutory reform in South Australia and Queensland pursued formal gender equality by expanding access to spouses of both genders (expansionist jurisdictions). In this article, we review consortium's history and reform, finding that in pursuing formal gender equality, the expansionist jurisdictions have failed to address the substantive gender inequality at the heart of consortium actions. Instead, they broadened and further entrenched disempowerment of vulnerable primary plaintiffs in ways that are inconsistent with best practice under international and domestic human rights law. We propose that these reforms should be revisited with a view to abolition. Damages for harms should instead be directed towards primary plaintiffs, consistent with other developments in tort law.

I Introduction

Third parties are generally prevented from suing tortfeasors who wrongfully injure others:

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> The law seeks to compensate the accident victim, but not anybody else who, because of their relationship to him, suffers loss of some kind consequent upon the accident.[1]

Historically, however, the law has made exceptions for certain classes of people who are dependent on others. At common law, loss of servitium actions enabled a master to seek redress for the loss of an injured servant's services.[2] Loss of consortium actions enabled husbands to seek redress for loss of consortium[3] of wives,[4] encompassing the loss of their services, companionship, and society.[5] However, the emancipation of women, such as through the *Matrimonial Causes Act 1959* (Cth)[6] and the *Married Women's Property Acts* in Australian states,[7] diminished the proprietary spousal interest supporting loss of consortium claims by: abolishing actions for enticement and criminal conversation; permitting women to hold property; and, to bring legal claims in their own right. Despite this, consortium actions survived, albeit dogged by doctrinal uncertainty about their scope (including what harms should be recognised),[8] — along with concerns about the gendered availability of

1 Peter Handford, 'Relatives' Rights and Best v Samuel Fox' (1979) 14(1–2) *University of Western Australia Law Review* 79, 79. See also *Commonwealth v Quince* (1944) 68 CLR 227, 240–1 (Rich J).

2 Gareth H Jones, 'Per Quod Servitium Amisit' (1958) 79(1) *Law Quarterly Review* 39, 50–1; William S Holdsworth, *A History of English Law* (Methuen, 3rd ed, 1923) 459–60; *Barclay v Penberthy* (2012) 246 CLR 258 ('*Barclay*'); William Blackstone, *The Oxford Edition of Blackstone: Commentaries on the Laws of England: Of Private Wrongs* (Oxford University Press, 2016) bk 3, 96 ('*Of Private Wrongs*').

3 Jeremy D Weinstein, 'Adultery, Law and the State: A History' (1986) 38(1) *Hastings Law Journal* 195, 217; Blackstone, *Of Private Wrongs* (n 2) 94–5.

4 The *Fatal Accidents Act 1846*, 9 & 10 Vict, c 93 (also known as *Lord Campbell's Act*) established than an action could be brought on behalf of the surviving dependents of a fatal tortious accident. Rather than receiving compensation for loss of earning capacity, the action compensates for loss of financial dependency (for example, generally the portion of the primary victim's earnings that ordinarily would have gone to the maintenance of the dependents). The cause of action remains available under Australian law in all jurisdictions: *Civil Law (Wrongs) Act 2002* (ACT) pt 3.1; *Compensation to Relatives Act 1897* (NSW); *Compensation (Fatal Injuries) Act 1974* (NT); *Civil Proceedings Act 2011* (Qld) pt 10; *Civil Liability Act 1936* (SA) pt 5; *Fatal Accidents Act 1934* (Tas); *Wrongs Act 1958* (Vic) pt III; *Fatal Accidents Act 1959* (WA).

5 Evans Holbrook, 'The Change in the Meaning of Consortium' (1923) 22(1) *Michigan Law Review* 1, 2; Ann C Riseley, 'Sex, Housework, and the Law' (1980) 7(4) *Adelaide Law Review* 421, 425–7.

6 *Matrimonial Causes Act 1959* (Cth), later repealed by *Family Law Act 1975* (Cth) s 3.

7 *Married Women's Property Act 1882*, 45 & 46 Vict, c 75; *Married Women's Property Act 1893* (NSW); *Married Women's Property Act 1890* (Qld); *Married Women's Property Act 1893* (SA); *Married Women's Property Act 1893* (Tas); *Married Women's Property Act 1884* (Vic); *Married Women's Property Act 1892* (WA) (collectively, '*Married Women's Property Acts*').

8 GHL Fridman, 'Consortium as an "Interest" in the Law of Torts' (1954) 32(10) *Canadian Bar Review* 1065.

the cause of action.[9] Notwithstanding widespread judicial disquiet about consortium actions, courts have proved reluctant to either expand availability of the action to wives or abolish it entirely,[10] and instead, have deferred reform to the legislature.[11]

Although much feminist legal scholarship focusses on issues including employment discrimination and domestic violence,[12] some has focussed on feminist issues within private law, including the law's valuation of women's work in the calculation of damages in tort, and the law's limited recognition of harms to women's sexual interests.[13]

Law reform efforts since the 1970s ultimately led to widespread statutory abolition of the action for loss of consortium in the majority of Australian jurisdictions.[14] South Australia and Queensland instead pursued formal gender equality reforms, expanding the cause of action to wives as well as husbands. Actions for loss of consortium remain available under s 65 of the *Civil Liability Act 1936* (SA) and s 58 of the *Civil Liability Act 2003* (Qld). In practice, the actions are rarely argued, and damages awarded are usually 'modest'.[15]

We suggest that expansion reforms are a formal, rather than substantive, response to gender inequality. In practice, the fact that reform objectives are often subordinate

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9 Joanne Conaghan, *Law and Gender* (Oxford University Press, 2013) 29–69.

10 *Best v Samuel Fox & Co Ltd* [1951] 2 KB 639 ('*Best*').

11 Ibid.

12 In Australia, see, eg: Ngaire Naffine, *Law and the Sexes: Explorations in Feminist Jurisprudence* (Allen & Unwin, 1990); Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (Federation Press, 1st ed, 1990); Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990).

13 Margaret Thornton, 'Loss of Consortium: Inequality before the Law' (1984) 10(2) *Sydney Law Review* 259 ('Loss of Consortium'); Janice Richardson and Erika Rackley, *Feminist Perspectives on Tort Law* (Routledge, 2012); Leslie Bender, 'Teaching Torts as if Gender Matters: Intentional Torts' [1994] (1) *Virginia Journal of Social Policy and the Law* 115; Leslie Bender, 'An Overview of Feminist Torts Scholarship' (1993) 78(4) *Cornell Law Review* 575; Leslie Bender, 'A Lawyer's Primer on Feminist Theory and Tort' (1988) 38(1) *Journal of Legal Education* 3; Joanne Conaghan, 'The Measure of Injury: Race, Gender and Tort Law' (2011) 38(2) *Journal of Law and Society* 331; Joanne Conaghan, 'Tort Law and Feminist Critique' (2003) 56(1) *Current Legal Problems* 175; Martha Chamallas and Lucinda M Finley (eds), *Feminist Judgments: Rewritten Tort Opinions* (Cambridge University Press, 2020); Anita Bernstein, *The Common Law Inside the Female Body* (Cambridge University Press, 2018); Martha Chamallas and Jennifer B Wriggins, *The Measure of Injury: Race, Gender and Tort Law* (New York University Press, 2010).

14 *Civil Law (Wrongs) Act 2002* (ACT); *Law Reform (Marital Consortium) Act 1984* (NSW); *Common Law (Miscellaneous Provisions) Act 1986* (Tas); *Law Reform (Miscellaneous Provisions) Act 1941* (WA); *Administration of Justice Act 1982* (UK).

15 Jillian Barrett, 'Damages for Loss of Consortium and Servitium' [2019] (151) *Precedent* 34.

to judicial concerns about awarding 'double damages' is problematic for determining which spouse should control expenditure of damages. Less directly but still importantly, the reform objectives are undermined by social factors including the inequitable distribution of funds, as well as issues with the economic recognition of both paid and unpaid labour. In turn, these factors may affect damages awards for both the primary plaintiff and the consortium-deprived spouse.

Further, while the reforms formally engage with gender equality, they undermine substantive equality by extending the objectification and denial of agency of vulnerable primary plaintiffs beyond gender boundaries. This is inconsistent with Australia's obligations under international human rights law.[16] The *Convention on the Rights of Persons with Disability* ('*CRPD*') is particularly salient. An overlooked intersection arises from the fact that many of those whose injuries are sufficiently serious to support their spouse bringing a claim for loss of consortium under the reforms will also satisfy definitions of 'disability'.[17] To date, surprisingly little scholarship has examined the expansion of consortium from an intersectional perspective,[18] considering it not just as a gendered issue, but also as a disability issue. In doing so, we draw on concepts including ableism, objectification, and vulnerability theory to support our contention that the expansion reforms should themselves be abolished.

16 Those obligations are normative rather than justiciable: Australia has yet to enact into domestic legislation many of the International Human Rights Instruments it has ratified, however those instruments are acknowledged by the judiciary as being an influential source of law. See, eg: *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 29–30 (Brennan J); Michael Kirby, 'The Australian Use of International Human Rights Norms: From Bangalore to Balliol: A View from the Antipodes' (1993) 16(2) *University of New South Wales Law Journal* 363; Philip Lynch, 'Harmonising International Human Rights Law and Domestic Law and Policy: The Establishment and Role of the Human Rights Law Resource Centre' (2006) 7(1) *Melbourne Journal of International Law* 255; Michael Kirby, 'The Impact of International Human Rights Norms: "A Law Undergoing Evolution"' (1995) 25(1) *University of Western Australian Law Review* 30; Justice Michael Kirby, 'The Road from Bangalore: The First Ten Years of the Bangalore Principles on the Domestic Application of International Human Rights Norms' (Speech, Conference on the 10th Anniversary of the Bangalore Principles, 28 December 1998); *Dietrich v The Queen* (1992) 177 CLR 292; Wendy Lacey, 'Judicial Discretion and Human Rights: Expanding the Role of International Law in the Domestic Sphere' (2004) 5(1) *Melbourne Journal of International Law* 108, 113.

17 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 1 ('*CRPD*'). Article 1 was enacted into Australian domestic law via the *Disability Discrimination Act 1992* (Cth) s 4 (definition of 'disability'); *Equal Opportunity Act 1984* (SA) s 5 (definition of 'disability'); *Disability Services Act 2006* (Qld) s 11.

18 See, eg: Kimberle Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43(6) *Stanford Law Review* 1241; Nancy J Hirschmann, 'Disability as a New Frontier for Feminist Intersectionality Research' (2012) 8(3) *Politics and Gender* 396.

Even under circumstances where the injured partner's injuries are so severe that they lose the capacity to act independently, there are other legal frameworks, including guardianship and supported decision-making powers, that have been amended recently to ensure compliance with the *CRPD*.[19] The amendments provide more appropriate mechanisms to support the needs of those primary plaintiffs than do actions for loss of consortium.

This article argues that abolition of the loss of consortium cause of action Australia-wide is both timely and necessary. It does so in four parts. In Part II, we review the historical origins of the action as a remedy for wrongs. Part III presents judicial disquiet over the scope and application of the action, alongside the feminist law critique that influenced statutory reform — either abolition or expansion — in Australia. In Part IV, we consider the effectiveness of expansion in addressing pre-reform concerns including gender equity, awarding of double damages, and ageism. We examine expansion through the lenses of vulnerability and objectification, including its intersection with human rights law, international disability rights discourse and family law. Here, this article will demonstrate that the reforms are inconsistent with the obligations of Australia towards vulnerable people generally, and that they fail to address the underlying substantive gender inequality issues associated with this historic cause of action. In Part V, we call for further reform to abolish the action entirely, arguing that while expansion of the right to bring an action may have had little impact on the day-to-day business of the courts, the normative potency of the law makes the retention of a cause of action so steeped in archaic and discriminatory values unconscionable in modern society. Thus, laissez-faire arguments against further reform based on the infrequency of use of the cause of action should be disregarded.

We also refute claims that the abolition of consortium would permit otherwise compensable wrongs to go uncompensated, noting that a recurring concern about loss of consortium claims is the potential for awarding of double damages — judicial responses to which have resulted in insufficient compensation — and the absence of evidence from abolition jurisdictions of any crisis of insufficient compensation. In recognition of the law's significant normative power to signal the value the community assigns to the rights of the most vulnerable, we conclude that restricting the award of damages to the primary plaintiff satisfies the need for adequate compensation while respecting and prioritising the primary plaintiff's dignity and autonomy, interests which should not be subordinated to derivative interests of the primary plaintiff's spouse.

II Development and Scope of Loss of Consortium

The scope and content of loss of consortium actions lack precision, which is partly due to the mutability of the underlying principles on which the cause of action

19 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Final Report No 124, August 2014) ('*Equality, Capacity and Disability*').

rests.[20] The earliest reported claims for loss of consortium relied upon the law's recognition of the proprietary or quasi-proprietary interest a husband had in the person, companionship, and labours of his wife.[21] Wives, under coverture, lacked a separate legal identity, and so could not recover damages for harms they suffered unless the claim was brought by their husbands.[22]

In *Guy v Livesey*,[23] the Court of King's Bench distinguished between a husband's action brought on his wife's behalf for her injuries, and one brought for the injuries occurring to him as a consequence of the injuries to her — describing the latter as 'only a damage and loss to himself, for which he shall have this action'.[24] Despite this distinction, the effect of coverture was to aggregate all claims for damages arising from negligent or intentional injury to the wife into a single claim brought by the husband. For practical purposes, courts were rarely required to attribute specific damages to a particular spouse.

The passage of the *Married Women's Property Acts*,[25] through which married women acquired limited legal independence from their husbands, dissolved the doctrine of marital unity, recognising that husbands and wives do not necessarily have common interests.[26] As wives and husbands became independently capable of bringing claims against the same defendant relating to the same negligent or trespassory acts, the need to identify which elements of a claim rightly belonged to a wife suing as a primary plaintiff, and which elements should be captured under a related loss of consortium claim brought by her husband assumed greater practical significance. The risk of awarding duplicate damages[27] became a prominent concern amongst judges hearing loss of consortium claims.[28]

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20 Holbrook (n 5); Glanville Williams, 'Some Reforms in the Law of Tort' (1961) 24(1) *Modern Law Review* 101; Peter Brett, 'Consortium and Servitium: A History and Some Proposals' (1955) 29(6) *Australian Law Journal* 321, 389, 428; Jacob Lippman, 'The Breakdown of Consortium' (1930) 30(5) *Columbia Law Review* 651.

21 Holbrook (n 5) 2.

22 William Blackstone, *The Oxford Edition of Blackstone: Commentaries on the Laws of England: Of the Rights of Persons* (Oxford University Press 2016) bk 1, 285 ('*Of the Rights of Persons*').

23 (1618) 79 ER 428.

24 Ibid 428.

25 *Married Women's Property Acts* (n 7).

26 Alecia Simmonds, 'Courtship, Coverture and Marital Cruelty: Historicising Intimate Violence in the Civil Courts' (2019) 45(1) *Australian Feminist Law Journal* 131, 134, 141; *Wright v Cedzich* (1930) 43 CLR 493 ('*Wright*'); Graycar and Morgan, *The Hidden Gender of Law* (n 12) 117; Jayme S Lemke, 'Interjurisdictional Competition and the Married Women's Property Acts' (2016) 166(3–4) *Public Choice* 291, 294.

27 *Van Gervan v Fenton* (1992) 175 CLR 327; *Griffiths v Kerkemeyer* (1977) 139 CLR 161 ('*Griffiths*').

28 Holbrook (n 5) 6; *Thorne v Strohfeld* [1997] 1 Qd R 540 ('*Thorne*'); *Norman v Sutton* (1989) 9 MVR 525 ('*Norman*'); *Johnson v Nationwide Field Catering Pty Ltd* [1992] 2 Qd R 494, 496 ('*Johnson*').

Throughout its existence, consortium has lacked precise conceptual boundaries.[29] *Baker v Bolton*[30] established that any claims for loss of consortium expired with the death of the injured wife. Lord Sumner subsequently described the relevant interest as 'not in the life but in the service or consortium during life'.[31] Despite this clarification, the rule has attracted extensive academic criticism,[32] and further confused the principle underlying the action. The High Court of Australia in *Toohey v Hollier*[33] ('*Toohey*') stated:

> There is no reason to suppose that the word *consortium* possessed or acquired a legal meaning. … The notion of sharing a domestic life was probably all that was intended.[34]

Shared aspects of a domestic life in consortium claims typically fell into two categories: (1) loss of the wife's services within the household — typically related to running the household and caring for and educating the children; and (2) the less-tangible loss of the wife's society and companionship. Both categories proved to be controversial.

A *Services*

Historically, the doctrine of coverture was used to reject a wife's claims for loss of consortium on the basis that the wife had no comparable proprietary interest in services performed by her husband. Emphasising the material value of the services, the court reasoned that if such services were required, the husband, as controller of finances and property, would bear responsibility for paying for them. In *Lynch v Knight*,[35] Lord Wensleydale characterised a husband's interests as

> the benefit which the husband has in the *consortium* of the wife, is of a different character from that which the wife has in the *consortium* of a husband. The relation of the husband to the wife is in most respects entirely dissimilar from that of the master to the servant, yet in one respect it has a similar character. The assistance of the wife in the conduct of the household of the husband, and in the education of his children, resembles the service of a hired domestic, tutor,

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29 *Kungl v Schiefer* (1960) 25 DLR (2d) 344 (Ontario Court of Appeal) (Schroeder JA); Holbrook (n 5).

30 *Baker v Bolton* (1808) 170 ER 1033, 1033 (Lord Ellenborough).

31 *The Amerika* [1917] AC 38, 54.

32 Anthony Gray, '*Barclay v Penberthy*, the Rule in *Baker v Bolton* and the Action for Loss of Services: A New Recipe Required' (2014) 40(3) *Monash University Law Review* 920. Allan Beever, '*Barclay v Penberthy* and the Collapse of the High Court's Tort Jurisprudence' (2013) 31(2) *University of Queensland Law Journal* 307; Jones (n 2); Dan Flanagan, '*Barclay v Penberthy*: Polishing the Antiques of Australian Tort Law' (2013) 35(3) *Sydney Law Review* 655.

33 *Toohey v Hollier* (1955) 92 CLR 618 ('*Toohey*').

34 Ibid 625–6 (emphasis in original).

35 (1861) 11 ER 854 ('*Lynch*').

> or governess; is of material value, capable of being estimated in money; and the loss of it may form the proper subject of an action, the amount of compensation varying with position in society of the parties.[36]

Effectively restricting women from bringing claims for loss of consortium, he continued:

> The loss of such service of the wife, the husband, who alone has all the property of the married parties, may repair by hiring another servant; but the wife sustains only the loss of the comfort of her husband's society and affectionate attention, which the law cannot estimate or remedy. She does not lose her maintenance, which he is bound still to supply …[37]

In *Wright v Cedzich*, the High Court similarly denied availability of consortium damages to a wife.[38] Justice Isaacs, dissenting, critiqued Lord Wensleydale's characterisation of the spousal relationship, pointing out:

> *The children are hers as well as his* … Why is her care for her own child to be considered that of his *servant*, rather than that of *a wife and a mother*, and as the natural consequence of the union into which both have entered, and of the responsibility to the child which both parents owe by every tie of nature and justice? Does she tend and watch and care for her children because she is ordered — actually or impliedly — by her husband, and does he either actually or impliedly pay her wages as for services rendered to him at his direction in so doing?[39]

Increased formal workforce participation by women has entrenched — rather than resolved — the difficulties presented by the 'material value' requirement of the services. Courts have assumed increased external labour participation by women correlates to decreased domestic labour, resulting in a devaluation of women's domestic labour, and reduced damages awards, disregarding evidence to the contrary.[40]

Reflecting contemporaneous non-recognition of mental pain or anxiety as compensable harms, Lord Wensleydale further sought to restrict recovery for loss of consortium entirely to special damages related to services lost by the husband. This proposition was supported in *Best v Samuel Fox & Co Ltd* ('*Best*'),[41] and — with qualification — in Australia in *Toohey*.[42]

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36 Ibid 863 [598] (emphasis in original).

37 Ibid 863 [599].

38 *Wright* (n 26) 500, 531, 535.

39 Ibid 509 (emphasis in original).

40 Riseley (n 5); Thornton, 'Loss of Consortium' (n 13) 267; *Bagias v Smith* [1979] FLC 78, 497 ('*Bagias*').

41 [1951] 2 KB 639 ('*Best*').

42 *Toohey* (n 33) 627.

B *Society and Comfort*

In *Best*,[43] a workplace injury rendered the plaintiff wife's husband permanently impotent. Dismissed at first instance for want of a cause of action, the Court of Appeal, rather than denying that wives had a right to bring claims for loss of consortium, instead found that the plaintiff's loss was incomplete, and therefore could not be recognised by damages. This principle of 'indivisibility' — requiring either temporary or permanent loss of services *and* society and companionship — lacked authority.[44]

The House of Lords in turn reverted to the issue relied on by the judge at first instance: that the cause of action was not available to wives, for the reasons outlined by William Blackstone[45] and Lord Wensleydale,[46] described above, amongst others. On the principle of indivisibility, the House of Lords was circumspect. Lords Goddard and Porter were supportive, consistent with their efforts to restrict claims to pecuniary damages. Lord Reid, Lord Oaksey concurring, rejected the indivisibility principle.[47]

In *Toohey*, the High Court considered an appeal from an award of general damages to a husband whose wife was injured in a motor vehicle accident. Dismissing the appeal, the Court noted that

> such elements as mental distress are to be excluded but the material consequences of the loss or impairment of his wife's society, companionship and service in the home and the expense of her care and treatment incurred as the result of the injury form proper subjects of compensation to the husband.[48]

The effect of this seems to be that if a husband could show 'material consequences' based on loss of services, he could also recover general damages for aspects excluding 'mental distress' arising from loss of her companionship and society. It is unclear what 'material and temporal' — pecuniary — losses associated with loss of society and companionship would support a claim in the absence of a component for loss of services.[49] In essence, pecuniary loss arising from loss of services seems to be an essential component of a loss of consortium claim — effectively excluding women from the cause of action for want of evidence of a pecuniary loss arising from loss

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43 *Best* (n 41).

44 *Toohey* (n 33); Eric CE Todd, 'Reflections on Best v. Samuel Fox, Ltd' (1952) 15(2) *Modern Law Review* 246, 250.

45 Blackstone, *Of the Rights of Persons* (n 22) 284–7.

46 See above nn 35–6.

47 *Best* (n 41) 736.

48 *Toohey* (n 33) 627 (Dixon CJ, McTiernan, Kitto JJ).

49 It is the view of the authors that costs associated with accessing assisted reproductive technologies necessitated by the injury could potentially be recognised as pecuniary losses. Loss of childbearing ability has been recognised as an element of 'companionship and society', in contrast to loss of sexual capacity per se.

of their husband's services, except presumably in those rare circumstances where the wife was the main earner.

Could claims for loss of society and companionship, without accompanying claims for loss of services, demonstrate the necessary 'material or temporal loss' to be recognised by the courts? This was a question considered in *Birch v Taubmans Ltd*,[50] a case similar to *Best*, except that the total and permanent loss of sexual capacity affected the wife rather than the husband. The New South Wales court upheld an appeal against a jury award of £1 in nominal damages for loss of comfort and society. Seeking to differentiate between the 'material or temporal' and 'spiritual' impacts of loss of a wife's comfort and society in the context of sexual capacity, the Court referenced the husband's 'right' to intercourse within marriage, including for procreation.[51] Neither line of reasoning has aged well. The common law right of a husband to intercourse is no longer recognised,[52] while the emphasis on procreation presumably excludes recognition of loss by a couple who were past child-bearing age, did not wish to have children, or for other reasons were not able to do so.[53]

Three South Australian judgments further developed the law regarding society and comfort. In *Hasaganic v Minister for Education*,[54] the Supreme Court of South Australia recognised a claim for loss of sexual capacity per se, rather than loss of sexual capacity as loss of childbearing capacity. *Markellos v Wakefield*[55] distinguished between an overall deterioration in the quality of the atmosphere and companionship of the marriage from mental distress (not compensable under *Toohey*). *Meadows v Maloney*[56] recognised the significant material loss of companionship arising from the injury to the wife, again distinguishing it from 'mental distress'.

C *An Element of Moral Luck?*

One problem evident in the lines of authority, alluded to by Lord Porter in *Best* — but not well-developed — is the role played by moral luck in consortium actions. According to Thomas Nagel:

50 (1956) 57 SR (NSW) 93 ('*Birch*').

51 Ibid 99.

52 *R v L* (1991) 174 CLR 379.

53 Riseley (n 5) sensibly suggests that a better explanation is that recognition of a husband's right to his wife's society is 'an exception to the common law rule excluding emotional damage from recovery': at 433.

54 (1975) 5 SASR 554 ('*Hasaganic*').

55 (1974) 7 SASR 436.

56 (1972) 4 SASR 567.

> Where a significant aspect of what someone does depends on factors beyond his control, yet we continue to treat him in that respect as an object of moral judgment, it can be called moral luck.[57]

Legal liability for negligence generally follows similar principles. The defendant must take the plaintiff as he or she finds them:[58] a young, old, male, female, injured, fit or — in this context — married or not. In addition to rejecting Mrs Best's claim on the grounds of the difference in the quality of the services noted above, Lord Porter, echoed by Lord Goddard, sought to distinguish precedent and obiter supportive of recognising wives' claims contained in *Gray v Gee* ('*Gray*'),[59] and *Place v Searle* ('*Place*'),[60] from the facts in *Best*. While *Gray* and *Place* indicated that both husband and wife alike have a 'cause of action against a third party who, without justification, destroys that consortium',[61] both cases related to actions for enticement where the defendant knew the plaintiff was married. Distinguishing them from *Best* — a claim for negligent injury — Lord Porter stated: 'I know of no case where such a right of action has even been suggested where there is no evidence that the defendant knew of the existence of a wife or husband',[62] echoing the earlier views of McCardie J in *Butterworth v Butterworth*.[63] The difference in liability for defendants could be significant: if they negligently injured married men whose families were complete, or single women, based on the common law at the time of *Best*, no action for loss of consortium would lie. In contrast, if the defendant injured a young married woman of childbearing age, in addition to any damages arising directly as the result of a claim brought by her for her injuries, the defendant would also potentially face another claim for loss of consortium brought by her husband, for which damages could be substantial.

By the mid-20th century, actions for loss of consortium were attracting significant criticism from judges and scholars alike.[64] In *Best*, no fewer than nine judges throughout the course of proceedings opposed expansion of the tort, while affirming female equality as a legal principle, and criticising past subordination of women.[65] Notwithstanding extensive concerns about the tort, *Best* highlighted that if any reform was to occur it would be legislative rather than judicial.

Best foreshadowed the legislative response and reasoning adopted by the majority of Australian jurisdictions, for largely similar reasons to those identified in *Best*,

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57 Thomas Nagel, 'Moral Luck' in Daniel Statman (ed), *Moral Luck* (State University of New York Press, 1993) 57–71, 59.

58 *Watts v Rake* (1960) 108 CLR 158, 164.

59 (1923) 39 TLR 429.

60 [1932] 2 KB 497 ('*Place*').

61 *Best* (n 41) 726 (Porter LJ), quoting ibid 512 (Scrutton LJ).

62 Ibid 727.

63 *Butterworth v Butterworth* (1920) P 126, 142, 151.

64 See, eg: Todd (n 44); Handford (n 1).

65 Conaghan, *Law and Gender* (n 9) 31.

which remain, in the authors' own views, valid. Curiously, of those jurisdictions which undertook legislative reform, the approaches taken were polarised between expansion, which the court in *Best* rejected, and abolition, which they supported, albeit via legislative rather than judicial reforms. The next Part of this article considers the historical context of the reforms and contextualises the need to revisit their outcome in the expansionist jurisdictions, with a view towards abolition.

III An Appetite for Reform

In 1970, the Law Reform Commission of South Australia reported on law relating to women and women's rights, including tort law reform.[66] Although brief, the recommendations were clear: amend the *Wrongs Act 1936* (SA) ('*Wrongs Act*')[67] to broaden the scope of consortium beyond *Wright* to reflect *Best* in scope, but exclude the reasoning ultimately employed in *Best*.[68] The *Wrongs Act* was subsequently amended to extend availability of consortium actions to wives, specifying that damages were to be calculated in the same way for spouses regardless of gender.[69]

The report's brevity was a limitation. While it was apparent that the committee sought to reduce or eliminate laws that were discriminatory, it lacked contextual justification for its recommendations. Its approach presented a seemingly obvious solution to an overtly discriminatory aspect of the common law, through expansion of access to the cause of action to spouses of both genders. This was, however, not the only approach that could have been taken.

The English Law Reform Committee in the late 1960s reviewed loss of servitium and loss of consortium actions,[70] finding that

> the action for loss of consortium is now an anachronism and that it ought to be abolished. But merely to abolish the action without putting anything in its place would lead to injustice.[71]

Referring to a proposal by Glanville Williams,[72] it proposed to permit either spouse to recover 'reasonable medical and nursing expenses and all other costs properly incurred in consequence' of an injury to husband or wife, including the costs of any

66 Law Reform Committee of South Australia, *Law Relating to Women and Women's Rights* (Report No 11, 1970) ('*Law Relating to Women*').

67 *Wrongs Act 1936* (SA) ('*Wrongs Act*').

68 *Law Relating to Women* (n 66) 5–6.

69 *Wrongs Act* (n 67) s 33, as amended *by Statutes Amendment (Law of Property and Wrongs) Act (No 19) 1972* (SA) Pt III s 33.

70 English Law Reform Committee, *Loss of Services* (Report No 11, Cmnd 2017, 1963).

71 Ibid 9.

72 Williams (n 20) 104–5.

domestic help required to replace services normally or previously provided by the injured partner.[73] Although an expansion model of reform on gender lines, it was significantly narrower in scope than the South Australian reforms, restricting claims to 'material or temporal' loss of services only, rather than loss of companionship and society.

South Australia's reforms foreshadowed it becoming the first Australian jurisdiction to pass sex discrimination laws three years later.[74] By the 1980s, feminist legal scholars were turning their attention to the gendered nature of tort law, particularly where damages awarded in tort intersected with broader feminist concerns about wage equality and recognition of the social value of women's unpaid labour.[75] On loss of consortium, Margaret Thornton noted that the courts'

> lowly perception of the value of the full-time homemaker tends to emanate from a judicial and societal inability to evaluate the contributions of unpaid work in a capitalist structure concerned with the acquisition of wealth and monetary reward. … The judiciary have adopted the view that the loss of all these skills is compensable at the lowest market rate for a replacement domestic worker or servant.[76]

Thornton observed that even when the wife was engaged in full time employment and still continued to do the bulk of the domestic work, the courts remained 'preoccupied with [consideration of] the husband's loss'.[77]

Subsequent law reform enquiries culminated in abolition of loss of consortium actions in all but two of the remaining Australian jurisdictions. The Australian Law Reform Commission's ('ALRC') Final Report on *Loss of Consortium and Compensation for Loss of Capacity to Do Housework* in the Australian Capital Territory[78] detailed 'discriminatory treatment of wives',[79] and recommended its abolition.[80] It referenced the New South Wales Law Reform Commission Research Paper which

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73 *Loss of Services* (n 70) 9.

74 *Sex Discrimination Act 1975* (SA).

75 Robin West, 'Women in the Legal Academy: A Brief History of Feminist Legal Theory' (2018) 87(3) *Fordham Law Review* 977; Martha Albertson Fineman, 'Feminist Legal Theory' (2005) 13(1) *American University Journal of Gender, Social Policy and the Law* 13; Nicola Lacey, 'Feminist Legal Theory' (1989) 9(3) *Oxford Journal of Legal Studies* 383; Carrie Menkel-Meadow, 'Feminist Legal Theory, Critical Legal Studies, and Legal Education or "The Fem-Crits Go to Law School"' (1988) 38(1–2) *Journal of Legal Education* 61.

76 Thornton, 'Loss of Consortium' (n 13) 263.

77 Ibid 268.

78 Australian Law Reform Commission, *Community Law Reform for the Australian Capital Territory: Second Report: Loss of Consortium and Compensation for Loss of Capacity to Do Housework* (Report No 32, 1986) ('*Loss of Consortium and Compensation*').

79 Ibid 4.

80 Ibid 10.

proposed reforming earnings-based, lump sum award compensation mechanisms and favouring providing compensation for non-earners, including primary plaintiffs in consortium claims.[81] The ALRC noted that:

> an equalised loss of consortium action would not in fact operate equally because the amount of damages awarded to husbands for the loss of wives' services would tend to be greater than damages awarded to wives in equivalent actions.[82]

Further, expansion would result in the action only being available to married people, presenting an additional problem from the perspective of discrimination.[83]

In New South Wales, consortium was expressly abolished by the *Law Reform (Marital Consortium) Act 1984* (NSW). In debating the reforms, the New South Wales legislature described consortium actions as 'abhorrent to the community's current view of the position of women in society'[84] and rejected the alternative reform — expansion of the action to women — as 'entrench[ing] the odium of proprietorial rights in marriage'.[85]

The Australian Capital Territory,[86] Tasmania,[87] and Western Australia[88] similarly abolished the cause of action. The Western Australian Parliament described it as 'anachronistic' because 'it is a right which is not shared by the wife; in other words, one cannot petition or sue the other way'.[89] Victoria and the Northern Territory, instead of abolition, implemented broader reform of legislation governing claims and calculation of damages,[90] which have been interpreted as abolishing the cause of action for practical purposes.[91]

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81 Michael R Chesterman, *Accident Compensation: Proposals to Modify the Common Law* (Consultation Paper, New South Wales Law Reform Commission, 1983).

82 *Loss of Consortium and Compensation* (n 78) 4.

83 Ibid 6.

84 New South Wales, *Parliamentary Debates*, Legislative Council, 10 May 1984, 541 (BJ Unsworth, Minister for Transport and Vice-President of the Executive Council).

85 Ibid 546 (Ann Symonds).

86 *Civil Law (Wrongs) Act 2002* (ACT) s 218.

87 *Common Law (Miscellaneous Actions) Act 1986* (Tas) s 3.

88 *Law Reform (Miscellaneous Provisions) Act 1941* (WA) s 3.

89 Western Australia, *Parliamentary Debates*, Legislative Council, 16 July 1986, 1881 (John Williams).

90 *Motor Accidents (Compensation) Act 1979* (NT) s 5; *Work Health Act 1997* (NT) s 52, repealed by *Work Health and Safety (National Uniform Legislation) Act 2011* (NT); *Transport Accident Act 1986* (Vic) ss 93(1), (1A), (2).

91 *Doughty v Martino Developments Pty Ltd* (2010) 27 VR 499, 508 [20]; *CSR Ltd v Eddy* (2005) 226 CLR 1, 22–3 [44] ('*CSR*').

Queensland did not reform actions for loss of consortium until 1989, which was prompted in part by the circumstances of *Thorne v Strohfeld*[92] where Mrs Thorne's husband suffered serious injuries, including permanent brain injury. A primary claim against the defendant was brought and settled on behalf of Mr Thorne. Under the common law at the time, Mrs Thorne was unable to bring a claim for loss of consortium. Responding to publicity surrounding the case, Queensland's then Attorney-General in a proposal to Cabinet recommended creating a 'wife's action for loss of consortium'.[93] The recommendation supported expansion rather than abolition despite noting the preponderance of abolition reforms in other jurisdictions. The Attorney-General noted the observation of Peter Handford that actions for loss of consortium award damages to spouses for loss of society, companionship, and assistance, which are not otherwise capable of compensation through awards to the primary victim:[94] 'from a policy point of view, it would perhaps be undesirable to abolish the husband's right to bring an action for loss of consortium, as it is such an entrenched part of our legal system'.[95]

With the *Law Reform (Husband and Wife) Act Amendment Act 1989* (Qld), the Queensland legislature intended to provide 'positive benefits to Mrs Thorne and to *the women of Queensland* … as this right of action [had] been available to men during this time, [and] it [was] only fair that the remedy be available *to all women as well*'.[96] The stated purpose was to specifically confer 'equal opportunity for women in this area of the law'.[97] Gender discrimination was, thus, identified as the sole mischief which the legislation was to remedy.

Notwithstanding the legislative reforms, Mrs Thorne's engagement with the legal system was not straightforward. Initially awarded $115,850 in damages to cover both the services and companionship and society elements of her consortium claim, the Queensland Court of Appeal, concerned about awarding of double damages for the service component brought about by an award of *Griffiths v Kerkemeyer*[98] damages — damages awarded to a plaintiff for domestic assistance or care, when that care is provided to the plaintiff gratuitously by friends or relatives of the plaintiff — included in Mr Thorne's previously settled claim, reduced her award to $31,350. Justice of Appeal Pincus and Helman J stated:

92 *Thorne* (n 28) 542, 545.

93 Explanatory Notes, Law Reform (Husband and Wife) Act 1968 Amendment Bill 1989 (Qld) ('Explanatory Notes').

94 Handford (n 1) 118.

95 'Creation of a Wife's Action for Loss of Consortium', *Queensland Government* (Web Page, 10 October 1988) 2 [8] <https://www.archivessearch.qld.gov.au/items/ITM3001199>.

96 Explanatory Notes (n 93) 3 (emphasis added).

97 Ibid.

98 *Griffiths* (n 27).

> We are in respectful disagreement with his Honour's conclusions, as it appears to us that the wife's claim for loss of the husband's services relates to the same matters as were claimed in the husband's suit.[99]

In 2010, Queensland's legislation was further amended, making the provisions gender-neutral. Consequently, the statutory action for loss of consortium is currently available to all spouses of injured persons in Queensland, including same sex and de facto partners.[100] The statutory claim also survives the death of a spouse.[101]

The *Civil Liability Act 2003* (Qld),[102] and the *Workers' Compensation and Rehabilitation Act 2003* (Qld) ('*WCR Act*')[103] establish qualifying parameters for the award of damages for the loss of consortium.[104] These provisions restrict the statutory action to circumstances where a spouse has died from their injuries or where the injured spouse's general damages have been assessed at or in excess of a prescribed amount — currently $49,700 for injuries occurring after 1 July 2022.[105] The *WCR Act* and its regulations operate to a similar effect.[106]

Part IV addresses some practical implications of the expansionist reforms, evident from the subsequent case law. Expansion through legislative reform has resulted in greater substantive inequality than was flagged even by the ALRC, including entrenching discriminatory and objectifying treatment of other disadvantaged groups, particularly people with disabilities. For these reasons, added to the initial gender-based concerns prompting the earlier abolition reforms, we argue that it is necessary for expansionist jurisdictions to reconsider their retention of the cause of action.

IV A Reform in Need of Reform?

Following the expansion reforms, few claims have come before the courts[107] and courts have largely relied on pre-reform common law decisions on husband's loss of

99 *Thorne* (n 28) 98.

100 *Acts Interpretation Act 1954* (Qld) s 32DA(5)–(6).

101 *Barclay* (n 2) 279.

102 *Civil Liability Act 2003* (Qld) s 58.

103 *Workers' Compensation and Rehabilitation Act 2003* (Qld) ss 306M, 610 ('*WCR Act*').

104 *Civil Liability Act 2003* (Qld) s 58; ibid.

105 *Civil Liability Regulation 2014* (Qld) reg 6; *Workers' Compensation and Rehabilitation Regulation 2014* (Qld) reg 128.

106 *WCR Act* (n 103) s 128.

107 *Corkery v Kingfisher Bay Resort Village Pty Ltd* [2010] QSC 161, [95] ('*Corkery*'). Recent Westlaw and LexisNexis searches identified 39 claims brought in South Australia, and 49 claims brought in Queensland, since the respective expansion reforms.

consortium in interpreting the reforms.[108] Despite the reforms, loss of consortium actions continue to raise issues of discrimination and unfairness.

In *Thorne*, the Queensland Court of Appeal was concerned about the risk of awarding double damages arising from the overlap between a spousal loss of consortium services claim, and the primary victim's claim for *Griffiths v Kerkemeyer* and gratuitous services damages.[109] This risk increases if the primary claim settles, as in *Thorne*, particularly where there is uncertainty about precisely which heads of damage had been claimed and compensated.[110]

Where the primary claim involving *Griffiths v Kerkemeyer* damages is concluded within the courts and if no action for loss of consortium is brought concurrently, it is presumed that the damages awarded for the primary claim appropriately compensate for the losses incurred, including those of any non-injured spouse.[111] A separate and subsequent claim for loss of consortium by the non-injured spouse will accordingly be restricted in scope, to prevent awarding of double damages for the same harm.[112] However, these court-imposed limitations on awarding of double damages are evaded where the non-injured spouse brings their claim for loss of consortium concurrently, or, as in *Thorne*, settled damages for the loss of consortium claim are assessed to mitigate against awarding of double damages (reduced) by favouring the injured spouse.[113]

The post-reform situation is also complicated regarding gratuitous services formerly provided by, rather than to, the primary victim. Previously, *Sullivan v Gordon*[114] damages allowed the injured party to recover for the future costs of services that, but for the injury suffered, they would have gratuitously provided. However, in *CSR Ltd v Eddy*,[115] the High Court overturned *Sullivan v Gordon*. Statutory reform was subsequently imposed in Queensland,[116] subjecting both the injured and non-injured

108 See, eg: *Daly v DA Manufacturing Co Pty Ltd* [2002] QSC 308, [46] (Muir J) ('*Daly*'); *Johnson v Kelemic* [1979] FLC 90–675, 78, 491 (Reynolds JA); *Toohey* (n 33) 625.

109 *Sianis v Barlow* (1987) 48 SASR 469; *Norman* (n 28) 523–3 (Gleeson CJ, Kirby P and Hope AJA); Hedvika Knopova, 'Loss of Consortium: Thorn in Our Side: *Thorne v Strohfeld*' (1998) 20(1) *University of Queensland Law Journal* 115.

110 *Thorne* (n 28).

111 *Norman* (n 28) 9–13; *Andrewartha v Andrewartha [No 2]* (1987) 45 SASR 85, 87–9 (O'Loughlin J) ('*Andrewartha*'); Jeffrey Rolls 'Loss of Consortium Claims' [1997] (23) *Plaintiff* 18.

112 *Thorne* (n 28).

113 *Norman* (n 28) 12; *Bresatz v Przibilla* (1962) 108 CLR 541, 549–50 (Owen J).

114 (1999) 47 NSWLR 319.

115 *CSR* (n 91) 13 [19], 32 [68] (Gleeson CJ, Gummow and Heydon JJ).

116 *Civil Liability Act 2003* (Qld) s 59A, as inserted by *Civil Liability and Other Legislation Amendment Act 2010* (Qld) s 10.

spouse to the same threshold requirement of an Injury Scale Value ('ISV')[117] — currently 23 or higher[118] — to claim damages in respect of loss of those services.[119] There, the similarities end. The non-injured spouse is entitled to claim for loss of the benefit of receiving those services without having to satisfy any additional requirements, as they form part of the services component for loss of consortium. The injured spouse, in contrast, in bringing a claim for loss of the ability to provide those services, must demonstrate that the services would have been provided to a member of their household or their unborn child,[120] and that the services would have been provided for a minimum of six hours a week, for a minimum period of six months.[121] So long as general damages are assessed at a minimum ISV of 23, the non-injured spouse may bring an action for loss of consortium pursuant to s 58 of the *Civil Liability Act 2003* (Qld). The injured spouse — as the former provider of the services — is subject to a higher threshold when seeking recovery for loss of the same services than the non-injured spouse seeking to recover for loss of their right to receive them. The non-injured spouse is compensated more readily for a harm which they do not personally suffer.[122]

Queensland's statutory reforms have had the unintended consequence of allowing the non-injured spouse to recover for loss of gratuitous domestic services more readily than the injured spouse.[123] Pursuant to s 59A, the injured spouse encounters additional barriers to recovering for the same loss.[124] Ergo, loss is conceptualised as a loss of benefit by the non-injured spouse, rather than a loss of the injured spouse's capacity.[125] South Australia has adopted a similar framework of qualifying injury severity thresholds in the context of motor vehicle accidents. For other types of accident, however, no such qualifying ISV equivalent provisions apply.[126]

A further tension exists between the expanded reforms, and the principles underpinning the *Family Law Act 1975* (Cth) ('*FLA*'). At common law, a claim for loss

117 *Civil Liability Act 2003* (Qld) s 61. An injury scale value (ISV) is a numerical value between 0 and 100 representing a plaintiff's general damages, that is, pain and suffering, loss of amenity or life expectancy, or disfigurement: *Civil Liability Act 2003* (Qld) ss 51, 61. The ISV is used as prescribed under the *Civil Liability Regulations 2014* (Qld) to convert the level of injury into a monetary sum.

118 Ibid s 75.

119 Ibid s 58.

120 Ibid ss 59A(2)(b)–(c).

121 Ibid s 59A(2)(e)(i)–(ii).

122 Regina Graycar, 'Compensation for Loss of Capacity to Work in the Home' (1985) 10(3) *Sydney Law Review* 528, 537–9.

123 *Civil Liability Act 2003* (Qld) s 58.

124 Ibid s 59A.

125 Thornton, 'Loss of Consortium' (n 13) 267; Graycar (n 122) 530–6.

126 *Civil Liability Act 1936* (SA) s 65(2).

of consortium does not survive divorce.[127] Readily accessible no-fault divorce,[128] permitting the termination of the spousal relationship, is irreconcilable with the presumption of continuing spousal rights to the services of the other[129] which underpins actions for loss of consortium.[130] Queensland's reforms, in expanding the action, implicitly create additional barriers to exiting a marriage to spouses of any gender in contrast to the Commonwealth's efforts to remove them.

Dissolution of the spousal relationship can cause a double deprivation of damages to the injured party, particularly if the injured spouse's award for general damages has been reduced to prevent awarding of double damages and accommodate a concurrent non-injured spouse's claim for loss of consortium.[131] Underlying the division of the total damages amongst the claims brought in separate actions of the spouses for the same loss is the assumption that there is communal wealth in a spousal relationship with each spouse having equal access[132] However, where the non-injured spouse leaves the relationship, damages awarded for their loss of consortium follow. A non-injured spouse can potentially receive a windfall if, after obtaining lump sum damages for the loss of their injured spouse's consortium, they subsequently dissolve the relationship and enter into a new spousal relationship with a fit person who provides the consortium which the damages for loss of consortium remedied.[133] Hence, the injured spouse is denied the damages which were awarded as a result of their personal injury for a second time.[134] In this circumstance, avoidance of the risk of awarding double damages may result in the injured spouse being insufficiently compensated.[135]

The pervasiveness of sex-role stereotypes continues to affect damages.[136] Where both spouses work outside the home, courts assume that both spouses equally contribute to the domestic workload,[137] obscuring the continuing gendered reality of domestic labour division and the phenomenon of the 'second shift'.[138] The loss of a wife's domestic services to the household[139] and her sexual services to her husband

127 *Parker v Dzundza* [1979] Qd R 55, 57 (Hoare J) ('*Parker*').

128 *Family Law Act 1975* (Cth) s 48 ('*FLA*').

129 See Graycar (n 122) 546; Riseley (n 5) 446.

130 *Wright* (n 26) 510 (Isaacs J).

131 Graycar (n 122) 541.

132 Riseley (n 5) 450.

133 Graycar (n 122) 543, discussing *Bagias* (n 40) 740 (Hutley JA).

134 *FLA* (n 128) s 79.

135 Graycar (n 122) 553.

136 *Sloan v Kirby* (1979) 20 SASR 263; Thornton, 'Loss of Consortium' (n 13) 270–1.

137 Graycar (n 122) 543.

138 Arlie Russell Hochschild and Anne Machung, *The Second Shift: Working Parents and the Revolution at Home* (Penguin Books, 2nd ed, 2012).

139 Ibid; *CSR* (n 91) 12–15 [16]–[24] (Gleeson CJ, Gummow and Heydon JJ).

are treated as being of greater than loss of their value to her.[140] This translates into minimal damages being awarded to women for loss of their husband's consortium, particularly household services and sexual relations, when compared with damages deemed appropriate for husbands.[141] Thus, while expansion reforms purportedly pursue gender equality, in effect, they perpetuate existing structural inequality.[142]

Consortium has been interpreted as encompassing both loss of services and loss of society components. This includes extending loss of sexual expression beyond the loss of reproductive capacity[143] to include diminution in the quality or frequency of sexual intercourse,[144] as well as the loss or interruption of sexual life between spouses.[145] In the absence of express legislative intention to the contrary, the effect of the statutory reform should have been to apply those principles to claims brought by either spouse. Problematically, however, the courts have failed to develop a method for quantifying the intangible aspects of the conjugal relationship or provide reasons explaining how they have determined awards of damages under either statutory or common law claims. As Lyons J stated in *Corkery v Kingfisher Bay Resort Village Pty Ltd* ('*Corkery*'), '[n]o recent authority has been identified which would be of significant assistance in assessing the amount of [damages for a] claim'.[146] Instead, courts have mostly awarded nominal sums,[147] leaving many of the judicial concerns about the fair and just estimation of those claims unaddressed.

The continued presence of the gender discrimination underpinning the common law right of action is consequently evident due to the lack of consideration given to a wife's loss of consortium regarding the impairment or diminution of sexual relations resulting from the injury of her male spouse. In *Daly v DA Manufacturing Co Pty Ltd*,[148] the impact of the husband's injury on the couple's sexual relationship was considered only insofar as it demonstrated stress on their marriage occasioned by the injury. In *Corkery*, the 'permanent impairment of sexual function experienced by Mr Corkery' was considered in relation to the husband's primary claim, but not for the wife's claim for loss of consortium.[149] Further, in *Thorne*, where the husband

140 Thornton, 'Loss of Consortium' (n 13) 271.

141 Riseley (n 5) 448.

142 Thornton, 'Loss of Consortium' (n 13) 271.

143 *Hasaganic* (n 54) 558. Cf *Thomas v Iselin* [1972] QWN 15, where the injured wife of the plaintiff was past childbearing age; Thornton, 'Loss of Consortium' (n 13) 266.

144 *Birch* (n 50); *Bagias* (n 40) 497; *Pickering v Ready Mixed Concrete (Queensland) Pty Ltd* [1967] QWN 45; *Parker* (n 127); *Andrewartha* (n 111); *Talbot v Lusby* [1995] QSC 143 ('*Talbot*'); *Henley v Queensland* [2002] QDC 256; *Corkery* (n 107).

145 *McIntyre v Miller* (1980) 30 ACTR 8; *Kealley v Jones* [1979] 1 NSWLR 723 ('*Kealley*'); *Corkery* (n 107); *Talbot* (n 146).

146 *Corkery* (n 107) [95], citing *McDonnell v Mount Sugarloaf Forest Pty Ltd* [2000] QSC 054 and *Lebon v Lake Placid Resort Pty Ltd* [2000] QSC 049 ('*Lebon*').

147 See, eg: *Toohey* (n 33) 624; *Kealley* (n 145) 741 (Hutley JA).

148 *Daly* (n 108) [48], [50].

149 *Corkery* (n 107) [73].

had sustained brain damage, the court did not consider how this affected the sexual aspect of the marital relationship for the wife's loss of consortium claim.[150]

This contrasts with the court's approach to sexual intercourse in husbands' claims for loss of consortium. In *Lebon v Lake Placid Resort Pty Ltd*, where 'sexual intercourse ceased from the date of the accident … it [was] not surprising that the parties became isolated and eventually the matrimonial relationship broke down completely'.[151] The damages accordingly considered the 'loss of comfort' suffered by the husband due to his wife's injuries. Thus, women continue to be treated as the passive receptacles of male sexual gratification. Further, it evidences an assumption that the sexual aspect of the marital relationship is not as important to women as it is to men.

Even when damages awarded primarily focuses on quantifiable loss of domestic and related services, which the injured spouse would ordinarily have provided for the benefit of the non-injured spouse, the gendered influence of the common law in the precedent cases is prominent. Where the injured party is male, the chief component of a wife's damages for loss of consortium appears to be for loss of the husband's services, such as 'household repairs and maintenance'.[152] In *Nationwide Field Catering*, it was accepted that a husband did no housework prior to his wife's injury.[153] It was then stated that '[e]ven when both spouses work there is nothing surprising in that as the division of labour may leave the outside tasks to the husband'.[154] This further exposes the gendered assumptions which inform judicial decision-making and how formal legislative reform has failed to 'fix' the gender discrimination in the right of action which prompted it, while still impinging on the damages awarded for the primary claim.[155]

These cases demonstrate that, despite the expansion's ostensible commitment to redressing gender inequality, cases relying on the reformed provisions have not necessarily achieved substantive equality between the genders. The limitations of formal equality as a means of achieving practical equality are well-recognised: formal equality begs the question 'equal to whom?';[156] and the male standard has typically become the accepted objective universal standard.[157] Sandra Fredman observes:

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150 *Thorne* (n 28) 546.

151 *Lebon* (n 146) [63].

152 See, eg, *Thorne* (n 28) 543.

153 *Johnson* (n 28) 496.

154 Ibid.

155 *Curran v Young* (1965) 112 CLR 99, 100–1 (Barwick CJ); *Taylor v Stratford* [2004] 2 Qd R 224, 225–6 (Wilson J).

156 Martha Albertson Fineman, 'Vulnerability and Inevitable Inequality' (2017) 4(3) *Oslo Law Review* 133, 135 (emphasis omitted) ('Inevitable Inequality').

157 See generally: Catharine A MacKinnon, 'Substantive Equality: A Perspective' (2011) 96(1) *Minnesota Law Review* 1; Regina Graycar and Jenny Morgan, 'Examining Understandings of Equality: One Step Forward, Two Steps Back?' (2004) 20(1) *Australian Feminist Law Journal* 23.

> formal equality assumes that the aim is identical treatment. Yet … where there is antecedent inequality, 'like' treatment may in practice entrench difference. Thus unequal treatment may be necessary to achieve genuine equality.[158]

The grounds of discrimination are not limited to gender. They include 'race, disability, sexual orientation, religion and belief, age, and nationality' at a minimum.[159]

Substantive equality, as an alternative to formal equality, considers antecedent inequalities and seeks to address them. It has proven elusive to define, and consequently has attracted criticism. Fredman's four-dimensional model of substantive equality addresses many of the criticisms of both formal equality and less sophisticated models of substantive equality:

> First, it aims to break the cycle of disadvantage associated with status or outgroups. This reflects the redistributive dimension of equality. Secondly, it aims to promote respect for dignity and worth, thereby redressing stigma, stereotyping, humiliation, and violence because of membership of an identity group. This reflects a recognition dimension. Thirdly, it should not exact conformity as a price of equality. Instead, it should accommodate difference and aim to achieve structural change. This captures the transformative dimension. Finally, substantive equality should facilitate full participation in society, both socially and politically. This is the participation dimension.[160]

The reforms regarding the expansion of this action do not address the first or third of these aims; monetary value of claims and damages awarded to women remain low, overshadowed by gender stereotypes of the division of household labour and its devaluation when done by women. Although women can bring claims, their claims are expressly limited to those which have recognised precedent, regardless of whether those precedents adequately reflect women's needs. These limitations, however, need not require wholesale abolition of loss of consortium actions. The second and fourth aims, however, undermine the entire basis of expansion.

Under Fredman's model, substantive equality aims to promote respect for dignity including — but not limited to — recognition of the individual's autonomy and right to self-determination.[161] Yet loss of consortium actions, by their very nature as indirect or secondary claims, patently fail to do this. The actions are brought by an outsider to the relationship arising between plaintiff and defendant, and rely on the objectification of the primary plaintiff. To draw on Immanuel Kant's second formulation of the categorical imperative — the Humanity formulation — consortium actions permit that outsider to treat the plaintiff as a means to an end.[162] The outsider

158 Sandra Fredman, *Discrimination Law* (Oxford University Press, 2nd ed, 2011) 13.

159 Ibid 25.

160 Ibid.

161 Fredman (n 158) 19–25.

162 Immanuel Kant, *Groundwork for the Metaphysics of Morals*, tr Allen W Wood and J.B Schneewind (Yale University Press, 2002) 46–9.

(spouse) can recover for harm to his interests via the intermediate and more direct harm occurring to his wife. His harm and ability to recover damages is dependent on something that has been done to her; but she is not required to participate in his efforts to recover damages for any harm that has occurred to him. She has become solely a means to an end: the damages he receives do not go to her, she has no legal claim or interest in them, and she is not a party to the litigation. Her autonomy is denied and she is objectified.

For Martha Nussbaum, 'objectification entails making into a thing, treating *as* a thing, something that is really not a thing'.[163] She identifies seven 'notions' of treating '*as an object*': instrumentality; denial of autonomy; inertness; fungibility; violability; ownership; and denial of subjectivity.[164] Nussbaum's formulation of objectification is broader than those of Kant, and of Catharine MacKinnon[165] and Andrea Dworkin,[166] who viewed objectification as primarily about instrumentality.[167] According to Nussbaum, objectification occurs where a human being is treated in one or more of these seven ways:[168]

1. Instrumentality: The objectifier treats the object as a tool of his or her purposes.

2. Denial of autonomy: The objectifier treats the object as lacking in autonomy and self-determination.

3. Inertness: The objectifier treats the object as lacking in agency, and perhaps also in activity.

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163 Martha C Nussbaum, 'Objectification' (1995) 24(4) *Philosophy and Public Affairs* 249, 257 (emphasis in original).

164 Ibid.

165 See, eg: Catharine A MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, 1987); Catharine A MacKinnon, *Towards a Feminist Theory of the State* (Harvard University Press, 1989); Catharine A MacKinnon, 'Pornography Left and Right' (1995) 30(1) *Harvard Civil Rights-Civil Liberties Law Review* 143; Catharine A MacKinnon, 'Sexuality, Pornography, and Method: "Pleasure under Patriarchy"' (1989) 99(2) *Ethics* 314; Catharine A MacKinnon, *Only Words* (Harvard University Press, 1993); Catharine A MacKinnon, 'Speech, Equality, and Harm: The Case Against Pornography' in L Lederer and R Delgado (eds), *The Price We Pay: The Case Against Racist Speech, Hate Propaganda, and Pornography* (Hill and Wang, 1995).

166 Andrea Dworkin, *Pornography: Men Possessing Women* (Women's Press, 1981); Andrea Dworkin, *Intercourse* (Free Press, 1987); Andrea Dworkin, 'Against the Male Flood: Censorship, Pornography, and Equality' in Drucilla Cornell (ed), *Oxford Readings in Feminism: Feminism and Pornography* (Oxford University Press, 2000) 19. Andrea Dworkin, *Woman Hating* (E.P. Dutton, 1974).

167 Evangelia Papadaki, 'Understanding Objectification: Is There a Special Wrongness Involved in Treating Human Beings Instrumentally?' (2012) 11(1) *Prolegomena* 5, 6.

168 Nussbaum, 'Objectification' (n 163). See also ibid.

4. Fungibility: The objectifier treats the object as interchangeable (a) with other objects of the same type, and/or (b) with objects of other types.

5. Violability: The objectifier treats the object as lacking in boundary-integrity, as something that it is permissible to break up, smash, break into.

6. Ownership: The objectifier treats the object as something that is owned by another, can be bought or sold, etc.

7. Denial of subjectivity: The objectifier treats the object as something whose experience and feelings (if any) need not be taken into account.[169]

Nussbaum identifies extreme instrumentality — treating a person not just as a means, but *merely* as a means — as the most morally problematic of the notions. She states:

> The instrumental treatment of human beings … is always morally problematic; if it does not take place in a larger context of regard for humanity, it is a central form of the morally objectionable.[170]

However, as Evangelia Papadaki has pointed out, it is not clear that any of the seven notions are less morally problematic when taken to their extremes.[171] These 'notions' are evident throughout the consortium action. Expansion of the cause of action to wives permits objectification instead of reducing the opportunity for objectification. Indeed, given the long and troubling history of denial of the autonomy of persons with disability[172] — and the significant likelihood of injured spouses likely to support consortium actions identifying as persons with disability in the aftermath of their injuries — the second of Nussbaum's 'notions' is at least as 'morally problematic' as the first.

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169 Nussbaum, 'Objectification' (n 163) 257 (emphasis omitted).

170 Martha C Nussbaum, *Sex and Social Justice* (Oxford University Press, 1999) 238.

171 Papadaki (n 167) 7, 15, 18.

172 See, eg: Lucy Series, 'Disability and Human Rights' in Nick Watson and Simo Vehmas (eds), *Routledge Handbook of Disability Studies* (Routledge, 2nd ed, 2020) 72, 91; Lucy Series, 'The Development of Disability Rights under International Law: From Charity to Human Rights' (2015) 30(10) *Disability and Society* 1590; Arlene S Kanter, *The Development of Disability Rights under International Law: From Charity to Human Rights* (Routledge, 2015); United Nations Department of Economic and Social Affairs, Office of the United Nations High Commissioner for Human Rights and the Inter-Parliamentary Union, *From Exclusion to Equality: Realizing the Rights of Persons with Disabilities* (United Nations, 2007); Kimberley Brownlee and Adam Cureton, *Disability and Disadvantage* (Oxford University Press, 2009); Franziska Felder, Laura Davy and Rosemary Kayess (eds), *Disability Law and Human Rights: Theory and Policy* (Palgrave Macmillan, 2022).

V What is the Role of the State in this Objectification?

Nussbaum's 'notions' of objectification[173] of the primary victim at the hands of the courts and/or the spouse are enabled by the state with its passage of legislation, retention of common law, and control of institutions. The 'notions' provide some insight into how the state, through its retention of loss of consortium actions, perpetuates objectification of primary victims.

Martha Fineman's vulnerability theory[174] — characterising vulnerability in the human condition as both universal and constant[175] — requires responsive/responsible state policy and law to overcome equality's limitations.[176] Fineman noted that humans experience vulnerability in the context of their social relationships, including relationships which may be 'inherently', 'desirably', or 'inescapab[ly]' unequal.[177] Law has a significant role in normalising and regulating some of those power differentials, including through setting and enforcing the limits of those powers. The law also has the function of establishing responsibilities and privileges attached to the existence of power imbalances and legitimacy of certain powers. Fineman's vulnerability theory involves an exchange of the idealised, neoliberal subject with a more realistic legal subject. This also requires 'a corresponding change in the state's orientation'.[178] That is, to enable the development of resilience, the state (as the legitimate governing entity), bears 'a responsibility to establish and monitor social institutions and relationships that facilitate the acquisition of individual and social resilience'.[179]

As Fineman observes, 'state responsibility for ensuring *equitable* treatment for differently positioned individuals is minimised within the overriding framework of *equality*'[180] — clearly in her mind, equal is not the same as equitable. It is the latter goal which Fineman's model aims to achieve.[181] Fineman's theory identifies

173 Nussbaum, 'Objectification' (n 163).

174 Fineman, 'Inevitable Inequality' (n 156).

175 Ibid 133.

176 Ibid 134.

177 Ibid 133.

178 Meredith Johnson Harbach, 'Childcare, Vulnerability, and Resilience' (2019) 37(2) *Yale Law and Policy Review* 459, 484.

179 Fineman, 'Inevitable Inequality' (n 156) 134.

180 Ibid 135 (emphasis added).

181 Ibid: Fineman takes issue with measuring 'equality' by comparing the circumstances of those individuals who are considered equals. This leads to the problematic question of 'equal to whom?' and presumes that the individuals involved are subject to 'socially and culturally imposed roles, obligations and burdens [that] are similar or equal in nature'. Consequently, if the circumstances of the individuals being compared are not equal/equivalent, equal treatment will often strengthen the unequal power relations that exist. Thus, when it comes to social justice, human vulnerability suggests that 'equality' is a limiting aspiration.

resilience as 'the critical, yet incomplete, solution to our vulnerability'.[182] She also notes that '[m]any of the institutions providing resources that give us resilience can only be brought into legal existence through state mechanisms'.[183]

Although much of Fineman's work focusses specifically on discrimination law and family law, vulnerability theory is applicable to law far more broadly. Courts and the legal systems they represent are clear examples of institutions of the type she references. The common law recognises and privileges certain categories of social relationship, according to a pre-determined suite of powers and obligations on parties within those relationships by virtue of their relationship status. Parent/child, employer/employee,[184] doctor/patient and lawyer/client are examples of social relationships characterised by power imbalances which have currency both in law and society more broadly.

Vulnerability of the plaintiff is ubiquitous throughout tort claims. Indeed, the existence of the claim itself is recognition that the plaintiff occupies a position of vulnerability vis-à-vis the defendant, in which the defendant either has, or has the potential to, cause them harm. Notwithstanding that the individuals concerned may have had no prior interaction, or even specific knowledge of the existence of each other, prior to the event which connects them, within the confines of a tort claim their relationship, for the purposes of the law, is characterised by a pre-determined set of responsibilities and privileges imposed and upheld by the legal system. The power differential between plaintiff and defendant reflects vulnerability is well recognised by scholars and judges alike.[185] In Australia, the High Court has acknowledged vulnerability of the plaintiff *relative to the defendant* vis-à-vis the harm as of importance in determining whether a novel duty of care should be recognised — indeed, this type of vulnerability expressly appears as one of the factors identified by Allsop P in the *Caltex Refineries v Stavar* novel duty of care checklist.[186] That vulnerability can arise from multiple power imbalance types, relating to knowledge, control, and risk. The plaintiff remains vulnerable by virtue of the harm that caused them to bring a claim before the court in the first place: they may be physically vulnerable due to an injury they received at the defendant's hands; their property may have been damaged or destroyed; or they may have suffered some other harm or interference which, prima facie, raises an arguable prospect of the court finding significant enough to award remedies.

While courts are extremely familiar with the concept of vulnerability as it applies between parties, we suggest that less overtly acknowledged is the plaintiff's

182 Ibid 146.

183 Ibid.

184 Ibid 135.

185 See, eg: Jane Stapleton, 'The Golden Thread at the Heart of Tort Law: Protection of the Vulnerable' (2003) 24(2) *Australian Bar Review* 135; Carl F Stychin, 'The Vulnerable Subject of Negligence Law' (2012) 8(3) *International Journal of Law in Context* 337.

186 (2009) 75 NSWLR 649, 676 [103].

vulnerability vis-à-vis the state. This might arise as a result of legal barriers to justice, such as limitation periods, procedural, and evidentiary requirements, or socioeconomic factors including access to justice barriers more broadly. Compensation seeks to address the harm arising from the vulnerability manifesting from the plaintiff's relationship to the defendant, and to redress the resultant power imbalance between the parties where appropriate. Harms arising from the plaintiff's secondary vulnerability — grounded in their relationship with the state — are entirely ignored.

Some vulnerability may be as Fineman described it, 'inescapable' or 'desirabl[e]'.[187] Yet even if it is desirable in the context of relations between the state and the individual (for example by using procedural rules to eliminate unmeritorious claims), that vulnerability should not be exploited by the state or be permitted by the state to be exploited by others. By expanding access to loss of consortium actions, the state is precisely doing that, by facilitating the objectification of the vulnerable.

In loss of consortium claims arising from a primary act of negligence, we propose that the plaintiff's vulnerability vis-à-vis the state is amplified. This is because the state, who is no longer a passive institution, instead becomes a facilitator of the objectification of the primary victim by the plaintiff spouse, furthering the denial of dignity and autonomy of a person who is already vulnerable. Rather than considering the full spectrum of objectification notions in their varying degrees, maintaining and expanding loss of consortium actions render the state complicit in the instrumentalisation of the primary victim as a means — merely a means — of channelling compensation to the plaintiff spouse as per Nussbaum's model. In the absence of offsetting provisions designed to bolster the other six 'notions' identified by Nussbaum, in order to reinforce the humanisation of the primary victim, the state perpetuates the 'morally objectionable' concerns identified as most grave by Nussbaum and exploits the plaintiff's vulnerability vis-à-vis the state. Rather than redressing this state-sponsored objectification, we consider that expansion instead widens the opportunity for objectification of injured plaintiffs of both genders, rather injured wives alone.

The state's facilitation of the objectification of vulnerable people goes beyond gender. Primary victims whose claims meet the ISV threshold will, by definition, have serious injuries, many of which will result in a long term or permanent full or partial loss of function.[188] Consequently, many primary victims will also identify, or be identified as, disabled, as a consequence of their injury.[189] The expansion reforms are inconsistent with the significant obligations the *CRPD* imposed on States with respect to protecting people with disability.

Those obligations include: (1) respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;

187 Fineman, 'Inevitable Inequality' (n 156) 133.

188 *Civil Liability Regulation 2014* (Qld) sch 4.

189 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 1 ('*CRPD*').

(2) non-discrimination; (3) equality of opportunity; and (4) equality between men and women.[190] States parties are obliged to: (1) 'adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized'; (2) 'take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities'; and (3) 'ensure that public authorities and institutions act in conformity', in order to 'ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability'.[191]

The expansion reforms do not specifically target people with disability for discriminatory treatment in the form of objectification, but their effect is that people with disability are likely to be objectified precisely because their disability, if resulting from negligence, is the very thing that will qualify their spouses to bring loss of consortium claims in the first place. Article 12 of the *CRPD* makes explicit the inconsistency of the reforms with the rights of people with disability who happen to fall within their scope. That article requires States to recognise that people with disability have the right to recognition as persons before the law,[192] and that they have legal capacity on an equal basis with everyone else.[193] Specifically, States

> shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.[194]

These provisions are of particular importance to consortium claims. As noted earlier, consortium claims presume a perpetual continuation of marriage, which in effect is to deny the legal agency of the primary victim in a loss of consortium claim to determine whether, and if, they continue with a marriage, or exercise the same legal right conferred upon all other married people within society to access no fault divorce under the *FLA*.[195]

Once again, the reforms may not directly target people with disability, but the overlap between primary victims and the definition of people with disability means that people with disability are disproportionately affected by them. Further, the difficulties in determining which spouse's claim for damages is most appropriate demonstrates that whenever damages for loss of services formerly provided by, or now required to be provided to, the primary victim is awarded to anyone other than

190 Ibid art 3.

191 Ibid art 4.

192 Ibid art 12.1.

193 Ibid art 12.2.

194 Ibid art 12.5.

195 *FLA* (n 128) s 48.

the victim, the primary victim's autonomy to decide how, and under what circumstances, services will be provided, is compromised.

Awarding services damages to a spouse for the increased care demands imposed on them because of the primary victim's injuries denies that victim the ability to decide whether they want their spouse to provide those services, or whether they would prefer to source them at arm's length on the market. If the spouse subsequently becomes unable to provide those services, the primary victim may find themselves unable to purchase replacement services in the event they require them.

Following substantial consultation,[196] Australia has undertaken reform of its capacity[197] laws — which were previously incompatible with art 12 of the *CRPD*[198] — in order to prioritise shared and supported, rather than substituted, decision-making practices.[199]

Consortium actions were overlooked in these law reform consultations; yet justification for privileging third-party claims over the primary claims of people with disability in loss of consortium is even weaker than the 'best interests' rationale previously held to justify substituted decision-making, not least of all because at least some injured plaintiffs retain full mental and intellectual capacity. For those plaintiffs, their substantive disability is physical in nature; however, the effect of the consortium action is to render their mental and intellectual capacity irrelevant, denying their agency and autonomy in a way that does not happen to someone without disability.

Loss of consortium actions, therefore, deny autonomy and legal capacity to primary victims in ways that are inconsistent with the *CRPD*, on insupportable grounds. As with loss of consortium provisions, guardianship and mental health laws are made at the state, rather than national level.[200] That did not prevent the Commonwealth from attracting criticism for non-compliance, nor diminish its significance as a stakeholder in promoting reforms. The link between state-based consortium laws, and non-compliance with art 12 of the *CRPD* may be indirect and normative, but it is nonetheless powerful.[201] Even if a primary victim cannot exercise legal capacity, the various capacity laws provide more nuanced alternative ways in which primary

196 *Equality, Capacity and Disability* (n 19).

197 See generally: Bruce Alston, 'Towards Supported Decision-Making: Article 12 of the Convention on the Rights of Persons with Disabilities and Guardianship Law Reform' (2017) 35(2) *Law in Context* 21; Terry Carney, 'Supported Decision-Making in Australia: Meeting the Challenge of Moving from Capacity to Capacity-Building?' (2017) 35(2) *Law in Context* 44.

198 Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Australia*, 10th sess, 118th mtg, UN Doc CRPD/C/AUS/CO/1 (21 October 2013) 3–6 [24]–[26].

199 *Equality, Capacity and Disability* (n 19) 52–3 [2.75]–[2.79].

200 Ibid 38 [2.9].

201 Ibid 38 [2.10].

plaintiffs' decision-making autonomy can be supported, rather than wholly denied, as consortium provisions currently do by assigning legal interests that rightly and more directly lie with them to their spouses.

Further, each of South Australia and Queensland has discrimination laws that are inconsistent with the expansion reforms. The *Equal Opportunity Act 1984* (SA) and *Anti-Discrimination Act 1991* (Qld) respectively govern the non-discriminatory provision of services, goods, and other public activities to people regardless of sex, gender, age, race, or disability. Neither statute specifically references the passing of laws or sets up an appeal pathway through which discrimination concerns about legislation can be pursued, but it binds the state as a provider of the employment, accommodation, services and goods within the scope of the laws.

It is logically incoherent, as well as normatively problematic, for states that have passed legislation directed at eliminating discrimination against specified groups of people based on certain attributes they possess in the context of engaging in particular public activities, to then pass and retain legislation which has the effect of indirectly discriminating against those people. The dissonance is even greater in the context of Queensland which, having recently become just the third Australian jurisdiction to pass a Human Rights Act,[202] nonetheless retains an expanded loss of consortium action which indirectly discriminates against people with disability. In order to achieve coherence with its commitment to human rights, therefore, we suggest that the Queensland parliament needs to revisit its retention of loss of consortium causes of action.

VI Conclusion

There are dangers inherent in endeavouring to convert a gender-specific action into a gender-neutral one.[203] We have highlighted problems associated with expansionist reform to the law of torts, including insurmountable conceptual defects within the reforms. In this final section, we outline a solution and some responses to those who might argue that undesirable though the appearance of the expansionist reforms might be, their practical effects are minimal.

Superficially, abolition of loss of consortium claims to spouses of both genders may resemble 'levelling down' formal equality, comparable to Fredman's example[204] of the State closing all public swimming pools to avoid an order to desegregate the 'whites only' pools because they discriminate on the grounds of race.[205] But it is more nuanced: rather than removing everyone's right in order to prevent some from exercising that right, abolishing loss of consortium claims is instead more of a corrective step. It removes an arcane 'right' — if indeed it can be claimed to be a

202 *Human Rights Act 2019* (Qld).

203 Thornton, 'Loss of Consortium' (n 13) 271.

204 Fredman (n 158) 10.

205 Ibid, citing *Palmer v Thompson*, 403 US 217 (1971).

right in modern law — and redirects a remedy to the party who was most directly harmed by the wrongdoing in the first place: the primary victim. This is consistent with tort law more generally, which holds that third-party claims are exceptional, rather than the norm. It resolves the difficulties in identifying a coherent principle of law to legitimate recognition of such third-party claims, particularly in the aftermath of female emancipation and reforms to damages laws, including damages for loss of services, and gratuitous services.

Further, it reinstates the dignity and autonomy of the primary plaintiff to exercise control over their own destiny, without the court assuming what that destiny would have entailed through presumption of perpetuation of marriage, inconsistent with family law. It avoids the undesirable influence of moral luck affecting the size of claims that defendants may encounter, increasing certainty both for them and their insurers alike. It also recognises both the significant normative power of law in influencing the attitudes and behaviours of the community, as well as demonstrating the commitment of Australian legal institutions to international and domestic human rights obligations, including with respect to people with disabilities, who will include many of the primary victims of the type of circumstance likely to give rise to claims for loss of consortium.

The South Australian and Queensland law reforms were well-intentioned efforts to address gender inequality. However, as experience in other jurisdictions has demonstrated, sometimes good intentions are insufficient. In *James v Eastleigh Borough Council*,[206] the House of Lords was asked to determine whether the policy of a Borough Council to provide free access to swimming pools and other public facilities to pensioners, in a bid to address socioeconomic disadvantage, was discriminatory considering different pension eligibility ages for men and women. The House of Lords found that the policy was inherently discriminatory, regardless of motivation. Expansion of loss of consortium actions in Australia are conceptually comparable: despite the gender equality motivations of those seeking the reforms, those reforms did not address substantive gender inequality, did not address the technical legal issues arising from over or undercompensating primary victims and spouses, were inconsistent with modern family law reforms, and extended the problematic objectification of primary victims beyond gender lines, discriminating — albeit inadvertently — against persons with disabilities contrary to international and domestic human rights law.

The time has come to abolish loss of consortium claims entirely, or at the very least restrict them to the (nominal) value of personal claims for loss of the amenity of spousal support and companionship, the gaps specifically identified by the Queensland Attorney-General in preferring expansion over abolition. Any component of damages for loss of services previously provided by the primary plaintiff should be entirely compensated within the primary plaintiff's claim, at market rates. Similarly, the primary plaintiff's claim for loss of amenity should always include a component reflecting the impact on their well-being and enjoyment

206 [1990] 2 AC 751.

of life of being unable to provide those services. They are the primary plaintiff's loss, and just as it would have been their prerogative to determine which services they chose to provide for the family, determining the degree of satisfaction or otherwise they receive from doing so, it should remain their prerogative to determine how (if at all) compensation for loss of that satisfaction attached to the service provision should be used.

If loss of consortium is abolished — as we think it should be — there may be concerns that plaintiffs are being denied a right of recovery for a harm they have suffered. Yet there are many other instances of people whose lives are affected negatively because of negligently inflicted harms who are not currently able to receive compensation. Casebooks are littered with family members and first responders, eyewitnesses, and others whose lives have been negatively impacted by negligently caused wrongs, but are unable to establish a duty of care, or prove causation, or provide a diagnosed mental injury, and are consequently left without a cause of action. Loss of consortium is an oddity: a very rare situation where the plaintiff need not personally suffer any recognised form of harm in negligence, to succeed with the claim arising from a negligent act. Rather than viewing reform of this type as deprivation of future claimants, it should instead be seen as correcting an historical anomaly, which has provided a windfall to claimants past.

An alternative and pragmatic, response would be to restrict claims for loss of consortium to simply that: claims for the value of the plaintiff's loss of amenity (associated with either receiving the services formerly provided by the injured spouse or being able to provide those services to the injured spouse). Any special damages component for servitium (the actual provision of services themselves) should be part of the primary victim's claim. As is evident from some of the judgments, such claims may be of limited value, as the costs of pursuing them may exceed the value of the claim itself. The end result is still likely to be the practical demise of consortium, if not its formal death.

*JFR Boddens Hosang**

AN ANALYSIS OF SOME RECENT MARITIME CHALLENGES FROM THE PERSPECTIVE OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS

Abstract

The international law of military operations provides a cohesive framework through which military actions and related geopolitical developments can be analysed with the aim to bring them into a clearer legal perspective. This is demonstrated on the basis of three case studies: the 2018 incident in the Kerch Strait between Russian State vessels and Ukrainian warships; the confrontations and tensions in the Mediterranean between Greece and Turkey, as well as between European warships and Turkish vessels; and the freedom of navigation of warships and military aircraft in the South China Sea. In each of these cases, an analysis is presented of the incident or situation in relation to applicable law as well as in relation to the interpretation of the law by the States involved. The latter part of that analysis includes discussing the interaction between geopolitical tensions or goals and the rule of (international) law.

I Introduction

International peace and security are facing a number of complex challenges which threaten geopolitical stability. The Russian annexation of Crimea in 2014 and the armed invasion of Ukraine in 2022 are perhaps the most significant examples of the threat and reality of war in the modern geopolitical arena, which included the use of hybrid tactics as a precursor.[1] The civil war in Libya and recurring tensions

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1 See, eg: James K Wither, 'Making Sense of Hybrid Warfare' (2016) 15(2) *Connections* 73; Sascha-Dominik Dov Bachmann and Anthony Paphiti, 'Russia's Hybrid War and Its Implications for Defence and Security in the United Kingdom' (2016) 44(2) *Scientia Militaria* 28. As regards Russia and Ukraine, see, eg: Johann Schmid, 'Hybrid Warfare on the Ukrainian Battlefield: Developing Theory Based on Empirical Evidence' (2019) 5(1) *Journal on Baltic Security* 5; Nicu Popescu, 'Hybrid Tactics: Russia and the West' (Issue Alert No 46, European Union Institute for Security

in the Mediterranean are testing alliances and fuelling tensions between the East and West, as well as between allies.[2] Finally, although the list could continue for quite a bit longer, the increasing tensions in the South China Sea transcend regional concerns and interests and have the potential to threaten international peace and security on a global scale as more States become involved in the situation.[3]

These situations of tension and crisis have been the subject of numerous analyses, from geopolitical to legal, examining the whole of each situation.[4] While the analysis of *jus ad bellum* — the conditions under which States may resort to the use of armed force in or against another State[5] — and general public international law in relation to these situations is both necessary and valuable, this article instead focuses on specific aspects of three of these situations. The situations include: (1) the maritime aspects of the annexation of Crimea; (2) tensions in the Mediterranean Sea; and (3) the developments in the South China Sea. Specifically, this article intends to analyse the relationship between the law of the sea ('LOTS') and the international

Studies, October 2015) <https://www.iss.europa.eu/sites/default/files/EUISSFiles/Alert_46_Hybrid_Russia.pdf>; Stephanie Stamm and Hanna Sender, 'Understanding Russia's Various Hybrid War Tactics in Ukraine', *Wall Street Journal* (online, 25 February 2022) <https://www.wsj.com/livecoverage/russia-ukraine-latest-news/card/understanding-russia-s-various-hybrid-war-tactics-in-ukraine-H1Hnr8iMvRinuh1qNoB4>.

2 See Marta Dassù, 'Why the War in Libya Is a Test for Italy: And for a Geopolitical European Commission', *European Council on Foreign Relations* (Blog Post, 30 June 2020) <https://www.ecfr.eu/article/commentary_why_the_war_in_libya_is_a_test_for_italy_and_for_a_geopolitical>; Mersiha Gadzo, 'The Unfolding Geopolitical Power Play in War-Torn Libya', *Al Jazeera* (online, 19 June 2020) <https://www.aljazeera.com/news/2020/6/19/the-unfolding-geopolitical-power-play-in-war-torn-libya>.

3 Ian Storey, 'Britain, Brexit, and the South China Sea Dispute', *Maritime Awareness Project* (Analysis Post, 3 February 2020) <http://maritimeawarenessproject.org/wp-content/uploads/2020/02/analysis_storey_020319.pdf>; Derek Grossman, 'Military Build-Up in the South China Sea' in Leszek Buszynski and Do Thanh Hai (eds), *The South China Sea: From a Regional Maritime Dispute to Geo-Strategic Competition* (Routledge, 2020) 182; Li Jianwei and Ramses Amer, 'British Naval Activities in the South China Sea: A Double-Edged Sword?', *Institute for Security & Development Policy* (Blog Post, April 2019) <https://isdp.eu/publication/british-navy-south-china-sea/>; Idrees Ali and Phil Stewart, 'Exclusive: In Rare Move, French Warship Passes through Taiwan Strait', *Reuters* (Blog Post, 25 April 2019) <https://www.reuters.com/article/us-taiwan-france-warship-china-exclusive-idUSKCN1S10Q7>.

4 See, eg: above nn 1–3; Thomas D Grant, 'Annexation of Crimea' (2015) 109(1) *American Journal of International Law* 68; Robin Geiβ, 'Russia's Annexation of Crimea: The Mills of International Law Grind Slowly but They Do Grind' (2015) 91(1) *International Law Studies* 425; 'Ukraine-Russia Symposium', *Lieber Institute* (Web Page) <https://lieber.westpoint.edu/category/ukraine-russia-symposium/>; 'Articles of War: Use of Force', *Lieber Institute* (Web Page) <https://lieber.westpoint.edu/articles-of-war/topics/use-of-force/>.

5 'What Are Jus Ad Bellum and Jus In Bello?', *International Committee of the Red Cross* (Web Page, 22 January 2015) <https://www.icrc.org/en/document/what-are-jus-ad-bellum-and-jus-bello-0>.

law of military operations ('ILMO') as it applies to naval operations in each of the three situations listed above. As regards the Russian annexation of Crimea, the incident in the Kerch Strait in 2018 between Russian Federal Security Service vessels and three Ukrainian warships will be used to examine the applicability of international law to naval operations in the area, including the *United Nations Convention on the Law of the Sea* ('*UNCLOS*')[6] and international humanitarian law ('IHL') as it applies to naval warfare. As regards the Mediterranean Sea, the confrontation between a French warship and Turkish vessels off the coast of Libya in 2020 will be used to analyse the interaction between the LOTS and the legal aspects and effects of resolutions of the United Nations Security Council ('UNSC'). Additionally, the tensions between Greece and Turkey regarding natural resources will be used to analyse complexities resulting from claims involving maritime zones of strategic economic importance and their interaction with the law on the use of force in military operations. Finally, as regards the South China Sea, the freedom of navigation of warships and military aircraft will be examined — especially as regards the regime of islands and the dispute surrounding the Spratly and Paracel island groups.

Clearly each of these topics could merit (at least) an article of its own, while a comprehensive discussion of each of these topics could fill volumes. However, the purpose of this article is not to be exhaustive, but to offer a more general insight into dimensions of the situations in question focusing on ILMO.[7] Although the status of ILMO as a distinct and recognised sub-element of international law is relatively new, it provides, as a discipline, an integrated and cohesive framework that allows examination of the situations in question with a specific focus on military operations and military conduct. In this way, this 'flux capacitor' of international law allows a broad inclusion of relevant elements of international law while also allowing specific observations as to how these elements affect military operations in the incidents in question.[8] Notwithstanding the scope and depth of ILMO, the analyses of the incidents and topics in question will be brief and are primarily intended to encourage further discussion. That includes discussing the interaction between political interests and goals and the functioning of international law given the inherent geopolitical context in which the military operations, to which ILMO applies, take place.

The situations were not chosen randomly as in each, a level of tension exists between the political interests (legitimate or otherwise) of the parties involved — including economic interests and geopolitical strategy — and the law. This has sometimes led to creative interpretations of both the substance and field of applicable law. The

6 *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) ('*UNCLOS*').

7 Terry D Gill, 'ILMO: The "Flux Capacitor" of Contemporary Military Operations' (2019) 112(3) *Militair Rechtelijk Tijdschrift* 5 ('ILMO: The "Flux Capacitor"'). Note especially the description of the dual function of ILMO: at 8–9.

8 Ibid 5–6. A flux capacitor is a fictional piece of technology used to facilitate time travel in the film *Back to the Future* (Universal Pictures, 1985) and its sequels: at 5.

tension is not necessarily related to the more traditional aspect of compliance with the law, as the views expressed by the States involved include legal explanations of their positions regardless of whether those explanations are tenable. In other words, the views do not deny the applicability of international law to the situations in question, nor do they seek to violate applicable law directly, but rather appear to utilise the law to further the goals and interests of the States concerned. While that, in itself, can be a natural interaction between politics and law, and part of the common purpose of politics and law in 'ordering societal relations'[9] even on the international level, there is nonetheless some cause for concern. While clearly law is derived from political processes and decisions,[10] and can equally be changed by political processes and decisions, 'law' as an entity once created — including, but not limited to, the institutions and processes related to that entity — must also function with sufficient distance from political processes if it is to serve its purpose.[11] Part of that purpose is to ensure predictability, stability and a degree of continuity in the ordering of relations.[12] There are conceptual difficulties discussed in academic writing as regards describing the role of international law from neither a 'utopian' nor an 'apologetic' point of view.[13] Notwithstanding these difficulties, a balance must be maintained between the dynamic and interactive relationship between politics and law and the normative role of law in restraining ad-hoc political opportunism. Political choices which directly violate (international) law most clearly affect legitimacy.[14] Similarly, it may be suggested that creative interpretation or selective application of the law strictly as a means to further geopolitical goals to the detriment of others may impact the legitimacy of those decisions, as well as undermine the role (and rule) of law in general. In other words, in addition to the goal stated above, this article intends to examine the interaction between bodies of (international) law in the face of complex situations of geopolitical tension.

9 Miro Cerar, 'The Relationship between Law and Politics' (2009) 15(1) *Annual Survey of International and Comparative Law* 19, 31.

10 This observation also applies to national laws created by the legislative process in the State in question, for which the national institutions are commonly political in nature, and to international law as created by States through the ratification of treaties and the establishment of international institutions, among other things.

11 See Cerar (n 9) 20–1, including the discussion of the monistic and dualistic ontological views of politics and law, as well as the observation that law can be a means of achieving political goals but must also be autonomous and independent to a relevant degree: at 35–7.

12 Ibid 30.

13 Martti Koskenniemi, 'The Politics of International Law' (1990) 1(1) *European Journal of International Law* 4, 9; Martti Koskenniemi, 'The Politics of International Law: 20 Years Later' (2009) 20(1) *European Journal of International Law* 7, 8.

14 See Gill, 'ILMO: The "Flux Capacitor"' (n 7) 7–8.

II The Kerch Strait Incident

A *The Incident*

On 25 November 2018, three Ukrainian military vessels were on an approach to the Kerch Strait from the Black Sea, with the intent to traverse the strait and head for a Ukrainian port in the Sea of Azov. They were subsequently stopped near the strait by vessels of the Russian Federal Security Service coast guard. After some time, the Ukrainian vessels proceeded to leave the area, heading back into the Black Sea. They were subsequently pursued by the Russian vessels and — after the *Berdyansk* was fired upon resulting in damage to the vessel and injuries being sustained by the crew members — all three vessels were boarded and seized by the Russian authorities.[15] The crew members were taken off the vessels and charged with illegal trespass into Russian territory.[16]

B *Applicable Law*

In this Part, the interplay between *UNCLOS* and IHL, including the law of naval warfare ('LONW'), will be discussed. First, the status of the Kerch Strait and the incident itself will be analysed from the perspective of the LOTS. Next, the incident will be examined from the perspective of IHL. Finally, a conclusion will be presented as to which body of law is more suitable for evaluating the incident.

1 *Status of the Kerch Strait*

The Kerch Strait is a narrow strait that connects the Black Sea and the Sea of Azov and is bordered on one side by the Crimean Peninsula and on the other side by Russia (see Figure 1 below).

Until the independence of Ukraine and the dissolution of the Union of Soviet Socialist Republics ('USSR') in 1991, the strait and the enclosed Sea of Azov behind it fell within the definitions of art 10 of *UNCLOS* regarding bays and, following the demarcation line declared by the USSR in 1985,[17] both the Kerch Strait and the Sea of Azov became internal waters of the USSR.[18] Following the dissolution of the USSR, art 10 of *UNCLOS* no longer applied, as the strait and the Sea of Azov

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15 *Detention of Three Ukrainian Naval Vessels (Ukraine v Russian Federation) (Order)* (International Tribunal for the Law of the Sea, Case No 26, 25 May 2019) [30]–[31] ('*Order*'). This case will be discussed in greater detail in Part II(B)(2)(c) below.

16 *Order* (n 15) [32].

17 *4450 Declaration*, (USSR) Council of Ministers, 15 January 1985, 39 [35]–[36] ['4450 Declaration', *Office of Legal Affairs* (Web Document) <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/RUS_1985_Declaration.pdf>].

18 For a discussion on the history of the status of the Kerch Strait, see Valentin J Schatz and Dmytro Koval, 'Ukraine v Russia: Passage through Kerch Strait and the Sea of Azov', *Völkerrechtsblog* (Blog Post, 10 January 2018) <https://voelkerrechtsblog.org/ukraine-v-russia-passage-through-kerch-strait-and-the-sea-of-azov/>.

Figure 1: Kerch Strait[19]

behind it were now bordered by two States: Russia and Ukraine. Applying the rules of *UNCLOS* and taking into account the size of the Sea of Azov, which leaves sufficient room for territorial seas and exclusive economic zones ('EEZs'), it could be argued that the Kerch Strait thus became a strait used for international navigation as covered by pt III of *UNCLOS*.[20] This view is not shared by Russia, however, which insists that the dissolution of the USSR did not change the status of the waters in question as being internal waters of both Russia and Ukraine.[21]

In 2003, Russia and Ukraine concluded the *Agreement between the Russian Federation and Ukraine on Cooperation in the Use of the Sea of Azov and the Kerch Strait* ('*2003 Agreement*').[22] Article 1 of the *2003 Agreement* declares that

19 Jeff Seldin, 'US, NATO Slam Russian Plan To Block Parts of Black Sea', *VOA* (online, 16 April 2021) <https://www.voanews.com/a/europe_us-nato-slam-russian-plan-block-parts-black-sea/6204673.html>.

20 See also Alexander Lott, 'The Passage Regimes of the Kerch Strait: To Each Their Own?' (2021) 52(1) *Ocean Development and International Law* 64, 65–7.

21 *Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v the Russian Federation) (Award Concerning the Preliminary Objections of the Russian Federation)* (Permanent Court of Arbitration, Case No 2017–06, 21 February 2020) [205]–[211].

22 Договор между Россйской Федерацией и Украной о Сотрудничестве в Использовании Азовского Моря и Керченского Пролива [Agreement between the Russian Federation and the Ukraine on Cooperation in the Use of the Sea of Azov and the Strait of Kerch], signed 24 December 2003 (entered into force 22 April 2004) <https://www.fao.org/faolex/results/details/en/c/LEX-FAOC045795/>. An unofficial published translation of this agreement is also available and will be referred to in this article: see *Agreement between the Russian Federation and Ukraine on Cooperation*

both the Kerch Strait and the Sea of Azov historically constituted internal waters of both Russia and Ukraine. Article 2(1) of the *2003 Agreement* also stipulates that '[m]erchant ships and warships, as well as other State ships flying the flag of the Russian Federation or Ukraine, operated for non-commercial purposes, enjoy freedom of navigation in the Sea of Azov and the Kerch Strait'.[23]

Following the annexation of Crimea by Russia in 2014, the Russian view became that the Kerch Strait was now bordered on both sides by Russia, a view emphasised by the building of a bridge across the strait.[24] In spite of this view, however, Russia did not terminate the *2003 Agreement* with Ukraine. Ukraine, on the other hand, does not acknowledge that the *2003 Agreement* definitively establishes the status of the Kerch Strait or the Sea of Azov, as the *2003 Agreement* is, in the Ukrainian view, a framework for further agreements on demarcation of the maritime boundaries between the two States.[25] Moreover, Ukraine insists that the term 'historically' or 'historical' modifies the word 'constitutes' and does not modify 'internal waters', and thus refers to a historical point of view and not the current legal status of the waters in question.[26] Russia disagrees with this interpretation.[27]

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in the Use of the Sea of Azov and the Kerch Strait, signed 24 December 2003 (entered into force 22 April 2004) [tr Dmytro Koval and Valentin J Schatz, 'Agreement between the Russian Federation and Ukraine on Cooperation in the Use of the Sea of Azov and the Kerch Strait' (Research Paper) <https://www.jura.uni-hamburg.de/die-fakultaet/professuren/proelss/dateien valentin/agreement-sea-of-azov>] ('*2003 Agreement*').

23 *2003 Agreement* (n 22) art 2(1), quoted in *Detention of Three Ukrainian Naval Vessels (Ukraine v Russian Federation) (Memorandum of the Government of the Russian Federation)* (International Tribunal for the Law of the Sea, Case No 26, 7 May 2019) n 8 ('*Memorandum*').

24 See, eg: Jess McHugh, 'Putin Eliminates Ministry of Crimea, Region Fully Integrated into Russia, Russian Leaders Say', *International Business Times* (online, 15 July 2015) <https://www.ibtimes.com/putin-eliminates-ministry-crimea-region-fully-integrated-russia-russian-leaders-say-2009463>; 'Ukraine Crisis: Putin Signs Russia-Crimea Treaty', *BBC News* (online, 18 March 2014) <https://www.bbc.com/news/world-europe-26630062>.

25 *Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v the Russian Federation) (Written Observations and Submissions of Ukraine on Jurisdiction)* (Permanent Court of Arbitration, Case No 2017–06, 27 November 2018) [81]–[86] ('*Written Observations and Submissions of Ukraine*'). Note that the *Treaty between Ukraine and the Russian Federation on the Ukrainian-Russian State Border*, signed 28 January 2003, 3161 UNTS 1 (entered into force 23 April 2004) similarly refers to the Sea of Azov and the Kerch Strait as internal waters: at art 5. However, Ukraine maintains that this provision was merely 'a reservation of each party's positions without clarifying exactly what those positions are; it evinces no common agreement on the status of the Sea of Azov and Kerch Strait': *Written Observations and Submissions of Ukraine* (n 25) n 130.

26 *Written Observations and Submissions of Ukraine* (n 25) [80]–[83].

27 *Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v the Russian Federation) (Reply of the Russian Federation to the Written Observations and Submissions of Ukraine on Jurisdiction)* (Permanent Court of Arbitration, Case No 2017–06, 28 January 2019) [100]–[103] ('*Reply of the Russian Federation*').

As regards the Sea of Azov behind the strait, it is clear that this sea is not bordered exclusively by one State, being clearly bordered by Ukraine as well, including the port of Berdyansk. Although Russia appears intent on capturing and occupying the entire Ukrainian side of the Sea of Azov in its current (2022) operations,[28] the territory in question is nonetheless part of Ukraine. That means that any claim of the Sea of Azov being historic internal waters by either State to the exclusion of the other, or any return to the pre-1991 situation, is impossible. In fact, Russia has made its position clear — that the Sea of Azov constitutes internal waters of both States (leaving aside for the moment whether the Sea of Azov truly constitutes internal waters).[29]

Based on these observations, the status of the Kerch Strait depends in part on the status and meaning of the *2003 Agreement*, including its provision as regards the Kerch Strait and the Sea of Azov being historically (or historical) internal waters of both States. If the claim for historic internal waters is rejected, then the Kerch Strait is a strait used for international navigation as covered by arts 37–44 of *UNCLOS*. Passage through the strait is then governed by the rules regarding transit passage — this being the position of Ukraine as regards the strait.[30] If the claim is accepted, however, the status of the Kerch Strait becomes more complex and it would no longer constitute a strait used for international navigation. In this view, supported by Russia,[31] the strait itself is also considered internal waters and passage is subject completely to the rules and conditions set forth by the coastal State(s) in question. As regards Ukrainian vessels, however, given that Russia considers the agreement to be applicable, this view would not negate the right of access to the strait by Ukraine on the basis of art 2(1) of the *2003 Agreement*.[32]

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28 Although clearly Russia has not announced its strategy or military plans, the shift from attacking Kiev to focusing on the southern and eastern regions clearly demonstrates the observation above. See, for a visual representation of the course of the war: 'Ukraine in Maps: Tracking the War with Russia', *BBC News* (online, 28 October 2022) <https://www.bbc.com/news/world-europe-60506682>.

29 *Reply of the Russian Federation* (n 27) [80]–[112].

30 See: *Written Observations and Submissions of Ukraine* (n 25) [78]; *UNCLOS* (n 6) arts 37–44.

31 *Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v the Russian Federation) (Preliminary Objections of the Russian Federation)* (Permanent Court of Arbitration, Case No 2017–06, 19 May 2018) [98].

32 Note that *UNCLOS* (n 6) art 45, applying the regime of innocent passage to straits used for international navigation which either do not meet the criteria outlined in art 37 or to such straits connecting the high seas or an exclusive economic zone to the territorial waters of a State, does not refer to internal waters. While art 45(1)(a) would appear to allow a broad interpretation on the basis of its wording, thus allowing application to straits connecting the high seas or an exclusive economic zone with the internal waters of a State, the fact remains that Russia does not consider the strait to be covered by *UNCLOS* (n 6) at all and considers both the strait and the Sea of Azov behind it as internal waters.

2 *LOTS*

Both Ukraine and Russia are State parties to *UNCLOS*.[33] Upon ratification, both States have, to the extent relevant to the present discussion, entered a reservation under art 298 of *UNCLOS* regarding binding decisions in relation to sea boundary delimitations, including those concerning historic bays or titles, and in relation to military activities.[34]

(a) Sovereign Immunity of Warships

Article 32 of *UNCLOS* specifies and confirms the (sovereign) immunity of warships, subject to certain exceptions,[35] only one of which is relevant to the present discussion. This exception is set forth in art 30, granting coastal States the right to 'require' a foreign warship to leave its territorial sea if the warship fails to adhere to the laws and regulations of that coastal State regarding passage in its territorial sea. The authority in question is, however, limited to requiring the warship in question to leave the territorial sea but does not extend to any right of seizure, capture or other activity. This authority will also be discussed further below in Part II(B)(2)(b).

The Ukrainian vessels involved in the incident were the *Berdyansk*, the *Nikopol*, and the *Yani Kapu*. As set forth in the order of the International Tribunal for the Law of the Sea ('ITLOS') — *Detention of Three Ukrainian Naval Vessels (Ukraine v Russian Federation) (Order)* ('*Order*') [36] — the first two vessels are artillery boats in service with the Ukrainian navy and the third vessel is a tugboat operated by the Ukrainian navy as a naval auxiliary. The *Order* makes it clear that '[t]heir status as Ukrainian naval warships and an auxiliary vessel is not disputed'.[37] Indeed, the *Memorandum of the Government of the Russian Federation* ('*Memorandum*') submitted by the Russian authorities to the ITLOS also clearly recognises the military (naval) status of the vessels in question.[38] Consequently, and regardless

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33 For a list of ratifications of, accessions and successions to *UNCLOS* (n 6), see 'Chronological Lists of Ratifications of, Accessions and Successions to the Convention and the Related Agreements: The United Nations Convention on the Law of the Sea of 10 December 1982', *Oceans & Law of the Sea: United Nations* (Web Page, 14 May 2022) <https://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm> ('Chronological Lists: United Nations Convention on the Law of the Sea').

34 '6. United Nations Convention on the Law of the Sea', *United Nations Treaty Collection* (Web Page, 1 October 2022) <https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en>.

35 *UNCLOS* (n 6) arts 17–26, 30–2.

36 *Order* (n 15). See discussion of the case below in Part II(B)(2)(c).

37 *Order* (n 15) [30].

38 *Memorandum* (n 23) [13]–[19], [28]–[29]. The vessels are referred to as 'naval warships and auxiliary vessels, manned by Ukrainian naval personnel': at [29(a)]. Clearly, then, there is no dispute as regards the status of the ships under *UNCLOS* (n 6) arts 29, 32.

of the further aspects regarding the incident as will be discussed below, all three vessels enjoyed sovereign immunity under the international LOTS.[39]

(b) Transit Passage and Innocent Passage

If reasoned that the Kerch Strait is a strait used for international navigation and that the Sea of Azov does not form historic internal waters (regardless of which State those waters belong to), then passage through the strait is subject to the regime of transit passage. In that case, passage may not be impeded, according to art 38(1) of *UNCLOS*, and is to be enjoyed by all ships and aircraft. Contrary to the regime of innocent passage discussed below, transit passage, as indicated by the reference to aircraft in art 38(1) of *UNCLOS*, includes the right of overflight.[40] In all cases, however, passage must be 'continuous and expeditious'.[41]

As regards the rights, duties and obligations of the States involved, coastal States may impose laws and regulations related to safety of navigation — including the designation of lanes and traffic separation schemes[42] — amongst other measures not relevant to the present discussion. Conversely, vessels and aircraft exercising the right of transit passage must, in addition to the requirements of continuous and expeditious passage, carry out the passage in normal modes of navigation, without any threat or use of force against the coastal States or engagement in any other activities which are not part of such normal modes of navigation.[43]

If, on the other hand, the regime of innocent passage applied,[44] somewhat different rules would apply to such passage. First, in innocent passage there is no right of 'innocent overflight' and the regime applies only to vessels.[45] Second, the list of activities prohibited for vessels exercising the right of innocent passage as set forth in art 19 is more detailed than the general obligations of vessels during transit

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39 A warship is defined in *UNCLOS* (n 6) art 29 as

> a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline.

Consequently, the category of warships includes both vessels capable of combat and auxiliary vessels, provided they meet these criteria.

40 Although not relevant to the incident, submarines may carry out transit passage (but not innocent passage) while submerged: ibid arts 20, 37–44.

41 Ibid art 38(2).

42 Ibid art 41.

43 Ibid art 39(1)(c). As regards warships and normal modes of navigation, see *Corfu Channel (United Kingdom v Albania) (Merits)* [1949] ICJ Rep 4, 30–1 ('*Corfu Channel*').

44 See the discussion of the *Memorandum* (n 23) below in this section.

45 This follows from *UNCLOS* (n 6) art 17, which refers only to ships, while art 38 specifically includes aircraft. Note also the differences as regards the passage of submarines: see above n 40.

passage set forth in art 39 of *UNCLOS*. Leaving aside the provisions regarding innocent passage by merchant vessels, the prohibitions (or more precisely, the activities which render the passage no longer innocent) under art 19 of *UNCLOS* include the threat or use of force against the coastal State, exercising or practicing with weapons, and collecting information 'to the prejudice of the defense or security of the coastal State'.[46] Coastal States may adopt and apply laws and regulations related to the safety of navigation, among other things, and may impose traffic separation schemes and lanes of navigation.[47] None of the measures imposed by the coastal State may, however, have the effect of hampering innocent passage or suspending innocent passage through straits, except in the situations set forth in art 25(3) of *UNCLOS*. This provision allows the coastal State to suspend innocent passage 'temporarily in specified areas of its territorial sea' if such suspension is 'essential for the protection of its security, including weapons exercises'.[48] Any such suspension must be 'duly published' before it takes effect and may not discriminate 'in form or fact' between foreign vessels so excluded from innocent passage.[49]

Warships enjoy the rights of transit passage and innocent passage, although the right of warships to exercise innocent passage in territorial waters, other than straits covered by art 45 of *UNCLOS*, is disputed (or in any case not recognised) by several States.[50] The right of warships to exercise both of these rights follows, however, from the use of the phrase 'all ships' in art 38 and the phrase 'ships of all States' in art 17 of *UNCLOS*. The right of warships to transit through straits used for international navigation was also clearly recognised by the International Court of Justice ('ICJ').[51] As regards innocent passage, the right of warships to exercise such passage

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46 *UNCLOS* (n 6) art 19(2)(c).

47 Ibid arts 21–2.

48 Ibid art 25(3).

49 Ibid.

50 For a collection of the national laws of coastal States notified to the United Nations, see 'Maritime Space: Maritime Zones and Maritime Delimitation', *United Nations* (Web Page) <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/regionslist.htm>. For declarations by States upon ratification or accession to *UNCLOS* (n 6) see '6. United Nations Convention on the Law of the Sea', *United Nations Treaty Collection* (Web Page) <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en> which shows that the following States require prior permission for warships to enter their territorial waters: Albania, Algeria, Antigua and Barbuda, Bahrain, Bangladesh, Barbados, China, Ecuador, Georgia, Iran, Latvia, Maldives, Myanmar, Oman, Pakistan, Romania, Russia, Saint Vincennes and the Grenadines, Seychelles, Sierra Leone, Somalia, Sri Lanka, Sudan, Sweden (except for certain specific maritime areas in which no prior permission is required), Syria, United Arab Emirates and Yemen. The following States require prior notification for warships to enter their territorial seas: Croatia, Egypt, Estonia, Guyana, India, Mauritius, Republic of Korea, Slovenia and Vietnam. Three States, Chile, Lithuania and Mexico, have officially notified a system of reciprocity, applying the same rules to other States' warships as those States apply to foreign warships in their territorial waters.

51 See *Corfu Channel* (n 43) 28.

may — in addition to the phrases in arts 17 and 38 of *UNCLOS* — be inferred from the existence of sub-s C, regarding warships and other government ships, in pt II(3) of *UNCLOS* which regulates innocent passage in the territorial sea. As regards sub-s C, art 30 of *UNCLOS*, as discussed above, allows coastal States to 'require' warships to leave the territorial sea if the warships do not comply with the laws and regulations of the coastal State regarding passage in its territorial sea, and the warship does not comply with requests to do so. *UNCLOS* does not specify which types of enforcement actions may be included under the term 'require', leaving it to other rules of international law to govern that aspect. While the authority to use force in such cases would depend on whether the activities carried out by the warship in question provide sufficient gravity and legal cause to do so, forcible means short of the use of force would in any case be justified.[52]

Relating these observations on the law to the Kerch Strait incident, the *Memorandum* states that innocent passage in Russian territorial waters in the Kerch Strait had temporarily been suspended for reasons of security following a storm.[53] Additionally, the *Memorandum* states that the Ukrainian vessels had not complied with the regulations regarding passage through the strait by 'foreign military vessels',[54] and that the Ukrainian vessels threatened to use military force and attempted to break through into the strait.[55] Following the events as described in Part II(A) above, the vessels were subsequently seized by the Russian coast guard vessels. Leaving an overall analysis for Part II(C) below, a few observations are in order regarding these statements.

The reference to innocent passage in territorial waters is relevant when determining which regime applies to the Kerch Strait according to Russia. Clearly the Russian claim to territorial waters surrounding Crimea is related to the issue of the legality of the Russian annexation of that territory. The reference to (the regime regarding) innocent passage as a basis for acting against the Ukrainian vessels would appear to indicate that, as far as Russia is concerned, the strait is subject to art 45 of *UNCLOS*. However, as was stated above in Part II(B)(1), this is not the Russian view and the reference to innocent passage is therefore confusing. The reference to the (non-adherence to) regulations governing the passage of the strait is partly relevant. While regulations regarding navigational safety are permitted under the regime of transit passage, if that regime is considered applicable, it remains questionable as to how forcefully such regulations may be enforced,[56] and such regulations may, in any

52 See, eg: TD Gill, 'The Forcible Protection, Affirmation and Exercise of Rights by States under Contemporary International Law' (1992) 23(1) *Netherlands Yearbook of International Law* 105, 131–40 ('The Forcible Protection, Affirmation and Exercise of Rights'), including the discussion as to when the use of force is justified, such as regarding submarines.

53 *Memorandum* (n 23) [12(c)].

54 Ibid [14].

55 Ibid [16]–[17].

56 Note that in the Russian view, such regulations do not in and of themselves constitute a violation of the *2003 Agreement* (n 22): ibid [10].

case, not have the effect of suspending passage. If the regime in the *2003 Agreement* were to apply, it is interesting to note that this part of the Russian explanations refers to 'foreign' military vessels.[57] While Ukrainian vessels are indeed 'foreign' to (claimed) Russian territorial waters, Ukrainian vessels still enjoy a privileged status as regards passage through the Kerch Strait under the *2003 Agreement* as opposed to military vessels of 'third countries'. [58] Next, the statements regarding the threat of the use of force and the description thereof in the *Memorandum*[59] are relevant, as such actions would constitute a breach of the obligations imposed by the regime of transit passage and would thus authorise some response by the Russian coast guard vessels (although not necessarily the response actually carried out).[60] Turning to the temporary suspension of passage through the strait, it should be noted that this measure was imposed in the interest of security of navigation but does not appear to be a suspension of innocent passage as referred to in art 25 of *UNCLOS*.[61] Finally, as regards the seizure of warships, the *Memorandum* does not discuss this element or provide any justification thereof.

In its statements before the ITLOS, Ukraine rejected the Russian statements discussed above.[62] As regards the temporary closure of the strait, Ukraine rejected the legality and the necessity of such closure as well as denied receipt of any notification to that effect.[63] As regards the threat of the use of force, Ukraine asserted that sailing with uncovered guns was normal operating procedure and that the angle of the guns (claimed by both sides as being 45 degrees elevation) would have made any use of force against the Russian vessels impossible.[64] It also asserted that the difference in military power (two gunboats opposing the numerous Russian military assets in the area) would presuppose any threatening intentions.[65] Finally, Ukraine provided extensive argumentation and substantiation as regards the sovereign immunity of warships and its assertion that the Russian actions were in violation of that immunity.[66]

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57 *Memorandum* (n 23) [14].

58 Ibid [10].

59 Ibid [16].

60 Note that Ukraine's forcing of its right to passage through the strait could be argued as constituting forcible affirmation of rights as that concept is described in Gill, 'The Forcible Protection, Affirmation and Exercise of Rights' (n 52), but that the Russian description of the events (partly disputed by Ukraine) would go beyond the constraints set forth by the ICJ in *Corfu Channel* (n 43) 34–5.

61 *Memorandum* (n 23) [12(c)], [16].

62 *Detention of Three Ukrainian Naval Vessels (Ukraine v Russian Federation) (Verbatim Record)* (International Tribunal for the Law of the Sea, Case No 26, 10 May 2019) 4, 10–14 ('*Verbatim Record*').

63 Ibid 9.

64 Ibid 9–10.

65 Ibid 9.

66 Ibid 9–15.

As regards the (illegality of) closure or suspension of passage through the strait, Ukraine challenged the Russian claim that safety of navigation was the underlying justification for that closure.[67] The Russian claim is indeed not particularly convincing, given that art 42(2) of *UNCLOS* regarding transit passage specifies that passage may not be denied or suspended and the *2003 Agreement* does not contain any right for either party to suspend or deny passage through the strait to the other party. Furthermore, the Russian claim that passage was suspended for naval vessels specifically appears at odds with the Russian justification,[68] as it is not clear why naval vessels would pose a greater risk of accidents among any other vessels waiting to pass through the strait. More to the point, such a specific injunction would appear at odds with the prohibitions set forth in *UNCLOS*, as regards limitations on transit passage, and is not consistent with the provisions of the *2003 Agreement*.[69] As regards the uncovered guns on board the *Berdyansk* and the *Nikopol*, the statement by Ukraine that sailing with uncovered guns is part of normal operating procedure appears generally reasonable from an operational point of view.[70] The issue as to whether the guns were aimed (in terms of azimuth) at the Russian vessels remains unclear from the statements by both parties and none of these aspects were addressed by the ITLOS itself in its *Order*.[71] Consequently, it is not possible on the basis of available information to determine whether the conduct of the Ukrainian vessels constituted a threat in violation of the regime of transit passage — even leaving aside the question of whether the Russian response would be justified if the conduct had constituted such a threat.[72]

(c) The Military Activities Exception to Arbitration under UNCLOS and the ITLOS Order

A few comments on the exception of military activities in regards to arbitration and binding decisions under *UNCLOS* are in order, as this topic relates to the question as to which law was applicable to the incident and the aftermath.

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67 Ibid 9.

68 *Memorandum* (n 23) [12]–[14].

69 *2003 Agreement* (n 22) art 2(1); *UNCLOS* (n 6) arts 38–44.

70 *Verbatim Record* (n 62) 9–10.

71 The ITLOS merely refers to the overall tensions between Russia and Ukraine: *Order* (n 15) [69]. Note that the Ukrainian assertion that two gunships facing multiple Russian military assets would in and of itself be indicative of the absence of hostile intentions is not convincing. Indeed, incidents in the past have shown that State vessels may take rather extreme measures even when facing overwhelming opposition. See, eg, the *Lido II* incident during Operation Sharp Guard: Stephen Prince and Kate Brett, 'Royal Navy Operations off the Former Yugoslavia: Operation Sharp Guard, 1991–1996' in Sandra J Doyle (ed), *You Cannot Surge Trust: Combined Naval Operations of the Royal Australian Navy, Canadian Navy, Royal Navy, and United States Navy, 1991–2003* (Naval History and Heritage Command, 2013) 45, 62–3.

72 See below Part II(C).

As was stated above in Part II(B)(2),[73] both parties have excluded military activities from arbitration under application of art 298(1)(b) of *UNCLOS*. In the case before the ITLOS, one of the central questions was therefore whether the incident involved military activities (thus excluding the incident from arbitration and binding decisions) or other types of activities.[74] While Russia claimed the incident involved military activities, Ukraine argued that the incident was clearly of a law enforcement nature.[75]

In its *Memorandum*, Russia provided several arguments as to why the incident had been a case of military activities. It pointed out that the vessels and personnel involved were all military and pointed to the 2016 ruling by the Arbitral Tribunal, set up by the Permanent Court of Arbitration under annex VII to *UNCLOS*, in the *South China Sea Arbitration* case,[76] describing military activities as those 'involving the military forces of one side and a combination of military and paramilitary forces on the other, arrayed in opposition to one another'.[77] Russia also pointed to the statements made by Ukraine on previous occasions,[78] such as the ones referred to below.[79] Finally, Russia stated that the Ukrainian claim that Russia had treated the incident as a law enforcement matter and that the servicemen were being subjected to civilian prosecution was 'an attempt to cast doubt on the plainly military nature of the activities'.[80]

In its statements before the ITLOS, however, Ukraine argued that art 298(1)(b) of the *UNCLOS* makes a clear distinction between military activities and law enforcement activities.[81] Notwithstanding that Ukraine has described the actions carried out by the Russian authorities during the incident as 'aggressi[ve]' and 'belligerent'.[82] It argued before the ITLOS that the mere fact that military vessels were involved did not in and of itself make the incident a military activity as intended by art 298.[83] The statements made by Russia and the subsequent actions undertaken by the Russian authorities made it clear, according to Ukraine, that this had been a law enforcement activity.[84]

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73 See especially n 34 and accompanying text.

74 *Order* (n 15) [50].

75 Ibid.

76 See *South China Sea Arbitration (Republic of the Philippines v People's Republic of China) (Award)* (Permanent Court of Arbitration, Case No 2013–19, 12 July 2016) ('*South China Sea Arbitration*'). See also Part IV below.

77 *Memorandum* (n 23) [30], quoting *South China Sea Arbitration* (n 76) [1161].

78 *Memorandum* (n 23) [32].

79 See below n 85–6 and accompanying text.

80 Ibid [33]. The reference to IHL will be discussed below in Part II(B)(3).

81 *Verbatim Record* (n 62) 18.

82 See, eg, Security Council, 73rd sess, 8410th Meeting, UN Doc S/PV.8410 (26 November 2018) 11–12.

83 *Verbatim Record* (n 62) 18–19, 23.

84 Ibid 18–25.

The Russian statements on this aspect appear somewhat difficult to reconcile with other paragraphs of the *Memorandum*, in which Russia states that the Ukrainian personnel 'were formally apprehended under Article 91 of the Code of Criminal Procedure of the Russian Federation as persons suspected of having committed a crime of aggravated illegal crossing of the State border of the Russian Federation',[85] and that '[b]y separate decisions of 27 and 28 November 2018 delivered by the Kerch City Court and the Kievskiy District Court of Simferopol, the Military Servicemen were placed in detention'.[86] Although Russia states that these (clearly law enforcement) actions are not relevant to the nature of the interaction between the vessels during the incident, that would appear to be a rather difficult distinction given that the nature of the incident clearly determines applicable law, including the law as regards the status of the detained persons.

In its *Order*, the ITLOS made it clear that in its view 'the distinction between military and law enforcement activities cannot be based solely on whether naval vessels or law enforcement vessels are employed',[87] observing that the use of naval vessels for law enforcement is common practice and emphasising that the nature of the activity in question is the determining factor.[88] While this does not contradict the Arbitral Tribunal's ruling to which the *Memorandum* refers,[89] it does appear to limit the scope of the exception of military activities slightly. In applying this general view to the case in question, the ITLOS first stated that the underlying contentious issue concerned passage through the Kerch Strait and that passage through straits was not a military matter.[90] Next, the ITLOS stated that the cause of the incident in question resulted from the Ukrainian attempts to enter the strait and the Russian actions to prevent that, pointing out that this indicates a difference of opinion regarding the applicable regime in the strait and that such a difference of opinion is not a military matter.[91] Finally, the ITLOS stated that the force used by Russia was related to arresting the Ukrainian vessels and, given the circumstances of that use of force, was of a law enforcement nature.[92] Based on the sum of these considerations, the ITLOS concluded that the incident 'took place in the context of a law enforcement operation' and that the military activities exclusion was not applicable.[93]

85 *Memorandum* (n 23) [21].

86 Ibid [22].

87 *Order* (n 15) [64].

88 Ibid.

89 *Memorandum* (n 23) [30].

90 Ibid [68]–[70].

91 Ibid [71]–[72].

92 Ibid [73]–[74].

93 Ibid [75].

Although the reasoning of the ITLOS has been met with some criticism,[94] the effects of the ITLOS's *Order* on the overall applicability of the military activities exclusion should not be overstated. First, the reasoning of the ITLOS, including para 75 as a summation of its reasoning in this part, suggests that the conclusion was based on the sum of the three elements (cumulatively rather than alternatively or individually) in relation to the specific circumstances of the incident. That would suggest that not every incident related to a difference of opinion on the applicable regime in a strait would thus automatically be considered a law enforcement incident rather than a military activity. Second, the ITLOS points to the subsequent criminal law charges brought against the crew of the vessels as indication that its reasoning is correct as regards the law enforcement nature of the activities.[95] This observation is in keeping with the observation made above in this Part regarding the link between the nature of the incident and the subsequent nature of the applicable law. The author therefore respectfully disagrees with James Kraska as regards his statement that the decision indicates 'outcome-based legal reasoning' on the part of the ITLOS.[96] While the outcome, in this case the charges brought against the Ukrainian personnel, is certainly relevant for the reasons just mentioned, the reasoning of the ITLOS is not based primarily on that aspect.

The observation of the ITLOS that the mere fact that the vessels were military in nature does not exclude a law enforcement context is, of course, correct.[97] Furthermore, the Russian description of the sequence of events as set forth in the *Memorandum* clearly indicates a law enforcement approach to the pursuit, use of force and subsequent detention of the vessels and the crew, once again contradicting itself as regards the purpose and nature of the conduct in question.[98] While the *Memorandum* emphasises that the conduct was military in nature, it also points out that the pursuit and capture were related to the illegal conduct (in the Russian view) of the Ukrainian vessels as regards entry into Russian territory.[99] Given that the Ukrainian warships were already leaving the territorial waters in question (leaving

94 See, eg, James Kraska, 'Did ITLOS Just Kill the Military Activities Exemption in Article 298?', *EJIL: Talk!* (Blog Post, 27 May 2019) <https://www.ejiltalk.org/did-itlos-just-kill-the-military-activities-exemption-in-article-298/> ('Military Activities Exemption').

95 *Order* (n 15) [76].

96 Kraska, 'Military Activities Exemption' (n 94).

97 See, eg: Rob McLaughlin, 'Authorizations for Maritime Law Enforcement Operations' (2016) 98(2) *International Review of the Red Cross* 465; 'HMS Defender Makes Second Gulf Drugs Bust', *Royal Navy* (Blog Post, 4 February 2020) <https://www.royalnavy.mod.uk/news-and-latest-activity/news/2020/february/04/200204-defender-drugs-bust>; 'French Navy Frigate Seizes $5.2 Million Worth of Narcotics', *US Central Command* (Blog Post, 23 September 2021) <https://www.centcom.mil/MEDIA/NEWS-ARTICLES/News-Article-View/Article/2786751/french-navy-frigate-seizes-52-million-worth-of-narcotics/>.

98 *Memorandum* (n 23) [12]–[19], [21]–[23].

99 Ibid [28].

aside the question as to which State could claim them as territorial waters),[100] and given that Russia denies, also in the *Memorandum*, that the actions were carried out as part of an armed conflict,[101] there is no legal basis for the Russian actions other than a law enforcement context. The question of whether the Russian denial of a state of armed conflict is legally accurate will be addressed in Part II(B)(3) below.

It follows from the above that — notwithstanding discussions regarding applicability of IHL — the reasoning of the ITLOS as regards the military activities exception is legally sound in relation to the arguments presented by Russia and Ukraine. In combination with the specific reasoning regarding each of the elements selected by the ITLOS, it may also be concluded for the present discussion that the applicability of the exception will be considered on a case-by-case basis and applied to the specific circumstances of each case.

3 *IHL and the LONW*

Although the distinction between *jus ad bellum* and *jus in bello* may be considered a point of general knowledge,[102] it cannot be emphasised enough when discussing both the conduct of the parties involved and the law applicable to that conduct in the context of a politically and legally volatile situation. This article will not address the *ad bellum* aspects of the annexation of Crimea by Russia, nor the current situation in Ukraine following the Russian invasion in February 2022. As regards the *in bello* aspects, IHL is clear as regards its applicability. Common art 2 of the four *Geneva Conventions*[103] and art 1(3) of the *Protocol I*[104] make it clear that IHL applies in all (factual) situations of armed conflict, regardless of the recognition of that situation by the parties involved, as well as all situations of belligerent occupation. As regards occupation, it is not relevant whether the occupation came about peacefully or through the use of force.

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100 *Order* (n 15) [59].

101 *Memorandum* (n 23) [33(b)].

102 *Jus in bello*, also referred to as IHL, refers to the law regulating the conduct of parties engaged in an armed conflict: 'What Are Jus Ad Bellum and Jus In Bello?' (n 5).

103 *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) art 2 ('*First Geneva Convention*'); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) art 2; *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) art 2 ('*Third Geneva Convention*'); *Geneva Convention Relative to the Protection of Civilian Persons in Times of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) art 2.

104 *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) art 1(3) ('*Protocol I*').

In spite of the intention behind the provisions of removing the political aspect of recognising the existence of an armed conflict,[105] many States still appear inclined to avoid acknowledgment of situations of armed conflict for various reasons and may choose to dismiss situations involving the use of force as 'incidents'.[106] However, and leaving aside the current situation between the two States, there can be little legal doubt that at the time of the incident, the continuing occupation of Crimea by Russia constituted grounds for applicability of IHL in the interaction between the two parties.[107]

The applicability of IHL to the incident under discussion has significant impact on the legal evaluation of the actions carried out by Russia and on the ITLOS's analysis of the case. That includes, first of all, the question of whether the incident can be evaluated on the basis of *UNCLOS* and whether the ITLOS had jurisdiction over the matter.[108] Given the *lex specialis* nature of IHL in situations of armed conflict,[109] it would appear logical to conclude that under the present circumstances, the legality of the incident and the legal status of the captured Ukrainian crew would need to be determined on the basis of IHL rather than peacetime LOTS. As will be discussed in Parts II(B)(3)(a)–(b), applying IHL to the incident provides a very different

105 Jean S Pictet (ed), *Commentary: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (International Committee of the Red Cross, 1952) vol 1, 28. See also Tristan Ferraro and Lindsey Cameron, 'Article 2: Application of the Convention' in International Committee of the Red Cross, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ed Knut Dörmann et al (Cambridge University Press, 2016) 68, 69 [193], 73–80 [201]–[219].

106 JFR Boddens Hosang, *Rules of Engagement and the International Law of Military Operations* (Oxford University Press, 2020) 117–19 ('*Rules of Engagement*'). See also at 112–21.

107 Note that the factual criteria for establishing the existence of an armed conflict would also provide grounds for the applicability of IHL if one focuses exclusively on the acts carried out during the incident. The International Criminal Tribunal for the Former Yugoslavia has made it clear, after all, that 'an armed conflict exists whenever there is a resort to armed force between States': *Prosecutor v Duško Tadić* (*Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT–94–1, 2 October 1995) [70]. The use of force by Russian military vessels against Ukrainian military vessels would fall under that description.

108 See *Detention of Three Ukrainian Naval Vessels (Ukraine v Russian Federation) (Declaration of Judge Lijnzaad)* (International Tribunal for the Law of the Sea, Case No 26, 25 May 2019). See also James Kraska, 'The Kerch Strait Incident: Law of the Sea or Law of Naval Warfare?', *EJIL: Talk!* (Blog Post, 3 December 2018) <https://www.ejiltalk.org/the-kerch-strait-incident-law-of-the-sea-or-law-of-naval-warfare/> ('The Kerch Strait Incident').

109 As confirmed by the ICJ: see, eg, *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 240 [25] ('*Legality of the Threat or Use of Nuclear Weapons*').

outcome compared to the one presented in the discussion of the ITLOS approach and the Russian explanations.

(a) Military Objectives

The LONW is part of IHL and consists of a combination of treaty provisions and (primarily) customary international law. The rules of naval warfare — commonly considered the core principles and part of customary law — are set out in the *San Remo Manual*.[110]

Like other forms of armed conflict, attacks under the LONW are permitted only against valid military objectives. While this includes attacks against some types of civilian vessels in certain circumstances, enemy warships and naval auxiliaries are in any case military objectives and may be attacked subject only to application of the rules of IHL — including precautions in attack and methods and means of warfare.[111] As regards capture and seizure of vessels, enemy vessels may be captured anywhere outside neutral waters, meaning outside the internal or territorial waters of neutral States.[112]

As stated above in Part II(B)(2)(a), the Ukrainian vessels involved in the incident were two warships and a naval auxiliary.[113] Under application of the LONW — in light of the existence of an armed conflict and/or state of belligerent occupation between Russia and Ukraine at the time — both the attack on and the seizure of the Ukrainian vessels were justified. Reference to the sovereign immunity of warships under *UNCLOS* and all related considerations would thus be irrelevant, given the *lex specialis* priority of IHL. An interesting contradiction exists, in that respect, in the *Memorandum*. While the arguments just presented would validate the Russian claim regarding military activities and would render the Ukrainian arguments on the immunity of the vessels invalid or irrelevant, the *Memorandum* appears to deny the applicability of IHL to the situation.[114] As Russia also denies that the incident took place in a law enforce-

110 See International Institute of Humanitarian Law, *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, ed L Doswald-Beck (Cambridge University Press, 1995) ('*San Remo Manual*'). See also 'San Remo Manual on International Law Applicable to Armed Conflicts at Sea, 12 June 1994', *International Committee of the Red Cross* (Web Page) <https://ihl-databases.icrc.org/ihl/INTRO/560>. See generally: Wolff Heintschell von Heinegg, 'The Development of the Law of Naval Warfare from the Nineteenth to the Twenty-First Century: Some Select Issues' in Terry D Gill (ed), *Yearbook of International Humanitarian Law: Volume 17, 2014* (Asser Press, 2014) 69; J Ashley Roach, 'The Law of Naval Warfare at the Turn of Two Centuries' (2000) 94(1) *American Journal of International Law* 64; Wolff Heintschell von Heinegg, 'The Law of Military Operations at Sea' in Terry D Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations* (Oxford University Press, 2nd ed, 2015) 375.

111 *San Remo Manual* (n 110) rr 65–6.

112 Ibid r 135. For the full definition of neutral waters, see rr 14–15.

113 See above n 37 and accompanying text.

114 *Memorandum* (n 23) [33(b)].

ment context, it remains, perhaps deliberately, unclear as to how Russia would seek to categorise the acts in question in terms of applicable international law.

(b) Prisoners of War

The rules pertaining to naval warfare make it clear that the crews of warships and naval auxiliaries, as members of the armed forces, are entitled to prisoner of war status following capture by the enemy.[115] Similar to the discussion regarding military objectives, applying IHL and the LONW to the incident under discussion leads to a disparate outcome as compared to the arguments presented before (and by) the ITLOS.[116] Given once again the status and nature of the Ukrainian vessels, the crew should have, following capture by Russia, been granted prisoner of war status.[117] However, while Ukraine referred to the crew at some points as being entitled to prisoner of war status, the arguments Ukraine presented before the ITLOS pertaining to the release of the crew were related to the sovereign immunity of warships under *UNCLOS*.[118] Those latter arguments would not be relevant under application of IHL and the LONW. Conversely, while Russia, as has been stated several times, considers the incident to have taken place as part of military activities, it denies that the captured crew is entitled to prisoner of war status and has sought to prosecute the personnel in question before civilian courts for illegal trespass into Russian territory.[119] As was stated in Part II(B)(3)(a), it is not entirely clear which parts of international law Russia would consider to apply to the incident or how it would categorise the status of the crew under international law — as prosecution of the crew on those grounds would clearly contravene the rules regarding the treatment of prisoners of war.[120]

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115 *Third Geneva Convention* (n 103) art 4(A)(1); *Protocol I* (n 104) arts 43(1)–(2), 44(1); *San Remo Manual* (n 110) r 165.

116 *Order* (n 15) [50]–[59], [68]–[74], [97]–[99], [118].

117 See also Kraska, 'The Kerch Strait Incident' (n 108).

118 See, eg, 'Ukraine Leader Vows To Bring Home Sailors Captured by Russia', *France 24* (online, 4 December 2018) <https://www.france24.com/en/20181204-ukraine-leader-vows-bring-home-sailors-captured-russia>.

119 *Memorandum* (n 23) [21]–[22], [33(b)]. See above Part II(B)(2)(c).

120 While arts 85 and 99 of the *Third Geneva Convention* (n 103) allow prosecution of prisoners of war for acts punishable under the domestic law of the detaining power, including acts committed prior to capture, the authority to do so is limited by the combatant privilege for combatants, for acts related to the armed conflict: see 'Commentary of 2020: Article 85', *International Committee of the Red Cross* (Web Page) <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=3A23C27AF17D2326C1258585005366D3>. If illegal border crossings were not to be so excluded, this would lead to the somewhat curious situation whereby combatants captured on enemy territory during an armed conflict could be tried under domestic immigration laws of the State in question, which is clearly not in keeping with IHL. Finally, note that prisoners of war prosecuted by the detaining power retain their rights and privileges under the *Third Geneva Convention* (n 103), while Russia denies such status applied to the crew in the situation under discussion: see *Memorandum* (n 23) [21]–[22], [33(b)].

C *Analysis and Conclusion*

There are not many lacunae in international law regarding the use of force and deprivation of liberty. Essentially, only two paradigms apply to the use of force by government agents: either (1) the use of force was part of, and related to, an armed conflict; or (2) the use of force was not so related.[121] In the first case, such use of force is governed principally by IHL as well as those elements of international human rights law that complement IHL.[122] In the second case, including law enforcement, the use of force is, as regards international law, governed by international human rights law. In both cases, the use of force in self-defence, whether national, unit or personal, is authorised as an inherent authority or right and subject to the requirements of necessity and proportionality.[123]

If peacetime law, including LOTS and law enforcement, is applied to the incident under discussion, then the applicable law leads to the conclusion that the use of force against the Ukrainian vessels was illegal. This conclusion is based on the following observations: (1) the law enforcement activities by Russia against the vessels, including their capture and seizure, would be a violation of the sovereign immunity of the Ukrainian warships under art 95 of *UNCLOS*; and (2) the use of force commenced after the vessels had begun to leave the (claimed) Russian territorial waters, thus negating any claim that the acts were necessary in the context of art 30 of *UNCLOS*.[124] Finally, while the arrest of the crew would also be illegal by extension, the crew would be subject to protection on the basis of human rights law but would not be immune from prosecution if the Russian courts adopt the principle of *male captus, bene detentus*.[125]

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121 See JFR Boddens Hosang, 'The Effects of Paradigm Shifts on the Rules on the Use of Force in Military Operations' (2017) 64(2) *Netherlands International Law Review* 353, 354–5.

122 For further discussion of the interaction between IHL and human rights law, see Terry D Gill, 'Some Thoughts on the Relationship between International Humanitarian Law and International Human Rights Law: A Plea for Mutual Respect and a Common-Sense Approach' in Terry D Gill (ed), *Yearbook of International Humanitarian Law: Volume 16, 2013* (Asser Press, 2013) 251.

123 See Boddens Hosang, *Rules of Engagement* (n 106) 76–94. Note that 'necessity' and 'proportionality' have different meanings in different legal contexts: see generally Boddens Hosang, 'The Effects of Paradigm Shifts on the Rules on the Use of Force in Military Operations' (n 121).

124 See above Part II(B)(2)(a)–(b).

125 The doctrine of *male captus, bene detentus* (wrongly captured, well kept) expresses the principle that although jurisdiction over a defendant may have been acquired by the forum State through a violation of international law, the wrongful arrest or abduction does not negate the validity of detention or imprisonment. The forum State may nonetheless exercise its jurisdiction lawfully over the defendant once they come within its judicial jurisdiction: Aaron X Fellmeth and Maurice Horwitz, *Guide to Latin in International Law* (Oxford University Press, 2nd ed, 2021) 183.

If, on the other hand, IHL and the LONW are applied to the incident under discussion, then the applicable law would lead to the conclusion that the use of force against the Ukrainian vessels was legal and the capture and seizure of those vessels would equally be legal. However, while the capture and detention of the crew would be legal under applicable law in this case, the status of the detention of the crew members would then be prisoner of war rather than criminal. Prosecution of the crew for 'illegal border crossing' would not be possible, given the combatant immunity of the crew in this context.

On the basis of this analysis, both Russia and Ukraine appear to have mixed elements of the applicable disciplines of international law in their arguments — although on the basis of available documentation it would appear that in the case of Ukraine this was more a change of approach between earlier statements and those made before the ITLOS. As regards the *Memorandum*, however, there appears to be not only internal contradiction,[126] but also the introduction of a third paradigm not supported by contemporary international law — military activities — which are neither law enforcement in nature, nor part of an armed conflict.[127] It remains to be seen how this aspect will be handled in the further treatment of this case before the ITLOS.

III The Mediterranean Situation

Two relatively recent situations in the Mediterranean deserve closer attention in the context of this analysis. The first concerns an incident between a French frigate and Turkish warships in the context of enforcing the arms embargo imposed by the United Nations against Libya. The second situation concerns the tensions between Greece and Turkey over the exploration and exploitation of natural resources in disputed maritime areas.

A *Enforcing the Libyan Arms Embargo*

1 *The Incident*[128]

On 10 June 2020, the Greek frigate HS *Spetsai*, operating as part of the European Union Naval Force Mediterranean Operation IRINI,[129] was tasked to send its helicopter towards the cargo vessel MV *Çirkin* sailing in the Mediterranean Sea. The purpose of this action was to initiate an inspection of the vessel in the context of enforcing the weapons embargo against Libya on the basis of the

126 See above n 119 and accompanying text.

127 See generally *Memorandum* (n 23).

128 At the time of writing, additional incidents have taken place since the incident under discussion. However, since the relevant information regarding those incidents is not yet publicly available, they will not be discussed.

129 'Welcome to the HS Spetsai', *EUNAVFOR MED Operation IRINI* (Web Page, 4 June 2020) <https://www.operationirini.eu/welcome-hs-spetsai/>.

UNSC Resolution 2292 (2016) ('Resolution 2292').[130] The MV *Çirkin* was under escort by three Turkish naval vessels and on its way to Libya. Upon approaching the MV *Çirkin*, the Greek helicopter was informed by the Turkish vessels that the MV *Çirkin* was under charter of the Turkish government and under the protection and control of the Turkish navy and not to approach any further.[131] The HS *Spetsai* subsequently recalled its helicopter. Later that day, the French frigate *Courbet* similarly attempted to approach the MV *Çirkin*. The *Courbet* was operating as part of the North Atlantic Treaty Organization's ('NATO') Operation Sea Guardian[132] with, inter alia, the same task of enforcing the weapons embargo against Libya. Although the details as to what transpired between the *Courbet* and the Turkish vessels differ between the French view and the Turkish view, the common ground is that a confrontation ensued in which the Turkish vessels prevented the *Courbet* from approaching the MV *Çirkin* and that the Turkish vessels subsequently continued to escort the MV *Çirkin* to Libya.[133]

2 *Applicable Law*

(a) LOTS

Given that, clearly, there is no situation of armed conflict between either Greece and Turkey, or between France and Turkey, and the incident occurred outside the territorial waters of any State, peacetime LOTS regarding freedom of navigation on the high seas applies to the situation. Greece is a party to *UNCLOS*, and France is a party to both *UNCLOS* and the *Convention on the High Seas*,[134] but Turkey is

130 SC Res 2292, UN Doc S/RES/2292 (14 June 2016) ('Resolution 2292').

131 Panel of Experts on Libya Established Pursuant to Security Council Resolution 1973 (2011), *Final Report of the Panel of Experts on Libya Established Pursuant to Security Council Resolution 1973 (2011)*, UN Doc S/2021/229 (8 March 2021) 172–3 ('*Final Report*').

132 See 'Operation Sea Guardian', *NATO* (Web Page) <https://mc.nato.int/missions/operation-sea-guardian>.

133 See: John Irish, 'NATO Must Deal with, Not Ignore Turkish Problem: French Official', *Reuters* (online, 17 June 2020) <https://www.reuters.com/article/us-nato-france-turkey-idUSKBN23O1OR>; John Irish and Robin Emmott, 'France-Turkey Tensions Mount after NATO Naval Incident', *Reuters* (online, 7 July 2020) <https://www.reuters.com/article/us-nato-france-turkey-analysis-idUSKBN2481K5>; 'Libya Crisis: France Suspends Nato Mission Role amid Turkey Row', *BBC News* (online, 2 July 2020) <https://www.bbc.com/news/world-europe-53262725>; Robin Emmott and John Irish, 'NATO To Investigate Mediterranean Incident between French, Turkish Warships', *Reuters* (online, 19 June 2020) <https://www.reuters.com/article/us-libya-security-france-turkey-idUSKBN23P2SJ>.

134 *Convention on the High Seas*, opened for signature 29 April 1958, 450 UNTS 11 (entered into force 30 September 1962).

not a party to either treaty. However, the provisions regarding the high seas that are relevant to a discussion of this incident can be considered part of customary law.[135]

(i) Flag State Jurisdiction

Vessels on the high seas are subject to the exclusive jurisdiction of their flag State, although a few exceptions apply on the basis of *UNCLOS* and other rules of international law.[136] The MV *Çirkin* was operated by Avrasya Shipping International, a Turkish shipping company, but registered under the flag of Tanzania.[137] That means that regardless of the vessel's (factual, rather than registered) home port in Turkey, and its operation by a Turkish shipping company, it is not a Turkish ship and is subject to the jurisdiction of Tanzania.[138] Based on the information currently available, however, Tanzania has not commented on either of the two incidents. Whether the HS *Spetsai* or the *Courbet* sought authorisation from Tanzania to inspect the vessel, as required by para 3 of Resolution 2292, is similarly not clear.

While the authority to board and inspect vessels on the basis of authorisation by the UNSC will be discussed below in Part III(A)(2)(b), other authorisations to board and inspect vessels, in this case without prior authorisation by the flag State, are set forth in art 110 of *UNCLOS*. Without discussing those authorisations in detail, it would seem that none of the situations described in those provisions are applicable in this case, nor do any other parts of *UNCLOS* appear to provide a basis for boarding in the context of this particular case.

The authority of the master in terms of all aspects of safety, operation and access, among other things, regarding their vessel is clearly established in both international law and national laws and also has a firm historical basis in customary law.[139] Consequently, some States consider consent by the master of a vessel as sufficient basis to carry out a boarding and search of a vessel without also seeking authorisation from the flag State.[140] Although such an approach does not create jurisdiction over the vessel, is subject to conditions and the (continued) consent of the master, and cannot include actual law enforcement, it does create a fast and simple method to determine if a ship warrants further action, in which case flag State consent would be required. However, given the rights, duties and obligations of the flag State,

135 See: J Ashley Roach, 'Today's Customary International Law of the Sea' (2014) 45(3) *Ocean Development and International Law* 239, 248–9; John A Duff, 'The United States and the Law of the Sea Convention: Sliding Back from Accession and Ratification' (2005) 11(1–2) *Ocean and Coastal Law Journal* 1, 10–12.

136 *UNCLOS* (n 6) art 92.

137 *Final Report* (n 131) 19–20, 153, 171–3.

138 *UNCLOS* (n 6) arts 91, 94.

139 See, eg: John AC Cartner, Richard P Fiske and Tara L Leiter, *The International Law of the Shipmaster* (Informa London, 2009); Marcus Toremar, 'The Legal Position of the Shipmaster' (LLM Thesis, Göteborg University, 2000).

140 See Department of the Navy et al, *The Commander's Handbook on the Law of Naval Operations* (Handbook, July 2007) 3-11–3-12 [3.11.2.5.2].

not all States recognise the authority of the master of a vessel as being sufficient for such boarding operations by State vessels and agents of another State in their official capacity.[141]

Finally, some States have adopted the practice, especially in the context of maritime military operations, of carrying out so-called 'friendly approaches'.[142] The difference between such approaches and consensual boarding is tenuous, although theoretically, a friendly approach is intended to elicit an invitation to come aboard the vessel being approached rather than outright requesting permission or stating an intention to board the vessel. As such, a friendly approach also requires further invitation by the master of the vessel to carry out any further activities on board, such as inspection of the ship's papers or cargo.[143]

Both consensual boarding and friendly approaches are instruments which allow, insofar as States acknowledge the right to carry out such activities, boarding of a vessel prior to, or absent of, flag State consent. However, the authority once on board the vessel in question is subject to the conditions and consent, among other things, of the master of the vessel. Neither instrument allows activities which would require jurisdiction over the vessel nor allows either the use of force or exercising control over the vessel.[144] In terms of carrying out enforcement operations — such as in the context of a weapons embargo — such instruments would only serve to ascertain whether a vessel should be considered for further enforcement action and therefore initiating the process of acquiring flag State consent. As both instruments rely on the free consent or invitation of the master of the vessel,[145] it would seem that neither of these instruments provide a viable option when the subject vessel is under escort by warships of another State, as was the case with the MV *Çirkin*.

141 See McLaughlin (n 97) 475–6. See also James Kraska, 'Broken Taillight at Sea: The Peacetime International Law of Visit, Board, Search, and Seizure' (2010) 16(1) *Ocean and Coastal Law Journal* 1, 16–17.

142 'Friendly Approaches: How Operation Irini Cooperates with Merchant Vessels', *EUNAVFOR MED Operation IRINI* (Web Page, 28 September 2020) <https://www.operationirini.eu/friendly-approaches-operation-irini-cooperates-merchant-vessels/>.

143 For a more detailed discussion of the various forms of maritime interception and associated legal aspects, see MD Fink, 'Maritime Interception and the Law of Naval Operations: A Study of Legal Bases and Legal Regimes in Maritime Interception Operations, in Particular Conducted Outside the Sovereign Waters of a State and in the Context of International Peace and Security' (PhD Thesis, University of Amsterdam, 2016) 39–50, 155–70.

144 See ibid.

145 This aspect provides another reason why some States do not recognise the validity of these instruments: it may be questioned how voluntary the consent or invitation of the master of a vessel truly is when approached or contacted by a warship or armed military personnel.

(ii) Immunity of State Vessels

The immunity of warships discussed above in Part II(B)(2)(a) applies equally to State vessels which are operated for non-commercial purposes, as expressed in art 32 of *UNCLOS*. While *UNCLOS* defines 'warship' specifically in art 29, no specific definition is provided for 'State vessels' or 'government vessels'. Instead, recourse must be had to other instruments to determine the scope of the sovereign immunity as it applies to such vessels.

Article 3(1) of the *International Convention for the Unification of Certain Rules Relating to the Immunity of State-Owned Vessels* refers to 'Government yachts, patrol vessels, hospital ships, auxiliary vessels, supply ships, and other craft owned or operated by a State, and used at the time a cause of action arises exclusively on Government and non-commercial service'.[146] Similarly, art 16(2) of the *United Nations Convention on Jurisdictional Immunities of States and Their Property* refers to 'vessels owned or operated by a State and used, for the time being, only on government non-commercial service'.[147] Although the convention has not yet entered into force, as at the time of writing, it is also of particular relevance to note that the International Law Commission's 'Draft Articles on Jurisdictional Immunities of States and Their Property and Commentaries thereto'[148] — which formed the foundation of the convention — express clearly, when referring back to the *Convention for the Unification of Certain Rules*,[149] that the term 'operate' extends equally to '"possession", "control", "management" and "charter" of ships by a State, whether the charter is for a time or voyage, bare-boat or otherwise'.[150]

All of the relevant provisions refer to vessels owned *or* operated by States.[151] Consequently, although the treaties just referred to focus primarily on State property, meaning both vessels and cargo (including State cargo on board non-State vessels), the various provisions in international law regarding State vessels and their immunity, at least appear to, imply that sovereign immunity may be enjoyed by merchant vessels which are not owned, but merely operated by a State. This does not appear particularly problematic or expansive in terms of interpreting the law regarding sovereign immunity when applied to merchant vessels sailing under the flag of the State in question and operated exclusively by that State. The question remains,

146 *International Convention for the Unification of Certain Rules Relating to the Immunity of State-Owned Vessels*, opened for signature 10 April 1926, 176 LNTS 199 (entered into force 18 February 1937) art 3(1) ('*Convention for the Unification of Certain Rules*').

147 *United Nations Convention on Jurisdictional Immunities of States and Their Property*, GA Res 59/38, UN Doc A/RES/59/38 (2 December 2004) art 16(2).

148 *Report of the International Law Commission on the Work of Its Forty-Third Session (29 April–19 July 1991)*, UN Doc A/46/10 (1991) ch II(D) ('*Report of the International Law Commission*').

149 *Convention for the Unification of Certain Rules* (n 146).

150 *Report of the International Law Commission* (n 148) 52.

151 See above nn 146–9 and accompanying text.

however, whether this approach would also apply to merchant vessels sailing under a different flag. The former approach is applied in practice, including by the United States Military Sealift Command.[152] The latter would expand the interpretation of the law regarding sovereign immunity, although the legal provisions, including the definitions of 'operate', do not exclude such interpretation provided the 'operation' is exclusively governmental and non-commercial in nature.[153]

Applying these conditions and provisions to the case under discussion, it should be noted that Turkey has stated that: (1) the MV *Çirkin* was carrying medical supplies; (2) the vessel was chartered by the Turkish State; and (3) the vessel was under the control and protection of the Turkish naval vessels during the incidents with the HS *Spetsai* and the *Courbet*.[154] No public information is available regarding the full exchange between the Greek and French vessels on the one hand and the Turkish vessels escorting the MV *Çirkin* on the other hand. However, the statements which are publicly available appear to indicate, at least, that it is possible that the MV *Çirkin* was, at the time, operated by the Turkish Government for exclusively non-commercial purposes.[155] If that was the case, applying the interpretation of the law as just outlined would mean that the MV *Çirkin* enjoyed sovereign immunity for the duration of that operation by the Turkish Government and was, at the time, a State vessel covered by art 32 of *UNCLOS*. Ironically, this would even be the case if the vessel was carrying weapons in contravention of the United Nations arms embargo,[156] provided that the weapons were being transported on behalf of the Turkish government and the vessel was under the direction and control of the Turkish government. While this scenario would mean a clear violation of the arms embargo by Turkey, it does not alter the vessel's status as a State vessel under applicable law, with all attendant consequences in terms of the authority to take action against the vessel.

152 See: 'Voluntary Intermodal Sealift Agreement (VISA)', *US Department of Transportation Maritime Administration* (Web Page, 20 October 2020) <https://www.maritime.dot.gov/national-security/strategic-sealift/voluntary-intermodal-sealift-agreement-visa>; 'Sealift', *United States Transportation Command* (Web Page) <https://www.ustranscom.mil/mov/sealift.cfm> ('*Sealift Command*'). The latter also specifies the immunity of the vessels while chartered by the Military Sealift Command and under operational control of the Military Sealift Command.

153 See also 46 USC § 2101(24) (1988) which limits the 'operation' by a foreign State to demise charter (also known as 'bare boat' charter).

154 *Final Report* (n 131) 172–3 [10].

155 See above nn 131–3 and accompanying text.

156 Note that the Panel of Experts on Libya Established Pursuant to Security Council Resolution 1973 (2011) concluded that the Turkish claims regarding the cargo of medical supplies were 'totally unconvincing' and that the MV *Çirkin* and accompanying naval vessels violated the arms embargo set forth in Resolution 1970 (2011): *Final Report* (n 131) 173 [12].

(b) UNSC Authority

The authority of the UNSC to determine the existence of threats to, or breaches of, international peace and security is firmly established in the provisions of the *Charter of the United Nations* ('*UN Charter*'), most notably in art 39.[157] The authority of the UNSC to establish embargoes in response to such situations is specified in art 41 of the same chapter of the *UN Charter*. Member States are required to carry out the decisions of the UNSC, as set forth in art 25 of the *UN Charter*. Should a conflict arise between a State's obligations under the *UN Charter* and those under any other treaty or convention, art 103 of the *UN Charter* makes it clear that the obligations under the *UN Charter* take precedence. Although there are limitations to the ability of the UNSC to set aside other obligations, especially as regards peremptory norms of international law,[158] the authority of the UNSC would in any case include setting aside normal rules of peacetime LOTS when authorising actions on the basis of ch VII of the *UN Charter*.

In Resolution 2292, recently extended through UNSC Resolution 2635 (2022),[159] the UNSC refers to its responsibility regarding international peace and security and to its determination that terrorism constitutes 'one of the most serious threats to peace and security'.[160] In paras 3 and 4 of Resolution 2292, the UNSC authorises the Member States to carry out inspections of vessels bound to or from Libya if there are 'reasonable grounds to believe [they] are carrying arms or related materiel to or from Libya',[161] subject to:

1. 'good-faith efforts' to obtain flag State consent prior to inspections (calling upon flag States to 'cooperate with such inspections');[162]

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157 *Charter of the United Nations* art 39 ('*UN Charter*').

158 See generally: Jann K Kleffner, 'Human Rights and International Humanitarian Law: General Issues' in Terry D Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations* (Oxford University Press, 2nd ed, 2015) 35; Aristotle Constantinides, 'An Overview of Legal Restraints on Security Council Chapter VII Action with a Focus on Post-Conflict Iraq' (Conference Paper, European Society of International Law Conference, 13 May 2004) <https://esil-sedi.eu/wp-content/uploads/2018/04/Constantinides_0.pdf>; Christian Tomuschat, 'The Security Council and *Jus Cogens*' in Enzo Cannizzaro (ed), *The Present and Future of Jus Cogens* (Sapienza Università Editrice, 2015) 7 <http://crde.unitelmasapienza.it/sites/default/files/GMLS_1_2015_3_Christian_Tomuschat.pdf>; Alexander Orakhelashvili, 'The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions' (2005) 16(1) *European Journal of International Law* 59; Marten Coenraad Zwanenburg, 'Accountability under International Humanitarian Law for United Nations and North Atlantic Treaty Organization Peace Support Operations' (PhD Thesis, University of Leiden, 2004) 144–52.

159 SC Res 2635, UN Doc S/RES/2635 (3 June 2022).

160 Resolution 2292 (n 130) 3.

161 Ibid 3 [3].

162 Ibid.

2. compliance with IHL and human rights law as applicable;[163]

3. the limitation of such interceptions to 'the high seas off the coast of Libya';[164] and

4. causing no 'undue delay to or undue interference with the exercise of freedom of navigation'.[165]

Of final relevance to the present discussion, para 7 of Resolution 2292 '[u]nderscores that these authorizations do not apply with respect to vessels entitled to sovereign immunity'.[166]

While there is no publicly available evidence as to what the MV *Çirkin* was carrying,[167] it is in any case clear that the vessel was heading to Libya and that both the European Union and NATO operations felt they had sufficient cause to seek to inspect the vessel. Whether a good faith effort was made by the European Union or NATO commands in charge of the HS *Spetsai* and the *Courbet*, respectively, to obtain authorisation from Tanzania, as the flag State of the MV *Çirkin* is not clear from the publicly available information. However, it should be noted that the wording of the requirement in Resolution 2292 leaves room for interpretation by the States acting under the authority it grants — including the time to be taken into account for receiving any reply to any request sent to the flag State.

As regards para 7 of Resolution 2292, the question as to the status of the MV *Çirkin* at the time of the incidents becomes particularly relevant. As was argued above in Part III(A)(2)(a), if the MV *Çirkin* was, at the time, under charter by and control of the Turkish Government and operated by Turkey exclusively for non-commercial purposes, then it can be argued that the MV *Çirkin* fell, at the time, under the category of ships enjoying sovereign immunity. If that interpretation of the law regarding sovereign immunity is applied, then para 7 of Resolution 2292 would exclude the MV *Çirkin* from the authorisations granted in the resolution and there would have been no legal authority for either the HS *Spetsai* or the *Courbet* to seek inspection of the vessel. If, on the other hand, the MV *Çirkin* was not being operated by the Turkish Government, or if the law regarding sovereign immunity does not extend to merchant vessels flying a different flag than the State operating the vessel, then the interference by the Turkish warships becomes more problematic. Given the obligations set forth in art 25 of the *UN Charter*, Turkey would then have failed to meet its obligations by actively preventing the European Union and NATO vessels from carrying out Resolution 2292. While Resolution 2292 does not contain an *obligation* to inspect, adhering to the arms embargo itself is an obligation and interfering with inspections carried out by States pursuant to the embargo, and

163 Ibid 3 [4].

164 Ibid 3 [3].

165 Ibid 3 [4].

166 Ibid 4 [7].

167 See *Final Report* (n 131) 171–3. See above n 156.

the authorisations set forth in Resolution 2292, would thus at least undermine the overall obligations in that regard.

3 *Analysis and Conclusion*

At present, the information publicly available is limited. Nonetheless, this incident illustrates that issues regarding the interpretation of the law or the applicability of various parts of international law to military operations are not limited to situations of adversarial or competitive relations between States, but can also arise between members of the same Alliance. Furthermore, the incident demonstrates that even in situations covered by a UNSC mandate, conflicts or incidents can arise as a result of the actual implementation of the mandate.

The description of the incidents and the analysis presented in this article lead to the very basic conclusion that the legitimacy of the actions undertaken by Greece (in the context of the European Union operation), France (in the context of the NATO operation), and Turkey depends on the status of the MV *Çirkin* at the time the incidents occurred. If the MV *Çirkin* was being operated by Turkey at the time, and an expansive view of the law regarding sovereign immunity is applied, then the vessel was a State vessel and was excluded from the authorisations granted by the UNSC for States to stop and inspect vessels on the high seas. Note that this exclusion is the result of the specific wording of the resolution in question, although it seems doubtful that the UNSC would issue broad authority to stop and inspect State vessels[168] in any case. While there is no legal reason why the UNSC would not be authorised to grant the authority to inspect State vessels, it seems, at least in practice, more likely that such authority would only be granted in the context of specific security measures targeted at a specific State. The present resolution, however, targets terrorist groups and the authorisations extend to any vessel (other than State vessels) sailing under any flag.

Based on the analysis above, it seems clear that in the event that the MV *Çirkin* was, at the time, a State vessel, the attempts by the European Union and NATO vessels to stop and inspect the vessel would not be covered by the authorisations granted by the UNSC and would therefore be in violation of the immunity of State vessels. If, on the other hand, the MV *Çirkin* was not a State vessel at the time of the incidents, then the actions taken by the Turkish warships to prevent the inspection of the MV *Çirkin* are questionable. While preventing other States from exercising the type of authorisations as set forth in the resolution is not in and of itself a violation of art 25 of the *UN Charter*, since authorisations are in themselves not mandatory actions, such a prevention would at least contravene the object and purpose of the resolution in question. Should such actions have the effect of undermining or contravening the weapons embargo, then the actions would constitute a violation of art 25 of the *UN Charter*. Obviously, the same would be the case if a State were to ship goods covered by the embargo directly to Libya.

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168 Note that ‘State vessels’ as a term includes warships, which are always State vessels, and vessels operated by a State for non-commercial purposes, which are State vessels for as long as they are so operated.

B *The Tensions over Natural Resources*

1 *The Incident*

Although tensions over the delimitation of maritime zones and rights to natural resources in the area have arisen periodically over much longer periods of time, the tensions between Greece and Turkey, and by extension between the European Union and Turkey, in the Eastern Mediterranean have increased since August 2020. In that month, Turkey sent the research and survey vessel *Oruc Reis*, accompanied by Turkish naval vessels, to explore deposits of natural gas in an area between Crete and Cyprus.[169] That area forms part of disputed claims concerning the delimitations of the EEZs of Greece and Turkey. Furthermore, the Turkish intentions regarding the exploitation of natural gas deposits in the area would place those activities within maritime areas claimed by Greece as part of the EEZ of, inter alia, the (Greek) island of Kastellorizo just a few miles off the coast of Turkey.[170]

The incident of August 2020 follows from an earlier controversial development regarding the rights to the natural resources in the area in question. In 2019, Turkey and Libya entered into an agreement delineating the EEZs of both countries.[171]

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169 See: 'EU Warns Turkey of Sanctions over "Provocations" in Mediterranean', *BBC News* (online, 2 October 2020) <https://www.bbc.com/news/world-europe-54381498>; Andreas Kluth, 'International Law Can't Solve the Greco-Turkish Island Problem', *Bloomberg* (online, 20 October 2020) <https://www.bloomberg.com/opinion/articles/2020-10-17/international-law-can-t-solve-greece-and-turkey-s-kastellorizo-island-problem?leadSource=uverify%20wall>; 'Turkey-Greece Tensions Escalate over Turkish Med Drilling Plans', *BBC News* (online, 25 August 2020) <https://www.bbc.com/news/world-europe-53497741> ('Turkey-Greece Tensions'); Alex Gatopoulos, 'Project Force: Battle for Resources in the Eastern Mediterranean', *Al Jazeera* (online, 13 August 2020) <https://www.aljazeera.com/features/2020/8/13/project-force-battle-for-resources-in-the-eastern-mediterranean> ('Project Force'); Sam Meredith, 'Turkey's Pursuit of Contested Oil and Gas Reserves Has Ramifications "Well beyond" the Region', *CNBC* (online, 18 August 2020) <https://www.cnbc.com/2020/08/18/turkey-greece-clash-over-oil-and-gas-in-the-eastern-mediterranean.html?&qsearchterm=Turkey%E2%80%99s%20pursuit%20of%20contested%20oil%20and%20gas%20reserves%20has%20ramifications%20%E2%80%98well%20beyond%E2%80%99%20the%20region>; Elena Becatoros, 'Greece Slams Turkish Move on Gas Exploration in Eastern Med', *The Washington Post* (online, 10 August 2020) <https://www.washingtonpost.com/world/europe/greek-national-security-council-to-meet-amid-turkey-tension/2020/08/10/a24ef7be-dae1-11ea-b4f1-25b762cdbbf4_story.html>.

170 See below Figure 2. The Greek island of Kastellorizo is marked with a small circle.

171 The agreement was concluded as a Memorandum of Understanding ('MOU') which is usually considered to be an instrument other than a treaty and not legally binding: see, eg, Office of Legal Affairs, *Treaty Handbook* (United Nations, 2012) 68. However, the MOU was registered with the United Nations under art 102 of the *UN Charter* (n 157) and the wording seems to indicate an intention for the document to form a treaty: *Memorandum of Understanding between the Government of the Republic of Turkey and the Government of National Accord-State of Libya on Delimitation of the*

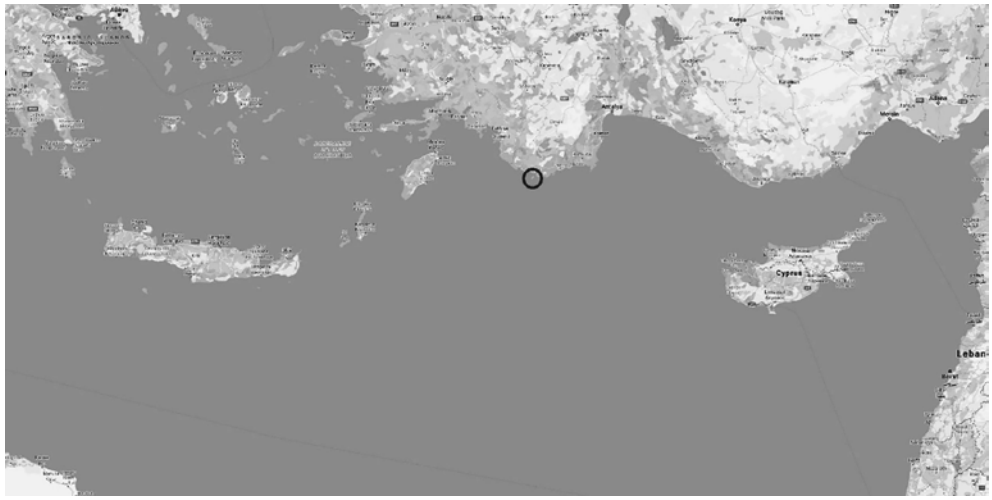

Figure 2: Eastern Mediterranean[172]

The boundary thus established, however, would cause the Turkish EEZ to overlap with any zone Greece could possibly claim in connection with, inter alia, the island of Kastellorizo and eastwards of the island of Crete. Consequently, the agreement has been met with considerable criticism from other States in the region and from the European Union but nonetheless appears to form the basis for the Turkish decisions regarding the activities in August 2020.[173]

With the exception of a collision between a Greek naval vessel and (one of) the Turkish vessels escorting the *Oruc Reis* in August 2020, the confrontation appears to have been minor. Turkey decided to withdraw the *Oruc Reis* from the disputed area and in spite of diplomatic offensives and public statements from the various States and organisations involved, the issue did not lead to an actual military

Maritime Jurisdiction Areas in the Mediterranean, signed 27 November 2019 <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/Turkey_11122019_%28HC%29_MoU_Libya-Delimitation-areas-Mediterranean.pdf>.

172 'Kastellorizo', *Google Maps* (Web Page) <https://www.google.com/maps/place/%CE%9A%CE%B1%CF%83%CF%84%CE%B5%CE%BB%CE%BB%CF%8C%CF%81%CE%B9%CE%B6%CE%BF+851+11,+Greece/@36.1495016,25.1099116,6z/data=!4m5!3m4!1s0x14c1d7ae617d4301:0x400bd2ce2b9b320!8m2!3d36.1495227!4d29.5934415>.

173 See, eg: 'EU Leaders to Reject Turkey-Libya Deal: Draft Statement', *Reuters* (online, 12 December 2019) <https://www.reuters.com/article/us-eu-summit-greece-turkey-idUSKBN1YF228>; Daren Butler and Tuvan Gumrukcu, 'Turkey Signs Maritime Boundaries Deal with Libya amid Exploration Row', *Reuters* (online, 28 November 2019) <https://www.reuters.com/article/us-turkey-libya-idUSKBN1Y213I>.

confrontation.[174] Furthermore, the earthquake in the region in October 2020 reduced tensions between the two principal States to a certain degree.[175] Nonetheless, the escort of the research vessel by military vessels, increased military readiness in the area, and the (implicit) references to national self-defence and mutual defence clauses,[176] raises a number of issues relevant in the context of ILMO.

2 *Applicable Law*

(a) LOTS

As was noted above in Part III(A)(2)(a), Greece is a party to *UNCLOS* but Turkey is not. It is therefore essential to determine whether the relevant provisions of *UNCLOS* are part of customary law and how their application would reflect on the positions taken by the States involved. Such relevant provisions include those regarding the EEZ, the continental shelf, and the regime regarding islands in connection to those zones. It should be noted that as regards the situation under discussion, Turkey has stated that islands (either categorically or those close to the coastline of Turkey depending on the report) cannot have an EEZ or continental shelf.[177] Greece, on the other hand, has referred to its rights to such zones in connection with the Greek islands, including Kastellorizo.

The provisions of *UNCLOS* in question are arts 74 ('Delimitation of the exclusive economic zone between States with opposite or adjacent coasts'), 76 ('Definition of the continental shelf'), 83 ('Delimitation of the continental shelf between States with opposite or adjacent coasts') and 121 ('Régime of islands').[178] All of these provisions have been subject to consideration by the ICJ in various cases.

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174 See Ali Kucukgocmen and George Georgiopoulos, 'Turkey's Oruc Reis Survey Vessel Back Near Southern Shore, Ship Tracker Shows', *Reuters* (online, 13 September 2020) <https://www.reuters.com/article/uk-turkey-greece-idUKKBN2640F1>.

175 'Turkey-Greece Quake: Search for Survivors under Rubble', *BBC News* (online, 31 October 2020) <https://www.bbc.com/news/world-europe-54759443>; 'Deadly Earthquake Strikes Turkey and Greece, Both Countries "Ready To Help Each Other"', *France 24* (online, 30 October 2020) <https://www.france24.com/en/europe/20201030-deadly-earthquake-strikes-turkey-and-greece>.

176 See, eg: Steven Erlanger, 'Rising Tensions between Turkey and Greece Divide EU Leaders', *The New York Times* (online, 27 August 2020) <https://www.nytimes.com/2020/08/27/world/europe/greece-turkey-eu.html>; Helena Smith, 'Mike Pompeo in Greece amid Tensions with Turkey over Gas Reserves', *The Guardian* (online, 28 September 2020) <https://www.theguardian.com/world/2020/sep/28/mike-pompeo-due-in-athens-amid-spiralling-tensions-between-greece-and-turkey>; 'Greece To Boost Military amid Tension with Turkey', *Al Jazeera* (online, 7 September 2020) <https://www.aljazeera.com/news/2020/9/7/greece-to-boost-military-amid-tension-with-turkey>; Letter from Nikos Dendias to Josep Borrell, 19 October 2020 <https://club.bruxelles2.eu/wp-content/uploads/let-art42-7turquie@gre201019.pdf>.

177 'Turkey-Greece Tensions' (n 169); 'Project Force' (n 169).

178 *UNCLOS* (n 6) arts 74, 76, 83, 121. For further discussion of art 121 of *UNCLOS* regarding the South China Sea, see below Part IV.

As regards the EEZ, the ICJ has ruled several times that the provisions of art 74 of *UNCLOS* are part of customary law, most notably in 2001,[179] 2012,[180] and 2014.[181] While art 74 concerns the delimitation of the EEZ, it should be noted that the ICJ has similarly ruled that the provisions regarding the EEZ itself also represent customary law.[182] In spite of the public statements by Turkey in the specific context of the natural resources in the area in question, there are no indications that Turkey has consistently rejected the customary law status of the provisions and Turkey cannot therefore be considered a 'persistent objector' in this case. Consequently, the provisions set forth in art 74 must be considered to apply to Turkey regardless of the fact that Turkey is not a party to *UNCLOS*.

In terms of the continental shelf, the ICJ has ruled on several occasions that art 76 of *UNCLOS*, regarding the continental shelf itself, and art 83 of *UNCLOS*, regarding the delamination between States with opposite or adjacent coasts, are part of customary international law.[183] Similarly, in this case there do not appear to be any indications that would render Turkey a persistent objector regarding the customary law status of these provisions. Consequently, these provisions must equally be considered to apply to Turkey regardless of whether Turkey is a party to *UNCLOS* itself.

Finally, and as will also be discussed below in Part IV, the customary law status of the provisions of *UNCLOS* regarding the regime of islands is relevant. It should be noted that art 121(2) of *UNCLOS* declares the provisions regarding the territorial sea, the EEZ and the continental shelf to be applicable to islands,[184] meaning that ascribing a customary law status of art 121 — in combination with the customary law status of the provisions regarding the EEZ and continental shelf — would render all of the previous elements equally applicable to the islands in question. This indeed appears to be the case, as the ICJ has ruled that art 121 is part of customary law.[185]

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179 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain) (Merits) (Judgement)* [2001] ICJ Rep 40, 91–3 [167]–[173] ('*Maritime Delimitation and Territorial Questions*').

180 *Territorial and Maritime Dispute (Nicaragua v Colombia) (Judgment)* [2012] ICJ Rep 624, 674 [139] ('*Territorial and Maritime Dispute*').

181 *Maritime Dispute (Peru v Chile) (Judgement)* [2014] ICJ Rep 3, 65 [179] ('*Maritime Dispute*').

182 *Continental Shelf (Libyan Arab Jamahiriya v Malta) (Judgment)* [1985] ICJ Rep 13, 33 [34] ('*Continental Shelf*').

183 Ibid 46–7 [77]; *Territorial and Maritime Dispute* (n 180) 666 [118], 674 [139]; *Maritime Dispute* (n 181) 65 [179].

184 With the (sole) exception set forth in art 121(3), regarding the absence of an EEZ or continental shelf for rocks which cannot sustain human habitation or economic life of their own. This exception is particularly relevant in the context of the discussion below in Part IV.

185 See, eg: *Maritime Delimitation and Territorial Questions* (n 179) 97 [185]; *Territorial and Maritime Dispute* (n 180) 674 [139].

Based on the decisions of the ICJ, it would appear that the Turkish statements regarding the rights of islands to an EEZ and/or a continental shelf are not compatible with customary international LOTS. Furthermore, given the customary law status of the relevant provisions of *UNCLOS*, the activities carried out by Turkey — as regards exploration and intended exploitation of natural resources in the area under dispute — would similarly appear to be incompatible with applicable customary international LOTS. This, in turn, influences the discussion regarding the use of military assets to protect those activities and defend against those activities.

(b) Jus ad Bellum

Given that the activities carried out by Turkey as regards exploration and intended exploitation of natural resources in the area in question would appear to be incompatible with applicable international LOTS, there equally appears to be no basis for the use of force to enable those activities to take place. While it is, of course, permitted under international law to provide military escorts to civilian vessels, provided all vessels comply with applicable law, there is no rule or principle authorising the use of force by those vessels unless authorised by a resolution of the UNSC (of which there is none to this effect in the present case) or on the basis of the right of self-defence. Additionally, while not constituting a legal basis for the use of force, the forcible affirmation of rights referred to in Part II(B)(2)(b) above appears relevant.[186]

(i) Self-Defence

Notwithstanding the collision between (at least) two of the naval vessels involved, there has not been any actual use of force between the States involved in the present case. Nonetheless, forceful language has been used in the public statements made by both States with regard to the situation in general.[187] It is therefore relevant to examine whether those statements should be construed as (political) rhetoric or whether a basis exists for the use of force in the present situation. As regards the right of self-defence, such an examination can be divided into two levels: (1) national self-defence; and (2) unit self-defence.

The right of States to defend themselves against an (imminent) armed attack is recognised under art 51 of the *UN Charter* and is part of customary international law as an inherent right of States.[188] The right to national self-defence covers both

186 See above n 52 and accompanying text.

187 See above nn 169 and 176.

188 See, eg: Terry D Gill, 'Legal Basis of the Right of Self-Defence under the UN Charter and under Customary International Law' in Terry D Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations* (Oxford University Press, 2nd ed, 2015) 213, 213–24; Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge University Press, 5th ed, 2011) 187–93; *Legality of the Threat or Use of Nuclear Weapons* (n 109) 263 [96]; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits) (Judgment)* [1986] ICJ Rep 14, 94 [176] ('*Military and Paramilitary Activities*'); Albrecht Randelzhofer and

attacks and imminent attacks and may be exercised individually or collectively — such as through pre-arranged alliances.[189] Two of those alliances are relevant in this case. Both Greece and Turkey are members of NATO, for which the founding *North Atlantic Treaty* contains the mutual defence clause set forth in art 5.[190] Additionally, Greece is a member of the European Union and can have recourse to art 42(7) of the *Treaty on European Union* ('*EU*').[191] Both provisions refer to the *UN Charter* as the basis for collective self-defence.

Notwithstanding the self-evident legal and political complexities that would arise if armed conflict were to erupt between two members of the same alliance, the present situation cannot qualify as justification for invoking art 5 of the *North Atlantic Treaty* or art 51 of the *UN Charter*. This follows from the simple observation that an (imminent) armed attack is a required precondition in both of those provisions. While there is no formal definition of the term 'armed attack',[192] it is generally accepted that the notion requires a considerable degree or scale of force to be (imminently) used against the State invoking the right of self-defence.[193] It would seem that a collision between naval vessels of two States and the sending of a survey vessel accompanied by naval vessels into disputed maritime areas outside the territorial waters of the affected State would in any case not amount to — even under a generously wide definition of the notion — an 'armed attack'. Similarly, while the various public statements made by both States are, at least, firm of tone from a diplomatic perspective, they do not as such provide indications of an imminent armed attack from either State against the other.

As regards art 42(7) of the *EU*,[194] it should be noted that the wording of this provision differs from that of art 5 of the *North Atlantic Treaty* and art 51 of the *UN Charter*

Oliver Dörr, 'Article 2(4)' in Bruno Simma et al (eds), *The Charter of the United Nations: A Commentary* (Oxford, 3rd ed, 2012) vol 1, 200. Albrecht Randelzhofer and Georg Nolte, 'Article 51' in Bruno Simma et al (eds), *The Charter of the United Nations: A Commentary* (Oxford, 3rd ed, 2012) vol 2, 1397.

189 Though it is acknowledged that the debate is ongoing as to whether the right of anticipatory self-defence exists subsequent to the opinion of the ICJ in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136.

190 *North Atlantic Treaty*, opened for signature 4 April 1949, 34 UNTS 243 (entered into force 24 August 1949) art 5 ('*North Atlantic Treaty*').

191 *Treaty on European Union*, opened for signature 7 February 1992, [2016] OJ C 202/1 (entered into force 1 November 1993) art 42(7) ('*EU*').

192 As noted by the ICJ in *Military and Paramilitary Activities in and against Nicaragua* (n 188) 94 [176].

193 Ibid 103–4 [195]. See Elizabeth Wilmshurst, 'Principles of International Law on the Use of Force by States in Self-Defence' (Working Paper, Chatham House, October 2005) 6, 13.

194 For a detailed discussion of art 42(7) of the *EU* (n 191), see, eg: JFR Boddens Hosang and PAL Ducheine, 'Implementing Article 42.7 of the Treaty on European Union: Legal Foundations for Mutual Defence in the Face of Modern Threats' (Research

in that it refers to 'armed aggression' as a prerequisite rather than an 'armed attack'. The relevance of this difference depends upon which of the various interpretations is considered convincing. While Aurel Sari points to a linguistic origin without normative or substantive meaning,[195] it has also been argued that the phrase is a deliberate choice providing a broader scope of application than art 5 of the *North Atlantic Treaty*.[196] However, regardless of the scope attached to these specific words in the provision, it is in any case clear that art 42(7) limits its application to 'armed aggression' against the territory of a Member State. As neither the EEZ nor the continental shelf are part of the territory of a State, the activities in the case under discussion cannot be cause to invoke art 42(7) of the *EU*. While attacks on the naval forces of a State by another State fall under the definition of aggression,[197] and would therefore fall within the broad interpretation of art 42(7) of the *EU* if so applied, this still does not remove the territorial requirement in the provision.

Based on these observations, it may be concluded that the situation in question does not give rise to a legal recourse as to the right of (collective) national self-defence. While art 6 of the *North Atlantic Treaty* provides that the vessels of the Member States fall within the scope of art 5, there simply was no 'armed attack' in the situation under discussion. As regards the *EU*, even if one were to accept a broader scope by virtue of the wording of art 42(7) of the *EU*, it does not include vessels in the scope and limits the application to the territory of the Member States.

(ii) Unit Self-Defence

Although there is some debate regarding the legal basis and conceptual framework, it is nonetheless recognised that military units have an inherent right to defend themselves against an (imminent) attack. It is recognised that this right, which is exclusive to military units, can most accurately be considered as a tactical level application of the right of national self-defence without invoking a nation-wide response

Paper No 2020–71, Amsterdam Center for International Law, Amsterdam Law School Legal Studies, 14 December 2020); Mattias G Fischer and Daniel Thym, 'Article 42 [CSDP: Goals and Objectives, Mutual Defence]' in Hermann-Josef Blanke and Stelio Mangiameli (eds), *The Treaty on European Union (TEU): A Commentary* (Springer, 2013) 1201; Aurel Sari, 'The Mutual Assistance Clauses of the North Atlantic and EU Treaties: The Challenge of Hybrid Threats' (2019) 10(2) *Harvard National Security Journal* 405; Niklas IM Nováky, 'The Invocation of the European Union's Mutual Assistance Clause: A Call for Enforced Solidarity' (2017) 22(3) *European Foreign Affairs Review* 357.

195 See, eg, Sari (n 194) 418.

196 See, eg, Anne Bakker et al, *Spearheading European Defence: Employing the Lisbon Treaty for a Stronger CSDP* (Report, Clingendael Netherlands Institute of International Relations, September 2016). See also ibid 418–19.

197 *Definition of Aggression*, GA Res 3314 (XXIX), 6th Comm, 29th sess, 2319th plen mtg, UN Doc A/RES/29/3314 (14 December 1974, adopted 14 December 1974) art 3(d).

by the flag State of the defending unit against the flag State of the attacking unit.[198] In addition to the requirement of an (imminent) attack, the use of force in this context must be considered as a last resort and meet the requirements of necessity and proportionality.[199] A collision between two naval vessels, even if it was the result of forceful posturing and provocation, would not necessarily be sufficient for the use of force in unit self-defence absent any further threats of, or actual use of, force against the vessel in question. However, the right to unit self-defence would apply if sufficiently threatening behaviour by one side could reasonably be interpreted by the other side as constituting an imminent or actual attack. As pointed out by Yoram Dinstein,[200] and referred to by Christopher Greenwood,[201] such an incident need not give rise to a full armed conflict with concomitant (legal) consequences, provided both sides treat the event as an 'incident' and no further use of force arises between them.[202] Obviously, however, such a development would not contribute to the overall safety and stability in the region.

(iii) Forcible Affirmation of Rights

As briefly referred to in Part II(B)(2)(b) above, and as analysed by Terry Gill,[203] and Dale Stephens,[204] the use of forceful means short of the actual use of force may be justified in exercising a right granted under international law, provided all attendant criteria and conditions set forth in the law are observed. This includes the use of warships to sail in areas where such ships have a right to sail. As regards observance of the rules of international law during such activities, special attention is required as regards compliance with the *UNCLOS* provisions regarding innocent passage and transit passage as well as compliance with art 2(4) of the *UN Charter*, regarding the

198 See, eg: Boddens Hosang, *Rules of Engagement* (n 106) 83–9; Charles P Trumbull IV, 'The Basis of Unit Self-Defense and Implications for the Use of Force' (2012) 23(1) *Duke Journal of Comparative and International Law* 121; EL Gaston, 'Reconceptualizing Individual or Unit Self-Defense as a Combatant Privilege' (2017) 8(1) *Harvard National Security Journal* 283. Dinstein refers to this as an 'on the spot reaction': Dinstein (n 188) 242–4. Finally, the ICJ has not 'exclude[d] the possibility' that an attack on 'a single military vessel might be sufficient to bring into play the "inherent right of self-defence"': *Oil Platforms (Islamic Republic of Iran v United States of America) (Judgment)* [2003] ICJ Rep 161, 195 [72].

199 In other words, the criteria established in the *Caroline* incident: RY Jennings, 'The Caroline and McLeod Cases' (1938) 32(1) *American Journal of International Law* 82. See, eg: Dale Stephens, 'Rules of Engagement and the Concept of Unit Self-Defense' (1998) 45(1) *Naval Law Review* 126; Dinstein (n 188) 244.

200 Dinstein (n 188) 244.

201 Christopher Greenwood, 'Scope of Application of Humanitarian Law' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (Oxford University Press, 2nd ed, 2008) 45, 48.

202 Note also the territorial requirement for invoking art 42(7) of the *EU* (n 191) mentioned in Part III(B)(2)(b)(i).

203 Gill, 'The Forcible Protection, Affirmation and Exercise of Rights' (n 52).

204 Ibid; Dale G Stephens, 'The Impact of the 1982 Law of the Sea Convention on the Conduct of Peacetime Naval/Military Operations' (1999) 29(2) *California Western International Law Review* 283.

prohibition of the (threat of the) use of force. In other words, the use of warships to threaten the coastal State or in a manner which does not constitute normal modes of navigation would not be permissible on this basis.

One of the essential elements of the theory of 'forcible affirmation of rights' is the existence of a 'right' under international law to be 'affirmed'.[205] Mere show of military force or aggressive behaviour as part of international relations without the purpose of 'affirming' a (contested) right does not fall under the aegis of this approach, and touches on different elements of the rules related to legitimacy and legality. In other words, the approach requires the unequivocal existence of a right under international law, a perceived necessity to affirm that right, and subsequent adherence to (other elements of) international law in the actual conduct related to that affirmation of the right. Moreover, the forcible affirmation of rights does not authorise the use of force absent an (imminent) armed attack, nor does it negate the law as regards peaceful settlement of disputes, whether under treaty law or general international law.[206]

Applying this approach and these principles to the situation under discussion, and applying the observations and conclusion presented in Part III(B)(2)(a) above, there would seem to be no basis for the use of warships by Turkey in terms of forcibly affirming any rights in this case. A protective escort of the Turkish exploratory vessel is, of course, generally permitted, provided the rules of international law applicable to warships are observed. Forcibly affirming rights through the deployment of such warships, however, does not appear applicable as there is no right for the exploratory vessel in question to carry out any activities related to exploration of natural gas deposits in the areas in which the incidents took place.

On the other hand, the deployment of Greek warships can be seen as a legitimate use of the principle under discussion, provided that: (a) the use of force is limited to situations of self-defence; and (b) the deployment is carried out to supervise or monitor the situation or to prevent the exploratory vessel from carrying out activities incompatible with Greek rights in the area. The use of such warships is not permitted, however, as a means of interfering with the freedom of navigation of any vessel in the area in question.

3 *Analysis and Conclusion*

As will become apparent in Part IV, the presence of natural resources can be a catalyst for geopolitical tensions. In the case of Greece and Turkey, those tensions are part of the long history between the two nations and the current situation regarding natural resources in disputed areas has exacerbated the bilateral relations. At the same time, it would appear that external crises, such as the earthquake in 2020, can inspire both States to transcend the bilateral difficulties and seek cooperation in times of mutual crisis.[207] That complex dynamic appears, at least for the time being, to offer hope that the dispute over maritime zones and the exploration and exploitation of natural resources in the area will not escalate to actual conflict in the region.

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205 Gill, 'The Forcible Protection, Affirmation and Exercise of Rights' (n 52) 125–6.

206 Ibid 119–25.

207 See above n 175 and accompanying text.

Turning to the aspects of international law, especially ILMO, as they apply to the situation under discussion, the analysis presented in this Part demonstrates that the tensions regarding maritime zones and natural resources do not provide a legal basis for the use of force on a national level, nor for invoking treaty provisions related to the right of national self-defence. Notwithstanding the diplomatic rhetoric employed,[208] the activities are related to maritime zones other than the territorial sea and consequently do not constitute any (imminent) armed attack against any State.

As regards the right of personal and unit self-defence, such rights attach to individuals and to military units at all times but only in the event of an (imminent) attack. While it is possible in theory that future confrontations may give rise to such a situation, it is of course to be hoped that this will not be the case and that tensions do not increase further. However, should a situation of unit self-defence arise, international law dictates that any response must adhere to the principles of necessity and proportionality and that the use of force be considered a measure of last resort.

Finally, as regards the forcible affirmation of rights, it should be emphasised first that this approach does not authorise the use of force. While situations authorising the use of force in self-defence may arise as a result of forcibly affirming rights, the approach itself cannot be considered a legal basis for the use of force. In the situation under discussion, the rights in question are Greek rights in relation to the maritime zones surrounding the Greek islands and to the right of Turkey regarding freedom of navigation in maritime areas outside the territorial waters of any State. Given the decisions of the ICJ discussed above in Part III(B)(2)(a), there can be no doubt that the Greek islands in question are entitled to a territorial sea, EEZ and continental shelf. Given the rights of coastal States in relation to such zones as set forth in *UNCLOS*, it would appear that Greece would be justified in affirming those rights when faced with possible infringements by other States and would be justified in forcibly affirming those rights in reaction to forcible infringements. While the right of Turkey to freedom of navigation in the areas under dispute is undeniable, there is clearly no right for Turkey to carry out exploration regarding natural gas deposits in the disputed areas and, consequently, no justification for forcibly protecting such actions.

IV Freedom of Naval and Air Navigation and Operations in the South China Sea

A *The Context*

Given the scope and history of international relations and concomitant challenges in the South China Sea and the wealth of academic writing on these topics, the analysis presented below will focus on the aspects which are relevant to the discussion of ILMO. Even with such a delimitation, however, the situation in the South China Sea provides a complex mixture of legal aspects, including historic claims and titles, claims to various maritime and air zones, and the freedom of navigation and military operations within such zones, all of which will be discussed below.

208 See above nn 169–76 and accompanying text.

As was observed in Part III, the presence of natural resources can cause additional incentives for disputes regarding maritime zones as well as divergent interpretations of applicable international law. This observation also applies to the South China Sea, with an estimated presence of large deposits of natural gas and oil as part of the situation.[209] Of the two island groups most heavily disputed in the area, the Spratly Islands are an area of interest for the exploration and exploitation of those resources.[210] Additionally, dependency on, and disputes over, fishery in the South China Sea contribute to tensions in the area as well.[211]

Although natural resources play a role in the tensions in the South China Sea, the actual disputes in the area primarily concern claims under the LOTS and the concomitant aspects of jurisdiction and rights related to maritime areas. In order to provide a logical structure to the discussion of these disputes, the following approach will be applied. Since the disputes relate in part to historic claims and in part to interpretations of applicable international law related to the status of islands, those two elements will be discussed first. That analysis and evaluation in turn leads to an analysis of applicable (claims regarding) maritime zones and the rights and obligations related to those zones. That part of the analysis focuses more specifically on the freedom of navigation and the rights related to military operations at sea, including air navigation and operations in the area.

B *Applicable Law*

1 *LOTS*

(a) Historic Rights

All of the relevant regional[212] States are parties to *UNCLOS*,[213] while non-regional States which play an active role in the issues in the South China Sea are parties to: *UNCLOS*;[214] the *Convention on the Territorial Sea and the Contiguous Zone*;[215] the

209 See, eg, Tim Daiss, 'Why the South China Sea Has More Oil than You Think' (22 May 2016) *Forbes* <https://www.forbes.com/sites/timdaiss/2016/05/22/why-the-south-china-sea-has-more-oil-than-you-think/>.

210 Richard Manley, 'Rocks and Shoals Ahead' (2020) 146(6) *Proceedings* 1408.

211 Pablo Valerín et al, 'FONOPs: Not the Only Option' (2020) 146(5) *Proceedings* 1407; Kevin Varley et al, 'Fight over Fish Fans a New Stage of Conflict in South China Sea', *Bloomberg* (Web Page, 2 September 2020) <https://www.bloomberg.com/graphics/2020-dangerous-conditions-in-depleted-south-china-sea/>; John Reed, 'South China Sea: Fishing on the Front Line of Beijing's Ambitions', *Financial Times* (online, 24 January 2019) <https://www.ft.com/content/fead89da-1a4e-11e9-9e64-d150b3105d21>.

212 The term regional as used in this section refers to the South China Sea region, not to Asia or the Asia–Pacific region as a whole.

213 This includes China, Indonesia, Malaysia, the Philippines and Vietnam: see 'Chronological Lists: United Nations Convention on the Law of the Sea' (n 33).

214 This refers specifically to Australia, France, and the United Kingdom.

215 *Convention on the Territorial Sea and the Contiguous Zone*, opened for signature 29 April 1958, 516 UNTS 205 (entered into force 10 September 1964).

Convention on the Continental Shelf;[216] and/or are at least not considered persistent objectors to the customary law status of the rules set forth in *UNCLOS* regarding the territorial sea, EEZ or continental shelf.[217]

Although *UNCLOS* recognises historic claims and titles in relation to certain bays and issues related to (the delimitation of) the territorial sea,[218] it does not contain any provisions addressing historic claims or titles to other maritime zones. As regards rights or obligations in such zones, art 62 of *UNCLOS* requires coastal States, in relation to the EEZ, to take into account 'the requirements of developing States' in the area and to minimise 'economic dislocation in States whose nationals have habitually fished in the zone'.[219] While this provision is relevant as regards the interests of other States in the South China Sea should the Chinese claims discussed below be considered valid, it does not, conversely, provide a legal basis for claims to (rights within) any zones. The question is therefore whether ratification of *UNCLOS* or the customary law status of the relevant provisions thereof has affected (prior) historic claims and titles if such claims and titles are incompatible with the provisions of *UNCLOS*. This question was one of the central issues addressed by the Arbitral Tribunal in the *South China Sea Arbitration* between the Philippines and China.[220]

Since 1958, China has claimed territorial seas in general conformity with international law as regards the width of the territorial sea.[221] However, it has consistently included the Paracel Islands (also known as the Xisha Islands) and Spratly Islands (also known as the Nansha Islands) in its claims despite the disputed ownership of those islands. In 1996, China claimed an EEZ in conformity with *UNCLOS* while 'reaffirming' its claim over the Paracel and Spratly islands, and in 1998 added a claim to a continental shelf in conformity with *UNCLOS*. Article 14 of the *Law of the People's Republic of China on the Exclusive Economic Zone and the Continental Shelf* contains a somewhat cryptic reference to the 'historical rights of the People's Republic of China'.[222] Those rights were detailed in two Notes Verbales sent by China to the United Nations in 2009, in which China claimed 'indisputable sovereignty over the islands in the South China Sea' as well as 'sovereign rights and

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216 *Convention on the Continental Shelf*, opened for signature 29 April 1958, 499 UNTS 311 (entered into force 10 June 1964).

217 This refers specifically to the United States.

218 See, eg, *UNCLOS* (n 6) arts 10(6), 15, 298(1)(a)(i).

219 Ibid art 62(3).

220 *South China Sea Arbitration* (n 76).

221 Note that the method of establishing baselines for the territorial sea as applied by China is heavily disputed and that the Chinese law diverges from international law as regards innocent passage by warships.

222 «中華人民共和國專屬經濟區和大陸架法» [Law of the People's Republic of China on the Exclusive Economic Zone and the Continental Shelf] (People's Republic of China) National People's Congress, Order No 6, 26 June 1998, art 14 [tr author] ('*Law of the People's Republic of China on the EEZ and the Continental Shelf*').

jurisdiction over the relevant waters as well as the seabed and subsoil thereof".[223] As substantiation thereof, China attached a map showing the so-called 'nine dash line'.

As the Arbitral Tribunal explained in detail,[224] the 'nine dash line' has appeared on Chinese maps since 1948 and represents the extent of the area over which China either claims jurisdiction (such as regarding the Paracel and Spratly islands) or sovereign rights (as regards maritime zones, including the seabed and subsoil). The historic claims of China have been challenged by other States, including Australia,[225] France,[226] Germany,[227] Indonesia,[228] Malaysia,[229] the Philippines (both as part of the Arbitral Tribunal Arbitration and separate thereof),[230] the United Kingdom,[231] the United States,[232] and Vietnam.[233]

223 Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations Secretary-General, 7 May 2009 <https://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf>; Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations Secretary-General, 7 May 2009 <https://www.un.org/depts/los/clcs_new/submissions_files/vnm37_09/chn_2009re_vnm.pdf>.

224 For the history of the 'nine dash line', see *South China Sea Arbitration* (n 76) [180]–[187].

225 Note Verbale from the Permanent Mission of the Commonwealth of Australia to the United Nations Secretary-General, 23 July 2020 <https://www.un.org/depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_07_23_AUS_NV_UN_001_OLA-2020-00373.pdf> ('Australian Note Verbale').

226 Note Verbale from the Permanent Mission of France to the United Nations Secretariat, 16 September 2020 <https://www.un.org/depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_09_16_FRA_NV_UN_001_EN.pdf>.

227 Note Verbale from the Permanent Mission of the Federal Republic of Germany to the United Nations Secretary-General, 16 September 2020 <https://www.un.org/Depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_09_16_DEU_NV_UN_001.pdf>.

228 Note Verbale from the Permanent Mission of the Republic of Indonesia to the United Nations Secretary-General, 12 June 2020 <https://www.un.org/Depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_06_12_IDN_NV_UN_002_ENG.pdf>.

229 Note Verbale from the Permanent Mission of Malaysia to the United Nations Secretary-General, 29 July 2020 <https://www.un.org/Depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_07_29_MYS_NV_UN_002_OLA-2020-00373.pdf>.

230 Note Verbale from the Permanent Mission of the Republic of the Philippines to the United Nations Secretary-General, 6 March 2020 <https://www.un.org/Depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_03_06_PHL_NV_UN_001.pdf>.

231 Note Verbale from the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations Secretariat, 16 September 2020 <https://www.un.org/depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_09_16_GBR_NV_UN_001.pdf>.

232 Michael R Pompeo, United States Secretary of State, 'US Position on Maritime Claims in the South China Sea' (Press Statement, 13 July 2020) <https://2017-2021.state.gov/u-s-position-on-maritime-claims-in-the-south-china-sea/index.html>.

233 Note Verbale from the Permanent Mission of the Socialist Republic of Vietnam to the United Nations Secretary-General, 3 May 2011 <https://www.un.org/depts/los/clcs_new/submissions_files/vnm37_09/vnm_2011_re_phlchn.pdf>.

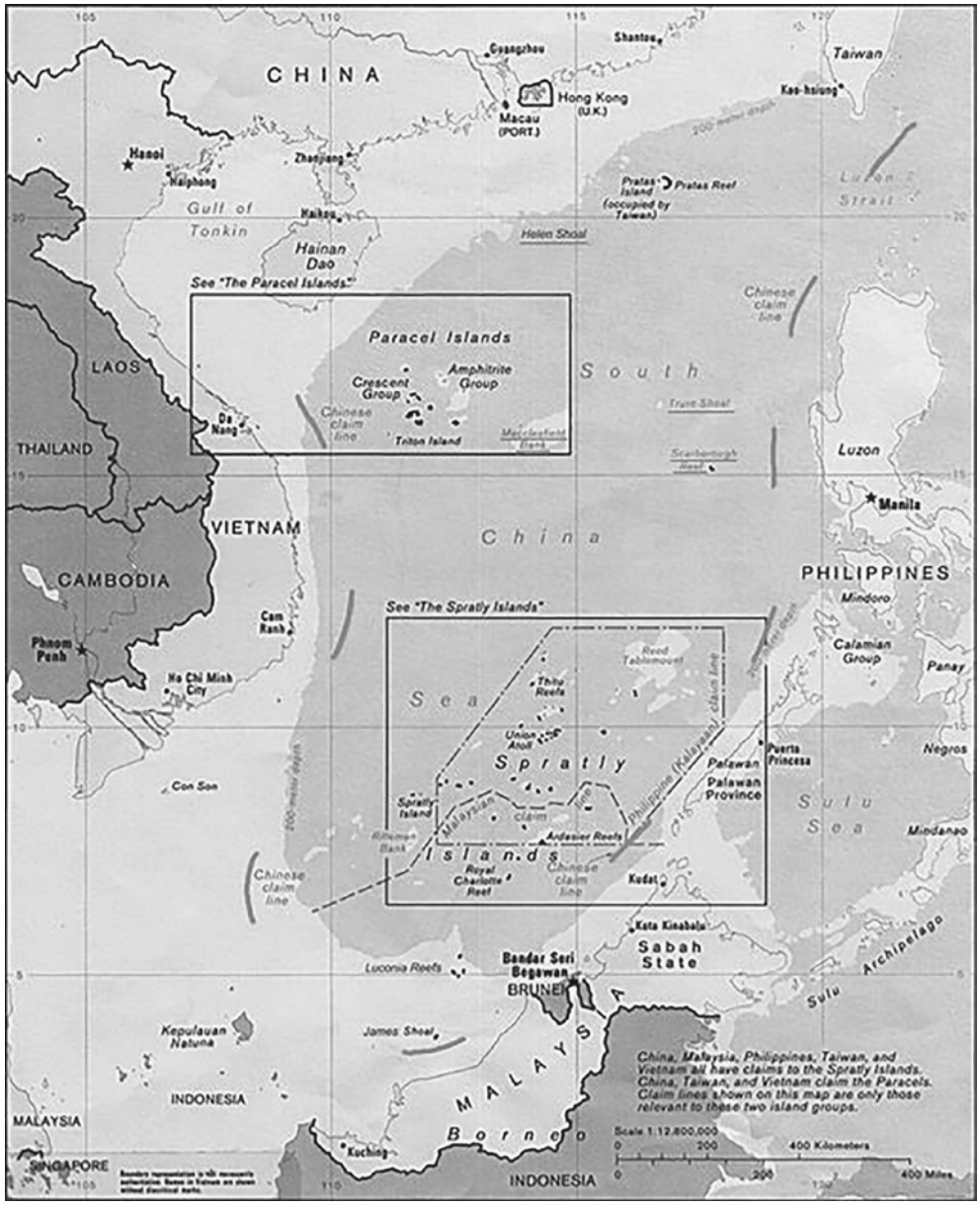

Figure 3: South China Sea and the 'Nine Dash Line'[234]

234 'South China Sea Islands', *University of Texas Libraries* (Web Page, 2021) <https://maps.lib.utexas.edu/maps/middle_east_and_asia/schina_sea_88.jpg>. This image was produced by the United States Central Intelligence Agency.

Based on the Chinese Notes Verbales and the analysis by the Arbitral Tribunal of the Chinese position in this regard, the Chinese historic claims in essence consist of claims to the Spratly and Paracel islands (and possibly other formations, such as the Scarborough Shoal) and exclusive rights to the natural (living and non-living) resources in the area enclosed by the 'nine dash line'. Leaving aside the question of ownership regarding the islands in question, the Arbitral Tribunal consequently addressed the following legal questions: (1) to what extent are historic claims which are incompatible with the provisions of *UNCLOS* valid; and (2) to what extent are the islands in the region in question entitled to maritime zones.[235]

Since *UNCLOS* does not recognise historic claims as a basis for establishing maritime zones, the Arbitral Tribunal assessed the legal effects of (ratification of) *UNCLOS* on the Chinese historic claims in the South China Sea on the basis of arts 293(1) (dispute resolution) and 311 (relation to other conventions and international agreements) of *UNCLOS* and art 30 of the *Vienna Convention on the Law of Treaties*,[236] as well as art 62 of *UNCLOS* as a basis for any *right* to harvesting natural resources.[237] On the basis of its comprehensive analysis of the various provisions, the Arbitral Tribunal concluded that there is no basis for historic rights contrary to the rights and obligations set forth in *UNCLOS*.[238] In other words, although the Arbitral Tribunal did not address the claims to sovereignty over the islands in the region, the ruling made clear that claims to natural (living and non-living) resources in areas other than a State's own territorial sea, EEZ or continental shelf are not compatible with *UNCLOS* and that the Chinese claims in that regard are invalid.[239] Given the placement of the 'nine dash line', it is clear that this ruling applies to large areas of the South China Sea that constitute the maritime zones of other States in the area, and thus cannot be the subject of Chinese historical claims.

235 The second question will be discussed below in Part IV(B)(1)(b).

236 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

237 Ibid (n 76) [235]–[239].

238 Ibid [246], [262].

239 Ibid [1203].

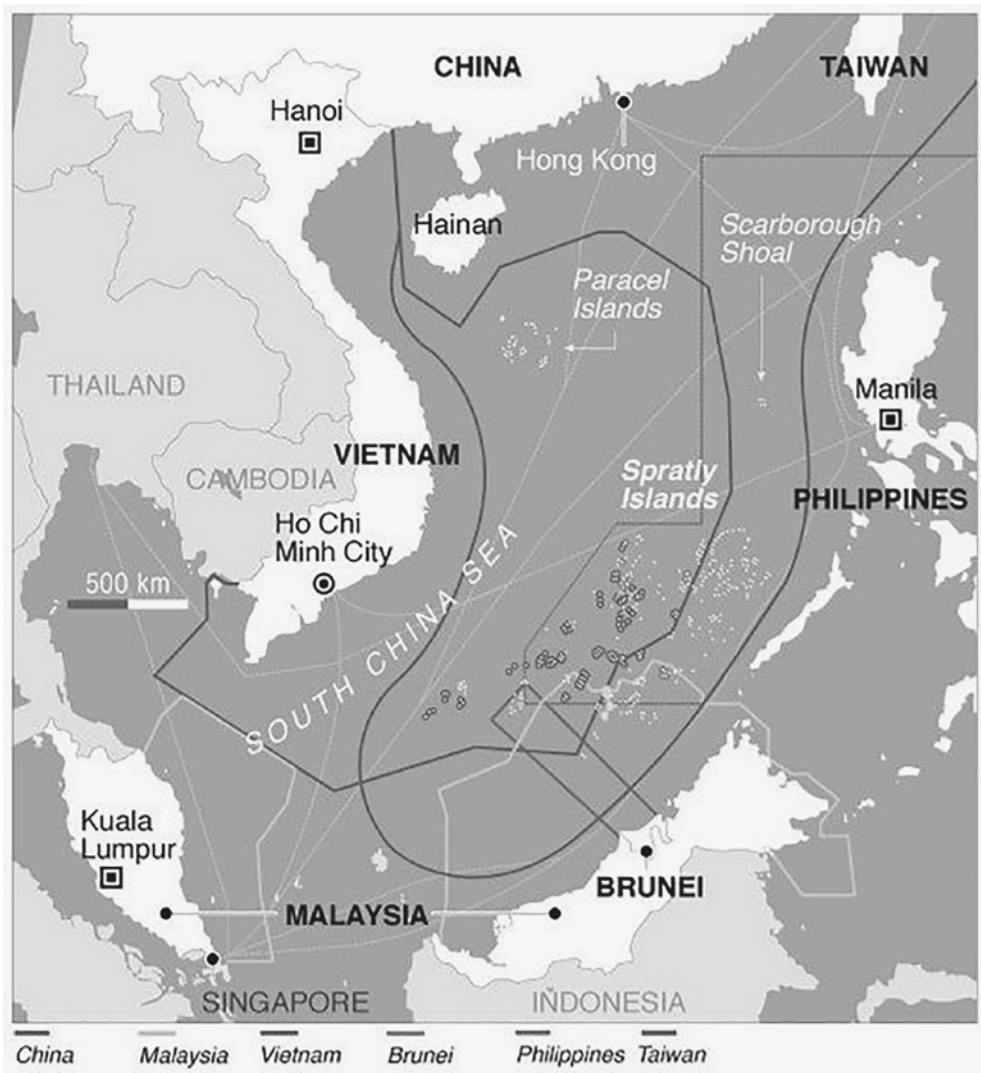

Figure 4: South China Sea EEZ claims[240]

(b) Status of Islands and Their Maritime Zones

In determining the entitlement to maritime zones in relation to formations in the disputed area, the Arbitral Tribunal extensively analysed the (history of the) law as regards the requirements for islands to be recognised as such and as regards the maritime zones to which islands are entitled. In doing so, the Arbitral Tribunal first established that the status of formations in the sea is determined by the natural state

240 Scott Stearns, 'Challenging Beijing in the South China Sea', *VOA* (online, 31 July 2012) <https://blogs.voanews.com/state-department-news/2012/07/31/challenging-beijing-in-the-south-china-sea/>.

of those formations and that man-made structures or alterations are irrelevant to the status of the formation itself.[241] The extensive construction of artificial high-tide facilities and features on and around the islands in question consequently do not alter or affect their status under international law, nor their entitlement to maritime zones under applicable law.

Next, the Arbitral Tribunal differentiated between low tide elevations, which are not entitled to any maritime zone and have no relevant status under *UNCLOS*,[242] high tide elevations without the ability to sustain life or to sustain economic activity on their own,[243] and 'fully entitled islands'.[244] Subsequently applying the provisions of art 121 of *UNCLOS*, including an analysis of the drafting history of that article,[245] the Arbitral Tribunal determined that high tide elevations which are not capable of sustaining life or their own economic life are entitled to a territorial sea, but not to an EEZ or continental shelf, leaving only the final category (fully entitled islands) as being entitled to the full range of maritime zones.

Finally, applying its extensive analysis to the situation in the area in question, including historical analysis of the most relevant formations, the Arbitral Tribunal concluded that Cuarteron Reef, Fiery Cross Reef, Gaven Reef (North), Johnson Reef, McKennan Reef and Scarborough Shoal are all rocks incapable of sustaining human life.[246] In applying art 121 of *UNCLOS*, this would mean that these formations fall under art 121(3) and would be entitled to a territorial sea but not to an EEZ or continental shelf. As regards the most relevant features of the Spratly Islands, the Arbitral Tribunal found that Itu Aba, North-East Cay, South-West Cay, Spratly Island, Thitu and West York may, as regarding all or some of these islands, (barely) sustain human life for some periods of time, but that none of these features are capable of 'sustaining an economic life of their own'.[247]

This analysis by the Arbitral Tribunal of the extent and meaning of the requirement in art 121(3) of *UNCLOS* regarding the ability to sustain an economic life was particularly noteworthy, as application of this requirement in the determination of entitlement to maritime zones was previously prone to some degree of speculation.[248] The Arbitral Tribunal ruling, on the other hand, clearly relates this requirement to the object and purpose of the two zones to which this requirement

241 *South China Sea Arbitration* (n 76) [305]–[306], [508]–[511].

242 Ibid [308]–[309]; *UNCLOS* (n 6) art 13.

243 *South China Sea Arbitration* (n 76) [280], [389]–[390].

244 Ibid [386]–[390].

245 Ibid [478]–[553].

246 Ibid [554]–[570].

247 Ibid [625].

248 See, eg, Alex G Oude Elferink, 'The Islands in the South China Sea: How Does Their Presence Limit the Extent of the High Seas and the Area and the Maritime Zones of the Mainland Coasts?' (2001) 32(2) *Ocean Development and International Law* 169, 173–4.

relates, both of which are, after all, related to economic activities in the sense of harvesting and exploiting the natural resources in those zones. It remains to be seen, however, to what extent artificial structures or other human intervention would be considered relevant in making this determination. While the Arbitral Tribunal was clear that man-made constructs and artificial alterations to the natural formations are not relevant for determining their status as either low tide elevation, a rock or an island, sustaining economic life requires at least some human intervention. The question therefore remains, as currently also actively being tested,[249] which degree of human influence or artificial processes is still acceptable in the determination whether an island can sustain an economic life 'of [its] own'.[250]

Consequently, although the high-tide elevations considered by the Arbitral Tribunal are entitled to a territorial sea, they are not entitled to an EEZ or continental shelf of their own. While the Arbitral Tribunal did not include the Paracel Islands in its ruling, and in spite of recent Chinese agricultural activities in that area, the criteria and requirements identified by the Arbitral Tribunal in its analysis would seem to indicate that a similar conclusion would apply to most or even all of that island group as well.[251]

(c) Freedom of Maritime Navigation and Operations

While the presence or absence of an EEZ and continental shelf does not directly impact military operations, the conclusions in Part IV(B)(1)(b) concerning the right to a territorial sea for several features in the region is relevant. As is clear from the Chinese statements and positions analysed by the Arbitral Tribunal, China has acknowledged the freedom of navigation 'in accordance with international law' in the area in question.[252] This means, first, that regardless of which State can claim sovereignty over the Spratly and Paracel islands, the regime of innocent passage rather than high seas navigation applies within (a maximum of) 12 nautical miles of the features eligible for a territorial sea. Second, if China is able to claim sovereignty over these islands, it should be noted that, contrary to China's statement regarding freedom of navigation in accordance with international law, China requires foreign warships to seek prior permission before exercising innocent passage in Chinese

249 See, eg: Drake Long, 'China Harvests Vegetables in South China Sea to Cultivate Territorial Claims', *Radio Free Asia* (online, 20 May 2020) <https://www.rfa.org/english/news/china/woody-vegetables-05202020173842.html>; Ralph Jennings, 'China Uses Cabbage To Advance Disputed Asian Sea Claim', *VOA* (online, 10 June 2020) <https://www.voanews.com/a/east-asia-pacific_voa-news-china_china-uses-cabbage-advance-disputed-asian-sea-claim/6190835.html>; Alexander Neill, 'South China Sea: What's China's Plan for Its "Great Wall of Sand"?', *BBC News* (online, 14 July 2020) <https://www.bbc.com/news/world-asia-53344449>.

250 *UNCLOS* (n 6) art 121(3).

251 This conclusion is also drawn in James Kraska, 'Vietnam Benefits from the South China Sea Arbitration', *Maritime Awareness Project* (Analysis Post, 31 August 2016) <http://23.101.187.184/wp-content/uploads/2016/08/analysis_kraska_083016.pdf>.

252 *South China Sea Arbitration* (n 76) [212], [1148].

territorial waters,[253] and consequently does not recognise the right of innocent passage within the territorial sea of any of the relevant features in these areas for warships.[254]

In addition to the concern regarding navigation in the territorial sea, the Chinese claim regarding the baselines of the territorial sea surrounding the Paracel and Spratly islands is a cause for operational and legal concern. For both island groups, China has applied straight baselines as part of treating the islands as archipelagic areas,[255] thus rendering all of the waters within both groups of islands as territorial (or archipelagic) waters subject to prior permission for warships to traverse those waters. This approach has been disputed[256] and the Arbitral Tribunal declared this

253 «中華人民共和國專屬經濟區和大陸架法» [Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone] (People's Republic of China) National People's Congress, Order No 55, 25 February 1992, art 6 [tr author] ('*Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone*').

254 Given the requirements set forth in art 19(2) of *UNCLOS* (n 6) it seems self-evident that military operations or exercises in the territorial sea of another State are prohibited in any case under *UNCLOS* (n 6) without the explicit consent of the coastal State in question. Note also that while China does not recognise the right of innocent passage for foreign warships in its territorial sea, China exercised that right in the territorial sea of the United States in 2015. See, eg: 'Five Chinese Ships Seen off Alaska Coast, Pentagon Says', *BBC News* (online, 3 September 2015) <https://www.bbc.com/news/world-us-canada-34131429>; Sam LaGrone, 'Chinese Warships Made "Innocent Passage" through US Territorial Waters off Alaska', *USNI News* (online, 3 September 2015) <https://news.usni.org/2015/09/03/chinese-warships-made-innocent-passage-through-u-s-territorial-waters-off-alaska>. The Chinese views on this issue are therefore at least inconsistent.

255 *Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone* (n 253) arts 2–3; *Declaration of the Government of the People's Republic of China on the Baselines of the Territorial Sea*, *15 May 1996* ['Declaration of the Government of the People's Republic of China on the Baselines of the Territorial Sea, 15 May 1996' *United Nations* (Web Document) <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN_1996_Declaration.pdf>]; Ministry of Foreign Affairs of the People's Republic of China, 'Foreign Ministry Spokesperson Hua Chunying's Remarks on Relevant Issue about Taiping Dao' (Press Release, 3 June 2016) <https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2535_665405/201606/t20160603_696661.html>; Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations Secretary-General, 14 April 2011 <https://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/chn_2011_re_phl_e.pd>; *South China Sea Arbitration* (n 76) [573]–[575].

256 See, eg: Australian Note Verbale (n 225); Note Verbale from the Socialist Republic of Vietnam to the United Nations Secretary-General, 30 March 2020 <https://www.un.org/depts/los/clcs_new/submissions_files/mys_12_12_2019/VN20200330_ENG.pdf>.

approach incompatible with the provisions of *UNCLOS*,[257] but China has so far rejected the ruling by the Arbitral Tribunal.[258]

While there is no legal requirement to adhere to illegal claims regarding maritime zones, it seems self-apparent that ignoring the claims (or purposely carrying out activities in contradiction of the claims) carries an inherent risk of escalating the already significant tensions in the region. This leaves two options for other States as regards maritime navigation and operations in the disputed areas. If States choose to abide by the Chinese claims, three possible consequences arise:

1. Navigation within the areas surrounded by the straight (archipelagic) baselines surrounding the entire Spratly and Paracel island groups is subject to prior permission from China for any warship wishing to sail through the areas;

2. Military operations or exercises are prohibited within the entire Spratly and Paracel island groups, unless explicitly authorised by China; or

3. Unless carefully-worded and consistent statements to the contrary are issued by the States in question, the adherence to the Chinese claims may be interpreted either as an official acknowledgment of those claims or as acquiescing by those States, including the baselines and delimitation of the territorial seas in the areas in question.

If, on the other hand, States choose to challenge the Chinese claims in question, two options apply as regards the method to do so:

4. States may issue diplomatic protests against the Chinese claims while avoiding the areas in question in order to avoid raising tensions; or

5. States may deliberately navigate through contested maritime zones (also referred to as Freedom of Navigation Operations) with warships, or stage exercises in contested areas in conformity with international law, but contrary to Chinese claims.

Both variations of option 5 (above) may be interpreted as forcible affirmation of rights,[259] with the latter option clearly being the more forceful version. Apart from the observation that such a course of action would increase tensions in the area and could be considered provocative if carried out by States with no (other) direct national interest in the South China Sea, it should be noted that neither of the variations in option 5 would authorise proactive use of force by the warships

257 *South China Sea Arbitration* (n 76) [573]–[576].

258 See, eg, Tom Phillips, Oliver Holmes and Owen Bowcott, 'Beijing Rejects Tribunal's Ruling in South China Sea Case', *The Guardian* (online, 12 July 2016) <https://www.theguardian.com/world/2016/jul/12/philippines-wins-south-china-sea-case-against-china>.

259 See above Parts II(B)(2)(b) and III(E)(2)(c).

in question. The right to unit self-defence would, of course, apply in the event that other States were to initiate the use of force against the vessels in question, subject to the rules and requirements discussed in Part III(B)(2)(b)(ii).

2 *Air Law*

Air law and its rules and regulations form a complex system consisting of a combination of public international law set forth inter alia in various treaties, most notably the *Convention on International Civil Aviation* (as subsequently amended and updated) ('*Chicago Convention*')[260] and its annexures, rules, and regulations — related to (the distributed responsibility for) air navigational safety and search and rescue services promulgated principally by the International Civil Aviation Organization ('ICAO'). Although some regulations are not 'laws' as such, it should be noted that they implement the related provisions of the treaties, including those related to air safety, and are therefore binding in that regard.[261]

(a) Zones for Air Traffic Control and Safety

Airspace can be divided vertically into flight levels, for which air traffic control and airspace management has equally been divided between, for example, lower airspace and upper airspace, as well as horizontally. Vertical airspace differentiation is primarily related to air traffic control services, as well as differentiating between 'airspace' and 'outer space', while horizontal differentiation is considerably more relevant for ILMO.

Starting with the territory of States, national airspace consists of the airspace over the land territory and the territorial sea and is subject to the 'complete and exclusive sovereignty' of the State in question.[262] Leaving aside the complex system of civil aviation rights and agreements regarding overflight and landing rights, there is quite simply no right of entry or overflight for State aircraft, including military aircraft, in the national airspace of another State without prior authorisation of the territorial State.[263] In addition to authorisation by the State in question, as well as obviously authorising resolutions issued by the UNSC, exceptions to this general rule regarding national airspace can be found in *UNCLOS* as regards the right of

260 *Convention on International Civil Aviation*, opened for signature 7 December 1944, 15 UNTS 295 (entered into force 4 April 1947) ('*Chicago Convention*').

261 See *Convention on International Civil Aviation*, opened for signature 7 December 1944, 15 UNTS 295 (entered into force 4 April 1947) annex 2 ('*Rules of the Air*') art 2.1.

262 *Chicago Convention* (n 260) arts 1–2.

263 Ibid art 3(c). Note also that *UNCLOS* (n 6) does not contain any right of overflight in the provisions regarding (innocent passage in) the territorial sea.

overflight over straits used for international navigation[264] and overflight through passages designated for that purpose over archipelagic waters.[265]

All airspace which is not national airspace is open for air navigation by any aircraft from any State, subject only to the national jurisdiction of the flag State of the aircraft and the rules and regulations pursuant to, inter alia, the *Chicago Convention*, including the obligation to exercise this right with due regard to the interests and safety of others.[266] Given the definition of national airspace, international airspace consists of the airspace over the sea outside the territorial sea of any State.[267] The right of air navigation over the waters outside any State's territorial sea is also recognised under *UNCLOS*.[268]

In the interest of air traffic control and air safety, areas of responsibility for providing services related to those interests have been established by ICAO throughout the world. As regards air traffic control, regional cooperation in some areas has established regional air traffic control services, such as those provided or coordinated by

264 *UNCLOS* (n 6) art 38.

265 Ibid art 53. See below Part IV(B)(2)(b) as regards the application of this provision in the South China Sea.

266 Though experts have noted that there are conditions where aircraft may dispense with their rights and protections under the *Chicago Convention* (n 260). See Program on Humanitarian Policy and Conflict Research at Harvard University, *HPCR Manual on International Law Applicable to Air and Missile Warfare* (Cambridge University Press, 2013) r 63.

267 Note that Greece differs from this general rule, in that it has claimed a territorial sea of six nautical miles: Νόμος Αριθμός 230/1936 Περί Επέκτασης των Χωρικών Υδάτων του Βασιλείου της Ελλάδος [Law No 230/1936 Concerning the Extension of the Territorial Waters of the Kingdom of Greece] (Greece) art 1 [tr author] <https://leap.unep.org/countries/gr/national-legislation/law-no-2301936-concerning-extension-territorial-waters-kingdom>. It also claims national airspace up to ten nautical miles off the Greek coasts: Διάταγμα της 6/18 Σεπτεμβρίου 1931 για τον καθορισμό της έκτασης των χωρικών υδάτων για τους σκοπούς της αεροπορίας και τον έλεγχο αυτών [Decree of 6/18 September 1931 to Define the Extent of the Territorial Waters for the Purposes of Aviation and the Control Thereof] (Greece) [tr author] <https://leap.unep.org/countries/gr/national-legislation/presidential-order-define-extent-territorial-waters-purposes>; Νόμος με αριθμό 5017 της 3/13 Ιουνίου 1931 περί Ρύθμισης της Πολιτικής Αεροπορίας [Law No 5017 of 3/13 June 1931 to Regulate Civil Aviation] (Greece) art 2 [tr author] <https://leap.unep.org/countries/gr/national-legislation/law-no-5017-313-june-1931-regulate-civil-aviation>. While the Greek claims remain within the maximum of twelve nautical miles for a territorial sea and its superjacent airspace, the discrepancy between the national airspace and the territorial sea of Greece is not in conformity with international law.

268 See *UNCLOS* (n 6) art 58(1) as regards overflight over the exclusive economic zone, art 78 as regards the airspace over the continental shelf, and art 87(1)(b) as regards freedom of overflight over the high seas.

EUROCONTROL.[269] Other States may provide such services within their national airspace or in cooperation with neighbouring States.

For the airspace over maritime areas which are not subject to national jurisdiction or sovereignty, coastal States have been assigned zones as well, including oceanic zones, for providing safety and air traffic guidance to aircraft traversing such zones. With the exception of the zones over certain oceans, Oceanic Control Area ('OCA'), these zones are referred to as Flight Information Regions ('FIRs'), which are defined in annex 2 to the *Chicago Convention* as '[a]n airspace of defined dimensions within which flight information service and alerting service are provided'.[270] In other words, an FIR does not provide any national (sovereign) rights for the coastal State in question and does not create any obligations for aircraft flying in such regions other than those related to air safety. This, in turn, means that while a State may deny any foreign State aircraft (including military aircraft) from entering its national airspace, a State responsible for an FIR beyond its national borders cannot deny entry or require prior permission in regard to any aircraft in those areas of the FIR which constitute international airspace. Conversely, State aircraft may not jeopardise the safety of civil aviation,[271] an obligation that reasonably includes adhering to air navigation safety guidance from the air traffic control centre responsible for the FIR in question. It seems self-apparent that this interaction between the rules in question can be subject to abuse by both State aircraft and coastal States.[272]

(b) Air Defence Identification Zones

While FIRs are regulated by, and instituted under, the rules and regulations of ICAO in the interest of flight safety, different interests and purposes apply to air defence identification zones ('ADIZs') as established by several States in various areas of the world. In the definition provided in annex 15 of the *Chicago Convention*, an ADIZ is a '[s]pecial designated airspace of defined dimensions within which aircraft are required to comply with special identification and/or reporting procedures additional

269 'Supporting European Aviation', *EUROCONTROL* (Web Page) <https://www.eurocontrol.int/>.

270 *Rules of the Air* (n 261) ch 1 (definition of 'flight information regions'). Flight Information Service is also defined as '[a] service provided for the purpose of giving advice and information useful for the safe and efficient conduct of flights': at ch 1 (definition of 'flight information service'). Alerting Service is also defined as '[a] service provided to notify appropriate organizations regarding aircraft in need of search and rescue aid, and assist such organizations as required': at ch 1 (definition of '*alerting service*'). See also *Convention on International Civil Aviation*, opened for signature 7 December 1944, 15 UNTS 295 (entered into force 4 April 1947) annex 15 ('*Aeronautical Information Services*') as regards the technical aspects, requirements, and ICAO recommendations regarding FIRs.

271 *Chicago Convention* (n 260) art 3(d). Also note the provisions regarding the use of force by State aircraft against civil aviation: at art 3 *bis*.

272 See, eg, Office of the Legal Adviser, United States Department of State, *Digest of United States Practice in International Law*, ed CarrieLyn D Guymon (2011) 407–8.

to those related to the provision of air traffic services'.[273] Annex 15 also requires that if an Aeronautical Information Publication ('AIP') is produced and made available, the en-route ('ENR') section should indicate whether and where an ADIZ has been established by the State in question and which procedures apply within an ADIZ, including interception procedures as applicable if aircraft fail to comply with the rules established for flights within an ADIZ.[274] Neither the *Chicago Convention* itself nor annex 15 authorise or regulate ADIZs beyond the stated requirements for inclusion in an AIP. It has consequently been observed that ADIZs are neither specifically authorised, nor specifically prohibited, by international law.[275]

ADIZs have existed for a long time and there is considerable — albeit divergent — State practice in relation to such zones. ADIZs were first established by the United States in the period immediately following the Second World War,[276] but have since been declared by a number of States.[277] In its most basic form, an ADIZ is a region of airspace in which a State declares certain requirements for any aircraft wishing to fly in that airspace, specifically related to identification of the aircraft and its flight plan or navigational intentions. Failure to comply with those procedures may result in interception and accompaniment of an aircraft by military aircraft of the State whose ADIZ is being traversed, as well as denial of any further, or revoking of prior, permission to enter the national airspace of the State in question.

ADIZs extending into international airspace do not violate international law, provided they meet certain conditions. First, while an ADIZ may extend (well) beyond the territory of the State in question, it may not extend into areas in which other States enjoy sovereign rights or into the territory of any other State.[278] As regards areas involving the sovereign rights of other States, meaning the EEZ and continental shelf, there is no rule of international law that would specifically

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273 *Aeronautical Information Services* (n 270) ch 1 (definition of 'air defence identification zone (ADIZ)').

274 Ibid appendix 1, ENR 5.2.

275 Christopher K Lamont, 'Conflict in the Skies: The Law of Air Defense Identification Zones' (2014) 39(3) *Air and Space Law* 187; Ruwantissa Abeyratne, 'In Search of Theoretical Justification for Air Defence Identification Zones' (2012) 5(1) *Journal of Transportation Security* 87; Edmund J Burke and Astrid Stuth Cevallos, 'In Line or Out of Order?: China's Approach to ADIZ in Theory and Practice' (Report, Rand Corporation, 2017) <https://www.rand.org/content/dam/rand/pubs/research_reports/RR2000/RR2055/RAND_RR2055.pdf>.

276 Lamont (n 275) 189, 196; E Pépin, Director of the Institute of International Air Law, *The Law of the Air and the Draft Articles Concerning the Law of the Sea*, UN Doc A/Conf.13/4 (4 October 1957) 69 [39], 70 [47]–[49].

277 See, eg, the matrix provided in Joëlle Charbonneau, Katie Heelis and Jinelle Piereder, *Putting Air Defense Identification Zones on the Radar* (Policy Brief No 1, Centre for International Governance and Innovation, June 2015). Note, however, that the interpretations of the rules applicable in the United States and Chinese ADIZs provided in that publication differ from the interpretations provided elsewhere, including by the States in question.

278 Note that the United States and Canada share an ADIZ by mutual consent.

prohibit a foreign State from establishing an ADIZ in such an area, given that an ADIZ does not directly infringe upon the nature and subject of those sovereign rights. Nonetheless, such a situation would at least be controversial. Second, not all States adhere to the commonly accepted view that the rights of the coastal State in the EEZ are limited to those explicitly stated in *UNCLOS*,[279] and some States appear to apply a more liberal interpretation of the coastal State's rights in such zones. Consequently, imposing ADIZ obligations in another State's EEZ without that State's explicit consent could be considered a provocation in the sense of geo-political relations. Third, regardless of the interpretation of sovereign rights in the EEZ, the rights of a coastal State in its EEZ would at least include a corollary right to monitor activities in the EEZ, including by maritime patrol aircraft. Such a right to aerial surveillance of the EEZ by a coastal State would not leave much room for another State to impose identification and reporting requirements for aircraft in that area. Finally, as regards the territorial sea and land territory of another State, the situation is quite clear: the airspace over such areas is the national airspace of the State in question,[280] and imposing any obligations in such areas without the consent of the territorial State would clearly violate the national sovereignty of that State.

An analysis of the basic duties imposed in ADIZs leads to the observation that the mere requirement of identification and reporting does not infringe upon the freedom of (air) navigation as such in international airspace. Not only is identification and reporting already a standard procedure in the context of FIRs, failure to comply with the requirements in an ADIZ does not result in any denial of the freedom of navigation in international airspace but merely leads to a denial of entry into the national airspace of the State in question. Such denial of entry into national airspace is, ultimately, a right of any State in the interest of public safety.[281] Finally, while interception and accompaniment by military aircraft may be intimidating, it does not violate international law as such, provided that the safety of the civilian aircraft is ensured,[282] the freedom of navigation of aircraft not intending to enter national airspace is not hindered in any way, and that the interception is accompanied by both sufficient and professional communication to avoid unnecessary concerns on the part of the crew (and passengers, if applicable) of the aircraft being intercepted.

Consequently, it may be concluded that although ADIZs do not have a clear basis in international law, they do not violate international law, provided: (a) their location neither infringes on, or openly violates, the rights of other States; and (b) the rules applicable in an ADIZ do not negate the freedom of air navigation in international airspace.

279 See, eg: Lamont (n 275) 193–4; Peter A Dutton, '*Caelum Liberum*: Air Defense Identification Zones outside Sovereign Airspace' (2009) 103(4) *American Journal of International Law* 691, 696–8.

280 *Chicago Convention* (n 260) arts 1–2.

281 Ibid art 9(b).

282 Ibid art 3(d). See above n 271 and accompanying text.

(c) Freedom of Aircraft Navigation and Operations in the South China Sea

Applying the preceding analysis to the South China Sea leads to the following observations in terms of ILMO. First, as regards overflight of national territory, the discussion presented above in Parts IV(B)(1)(a)–(b) regarding the status of the islands under dispute in the South China Sea is relevant in this regard. Given China's claim that (inter alia) the 'land territory' of the People's Republic of China includes the Spratly and Paracel islands,[283] overflight by military or (other) State aircraft of other States over these areas would be seen by China as a violation of its sovereignty and of international law. This would also include overflight of the territorial sea surrounding those geological features within the island groups that qualify for a territorial sea.[284]

As regards the EEZ, such zones have been claimed and implemented in the national laws of Cambodia,[285] China,[286] Malaysia,[287] the Philippines,[288] Thailand,[289] and

283 In addition to the discussion in this article, see *Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone* (n 253) art 2.

284 See above Part IV(B)(1)(b). It should be noted, however, that the status of the islands in terms of national ownership is in dispute, but the islands are not terra nullius or terra communis. This means that flying State aircraft, including military aircraft, over these islands is legally problematic in any case as no consent can presently be given by any State, but neither can the requirement of national consent simply be ignored.

285 *Decree of the Council of State of 13 July 1982* (Cambodia) ['Decree of the Council of State of 13 July 1982' *United Nations* (Web Document) <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/KHM_1982_Decree.pdf>].

286 *Law of the People's Republic of China on the EEZ and the Continental Shelf* (n 222).

287 *Exclusive Economic Zone Act (No 311) 1984* (Malaysia) ['Exclusive Economic Zone Act (No 311) 1984' *United Nations* (Web Document) <https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/MYS_1984_Act.pdf>].

288 *Presidential Decree No 1599 of 11 June 1978 Establishing an Exclusive Economic Zone and for Other Purposes* (Philippines) ['Presidential Decree No 1599 of 11 June 1978 Establishing an Exclusive Economic Zone and for Other Purposes' *United Nations* (Web Document) <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/PHL_1978_Decree.pdf>].

289 *Royal Proclamation Establishing the Exclusive Economic Zone of the Kingdom of Thailand*, *23 February 1981* ['Royal Proclamation Establishing the Exclusive Economic Zone of the Kingdom of Thailand, 23 February 1981' *United Nations* (Web Document) <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/THA_1981_Proclamation.pdf>]; *Proclamation Establishing the Exclusive Economic Zone of the Kingdom of Thailand Adjacent to the Exclusive Economic Zone of Malaysia in the Gulf of Thailand* (Thailand) (16 February 1988) ['Proclamation Establishing the Exclusive Economic Zone of the Kingdom of Thailand Adjacent to the Exclusive Economic Zone of Malaysia in the Gulf of Thailand (Thailand) (16 February 1988)' *United Nations* (Web Document) <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/THA_1988_1_Proclamation.pdf>].

Vietnam.[290] With the exception of the law of China, none of these laws restricts or negates the right of overflight over the EEZ and the laws of the Philippines and Thailand specifically recognise this right. The law of China, however, subjects the freedom of navigation and overflight in and over the EEZ to international law and 'the laws and regulations of the People's Republic of China'.[291] This in itself is not problematic, and is in conformity with art 58(3) of *UNCLOS*, provided that the laws and regulations in question do not have the effect of negating the freedom of navigation set forth in art 58(1) of *UNCLOS*. In public statements issued in 2001 following a mid-air collision between a United States military aircraft and a Chinese military aircraft off the coast of Hainan in the South China Sea,[292] however, the extent to which China interprets its rights regarding regulating overflight over its EEZ becomes considerably more problematic. First, the Chinese statements asserted that 'it was proper and in accordance with international law for Chinese military fighters to follow and monitor the US military surveillance plane within airspace over China's exclusive economic waters'.[293] While, as stated above,[294] the interception and accompaniment of aircraft by another State's military aircraft does not violate international law as such, it should be noted that this observation was made in relation to such activities in a zone dedicated to national security. It is not entirely clear which rule or principle of international law would provide a reason to carry out such activities in the entire EEZ of the State in question, specifically related to the EEZ itself. Next, the statements clarified that in the view of China, the right of overflight over the EEZ is subject to respecting 'the rights of the country concerned' and that reconnaissance flights aimed (in the view of China) at Chinese coastal areas would extend 'far beyond the scope of "overflight", and [would] thus abuse … the principle of overflight freedom'.[295] Finally, the statements made it clear that the reconnaissance flight in question 'posed a serious threat to China's security

290 *Statement on the Territorial Sea, the Contiguous Zone, the Exclusive Economic Zone and the Continental Shelf of 12 May 1977* (Vietnam) ['Statement on the Territorial Sea, the Contiguous Zone, the Exclusive Economic Zone and the Continental Shelf of 12 May 1977' *United Nations* (Web Document) <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/VNM_1977_Statement.pdf>].

291 See *Law of the People's Republic of China on the EEZ and the Continental Shelf* (n 222) art 11.

292 As regards the Chinese statements, see Xinhua, 'FM Spokesman Gives Full Account of Air Collision', *China.org.cn* (Web Page, 4 April 2001) <http://www.china.org.cn/english/2001/Apr/10070.htm>. See also: Elisabeth Rosenthal and David E Sanger, 'US Plane in China after It Collides with Chinese Jet', *New York Times* (online, 2 April 2001) <https://www.nytimes.com/2001/04/02/world/us-plane-in-china-after-it-collides-with-chinese-jet.html>; Shirley A Kan, *China-US Aircraft Collision Incident of April 2001: Assessments and Policy Implications* (Report, Congressional Research Service, 10 October 2001) <https://crsreports.congress.gov/product/pdf/RL/RL30946>; Frederic L Kirgis, 'United States Reconnaissance Aircraft with Chinese Jet' (2001) 6(7) *American Society of International Law* <https://www.asil.org/insights/volume/6/issue/7/united-states-reconnaisance-aircraft-collision-chinese-jet>.

293 Xinhua (n 292).

294 See above Part IV(B)(2)(b).

295 Xinhua (n 292).

interests, so that it was right for the Chinese military planes to monitor the US spy plane for the sake of China's state security'.[296]

Based on these statements, it appears that China interprets the right of coastal States to preserve and protect their rights in the EEZ to refer not only to the rights specifically associated with the EEZ as set forth in *UNCLOS*, but to all rights under international law, thus authorising Chinese actions within and over the EEZ to respond to a (perceived) threat to, or violation of, those rights.[297] As is clear from both the *Chicago Convention* and *UNCLOS*, however, there is no basis in international law for such an interpretation of the coastal State's rights in the EEZ. Contrary to the rules regarding innocent passage in the territorial sea, which render passage no longer innocent if activities are carried out 'aimed at collecting information to the prejudice of the defence or security of the coastal State' as well as several other activities 'considered to be prejudicial to the peace, good order or security of the coastal State',[298] there are no similar rules for navigation in or over the EEZ. China's approach would consequently have the effect of effectively turning the airspace over the entire EEZ into a form of ADIZ, but one specifically aimed at foreign State aircraft, including military aircraft, and prohibiting certain activities in that airspace. Clearly this approach would extend beyond the permissible rules in an ADIZ as discussed above,[299] and would considerably hinder both the freedom of navigation in and over the EEZ and of military operations and activities not prohibited under international law.

Turning next to FIRs, the entire airspace over the South China Sea is covered by FIRs operated by the various States in the area and coordinated by ICAO. Such regions include the, Ho Chi Minh FIR (operated by Vietnam), Hong Kong FIR (operated by the Civil Aviation Department of Hong Kong), Kota Kinabalu FIR (operated by Malaysia), Manila FIR (operated by the Philippines), Sanya FIR (since 2001 operated by China from Hainan province) and Singapore FIR.[300] Although there have not been any incidents specifically related to the duties regarding flight information services or alerting services by China in this FIR, the Sanya FIR is relevant for two reasons. First, given the discussion in this Part regarding Chinese views on the rights of coastal States in the airspace over the EEZ, it will be relevant to observe whether those views affect China's operation of the Sanya FIR. Second, and as an extension from the previous comment, it should be noted that the Sanya FIR covers

296 Ibid.

297 This observation is shared by Dutton (n 279) 704–5.

298 *UNCLOS* (n 6) art 19(2).

299 See above Part IV(B)(2)(b).

300 See, eg: Nicholas Ionides, 'ICAO Helps Rearrange South China Sea Airspace', *Flight Global* (Blog Post, 13 November 2001) <https://www.flightglobal.com/icao-helps-rearrange-south-china-sea-airspace-/40238.article>; 'General Situation of ATC Support Capability at South China Sea Area', *Civil Aviation Administration of China* (Web Page) <https://www.icao.int/APAC/Meetings/2015%20SCSMTFRG2/PPT%20-%20IP06%20GENERAL%20SITUATION%20OF%20ATC%20SUPPORT%20CAPABILITY%20AT%20SOUTH%20CHINA%20SEA%20AREA-CHINA.pdf>.

the Paracel Islands. Consequently, it will be relevant to observe whether the Chinese claims to those islands will affect China's operation of the Sanya FIR in relation to any flights by State aircraft, including military aircraft, within that FIR.

Finally, as regards ADIZs, only the Philippines currently operates an ADIZ in the South China Sea, established in 1953.[301] Based on the April 2021 version of the Philippines AIP, however, the ADIZ is not active except for one section used as a military training area.[302] The restrictions regarding air navigation in that area are consequently less related to the common purpose of an ADIZ and more related to air safety in relation to military training activities. In 2020, however, China announced its intentions to establish an ADIZ in the South China Sea to cover, inter alia, the Spratly and Paracel islands.[303] While this decision appears to have been reversed a few months later,[304] both the inclusion of disputed island groups and prior decisions made by China are cause for concern in this regard.

C *Analysis and Conclusion*

The analysis and observations regarding maritime and air navigation in the South China Sea make it clear that the area provides many complexities, both of a geo-political nature and of a legal nature. While much of the media attention on the area appears more focused on the former, the underlying legal issues are subtler and more complex. Moreover, the legal aspects provide cause for valid concern. While some of the specific, sometimes controversial, approaches to international law in the region may be driven by incentives and interests which are specific to that region, that does not, of course, change the potential for precedent as regards the interpretation of international law by other States in other regions or on a global scale.

Regarding the freedom of maritime (surface and subsurface) navigation and operations, the status of islands is of considerable importance in the South China Sea region, given both the prevalence of island groups and relevant formations and the variety of disputes over the ownership of those islands and formations. Regardless of the issue of ownership, the interpretation of international law regarding the status of islands under the regime of *UNCLOS* and customary international law, especially

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301 *Administrative Order (No 222) 1953* (Philippines) <https://www.officialgazette.gov.ph/1953/11/21/administrative-order-no-222-s-1953/>.

302 *Aeronautical Information Publication* (Philippines) 22 April 2021, s ENR 5.2 ['Aeronautical Information Publication' *Civil Aviation Authority of the Philippines* (Web Document) <http://3.15.185.122/milais_demonstrator/milais_doc/rp/free/RP_AIP_2109_en.pdf>].

303 Minnie Chan, 'Beijing's Plans for South China Sea Air Defence Identification Zone Cover Pratas, Paracel and Spratly Islands, PLA Source Says', *South China Morning Post* (online, 31 May 2020) <https://www.scmp.com/news/china/military/article/3086679/beijings-plans-south-china-sea-air-defence-identification-zone>.

304 Minnie Chan, 'South China Sea: Beijing "Doesn't Want To Upset Neighbours" with Air Defence Identification Zone', *South China Morning Post* (online, 25 November 2020) <https://www.scmp.com/news/china/military/article/3111204/south-china-sea-beijing-doesnt-want-upset-neighbours-air>.

the issue of entitlement to maritime zones under international law, directly affects the ability to exercise freedom of navigation and the conduct of military exercises and operations in the area.

As regards military navigation and operations, it is firstly relevant which of the formations in the South China Sea are, based on their natural condition,[305] entitled to territorial waters. Under the commonly accepted views on the international LOTS, navigation by military vessels within the territorial waters of those formations would be restricted to innocent passage. However, as was discussed above,[306] not all States in the region accept this interpretation and some may require prior notification or permission for such navigation. Additionally, the Arbitral Tribunal ruling regarding archipelagic straight baselines[307] is particularly relevant in this regard, given the extent of the maritime areas which would be encompassed by such baselines if they were to be applied to (especially) the Spratly and Paracel islands.

While the EEZ is not normally considered relevant in the context of military navigation or operations, given the freedom of navigation as well as 'other internationally lawful uses of the sea related to these freedoms' as set forth in art 58 of *UNCLOS*, the views expressed by China as regards the rights of the coastal State in the EEZ,[308] makes the EEZ of, at least, China relevant in this regard. This aspect becomes even more relevant in combination with the Chinese claims to the Spratly and Paracel islands and apparent attempts to claim a status for (at least some of) the islands which would entitle them to an EEZ.[309] Clearly the expansion of a perceived or alleged right to control or limit foreign military activities in an area up to 200 nautical miles around even some of the islands in the Spratly and Paracel island groups would have a significant impact on geopolitical relations and the ability for peaceful navigation and exercising by military vessels in the area.

Finally, as regards military air navigation and operations in the South China Sea, the same concerns and observations apply as regards maritime navigation and operations. As regards the issue of (status and ownership of) territory, including territorial waters, this follows from the basic rule set forth in art 3(c) of the *Chicago Convention* requiring prior authorisation from the territorial State for entry into that State's national airspace by foreign State aircraft, including military aircraft.[310] As regards air navigation and operations over the EEZ, it should be noted that the Chinese views on the rights of coastal States in the EEZ extend to the airspace over the EEZ and have been clearly expressed in that regard.[311] Finally, as regards FIRs and ADIZs, it is to be hoped that operation of the Sanya FIR, will continue to

305 See above Part IV(B)(1)(b).

306 See above Part IV(B)(1)(c).

307 Ibid.

308 See above Part IV(B)(2)(c).

309 See above n 249 and accompanying text.

310 *Chicago Convention* (n 260).

311 See above Part IV(B)(2)(c).

comply with the rules established by ICAO for such regions and that the Chinese decision not to establish an ADIZ in the South China Sea[312] will continue to apply.

V Conclusion

As discussed in Part I, international peace and security currently face a number of challenges. In addition to rising tensions in geopolitical relations and the increase in hybrid and cyber threats,[313] the incident in the Kerch Strait and, of course, the armed conflict in Ukraine generally show that these tensions can rise to the level of military confrontations. The incidents in the Mediterranean moreover demonstrate that such tensions, including military provocations, can arise even between allies within the same international organisation aimed at mutual defence. Finally, while the situation in the South China Sea has fortunately not yet led to (major) military confrontations, that situation demonstrates that regional tensions and (political and legal) confrontations can expand beyond their own region and become significant on a global scale.

In spite of the many differences in factual circumstances, the nature of the events, and the States involved in the situations discussed in this article, all of these situations share a common theme. The common theme being the interpretation of international law, especially the LOTS, in the pursuit of political motives and with consequences for military activities and operations. In other words, all of the situations took place and, in the case of the South China Sea, are taking place in the overlap of the LOTS and ILMO. Before exploring that observation further, however, a few comments on each of the situations and how they relate to that observation will be made.

The situation in the Kerch Strait and the views expressed by Russia in the proceedings before the ITLOS most clearly demonstrate the interplay between political interests and the law, as well as the role of the LOTS in the context of ILMO. The outcome of that interplay and overlap is paradoxical. The initial acts — the use of force and capture of the Ukrainian vessels — carried out by Russia are lawful under IHL, but the subsequent treatment of the crew as (suspected) criminals would be in violation of their right to prisoner of war status under that body of law. By seeking to deny, or at least to leave unsettled, the existence of an armed conflict at the time, however, Russia essentially created its own legal challenges as the capture of the vessels and detention of the crew are both clearly illegal under peacetime LOTS. While the relevance of IHL to the situation in question was rightly observed by one of the judges, it is unfortunate that the ITLOS, in its approach at this stage of the proceedings, exclusively relied on peacetime international law.[314] It is to be hoped that the relevance of IHL, including its applicability de jure regardless of political

312 See above n 304 and accompanying text.

313 See Boddens Hosang and Ducheine (n 194).

314 On the other hand, if the ITLOS had concluded that IHL was applicable and the *lex specialis* in this case, it would subsequently (and consequently) have had to declare the case inadmissible as that would put the case outside the jurisdiction of the ITLOS.

recognition of the existence of an armed conflict by any party to that conflict,[315] will be considered in the subsequent stages.

The situation regarding enforcement of the embargo against Libya is slightly different from the other situations in that it is less related to variances in *interpretation* of the law than to the need for careful *compliance* with the law. In this situation, different bodies of international law intersect: the peacetime international LOTS and the legal power of the UNSC to mandate operations in the interest of international peace and security and, if necessary, to override other obligations under international law in doing so.[316] That intersection can complicate the vertical dimension of ILMO,[317] in which the law is 'converted' into clear instructions and guidance for the military forces in question. Given that this vertical role or dimension is dependent on the fusion of elements of international law in the horizontal role of ILMO,[318] conflicts between those elements need to be carefully assessed, including their consequences for military action and their impact on the instructions given to the military forces expected to carry out the operation in question. In the incidents in question, the political and military frustrations over the inability to intercept vessels operating as State vessels is understandable in terms of possible undermining of the arms embargo. But however understandable those frustrations may be, the immunity of State vessels under international law needs to be taken into account in the planning of military operations. The apparent impasse in the current operations in the area is, after all, not a flaw in applicable international law, but is instead part of the essential reciprocity that is ingrained in international law.

Next, the situation regarding the exploration for, and exploitation of, natural resources in the Mediterranean adds economic incentives to the motives for creative interpretation of international law. The rights of the coastal State regarding exploration and exploitation of the natural resources in the seabed of its EEZ and continental shelf are clear and unequivocal. Article 56(1)(a) of *UNCLOS* quite simply reserves the right to such exploration and exploitation to the coastal State, while art 56(3) in combination with art 77(2) of *UNCLOS* makes it clear that no other State may engage in exploration or exploitation of, in the case of the situation under discussion, natural gas or oil in the seabed of the EEZ or continental shelf of a coastal State without the consent of the coastal State. Applying the same principle of reciprocity as was just discussed to this situation, it becomes clear that it may not be expedient to deny such rights for a coastal State while simultaneously pursuing the establishment of one's own EEZ and continental shelf. On the other hand, denying the right to an EEZ or continental shelf for certain features appears futile, since the law, including the case law of the ICJ, is clear in this regard. Equally clear is that ILMO cannot

315 This applicability of IHL on the basis of the factual situation rather than the political motives of the parties is clearly expressed in common art 2 of the *Geneva Conventions*: see *First Geneva Convention* (n 103) art 2. It is also clearly expressed in *Protocol I* (n 104) art 1(4).

316 See *UN Charter* (n 157) arts 25, 103.

317 Gill, 'ILMO: The "Flux Capacitor"' (n 7).

318 Ibid.

authorise the use of (military) force against another State absent a legal basis under international law, nor can forcible affirmation of rights be applied in the absence of a right to be so affirmed. Conversely, caution is advised in the interpretation of other elements of international law, including ILMO, as regards the methods and means to prevent infringements on the rights of the coastal State. Both art 51 of the *UN Charter* and the mutual defence clauses in international treaties implementing the right to collective national self-defence are clear as regards the requirements related to territory and to an (imminent) armed attack and cannot, and should not, be invoked lightly.

Finally, as was observed at the beginning of Part V, the situation in the South China Sea differs from the other situations in that it is less related to incidents involving the actual (imminent) use of force between military units than to a subtle and long-term bending (or at least creative interpretation) of international law, leading to encroachments on the rights of other States. The motives in this case appear to be a combination of regional strategic interests, geopolitical relations and economic interests. While the risk of a major military confrontation between the States involved appears limited at the moment, caution is required as regards a more subtle, legal risk — the risk of acquiescence or, less likely, the creation of customary law.

Contrary to the creation of customary law, acquiescence need not be general,[319] but may arise between two or more States in relation to specific situations. Acquiescence arises as a result of relatively consistent behaviour by one or more States over a relevant period of time, without objections against that behaviour from the State(s) accused of having acquiesced.[320] In the situation in the South China Sea, and notwithstanding the ruling of the Arbitral Tribunal,[321] China has consistently expressed its 'historic claim' referred to as the 'nine dash line' since 1948; its claim to the Spratly and Paracel islands and the straight archipelagic baselines surrounding them since (at least) 1992; its views on innocent passage in the territorial sea since (at least) 1992; and its views on the EEZ since (at least) 1998. While clearly the ruling of the Arbitral Tribunal cannot be ignored in any dispute regarding these claims, it is nonetheless clear that objections by States affected by, or involved in, the situation in question would be advisable if they wish to avoid at least the impression of having acquiesced to these Chinese claims.

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319 As regards the 'general' aspect as a required element for the creation of customary law, see International Law Commission, *Draft Conclusions on Identification of Customary International law, with Commentaries*, 70th sess, UN Doc A/73/10 (2018) conclusion 8, 135–6 ('*Draft Conclusions*').

320 *Fisheries Case (United Kingdom v Norway) (Judgment)* [1951] ICJ Rep 116. See: at 138 as regards relative consistency; at 138–40 as regards the relevant period of time without objection. See *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States of America) (Judgment)* [1984] ICJ Rep 246, 305 [130], 308–10 [140]–[148]. See generally Christopher Brown, 'A Comparative and Critical Assessment of Estoppel in International Law' (1996) 50(2) *University of Miami Law Review* 369, 401.

321 See above Parts IV(B)(1)(a) and IV(B)(1)(b).

As regards customary international law, the risk of new rules arising as a result of the situation in the South China Sea seems less likely. The element of general practice was already referred to in the previous paragraph and would in any case render the 'nine dash line' and territorial claims irrelevant in this regard, as being too specifically related to the region and the limited number of States involved in those issues.[322] The interpretation of a coastal State's rights in the EEZ, however, does deserve attention in this context, as the views expressed by China on that issue are neither unique nor, given similar views by other States, limited to the South China Sea region.[323] Finally, while the emergence or creation of a rule of international customary law also requires that States consider adhering to, or accepting, the practice in question to be a legal requirement (the *opinio juris*) and not just 'mere usage or habit',[324] the *Draft Conclusions on Identification of Customary International law, with Commentaries* by the International Law Commission also indicate that '[f]ailure to react over time to a practice may serve as evidence of acceptance as law (*opinio juris*), provided that States were in a position to react and the circumstances called for some reaction'.[325] Consequently, in any case as regards the aspect of coastal State rights in the EEZ, objections by States affected by, or involved in, situations in which such issues arise would be advisable.

While objections to divergent or unwelcome interpretations of international law or to practices considered inconsistent with international law can take many forms, including simple diplomatic protests through 'quiet diplomacy', from the perspective of ILMO it might be argued that the so-called 'freedom of navigation' programs of some States can be considered a form of 'forcible affirmation of rights' as discussed above.[326] Deliberately sailing through contested areas with warships or flying through the airspace over the EEZ of certain States with military aircraft would, provided the conduct in question complies with all applicable rules of international law, not be unlawful. Whether such practices would contribute to improving geopolitical relations or international peace and security is, however, subject to debate.

As was stated in Part I, the purpose and goal of this discussion was to illustrate the interaction of elements of international law, especially the international LOTS, in the application of ILMO in practice, as well as to illustrate the interaction between the law and geopolitical considerations. As regards the first goal, the interaction between the LOTS, air law, human rights law, IHL, elements of general international law and military operations, illustrate the horizontal function of ILMO as discussed above in Part V. As each of the cases presented in this discussion illustrate, the conduct of military operations is governed, affected and influenced by

322 Although the ILC also recognises the emergence or existence of 'particular customary international law' among a limited number of States, such as in a region, this would still require general practice among those States as well as the element of *opinio juris* discussed in this section: *Draft Conclusions* (n 319) conclusion 16, 154.

323 Dutton (n 279) 706–8.

324 *Draft Conclusions* (n 319) conclusion 9.2, 138.

325 Ibid conclusion 10.3, 140.

326 See above Part II(B)(2)(b).

various aspects and elements of various components of international law, working in combination to produce the legal framework for military action and operations in all their various forms. The cases also illustrate that in translating the theoretical legal framework into clear guidelines and instructions for military units, the vertical function of ILMO, a clear understanding of the law, the context, and the possibilities and limitations of military capacities is required. In this vertical role of ILMO, the discussion on the interaction between politics and law becomes particularly relevant, as political desires and military capabilities may provide the means to an end, but violating the law or contorting the law in order to justify political opportunism is ultimately (self-) destructive and self-defeating. Perhaps that principle can be expressed more eloquently by remembering the words of J William Fulbright:

> Insofar as international law is observed, it provides us with stability and order and with a means of predicting the behavior of those with whom we have reciprocal legal obligations. When we violate the law ourselves, whatever short-term advantage may be gained, we are obviously encouraging others to violate the law; we thus encourage disorder and instability and thereby do incalculable damage to our own long-term interests.[327]

327 J William Fulbright, *The Arrogance of Power* (Random House, 1966) 96.

*Greg Carne**

GUIDING LIGHT OR OPAQUE FILTER?: THE MINISTER'S GUIDELINES FOR THE AUSTRALIAN SECURITY INTELLIGENCE ORGANISATION IN PERFORMING ITS FUNCTIONS AND EXERCISING ITS POWERS AS RELEVANT TO SECURITY

Abstract

The issue in 2020 of new ministerial guidelines ('*2020 Guidelines*') for the performance by the Australian Security Intelligence Organisation ('ASIO') of its functions and the exercise of its powers as relevant to security, after a 13-year interval, is significant as very substantial changes in ASIO's legislation, powers, resources and priorities occurred during that time.

The *2020 Guidelines* reveal critical new issues in their review processes, content and operation. These issues should be addressed if the Guidelines are to achieve optimal, integrated and complementary performance as one of several ASIO accountability mechanisms, in turn part of ministerial responsibility under the chosen Australian parliamentary model of human rights.

There are several pressing reform issues in the *2020 Guidelines*, including: the need to improve consultative processes for review and development to match the expanding reach of ASIO security activities; the fact that the *2020 Guidelines* authorise classified ASIO policies and thereby provide insufficient public guidance; and, the capacity of the *2020 Guidelines* to interpretively enlarge the concept of relevance to security and, in particular, broaden the concept of politically motivated violence.

Further important issues and reforms arise from the treatment by the *2020 Guidelines* of exiting or remediating the intelligence gathering process, including the collation and retention of personal information, as well a need to more clearly shape proportionality matters in familiar legal principles.

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Noticeable deficiencies in the *2020 Guidelines* give cause for concern and reflection. Specific and broader reforms to the processes generating, and the content informing, the Guidelines are canvassed throughout the article and in its conclusion. These reforms are intended to improve the presently understated function of the *2020 Guidelines* as part of a more integrated and responsive ASIO accountability framework.

I Introduction

In 2020, ministerial guidelines ('*2020 Guidelines*') for the performance by the Australian Security Intelligence Organisation ('ASIO') of its functions or the exercise of its powers under s 8A of the *Australian Security Intelligence Organisation Act 1979* (Cth) ('*ASIO Act*') were renewed and revised by the Minister for Home Affairs ('Minister').[1] Three matters regarding the *2020 Guidelines* are of special importance.

First, the *2020 Guidelines* represent the first revision since guidelines were issued by the Attorney-General in 2007 ('*2007 Guidelines*').[2] The intervening time has seen enormous increases in ASIO's legislation, powers, resources and priorities.[3] This long interval is likely to have diminished the efficacy of the *present* Guidelines model as an accountability measure. Second, parliamentary committee processes have raised issues about the revision of Guidelines, including matters of fitness for

1 Minister for Home Affairs (Cth), *Minister's Guidelines in Relation to the Performance by the Australian Security Intelligence Organisation of Its Functions and the Exercise of Its Powers* (August 2020) ('*2020 Guidelines*').

2 The *2020 Guidelines* replaced two previous guidelines that were issued in 2007 ('*2007 Guidelines*'): Attorney-General (Cth), *Attorney-General's Guidelines in Relation to the Performance by the Australian Security Intelligence Organisation (ASIO) of Its Function of Obtaining Intelligence Relevant to Security* (29 August 2007); Attorney-General (Cth), *Attorney-General's Guidelines in Relation to the Performance by the Australian Security Intelligence Organisation of Its Functions Relating to Politically Motivated Violence* (29 August 2007). See also: Philip Ruddock, 'New Guidelines Update ASIO Accountability' (News Release 235/2007, 12 October 2007); Letter from Robert Cornall to Bill Grant, 27 June 2008.

3 ASIO activity expanded following multiple national security legislative enactments. 'Since the 9/11 terrorist attacks in 2001, the Australian Parliament has passed more than 124 Acts amending the National Intelligence Community's legislative framework': Attorney-General's Department (Cth), 'Government Response to the Comprehensive Review into Intelligence Legislation (Richardson Review)' (Media Release, 4 December 2020) ('Government Response'). See also: George Williams, 'A Decade of Australian Anti-Terror Laws' (2011) 35(3) *Melbourne University Law Review* 1136, 1144–6; Jessie Blackbourn and Nicola McGarrity, 'How Reactive Law-Making Will Limit the Accountability of ASIO', *Inside Story* (online, 24 July 2014) <https://insidestory.org.au/how-reactive-law-making-will-limit-the-accountability-of-asio/>; Rebecca Ananian-Welsh and George Williams, 'The New Terrorists: The Normalisation and Spread of Anti-Terror Laws in Australia' (2014) 38(2) *Melbourne University Law Review* 362, 365 ('The New Terrorists').

purpose and public reassurance.[4] Third, the relocation of ASIO from the Attorney-General's portfolio to the Home Affairs portfolio in 2017, as part of a broader re-assignment of functions in forming a National Intelligence Community ('NIC'),[5] accentuates concerns about ministerial responsibility and accountability, with the concentration of ASIO and other agencies in Home Affairs.[6] Those concerns are apposite for the *2020 Guidelines*, which provide ministerial mandated standards for performing some aspects of ASIO's work, but leave significant reliance upon developing and maintaining classified policies sitting below the public Guidelines, in addition to ministerial discretion. Ministerial disposition and practice therefore emerge as important considerations in whether the content and operation of the *2020 Guidelines* is shaped for controlling, or enhancing, agency power.[7]

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4 See Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the National Security Legislation Amendment Bill (No 1) 2014* (Report, September 2014) 46 [3.51]–[3.52], recommendation 4 ('*PJCIS Advisory Report*'). See also Evidence to Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, Canberra, 10 July 2020, 7 (Natasha Molt, Director of Policy, Law Council of Australia), 21 (Margaret Stone, Inspector-General of Intelligence and Security), 58 (Anthony Coles, First Assistant Secretary, Law Enforcement Policy Division, Department of Home Affairs).

5 ASIO, the Australian Signals Directorate ('ASD'), the Australian Secret Intelligence Service ('ASIS'), the Australian Geospatial-Intelligence Organisation ('AGO'), the Defence Intelligence Organisation ('DIO'), and the Australian Criminal Intelligence Commission ('ACIC') are the intelligence agencies, whilst the Australian Transaction Reports and Analysis Centre ('AUSTRAC'), the Australian Federal Police ('AFP'), the Department of Home Affairs and the Department of Defence (other than the AGO or DIO) are agencies with an intelligence role or function. Collectively, these ten agencies form the National Intelligence Community ('NIC'). See: *Office of National Intelligence Act 2018* (Cth) s 4 (definitions of 'national intelligence community', 'intelligence agency', 'agency with an intelligence role or function'); Greg Carne, 'Designer Intelligence or Legitimate Concern?: Establishing an Office of National Intelligence and Comprehensively Reviewing the National Intelligence Community Legal Framework' (2019) 46(1) *University of Western Australia Law Review* 144, 144. ('Designer Intelligence or Legitimate Concern?').

6 ASIO, AFP, the Australian Border Force, ACIC and AUSTRAC were the five Department of Home Affairs agencies. In 2022, the Albanese Government moved the AFP from the Department of Home Affairs to the Attorney-General's Department: Michael Pelly, 'AFP Back in the A-G's Hands amid Portfolio Reshuffle', *Australian Financial Review* (Sydney, 3 June 2022) 32.

7 See, eg, Flick J's observations regarding the previous Minister for Home Affairs ('Minister'), Peter Dutton, in light of possible non-compliance with legal obligations: *AFX17 v Minister for Home Affairs [No 4]* (2020) 279 FCR 170, 173 [9]. Karen Andrews succeeded Dutton in the Home Affairs portfolio in 2021. The present Minister is Clare O'Neil.

Part II commences with an assessment of the origins, sources, and characteristics of the legal framework of the *2020 Guidelines*,[8] founded upon a ministerial responsibility model to Parliament. A synopsis follows of the *2020 Guidelines*' five parts and appendix. Supporting historical sources are canvassed, confirming the location of the *2020 Guidelines* within responsible government and ministerial responsibility doctrines. The major ministerial responsibility consideration with the Guidelines as an ASIO accountability mechanism is ASIO's distinctive circumstances in comparison to other state institutions. Principally, these circumstances include the necessity to conduct intelligence activities in secret, as well as the risk of ASIO ministerial authority being applied in a politicised way. Both factors have generated distinctive ministerial practices, shaping the *legislated* relationship between the Minister and the Director-General of Security ('Director-General'), whilst reflecting the more problematic contextual nature of ministerial responsibility and its conventions. It is argued that these distinctive characteristics and the recent bifurcation of responsibilities between the Minister and the Attorney-General make it particularly important that the Guidelines are carefully calibrated to ensure ASIO practices are lawful and proper. The identified distinctive challenges for the doctrine of ministerial responsibility in ASIO security circumstances are of course cumulative upon existing difficulties outside a specific national security context.

The special functions of the Inspector-General of Intelligence and Security ('IGIS'), created partly to address the conundrums of ministerial responsibility in the ASIO security context, are then examined. The Guidelines' status as administratively, but not legally, enforceable, alongside the IGIS's compliance, review and monitoring functions over ASIO and the Guidelines, creates two distinctive issues. First, the Guidelines need optimal drafting for the IGIS to best perform its compliance functions. Second, breaches of the Guidelines, reported by IGIS to the Minister, then incorporated in the IGIS annual report, suggest that resultant Guidelines improvements may further reinforce the IGIS compliance function, and indirectly, ministerial responsibility.

Additional reform rationales exist for the Guidelines through their indirect influence upon other parts of the ASIO accountability framework — the Parliamentary Joint Committee on Intelligence and Security ('PJCIS') and the Independent National Security Legislation Monitor ('INSLM') — in the effective discharge of their roles, particularly with the profusion of enacted ASIO national security laws. Principles and lessons obtained in academic commentary discussing ASIO accountability may be extrapolated to inform refinement of the Guidelines — in order to make ministerial responsibility matters more obvious and increase the responsiveness of

8 There is limited academic literature on any version of the Guidelines. See, eg: Keiran Hardy and George Williams, 'Executive Oversight of Intelligence Agencies in Australia' in Zachary K Goldman and Samuel J Rascoff (eds), *Global Intelligence Oversight: Governing Security in the Twenty-First Century* (Oxford University Press, 2016) 315, 330–1; Greg Carne, 'Thawing the Big Chill: Reform, Rhetoric and Regression in the Security Intelligence Mandate' (1996) 22(2) *Monash University Law Review* 379, 425–9 ('Thawing the Big Chill').

other accountability mechanisms. These ministerial responsibility considerations highlight the need for improvements in the content, operation and review processes of the Guidelines.

Part III examines and critiques *selected and illustrative* priority areas for Guidelines reform.[9] These include: the fact that the Guidelines do not always provide guidance, allowing significant delegation of subject matter to maintained and classified internal ASIO policies; that the Guidelines' central criterion of *relevance to security* is an inherently broad concept, the Guidelines facilitating further expansion of this already capacious security remit in such an area as politically motivated violence; and that the Guidelines afford inadequate exit points for intelligence gathering and insufficient prescribed processes for the review, deletion and destruction of information not relevant to security.

Part IV concludes by noting that deficiencies in the Guidelines give cause for concern and reflection. Within their inherent limitations, the Guidelines need re-conceptualisation and enhanced content if they are to adequately influence ASIO's contemporary and prospective roles of engaging with activities *relevant to security*. The Guidelines are premised as an ASIO accountability measure within a complex and contested model of ministerial responsibility, indirectly affecting other accountability mechanisms. Within the preferred Australian model of the parliamentary protection of human rights, the Guidelines require refinement to facilitate the best possible ministerial responsibility-based accountability. Various review forums for the Guidelines, and overtly re-positioning them as part of a matrix of integrated and complementary ASIO accountability mechanisms, are proposed. It is further argued that the Guidelines would be coherently shaped by a stated series of objectives. The inherent limitations of the Guidelines mean that direct legislative and other accountability changes to the *ASIO Act* on occasions would be more effective and would instil greater public confidence.

II The Background of the Guidelines

A *The Legal Framework of the Guidelines*

Guidelines in relation to the performance by ASIO of its functions and the exercise of its powers are authorised under s 8A(1) of the *ASIO Act*.[10] A further ministerial authority exists to issue guidelines for the performance of ASIO's functions relating to politically motivated violence.[11] The Guidelines' objective is the provision to ASIO of guidance when performing its functions under s 17(1) of the *ASIO Act*.

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9 Space precludes an examination of other issues such as the Minister's introduction of a proportionality test in the *2020 Guidelines*.

10 *Australian Security Intelligence Organisation Act 1979* (Cth) s 8A(1) ('*ASIO Act*').

11 Ibid ss 4 (definition of 'politically motivated violence'), 8A(2).

The *2020 Guidelines* were tabled out of session in the Senate on 13 August 2020.[12] They replaced the *2007 Guidelines*, whilst incorporating new guidelines regarding politically motivated violence.[13]

The *2020 Guidelines* constitute a distinctive ASIO accountability scheme measure. Their intention is to give practical ministerial guidance, through the Director-General, in the performance by ASIO of its functions and powers and to the Director-General in relation to specified ASIO personnel matters.[14] The Guidelines constitute an important, but understated, part of the ASIO oversight and accountability framework, which includes the PJCIS,[15] the IGIS,[16] and the INSLM.[17]

The origin of the Guidelines traces to the 1984 Royal Commission on Australia's Security and Intelligence Agencies ('Second Hope Royal Commission'), which recommended that 'there should be clear provision in the [ASIO] Act enabling the Attorney-General to lay down guidelines governing ASIO's activities in particular areas'.[18] Whilst not legislative instruments,[19] the Guidelines are administratively

12 Law Council of Australia, *Comments on the Minister's Guidelines to the Australian Security Intelligence Organisation* (Comment, 13 August 2020) 4 [1] ('*Comments on the Minister's Guidelines*').

13 Guidelines concerning politically motivated violence formed a separate set of guidelines in the *2007 Guidelines* (n 2). They are now incorporated in pt 5 of the *2020 Guidelines* (n 1), which is a single set of guidelines.

14 *ASIO Act* (n 10) ss 8A(1)(a)–(b).

15 *Intelligence Services Act 2001* (Cth) pt 4 ('*Intelligence Services Act*'). For appraisal of the PJCIS's review of national security laws, see: Greg Carne, 'Sharpening the Learning Curve: Lessons from the Commonwealth Parliamentary Joint Committee of Intelligence and Security Review Experience of Five Important Aspects of Terrorism Laws' (2016) 41(1) *University of Western Australia Law Review* 1 ('Sharpening the Learning Curve'); Greg Carne, 'Reviewing the Reviewer: The Role of the Parliamentary Joint Committee on Intelligence and Security' (2017) 43(2) *Monash University Law Review* 334 ('Reviewing the Reviewer').

16 *Inspector General of Intelligence and Security Act 1986* (Cth) s 8 ('*IGIS Act*').

17 *Independent National Security Legislation Monitor Act 2010* (Cth) s 6 ('*INSLM Act*'). For INSLM engagement with national security accountability issues, see: Jessie Blackbourn, 'The Independent National Security Legislation Monitor's First Term: An Appraisal' (2016) 39(3) *University of New South Wales Law Journal* 975, 993–5; Bret Walker, 'Reflections of a Former Independent National Security Legislation Monitor' [2016] (84) *AIAL Forum* 74; Michael Pelly, 'What Terrorism Law Expert James Renwick Learnt in Afghanistan', *Australian Financial Review* (online, 21 February 2020) <https://www.afr.com/policy/foreign-affairs/what-terrorism-law-expert-james-renwick-learnt-in-afghanistan-20200217-p541nb>.

18 *Royal Commission on Australia's Security Intelligence Agencies: Report on the Australian Security Intelligence Organization* (Report No 232/1985, December 1984) 321 [16.52] ('*Second Hope Royal Commission Report*').

19 The Guidelines are not a legislative instrument, nor a non-disallowable legislative instrument, nor a notifiable instrument: *Legislation Act 2003* (Cth) ss 7–8, 11; ibid 321–2 [16.52].

binding on ASIO,[20] setting internal standards for the performance of its functions[21] and the exercise of its powers.[22] The Guidelines are located *squarely* within a model of ministerial responsibility to Parliament, reflected in other aspects of the *ASIO Act*.[23] In the Second Hope Royal Commission's report, the Guidelines are described as '"binding" on ASIO in the sense that any action in breach of them would be in breach of a lawful ministerial direction, and the person or persons responsible for the breach would be accountable administratively'.[24] In other words, the Guidelines directly form an administrative accountability measure, but lack prescribed consequences for breach as a stronger measure of public accountability. .

B *A Synopsis of the 2020 Guidelines*

An outline of the *2020 Guidelines* is a useful tool for framing discussion and analysis. The Ministerial Foreword to the *2020 Guidelines* states:

> These Guidelines set out the principles ASIO is required to observe in order to meet the public's expectations in performing its functions, including obtaining, correlating and evaluating intelligence relevant to security, and the interpretation of politically motivated violence. In doing so, the Guidelines form a critical component of the accountability framework that provides assurance that ASIO fulfils its vital functions consistent with the values of the community it serves.[25]

The Introduction and Overview follows the Foreword. The Guidelines are divided into five Parts, with an Appendix setting out key terms. The *2020 Guidelines* are distinctive for adopting a broad, general principles approach, the omission of major security-related subject content, and the outsourcing of significant accountability measures to classified ASIO internal policies. This highlights a likely shortfall between the Guidelines' public accountability role, in how effectively the Guidelines might deliver such accountability.

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20 *ASIO Act* (n 10) s 8A(1).

21 Ibid s 17(1)(a) lists ASIO's functions, which importantly include 'to obtain, correlate and evaluate intelligence relevant to security'.

22 See ASIO's special powers relating to politically motivated violence, espionage, acts of foreign interference and special intelligence operations: ibid pt 3 divs 3–4. Significantly, the *2020 Guidelines* (n 1) refer specifically to 'special intelligence operations': at 9. However, the *2020 Guidelines* omit reference to exercising special powers for politically motivated violence, espionage and acts of foreign interference.

23 The Attorney-General of Australia, as first law officer and a member of Cabinet, is the warrant issuing authority, exercising administrative power, for the special powers in *ASIO Act* (n 10) pt III div 2.

24 *Second Hope Royal Commission Report* (n 18) 322 [16.52(b)]. The Report notes that '[i]t would be for the Attorney-General, aided by the Inspector-General, to hold ASIO to account under the guidelines': at 322 [16.52(b)].

25 *2020 Guidelines* (n 1) 2.

Part 1[26] provides information about 'how the Guidelines should be implemented and observed, with the Director General of Security ultimately responsible for [their] implementation … and ASIO's compliance with them subject to oversight by the [IGIS]'.[27] It also includes a Guidelines review clause.

Part 2[28] provides ASIO with initial guidance on the authorisation and conduct of inquiries and investigations. It also includes content regarding review of inquiries and investigations, advice to the Minister, warrants, special intelligence operations, the requirement for the Leader of the Opposition to be kept informed on security matters, the conduct of security assessments and the use of force against a person under warrant.

Part 3[29] provides guidance relating to ASIO collection activities when performing its functions of obtaining, correlating and evaluating intelligence relevant to security. It introduces a consolidated section on the proportionality of ASIO collection of information, as well as statements about what type of collection of intelligence may be relevant to security.

Part 4[30] provides an outline of the timing and method of ASIO's handling, retention and destruction of personal information. Passing reference is made to applicable legislation and the need to maintain internal policies and practices around access, management and destruction of personal information records.

Part 5[31] provides guidance for ASIO performance in relation to its functions for politically motivated violence. This includes the interpretation of the different aspects of politically motivated violence, investigations into demonstrations and other forms of protest, and the assessment of politically motivated violence.

The Appendix[32] importantly defines a number of terms in the Guidelines, including: 'ASIO affiliate'; 'de-identified'; 'intelligence relevant to security'; 'inquiry'; 'investigation'; 'personal information'; and 'subject'.

C *Ministerial Responsibility as Framing the Guidelines in the ASIO Circumstances of Relevance to Security*

The Guidelines as an accountability measure are firmly located within the doctrine of responsible government and ministerial responsibility. As such, the special

26 Ibid 4–6.

27 Ibid 3. See also *IGIS Act* (n 16) s 8(1)(a)(ii).

28 *2020 Guidelines* (n 1) 7–10.

29 Ibid 11–12.

30 Ibid 13–16.

31 Ibid 17–21.

32 Ibid 22.

challenges of ministerial responsibility for ASIO security activities are further informed by the practical realities of the doctrine in non-security contexts.[33]

In the security context, operational control of ASIO is given to the Director-General.[34] In performing the Director-General's functions under the *ASIO Act* the Director-General is subject to the directions of the Minister.[35] This includes the capacity of the Minister to issue guidelines to the Director-General to be observed by ASIO in the performance of its functions or the exercise of its powers[36] and in the performance of ASIO in relation to politically motivated violence.[37]

These arrangements reflect the informing content of the Second Hope Royal Commission Report, the recommendatory source for the Guidelines' introduction:

> ASIO is part of the executive government of the Commonwealth and, subject to any legislation which otherwise provides, is subject to ministerial control. … The oversight of ASIO's activities in the public interest, and ASIO's accountability through the Parliament to the public, depends on the effectiveness of this ministerial control.[38]

The Second Hope Royal Commission Report recommended that the Attorney-General should be able to issue guidelines governing ASIO's activities:

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33 On problems associated with the ministerial responsibility doctrine in non-security situations, see: JW Shaw, 'The Established Principles of Cabinet Government' (2001) 73(2) *Australian Quarterly* 21, 21; John Summers, 'Parliament and Responsible Government' in Alan Fenna, Jane Robbins and John Summers (eds), *Government and Politics in Australia* (Pearson Australia, 10th ed, 2014) 35; Patrick Weller, 'Disentangling Concepts of Ministerial Responsibility' (1999) 58(1) *Australian Journal of Public Administration* 62, 63; Kevin Martin, 'Ministerial Responsibility and Parliamentary Accountability: Observations on the Role of the Leader and Ministerial Responsibility' (2008) 23(1) *Australasian Parliamentary Review* 229, 230; Charles Lawson, 'The Legal Structures of Responsible Government and Ministerial Responsibility' (2011) 35(3) *Melbourne University Law Review* 1005, 1008–10; Suri Ratnapala and Jonathan Crowe, *Australian Constitutional Law: Foundations and Theory* (Oxford University Press, 3rd ed, 2012) 43–5, 53–5; Judy Maddigan, 'Ministerial Responsibility: Reality or Myth?' (2011) 26(1) *Australasian Parliamentary Review* 158, 158–60. In June 2022, the Albanese Government introduced a new ministerial code of conduct, replacing the Morrison Government's Statement of Ministerial Standards: Department of the Prime Minister and Cabinet, *Code of Conduct for Ministers* (June 2022); Anna Macdonald, 'Albanese Enacts Changes to Ministerial Code of Conduct', *The Mandarin* (online, 11 June 2022) <https://www.themandarin.com.au/194283-albanese-enacts-changes-to-ministerial-code-of-conduct/>.

34 *ASIO Act* (n 10) s 8.

35 Ibid.

36 Ibid s 8A(1)(a).

37 Ibid s 8A(2).

38 *Second Hope Royal Commission Report* (n 18) 309 [16.17]–[16.18].

> There is … a strong case for the Attorney-General to play a positive role in laying down general directions or guidelines to govern ASIO's conduct in particular areas. Within the framework of the legislation there will inevitably be areas of broad discretion and judgment where the setting by the responsible Minister from time to time of standards will be proper and appropriate. … The performance of that function would give substance to the notion of ministerial control and responsibility and provide valuable guidance to ASIO.[39]

Acknowledgment that the doctrines of ministerial responsibility and ministerial control underpin the Guidelines is made in the *2017 Independent Intelligence Review* ('*Independent Intelligence Review*'),[40] and also in the *Comprehensive Review of the Legal Framework of the National Intelligence Community* ('*Richardson Review*').[41] Both reviews stress the importance of ministerial control in relation to intelligence agencies.[42]

The effectiveness and importance of ministerial responsibility and ministerial control needs, however, to be considered in the operational context of the work and practices of ASIO. This particular context tempers and influences the circumstances of these accountability doctrines, demanding adjustment and innovation to maximise their efficacy.

The major accountability consideration is the unique circumstances of ASIO activities in contradistinction to other state institutions and departments. The necessary procedures, practices and tradecraft of a domestic intelligence agency such as ASIO are affected by two considerations which make ministerial responsibility and accountability problematic.

The first issue is that a significant proportion of ASIO activities are necessarily conducted in secret, directly impacting upon how a Minister might respond to parliamentary and other questions:

> Since much of the work of intelligence agencies is necessarily secret, many of the traditional means by which the broader community can determine that government agencies are operating in an appropriate manner are not fully applicable to the intelligence community.[43]

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39 Ibid 321 [16.51].

40 Department of the Prime Minister and Cabinet, Commonwealth, *2017 Independent Intelligence Review* (Report, June 2017) 111 [7.2]–[7.4] <https://www.pmc.gov.au/sites/default/files/publications/2017-Independent-Intelligence-Review.pdf> ('*Independent Intelligence Review*').

41 Dennis Richardson, *Comprehensive Review of the Legal Framework of the National Intelligence Community* (Report, December 2019) vol 1, 302–5 [14.1]–[14.13], vol 3, 236 [40.1] ('*Richardson Review*').

42 Ibid vol 1, 305 [14.13]–[14.15]; *Independent Intelligence Review* (n 40) 111.

43 *Independent Intelligence Review* (n 40) 111 [7.3].

> This secrecy is in contrast to the transparency and open accountability, which characterises the oversight of the non-intelligence agencies.[44]

Accordingly, distinctive security intelligence ministerial practices have emerged, such as not responding to operational subject matters,[45] claiming plausible deniability,[46] as well as engaging in the practice of neither confirming nor denying the occurrence of events with a national security aspect.[47] These examples adversely affect standard conceptions of ministerial responsibility for ASIO. The challenges to conventional application of the doctrine are tangible in the bipartisan ministerial position of declining to comment in the parliamentary chamber, before parliamentary committees, or in the media, on national security matters, often capaciously defined.[48] That practice is at odds with basic assumptions of ministerial responsibility and accountability.[49]

The second issue arises from the risk of ministerial authority being applied for partisan political advantage and politicisation of security intelligence activities: 'Intelligence agencies must be free from political control. They need to be independent from ministers to ensure the extraordinary powers afforded to them are not used for party political purposes or are subject to departmental administration.'[50]

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44 *Richardson Review* (n 41) vol 3, 236 [40.3].

45 As favoured by then Minister for Immigration and Border Protection, Scott Morrison, in the implementation of Operation Sovereign Borders under the Abbott Government: David Wroe, 'Veil of Silence Descends on Asylum Boat Arrivals', *The Age* (online, 20 September 2013) <https://www.theage.com.au/politics/federal/veil-of-silence-descends-on-asylum-boat-arrivals-20130920-2u5t5.html>. See also Kaldor Centre for International Refugee Law, *Turning Back Boats* (Research Brief, August 2018) 3.

46 Typically, in the filtering and nuancing of information flows to the Minister from departmental and ministerial officials to facilitate ignorance or ambiguity in the Minister's mind and thereby assist deniability in public accountability fora. See generally Michael Poznansky, 'Revisiting Plausible Deniability' (2022) 45(4) *Journal of Strategic Studies* 511.

47 Known as the Glomar response. See *Philippi v Central Intelligence Agency*, 546 F 2d 1009 (DC Cir, 1976).

48 Standard responses identify the question's content as 'operational matters' or more broadly as 'national security', and neither confirm nor deny its accuracy. The PJCIS is excluded from examining operational matters: see *Intelligence Services Act* (n 15) ss 29(3)(a)–(e). The Intelligence Services Amendment (Enhanced Parliamentary Oversight of Intelligence Agencies) Bill 2018 (Cth) introduced by Senator Rex Patrick sought the removal of restrictions on the PJCIS to review operations of ASIO and other intelligence agencies. This Bill was restored in the notice paper on 4 July 2019, but lapsed again at the end of the 2022 Parliament: Commonwealth, *Notice Paper*, Senate, 4 July 2019, 7.

49 The ministerial practice of declining to comment on national security matters has been discussed in Parliament: Commonwealth, *Parliamentary Debates*, Senate, 4 December 2013, 766 (John Faulkner), 819 (George Brandis).

50 *Richardson Review* (n 41) vol 1, 305 [14.14].

The strengthening of ASIO ministerial control followed the Hope Royal Commissions,[51] and is reflected in the legislated arrangements governing the relationship between the Minister and the Director-General.[52] The qualified capacity of the Minister to direct the Director-General in the performance of ASIO functions reflects efforts to contain or excise risks of political interference or influence within a framework of ministerial control.[53] In particular, the Minister is 'not empowered to override the opinion of the Director-General concerning the nature of the advice that should be given by the Organisation'.[54] Further, the Minister has limited capacity to override the opinion of the Director-General on other matters relating to ASIO's conduct:

> **8 Control of Organisation**
>
> (5) The Minister is not empowered to override the opinion of the Director General:
>
> (a) on the question whether the collection of intelligence by the Organisation concerning a particular individual would, or would not, be justified by reason of its relevance to security; or
>
> (b) on the question whether a communication of intelligence concerning a particular individual would be for a purpose relevant to security;
>
> except by a direction contained in an instrument in writing that sets out the Minister's reasons for overriding the opinion of the Director General.[55]

Complementary provisions provide further responsibilities for the Director-General:

> **20 Special responsibility of Director-General in relation to functions of Organisation**
>
> The Director-General shall take all reasonable steps to ensure that:

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51 Particularly relating to ASIO illegalities and improprieties over decades, see: Brian Toohey, *Secret: The Making of Australia's Security State* (Melbourne University Press, 2019); John Blaxland, *The Protest Years: The Official History of ASIO: 1963–1975* (Allen & Unwin, 2015); Peter Edwards, *Law, Politics and Intelligence: A Life of Robert Hope* (NewSouth Publishing, 2020).

52 *ASIO Act* (n 10) s 8.

53 'Subject to subsections (4) and (5), in the performance of the Director-General's functions under this Act, the Director-General is subject to the directions of the Minister': ibid s 8(2).

54 Ibid s 8(4).

55 Ibid s 8(5).

> (a) the work of the Organisation is limited to what is necessary for the purposes of the discharge of its functions; and
>
> (b) the Organisation is kept free from any influences or considerations not relevant to its functions and nothing is done that might lend colour to any suggestion that it is concerned to further or protect the interests of any particular section of the community, or with any matters other than the discharge of its functions.[56]

These two issues make ASIO ministerial responsibility and accountability inherently problematic, which increases the importance of the Guidelines in effectively reinforcing that framework and ensuring that ASIO practices conform to standards of lawfulness and propriety.

A further issue complicating ASIO ministerial responsibility is the revised ministerial arrangements instituted by the Turnbull Government in 2017. ASIO moved from the Attorney-General's portfolio to the portfolio of the newly created Department of Home Affairs,[57] a development not foreshadowed by the *2017 Independent Intelligence Review*.[58] The change occurred largely due to political factors.[59] However, elements of ASIO's accountability mechanisms — such as its warrant approval process — remain with the Attorney-General.[60] The Minister, in making or varying the Guidelines, must consult with the Attorney-General.[61] The change was justified on the ground that the Attorney-General's portfolio was the proper integrity and accountability portfolio amongst the ministries.[62] This more complicated ministerial accountability model for domestic national security matters risks frustrating ministerial responsibility through ministerial deniability or oscillation between the two portfolios. The Guidelines should explicitly address the dual ministerial role, consistent with the asserted integrity role of the Attorney-General's portfolio.

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56 Ibid s 20.

57 Malcolm Turnbull et al, 'A Strong and Secure Australia' (Joint Media Release, 18 July 2017). See also Governor-General, *Administrative Arrangements Order* (29 May 2019) 26–7.

58 *Independent Intelligence Review* (n 40).

59 Then Prime Minister Malcolm Turnbull was perceived to have given Peter Dutton this senior portfolio to manage factional tensions and individual ambitions in the parliamentary Liberal Party. See: Geoff Kitney, 'Politics and Policy Meet in New Home Affairs Department', *The Interpreter* (online, 18 July 2017) <https://www.lowyinstitute.org/the-interpreter/politics-and-policy-meet-new-home-affairs-department>; Malcolm Turnbull, *A Bigger Picture* (Hardie Grant Books, 2020) 436–9.

60 *ASIO Act* (n 10) pt 3 div 2; *Home Affairs and Integrity Agencies Legislation Amendment Act 2018* (Cth) sch 2 pt 1.

61 *ASIO Act* (n 10) ss 8A(1A), (2A).

62 Turnbull et al (n 57).

D *The Special Role of the IGIS in Addressing Issues of Ministerial Responsibility for ASIO and the Effectiveness of the Guidelines*

The Guidelines further need optimal formation to enhance the effectiveness of the IGIS, the body legislated to partly address the conundrums of ministerial responsibility arising in national security matters. The Guidelines' status as administratively, but not legally, enforceable, further underlines the critical IGIS role. The integrated role of the IGIS within the model of ministerial responsibility indicates the need for sharper drafting and application of the Guidelines, to ensure continuing relevance for the ever-expanding ASIO legislative remit.

The IGIS is conferred with a series of self-enabled compliance, review and monitoring functions in relation to ASIO.[63] The IGIS is empowered to inquire into any matter that relates to 'the compliance by ASIO with directions or *guidelines* given to ASIO by the responsible Minister'.[64] The IGIS's power to conduct inquiries is extensive,[65] including a power to issue notices to give the IGIS information and documents.[66]

The IGIS has a specific function to assess compliance of ASIO with the Guidelines provided to it by the responsible Minister.[67] From one perspective, the IGIS here performs a substitute role for the Parliament, constrained by its lack of previously mentioned effective ministerial responsibility practices in national security *operational* matters.[68] The IGIS is then able to investigate, measure and determine the level of operational issue compliance with the Guidelines. As observed, 'the ASIO Guidelines provide benchmarks against which the [IGIS] may conduct oversight of ASIO's activities and make findings and advisory recommendations to the Australian Government'.[69] Further, the IGIS is able to report its findings on Guidelines compliance in the *IGIS Annual Report*.[70] This measure allows the IGIS engagement with ASIO to potentially remediate breaches of the Guidelines and the *ASIO Act* through follow up action and reporting in subsequent IGIS annual reports.

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63 *IGIS Act* (n 16) s 8(1). For the IGIS' role in this accountability framework, see: Ian Carnell and Neville Bryan, 'Watching the Watchers: How the Inspector-General of Intelligence and Security Helps Safeguard the Rule of Law' (2006) 57(1) *Admin Review* 33; Vivienne Thom, 'Reflections of a Former Inspector-General of Intelligence and Security' [2016] (83) *AIAL Forum* 11. For the ASIO special powers regime, see Lisa Burton and George Williams, 'The Integrity Function and ASIO's Extraordinary Questioning and Detention Powers' (2012) 38(3) *Monash University Law Review* 1, 12–17.

64 *IGIS Act* (n 16) s 8(1)(a)(ii) (emphasis added).

65 Ibid s 17.

66 Ibid s 18(1).

67 *ASIO Act* (n 10) s 8A(6).

68 See above nn 45–9 and accompanying text.

69 *Comments on the Minister's Guidelines* (n 12) 4 [4].

70 See, eg, Inspector-General of Intelligence and Security, *2020–2021 Annual Report* (Report, 4 October 2021) 40 ('*IGIS 2020–2021 Annual Report*').

As part of the IGIS scheme ultimately relating to ASIO ministerial responsibility, the IGIS is obliged to provide copies of such reports to the responsible Minister[71] and inquiries by the IGIS relating to ASIO compliance with the Guidelines will appear in the *IGIS Annual Report*.[72] Examples of revealed breaches of the Guidelines are located in each of the *2017–2018*,[73] *2018–2019*,[74] *2019–2020*[75] and *2020–2021*[76] *IGIS Annual Reports*.[77] The placing of information about breached Guidelines in the public domain through the IGIS annual reports makes deliberative information available for parliamentary sittings, parliamentary committees and media commentary. Identifying issues and improvements within the existing Guidelines may assist IGIS accountability capacities through ministerial responsibility, at one step removed.

There are several other IGIS inquiry powers related to ASIO. These include the power to inquire into: 'compliance by ASIO with the laws of the Commonwealth and of the States and Territories';[78] 'the propriety of particular activities of ASIO';[79] 'the effectiveness and appropriateness of the procedures of ASIO relating to the legality or propriety of the activities of ASIO';[80] and 'an act or practice of ASIO that is or may be inconsistent with or contrary to any human right, that constitutes or may constitute discrimination, or that may be unlawful under' one or more of four Commonwealth anti-discrimination Acts, 'being an act or practice referred to the [IGIS] by the Australian Human Rights Commission'.[81]

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71 *Public Governance, Performance and Accountability Act 2013* (Cth) s 46(1). See also *IGIS Act* (n 16) s 35 for obligatory content in the annual report to the responsible minister.

72 *IGIS Act* (n 16) s 35(2A).

73 Inspector-General of Intelligence and Security, *2017–2018 Annual Report* (Report, 24 September 2018) 22–3 ('*IGIS 2017–2018 Annual Report*').

74 Inspector-General of Intelligence and Security, *2018–2019 Annual Report* (Report, 30 September 2019) 33–4 ('*IGIS 2018–2019 Annual Report*').

75 Inspector-General of Intelligence and Security, *2019–2020 Annual Report* (Report, 29 September 2020) 39–40.

76 *IGIS 2020–2021 Annual Report* (n 70) 40.

77 Amongst the breaches of the Guidelines were investigative activities undertaken without proper authorisations, some failures to review investigations on an annual basis, approvals on yearly review for continuation of investigations without sufficient seniority, the disclosure of inaccurate and misleading personal information in relation to Australian status, instances of mistaken identity in security investigations, and providing financial records to ASIO contrary to internal procedures and absent required approvals.

78 *IGIS Act* (n 16) s 8(1)(a)(i).

79 Ibid s 8(1)(a)(iii).

80 Ibid s 8(1)(a)(iv).

81 Ibid s 8(1)(a)(v).

E *The Guidelines as Part of a Broader Accountability Framework: The ASIO Accountability Experience Informing Reform of the Guidelines*

Other rationales for reform of the Guidelines exist in the fact that the Guidelines are properly considered as part of a broader ASIO accountability framework. This extends beyond the IGIS scheme, encompassing other members of the NIC. For ASIO, the most relevant elements of that accountability framework are the PJCIS[82] and the INSLM.[83] The principles and lessons contained in the academic commentary and literature about that ASIO accountability framework offer some *general* guidance around refining the Guidelines.

The Guidelines are properly conceptualised as part of that composite whole, having a distinctive, differentiated, but low-profile accountability role. The Guidelines' characteristics highlight the importance of their revision and development to contribute optimally to a distinctive ASIO ministerial responsibility. This experience may identify common or overlapping issues around ASIO accountability from other sources, as well as more broadly complementing and supporting other ASIO accountability network components.

Contextual information to better shape the Guidelines arises in academic literature around ASIO accountability,[84] including the reviews by the PJCIS and INSLM of ASIO legislation and practice. That literature principally arises as critique and analysis of serial national security legislative enactments, many relating to ASIO, following the September 11 terrorist attacks. Cyber security, espionage, politically motivated violence and foreign interference as contemporary national security topics have been more recently engaged.[85] Further factors usefully informing the content and revision of the Guidelines include recent reforms to, and enlargement

82 *Intelligence Services Act* (n 15) pt 4.

83 *INSLM Act* (n 17) pt 2 div 1.

84 See, eg: Lisa Burton, Nicola McGarrity and George Williams, 'The Extraordinary Questioning and Detention Powers of the Australian Security Intelligence Organisation' (2012) 36(2) *Melbourne University Law Review* 415; Williams, 'The New Terrorists' (n 3); Nicola McGarrity, Rishi Gulati and George Williams, 'Sunset Clauses in Australian Anti-Terror Laws' (2012) 33(2) *Adelaide Law Review* 307; Greg Carne, 'Gathered Intelligence or Antipodean Exceptionalism?: Securing the Development of ASIO's Detention and Questioning Regime' (2006) 27(1) *Adelaide Law Review* 1.

85 See, eg: Julian Lincoln, Anna Jaffe and Lara Howden, 'The Assistance and Access Act: The Controversy Continues' (2019) 21(9) *Internet Law Bulletin* 150; Arthur Kopsias, '"Going Dark": The Unprecedented Government Measures To Access Encrypted Data' [2019] (52) *Law Society Journal* 74; Peter Leonard, 'Australia's Mandatory Decryption Law' (2019) 16(8) *Privacy Law Bulletin* 150, 154; Sarah Kendall, 'Australia's New Espionage Laws: Another Case of Hyper-Legislation and Over-Criminalisation' (2019) 38(1) *University of Queensland Law Journal* 125, 142–61; Hannah Ryan, 'The Constitutional Cost of Combatting Espionage and Foreign Interference' [2018] (47) *Law Society Journal* 73; James Meehan, 'Protecting Public Interest Journalism in Australia: A Defence to Information Secrecy Offences' (2020) 23(4) *Media and Arts Law Review* 347, 352–6.

of, the ASIO legislative remit.[86] Major themes are relevantly identifiable from this ASIO academic literature, affording reasons to guide revision and upgrading of the Guidelines, in order to improve the application of ministerial responsibility, and subsequently improve other ASIO accountability mechanisms. It is convenient to summarise such themes.

The first of these themes is the exponential growth in national security laws and activity since 2001.[87] Major new powers have regularly been conferred on ASIO[88] without an integrated appraisal of how these laws collectively interact.[89] This may produce various security-related effects and potentially transformative consequences for democratic practices and institutions.

The Guidelines operate within a vastly increased quantum of ASIO-related activity[90] and establishment size.[91] Further expanded ASIO activity is likely in two respects. First, the passage of the ASIO Legislation Amendment Bill 2020 (Cth) has expanded the availability of questioning warrants beyond terrorism offences to politically motivated violence, espionage and foreign interference, and made those warrants easier to obtain by removing the independent issuing authority.[92]

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86 The *Australian Security Intelligence Organisation Amendment Act 2020* (Cth) ('*ASIO Amendment Act*') significantly expanded ASIO questioning powers on matters relevant to security (now extended to politically motivated violence, espionage and foreign interference) and removed independent warrant issuing authorities: at sch 1 pt 1.

87 See, eg: Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press, 2011); Williams, 'A Decade of Australian Anti-Terror Laws' (n 3); Williams, 'The New Terrorists' (n 3); George Williams, 'The Legal Legacy of the "War on Terror"' (2013) 12(1) *Macquarie Law Journal* 3.

88 Major examples of new powers conferred on ASIO under the *ASIO Act* (n 10) include expanded questioning powers and special intelligence operations powers, as well as extensions to ASIO's telecommunications interception powers and access to metadata.

89 The ad hoc and exponential accretion of laws, often a reactive and politicised response to real or perceived terrorism threats, has rarely engaged laws' interactivity — for example, interactions between separate terrorism-related detention provisions enacted for criminal prosecution, intelligence gathering, pre-emptive prevention, post-sentence expiration, and immigration purposes.

90 Reflected in serial amendments to the *ASIO Act* (n 10) since 2001, including pt III div 2 (Special Powers), pt III div 3 (Special Powers Relating to Terrorism Offences) and pt III div 4 (Special Intelligence Operations). See *Richardson Review* (n 41) vol 4, annex B.

91 Sally Neighbour, 'Hidden Agendas', *The Monthly* (online, November 2010) <https://www.themonthly.com.au/issue/2010/november/1289174420/sally-neighbour/hidden-agendas#mtr>; *Richardson Review* (n 41) vol 1, 267; Australian Security Intelligence Organisation, *ASIO Annual Report 2019–2020* (Report, 21 September 2020) 118–21.

92 The Bill was subject to a PJCIS report: Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Australian Security Intelligence Organisation Amendment Bill 2020* (Report, December 2020). The Bill passed the Commonwealth Parliament on 10 December 2020: Commonwealth, *Parliamentary Debates*, House of Representatives, 10 December 2020, 11284.

Second, the public release and prospective implementation of the *Richardson Review* will likely liberalise and harmonise the powers of the NIC (of which ASIO is part).[93] Critical appraisal of the coverage and efficacy of the Guidelines is desirable given the transformative character of these developments.

Third, these developments have created a significantly greater reliance on executive or ministerial *discretion* in the equitable administration of ASIO laws.[94] Those realities speak clearly to the need for more comprehensive Guidelines across the range of ASIO activities[95] *as relevant to security*, including an improved process for revision to keep pace with ongoing changes to ASIO legislation.[96] The Guidelines need to illuminate greater transparency of principles where the exercise of discretion in decisions arises around ASIO's powers *relevant to security*. Presently, the Guidelines are not calibrated to the volume nor seriousness of serially legislated ASIO security subject matters, nor to the levels of ministerial discretion embedded in them.

Fourth, parallel to the ongoing revision and expansion of the ASIO remit have been the constant process and substance efforts required to obtain adequate legislated checks and balances upon such expansion,[97] principally evident in parliamentary

93 *Richardson Review* (n 41); Carne, 'Designer Intelligence or Legitimate Concern?' (n 5).

94 Carne, 'Sharpening the Learning Curve' (n 15) 1, 24, 40. The claim that executive discretion is a desirable safeguard runs contrary to the fact that the executive's interests do not consistently coincide with the public interest: Greg Carne, 'Beyond Terrorism: Enlarging the National Security Footprint through the *Telecommunications Interception and Intelligence Services Legislation Amendment Act 2011 (Cth)*' (2011) 13(2) *Flinders Law Journal* 177, 227–8.

95 The *2020 Guidelines* (n 1) are notable for omitting discrete ASIO activity areas: *Comments on the Minister's Guidelines* (n 12) 6–7.

96 The pace of national security legislative reform is fuelled by the urgency principle: Andrew Lynch, 'Legislating Anti-Terrorism: Observations on Form and Process' in Victor V Ramraj et al (eds), *Global Anti-Terrorism Law and Policy* (Cambridge University Press, 2nd ed, 2012) 151, 166–82; Andrew Lynch, 'Legislating with Urgency: The Enactment of the *Anti-Terrorism Act [No 1] 2005*' (2006) 30(3) *Melbourne University Law Review* 747, 767–75; Shawn Rajanayagam, 'Urgent Law-Making and the Human Rights (Parliamentary Scrutiny) Act' in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights: Executive and Parliamentary Scrutiny across Australian Jurisdictions* (Lawbook, 2020) 647, 655–6. Repeated ministerial commitments to constantly review terrorism laws further propels legislative activity: Carne, 'Reviewing the Reviewer' (n 15) 344–6, 376.

97 This is evidenced in the generally modest uptake in report recommendations of suggested improvements and reforms from detailed submissions made by various bodies and expert individuals to the PJCIS. For example, following low uptake of suggested improvements in recommendations in the PJCIS' Inquiry into the Australian Security Intelligence Bill 2020 (Cth), legislative amendments were passed in the *ASIO Amendment Act* (n 86), which significantly extended ASIO questioning powers and removed independent warrant issuing authority safeguards.

committee review processes.[98] The ASIO accountability literature highlights important issues regarding methodologies and deficiencies, the legislative process, review of legislation and adoption of review committee recommendations in relation to ASIO matters.[99] The Guidelines' formation and content needs to avoid replicating in microcosm such legislative process difficulties. Drawing from the ASIO legislative review experience, clear measures can be taken, including: wider exposure to analysis and critique from different expert sources (and acknowledgment of their legitimacy); greater Guidelines coverage; and greater receptivity to instituting checks and balances. These measures are preferable to the present narrowly conceived, Minister approved and departmentally derived Guidelines.[100]

Fifth, the enlargement of the ASIO mandate has occurred without the tempering effect of a statutory or constitutional charter of rights.[101] Preference is for reliance

98 Legislative amendments to the *ASIO Act* are principally reviewed by the PJCIS. Other review is conducted by the Parliamentary Joint Committee on Human Rights ('PJCHR'), and formerly (prior to the Abbott Government) the Senate Legal and Constitutional Affairs Committee. Positioning of the PJCHR as inferior to the PJCIS is evident in several examples: Carne, 'Sharpening the Learning Curve' (n 15) 367–76.

99 The effectiveness of parliamentary committee review is appraised differently by different commentators. See, eg: Dominique Dalla-Pozza, 'A Dual Scrutiny Mechanism for Australia's Counter-Terrorism Law Landscape: The INSLM and the PJCIS' in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights: Executive and Parliamentary Scrutiny across Australian Jurisdictions* (Lawbook, 2020) 673; Dominique Dalla-Pozza,'The Parliamentary Joint Committee on Intelligence and Security: A Point of Increasing Influence in Australian Counter-Terrorism Law Reform?' in Ron Levy et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (ANU Press, 2017) 397; Carne, 'Sharpening the Learning Curve' (n 15); Carne, 'Reviewing the Reviewer' (n 15); Sarah Moulds, 'Forum of Choice? The Legislative Impact of the Parliamentary Joint Committee of Intelligence and Security' (2018) 29(4) *Public Law Review* 287; Sarah Moulds, 'Committees of Influence: Parliamentary Committees with the Capacity To Change Australia's Counter-Terrorism Laws' (2016) 31(2) *Australasian Parliamentary Review* 46.

100 Formally, the 'Guidelines are given by the Minister for Home Affairs to the Director-General under subsections 8A(1) and 8A(2) of the ASIO Act': *2020 Guidelines* (n 1) 4 [1.1].

101 National Human Rights Consultation Committee, *National Human Rights Consultation Report* (Report, September 2009) xxxiv, recommendation 18 ('*Brennan Report*'). The Rudd Government declined the recommended implementation of a statutory rights charter: Robert McClelland, *The Protection and Promotion of Human Rights in Australia* (October 2009) 4 <http://web.archive.org/web/20110312104038/http://www.attorneygeneral.gov.au/www/ministers/RWPAttach.nsf/VAP/(3273BD3F76A7A5DEDAE36942A54D7D90)~091008_NHRC_Statement.pdf/$file/091008_NHRC_Statement.pdf> ('*The Protection and Promotion of Human Rights in Australia*'); David Erdos, 'The Rudd Government's Rejection of an Australian Bill of Rights: A Stunted Case of Aversive Constitutionalism?' (2012) 65(2) *Parliamentary Affairs* 359, 359–60.

upon parliamentary processes, committees,[102] and statutory appointments[103] as the mechanism of human rights protection.[104] The absence of a charter of rights highlights that the Guidelines are conceptualised and located within the Australian parliamentary-based model of human rights protection,[105] institutionally encompassing a ministerial responsibility doctrine. A rationale for rejecting a statutory charter or constitutional bill of rights is that Parliament is the most institutionally proper, effective and politically representative method of rights protection.[106] That choice carries a logical corollary that the Guidelines need drafting to deliver optimal performance within that selected parliamentary-based model, including ministerial responsibility.

The Guidelines importantly function within the Parliamentary-based model to provide public reassurance and confidence of the legality and propriety of ASIO's activities.[107] The Guidelines formally but pragmatically express the legal relationship between the Minister and the Director-General regarding the performance by ASIO of its functions and the exercise of its powers including its functionality as

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102 This included the establishment of the PJCHR to review legislation for compatibility with Australia's seven major international human rights covenants: *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 3 (definition of 'human rights'). For assessment of the PJCHR's work, see: Zoe Hutchinson, 'The Role, Operation and Effectiveness of the Commonwealth Parliamentary Joint Committee on Human Rights after Five Years' (2018) 33(1) *Australasian Parliamentary Review* 72; George Williams and Daniel Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights' (2018) 41(2) *Monash University Law Review* 469.

103 For example, the specialist Australian Human Rights Commission appointments under s 8(1) of the *Australian Human Rights Commission Act 1986* (Cth).

104 Initially this was in the form of a National Human Rights Framework, which implemented limited aspects of the *Brennan Report* (n 101): see Robert McClelland, 'Australia's Human Rights Framework' (Media Release, 21 April 2010); Robert McClelland, 'Enhancing Parliamentary Scrutiny of Human Rights' (Media Release, 2 June 2010). This position was maintained in Australia's 2021 United Nations Universal Periodic Review before the Human Rights Council: Human Rights Council, *National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21: Australia*, UN Doc A/HRC/WG.6/37/AUS/1 (28 December 2020).

105 George Williams and Lisa Burton, 'Australia's Exclusive Parliamentary Model of Rights Protection' (2013) 34(1) *Statute Law Review* 58; Williams and Reynolds (n 102).

106 Australian rights charter opponents favour this argument: James Allan, 'Human Rights: Can We Afford To Leave Them to the Judges?' (2005) 16(2) *Commonwealth Judicial Journal* 4; James Allan, 'Bills of Rights as Centralising Instruments' (2006) 27(1) *Adelaide Law Review* 183; James Allan, 'Oh That I Were Made Judge in the Land' (2002) 30(3) *Federal Law Review* 561.

107 The contested issue of public trust of intelligence activities is raised in relation to the *Australian Security Intelligence Organisation Amendment Bill 2020* (Cth): 'ASIO Bill Highlights Why the Government Has a Problem with Public Trust', *Digital Rights Watch* (Web Page, 27 May 2020) <https://digitalrightswatch.org.au/2020/05/27/asio-bill-highlights-government-trust-problem/>.

an aspect of representative government. In fulfilling this role, the drafting of the Guidelines should provide accessible, practical and contemporary guidance over the *full scope* of the security referenced functions in s 17 of the *ASIO Act*, including restraints upon such functions implemented by s 17A of the *ASIO Act*.[108]

Each of these four themes, summarised from the ASIO accountability literature, provide important rationales to refine ASIO accountability mechanisms along more integrated and synchronous lines, commencing with the Guidelines. These reasons clearly justify highlighting the selected major Guidelines' shortcomings, with the ultimate aim of increasing the effectiveness of the doctrine of ministerial responsibility underpinning the Guidelines. Consistent with that aim, the article now critically appraises *selected key features* of the Guidelines requiring improvement. The review, content and operation of the Guidelines requires attention around the following priority items so that the Guidelines can evolve into a more effective ministerial responsibility mechanism.

III Selected Guidelines Features: Review Processes, Content and Operation To Strengthen Ministerial Responsibility

A *The Guidelines Do Not Always Provide Guidance: The Significant Role of Maintained and Classified ASIO Policies Made under the Guidelines' Authority*

An emergent problem facing the Guidelines has been one of fidelity to the original concepts of ministerial direction, responsibility and accountability. It has been difficult to crisply encapsulate these in a unique, statutorily mandated document,[109] providing operational accessibility for daily security-related activities.[110] The *2020 Guidelines* now extend to 21 pages, reflecting the new ministerial bifurcation of responsibilities between the Department of Home Affairs and the Attorney-General's Department, alongside the vast post-2001 growth of ASIO's legislated activities.[111] The *2007 Guidelines*[112] combined statutory obligations relating to the obtaining of intelligence relevant to security and for politically motivated violence into a single 11-page publication.

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108 Section 17A of the *ASIO Act* (n 10) provides that the 'Act shall not limit the right of persons to engage in lawful advocacy, protest or dissent and the exercise of that right shall not, by itself, be regarded as prejudicial to security, and the functions of the Organisation shall be construed accordingly'.

109 Note also the ministerial obligation to give written notice to the Director-General regarding politically motivated violence Guidelines: ibid s 8A(2).

110 This was probably contemplated in Hope J's recommendation that the Attorney-General should be able to issue guidelines governing ASIO's activities: *Second Hope Royal Commission Report* (n 18) 321 [16.51]–[16.52].

111 See above n 3 and accompanying text. See also Christian Porter, 'Attorney-General Welcomes Committee Report on Espionage and Foreign Interference Bill' (Media Release, 7 June 2018).

112 *2007 Guidelines* (n 2).

More importantly, the *2020 Guidelines* rely in two primary examples upon references to maintaining internal policies (in the form of an additional document): (1) the use of authorised force under an ASIO warrant against a person;[113] and (2) ASIO access to, and retention of, personal information.[114] A third example exists in the obligation to maintain policies in respect of para 3.5 of the *2020 Guidelines*.[115]

Maintaining such internal policies raises an inherent conundrum around the conceptual integrity of the Guidelines. The Guidelines collide at an early point with standard national security practices of not disclosing operational matters, intelligence techniques, or tradecraft. The Guidelines in the two primary mentioned areas realistically are minimalist exercises. The Guidelines' function as a visible, public accountability reassurance mechanism is in tension with the practice of not making public (even in part) information of how internal ASIO controls are drafted and actioned. Such tension should be preferably candidly acknowledged, to alert, inform and shape effective accountability responses. Alongside that acknowledgment, it is of paramount importance for the IGIS to be fully informed and adequately resourced to enable regularly scheduled reviews of these two primary matters — to discharge *in camera* its extensive powers, reporting publicly, as linked to ministerial responsibility.[116]

In other words, limits upon the direct application of ministerial responsibility need clarity in relation to how, and to what extent, at one step removed (in the form of maintained and classified ASIO policies) ministerial responsibility is maintained or contested, including in IGIS interactions. Importantly, such measures will encourage a realistic public appreciation of how effectively the Guidelines underpin ministerial responsibility.

Further, the *2020 Guidelines* as an ASIO accountability measure need reconceptualisation as a composite: comprising public Guidelines and undisclosed internal policies made under the Guidelines authority. This substantiality of internal policies carries distinctive risks. First, the emergence of executive discretion exercised within those policies, which is at variance with the import of the Guidelines. Second, the policies by default practice becoming the practical operational document for the Organisation, being not necessarily synchronous with the Guidelines, nor consistent with a plain reading of the parent *ASIO Act*.

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113 *2020 Guidelines* (n 1) 10 [2.13]–[2.15].

114 Ibid 13–14 [4.3].

115 Where the Director-General is considering requesting assistance to ASIO under s 21A of the *ASIO Act* (assistance provided in accordance with a request by the Director-General) or pt 15 of the *Telecommunications Act 1997* (Cth)

> in circumstances where a civil or criminal immunity could arise, proportionality must be considered. In determining proportionality, the Director-General should consider the seriousness of any offence or conduct to which the immunity may apply and the impact on innocent parties

ibid 12 [3.5].

116 See above Part II(D).

The necessary generality of the *2020 Guidelines* in the two primary examples mentioned above is evident in their language and structure.

In relation to authorised force under an ASIO warrant against a person:

> **Use of force against the person under warrant**
>
> 2.13 The Director-General will take all reasonable steps to ensure that persons, including ASIO employees, who are authorised to use force against a person under an ASIO warrant are appropriately trained.[117]
>
> 2.14 The Director-General is entitled to presume that the following categories of persons are appropriately trained:
>
> a) Sworn members of the Australian Federal Police, or of a police force of a State or Territory.
>
> b) Other Commonwealth, State and Territory officials, who would ordinarily be expected to use force as part of their duties.[118]
>
> 2.15 ASIO will maintain policies in respect of paragraphs 2.13 and 2.14.[119]
>
> 2.16 Section 2.13 does not limit the inherent right of an ASIO employee or ASIO affiliate to self-defence.[120]

In relation to ASIO access to and treatment of personal information, 'personal information' is generously defined:

> "**personal information**" means information or an opinion about an identified individual, or an individual who is reasonably identifiable:
>
> a) whether the information or opinion is true or not; and
>
> b) whether the information or opinion is recorded in material form or not.[121]

Personal information therefore need not be factually accurate, it can be simply an opinion. It need not be reduced to a recorded form (in any of the myriad ways of

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117 *2020 Guidelines* (n 1) 10 [2.13]. This is obviously a statement of broad generality, with the Organisation itself making a self-determination of what constitutes appropriate training.

118 Ibid 10 [2.14].

119 Ibid 10 [2.15].

120 Ibid 10 [2.16]. This clearly contemplates the use of force capacities conferred by ASIO warrant authority as distinctive from rights of self-defence under statute or at common law.

121 Ibid appendix 1.

recording) and the matching of such 'information' or 'opinion' need not be identity proven, but simply ascribable to 'an individual who is reasonably identifiable'. From one perspective, the definition of personal information in the Guidelines, copying the definition from the *Privacy Act 1988* (Cth) ('*Privacy Act*')[122] and the Australian Privacy Principles,[123] *might* create circumstances offering broader protection and legal consistency with other bodies. On the other hand, the breadth of the definition of personal information is particularly sensitive, as it applies to the distinctive context of gathering intelligence relevant to security, that is intelligence, and not factually accurate information. This is a complex question ultimately turning upon the efficacy of the Guidelines in facilitating ministerial responsibility for the processing and deletion of information that never was, or no longer is, of relevance to security, and in preventing information misuse.

Statements of broad generality open pt 4 of the *2020 Guidelines*, titled 'Treatment of Personal Information':

> 4.1 ASIO will only collect, use, handle, retain or disclose personal information for purposes related to the performance of its functions or exercise of its powers, or where otherwise authorised, or required, by law.[124]
>
> 4.2 The Director-General will take all reasonable steps to ensure that ASIO's collection, retention, use, handling and disclosure of personal information is limited to what is reasonably necessary to perform its functions. This includes having reasonable controls to prevent the collection and processing of information in breach of a warrant or statutory authority, and procedures for appropriate remediation and reporting should this occur.[125]
>
> 4.3 ASIO will maintain policies about its access to, and retention of, personal information.
>
> a) These policies must provide clear guidance on:
>
> i. the type of personal information ASIO collects and retains
>
> ii. how ASIO should collect, hold, retain, protect and access personal information
>
> iii. the circumstances and associated requirements around the de-identification of personal information

122 *Privacy Act 1988* (Cth) s 6 (definition of 'personal information') ('*Privacy Act*').

123 Ibid sch 1.

124 *2020 Guidelines* (n 1) 13 [4.1].

125 Ibid 13 [4.2].

> iv. the purposes for which ASIO may collect, hold, retain, use, access and disclose personal information
>
> v. the disclosure of information overseas, including its effect on individual privacy interests
>
> vi. processes for periodic review of its holdings, including personal information, to determine whether retention is reasonable, and
>
> vii. setting, reviewing and undertaking disposal actions in accordance with the ASIO Records Authority and any other Commonwealth recordkeeping directives or legislative requirements.[126]

Paragraph 4.3(b) of the *2020 Guidelines* creates other requirements for ASIO around the use of 'personal information':

> b) These policies must require ASIO to:
>
> i. ensure that it retains personal information only:
>
> a. when it is relevant to the proper performance of its functions or the exercise of its powers, or
>
> b. where otherwise authorised, or required, by law
>
> ii. ensure only ASIO employees and ASIO affiliates who require access to data and information, which may include reference data, for the proper performance of their duties are authorised to do so;
>
> iii. maintain internal audit mechanisms which provide assurance that ASIO employees and ASIO affiliates who are authorised to access data and information, which may include reference data, do so only for the proper performance of their duties; and
>
> iv. report to the IGIS any collection of, or access to, data which may include reference data, which are inconsistent with, or in contravention of legislation.[127]

The opening statement at para 4.2 of the *2020 Guidelines* obliging the Director-General to 'take all reasonable steps ensuring that ASIO's collection, retention, use, handling, and disclosure of personal information is limited to what is reasonably necessary

126 Ibid 13 [4.3(a)].

127 Ibid 13–14 [4.3(b)].

to perform its functions'[128] is drafted in overtly objective terms, but organisationally interpretable to be consistent with internalised and institutionalised national security norms. The broadly descriptive terms, and the use of words 'reasonable' and 'reasonably', import a nominally objective, but executive determined element into the personal information interactions. The further inclusion of reasonable controls to prevent the collection and processing of information in breach of a warrant or statutory authority, and procedures (in that event) for appropriation, remediation and reporting of such breaches, impresses an expansive executive scope.

The practical effect is that para 4.2 of the *2020 Guidelines* minimises public obligatory content, as the substantive regulatory framework of ASIO is framed by the para 4.3 obligation — that is to maintain policies about access to, and retention of, personal information, the content of the policies having to provide 'clear guidance' on listed items (i) to (vii). The bulk of the regulatory framework, and its responsiveness to the listed issues, is invisible to public scrutiny. The public scrutiny arises through proxy by the IGIS, becoming public if and when the IGIS publishes details relating to the treatment of personal information[129] in an annual report.[130] It is therefore important to scrutinise the positively presented adoption of the *Privacy Act* language (wherever it might arise) against concrete experience.

Two illuminating experiential points arise. In contrast to the Guidelines, in the case of ASIS, AGO and ASD, the relevant responsible Minister in discharging the obligation to make rules regulating the privacy — the communication and retention of such intelligence information concerning Australian persons — is under *three obligations*: (1) to consult the IGIS;[131] (2) to provide the IGIS a copy of the proposed rules;[132] and (3) for the IGIS to brief the PJCIS on the rules if requested, or if the rules change.[133] This places the IGIS in a stronger position, early and subsequently, for the non-ASIO agencies to facilitate ministerial responsibility, in contrast to the Guidelines position.[134] Second, several significant breaches of the ASIO guidelines in relation to investigative activity and personal information were previously identified by the IGIS.[135]

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128 Ibid 13 [4.2].

129 The policy requires ASIO to 'report to the IGIS any collection of, or access to, data, which may include reference data, which are inconsistent with, or in contravention of legislation': ibid 14 [4.3(b)(iv)]. The accompanying note to this paragraph of the *2020 Guidelines* further advises that '[t]his section of the Guidelines does not apply to ASIO's corporate business information or data' and '[u]nder the *Inspector-General of Intelligence and Security Act 1986*, the IGIS may review access by ASIO employees and ASIO affiliates to data and information': at 14. See also *IGIS Act* (n 16) s 8(1)(a).

130 See: *IGIS 2017–2018 Annual Report* (n 73) 22–3; *IGIS 2018–2019 Annual Report* (n 74) 33–4.

131 *Intelligence Services Act* (n 15) s 15(3)(c).

132 Ibid s 15(4).

133 Ibid s 15(6)(b).

134 *ASIO Act* (n 10) s 8A.

135 *IGIS 2017–2018 Annual Report* (n 73) 43.

Other limitations of the *2020 Guidelines* need further consideration in assessing their effectiveness. The ensuing para 4.4 of the *2020 Guidelines* includes matters relating to security and access to personal information holdings. In this paragraph, there is simply directive content to the Director-General, rather than an obligation to maintain a policy. The structural minimalism is again likely intended to avoid disclosure of operational and internal methods:

> 4.4 Where ASIO retains personal information, the Director-General will ensure that:
>
> a) the information is protected, by such safeguards as are reasonable in the circumstances, against:
>
> i. loss
>
> ii. unauthorised access, use, modification or disclosure, and
>
> iii. other misuse or interference,
>
> b) access is limited to those ASIO employees or ASIO affiliates who require it for the performance of their roles and functions, consistent with the ASIO Act, ASIO Code of Conduct and ASIO's security and information management policies, and
>
> c) access is available to the IGIS and authorised IGIS staff, in the performance of their functions.[136]

The Director-General's obligation to ensure the content of para 4.4 reflects the bare structural arrangements of control of the Organisation by the Director-General,[137] subject to the IGIS review powers for Guidelines compliance.[138] Other measures augment this arrangement. These measures include: the obligation of providing the IGIS as soon as practicable with a copy of the Guidelines;[139] the tabling of the Guidelines in Parliament;[140] the obligation to provide the Leader of the Opposition with a copy of the Guidelines;[141] and the obligation to provide a copy to the PJCIS, unless considered by the Minister inappropriate to do so.[142]

Overall, the Guidelines' arrangements for the treatment of personal information spotlight significant limits as an accountability device. Much is reliant upon the

136 *2020 Guidelines* (n 1) 14 [4.4].

137 *ASIO Act* (n 10) s 8(1).

138 See *IGIS Act* (n 16) s 8(1)(ii).

139 *ASIO Act* (n 10) s 8A(6).

140 Ibid ss 8A(3)–(4).

141 Ibid s 8A(4).

142 Ibid s 8A(6).

qualitative nature of reporting and supervisory lines between the Minister and Director-General, and the good faith of the Director-General in conforming to both the directive paragraphs and paragraphs requiring implementation of undisclosed policies. The ability to monitor and confirm such adherence ultimately depends upon the legislated level of involvement, resourcing and priorities of the IGIS. This aspect of the treatment of personal information demonstrates that the Guidelines are an important and pragmatically focused accountability mechanism, albeit with substantial limitations. The practical connection with ministerial responsibility is contingent and contained. These limitations, unpacked above, are neither publicly articulated nor appreciated. The inherent limitations of the Guidelines logically demand that other ASIO accountability framework components compensate and balance through influencing better drafting of the Guidelines. Enhanced efficacy of these other accountability roles, including operational optimisation is a practical contribution to redressing limitations and improving ministerial responsibility.

B *Relevance to Security: The Special Case of Politically Motivated Violence, Extending and Expanding Relevance to Security by the Operation of the Guidelines*

The content of ASIO's functions is organised around the concept of relevance to security,[143] broadly defined.[144] Several of these security listed elements are separately and expansively defined.[145] The legislative definition of 'security' capaciously applies to the three initial ASIO functions in ss 17(1)(a)–(c) of the *ASIO Act*.[146] Significantly, the Guidelines further extend the practical meaning of security, linked to these three initial examples of security relevance. The Guidelines' capacity, conceived as a mechanism of ministerial responsibility, to instead increase the reach of aspects of relevance to security, is anomalous and needs clarification. It is inconsistent with the original Guidelines conception of accountability and constraint. It confirms the need for stronger Guidelines consultation and review processes,[147] to ensure closer adherence to first principles of ministerial responsibility,

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143 See ibid s 17(1):

> The functions of the Organisation are:
>
> (a) to obtain, correlate and evaluate intelligence relevant to security;
>
> (b) for purposes relevant to security, to communicate any such intelligence to such persons, and in such manner, as are appropriate to those purposes;
>
> (c) to advise Ministers and authorities of the Commonwealth in respect of matters relating to security, in so far as those matters are *relevant to* their functions and responsibilities … (emphasis added).

144 Ibid s 4 (definition of 'security').

145 See definitions in ibid s 4 in relation to several components of security, namely politically motivated violence (which subsequently incorporates a further definition of 'terrorism offence'), promotion of communal violence, attacks on Australia's defence system, and acts of foreign interference.

146 See above n 143 and accompanying text.

147 See above Part II(B).

with more tightly defined items relevant to security, instead of a mechanism to enlarge executive based discretion. Intelligence practices also must allow latitude (in the sense of preliminary, precursor and preparatory information) for effective obtaining, correlating and evaluating intelligence relevant to security,[148] but that should be clearly circumscribed.

The Guidelines' practical extension of the meaning of security arises most sharply in the example of politically motivated violence.[149] The history of ASIO's interactions with political protest and dissent[150] led to the 1977 and 1984 Hope Royal Commission reforms. This is a timely reminder against the weakening of the accountability framework, for example, by Guidelines' changes interacting with *ASIO Act*'s changes. The concept of politically motivated violence post-Hope Royal Commission became the marker in security activities of what would properly constitute legitimate political expression and dissent.[151] The Guidelines in the politically motivated violence example have tilted towards enlarging the scope of ministerial authority and ASIO activities in their application of relevance to security.

Politically motivated violence comprises five distinctive elements.[152] These elements traverse a range of violent and potentially violent activity, to which the Guidelines apply. The elements are:

> ***politically motivated violence*** means:
>
> (a) acts or threats of violence or unlawful harm that are intended or likely to achieve a political objective, whether in Australia or elsewhere, including acts or threats carried on for the purpose of influencing the policy or acts of a government, whether in Australia or elsewhere;[153] or
>
> (b) acts that:
>
> (i) involve violence or are intended or are likely to involve or lead to violence (whether by the persons who carry on those acts or by other persons); and

148 *ASIO Act* (n 10) s 17(1)(a).

149 See ibid s 4 (definition of 'security' para (a)(iii)). Politically motivated violence is one of the security elements.

150 See: Blaxland (n 51); Frank Cain, 'Australian Intelligence Organisations and the Law: A Brief History' (2004) 27(2) *University of New South Wales Law Journal* 296.

151 Carne, 'Thawing the Big Chill' (n 8) 379, 413–16.

152 *ASIO Act* (n 10) s 4 (definition of 'politically motivated violence' paras (a)–(d)).

153 Ibid s 4 (definition of 'politically motivated violence' para (a)). The political objective refers to an objective anywhere in the world, with the 'acts or threats including those carried on for the purpose of influencing the policy or acts of a government, whether in Australia or elsewhere'.

> (ii) are directed to overthrowing or destroying, or assisting in the overthrow or destruction of, the government or the constitutional system of government of the Commonwealth or of a State or Territory;[154] or
>
> (ba) acts that are offences punishable under Subdivision A of Division 72, or Part 5.3, of the *Criminal Code*;[155] or
>
> (c) acts that are offences punishable under Division 119 of the *Criminal Code*, the *Crimes (Hostages) Act 1989* or Division 1 of Part 2, or Part 3, of the *Crimes (Ships and Fixed Platforms) Act 1992* or under Division 1 or 4 of Part 2 of the *Crimes (Aviation) Act 1991*;[156] or
>
> (d) acts that:
>
> (i) are offences punishable under the *Crimes (Internationally Protected Persons) Act 1976*;[157] or
>
> (ii) threaten or endanger any person or class of persons specified by the Minister for the purposes of this subparagraph by notice in writing given to the Director-General.[158]

The *2020 Guidelines* reduce and remove the preparatory, descriptive and discursive content of the *2007 Guidelines*.[159] The 2007 content provided useful guidance in applying criteria for the obtaining, correlating and evaluating of intelligence relevant to politically motivated violence. In particular, this content constructively included restraining, triaging and prioritising mechanisms. Prominent examples (removed from the comparable section of the *2020 Guidelines*) are:

> 3.5 ASIO is not required to inquire into every instance, actual or potential, of [politically motivated violence]. The Director-General must always make a judgment as to the potential seriousness of any matter or information, the Organisation's priorities, and available resources.[160]

154 Ibid s 4 (definition of 'politically motivated violence' paras (b)(i)–(ii)).

155 Ibid s 4 (definition of 'politically motivated violence' para (ba)). However, a person can commit a terrorism offence against pt 5.3 of the *Criminal Code Act 1995* (Cth) even if no terrorist act (as defined in that part) occurs: see *Criminal Code Act 1995* (Cth) pt 5.3.

156 *ASIO Act* (n 10) s 4 (definition of 'politically motivated violence' para (c)).

157 Ibid s 4 (definition of 'politically motivated violence' para (d)(i)).

158 Ibid s 4 (definition of 'politically motivated violence' para (d)(ii)).

159 This content prefaced the individual sub-paragraph descriptions in the *2007 Guidelines* (n 2), comprising one and two thirds content pages in small typeface.

160 Ibid [3.5].

> 3.6 In deciding whether to conduct an investigation and the investigatory methods to be employed, the Director-General shall consider all of the circumstances, including —
>
> (a) the magnitude of the threatened or perceived violence or harm;
>
> (b) the likelihood it will occur;
>
> (c) the immediacy of the threat; and
>
> (d) the privacy implications of any proposed investigation.[161]
>
> …
>
> 3.9 The gravity of risk to security will be a factor in determining the investigative techniques that are appropriate where an investigation is decided upon. Where, for example, there is little information to indicate that serious acts of politically motivated violence are in prospect, the degree of intrusion into individual privacy should, so far as is practicable consistent with resolution of the investigation, be limited.[162]

Elsewhere, the relevant preparatory, descriptive and discursive content of the *2007 Guidelines* has been absorbed into the *2020 Guidelines*, with changes made in the latter to increase ASIO investigative activities. For example, para 3.12(a) in the *2007 Guidelines* stated that 'ASIO is not to make inquiries into demonstrations or other protest activity unless (a) there is a risk of serious premeditated violence for the purpose of influencing government acts or policy …'.[163] This paragraph is relaxed in the *2020 Guidelines*, now stating 'there is a risk of pre-meditated use of violence against persons or property for the purposes of achieving a political objective, or pre-meditated use of tactics that can be reasonably assessed as likely to result in violence …'.[164]

The same contrast emerges between the *2007 Guidelines* and the *2020 Guidelines*, in relation to para (a) of the definition of politically motivated violence. Both versions include prioritising ASIO activities 'to persons or groups likely to be involved in: (a) acts or threats of serious violence or unlawful harm designed to provoke violent reaction …'.[165] However, the *2020 Guidelines* go further, including as an alternative, 'the use of tactics that can reasonably be assessed as likely to result in violence'.[166]

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161 Ibid [3.6(d)].

162 Ibid [3.9].

163 Ibid [3.12(a)].

164 *2020 Guidelines* (n 1) 20 [5.18(a)].

165 Ibid. See also *2007 Guidelines* (n 2) [2.2(b)(i)].

166 *2020 Guidelines* (n 1) 18 [5.4(b)].

Changed circumstances and experiential evidence from the 13 years of operation of the *2007 Guidelines* may justify a more relaxed and liberalised interpretation. Unfortunately, the reasons substantiating change are neither publicly accessible nor justified. This indicates confusion over the Guidelines' roles of ministerial responsibility and ministerial accountability. These changes to the Guidelines may be precursors and enablers for the expanded ASIO questioning warrants, which now include politically motivated violence.[167] These measures significantly ease the availability of questioning warrants as being relevant to security,[168] especially with the legislative deletion of an independent issuing authority.[169]

A further feature of the Guidelines' politically motivated violence aspect arises at the junction of political protest and political communication. Section 17A of the *ASIO Act*'s foundational principle states:

> **17A Act not concerned with lawful dissent etc.**
>
> This Act shall not limit the right of persons to engage in lawful advocacy, protest or dissent and the exercise of that right shall not, by itself, be regarded as prejudicial to security, and the functions of the Organisation shall be construed accordingly.[170]

Section 17A of the *ASIO Act* is referred as an operational meaning in the Guidelines, forming the perimeter of ASIO activities:[171]

> 5.17 ASIO is not to undertake investigations where the only basis for the investigation is the exercise of a person's right of lawful advocacy, protest or dissent (section 17A of the ASIO Act).[172]

The prefacing wording of s 17A of the *ASIO Act* in the *2020 Guidelines* points to other possible situations.[173] These situations might arise in parallel, differentiated circumstances to those of lawful advocacy, protest and dissent; where ambivalence exists around the nature of activity as constituting lawful advocacy, protest and dissent; and further, the intersection of political protest and communication with

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167 See *ASIO Amendment Act* (n 86) ss 34B, 34AD(1).

168 In interpretations of politically motivated violence relating to activist groups: see Daniel Hurst, 'Asio Boss Denies Expanded Powers Could Be Used To Target Black Lives Matter Protesters', *The Guardian* (online, 10 July 2020) <https://www.theguardian.com/australia-news/2020/jul/10/asio-boss-denies-expanded-powers-could-be-used-to-target-black-lives-matter-protesters>.

169 *ASIO Amendment Act* (n 86). See above Part II(E) regarding deletion of the independent issuing authority for ASIO questioning warrants.

170 *ASIO Act* (n 10) s 17A.

171 Ibid s 20 provides a further administrative constraint on performance of ASIO functions.

172 *2020 Guidelines* (n 1) 20 [5.17].

173 See also ibid 5 [1.10].

politically motivated violence, drawing in preliminary, exploratory investigative ASIO activity.[174] The modification of the *2007 Guidelines* content in the *2020 Guidelines*, facilitating increased ASIO investigative activities, demonstrates insufficient ministerial attention to the tenor of s 17A of the *ASIO Act*.

The *2020 Guidelines* have further distinctive features confirming their practical operational interpretive influence over politically motivated violence, opening the gateway to security investigation, beyond that apparent from a conventional textual reading of relevant *ASIO Act* sections. As seen, paras 3.11 and 3.12 from the *2007 Guidelines* are copied over to become paras 5.20, 5.18 and 5.21 of the *2020 Guidelines*, with the content of para 3.12 significantly changed in its new guise.

The *2020 Guidelines* provide a second set of examples in relation to para (b) of the definition of politically motivated violence.[175] Three paragraphs are transpositions from the *2007 Guidelines*.[176] Another paragraph had the first sentence deleted, then was carried over unamended, from the *2007 Guidelines*.[177] Paragraph 3.20 of the *2007 Guidelines* is replaced by para 5.8 in the *2020 Guidelines*. Paragraph 5.8 sharpens up the language, with direct reference to a person or group as actors as not requiring an intention to initiate violence to achieve classification as politically motivated violence. Instead, an objective test applies for activities potentially leading to violence, merely requiring a 'reasonable likelihood that the activity will produce violence from others'.[178]

The Guidelines' liberalised content similarly supports an expansive interpretation of the politically motivated violence aspect of security. Probability of success or imminence of the violence are not determinative factors, but merely factors relevant in setting investigative priorities.[179] Though para (b) of the definition of politically motivated violence is both prefaced and conditioned upon the performance of 'acts',[180] the *2020 Guidelines* capaciously treat both lawful and non-public

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174 The tension between s 17A of the *ASIO Act* and the *2022 Guidelines* likely arises from two sources: (a) the ample and definitive language of s 17A, protective of core political rights of expression, association and assembly, contrasted with the *2020 Guidelines* approach being more specious about the content of such rights; and (b) the effluxion of time since the *2007 Guidelines* influencing and eliding, through serial legislative terrorism law enactments, the thresholds at which it is considered proper to investigate politically motivated violence, of which terrorism is a subset: see *ASIO Act* (n 10) s 4 (definition of 'politically motivated violence' paras (a)–(d)). This is substantiated by the fact that s 17A was introduced in 1986: *Australian Security Intelligence Organisation Amendment Act 1986* (Cth).

175 *ASIO Act* (n 10) s 4 (definition of 'politically motivated violence' para (b)).

176 Paragraphs 3.18, 3.21 and 3.22 of the *2007 Guidelines* (n 2) respectively became paras 5.6, 5.9 and 5.10 of the *2020 Guidelines* (n 1).

177 Paragraph 3.19 of the *2007 Guidelines* (n 2) became para 5.7 of the *2020 Guidelines* (n 1).

178 *2020 Guidelines* (n 1) 19 [5.8].

179 Ibid 19 [5.7].

180 *ASIO Act* (n 10) s 4 (definition of 'politically motivated violence' para (b)).

advocacy of violence as an act, stating that 'preparations directed at the overthrow of government are likely to be clandestine and their early manifestations are deceptive'.[181] The understanding of politically motivated violence as an element of security becomes predictive and pre-emptive as classes of non-violent activities, minimally contemplating violence, are included, potentially warranting ASIO investigation in ascertaining a risk of politically motivated violence.[182]

This very elastic interpretation in the Guidelines — aiding the collation, correlation and evaluation of the politically motivated violence aspect of security — is highly adaptable to increasing ASIO activity, such as liberalised questioning warrants covering politically motivated violence.[183] How the Guidelines might further elasticise the boundaries of what constitutes politically motivated violence, triggering this new aspect of ASIO's investigative powers regime, remains to be seen. The above politically motivated violence examples demonstrate a formalistic level of ministerial responsibility underpinning the Guidelines, combined with relaxed thresholds and an increased ASIO mandate, with the Guidelines enabling various expansive enabling features as relevant to security. This is a silently occurring phenomenon, under the nominal device of ministerial responsibility, requiring closer review and scrutiny ensuring that new restraints — for example a revised IGIS mandate — are more clearly calibrated to ministerial responsibility accountability principles.

C *The Capacity for Exiting or Remediating the Intelligence Gathering Process: Review, Deletion and Destruction of Information Not Relevant to Security*

The preceding discussion has highlighted the capacity of the Guidelines to interpretively extend ASIO investigative activities as relevant to one or more of the aspects of security, exceeding a conventional textual interpretation of the *ASIO Act*. That capacity is also prominent in relation to preliminary and determinative investigations, as to whether conduct falls within one of the components of security, or more specifically falls within the latitudinal accommodations of investigating politically motivated violence.

The converse of that question also arises. This is whether exit points exist for ASIO investigations after commencement, allowing ascertaining of whether contemporary circumstances are reasonably determinative of continuing relevance to

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181 *2020 Guidelines* (n 1) 19 [5.9].

182 Ibid 19 [5.10] states:

> If apparently non-violent activities directed at destabilising or undermining constitutional government are associated with what purports to be no more than contemplation of the prospect of the violent overthrow of government, ASIO may investigate those activities to the extent necessary to establish (with some confidence) whether the activities involve a real risk or danger that violence will flow from those activities.

183 Introduced in the *ASIO Amendment Act* (n 86) which significantly expanded ASIO questioning powers on matters relevant to security (now extended beyond terrorism offences to politically motivated violence, espionage and foreign interference, whilst removing independent warrant issuing authorities): at sch 1 pt 1.

security, and whether the continuity of that relevance remains as an ASIO function. That issue is not resolved in the Guidelines. The necessary criteria and information might only appear in classified, publicly unavailable ASIO policies. Such apparent gaps in the Guidelines are not aligned with a best practice Guidelines accountability approach. The issues examined below indicate several lacunae and weaknesses in the Guidelines falling short of their optimisation as a ministerial responsibility and accountability measure — there is a significant reliance on ministerial and ASIO interpretative discretion around these issues, which may unnecessarily complicate the IGIS's review role.

First, a need exists for an accountable scheme for the deletion and destruction of such ASIO acquired information, which is not relevant, or no longer relevant, to security, to be incorporated into the Guidelines.[184] That would provide a default setting for information acquisition and retention issues in ongoing ASIO security investigations.

Further relevant Guidelines' observations arise. Ongoing investigations require review no less than annually.[185] Arguably, such internal review is insufficiently frequent, with compulsory internal periodic review likely to be better served at strategic intervals such as the expiration of various warrant authorities under div 2 of the *ASIO Act*. Such review should be more independent, carried out only by a senior ASIO official not involved in the instant security investigation.

Part 4 of the *2020 Guidelines*[186] (the treatment of personal information), lacks sufficiently specific obligations and timelines,[187] including for deletion and destruction. This looseness assimilates s 31 of the *ASIO Act* drafting, which is the obligation to destroy records or copies made from information sourced under ASIO warrant authority, when the Director-General is satisfied that the record or copy is not required for the purposes of the performance of functions or exercise of powers under the *ASIO Act*.[188]

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184 Rule 2.18 of the original Guidelines (prior to 2007) included an obligation for ASIO 'to destroy records of any investigation that ends up being irrelevant to national security': 'Govt To Reissue ASIO Guidelines', *ABC News* (online, 21 September 2007) <https://www.abc.net.au/news/2007-09-21/govt-to-reissue-asio-guidelines/676296>. See also: 'New ASIO Rules Cause Concern', *ABC Local Radio* (ABC News, 21 September 2007) 08:08:00 <https://www.abc.net.au/am/content/2007/s2039346.htm>. This paragraph was reinstated in modified form in the *2007 Guidelines* (n 2) [2.18].

185 *2020 Guidelines* (n 1) 8 [2.5].

186 See ibid pt 4. Part 4 is titled 'Treatment of Personal Information', and includes subheadings on 'Security and Access to Personal Information Holdings', 'Compliance with Commonwealth Recordkeeping Requirements' and 'Disposal of Records'.

187 See above Part III(A) for examination of pt 4 of the *2020 Guidelines* (n 1). The Guidelines do not always provide guidance — the significant role of maintained and classified ASIO policies made under Guidelines' authority.

188 This provision is open ended, imposing no interval or time requirement for the Director-General's active engagement in such an assessment.

Part 4 of the Guidelines commences with textual invocations of reasonableness,[189] immediately devolving responsibility for access to and retention of personal information to the maintenance of classified ASIO policies.[190] Following these principles, the policies must provide clear guidance in 'processes for periodic review of its holdings, including personal information, to determine whether retention is reasonable'.[191] Such periodic reviews will be useful if the maintained policies faithfully and substantively implement this aspect of the Guidelines. The Law Council observed that '[t]his requirement may assist in remediating or preventing ASIO from retaining large volumes of personal information for prolonged periods of time, without regular assessment of whether the relevant individuals remain of security interest'.[192] It is a useful improvised step in response to the lack of a precise statutory obligation of regular review and destruction of personal information not relevant to security, or no longer relevant to security.[193] Reforming the *ASIO Act* provision[194] would be a superior, direct and more durable alternative.

Specified inclusion in policies includes retaining personal information only: (a) when it is relevant to the proper performance of ASIO's functions or the exercise of its powers; or (b) where otherwise authorised, or required, by law.[195] The Law Council highlighted the risk that the lack of a comprehensive ASIO personal information destruction requirement — in the *ASIO Act* or in the Guidelines — might mean that information not explicitly captured, by default would otherwise be authorised by law, allowing retention.[196] It also called for a definition of 'reference data'[197] to be included in the Appendix to the Guidelines, to avoid any specialised, unknown meaning that ASIO might settle upon.[198]

The vexed contest of maintaining ASIO operational and methodological secrecy and ensuring accountability emerges again, in establishing obligations maintaining these

189 See above n 125 and accompanying text.

190 *2020 Guidelines* (n 1) 13–14 [4.3(a)–(b)]. The policies are formed under broad principles.

191 Ibid 13 [4.3(a)(vi)].

192 *Comments on the Minister's Guidelines* (n 12) 23 [77].

193 See, eg: *PJCIS Advisory Report* (n 4) 45 [3.48]–[3.50], 46 [3.51]–[3.52]; Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (Report, 27 February 2015) 259–62 [6.217]–[6.225], 262, recommendation 28.

194 For example, s 31 of the *ASIO Act* (n 10) applies to records obtained under div 2 in the Act.

195 See *2020 Guidelines* (n 1) 13–14 [4.3(b)(i)]. See also discussion under Part III(A) above.

196 *Comments on the Minister's Guidelines* (n 12) 24 [81].

197 *2020 Guidelines* (n 1) 14 [4.3(b)(ii)].

198 *Comments on the Minister's Guidelines* (n 12) 25 [89]–[91].

policies, against the policies' approach to classified documents.[199] The maintained policies require '[reporting] to the IGIS any collection of, or access to, data, which may include reference data, which are inconsistent with, or in contravention of legislation'.[200] This is a useful accountability mechanism, but the Guidelines would be strengthened by an improved accountability of obligations and timelines — in turn facilitating a more focused IGIS role in auditing, investigation and annual reporting.

Part 4 of the *2020 Guidelines*[201] assigns the Director-General of ASIO direct responsibilities, not separately contingent upon maintaining policies. This includes a responsibility relating to security and access to personal information holdings.[202] Distinctively, the *2020 Guidelines* deal with Director-General post-retention of personal information, in compliance with Commonwealth recordkeeping requirements;[203] along with disposal of records,[204] under the *Archives Act 1983* (Cth).[205] The preconditions for the Director-General's specified responsibilities are nonetheless loose and accommodative:

> 4.11 ASIO must take reasonable steps to destroy or otherwise dispose of personal information where that personal information is:
>
> a) not required by ASIO for the performance of its functions or exercise of its powers, and

199 Ibid 25–6. This issue is approached differently when highlighting PJCIS objections to no ASIO obligation to provide it with the maintained policies.

200 *2020 Guidelines* (n 1) 14 [4.3(b)(iv)].

201 See discussion under Part III(A) above.

202 *2020 Guidelines* (n 1) 14 [4.4(a)–(c)].

203 Ibid 15 [4.8]: 'The Director-General will ensure that appropriate internal policies and procedures are in place to inform the setting and reviewing of disposal classes applied to records under the ASIO Records Authority.'

204 Ibid 16 [4.13]:

> Subject to paragraph 4.11, the Director-General will ensure that in accordance with applicable legislative requirements: (a) after the minimum retention period for a record (including a record containing personal information) has expired, and (b) where ASIO's review processes have determined the record is no longer needed for the proper performance of ASIO's functions, the relevant record will be destroyed in accordance with the ASIO Records Authority.

205 See *Archives Act 1983* (Cth) ss 29(1)(a)–(b), (8)(a). See also National Archives of Australia, *Australian Security Intelligence Organisation: Foreign Intelligence Collection; Protection of Agency Personnel and Personnel Records; Security Intelligence Assessment and Advice; Security Intelligence Collection* (Records Authority 2012/00324244, 26 October 2016) listing ASIO records under the categories of Foreign Intelligence Collection, Protection of Agency Personnel and Personnel Records, Security Intelligence Assessment and Advice and Security Intelligence Collection, including sub-categories of these records to be retained as national archives or to be destroyed after prescribed expiration of years by ASIO itself.

> b) not required to demonstrate propriety, compliance by ASIO with laws of the Commonwealth and of States and Territories, or directions and guidelines given to ASIO by the Minister.[206]

The term 'disposal' marks the finality of the personal information holdings, in contradistinction to ASIO's preceding access and retention of information, involving the management of that personal information. Disposal may include de-identified personal information.[207] ASIO may retain de-identified information (therefore making it no longer personal information), for the performance of functions and the exercise of its powers consistent with legislative requirements.[208]

These are open textured provisions — the breadth of ASIO's functions and investigative powers has sizeably increased since the inception of the ministerial guidelines, diminishing the circumstances of personal information being 'not required'[209] for ASIO performance. Similarly, 'not required' might have been more precisely expressed as 'demonstrably not required' or 'reasonably not required'. Refining the wording would have created a lower threshold for the Director-General's specific obligations to dispose of information.

The phrase 'directions or guidelines given to ASIO by the Minister',[210] contemplates the use of ss 8 (Directions from the Minister) and 8A (Ministerial Guidelines) of the *ASIO Act* for other purposes consistent with the functions of the Organisation, potentially overriding the obligation to take reasonable steps to destroy or otherwise dispose of personal information. Additionally, the capacity to de-identify information (which is categorised as disposal) allows and may even encourage the retention of substantial security subject matter information, organisations and groups in civil society in a residual form as long as the appendix threshold of 'de-identified'[211] information is reached. This leaves open the possibility to augment ASIO's existing long-term information holdings on subject matters, organisations and groups, considered as of continuing relevance to security.

206 *2020 Guidelines* (n 1) 15–16 [4.11].

207 Ibid 22 (definition of 'de-identified').

208 Ibid 16 [4.12].

209 Ibid 15–16 [4.11]. See above n 206 and accompanying text.

210 *2020 Guidelines* (n 1) 16 [4.11(b)].

211 See ibid 16 [4.12]. See also at 22 for the meaning of 'de-identified': 'the removal of direct identifiers and one or both of the removal or alteration of other information that could potentially be used to re-identify an individual, and/or the use of controls and safeguards in the data access environment to prevent re-identification'.

IV Concluding Observations: Renewing and Reforming the Guidelines To Enhance Ministerial Responsibility and ASIO Accountability

This article's identification of noticeable Guidelines' deficiencies gives cause for both concern and reflection. The conception of the Guidelines emerged from the Second Hope Royal Commission, conceived within a distinctive context of ASIO improprieties and illegalities,[212] a much narrower compass of security-related activities, and an organisation of significantly smaller scale and budget.

Nearly 40 years on, the Guidelines' conception and content invite re-imagination and reform to simultaneously engage exponentially evolved national security authority with principles of ministerial responsibility. The *2020 Guidelines* presently fall noticeably short of such an objective.

The Guidelines need to be a contemporary document, conceptualised as one of many integrated ASIO accountability measures and attuned to Australia's preference for a parliamentary model of rights protection involving explicit rejection of a statutory charter of rights.[213] A reasonable public policy expectation for the Guidelines is that they should operate optimally as a part of that ministerial responsibility model, facilitating representative government system accountability. The legitimacy of that expectation is vindicated by the secretive nature of ASIO functions, alongside the potentially sensitive and damaging nature of security intelligence to individual rights and to the proper institutional and procedural functioning of representative government. Reform of the Guidelines therefore needs to enhance the operatives of ministerial responsibility, whilst affording consequential benefits for the other ASIO accountability mechanisms indirectly reflecting ministerial responsibility.

The Guidelines speak, when best, in pragmatic ways for providing ministerial guidance to the Director-General in carrying out ASIO's functions relevant to security. Reforms are achievable in this pragmatic spirit. The earlier sections of this article raised background issues and perspectives informing reform of the Guidelines around ministerial responsibility. The article then canvassed selected and important reforms to the Guidelines, to meet contemporary accountability expectations for ASIO consistent with ministerial responsibility.

The confluent timelines of periodic Review in para 1.14 of the *2020 Guidelines* and in the scheduling of the next Independent Intelligence Review[214] provide the opportunity for extensive review of the concept, content and connectivity of the *2020 Guidelines*. Enhancing the effectiveness of the Guidelines within the suite

212 See above n 51 and accompanying text.

213 See, eg: Robert McClelland, 'Australia's Human Rights Framework' (Media Release, 21 April 2010); McClelland, *The Protection and Promotion of Human Rights in Australia* (n 101).

214 The last independent intelligence review was in 2017: *Independent Intelligence Review* (n 40).

of ASIO accountability measures requires genuine independent review. Inadequacies in the newly revised *2020 Guidelines* suggest that task exceeds the capacity of the Minister and the Department of Home Affairs, acting in consultation with the Attorney-General.

Paragraph 1.14 of the *2020 Guidelines* interestingly refers to the 'operation and continued suitability of these Guidelines'.[215] This may simply presume internal ministerial review in conjunction with the operation of s 8A of the *ASIO Act*. This, however, is not textually explicit. The structural arrangements for review of the Guidelines are therefore sufficiently opaque to accommodate different review models.

Alternatively, there could be a reference of the Guidelines by the Prime Minister or the Attorney-General for INSLM review under the *INSLM Act*.[216] The INSLM review could advantageously engage directly with international human rights obligations and proportionality like standards when conducting such a review.[217]

A further alternative would be for Guidelines review to be included within a larger, Royal Commission review into intelligence agencies.[218] This approach could be accommodated within the existing Guidelines review paragraphs. This is a desirable model when the next Independent Intelligence Review is due, following release of the public version of the *Richardson Review* and the Government Response to it.[219] This is a plausible approach given the substantial human rights and representative government system implications ensuing from a probably liberalised, harmonised and integrated NIC security intelligence approach. This recommended course of action would focus upon critical aspects of the *Richardson Review*, providing a broad forum for greater public policy participation, including review of ministerial responsibility and other accountability measures.

More immediate Guidelines reforms (other than review) are achievable. The Guidelines that inform oversight and accountability objectives, and the explicit embrace and articulation of ministerial responsibility for ASIO, could usefully be incorporated in a preamble, forming a presumptive interpretive source. That statement should clearly set the Guidelines' role and utility given: (1) the unique identified ministerial responsibility circumstances in matters relevant to security; and (2) the identification of the Guidelines as part of an interlocking and reciprocally informing accountability framework immediately with the IGIS, but further affecting the INSLM, PJCIS and PJCHR.

215 *2020 Guidelines* (n 1) 5 [1.14].

216 *INSLM Act* (n 17) s 7.

217 See ibid ss 3(c)(i), (d), 8(a)(i).

218 See Kim McGrath, 'Drawing the Line: Witness K and the Ethics of Spying' (2020) 9(1) *Australian Foreign Affairs* 53, 77; Edwards (n 51) 334–5.

219 See *Richardson Review* (n 41) vols 1–4; Government Response (n 3).

Mindful of the latter of these two important principles, a productive Guidelines reform initiative would draw upon proposed integrated national security accountability reforms of former Labor, Senator John Faulkner and present Labor Senators Penny Wong and Jenny McAllister, adapting and integrating the role of the Guidelines explicitly in a renewed ASIO accountability package. Senator Faulkner suggested building stronger, beneficial relationships between the PJCIS, the IGIS, and the INSLM.[220] Senator Wong introduced a Bill in 2015[221] to allow the INSLM and IGIS to provide copies of their reports to the PJCIS and for the INSLM and National Security Adviser to consult with PJCIS. Senator McAllister introduced a further 2020 Bill[222] extending PJCIS capacities, information, advice and expertise.[223]

Importantly, the other ASIO accountability mechanisms can be informed by the operation of the Guidelines for their own purposes, namely how the Guidelines might increase the effectiveness of these other accountability mechanisms — IGIS, INSLM, PJCIS and PJCHR, including reviews of them. These other accountability mechanisms could in turn offer differently informed perspectives on Guidelines' reform.

Other reforms need grounding in the reality of the Guidelines' conception nearly forty years ago in a more placid national security environment, including a decidedly narrower ASIO official security remit. National security circumstances have changed dramatically. The Guidelines require re-setting around principles of flexibility, adaptability and responsiveness if they are to remain an effective ministerial responsibility mechanism. This involves several sequenced reforms.

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220 See: John Faulkner, 'Surveillance, Intelligence and Accountability: An Australian Story' (Web Document) 46–7 <https://apo.org.au/sites/default/files/resource-files/2014-10/apo-nid41934.pdf>; 'Greater Oversight of Spies Needed, Says Faulkner', *Australian Financial Review* (online, 24 October 2014) <https://www.afr.com/politics/greater-oversight-of-spies-needed-says-faulkner-20141023-11aw8z>.

221 Parliamentary Joint Committee on Intelligence and Security Amendment Bill 2015 (Cth) sch 1 items 1, 3, 10. The Bill lapsed at the dissolution of the 44th Parliament on 9 May 2016, and was restored to the Notice Paper on 31 August 2016, the second reading adjourned on 13 October 2016, and eventually lapsed with the 44th Parliament conclusion on 1 July 2019.

222 Intelligence and Security Legislation Amendment (Implementing Independent Intelligence Review) Bill 2020 (Cth) was introduced into the Senate by Senator McAllister on 26 February 2020. This Bill is intended to implement several recommendations of the *Independent Intelligence Review* (n 40).

223 Under the Bill, the PJCIS would have capacity for self-activated review of existing, proposed, repealed, expiring, lapsing or ceasing laws relating to counter-terrorism or national security. The Bill would also allow the PJCIS to request reports on counter-terrorism or national security matters referred to the INSLM and to require regular briefings to the PJCIS by the IGIS and the Director-General of National Intelligence. A majority only report (with an ALP dissenting report) recommended that the Bill *not* be passed: Senate Finance and Public Administration Committee, Parliament of Australia, *Intelligence and Security Legislation Amendment (Implementing Independent Intelligence Review) Bill 2020* (Report, December 2020) 6–7 [1.23].

The first of these reforms is to amend the language of s 8A of the *ASIO Act* to create obligations, rather than options, for the making of ministerial guidelines, and to do so within specified timeframes. Two timeframes would beneficially assist ministerial accountability. First, an adoption of the practice that Bills amending the *ASIO Act* must be simultaneously accompanied by a Bill appendix setting out corresponding changes to the Guidelines. This would allow periodic examination of the Guidelines by parliamentary and PJCIS processes at the time of the amending Bill. A more positive interactive interpretive relationship of the Guidelines with the legislation would be promoted than has hitherto occurred.[224]

The second change would be inclusion within s 8A of the *ASIO Act* and s 6 of the *INSLM Act*, a function that the INSLM review and report upon the Guidelines every three years, and communicate such reviews to the Minister, the Attorney-General and the IGIS. This would advantageously propel a regular Guidelines review schedule, such review then being informed by the INSLM report, prior to consultation with a wider category of stakeholders.

These two measures amending s 8A of the *ASIO Act* are appropriate and adapted to the realities of serial national security legislative reform, with constant review of national security laws (which include the *ASIO Act*). Both measures would ensure, over time, that substantial content omissions in the Guidelines would be remediated and new omissions not emerge, when the *ASIO Act* is further amended consistent with government claims of a changing security environment.

Enhancing the Guidelines' responsiveness to ongoing and rapid national security change will render the Guidelines of greater contemporary relevance. It will orientate Guidelines' culture as more responsive to the likely horizontal expansion of national security activity, and increased ASIO harmonised co-operative arrangements with other NIC members. This is likely to be of increased urgency now that the Richardson Review,[225] along with the Government Response[226] to that Review, are in the public domain. A more expeditious response is desirable due to a likely increase in ASIO questioning warrant activity for politically motivated violence, foreign interference and espionage.[227] Both items will increase the volumetrics and intrusiveness of ASIO activities relevant to security, which the Guidelines need address.

These reform initiatives will also usefully ventilate the Guidelines' inherent structural limitations as an instrument of ministerial responsibility. It might then be concluded that different accountability alternatives to the Guidelines are preferable in guiding discrete examples of ASIO activities relevant to security and in enhancing ministerial responsibility. Actual amendments to the *ASIO Act* may be

224 See the discussion under Part III(B) above.

225 *Richardson Review* (n 41).

226 Government Response (n 3).

227 Following the passage of the *ASIO Amendment Act* (n 86). *ASIO Amendment Act* (n 86) sch 1 pt 1 is now incorporated into the *ASIO Act* (n 10) div 3.

more effective. Internal ASIO organisational culture, ministerial and departmental attitudes will obviously affect the Guidelines' efficacy, making a broadened IGIS scrutiny of these desirable. Parts of the Guidelines might warrant reclassification as disallowable instruments, improving parliamentary scrutiny.

Each of these issues involves a balancing both of ASIO and executive Ministers' accountability, as against the need to protect ASIO operational methods and sources. It also recognises that the Guidelines are, of course, executive sponsored instruments, with the IGIS acting as a proxy or medium for full ministerial accountability through parliamentary scrutiny. These are complex questions best examined by the suggested independent review mentioned above. The Guidelines have an important, but constrained, role as a ministerial responsibility mechanism. The progressive reforms outlined in this article would maximise the Guidelines' ministerial responsibility performance, by improving the integration and workability of the ASIO accountability suite.

*Hossain Mohammad Reza**

EVALUATING THE PROSPECT OF THE *PARIS AGREEMENT* IN LIGHT OF EXPERIMENTALIST GOVERNANCE

Abstract

The theory of experimentalist governance ('EG') emerged to show how stakeholders facing uncertainty may solve a complex governance problem and how they can jointly explore feasible ways to advance their goals in a learning-by-doing process. Given that climate change is characterised by strategic uncertainty and polyarchic distribution of power, EG is claimed to be a potentially attractive model to respond to the multidimensional nature of climate change in comparison to more traditional forms of governance. The *Paris Agreement* brought a new governance structure into the climate change regime by introducing a 'pledge and review' model based on nationally determined contributions as opposed to the traditional legally binding, targets-and-timetables approach adopted by the *Kyoto Protocol*. Against this backdrop, the aim of this article is to assess the explanatory accuracy and evaluative utility of EG theory when applied to the *Paris Agreement*. This article ends by evaluating the prospect of the *Paris Agreement* in light of EG and highlighting the key areas of concern indicated by this theory.

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I Introduction

The theory of experimentalist governance ('EG') emerged to show how a complex governance problem can be solved by the joint actions of different stakeholders in a 'learning-by-doing process'.[1] EG entails a bottom-up approach of decomposition and decentralisation of the problem, allowing an iterative process of learning and adjustment of framework goals in response to evolving evidence. The mutual monitoring, reporting and review, and evaluation of collective goals hold central and local actors accountable for their actions. On that account, EG theory can be described as a 'useful heuristic device to capture policymaking and implementation in complex, dynamic, and highly diverse political entities'.[2] In an international order where there is strategic uncertainty and fragmentation of power, EG generally plays a role in the form of 'a recursive process of provisional goal-setting'.[3] These alternative approaches are typically adopted by local actors, of which predominantly includes non-State actors and civil society. EG, in its most developed form, works in a sequence: starting with an agreement on open-ended framework goals, where lower-level units are given wide discretion to advance these goals in their own way considering their local circumstances, subject to regular reporting on their performance and peer review of their efforts; and followed by periodical revision of local plans and central goals.[4] Put simply, EG fosters decomposition of a grand problem, suggests decentralised efforts from the actors, and promotes experimentation and learning.

Given that climate change is characterised by 'strategic uncertainty and polyarchic distribution of power',[5] EG theory is claimed to be a potentially more attractive model to respond to the multidimensional nature of climate change than more traditional forms of governance.[6]

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1 Vanessa C Pinsky, Isak Kruglianskas and David G Victor, 'Experimentalist Governance in Climate Finance: The Case of REDD+ in Brazil' (2019) 19(6) *Climate Policy* 725, 728.

2 John Erik Fossum, 'Reflections on Experimentalist Governance' (2012) 6(3) *Regulation and Governance* 394, 394.

3 Charles F Sabel and Jonathan Zeitlin, 'Experimentalism in the EU: Common Ground and Persistent Differences' (2012) 6(3) *Regulation and Governance* 410, 412, quoting ibid 394 ('Experimentalism in the EU').

4 Gráinne De Búrca, Robert O Keohane and Charles Sabel, 'Global Experimentalist Governance' (2014) 44(3) *British Journal of Political Science* 477, 478 ('Global Experimentalist Governance').

5 Chiara Armeni, 'Global Experimentalist Governance, International Law and Climate Change Technologies' (2015) 64(4) *International and Comparative Law Quarterly* 875, 884. For an explanation of the terms 'strategic uncertainty' and 'polyarchic distribution of power' in the context of experimentalist governance, see Part II(B) below.

6 Paula Kivimaa et al, 'Experiments in Climate Governance: A Systematic Review of Research on Energy and Built Environment Transitions' (2017) 169(1) *Journal of Cleaner Production* 17, 17; Armeni (n 5) 876.

The *Paris Agreement*[7] of 2015 brought a seismic shift in climate governance by introducing 'different types of targets, commitments and actions' that are often characterised as a decentralised and bottom-up process.[8] Instead of imposing the previous strategy of top-down[9] emission reduction targets, the *Paris Agreement* gives parties leeway to develop bottom-up[10] mitigation approaches through a system of nationally determined contributions ('NDCs').[11] In order to track progress towards achieving individual pledges, and to identify areas of improvement for States parties,[12] the *Paris Agreement* introduced a new 'enhanced transparency framework' under art 13.[13] The *Paris Agreement* also established a key mechanism known as the 'global stocktake' in art 14[14] to monitor progress towards collective goals of keeping warming well below 2°C.[15] Moreover, art 15 of the *Paris Agreement* established a committee to 'facilitate implementation of and promote compliance with the provisions of … [the] Agreement'.[16] Therefore, multilateral climate governance now consists of a framework goal, NDCs or climate pledges, decentralised implementation, reporting and review, and regular collective assessment of the goals in light of experiences gained.

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7 *Paris Agreement*, opened for signature 22 April 2016, [2016] ATS 24 (entered into force 4 November 2016) ('*Paris Agreement*').

8 Daniel Bodansky and Lavanya Rajamani, 'The Evolution and Governance Architecture of the United Nations Climate Change Regime' in Urs Luterbacher and Detlef F Sprinz (eds), *Global Climate Policy: Actors, Concepts, and Enduring Challenges* (MIT Press, 2018) 13, 59 ('The Evolution and Governance Architecture').

9 A top-down approach to an international climate policy agreement is managed by a strong multilateral organisation and based on legally binding commitments for emission reductions or financing. In the climate change regime, the *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 11 December 1997, 2303 UNTS 162 (entered into force 16 February 2005) ('*Kyoto Protocol*'), is a quintessential example of a standard top-down international treaty that bound only the developed-country parties: Finn Cahill-Webb, 'International Environmental Governance and the Paris Agreement on Climate Change: The Adoption of the "Pledge and Review" Governance Approach' (Working Paper No 99/2018, Institute for International Political Economy Berlin, February 2018) 4.

10 A bottom-up approach to an agreement allows States to define their commitments individually. Within the context of this article, 'bottom-up refers to the pledge and review system of the *Paris Agreement*', which offers more flexibility from using nationally determined targets that are chosen and given at the national level: Cahill-Web (n 9) 4.

11 *Paris Agreement* (n 7) arts 3, 4. See also Maria L Banda, 'The Bottom-Up Alternative: The Mitigation Potential of Private Climate Governance after the Paris Agreement' (2018) 42(2) *Harvard Environmental Law Review* 325, 333 ('The Bottom-Up Alternative').

12 *Paris Agreement* (n 7) art 13.12.

13 Ibid art 13.1.

14 Ibid art 14.1.

15 See ibid art 2.1(a).

16 Ibid art 15.1.

In this context, the 'pledge and review' approach of the *Paris Agreement* appears to reflect some of the features of EG. The main objective of this article is to examine the provisions of the *Paris Agreement* through the lens of EG in order to better understand the current climate governance structure and its prospects. This is not the first piece of scholarly work to consider EG in the context of climate change and the *Paris Agreement*. Previously, Harro van Asselt, Dave Huitema and Andrew Jordan examined whether and to what extent we can observe an experimentalist turn in global climate governance — focusing on the four elements of global experimentalist governance outlined by Gráinne De Búrca, Robert Keohane and Charles Sabel.[17] Based on their work, this article will contribute to the literature by drawing evaluative lessons from EG theory in order to strengthen the governance mechanisms of the *Paris Agreement* and thereby maximise its prospects.

This article proceeds in four parts. Part II provides an outline of EG. Part III analyses the relevant provisions of the *Paris Agreement* through the four crucial features of EG. Part IV investigates the evaluative implications of applying EG theory to the potential effectiveness of the *Paris Agreement*, highlighting four main areas of concern. Finally, Part V sums up and provides conclusions.

II Outline of Experimentalist Governance

A *The Meaning of Governance and Different Governance Approaches*

The use of the word 'governance' has become widespread since the 1980s.[18] Recent popularity of the term has also led to the proliferation of its meanings and uses.[19] Yet at its core, 'governance' refers to 'all processes of governing, whether undertaken by a government, market, or network'.[20] At the international level, the present period of rapid global change has shifted the 'loci of authority' of governance. This means the globalisation of economies, environmental pollution, terrorism, and the growing influence of non-State actors in key areas of international relations have shifted the authority of national government toward sub-national collectivities.

'Global governance' thus refers to a system of norms, rules, regulations and structures — established, operated and implemented by a constellation of State and non-State actors — with a view to solving specific 'denationalized and

17 Harro van Asselt, Dave Huitema and Andrew Jordan, 'Global Climate Governance after Paris: Setting the Stage for Experimentation?' in Bruno Turnheim, Paula Kivimaa and Frans Berkhout (eds), *Innovating Climate Governance: Moving beyond Experiments* (Cambridge University Press, 2018) 27, 32–43 ('Global Climate Governance after Paris').

18 Mark Bevir, *Governance: A Very Short Introduction* (Oxford University Press, 2012) 1.

19 Ibid 5.

20 Ibid 1.

deregionalized problems or providing transnational common goods'.[21] However, over time the trends of global governance have changed 'to reflect increasing fragmentation, regime complexity, network orchestration and transnational dynamics'.[22] In response to these far-reaching transformations, several governance approaches, such as adaptive governance, anticipatory governance, earth system governance, and experimentalist governance have received considerable attention for offering solutions to emerging challenges.

Adaptive governance 'focuses on the evolution of formal and informal institutions for the management and use of shared assets', such as environmental assets and common pool natural resources in complex adaptive systems.[23] This type of governance facilitates collaboration across diverse sectors, interests, and institutional arrangements. By focusing on collaboration, flexibility and learning, adaptive governance can embrace uncertainty and so is considered efficient to address many challenges of climate change and natural disasters.[24] Even so, adaptive governance remains an underdeveloped concept where it is not clear under which conditions a government should decide to adopt it.[25]

Similarly, anticipatory governance is 'a broad-based capacity extended through society that can act on a variety of inputs to manage emerging knowledge-based technologies while such management is still possible'.[26] It employs foresight, engagement and integration that encourage policy makers to reflect their roles in new technologies.[27] However, no uniform frameworks of anticipatory governance have been developed which can be followed by newcomers. Therefore, diverse

21 Michael Zürn, 'Global Governance as Multi-Level Governance' in David Levi-Faur (ed), *The Oxford Handbook of Governance* (Oxford University Press, 2012) 730, 730 (emphasis omitted).

22 Armeni (n 5) 878. See also Frank Biermann et al, 'The Fragmentation of Global Governance Architectures: A Framework for Analysis' (2009) 9(4) *Global Environmental Politics* 14.

23 Steve Hatfield-Dodds, Rohan Nelson and David Cook, 'Adaptive Governance: An Introduction, and Implications for Public Policy' (Conference Paper, Annual Conference of the Australian Agricultural and Resource Economics Society, 13–16 February 2007) 1.

24 Colin Walch, 'Adaptive Governance in the Developing World: Disaster Risk Reduction in the State of Odisha, India' (2019) 11(3) *Climate and Development* 238, 238.

25 Ibid.

26 David H Guston, 'Understanding "Anticipatory Governance"' (2014) 44(2) *Social Studies of Science* 218, 219, quoting David H Guston, 'Preface' in Erik Fisher, Cynthia Selin and Jameson M Wetmore (eds), *The Yearbook of Nanotechnology in Society, Volume 1: Presenting Futures* (Springer, 2008) v, vi ('Understanding Anticipatory Governance').

27 Guston, 'Understanding Anticipatory Governance' (n 26) 219, 234.

frameworks can be found in countries including Finland, Korea, the Netherlands and the United Kingdom.[28]

Apart from those governance systems, in the pursuit of a newly conceptualised notion of earth system law,[29] the concept of earth system governance emerged. This governance is driven by the concept that 'the Anthropocene invites a holistic perspective on a globally interconnected and reciprocally related Earth system'.[30] Earth system governance may be understood as

> the interrelated and increasingly integrated system of formal and informal rules, rule-making systems and actor-networks at all levels of human society (from local to global) that are set up to steer societies towards preventing, mitigating and adapting to global and local environmental change and, in particular, earth system transformation …[31]

However, researchers believe that more systematic study is needed to understand the contextual conditions within which the earth system governance works such as transformations, inequalities, the Anthropocene and diversity.[32] Particularly, renewed research on the 'overall architecture of earth system governance … of the adaptiveness of governance mechanisms … and of modes of allocation and access in earth system governance' should be prioritised.[33]

B *Experimentalist Governance*

Over the past two decades, the world has witnessed the proliferation of EG within and across multiple levels and policy domains in a number of international regulatory regimes. Well-documented examples can be found in many jurisdictions, including

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28 Kyungmoo Heo and Yongseok Seo, 'Anticipatory Governance for Newcomers: Lessons Learned from the UK, the Netherlands, Finland and Korea' (2021) 9(1) *European Journal of Futures Research* 9:1–14, 2.

29 For a discussion on the concept of 'earth system law' see: Marie-Catherine Petersmann, 'Sympoietic Thinking and Earth System Law: The Earth, Its Subjects and the Law' (2021) 9 *Earth System Governance* 100114:1–8; Louis J Kotzé et al, 'Earth System Law: Exploring New Frontiers in Legal Science' (2022) 11 *Earth System Governance* 100126:1–9.

30 Louis J Kotzé, 'Reflections on the Future of Environmental Law Scholarship and Methodology in the Anthropocene' in Ole W Pedersen (ed), *Perspectives on Environmental Law Scholarship: Essays on Purpose, Shape and Direction* (Cambridge University Press, 2018) 140, 152.

31 Frank Biermann et al, 'Navigating the Anthropocene: The Earth System Governance Project Strategy Paper' (2010) 2(3) *Current Opinion in Environmental Sustainability* 202, 203 (emphasis omitted).

32 See Sarah Burch et al, 'New Directions in Earth System Governance Research' (2019) 1 *Earth System Governance* 100006:1–18.

33 Frank Biermann et al, 'Earth System Governance: A Research Framework' (2010) 10(4) *International Environmental Agreements* 277, 280 (emphasis omitted).

the European Union ('EU') and the United States. In the EU, a broad array of policy domains institutionalised EG architectures including regulation of environmental protection, finance, food, drugs, data privacy, and justice and security.[34] EG with similar properties is found in the regulations of public health and food safety in the United States and other developed countries.[35] Analogous developments are evident at the global or transnational level across a wide range of policy domains including human rights, data privacy, and environmental sustainability.[36] EG seeks to explain how stakeholders facing uncertainty solve highly complex governance problems and how they can jointly explore feasible ways to advance their goals in a learning and doing process.[37] EG, therefore, does not operate through traditional 'command-and-control' mechanisms and it favours '"regulatory" approaches which are less rigid, less prescriptive, less committed to uniform outcomes, and less hierarchical in nature'.[38] In exploring its contours, De Búrca, Keohane and Sabel have described EG as 'a set of practices involving open participation by a variety of entities (public or private), [which] lack … formal hierarchy within governance arrangements'.[39]

Charles Sabel and Jonathan Zeitlin posit two conditions for the emergence of EG. The first being a situation of 'strategic uncertainty' — meaning that neither policy-makers nor primary actors know what their particular goal is and how to achieve that goal conveniently.[40] As the official decision-makers acknowledge that they do not know the best governance approach to achieve their aims, they conduct a

34 Bernardo Rangoni, 'Architecture and Policy-Making: Comparing Experimentalist and Hierarchical Governance in EU Energy Regulation' (2019) 26(1) *Journal of European Public Policy* 63, 65.

35 Susanne Wengle, 'When Experimentalist Governance Meets Science-Based Regulations: The Case of Food Safety Regulations' (2016) 10(3) *Regulation and Governance* 262, 262. For example, in the United States, food safety regulations rely on 'a science-based transnational regulatory system known as Hazard Analysis and Critical Control Point' ('HACCP'), which reflect central features of experimentalist governance: at 262.

36 Christine Overdevest and Jonathan Zeitlin, 'Experimentalism in Transnational Forest Governance: Implementing European Union Forest Law Enforcement, Governance and Trade (FLEGT) Voluntary Partnership Agreements in Indonesia and Ghana' (2018) 12(1) *Regulation and Governance* 64, 66; Gráinne de Búrca, 'Human Rights Experimentalism' (2017) 111(2) *American Journal of International Law* 277, 279.

37 Charles F Sabel and David G Victor, 'Governing Global Problems under Uncertainty: Making Bottom-Up Climate Policy Work' (2017) 144(1) *Climatic Change* 15, 18–19 ('Governing Global Problems').

38 Gráinne De Búrca and Joanne Scott, 'Introduction: New Governance, Law and Constitutionalism' in Gráinne De Búrca and Joanne Scott (eds), *Law and New Governance in the EU and the US* (Hart Publishing, 2006) 1, 2.

39 Gráinne de Búrca, Robert O Keohane and Charles Sabel, 'New Modes of Pluralist Global Governance' (2013) 45(3) *New York University Journal of International Law and Politics* 723, 738 (emphasis omitted).

40 Charles F Sabel and Jonathan Zeitlin, 'Learning from Difference: The New Architecture of Experimentalist Governance in the EU' (2008) 14(3) *European Law Journal* 271, 280 ('Learning from Difference').

joint exploration of prospective problems and solutions.[41] The second condition is 'multipolar or polyarchic distribution of power' in which no single actor can impose its solution or undertaking without considering other views.[42] When polyarchy is absent, there will be a struggle for dominance and the powerful prefer to impose decisions on others; in such a situation, pursuing a goal cooperatively with others is unusual.[43] These two conditions open up the opportunity for deliberative problem solving instead of distributive bargaining.[44] In such situations, EG renders a mode of governance that stimulates and promotes learning.

Though there is no universally recognised model for EG, the proponents of EG identify four crucial features of this type of governance.[45] The first is the establishment of open-ended framework goals with metrics to measure progress and overall achievement ('first element').[46] EG suggests that the goals of governance have a provisional character which can be adjusted to an evolving context and can be shaped by new technological and scientific knowledge.[47] Typically, a central authority takes the responsibility of articulating such goals. The existence of such a central authority indicates that EG does not wholly resemble purely bottom-up governance.[48] To some extent, experiments are managed within 'a set of overarching rules' intended to meet the declared goals.[49]

The second feature is autonomy of lower-level units (either individuals, cities, non-government organisations ('NGOs'), or nation-States) in the implementation of the framework goals ('second element').[50] EG accords multiple actors considerable discretion to pursue their goals as a form of 'experiment'.[51] The opportunity to 'experiment' offers flexibility to develop novel policy options or to initiate new practice on a limited scale. Experiments by lower-level actors are expected to

41 Ibid; Sabel and Zeitlin, 'Experimentalism in the EU' (n 3) 412.

42 Sabel and Zeitlin, 'Learning from Difference' (n 40) 280. See also Sabel and Zeitlin, 'Experimentalism in the EU' (n 3) 412.

43 Sabel and Zeitlin, 'Experimentalism in the EU' (n 3) 412.

44 Sabel and Zeitlin, 'Learning from Difference' (n 40) 280.

45 De Búrca, Keohane and Sabel, 'Global Experimentalist Governance' (n 4) 478; ibid 273–4.

46 De Búrca, Keohane and Sabel, 'Global Experimentalist Governance' (n 4) 478.

47 See, eg, van Asselt, Huitema and Jordan (n 17) 34.

48 Ibid 33.

49 Ibid.

50 De Búrca, Keohane and Sabel, 'Global Experimentalist Governance' (n 4) 478; Tanja A Börzel, 'Experimentalist Governance in the EU: The Emperor's New Clothes?' (2012) 6(3) *Regulation and Governance* 378, 379.

51 De Búrca, Keohane and Sabel, 'Global Experimentalist Governance' (n 4) 478.

demonstrate how a technology or a policy works in the real world. Therefore, the essential justification of allowing experiments is to enable learning.[52]

The third feature is regular reporting on performance and peer review ('third element').[53] Therefore, national and sub-national governments are to provide feedback to the central authority.[54] Additionally, the outcome of the activities of the experimenting governance units is subject to peer review.[55]

Lastly, EG includes the periodical revision of framework goals, measures, and procedures by a circle of actors ('fourth element').[56] According to De Búrca, Keohane and Sabel, when all these elements proceed together, 'they can constitute a form of governance that fosters a normatively desirable form of deliberative and participatory problem solving'.[57]

It is generally thought that EG, as a mode of governance, is likely to flourish under four interconnected conditions. First, governments must be unable to devise a 'comprehensive set of rules and efficiently monitor compliance with them'.[58] This condition is well suited to uncertain and diverse environments where central actors are typically unable to 'foresee the local effects of [their] rules'.[59] The ambiguity, complexity or constant development of those diverse environments can even undermine rules which were thought to be effective.[60] Therefore, the increases in diversity and uncertainty contribute to the emergence of EG, but do not make it inevitable.

Second, governments must not disagree on basic principles.[61] EG is unlikely to thrive '[w]hen there is substantial distributive conflict, penalty defaults are … [absent]', and the probable costs of substandard responses are high.[62] A penalty default is a sanction imposed by a central authority as a disincentive for the violation

52 For a discussion of the lessons learned from policy experiments in the context of Experimental Technology Incentives Program devised by the White House in the United States, see Gregory Tassey, 'Innovation in Innovation Policy Management: The Experimental Technology Incentives Program and the Policy Experiment' (2014) 41(4) *Science and Public Policy* 419, 422. See also Kivimaa et al (n 6) 18.

53 De Búrca, Keohane and Sabel, 'Global Experimentalist Governance' (n 4) 478.

54 van Asselt, Huitema and Jordan (n 17) 33.

55 Charles F Sabel and Jonathan Zeitlin, 'Experimentalist Governance' in David Levi-Faur (ed), *The Oxford Handbook of Governance* (Oxford University Press, 2012) 169, 170.

56 Ibid.

57 De Búrca, Keohane and Sabel, 'Global Experimentalist Governance' (n 4) 478.

58 Ibid 483.

59 Ibid.

60 Ibid.

61 Ibid 484.

62 Ibid.

of a regime's norms.[63] In summary, EG develops where there is a balance between too much and too little agreement.

Third, EG works best in a situation where key actors are eager to cooperate.[64] Therefore, cooperation amongst decision-makers is crucial. In other words, EG will not be effectual where veto powers are exercised to block consensus and to save established interests or to advance hidden agendas.[65] Considering the importance of cooperation, EG 'frequently operates … in the shadow of a "penalty default" that induces appreciation of the relative benefits of joint efforts by sanctioning non-co-operation'.[66]A well-documented example of penalty defaults can be found in international trade where they are used to bring environmentally-oriented collaboration.[67] The threat of penalty defaults is significant in global climate governance where securing multi-actor cooperation is challenging due to diverse political and economic interests.

Finally, the participation of non-State actors (eg NGOs, business groups, civil society organisations, the scientific community, international organisations, and collaborative groupings) is a must for successful EG regimes.[68] Non-State actors can play a crucial role as agenda-setters, expert advisers, implementation partners, lobbyists and enforcers in an environmental agreement. Peter Spiro states that non-State actors can act in the 'before' (setting the agenda and events), 'during' (taking part in negotiations), and 'after' (monitoring, review and implementation) stages.[69] In the *Montreal Protocol on Substances That Deplete the Ozone Layer* ('*Montreal Protocol*'),[70] NGOs played a critical role in raising public awareness of ozone depleting substances, and put pressure on governments for a regulatory response. Eventually,

63 Robert O Keohane and David G Victor, 'After the Failure of Top-Down Mandates: The Role of Experimental Governance in Climate Change Policy' in Scott Barrett, Carlo Carraro and Jaime de Melo (eds), *Towards a Workable and Effective Climate Regime* (CEPR Press, 2015) 201, 207.

64 De Búrca, Keohane and Sabel, 'Global Experimentalist Governance' (n 4) 484. See also ibid.

65 De Búrca, Keohane and Sabel, 'Global Experimentalist Governance' (n 4) 484.

66 Ibid.

67 See: Richard W Parker, 'The Use and Abuse of Trade Leverage To Protect the Global Commons: What We Can Learn from the Tuna-Dolphin Conflict' (1999) 12(1) *Georgetown International Environmental Law Review* 1, 112–22. See also Muhammad Luqman et al, 'Rewards and Penalties in an Evolutionary Game Theoretic Model of International Environmental Agreements' (2022) 35(1) *Economic Research-Ekonomska Istraživanja* 602, 605.

68 De Búrca, Keohane and Sabel, 'Global Experimentalist Governance' (n 4) 484.

69 Peter J Spiro, 'Non-Governmental Organizations and Civil Society' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2007) 771, 774.

70 *Montreal Protocol on Substances That Deplete the Ozone Layer*, opened for signature 16 September 1987, 1522 UNTS 28 (entered into force 1 January 1989) ('*Montreal Protocol*').

firms became proponents of reform and they, as central participants in the sectoral working group, proposed alternatives to ozone depleting substances.[71] The success of the *Montreal Protocol* suggests that EG processes can effectively be operated under a wide range of institutional and political background conditions in solving global environmental problems.[72]

III Analysis of Relevant Provisions of the *Paris Agreement* through the Four 'Crucial Features' of EG

Climate change has always been a viable candidate for the application of EG having been marked by two intertwined sets of characteristics: (1) strategic uncertainty; and (2) polyarchic distribution of power. In the climate regime, uncertainty stems from the 'fragmentation of power' in the international system and the 'absence of a hegemon to impose order on actors' with varying interests.[73] Additionally, there is 'uncertainty about the feasibility of achieving policy outcomes'.[74] As a result, any given country is unable to identify what regulatory, technological, and behavioural commitments will be most effective.

At the time of bargaining, if the actors do not know which commitments can be fulfilled, bargaining among actors will be complex, and '[r]isk-averse players will prefer deadlock to codifying ambitions that may prove too costly or simply unattainable'.[75] In a situation like this, integrated, purposeful and comprehensive efforts to coordinate key players — that is the top-down approach of global coordination — is ill-suited. The top-down approach works best only if the key actors know, *ex ante*, their interests and capabilities, and 'where uncertainty is low — prior knowledge of means, ends, and preferences is reasonably complete — and bargaining costs are correspondingly low'.[76]

Regrettably, over the last 25 years, analysts and diplomats have adopted a top-down strategy of legally binding agreements to tackle the climate change problem.[77] This strategy treats the *United Nations Framework Convention on Climate Change*

71 Dave Toke, 'Epistemic Communities and Environmental Groups' (1999) 19(2) *Politics* 97, 99–102.

72 'David Victor: "An Experimentalist Approach to Governing Global Climate Change"', *Colloquium* (Ostrom Workshop, Indiana University, 16 October 2017) <https://www.youtube.com/watch?v=CiRyDQjDfiU>.

73 Sabel and Victor, 'Governing Global Problems' (n 37) 18.

74 Ibid.

75 Ibid.

76 Charles F Sabel and David G Victor, 'Making the Paris Process More Effective: A New Approach to Policy Coordination on Global Climate Change' (Policy Analysis Brief, The Stanley Foundation, February 2016) 3 <https://stanleycenter.org/publications/pab/Sabel-VictorPAB216.pdf> ('Making the Paris Process More Effective').

77 Ibid.

('*UNFCCC*')[78] as the 'exclusive' venue for diplomacy.[79] In 1994, the *UNFCCC* entered into force with the aim of 'stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system'.[80] In the absence of any precise solution and strategies for implementation in the *UNFCCC*, negotiations have continued to strengthen international action, resulting in the *Kyoto Protocol*[81] in 1997.[82] The *Kyoto Protocol* imposed legally binding obligations on Annex I countries to meet set emission reduction targets — greenhouse gas ('GHG') emission reduction by at least 5% below their 1990 levels between the period 2008 and 2012.[83] The timetables and country-specific targets of the *Kyoto Protocol* were multilaterally negotiated and a result of political bargaining.[84] The failure of the top-down approach of the *Kyoto Protocol* became conspicuous in 2005 when further commitments and targets for the subsequent period had to be negotiated.[85]

With the adoption of the *Paris Agreement*, analysts and diplomats officially moved away from integrated, top-down bargaining strategies followed under the *Kyoto Protocol*, and captured a hybrid approach that combines a top-down and bottom-up process.[86] The components of the *Paris Agreement*'s accountability framework have been described above as: (1) the NDCs; (2) the transparency framework; (3) the global stocktake; and (4) the implementation and compliance mechanism.[87] The NDCs are bottom-up in substance whereas the provisions relating to transparency, stocktake and compliance reflect top-down oversight elements.[88] Now it should be of interest to see the extent to which this governance architecture of the *Paris Agreement* features the elements of EG.

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78 *United Nations Framework Convention on Climate Change*, opened for signature 20 June 1992, 1771 UNTS 107 (entered into force 21 March 1994) ('*UNFCCC*').

79 Sabel and Victor, 'Making the Paris Process More Effective' (n 76) 3.

80 *UNFCCC* (n 78) art 2.

81 *Kyoto Protocol* (n 9).

82 Georgia Piggot et al, 'Swimming Upstream: Addressing Fossil Fuel Supply under the UNFCCC' (2018) 18(9) *Climate Policy* 1189, 1190.

83 *Kyoto Protocol* (n 9) art 3.1; Nikhil R Ullal, 'A Successor for the Kyoto Protocol: Challenges and Options' (2013) 17(17) *New Zealand Journal of Environmental Law* 81, 91.

84 Annalisa Savaresi, 'The Paris Agreement: Reflections on an International Law Odyssey' (Conference Paper, ESIL Annual Conference, 8–10 September 2016) 7.

85 Sharaban Tahura Zaman, 'The "Bottom-up Pledge and Review" Approach of Nationally Determined Contributions (NDCs) in the Paris Agreement: A Historical Breakthrough or a Setback in New Climate Governance' (2018) 5(2) *IALS Student Law Review* 3, 5.

86 See Bodansky and Rajamani, 'The Evolution and Governance Architecture' (n 8) 29.

87 See Banda (n 11) 334–5.

88 Zaman (n 85) 8.

A *The NDCs, Open-Ended Framework Goals with Metrics and Decentralised Actions*

The *Paris Agreement* sets a global temperature goal of '[h]olding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C'.[89] To reach these objectives, parties further agreed to 'reach global peaking of greenhouse gas emissions as soon as possible' in order to achieve a climate neutral world by the second half of this century.[90] To realise the goals and to build a new climate agreement, the parties have agreed to put forward their contributions to address climate change in the form of NDCs.[91] Parties' NDCs may embody adaptation actions and support, but mitigation NDCs are expected to play a significant role.[92]

Examining the *Paris Agreement* goal and NDCs through the lens of EG reveals that the objectives of the *Paris Agreement* and the provisions relating to NDCs embody the first two essential features of EG theory. Put simply, the first element of EG is the establishment of open-ended framework goals with metrics to measure progress and overall achievement.[93] For EG to be functional, there must be a 'thin consensus' among actors regarding a problem and the need to address it through specified goals and associated metrics.[94] 'Thin consensus' implies that a comprehensive plan of action may not be appropriate to address the problem. Importantly, 'thin consensus' also entails that there must not exist any sharp disagreement over fundamentals issues (ie that a specific problem exists, and it is urgent).[95]

From this perspective, the core objective of the *Paris Agreement* — '[h]olding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels'[96] — and the inclusion of the goal to achieve net zero carbon

89 *Paris Agreement* (n 7) art 2.1(a).

90 Ibid art 4.1.

91 Xunzhang Pan et al, 'Exploring Fair and Ambitious Mitigation Contributions under the Paris Agreement Goals' (2017) 74(1) *Environmental Science and Policy* 49, 49. See ibid arts 4.2–3.

92 *Paris Agreement* (n 7) art 4.7. A distinctive feature of the *Paris Agreement* is an expectation of individual and collective progression in relation to mitigation. Article 3 of the *Paris Agreement* establishes an overarching expectation that '[t]he efforts of all Parties will represent a progression over time'. A complementary expectation is enshrined in art 4.3 which says that each party's successive NDC will 'reflect its highest possible ambition' and represent a progression beyond the existing one. Thus, the party's existing NDCs are a self-referential baseline for the reference of future NDCs.

93 See Part II(B) above.

94 Armeni (n 5) 880–1.

95 De Búrca, Keohane and Sabel, 'Global Experimentalist Governance' (n 4) 484.

96 *Paris Agreement* (n 7) art 2.1(a).

emissions in the second half of this century[97] — can be cited as a manifestation of 'the presence of a thin (or even "medium thick") consensus among nation states'.[98] Over time, through intergovernmental bargaining as well as scientific insights, the objective has taken the form of a long-term temperature goal such as the gradual embrace of the 2°C aim. For example, the 'ultimate objective' of the *UNFCCC* is to 'prevent dangerous anthropogenic interference with the climate system'.[99] This objective constituted the framework goal of climate governance. The Intergovernmental Panel on Climate Change ('IPCC') First Assessment Report from 1990[100] played a vital role in framing the goal.[101]

The issue of metrics is associated with the goals of governing, but metrics do not define goals and policy.[102] In respect of climate change, a metric is a climate parameter that measures effects: for example, radiative forcing and temperature response.[103] The key metric used for climate governance is a tonne of carbon dioxide emissions, known as carbon dioxide equivalent ('CO_2-eq').[104] The modalities, procedures and guidelines ('MPGs') for the transparency framework under art 13 of the *Paris Agreement*[105] provide two ways for parties to report aggregate emissions and removals of GHGs expressed in CO_2-eq: (1) use of the 100-year time-horizon global warming potential values from the IPCC Fifth Assessment Report[106]; or (2) the 100-year time-horizon potential values from a subsequent IPCC assessment report as agreed upon by the Conference of the Parties ('COP') serving as the meeting of the parties to the *Paris Agreement*.[107] Additionally, parties may use other metrics

97 Ibid art 4.1.

98 van Asselt, Huitema and Jordan (n 17) 35.

99 *UNFCCC* (n 78) art 2.

100 See Intergovernmental Panel on Climate Change, *Climate Change: The IPCC 1990 and 1992 Assessments* (Report, June 1992).

101 van Asselt, Huitema and Jordan (n 17) 34.

102 Gunnar Myhre et al, 'Anthropogenic and Natural Radiative Forcing' in Thomas Stocker et al (eds), *Climate Change 2013: The Physical Science Basis* (Cambridge University Press, 2013) 659, 710.

103 Ibid.

104 Ibid.

105 United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties Serving as the Meeting of the Parties to the Paris Agreement on the Third Part of Its First Session, Held in Katowice from 2 to 15 December 2018*, UNFCCC Dec 18/CMA.1, UN Doc FCCC/PA/CMA/2018/3/Add.2 (19 March 2019).

106 See International Panel on Climate Change, *Climate Change 2014: Synthesis Report* (Report, 2015).

107 United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties Serving as the Meeting of the Parties to the Paris Agreement on the Third Part of Its First Session, Held in Katowice from 2 to 15 December 2018*, UNFCCC Dec 18/CMA.1, UN Doc FCCC/PA/CMA/2018/3/Add.2 (19 March 2019) annex para 37.

such as the Global Temperature Potential 'to report supplemental information on aggregate emissions and removals of GHGs, expressed in CO_2 eq'.[108]

The second element of EG is decentralised actions allowing lower-level units such as cities, civil-society groups, research organisations, businesses, and sub-national authorities, a significant discretion to give effect to the commitments undertaken by States. The *Paris Agreement* has tried to ensure effective cooperation by decomposition of the grand problem of climate change into smaller units. To that end, the negotiators have shifted away from the top-down regulatory approach of the *Kyoto Protocol* and focused on a decentralised, bottom-up process of voluntary pledges, or NDCs. By embracing a bottom-up approach, the agreement and COP decision not only encourage governments but also make a solid foundation to integrate non-State actors into the treaty-based climate regime so that all stakeholders can contribute to reaching ambitious climate goals.[109] For example, the *Paris Agreement* has emphasised the role of non-State actors in achieving the 1.5°C global warming target. The preamble of the *Paris Agreement* recognises 'the importance of the engagements of all levels of government and various actors, in accordance with respective national legislations of Parties, in addressing climate change'.[110] The decisions adopted in the Paris COP appreciate the efforts of party stakeholders including civil society, the private sector, and financial institutions to scale up their climate actions, and encourages the registration of those actions in the Non-State Actor Zone for Climate Action ('NAZCA') platform.[111] The importance of non-State actors was initially underlined at the Durban COP in 2011.[112] In 2014, the NAZCA platform, a central tool for the Lima-Paris Action Agenda, was launched with a view of bringing together the 'commitments to action by companies, cities, sub-national regions, investors and civil society organizations'.[113] As of August 2022, 11,355 cities, 270 sub-national regions, 12,957 companies, 1,529 investors, and

108 Ibid.

109 Charlotte Streck, 'Filling in for Governments? The Role of the Private Actors in the International Climate Regime' (2020) 17(1) *Journal for European Environmental and Planning Law* 5, 7.

110 *Paris Agreement* (n 7) Preamble para 15.

111 Ibid; United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on Its Twenty-First Session*, *Held in Paris from 30 November to 13 December 2015,* UNFCCC Dec 1/CP.21, UN Doc FCCC/CP/2015/10/Add.1 (29 January 2016) paras 118, 135. For an overview of the non-State actor zone for climate action, see 'Global Climate Action Portal', *Global Climate Action NAZCA* (Web Page) <http://climateaction.unfccc.int>.

112 United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on Its Seventeenth Session, Held in Durban from 28 November to 11 December 2011*, UN Doc FCCC/CP/2011/9 (15 March 2012).

113 Paolo Bertoldi et al, 'Towards a Global Comprehensive and Transparent Framework for Cities and Local Governments Enabling an Effective Contribution to the Paris Climate Agreement' (2018) 30(1) *Current Opinion in Environmental Sustainability* 67, 67.

3,349 organisations were registered.[114] Furthermore, in recent years, transnational initiatives such as the GHG Protocol,[115] C40 Cities Network,[116] and the Verified Carbon Standard[117] have also increased.[118] Though the States are still in the driver's seat, these various initiatives significantly expand the universe of experiments in global climate governance,[119] manifesting that climate governance is no longer in the exclusive domain of national governments.[120] The bottom-up architecture of the *Paris Agreement* has enabled an increasing number of private initiatives and networks to fulfil leadership roles.[121]

B *The Enhanced Transparency Initiative*

To assess parties' contribution and their actual performance, transparency in the form of reporting and review is crucial. The 1992 *UNFCCC* requires Annex I parties to submit annual GHG inventories and national communications every four years, both of which are subject to 'in-depth review'.[122] Non-Annex I parties may also submit these reports with more flexibility in reporting format and method, but they are not subject to review.[123] The 2010 Cancun COP decision[124] introduced a new reporting and review process. The Cancun COP decision specified that Annex I parties are required to prepare new biennial reports ('BRs'), either independently or with national communications.[125] These reports are subject to a process of

114 'Global Climate Action Portal', *Global Climate Action NAZCA* (Web Page) <https://climateaction.unfccc.int/>.

115 'About Us', *Greenhouse Gas Protocol* (Web Page) <https://ghgprotocol.org/about-us>.

116 'About C40', *C40 Cities* (Web Page) <https://www.c40.org/about-c40/>.

117 'Verified Carbon Standard', *Verra* (Web Page) <https://verra.org/project/vcs-program/>.

118 Katharina Michaelowa and Axel Michaelowa, 'Transnational Climate Governance Initiatives: Designed for Effective Climate Change Mitigation?' (2017) 43(1) *International Interactions* 129, 130.

119 Thomas Hale and Charles Roger, 'Orchestration and Transnational Climate Governance' (2014) 9(1) *Review of International Organizations* 59, 60.

120 Bertoldi et al (n 113) 67.

121 Streck (n 109) 7.

122 Romain Weikmans, Harro van Asselt and J Timmons Roberts, 'Transparency Requirements under the Paris Agreement and Their (Un)Likely Impact on Strengthening the Ambition of Nationally Determined Contributions (NDCs)' (2020) 20(4) *Climate Policy* 2021511, 516.

123 *UNFCCC* (n 78) art 4.1(g).

124 United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on Its Sixteenth Session, Held in Cancun from 29 November to 10 December 2010*, UNFCCC Dec 1/CP. 16, UN Doc FCCC/CP/2010/7/Add.1 (15 March 2011).

125 Ibid paras 40(a), 60(c). See also United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on Its Fifteenth Session, Held in Copenhagen from 7 December to 19 December 2009*, UNFCCC Dec 2/CP.15, UN Doc FCCC/CP/2009/11/Add.1 (30 March 2010) paras 4–5.

international assessment and review which combines a technical expert review and multilateral assessment.[126] The latter is a peer-to-peer process. The *Cancun* COP decision also specified new obligations and processes for developing countries who are required to submit biennial update reports that need to undergo an 'international consultation … and analysis'.[127] This analysis resembles the International Assessment and Review, however the latter process is to be non-confrontational, non-intrusive, and respectful of national sovereignty.

The transparency initiative introduced by the *Paris Agreement* in art 13 will supersede the *Cancun Agreements* transparency framework. The initiative applies to all parties but offers 'built-in flexibility' that takes into account parties' different capacities.[128] The initiative will lead to a reporting and review system through which parties are obliged to report on emission inventories, as well as their progress in implementing and achieving NDCs. Furthermore, the developed countries also have to report support provided to developing countries.[129]

Looking at the transparency initiative through the lens of EG discloses that it embodies the third element of EG that requires mechanisms for reporting and review. The *Paris Agreement* introduced a transparency initiative, applicable to all parties, designed to report and review parties' progress made in implementing and achieving NDCs, as well as to gather information on parties' GHG emissions, their adaptation actions, and the financial, technological and capacity-building support provided and received by individual parties in the context of climate change. The Katowice COP adopted a detailed set of MPGs to make this transparency framework operational.[130]

C *The Global Stocktake*

While the transparency initiative focuses on individual parties' progress towards their NDCs, the global stocktake is a mechanism to monitor collective performance

126 United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on Its Seventeenth Session, Held in Durban from 28 November to 11 December 2011*, UNFCCC Dec 2/CP.17, UN Doc FCCC/CP/2011/9 (15 March 2012) para 23. See also United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on Its Fifteenth Session, Held in Copenhagen from 7 December to 19 December 2009*, UNFCCC Dec 2/CP.15, UN Doc FCCC/CP/2009/11/Add.1 (30 March 2010).

127 United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on Its Sixteenth Session, Held in Cancun from 29 November to 10 December 2010*, UNFCCC Dec 1/CP. 16, UN Doc FCCC/CP/2010/7/Add.1 (15 March 2011) para 63.

128 *Paris Agreement* (n 7) arts 13.1–2.

129 Ibid art 11.4.

130 United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties Serving as the Meeting of the Parties to the Paris Agreement on the Third Part of Its First Session, Held in Katowice from 2 to 15 December 2018*, UNFCCC Dec 18/CMA.1, UN Doc FCCC/PA/CMA/2018/3/Add.2 (19 March 2019).

vis-à-vis the shared global goal. According to art 14 of the *Paris Agreement*, a 'global stocktake' is a mechanism to 'assess … collective progress' and is necessary to generate the level of required ambition towards the agreed collective goals.[131] The global stocktake is crucial to gauge whether States, as a whole, are contributing as much as they should. Article 14.1 stresses the 'comprehensive and facilitative' manner of the global stocktake.[132] The word 'comprehensive' reinforces the idea that the *Paris Agreement* addresses not only mitigation but also adaptation and support.[133] The word 'facilitative' indicates that the global stocktake should be a process that assists parties in enhancing their actions and support.[134] Previously, the *UNFCCC*, under which the *Paris Agreement* was negotiated, contained a provision that mandated such type of revision. Article 7.2(a) of the *UNFCCC* instructs the COP to '[p]eriodically examine the obligations of the Parties and the institutional arrangements under the Convention … [and] the experience gained in its implementation'.[135] In 2010, the parties to the *UNFCCC* decided to establish a new review process to periodically review: (1) the adequacy of the temperature goal in the light of the ultimate objective of the *UNFCCC*; and (2) the progress towards achieving the long-term global goal, including collective implementation of the commitments made under the *UNFCCC*.[136] This periodic review serves as precedent for the global stocktake. The first periodic review was conducted between 2013 and 2015.[137] The second periodic review was to be conducted between 2020 and 2022. The first stocktake will take place in 2023 and will be repeated every five years. The COP will consider the continuation of the periodic review at its 29th session in 2024, in the light of experiences from first and second periodic reviews as well as from the first global stocktake.

From the viewpoint of the fourth element of EG, the global stocktake under art 14 of the *Paris Agreement* offers an opportunity for periodical revision of parties' collective progress towards achieving their global climate change goals. Undoubtedly, the central challenge of the *Paris Agreement* is to generate the level of ambition required to reach collective goals.[138] The *Paris Agreement* adds a core element to the toolbox for enhancing ambition as well as for periodical revision of framework goals

131 *Paris Agreement* (n 7) art 14.1.

132 Ibid.

133 Ibid.

134 Ibid.

135 *UNFCCC* (n 78) art 7.2(a).

136 United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on Its Sixteenth Session, Held in Cancun from 29 November to 10 December 2010*, UNFCCC Dec 1/CP. 16, UN Doc FCCC/CP/2010/7/Add.1 (15 March 2011) para 138.

137 United Nations Framework Convention on Climate Change, *Report on the Structured Expert Dialogue on the 2013–2015 Review: Note by the Co-Facilitators of the Structured Expert Dialogue*, UN Doc FCCC/SB/2015/INF.1 (4 May 2015).

138 Jürgen Friedrich, 'Global Stocktake (Article 14)' in Daniel Klein et al, *The Paris Agreement on Climate Change: Analysis and Commentary* (Oxford University Press, 2017) 319, 320.

by establishing the global stocktake.[139] According to the decision adopted at the Katowice COP, the global stocktake process will be divided into three stages: (1) information collection; (2) technical assessment; and (3) consideration of outputs.[140] The yardstick for new action is the gap between action to date and the goals of the *Paris Agreement*. In this sense, the stocktake represents a procedural innovation which helps parties to understand how far they have advanced in achieving their goals, and 'realize what is still required collectively to reach them and be informed about possible options on how to enhance their actions both nationally and internationally and thereby hopefully be motivated to do more'.[141]

D *The Implementation and Compliance Mechanism*

With a view to preventing non-compliance, the *Paris Agreement* establishes a mechanism to facilitate implementation and promote compliance. To that end, art 15.2 of the *Paris Agreement* establishes an expert-based committee.[142] The committee shall be facilitative in nature and 'function in a manner that is transparent, non-adversarial and non-punitive'.[143] The committee is charged with paying 'particular attention to the respective national capabilities and circumstances of Parties'.[144]

Viewing the implementation and compliance mechanism through the lens of EG reveals that the *Paris Agreement* does not have a strong compliance mechanism as required by EG theory. Typically, the fear of penalty defaults is considered as a significant driving force for parties to engage in EG.[145] In the case of non-compliance, penalty defaults are perceived as sanctions.[146] True, the *Paris Agreement* does not allow parties to use legal sanctions such as trade measures in the case of non-participation or non-compliance.[147] However, there are other ways to materialise penalty defaults including through naming and shaming by environmental groups.[148] The *Paris Agreement* enables environmental campaign groups and civil society organisations to assess the commitments made by States. This scrutiny may happen

139 Ibid.

140 United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties Serving as the Meeting of the Parties to the Paris Agreement on the Third Part of Its First Session, Held in Katowice from 2 to 15 December 2018*, UNFCCC Dec 19/CMA.1, UN Doc FCCC/PA/CMA/2018/3/Add.2 (19 March 2019).

141 Friedrich (n 138) 320.

142 *Paris Agreement* (n 7) art 15.2.

143 Ibid.

144 Ibid.

145 See generally Cahill-Webb (n 9) 5–6.

146 Keohane and Victor (n 63) 207.

147 Ibid 202–3.

148 Cahill-Webb (n 9) 5.

in a domestic context.[149] It can also be exercised by non-State actors operating transnationally.[150] Some governments also expose themselves to more systematic scrutiny through courts and parliaments by incorporating international pledges in domestic legislation.[151] Furthermore, the five-yearly review sessions are a central tool for driving up States' ambition.[152] Robert Falkner rightly observed that instead of sanctions, the peer pressure among States and the formalised review process 'will create regular moments for "naming and shaming" strategies to be deployed against those countries that fall short of international expectations'.[153]

The foregoing analysis suggests that the 'pledge and review' approach of the *Paris Agreement* embodies essential features of EG. Typically, the drafters of an agreement do not tend to think about the suitability of a particular governance model when they embark on drafting a treaty. That is why drafters of the *Paris Agreement* did not seem to have had EG in mind. However, the embodiment of experimentation, iterative learning and responsiveness in the *Paris Agreement* are the hallmarks of EG. Importantly, it is useful to examine the relevant provisions of the *Paris Agreement* through the lens of EG. Lessons from EG could help transform the *Paris Agreement* into a more adaptive, proactive and effective governance framework. In Part IV below, the article identifies five major challenges that might prevent the proper generation of intelligible, comparable, and complete information. Those challenges can pose barriers in ensuring credible review processes and proper revision of goals and thereby hinder the *Paris Agreement's* effectiveness. This article suggests that the following concerns must be addressed if an EG arrangement can contribute to creating a process of learning and problem-solving. If these concerns are left unaddressed, the experimentalist character of *Paris Agreement* will remain underdeveloped and may skew its evolution in unproductive directions.

IV Implications of Applying Experimentalist Governance to the *Paris Agreement*

A *Inclusive Metrics?*

The first element of EG is the establishment of open-ended framework goals with metrics to measure the progress and overall achievement. As stated earlier, EG provides an effective atmosphere of learning from differences and revising stakeholders' practices and goals. This atmosphere of learning substantially requires evaluating and comparing domestic efforts to mitigate global climate change.[154]

149 Robert Falkner, 'The Paris Agreement and the New Logic of International Climate Politics' (2016) 92(5) *International Affairs* 1107, 1122.

150 Ibid.

151 Ibid.

152 Ibid 1121.

153 Ibid.

154 Joseph E Aldy and William A Pizer, 'Alternative Metrics for Comparing Domestic Climate Change Mitigation Efforts and Emerging International Climate Policy Architecture' (2016) 10(1) *Review of Environmental Economics and Policy* 1, 2.

The issue of metrics has a vital role to play in measuring and comparing effort among countries in the global climate governance.[155] An ideal metric should be comprehensive, measurable, less complex and universal.[156] Therefore, an effective metric should capture and reflect the entire effort and all climate related measures undertaken by a country in mitigating emissions.[157]

The CO_2-eq metric is used to compare the emissions from various GHGs on the basis of their global warming potential. However, the CO_2-eq metric used to consider the radiative effects[158] of emissions is not all-inclusive. As metrics are used for gauging the achievement and contribution of the central and local level units to climate change goals, it should be inclusive, in the sense that all types of developmental activities contributing to the upholding the intended goals should be evaluated and counted.[159] The existing climate regime uses one metric, namely the 100-year time-horizon global warming potential values expressed in CO_2-eq. However, there is controversy about the appropriateness of this metric. This CO_2-eq metric 'is a best guess estimate of the *concentration* of CO_2 required to achieve a specific level of radiative forcing' and suitable for climate change mitigation domain.[160] Radiative forcing is 'one of the most widely used metrics'.[161] It is used to show 'the net change in the energy balance of the Earth system due to some imposed perturbation'.[162] There are many other activities that are necessary for effective climate action, but they are not measurable in terms of climate change mitigation. For example, the outcome of capacity building, sharing best practices, adaptation and information sharing cannot be captured in term of emission reduction.[163] Similarly, regulations supporting renewable energy might represent significant effort to mitigate emissions but cannot be reflected in CO_2-eq. In such cases, energy price metrics or cost metrics can capture some of the effects of non-price regulations. Reductionists like David Frame criticize this metric, arguing that CO_2-related metrics could potentially distract or even undermine the achievement of other development goals.[164] Frame urges to use 'the global temperature potential' as a substitute method of evaluating emissions.[165] As no single metric is fully capable of capturing all types of mitigation

155 Ibid 4.

156 Ibid 4–5.

157 Ibid.

158 Radiative effects are the physical and chemical property changes of materials due to radiation.

159 van Asselt, Huitema and Jordan (n 17) 35.

160 David J Frame, 'The Problems of Markets: Science, Norms and the Commodification of Carbon' (2011) 177(2) *Geographical Journal* 138, 142 (emphasis in original).

161 Gunnar Myhre and Drew Shindell, 'Anthropogenic and Natural Radiative Forcing' in Thomas F Stocker et al (eds), *Climate Change 2013: The Physical Science Basis* (Cambridge University Press, 2013) 659, 664.

162 Ibid.

163 van Asselt, Huitema and Jordan (n 17) 35.

164 Frame (n 160) 142.

165 Ibid.

efforts across countries, researchers predict that a suite of metrics (which provides a richer characterisation of countries' efforts) or further metrics may be required to capture the diversity of national and local actions.[166]

B *A Common Format and Guidance?*

One of the key characteristics of EG is that it allows continuous feedback with outcomes provided from local contexts that are subject to peer review. Currently, parties enjoy wide discretion in formulating NDCs. The absence of a common format and guidance vis-à-vis type, timing and coverage of NDCs creates difficulties for experts to assess, review and compare the commitments made.[167] Variance and complexity among NDCs make it difficult to compare and review what pledges really mean in emission and temperature terms.[168]

For example, of the 147 NDCs, about 80% of parties (such as New Zealand and India) submitted targets upon conditions such as access to international finance and cooperation.[169] While some NDCs reflect economy-wide GHG mitigation targets, few display a 'deviation from business as usual', and few consider emissions intensity targets.[170] Significant differences between NDCs are also found in the scope and coverage of GHGs. Most countries include CO_2 while many include methane ('CH_4'); some countries exclude CH_4 and nitrous oxide ('N_2O'), though these gases constitute a notable portion of aggregate national emissions. The choice of base year also varies. For example, Russia aims to reduce emissions by 25% compared to 1990, while Australia committed to a '26%–28% reduction relative to 2005'.[171] If we compare both to 2015 emissions, we will see a 9% emission drop in the case of Australia and 13% increase in the case of Russia.[172] Therefore, each parties' level

166 Aldy and Pizer (n 154) 5.

167 Lewis C King and Jeroen CJM van den Bergh, 'Normalisation of Paris Agreement NDCs to Enhance Transparency and Ambition' (2019) 14(8) *Environmental Research Letters* 084008:1–14, 2–3.

168 Ibid 7.

169 Ibid 2.

170 Of the 169 NDCs submitted through 4 April 2016, about one third are found to have absolute economy-wide GHG mitigation targets, 45% reflect a deviation from business as usual, 20% display policies and actions, and 4% represent emissions intensity targets. See Lavanya Rajamani and Daniel Bodansky, 'The Paris Rulebook: Balancing International Prescriptiveness with National Discretion' (2019) 68(4) *International and Comparative Law Quarterly* 1023, 1028 ('The Paris Rulebook').

171 King and van den Bergh (n 167) 5. See also: Commonwealth, *Australia's Intended Nationally Determined Contribution to a New Climate Change Agreement* (August 2015) <https://www4.unfccc.int/sites/submissions/INDC/Published%20Documents/Australia/1/Australias%20Intended%20Nationally%20Determined%20Contribution%20to%20a%20new%20Climate%20Change%20Agreement%20-%20August%202015.pdf>; Commonwealth, *Australia's Nationally Determined Contribution: Communication 2022* (2022) 3.

172 King and van den Bergh (n 167) 5.

of ambition is not necessarily displayed by their NDCs. These variations in individual pledges make it difficult to aggregate the efforts of countries and compare them to each other. The *Paris Agreement* rules seek to strengthen informational requirements by including annex I to facilitate clarity, transparency and understanding of NDCs as required by the *Paris Agreement*.[173] Annex I requires that parties need to provide quantifiable information on the reference years, periods for implementation, scope and coverage and planning process etc.[174] However, although annex I has brought greater specificity of the informational requirements in submitting NDCs, it also allows further discretion by stating that 'Parties shall provide the information necessary for clarity, transparency and understanding contained in annex I *as applicable* to their nationally determined contributions'.[175] This 'as applicable' qualification allows parties to decide their informational requirements through their choice of NDC.[176] Without addressing the existing variations relating to types of information that must accompany an NDC — correct evaluation of those NDCs will be unlikely. Experimentation without proper evaluation will hamper the learning process that is one of the main themes of EG.

C *Effective Decentralised Action?*

The third concern is that though a defining element of EG are decentralised actions allowing lower-level units — either individuals, cities, NGOs, or nation-States — wide discretion in the implementation of the framework goals, the *Paris Agreement* does not explicitly allow non-State actors a defined role in the process of its implementation. The *Paris Agreement* also allows the autonomy of non-State actors to give effect to the pledges made by the States. By this time, enough of the MPGs of the enhanced transparency framework have been adopted that it is difficult to envision where and how a non-State actor would be allowed to participate in the three most important processes of the *Paris Agreement*, namely: (1) the transparency framework to review mitigation and adaptation action; (2) the global stocktake; and (3) the mechanism to facilitate implementation and promote compliance. For example, the review process under the transparency framework of the *Paris Agreement* does not specify a role for non-State actors. Technical expert review teams conduct reviews of national reports submitted by parties. As the technical experts shall be nominated to the *UNFCCC* roster of experts by parties, they do not have an interest to consider the ideas or concerns from non-State actors.[177]

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173 Rajamani and Bodansky, 'The Paris Rulebook' (n 170) 1029–30.

174 United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties Serving as the Meeting of the Parties to the Paris Agreement on the Third Part of Its First Session, Held in Katowice from 2 to 15 December 2018*, UNFCCC Dec 4/CMA.1, UN Doc FCCC/PA/CMA/2018/3/Add.1 (19 March 2019) annex I.

175 Ibid annex I para 7 (emphasis added).

176 Rajamani and Bodansky, 'The Paris Rulebook' (n 170) 1030.

177 Eric Dannenmaier, 'The Role of Non-State Actors in Climate Compliance' in Jutta Brunnée, Meinhard Doelle and Lavanya Rajamani (eds), *Promoting Compliance in an Evolving Climate Regime* (Cambridge University Press, 2012) 149, 162.

As to the global stocktake, the Katowice COP decision suggests that the global stocktake will be conducted with the participation of non-party stakeholders.[178] The Katowice COP also decided the sources of input for the global stocktake, including 'the overall effect of nationally determined contributions communicated by Parties',[179] '[t]he state of adaptation efforts, support, experience and priorities',[180] the latest reports of the IPCC,[181] and the reports of the *UNFCCC* subsidiary bodies.[182] Non-State actors could make a valuable contribution by offering relevant inputs into the global stocktake, in at least two ways.[183] First, scientific insights can be incorporated through the IPCC process.[184] Second, the decision adopting the *Paris Agreement* states that the inputs mentioned are not exhaustive.[185] This decision implies that other inputs from non-State actors might be received. For example, the annual Emissions Gap Reports[186] prepared by the United Nations Environment Programme is one of the possible inputs that may be considered.[187]

With respect to the implementation and compliance mechanism, art 15 of the *Paris Agreement* creates 'a committee that shall be expert-based and facilitative in nature and function in a manner that is transparent'.[188] Non-State actors can potentially play a role in this mechanism.[189] However, the phrases 'facilitative in nature' and 'non-adversarial and non-punitive' signify that non-State actors cannot play an adversarial role such as triggering a compliance process by filing a complaint or challenging any information submitted by the parties.[190] Nonetheless, there exist possibilities to consider inputs from non-State actors. The compliance mechanism

178 United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties Serving as the Meeting of the Parties to the Paris Agreement on the Third Part of Its First Session, Held in Katowice from 2 to 15 December 2018*, UNFCCC Dec 19/CMA.1, UN Doc FCCC/PA/CMA/2018/3/Add.2 (19 March 2019).

179 Ibid para 23(c).

180 Ibid para 36(c).

181 Ibid para 37(b).

182 Ibid para 37(c).

183 Harro van Asselt, 'The Role of Non-State Actors in Reviewing Ambition, Implementation, and Compliance under the Paris Agreement' (2016) 6(1–2) *Climate Law* 91, 99.

184 Ibid.

185 Ibid. See United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on Its Twenty-First Session*, *Held in Paris from 30 November to 13 December 2015*, UNFCCC Dec 1/CP.21, UN Doc FCCC/CP/2015/10/Add.1 (29 January 2016).

186 See, eg, United Nations Environment Programme, *The Heat Is On: A World of Climate Promises Not yet Delivered* (Emissions Gap Report, 2021).

187 van Asselt (n 183) 97.

188 *Paris Agreement* (n 7) art 15.2.

189 Harro van Asselt and Thomas Hale, *How Non-State Actors Can Contribute to More Effective Review Processes under the Paris Agreement* (Policy Brief, Stockholm Environment Institute, 2016) 3.

190 Ibid.

under the *Kyoto Protocol* allowed the submission of relevant data from international and non-governmental organisations.[191] The *Paris Agreement* could follow the *Kyoto Protocol* approach. Apart from such measures, non-State actors could also help parties enhance capacity building and technical knowledge.[192]

On the other hand, the *Kyoto Protocol* included an effective measure to address cases of non-compliance by establishing an enforcement branch under art 18 of the *Kyoto Protocol* to impose sanctions.[193] The *Paris Agreement* needs to establish a robust review mechanism. Furthermore, at present, the role of non-State actors in the formal review process is also extremely limited as the role for non-State actors is not specified in the *Paris Agreement*. Therefore, like the reporting and reviewing of the *UNFCCC* and *Kyoto Protocol*, non-State actors are not allowed to 'file complaints, initiate investigations, challenge compliance data they believe to be incomplete or inaccurate, or request compliance documentation beyond pro forma submissions'.[194] In this respect, the *Paris Agreement* could draw inspiration from the *Aarhus Convention*[195] that allows non-State actors to trigger applicable compliance procedures.[196] Furthermore, NGOs could also play a vital role in the review mechanism. Many NGOs are now involved in monitoring key areas of climate policy such as Forest Law Enforcement, Governance and Trade initiatives and Reducing Emissions from Deforestation and Forest Degradation on land use and forestry.[197]

D *The Prospect of Penalty Default*

Though penalty defaults are characteristics of traditional modes of governance, EG frequently operates 'in the shadow of penalty defaults, as a threat of less favourable default rules'.[198] Penalty defaults are applied when parties refuse to sign up to or cooperate with a proposed governance system.[199] Examples of penalty defaults such as trade sanctions or trade restrictions are seen in the global governance context.[200] For example, under the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* ('*CITES*'),[201] a persistent failure to provide annual

191 Ibid.

192 Ibid.

193 *Kyoto Protocol* (n 9) art 18.

194 See generally Dannenmaier (n 177) 159–60.

195 *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, opened for signature 25 June 1998, 2161 UNTS 447 (entered into force 30 October 2001) ('*Aarhus Convention*').

196 van Asselt (n 183) 104.

197 Sabel and Victor, 'Governing Global Problems' (n 37) 24.

198 Armeni (n 5) 901.

199 Ibid.

200 Ibid.

201 *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) ('*CITES*').

reports on parties' *CITES*-related trade for three consecutive years would justify the suspension of all trade in all *CITES* species.[202] However, penalty default rules are absent or at least less obvious in the *Paris Agreement*. Instead, the *Paris Agreement* relies on 'naming and shaming' strategies and peer pressure between States to encourage expected collaborative participation and performance. Time and again, the world witnessed that major emitters, for example, the United States and Canada, were willing to accept a loss in international reputation when domestic economic interests had been at stake.[203] Thus, more pronounced penalty defaults will be necessary. Border tariff adjustments and trade sanctions can be considered as they are important incentives to encourage deeper cooperation and discourage free riding. The experiment can be conducted to identify practical ways to use trade measures. Margaret Young has shown how existing trade law would enable the use of trade measures.[204] Charles Sabel and David Victor said that

> a central challenge in developing and implementing practical trade measures will be to take advantage of the ability to sanction in small groups, which can create an incentive for climate clubs to deepen their efforts, while also tempering the risks of unilateralism.[205]

In this respect, the experience of the *Montreal Protocol* can be of use.[206]

One lesson from the *Montreal Protocol* experience is the need to link trade measures to practical technical assistance according to the principle of common but differentiated responsibilities — to offer carrots to countries that want to cooperate and stick to those that refuse.[207]

At the same time, future pledges of action should be made stronger, and a system of imposing cost can be considered on those that do not make equivalent or significant efforts at abatement. In this respect, the *Paris Agreement* allows too much leeway to the parties in tailoring their ambitions. Such latitude can potentially challenge the implementation of the aim and objectives of the *Paris Agreement.* For example, the core mechanism for ratcheting reads: 'Each Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition'.[208] The legal wording in this art is imprecise. The use of 'will' instead of 'shall' indicates

202 See Rosalind Reeve, 'Wildlife Trade, Sanctions and Compliance: Lessons from the CITES Regime' (2006) 82(5) *International Affairs* 881, 887.

203 Falkner (n 149) 1125.

204 Margaret A Young, 'Trade Measures To Address Environmental Concerns in Faraway Places: Jurisdictional Issues' (2014) 23(3) *Review of European Comparative and International Environmental Law* 302, 303, 316.

205 Sabel and Victor, 'Governing Global Problems' (n 37) 24.

206 *Montreal Protocol* (n 70).

207 Sabel and Victor, 'Governing Global Problems' (n 37) 24.

208 *Paris Agreement* (n 7) art 4.3.

that ratchet-up mechanism is an expectation rather than an obligation. Again, the word 'progression' can include any trivial adjustment that might not influence the temperature goal at all. Luke Kemp gives an example in this context,[209] where previous the Australian pledge to reduce emissions to 26–8% below 2005 levels by 2030 has now been updated to 43% by 2030.[210] Therefore, a progression on this target could be 29–30% by 2035. According to Kemp, it would not be a progression in terms of the rate of emissions reductions but would be an increase in absolute terms.[211] In order to constrain States' behaviour, a stronger system of pledging should be developed.

V Conclusion

The important insight of EG theory is that it allows actors facing uncertainty to jointly explore potential and practical solutions to reach their overarching goals. Therefore, though developed in other settings, EG is valuable to climate change governance — which inherently combines uncertainty regarding policy formulation with administrative and political challenges. EG is seen as emerging in climate change governance. Consequently, EG may not provide an immediate cure to the climate change problem, but it provides a new way of extending cooperation among actors. Essentially, the features of EG have contributed to making climate governance flexible, as goals are adjusted in light of evidence and experiences. Stakeholders, not bound by complex regulations, can now adapt and implement self-regulation to uphold climate change goals. However, the mutual monitoring, reporting and review, and evaluation of collective goals establish accountability.[212] Viewing the key provisions of the *Paris Agreement* through the lens of EG provides a valuable insight into the governance structure of the *Paris Agreement* and its limitations and effectiveness.

This article has identified four major limitations of the 'pledge and review' approach to the *Paris Agreement*. Firstly, the CO_2-eq metric, which is used to assess how well central and local level units are doing in achieving climate change goals, is not inclusive in the sense that all forms of developmental activities that support the intended goals cannot be assessed and quantified by this metric. For instance, it is impossible to measure the results of capacity building, sharing best practices, adaptation, and information sharing in terms of emission reduction. Secondly, the lack of a standard framework and guidelines regarding the nature, timing, and scope

209 Luke Kemp, 'A Systems Critique of the 2015 Paris Agreement on Climate' in Moazzem Hossain, Robert Hales and Tapan Sarker (eds), *Pathways to a Sustainable Economy: Bridging the Gap between Paris Climate Change Commitments and Net Zero Emissions* (Springer, 2018) 25, 28.

210 Commonwealth, *Australia's Nationally Determined Contribution: Communication 2022* (2022) 3.

211 Kemp (n 209) 28.

212 De Búrca, Keohane and Sabel, 'Global Experimentalist Governance' (n 4) 484; Armeni (n 5) 882, 903.

of NDCs makes it challenging for specialists to evaluate, scrutinise, and contrast the pledges made. It is challenging to evaluate and analyse what promises actually signify in terms of emissions and temperature due to the diversity and complexity of NDCs. Thirdly, in the context of its implementation, the *Paris Agreement* does not expressly grant non-State actors a specific role. It is now difficult to envision where and how a non-State actor would be permitted to take part in the three most crucial processes of the *Paris Agreement*, namely: (1) the transparency framework to review mitigation and adaptation action; (2) the global stocktake; and (3) the mechanism to facilitate implementation and promote compliance. Finally, the *Paris Agreement* uses 'naming and shaming' strategies as a penalty for noncompliance, which are a relatively weak type of sanction and might not work for the climate change regime.

By employing EG theory, this article has shown that the *Paris Agreement* has the potential to engage non-State actors in the transparency framework and review mechanisms for bringing greater policy coherence. At the same time, non-State actors have the potential to contribute to the framework goals through supplying scientific insights and through bottom-up incorporation of local level knowledge and practices. This article also shows that a re-examination of the metrics — used for gauging the achievement and contribution of the actors — is crucial. Finally, this article has suggested that besides ensuring strong penalty defaults, reforms might be required to ensure proper reporting standards and submission of comparable information by the parties to enable better aggregation and comparison of national efforts.

Sarah Sorial and Shireen Morris***

BALANCING IMPARTIALITY AND FREE SPEECH: AN EMPIRICAL STUDY OF 'ON THE GROUND' EXPERIENCES OF AUSTRALIAN PUBLIC SERVANTS

Abstract

In this article, we share findings of a study exploring whether and how public servants experience tensions between their duties of impartiality and restraint in public speech and their freedom to participate in political debate, whether and how they experience confusion or uncertainty with respect to the law governing their speech, as well as the impacts of such uncertainty, confusion and tension where it arises. We found that there was significant uncertainty about whether the Australian Public Service ('APS') guidelines do in fact allow public servants to make public comments, including on social media. This lack of clarity has profound professional and personal impacts identified by participants, but also was perceived to have broader and more troubling impacts for democracy and the APS itself.

I Introduction

There is a longstanding institutional tradition bolstered by legally binding requirements restraining public servants from participating in public debate in the interests of preserving the impartiality of the Australian Public Service ('APS'). At the same time, there is recognition in APS guidelines that public servants are also citizens, who, to some extent, are entitled to express their personal political views.[1] Section 10 of the *Public Service Act 1999* (Cth) ('*PS Act*') sets out the APS Values, which require the APS to be 'apolitical', providing the government with 'advice that is frank, honest, timely and based on the best available evidence'.[2] Section 13 sets out the APS Code of Conduct ('Code of Conduct'), which includes the following requirement:

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1 See, eg, 'Social Media: Guidance for Australian Public Service Employees and Agencies', *Australian Public Service Commission* (Web Page, 17 March 2021) <https://www.apsc.gov.au/working-aps/integrity/integrity-resources/social-media-guidance-australian-public-service-employees-and-agencies> ('2020 Guidance').

2 *Public Service Act 1999* (Cth) s 10(5) ('*PS Act*').

> **13 The APS Code of Conduct**
>
> …
>
> (11) An APS employee must at all times behave in a way that upholds:
>
> (a) the APS Values and APS Employment Principles; and
>
> (b) the integrity and good reputation of the employee's Agency and the APS.[3]

This appears to regulate public servants' speech and behaviour both within and outside working hours. However, the guidance published on the APS Commission's website in 2020 ('2020 Guidance') also acknowledges that 'employees have a right to participate in online society, just as they have rights as citizens of Australia to engage in community life. APS employees are entitled to private lives, personal views, and political opinions.'[4] But if public servants have a right to participate in online society and democratic life, how is this right exercised in practice within APS guidelines? What are public servants allowed to say publicly, and how do they participate given expectations of impartiality and restraint? These questions have become more urgent since the 2019 High Court decision in *Comcare v Banerji* ('*Banerji*'),[5] which has generated further ambiguity in relation to these issues.

In this article, we share findings of our study exploring whether and how public servants experience tensions between their duties of impartiality and restraint in public speech and their freedom to participate in political debate, whether and how they experience confusion or uncertainty with respect to the law governing their speech, as well as the impacts of such uncertainty, confusion, and tension where it arises. While there has been some scholarship addressing free speech and the public service,[6] there has been minimal research examining how this tension is *experienced* by public servants in their employment and private lives. This is an important question, relevant to not only understanding the issues public servants

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3 Ibid s 13(11).

4 2020 Guidance (n 1).

5 (2019) 267 CLR 373 ('*Banerji*').

6 See, eg: Kieran Pender, '"Silent Members of Society"? Public Servants and the Freedom of Political Communication in Australia' (2018) 29(4) *Public Law Review* 327 ('Silent Members'); Kieran Pender, '*Comcare v Banerji*: Public Servants and Political Communication' (2019) 41(1) *Sydney Law Review* 131 ('Public Servants and Political Communication'); Azadeh Dastyari, 'Vitalising International Human Rights Law as Legal Authority: Freedom of Expression Enjoyed by Australian Public Servants and Article 19 of the *International Covenant on Civil and Political Rights*' (2020) 43(3) *University of New South Wales Law Journal* 827; Katharine Gelber, 'The Precarious Protection of Free Speech in Australia: The *Banerji* Case' (2019) 25(3) *Australian Journal of Human Rights* 511; Don A Driscoll et al, 'Consequences of Information Suppression in Ecological and Conservation Sciences' (2020) 14(1) *Conservation Letters* e12757:1–13, 8–9.

face, but also ensuring that any reforms or recommendations are suitably tailored to address these 'on the ground' experiences and tensions. Our study seeks to address this gap. Among those we interviewed, we found there was significant uncertainty about whether and how the APS guidelines allow public servants to make public comments, including on social media. This lack of clarity had profound professional and personal impacts identified by participants, but also was perceived to have broader and more troubling impacts for democracy and the APS itself.

Through semi-structured interviews, the study explored public servants' understanding of the APS guidelines,[7] whether they know of their responsibilities when engaging with social media, and whether they experience tensions between their day-to-day roles and private lives. Specifically, the project addresses the following three research questions:

1. Is there widespread uncertainty within the public service about the speech rights of employees?

2. If so, what are the effects of this uncertainty? Does it create a 'chilling effect'[8] on speech?

3. Could the responsibilities of public servants be made clearer, especially in relation to the use of social media?

In Part II, we explain the project design and methodology. In Part III, we briefly examine the legal background and context which we suggest gives rise to legal uncertainty in relation to whether and how public servants can participate in public debate. In Part IV, we use systems theory to argue that public servants constitute an integral part of Australia's deliberative system and that their public contributions, including on social media, can improve the quality of public debate. Given fair participation in debate is crucial for citizens in a democracy, the legal certainty, comprehensibility and reasonableness of any free speech restrictions must be ensured. It is therefore essential that any confusion about whether and how public servants can contribute to public debate is resolved. In Part V, we analyse our findings with respect to six identified themes emerging from the interviews, namely questions around: (1) clarity; (2) tone; (3) balance; (4) impact; (5) seniority; and (6) mitigation. We find that most of the public servants interviewed experienced significant confusion and uncertainty regarding their ability to contribute to public debate. This uncertainty entails important professional, personal and democratic impacts, but we recommend broader inquiry to ascertain a fuller and more accurate understanding of public servants' experiences of free speech restrictions. We conclude

7 2020 Guidance (n 1).

8 The 'chilling effect' has its roots in First Amendment jurisprudence and refers to cases where speech regulations have the indirect effect of deterring people from exercising their free speech rights because they fear sanctions. See Frederick Schauer, 'Fear, Risk and the First Amendment: Unravelling the "Chilling Effect"' (1978) 58(5) *Boston University Law Review* 685.

in Part VI with a summary of our findings and tentative recommendations for how issues identified can be addressed.

II Project Design and Methodology

We adopted a qualitative methodology to answer the research questions because we were interested in gaining a deeper understanding of the experiences of the public servants affected by the APS guidelines. It was our contention that purely quantitative methods would not give us the data we would need to address the research questions; nor would they give a sense of the complexity of the issues and nuances involved. The purpose of qualitative research methods is to examine a social situation or interaction by enabling the researcher to enter the world of others, allowing for a more holistic rather than reductionist understanding.[9] Data was collected through semi-structured interviews with 23 public servants at different levels and stages of their career, including recent retirees and employees from different departments in the APS. Prior ethics approval was obtained from Macquarie University's Human Research Ethics Committee.[10] Each participant signed a consent form agreeing to be interviewed, and for the interview to be recorded and transcribed.

A purposeful sampling procedure was used to ensure we had representatives from different departments, a representation of junior and senior public servants (including supervisors responsible for enforcing APS guidelines) and a balance in terms of gender. Fifteen participants were initially recruited through the Community and Public Sector Union which advertised the study to its members. Public servants who wished to participate contacted the researchers directly to arrange a time for interview. A snowball sampling strategy (also referred to as network or chain sampling)[11] was also employed to ensure representation by non-union members and to ensure that more senior public servants were included in the study. The initial participants distributed information about the study to their wider networks, and we were contacted by an additional 8 participants through snowballing.

We interviewed 11 female and 12 male public servants. Nine of the participants were junior or mid-career, 11 were senior or held supervisory/executive roles, 2 were recently retired and had held executive roles, and 1 had recently left the public

9 Robert C Bogdan and Sari Knopp Biklen, *Qualitative Research for Education: An Introduction to Theories and Methods* (Pearson, 5th ed, 2007) 9–10.

10 Macquarie University Human Research Ethics Committee approval: application number 10334.

11 Mark S Handcock and Krista J Gile, 'Comment: On the Concept of Snowball Sampling' (2011) 41(1) *Sociological Methodology* 367, 367–70; Patrick Biernacki and Dan Waldorf, 'Snowball Sampling: Problems and Techniques of Chain Referral Sampling' (1981) 10(2) *Sociological Methods and Research* 141, 141–3; Chaim Noy, 'Sampling Knowledge: The Hermeneutics of Snowball Sampling in Qualitative Research' (2008) 11(4) *International Journal of Social Research Methodology* 327, 328.

service. The participants were from a range of different Commonwealth departments, some large and some smaller. We have not identified the specific departments because: (1) given the sensitive nature of the subject matter and the potential career consequences, the protection of participants' identities was of crucial importance and could not be guaranteed in the event of identification through disclosure of department, especially in the case of smaller departments; (2) the consent form signed by the participants and approved by the University Ethics Committee stated that departments and APS level of participants would not be identified; and (3) this was a necessary clause in order to mitigate the risk of revealing the participants' identity.

Interviews were selected as the primary method of data collection for this study because interviews can elicit 'thick' descriptions, and we were able to clarify statements and probe for additional information.[12] Although interviews have these benefits, there are also some limitations associated with interviewing, including the fact that interviews are not neutral tools of data gathering because they are coloured by the participants' experiences and perceptions.[13] This is a limitation to any interview based qualitative research, which we attempted to mitigate through a large sample size. We stopped interviewing at the point we reached 'saturation': where no additional data was being found despite our attempts to 'stretch' the diversity as far as possible.[14]

Interviews were conducted by phone and went for approximately 30–45 minutes, during which the participants were asked the following questions:

1. Do you have a clear understanding of the APS guidelines[15] in relation to participating in political debate?

2. The guidelines suggest that you can participate in public debate as long as the tone is appropriate. Do you know what that means?

3. Do you feel confident participating in public debate via other social media platforms if you want to? If not, do you feel this affects you in any way?

4. Do you think there is an appropriate balance between your responsibilities as a public servant to remain impartial, and your rights as a citizen?

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12 Catherine Marshall, Gretchen B Rossman and Gerardo L Blanco, *Designing Qualitative Research* (Sage Publications, 7th ed, 2022) 12.

13 For analysis of the advantages and limitations of interviewing, see Herbert J Rubin and Irene S Rubin, *Qualitative Interviewing: The Art of Hearing Data* (Sage Publications, 2nd ed, 2005).

14 Barney G Glaser and Anselm L Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Aldine, 1967) 61.

15 We were referring to the 2020 Guidance but did not specify this in our questioning: 2020 Guidance (n 1).

These questions allowed the participants to reflect at length, often prompting further questions. This meant that the experiences and reflections of the public servants largely informed what was discussed.

Interviews were then transcribed, and each researcher read all 23 transcripts. We met to discuss the broad themes that had emerged and then re-read the transcripts a second time with these themes in mind. At a second meeting, the researchers identified the following common terms and themes emerging from the data. These included: (1) clarity; (2) tone; (3) balance; (4) impact (5) seniority; and (6) mitigation. We then read the transcripts a third time and began a process of manual coding, where we cut and pasted relevant quotations from the transcripts under the main themes.

The coding process requires the researcher to fragment the interviews into separate categories. This data then needs to be synthesised by 'piecing these fragments together to reconstruct a holistic and integrated explanation'.[16] Our approach here was to examine and compare threads and patterns within each of the coded categories, then to compare the threads across the categories.[17] We then situated these findings within the broader literature, with a view to thinking about the broader implications of this research and making some tentative recommendations.[18]

Clarity refers to whether the APS guidelines were well understood, and whether public servants perceived them to be clear. Tone refers to whether public servants understood, and were able to implement, the appropriate tone in their public contributions. Balance refers to whether public servants thought the appropriate balance had been struck between their responsibilities as public servants to remain impartial, and their freedoms as ordinary citizens to contribute to public debate. This includes whether they felt they ought to be able to contribute to public debate in areas outside their department and portfolio. Impact refers to the kinds of impact the APS guidelines had on their professional and personal lives. It also encompasses whether the restrictions entailed broader democratic impacts. Seniority refers to whether APS level made a difference: were the contributions of more senior public servants subjected to greater scrutiny, and should they be? Finally, mitigation refers to the steps public servants took to mitigate any effects of their contributions to public debate and avoid risk of sanction.

III Background

A *The APS Guidelines*

The APS Values and Code of Conduct, when read together, seem to require APS employees to exhibit at all times (not just within work hours) a level of political

16 Linda Dale Bloomberg and Marie Volpe, *Completing Your Qualitative Dissertation: A Road Map from Beginning to End* (Sage Publications, 4th ed, 2019) 222.

17 Ibid.

18 Ibid.

impartiality, to protect the integrity and reputation of the APS. However, the degree of impartiality, and what it requires at all times, is unclear. Various guidelines have attempted to clarify expectations and balance concerns about free speech. For example, the 1979 *Guidelines on Official Conduct of Commonwealth Public Servants* recognised that public servants may participate in political life. The Guidelines explained that

> public servants should not be precluded from participating, as citizens in a democratic society, in the political life of the community. Indeed it would be inappropriate to deprive the political process of the talent, expertise and experience of certain individuals simply because they are employed in the public sector.[19]

However, the impact of social media has perhaps encouraged a stricter approach in recent decades. Updated guidance issued by the APS Commission in 2017 ('2017 Guidance') advised that even 'liking', reposting or sharing social media content, or selecting particular reaction icons (such as an 'angry face' reaction icon to signal disapproval), could breach employment expectations.[20] Despite the fact that maintaining impartiality should preclude public criticism of government as well as public praise,[21] the 2017 Guidance also confusingly stated that while '[c]riticising the work, or the administration, of your agency is almost always going to be seen as a breach' of the Code of Conduct, this 'doesn't stop you making a positive comment on social media about your agency'.[22]

The most recent guidance published on the APS Commission's website in 2020 backtracks from this position,[23] perhaps prompted by legal scholarship[24] and judicial comments in *Banerji*.[25] The 2020 Guidance clarifies that 'extreme pro-Government posts raise the same concerns as those that are extremely anti-Government: both can call into question your capacity to be impartial, and damage public confidence'.[26]

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19 Public Service Board, *Guidelines on Official Conduct of Commonwealth Public Servants* (Australian Government Publishing Service, 1979) 47 [5.3], quoted in *Banerji* (n 5) 430–1 [127].

20 'Making Public Comment on Social Media: A Guide for APS Employees', *Australian Public Service Commission* (Web Page, 2017) <https://legacy.apsc.gov.au/social-media-guidance-australian-public-service-employees-and-agencies>, archived at <https://web.archive.org/web/20210315165809/https://www.apsc.gov.au/archived-making-public-comment-social-media-guide-employees> ('2017 Guidance'), quoted in Gelber (n 6) 513.

21 Pender, 'Public Servants and Political Communication' (n 6) 146.

22 2017 Guidance (n 20).

23 2020 Guidance (n 1).

24 Pender, 'Public Servants and Political Communication' (n 6) 146.

25 *Banerji* (n 5) 424–5 [105] (Gordon J).

26 2020 Guidance (n 1).

The 2020 Guidance further notes that anonymity provides no guaranteed shield from APS requirements, and that disclaimers and aliases on social media accounts, while potentially mitigating risks of sanction, cannot eliminate them.[27] Again, even 'liking' certain posts or signing a petition critical of government policy could — depending on the relevant circumstances — raise concerns about impartiality.[28] Further, it is not only *public* speech that is affected, because as the 2020 Guidance warns: 'private correspondence does not always stay private'.[29]

Given the evolving and ambiguous APS guidelines inform the operation of the legislative restrictions, the framework appears to impose significantly on public servants' political communication. The ambiguity of the guidelines is also reflected in the litigation: the extent to which public servants can make public comments has been the subject of contradictory case law.[30] This arguably contributes to confusion about whether and how public servants can participate in public debate.

Legal certainty on this issue is important, because as Kieran Pender notes, '[i]f public servants are required to accept employment-related limitations' on their free speech, 'those obligations — and their practical application — should be clearly defined'.[31] The following sections discuss our empirical investigation of whether uncertainty exists in relation to whether and how public servants can participate in public debate, and the consequences this may have for free speech and democracy.

B *The Banerji Case*

In 2019, the case of Michaela Banerji came before the High Court to determine whether relevant sections of the *PS Act* 'imposed an unjustified burden on the implied freedom of political communication' under the *Australian Constitution*, and whether Banerji was entitled to compensation for termination of employment under the *Safety, Rehabilitation and Compensation Act 1988* (Cth).[32] Banerji was an APS employee at the Department of Immigration and Citizenship.[33] Sometime before 2012, she began using an anonymous Twitter account, where she criticised the government's immigration policies.[34] At times, the tweets were 'vituperative'

27 Ibid.

28 Ibid.

29 Ibid.

30 A history of the vexed case law on public servants and free speech is provided in Shireen Morris and Sarah Sorial, 'Balancing Public Servants' Responsibilities with the Implied Freedom of Political Communication: What Can We Learn from *Banerji*?' (2022) 48(1) *Monash University Law Review* (advance).

31 Pender, 'Silent Members' (n 6) 329.

32 *Banerji* (n 5) 388–9 [1]. See also *Safety, Rehabilitation and Compensation Act 1988* (Cth) ss 5A(1), 14.

33 *Banerji* (n 5) 389 [2].

34 Ibid; *Banerji and Comcare (Compensation)* [2018] AATA 892, [8], [40] ('*Banerji AAT*').

and 'intemperate'.[35] Following a lengthy investigation, she was identified as the anonymous person behind the tweets, and her employment contract was terminated on the grounds that she had breached the Code of Conduct.[36] Before the High Court, Banerji argued that the *PS Act* provisions unduly burdened the implied freedom, an argument that was unanimously rejected by the High Court.[37]

While the High Court was correct that Banerji's specific tweets were in violation of the Code of Conduct, and while the judgments identify the relevant tensions between having an impartial and neutral public service and the burdens imposed on the speech of public servants in their capacity as ordinary citizens, the judgments do not resolve this tension.[38] As we have argued, the case gave rise to further uncertainties.[39] What emerges from all judgments is the ill-defined and situation-specific nature of the boundary between permissible and impermissible political communication for public servants.[40]

IV Theoretical Framework: Deliberative Systems Theory

Theoretically, our approach draws from the concept of democracy as a 'deliberative system'.[41] Deliberative systems theory explains how deliberation occurs and is connected across different deliberative 'sites' in the complex modern deliberative landscape.[42] Deliberative sites can include formal sites such as legislatures and courts, schools and universities, as well as more informal civil society networks, advocacy groups, 'private and non-profit institutions', and both mainstream and social media.[43] While the deliberation in some of these sites will be more informed than in others (for example, you would expect the deliberation in a university to be better informed than an unregulated, public online blog), the way these sites interact has potential to improve the quality of deliberation overall.[44]

For example, while the deliberation in an unregulated online site might be of a poorer quality, it may nevertheless, raise relevant issues that have not been considered

35 *Banerji AAT* (n 34) [109].

36 *Banerji* (n 5) 389–90 [3]–[5].

37 Ibid 404–5 [42] (Kiefel CJ, Bell, Keane and Nettle JJ), 408–9 [53]–[54], 423–4 [102] (Gageler J), 440 [161] (Gordon J), 442 [166], 457–8 [206] (Edelman J).

38 Morris and Sorial (n 30) 23–4.

39 Ibid 24.

40 Ibid.

41 See generally Jane Mansbridge et al, 'A Systemic Approach to Deliberative Democracy' in John Parkinson and Jane Mansbridge (eds), *Deliberative Systems: Deliberative Democracy at the Large Scale* (Cambridge University Press, 2012) 1, 4–5.

42 See ibid 2.

43 See ibid.

44 See ibid 2–3.

by more formal and regulated spheres. Conversely, unregulated sites with poor deliberative quality can have a destructive effect, such as when they perpetuate misinformation. The systems approach to deliberation is based on the idea that because these individual sites together constitute a cohesive 'system', it is possible for some parts of the system to correct for deficiencies in other parts in a way that improves deliberation overall.[45]

Variations on the systems approach are developed in the theoretical literature. For Robert E Goodin, the virtues associated with deliberation do not need to be located in any one particular site, but can be dispersed between and across different institutions:

> In this model of 'distributed deliberation', the component deliberative virtues are on display sequentially, over the course of this staged deliberation involving various component parts, rather than continuously and simultaneously present as they would be in the case of a unitary deliberating actor.[46]

John Parkinson argues that different actors, such as activist networks, experts, bureaucracy, media, and elected assembly, play different roles within the system: '[e]ach element in such a system may not be perfectly deliberative or democratic in its own right, but may still perform a useful function in the system as a whole'.[47] Jane Mansbridge et al define a 'system' as 'requir[ing] some functional division of labour, so that some parts do work that others cannot do as well. And it requires some relational interdependence, so that a change in one component will bring about changes in some others.'[48]

Our contention is that while impartiality is of utmost importance for the public service, public servants nevertheless constitute an integral part of Australia's 'deliberative system', which includes all the institutional components established by the *Australian Constitution*, as well as other important organisations and participants. The public service, as part of the executive, is one of the three arms of constitutional government in Australia. Public servants are therefore important constitutional actors helping manoeuvre the executive as an institution, along with Ministers. Public servants can be understood as undertaking constitutional implementation both of government policy and constitutional values.[49] But they should be able to participate in the deliberative system not only in their institutional role, but also as private citizens. Like other constitutional actors, public servants should be

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45 See ibid 4–7.

46 Robert E Goodin, *Innovating Democracy: Democratic Theory and Practice after the Deliberative Turn* (Oxford University Press, 2008) 186.

47 John Parkinson, *Deliberating in the Real World: Problems of Legitimacy in Deliberative Democracy* (Oxford University Press, 2006) 7.

48 Mansbridge et al (n 41) 4 (emphasis omitted).

49 Vanessa MacDonnell, 'The Civil Servant's Role in the Implementation of Constitutional Rights' (2015) 13(2) *International Journal of Constitutional Law* 383, 392–7, 405–6.

recognised as being capable of wearing two hats.[50] This does not mean they should be entitled to say whatever they like however they like.[51] However, public servants should be entitled to engage in reasoned, restrained political communication.[52] This is important, because their contributions to public debate can help improve deliberation across the system as a whole.

Several reasons support this position. First, public servants comprise approximately 16% of the workforce.[53] This is a sizeable proportion of the Australian population. Second, public service employees have specialised knowledge and expertise about the policy issues with which they engage at work. As John Wilson and Pender point out, '[t]he APS, as an employer, is placing increased emphasis on advanced higher education', in some cases funding PhD scholarships for 'high-achieving public servants'.[54] Additionally, '[a] number of recent agency heads have … PhDs' and '[a]cross the federal public service, almost 2 per cent of employees hold doctorates (just under 3,000 staff)', which is 'double' the rate in Australia of 1%.[55]

Because of this specialised knowledge and expertise, public servants can make informed contributions to public debate, thereby improving the quality of public debate overall. Given that a significant portion of public political debate now occurs online on social media platforms, participating in online debate — in a restrained and informed way, subject to confidentiality requirements — offers an opportunity for public servants to correct misinformation cascades occurring online and to promote more informed debate about policy issues. To exclude public servants from the 'deliberative system', whether overtly through speech restrictions or through the 'chilling effect' of unclear guidelines, is to potentially damage the whole system. With misinformation on the rise, trust at an all-time low, and the polarisation of debate of growing concern, the restrained and reasoned contributions of public servants should be encouraged, not unnecessarily curtailed.

V Project Findings

In this study, we aimed to test the levels and experiences of legal uncertainty, as relayed by public servants, in relation to their free speech. As noted, our interviews

50 We argue this in Morris and Sorial (n 30): at 33.

51 Ibid.

52 Ibid.

53 Australian Bureau of Statistics, *Employment and Earnings, Public Sector, Australia* (Catalogue No 6248.0.55.002, 11 November 2021); Australian Bureau of Statistics, *Labour Force, Australia* (Catalogue No 6202.0, 15 July 2021). See also Pender, 'Silent Members' (n 6) 327, citing Australian Bureau of Statistics, *Employment and Earnings, Public Sector, Australia, 2016-17* (Catalogue No 6248.0.55.002, 9 November 2017).

54 John Wilson and Kieran Pender, 'Uncertainty Silences Public Service Free Speech', *Lexology* (Blog Post, 2 June 2020) <https://www.lexology.com/library/detail.aspx?g=f9d6345c-7edd-4a11-98f3-f17b16165fbc>.

55 Ibid.

uncovered six key themes: (1) clarity of guidelines; (2) understanding of what constitutes 'tone'; (3) whether the balance between impartiality and free speech is well struck; (4) the impact of speech restrictions on professional and private lives as well as democracy more broadly; (5) the relevance of seniority; and (6) strategies for managing and mitigating these tensions. Our findings are discussed below.

A *Clarity*

Justice Gordon in *Banerji* referred to the 'transparency' and fairness of disciplinary processes in finding that the restrictions on public servants' free speech were appropriately balanced.[56] However, in previous work, we have suggested that the guidelines are unclear and that the uncertainty of the High Court's reasoning compounded this lack of clarity.[57] To test this, we sought to understand whether the APS guidelines[58] in relation to participating in public debate are clear and understood by public servants. Responses fell into two main categories: 7 of the participants thought the guidelines were clear and understood what was required of them but nevertheless expressed some uncertainty about how they would be interpreted in practice, or how they would affect them should they choose to contribute to public debate; and 16 participants thought they were unclear. A significant related concern was that the guidelines were often changing and restrictions were evolving to become tighter.

1 *Guidelines Are Clear*

These interviewees expressed a clear understanding of the guidelines, but also understood what they were signing up for when they entered the public service. As Interviewee A describes:

> I am aware of the APS guidelines and, for me, it's a way of life. I entered this career knowing what the expectations are of how you're supposed to act as an APS employee … I took it similar to, for example, police officers, how when they're on duty, they're expected to act a particular way, and when they're off duty, they're also expected to be portrayed to being a model citizen, for example.

Interviewee J thought that the High Court judgment in *Banerji* improved clarity:

> Yeah, I think I do have a pretty good understanding, because I remember that one of the things that came out of that case was that the court did find that public servants were still allowed to engage in public debates, and could be members of political parties.

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56 *Banerji* (n 5) 435 [141], 440 [158].

57 Morris and Sorial (n 30) 28–9.

58 2020 Guidance (n 1). As noted, we did not provide these guidelines to interviewees, as we wanted to understand their awareness and understanding of the guidelines independently: see above n 15.

Others expressed an understanding that they could participate in public debate, subject to two qualifications. As Interviewee E described:

> So as I understand it, you've pretty much the same right of political communication in a public setting with two exceptions. One being that the criticism shouldn't be harsh or extreme about a specific person. And two, that it shouldn't be something directed to your own agency or portfolio. That's the two main caveats that I'm aware of.

However, these participants identified dissonance between what the guidelines said on paper and how they would be interpreted by supervisors. Some noted that the 'unofficial' advice was to refrain from participating as the safest option. Interviewee G explained, 'you don't know how far you can push things really. Cause there's just no visibility of where the actual boundaries are being enforced.' Interviewee G further identified 'a sort of wordplay that goes on' in the guidelines, making it 'hard to trust if you haven't seen actual implementation of the policy, you don't know what it actually means'. As a consequence of this uncertainty in practice, the majority expressed unease when participating in social media platforms, or exercised extreme caution.

2 *Guidelines Are Unclear*

These participants thought the guidelines were unclear, and that they were deliberately left vague to give supervisors wide discretion in enforcement. As Interviewee C described 'I have read them, but I don't trust them basically … I don't really trust that they will be fairly implemented and I'm not reassured to participate … '. Others interpreted the guidelines as imposing a blanket prohibition on public comment. As Interviewee D explained:

> I don't comment on the government or the department's activities while I'm online. I'm not allowed to say anything about the government or 'like' anything that's criticism of the government, or post anything that's criticism of the government, that they perceive.

Interviewee D further described the policies as being 'deliberately quite elastic' which meant they could be 'overbearing'. According to this participant, this elasticity was intended to give the APS bureaucracy 'more flexibility as what they interpret as being inappropriate'. Interviewee F also felt the ambiguity of the guidelines gave enforcers more power: 'I don't think anybody policing that is clear about it, and I think that the subjectivity of that makes it easy to sort of shove somebody out'.

There was also, predictably, some variation depending on the department the person worked in, with some departments requiring higher levels of caution because of the nature of the work and the obligations of confidentiality. The public servants who worked for these departments accepted the level of restriction to their speech in relation to their work and their portfolios, but still expressed some uncertainty about whether they could participate in public debates on topics that did not concern their employment. Interviewee U noted that the guidelines are deliberately broad

because they must cover the whole of the APS, but the risk is that they also restrict other departments, such as cultural departments, that do not have the same kind of power or decision-making authority as departments where security might be more of a concern.

Interviewee T described the uncertainty from the perspective of being a supervisor, noting that supervisors were not provided with any training on how to interpret the guidelines. They described being alerted to some posts by the integrity team made by staff under their supervision. They note that 'it wasn't necessarily clear what I was meant to do with that [information]' and chose not to pursue an investigation because the posts were not deemed to be biased. The fact that there was this divergence of views about what constituted bias further highlights the uncertainty of the guidelines.

3 *Changeability*

A significant related concern was the feeling that the guidelines were tightening and becoming more ambiguous. While Interviewee B felt they previously understood the guidelines, enabling them to participate confidently in public debate, including by blogging on topics outside their own department, they felt ambiguity was increasing and limitations were tightening. Part of the reason was what Interviewee B described as the 'absurd and doomed' *Banerji* case, which 'muddied the water so badly for everybody'. The resulting 'huge uncertainty' gave the government 'leverage' to 'clamp down' on social media comment, creating 'a toxic influence on our ability to engage publicly'. Interviewee M also noticed that the guidelines 'chopped and changed', while Interviewee C emphasised the increased uncertainty meant that 'the advice you get from people who are active in this space' is 'in effect saying, "Just don't do it" … Don't participate in media, social media … because you just don't know how it'll come back to haunt you. And whatever the rules are, they can change them anyway …'.

Interviewee D similarly observed that the guidelines had become 'more strict' and were increasingly open to interpretation, which works in favour of government power: 'It's kind of moved all the way along to almost got no right to say anything about the government because I work for the government. That's the policy.' Interviewee D further explained: 'this is how I've seen it evolving over time. I think it benefits the employer more to not have something absolutely set in stone'.

B *Tone*

What constitutes appropriate tone in public speech for public servants can be a vexed question, as acknowledged in *Banerji*.[59] We were interested to understand how requirements regarding appropriate tone have been interpreted by public servants. There was widespread consensus that what constitutes appropriate tone is open to interpretation and potentially abuse. Interviewee C stated that proper tone

59 See, eg, *Banerji* (n 5) 435 [140] (Gordon J), 448–9 [182]–[183] (Edelman J).

is 'very subjective … it's a completely contestable area'. Interviewee H explained that in extreme examples, it was possible to identify the appropriate tone:

> I can make a guess as to what would be clearly inappropriate, if anything really personal or anything unprofessional, if I said a certain politician is a lying dog who should be taken out and shot, that's probably a tone that would get me into trouble.

However, there were borderline cases where it was unclear, which meant 'it's kind of hard to know where the boundary is between what is acceptable and unacceptable. I think there's a lot of grey.'

Some public servants had received media training, which involved identifying whether the tone was appropriate. Some training used 'scenarios where you had to read … about somebody posting something online and then go through and work out whether they had breached anything or not'. However, Interviewee I still felt that it 'leaves it up to the person who's potentially punishing you … to interpret whether something was right or wrong'. Interviewee I similarly considered that an assessment of tone is subject to the vagaries of a person's age, background, culture and other factors. They further noted that the correct tone can be particularly difficult to convey in writing: 'tone on social media is very hard to convey and I can say, "In no way did I mean what I said to be rude," and you can say, "Yeah, but it was rude. I think it was rude".' Interviewee F agreed that managers and supervisors have difficulty assessing tone because

> [p]eople write in certain ways, people express themselves in certain ways, correcting argument matter of factly, could be interpreted as hostile. It could be interpreted as just correcting the record online. So that's a sort of a difficulty we have.

Similarly, Interviewee K noted that background was relevant, including education:

> what's an acceptable tone to one person may not be to another person. I come from a medical background speaking openly and plainly about abortion to me is completely acceptable … [but] to a person from a more conservative, perhaps less scientific, less educational background that could be totally unacceptable …

The overwhelming view was that while tone can be determined in cases where speech is clearly vitriolic, it is too open to subjective assessments, potentially chilling speech as a consequence.

C *Balance*

Participants were asked whether they think there is an appropriate balance between the responsibilities of public servants to remain impartial, and their freedoms as ordinary citizens to contribute to public debate. The majority of responses suggested that the balance is not appropriately struck. While there was consensus that it was inappropriate for public servants to comment on the work of their department or

within their portfolio, many thought they should be able to make public comments in areas outside their portfolio. The one exception to this was public servants who were also academics. Their responses were more complicated and will be discussed in Parts V(D)(1) and V(F).

A minority felt the restrictions were balanced, with some qualifications. Emphasising that it is inappropriate to comment on issues even outside of their department, Interviewee A noted that as 'a public servant, you're representing the Australian government as a whole. Not just your department.' Others felt the balance was appropriate, so long as it just required public servants to exercise restraint and caution when making public comments. As Interviewee E argued:

> To expect them never to speak about it [political views] or share it in any way seems a bit unreasonable. But I think that it is reasonable to have them temper that. Hold them to a bit of a higher standard of impartiality than the average person who's not a public servant.

Others thought that while they should be able to comment on areas outside their portfolios, they did not feel able. As Interviewee H explained, 'I think your own agency might may well [sic] reasonably be off limits, so I accept that', however given public servants are also ordinary citizens who interact with government agencies like the Australian Taxation Office and the public health system, restricting public servants' speech on those topics was 'kind of giving us less rights than somebody who doesn't work for a government agency'.

Most participants felt the guidelines were inappropriately balanced. Interviewee K said that while the guidelines were clear, they were nevertheless 'an overstep', because 'it pretty much directs you that you can't post anything. You must remain completely impartial.' They explained that even 'liking' something or being tagged by family in something political could have disciplinary consequences, 'if you don't respond to it saying, "That's not my point of view that doesn't represent the broader perspective of the public service" … you can actually be pulled up for that kind of stuff, which was pretty shocking'.

Public servants who occupied two positions — such as public servants who were also scientists — also thought the balance was imperfect. Often, they felt a duty to contribute to debates within their portfolios, especially given their special expertise. This tension was compounded by the COVID-19 pandemic, where some wanted to correct the public record regarding vaccines or mask-wearing, but felt constrained. These participants thought it was important contribute their expertise to public debates, particularly to dispel conspiracy theories on social media. The restraint entailed professional, personal and broader democratic impacts, discussed in Part V(D).

D *Impact*

There were three kinds of impact arising from APS free speech restrictions noted by participants: personal, professional and democratic impacts. However, a minority of

participants felt largely unaffected by the restrictions on free speech. For example, Interviewee E said the guidelines did not 'restrict me in any meaningful way' and they did not feel '[h]ammed in by it'. This attitude was generally connected to personal circumstances. As Interviewee J explained, they felt unrestricted by the guidelines because 'I'm not a wide user of social media anyway', and being 'pretty junior', they did not think 'anybody would even notice' their online behaviour. This participant was also 'not that fussed' about career security or progression as they were 'hoping to retire soon', which meant that '[i]f they want to kick me out, I really don't care'. Nonetheless, Interviewee J was concerned about how colleagues were experiencing the restrictions:

> It does bother me to see other people … Intimidated sounds like a strong word, but perhaps intimidated a little bit by feeling there's a conflict between wanting to be involved politically and keeping their jobs …

More interviewees felt the guidelines' restrictions on free speech entailed professional, personal and broader democratic impacts.

1 *Professional Impacts*

Professional impacts of the restrictions included worries about job security, concerns about lack of trust, and unfair restraint of professional and moral obligations to speak out.

Many felt concern about job security arising from the uncertainty of guidelines. As Interviewee I explained, the 'nuanced view' of what is acceptable public speech was 'quite confusing' and 'worrying because I've seen people lose jobs … it makes me quite nervous to try and interpret the public service's view of what is appropriate … It stresses me out'. An unfair connection between job security and rights to free speech was noted by some participants. As Interviewee I strongly put it: 'I shouldn't have to sacrifice my freedom to have an opinion publicly because of my job.' Contradicting observations made by Justices of the High Court in *Banerji*,[60] threats to job security were amplified by the fact that, where disciplinary processes occur, they can lack transparency, especially where security clearances are involved. As Interviewee L explained: 'It's not like a transparent, open court case.' Appealing a decision can be 'very difficult because the decision on a clearance sits solely with an agency head … You can have the right to representation and appeal, if you know about it, is very hard to navigate.' Interviewee J further explained that as a casual employee, they were 'pretty terrified to lose my job over posting the wrong thing on social media'. But this restriction was not limited to social media. They recalled a former Minister who warned against making 'a political comment to your family in a dinner party because that's outside of your code of conduct'.

60 See comments in *Banerji* about the administrative processes and their alleged transparency: *Banerji* (n 5) 421 [93] (Gageler J), 434–5 [139]–[140], 439–40 [157]–[158] (Gordon J).

This speaks to concerns about the guidelines fostering lack of trust within the public service. Interviewee C identified 'a lack of trust of employees', despite acknowledging that 'in public sector life … your reputation and whether you're trustworthy is pretty important'. Interviewee K similarly explained:

> I think that the lack of respect is a bit sad because … I haven't really met a lot of people who couldn't be trusted to have an intelligent conversation with people or intelligently vent their perspective on things and you come to work and totally just put that aside … They pick their candidates carefully enough … there should be more trust there.

Interviewee G agreed that 'it's a bit hard to trust if you haven't seen actual implementation of the policy'.

Such mistrust was compounded by the fact that, as Interviewee I explained, policing of the rules in practice relies on 'dobbers', which can cultivate mistrust of colleagues and encourage conflict. In their observation,

> [p]eople just absolutely love to dob … I'm Aboriginal and sometimes when Aboriginal people put their head online, up above the parapet, people instead of taking shots at them online and like taking the argument there online, they'll go and dob them into their workplace and say they're inappropriate … It's pretty nasty …

This added an important insight into the way intersectionality can compound the chilling effect of APS speech restrictions, and the ways that they affect some groups more than others, either because of race or sexuality.

Some participants, especially those with special expertise, expressed frustration that the guidelines prevent them from properly fulfilling their professional obligations. Interviewee G noted that public servants with specific and special knowledge or skills should be trusted to comment on their work, because 'we're important repositories of national expertise. It's very disturbing that people like right wing think tanks are always talking about things, but we never hear anything from the actual national expertise in the matters.' While scientists could publish in academic journals in their areas, and were even expected to do so (subject to approval processes), they generally expressed reluctance to engage, for fear of falling foul of the guidelines.[61]

2 *Personal Impacts*

We also heard from participants about how the guidelines may impact personal financial security, mental health, romantic relationships, personal online enjoyment and even minor political interactions. Interviewee B explained that they had previously been sanctioned for making public comments about matters outside their own department, which meant they were 'always a little scared because it destroyed

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61 See also Driscoll et al (n 6) 8–9.

my career for some years'. This participant went through a conduct investigation which was ultimately withdrawn, however it had 'far reaching' personal ramifications. The disciplinary process cost thousands of dollars in legal representation which was 'never recoverable' and resulted in a 'couple of months health leave because it was doing my heading in'. It affected their personal relationship, led to depression and unemployment.

Interviewee I expressed concern about whether romantic relationships might be monitored due to their APS role:

> I'm even worried about the fact that I'm a single person, and I don't live the most conservative lifestyle and I have dating apps, which are technically, I don't know if they would fall under social media, but I think if they wanted to police anything I did or said on dating apps, it would absolutely fall under social media …
>
> And I worry about the fact that I'm non-monogamous and it says that on my dating profile, and if somebody screenshot that and sent it to my work, for me I don't know whether they would actually have a right to discipline me over something like that.

The creeping restriction curtailed personal enjoyment of online activity for some participants. According to Interviewee D:

> you can't even like something funny that someone's put up. Like a cartoon or whatever, of Peter Dutton, because he might take offence. Or someone else you know might take offence. I think that's pretty sad. That is a breach of my rights as a citizen …

Interviewee I said they 'even worry about signing petitions' and whether that will 'come back to haunt me at work somehow', even though the petition signed was about matters outside their department. Interviewee N further explained: 'I don't go around 'liking' politicians' pages. I have in the past, but I just don't want to get myself in a situation where I'm compromising myself …'. Interviewee P described the mental health impacts of not being able to comment during the marriage equality debate, which affected them personally, again highlighting the ways in which intersectionality compounded APS speech restrictions. These reflections convey a sense of worry, paranoia and anxiety colouring these participants' online engagement.

3 *Democratic Impacts*

The restriction of public servants' free speech may also entail broader democratic consequences, according to many participants. As Interviewee C described:

> I would expect that in a free democratic society, that this [participating in debate] would be possible. But unfortunately in this free democratic society, it's dangerous. It's dangerous. There are consequences for you doing it. If you're asking me the question, ideally, would I want this to be different? Yes. But I live with the reality that it's not.

Again, this feeling was particularly potent for public servants with special expertise. While Interviewee L felt that being restricted from publicly sharing their scientific expertise was for 'the greater good', this was a minority view. Other interviewees felt the guidelines' restrictions on free speech conflicted with their responsibilities as public servants (and sometimes as scientific experts) to 'correct the public record' and contribute to a healthy democracy.

Interviewee K felt the restriction was 'really frustrating' because the expertise of public servants could help 'people to be knowledgeable about politics and the way that government works'. Interviewee K noted that, as a public servant, it can be 'hard to even help people', for example 'friends who are not super literate about voting'. Public servants can feel inhibited from helping them understand political systems for fear of being perceived as trying to influence politics.

Some participants expressed a desire to share expertise by helping fact-check false information. Interviewee F explained that, in the context of 'Craig Kelly's claims about unproven drugs, for instance … I personally feel it's a responsibility of public servants to correct the record. Obviously tactfully and carefully, but in a very contested space and a very unpleasant space.' Interviewee M similarly felt that 'sometimes when you see obvious information that's incorrect and where the correct information is publicly available, even then, I often hesitate to point things out'. This can have broader ramifications, because as Interviewee F explained, if public debate becomes too chilled, this can drive secrecy unconducive to rational democratic discussion:

> if you don't have these debates in public, people move to things like Telegram, where it's all secret. So I think it's the balance between trying to address things in the open space, and be that balanced voice, versus just having … I mean, for instance, a lot of the people that were posting on Facebook with these conspiracy theories that I was following, have just disappeared. Now they've been banned and gone somewhere else.

According to Interviewee K: 'The concern is there are debates going off somewhere else, without any sort of factual corrections.' Interviewee T noted that they do not feel they are participating in their democracy.

Public servants thus clearly perceive themselves to be part of a wider 'deliberative system' in which they should play an important role, namely, in using their expertise to correct the public record and improve deliberation about important policy matters. According to some participants, over-restriction of public servants' free speech may also compromise the APS. Interviewee F said it could lead to a perception of politicisation: 'The boundaries, I feel have become quite blurred during the pandemic, between the political and the impartial advice that public servants are supposed to give.' A culture of overt control, through 'militarisation of the public service', may hamper the giving of frank and fearless advice. Interviewee P similarly stated: 'frank and fearless advice in my portfolio died about eight years ago'. As Interviewee H suggested, tight controls may also prevent public servants defending the public service in online debate.

E *Seniority*

Many interviewees felt that APS seniority entailed greater scrutiny in public speech. Interviewee A, as a more senior member of the APS, felt that seniority meant 'more expectations that as a senior member … you are expected to know how to act'. By contrast, as 'a junior member … it might be slightly more relaxed if you do get in trouble the first time'. Interviewee I agreed that junior staff had more freedom: 'My understanding is now the lower you are, the more freedom you have. Like if you're a six, you have a little less freedom than say a four to talk publicly on social media about political issues.' Further, for senior members, as Interviewee B indicated, 'if you are anything above level six' in the APS 'you're almost fair game on what you say publicly' (though notably, Banerji was level six[62]). Interviewee C similarly explained that seniority entailed experience that would probably lead to further restraint: 'I think the more senior they get, the more careful they get.' Interviewee F observed that 'senior public servants are probably more trusted' to speak publicly, and stated: 'I think by virtue of seniority, you're not going to make stupid comments in public, too often in your career.'

Interviewee H said 'only the most senior people' were 'allowed to use social media in their official role. We're talking secretary level, basically.' But they are 'pretty heavily scrutinised'. Interviewee J thought tighter rules for senior APS staff was logical:

> if you're really high up and in maybe a place of advising government and stuff like that, I think that's one part of the guidelines I do kind of agree with, because there could be a perception that maybe you couldn't do that job or give that advice impartially … I think pretty much everybody else should be given a fair bit of freedom. … I reckon the rest of us should be pretty much left to our own devices and our own discretion.

But Interviewee K identified that sometimes 'the highest figures … wouldn't even know their code of conduct'. As Interviewee L noted:

> You might have managers or supervisors that say, 'You can't join a political party. You can't post about that.' They don't know the rules and that's where the risk comes in … Managers and certifiers don't know the rules on a whole heap of things. We've got policies coming out … and they're too busy to read them, and making calls that aren't accurate on a whole heap of things, not just social media use.

F *Mitigation*

Most APS participants implemented strategies to mitigate the risk of sanction when engaging in online and other debate. These included being careful in public discourse, seeking advice or permission from managers or colleagues, wearing

62 *Banerji AAT* (n 34) [3].

two hats (that is, distinguishing between their professional and personal roles), and remaining anonymous or using pseudonyms to conceal identity.

1 *Taking Care*

Taking extra care in public communication was common. Interviewee A, a more senior member of the APS, felt relatively confident about constructing a personal tweet within APS guidelines, but also felt it might take 'a few tries', requiring them to 'write out the tweet first, and then review it to make sure'. Interviewee B would also cautiously engage on social media, but acknowledged that even careful engagement in public discourse could come with risks of career damage:

> I am careful, but still make comments … I don't call the prime minister a moron and stuff like that …
>
> If I'm making a factual analysis of bad decision making and it's nothing to do with my portfolio, then I think I'm on relatively safe grounds. But if somebody really hated me … maybe they could make a case. And it's happened to me before when I was in my other department …

Interviewee E explained that the guidelines required them to 'moderate' what they say publicly. This would include refraining from 'the type of debate that I have with friends and in smaller groups' and being 'aware of the fact that it is in a public setting and the fact that I'm a public servant would factor in to how I'm presenting'. Many were careful not to talk publicly about matters related to their department. Interviewee D explained that they participate in political debate online, but 'I don't talk about the department at all or comment on any other posts or tweets about the department I'm in' and 'my profile doesn't have anything on it that would identify me as coming from department'.

2 *Seeking Advice*

Some interviewees mitigated risks by getting clearance from managers or advice from colleagues. Interviewee A felt they could talk to their supervisor if they were unsure about constructing a social media post, explaining that '[i]n my workplace, I have a very casual team, so we talk openly. So I would just openly talk to my supervisor.' Interviewee L said they would probably ask a 'someone I trust, a colleague' to proofread a potential blog. By contrast, Interviewee H said:

> I can't see much myself talking to my boss about my social media use. I … wouldn't feel comfortable feel like it was appropriate that I had to clear my social media posts with them … before I put them up and I think he [would] probably also feel that that wasn't his job.

3 *Publishing Academic Work*

Interviewee G experienced more formal processes for managerial sign-off of academic publications:

> essentially we'll write what we want to write and then we'll put it to our immediate supervisor who will do this normal sort of editing sort of thing you might expect. And then it will go through a couple more levels above that, to what we call a division chief …
>
> we're expected to publish, so it is facilitated, but it is a very slow and cumbersome process because it goes up to people who have to see these things from couple 200 to 300 people. So it tends to take a month or so to get a publication.

Interviewee F similarly described how staff might author papers 'that are cleared for publication' using 'a very light touch' by management. In scientific areas, for example, this ability to publish was considered important:

> I think the threshold for refusing should be very low, because I think if you're employed to do something and you know what you're doing, in a sense, it's your own personal reputation that is important as well …
>
> I think if there was a process that did prohibit advice for publication, I think there should be an appeals mechanism …

But slow approval timeframes can cause 'considerable problems' in some fields. As Interviewee G explained, tight publication and conference deadlines may not 'fit terribly well having to wait five to six weeks to get approval for the publication'.

4 *Wearing Two Hats*

Some interviewees spoke about distinguishing between public speech as an APS employee, and speech as a private citizen — what has been described as 'wearing two hats'.[63] Interviewee D explained:

> It has never mattered to me who the government is, I do my job the same no matter what, because it's a job. But that part of me that does that work is not the same person I am out of work and they don't know me.

As Interviewee N put it: we 'can be private citizens outside the workplace'. Interviewee C explained that trying 'to keep the two separate' meant conceptualising the wearing of 'two hats' to mitigate risk and manage restriction: in 'things I feel very passionately about, I basically say, "Well, this is not in my work role … I'm putting on my private citizen hat."' Explaining further, Interviewee C said:

> I'm absolutely clear about what it is I can't do in the work space and you think departmental resources, shall we say, that includes any computer system, email or whatever it is, that's all subject to scrutiny …
>
> … but I have to be very clear it's on my personal resources, on my personal time, on my personal stuff.

63 See our discussion in Morris and Sorial (n 30): at 29–33.

This might include participating 'in activism using my personal email account'. But even trying to utilise two hats, participation in debate was not always possible, because of the feeling that, with 'social media stuff … there is no private interaction with it'. Accordingly, though Interviewee C has a Facebook account to observe debate, they emphasised that they 'never post anything … I just don't engage on any of these platforms that can come back to haunt me'.

Interviewee I further explained that APS staff 'have the ability to be multiple people'. But it was noted that the government did not understand that public servants can wear two hats, which indicated a lack of trust: 'There's not this understanding that as a public servant, I can be impartial in my job and also in my private life be really critical of the government.' Interview K remarked that 'there's this attitude where you get treated a bit like the kid' in the APS, whereas 'they need to think of us as adults' who are

> capable of coming to work and putting aside [political views] … I don't care who is in government … whether I like them or I don't … It's totally irrelevant, my political persuasion from my customer service and service delivery roles … the lack of respect is a bit sad.

The approach 'forgets that we're also private citizens, we all go home. And we also need to be able to have private interests and hobbies'.

However, Interviewee P described the 'emotional labour' that can go into maintaining the distinction between private and public selves:

> People working in these policy areas and in these regulatory areas are on the ground to see exactly how these things are working or not working, and are often experts in how the government is failing. Going to sleep at night with that knowledge, and then waking up the next day and administering whatever bogus scheme … it really takes its toll.

5 *Using Anonymity and Pseudonyms*

Some interviewees used anonymity as a shield, even though under the 2020 Guidance anonymity is no guarantee against sanction.[64] For example, Interviewee I used anonymity and explained: 'I wouldn't be confident in putting my face and name to something if I thought people could track down where I worked'. But they acknowledged this was still risky. Another mitigation strategy was therefore to 'regularly delete' tweets. This did not eliminate anxiety however:

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64 2020 Guidance (n 1). A 2012 APS Circular also warned employees that 'anyone who posts material online should make an assumption that … their identity and the nature of their employment will be revealed': 'Circular 2012/1: Revisions to the Commissioner's Guidance on Making Public Comment and Participating Online', *Australian Public Service Commission* (Web Page, 13 January 2012) <http://www.apsc.gov.au/circulars/circular121.htm>, archived at <https://webarchive.nla.gov.au/awa/20120321015912/http://www.apsc.gov.au/circulars/circular121.htm>.

> I delete my tweets regularly. I have a locked account. It does cause me stress. It actually causes me a bit of anxiety occasionally, especially when I see people getting fired or getting called in. Even just getting called in to go through and defend myself would be quite stressful.

Interviewee G said they 'interact under a pseudonym' and strive to 'adopt appropriate tone'. Interviewee K further explained they 'don't comment anywhere my name is obvious'. Interviewee M also used privacy settings, as well as overall restraint, to mitigate risks:

> On Facebook I was very conscious about restricting the privacy of my account. So I don't let [sic] any information publicly viewable. That's only visible to friends. … [but] even then I generally avoid commenting or making public statements about policy issues related to the portfolio that I work in.

Yet even so, Interviewee M remained 'hesitant. I don't really express my full view … I'm self moderating and limiting what I would say compared to what I might say if I wasn't in a public service courtroom.' This was partly because factors like anonymity and seniority were not taken into account enough in APS sanctions: 'I think the guidelines are probably too restrictive', because there are 'public servants like myself who do hesitate and who don't engage openly in public debate, even in a respectful way and effective way because of concern about getting called by your HR department and questioned'.

VI Conclusions and Recommendations

Our study's findings indicate that the APS guidelines in relation to making public comments, including on social media, are perceived to be unclear and unbalanced by public servants. This lack of clarity has profound professional and personal impacts. However, it also has broader and more troubling impacts for democracy and the APS itself. Adopting a systems approach to democracy, we suggest that public servants constitute an integral part of the Australian democratic deliberative system. Their reasoned and rational contributions can potentially improve the quality of deliberation overall. Public servants in Australia not only comprise a significant proportion of the workforce, but also have specialised expertise and knowledge, that when incorporated into debate appropriately, can improve deliberative outcomes. Our findings also suggest that public servants see themselves as part of this system and are keen to contribute to it in productive ways. However, over-restriction of public servants' speech also may entail broader implications for the APS itself, and its objective to maintain impartiality. An overzealous approach to restraining speech — either through overt restrictions or through 'chilling' due to ambiguity — can itself appear politically biased, compromising APS impartiality and professionalism.

To address these concerns, APS guidelines should be revised to improve clarity. While the guidelines contain explicit recognition that public servants are also

private citizens who are entitled to express their views,[65] we suggest that confusing and subjective requirements as to appropriate tone, expression, language and content[66] need to be further clarified. Given there also may be uncertainty on the part of supervisors implementing the guidelines, some objective criteria or concrete examples could be included to help distinguish acceptable and unacceptable contributions. While there is consensus about extreme cases that are clearly unacceptable — overtly critical or vitriolic statements made about a person or government department, for example — there are also significant grey areas that the participants found worrying. The following relevant factors could be included in the guidelines to provide greater clarity, objectivity when making assessments, and in turn, better balance between the public and private freedoms and responsibilities of public servants. Drawing on factors of relevance raised by the Justices in *Banerji*, existing legislation that balances free speech with other duties with respect to defamation and racial vilification,[67] and our own examination of these matters, such considerations could include whether the contribution:

1. was a fair and accurate report or discussion about a matter of public interest, including in an area in which the person works, made in a manner that upholds APS professionalism and impartiality;

2. involved disclosure of any confidential information the person may be privy to in the capacity as a public servant;

3. named or criticised any particular person, such as a Minister or supervisor;

4. was made by a public servant who is an expert in a particular area, able to offer expert evidence in relation to an issue of public importance;

5. was about a matter or issue outside the employees' department;

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65 See above n 4 and accompanying text.

66 2020 Guidance (n 1).

67 For example, s 18D of the *Racial Discrimination Act 1975* (Cth) ('*RD Act*') provides exemptions to the prohibition in s 18C of the *RD Act* on offensive behaviour based on racial hatred. These exemptions apply to making or publishing 'a fair and accurate report of any event or matter of public interest' or 'a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person': *RD Act* (n 67) ss 18D(c)(i)–(ii). The recent changes to defamation laws, contained in Australasian Parliamentary Counsel's Committee, *Model Defamation Amendment Provisions 2020* (27 July 2020), also use defences to protect free speech. These include the defence of contextual truth (which echoes the fairness and accuracy requirement in s 18D(c)(i) of the *RD Act*): at sch 1 cl 26; the defence of 'publication of matter concerning [an] issue of public interest' (similar to the 'public interest' element in ss 18D(b) and 18D(c)(ii) of the *RD Act*): at sch 1 cl 27; and the defence of honest opinion (similar to the 'genuine belief' element of s 18D(c)(ii) of the *RD Act*): at sch 1 cl 31.

6. was made by a very senior public servant, which suggests they should be held to a higher standard in upholding APS professionalism and impartiality;

7. was made in a private capacity, anonymously or with caveats or disclaimers making clear that the speech was not reflective of APS views; and

8. was discussed, negotiated and approved by the person's supervisor prior to publication.[68]

These recommendations are only tentative, and would need to be developed collaboratively with the APS and tested with both employees and supervisors.

In most areas of speech, there are so-called 'boundary cases' between what is acceptable and unacceptable speech. Given the high standards to which public servants are held relative to ordinary speakers, it will not be as difficult to develop clearer and more robust criteria that strike a better balance between their free speech and professional responsibilities, minimise the impact the current restrictions have on their personal and professional lives, and the broader impact on the deliberative system and the APS itself. The indications of a culture of mistrustfulness and of creeping tightening of the guidelines, uncovered by this study, present particular concern for the maintenance of a robust and functional public service. Trust and confidence are essential to a professional public service, and, as Gageler J explained in *Banerji*, '[c]onfidence cannot exist without trust'.[69] It is therefore in the interests of maintaining a professional, impartial and trustworthy APS that the guidelines in relation to public servants' free speech are made clearer and more certain. A broader, randomised study should be undertaken to test the workability and appetite within the APS for changes along the lines suggested here.

68 We put forward these factors in Morris and Sorial (n 30): at 35–7.

69 *Banerji* (n 5) 424 [105].

Neera Bhatia and Lily Porceddu***

DONORS AND DADS ONLINE: EMERGING TRENDS AND LEGAL IMPLICATIONS INVOLVING THE INTERNET IN THE CREATION OF NON-TRADITIONAL FAMILIES IN AUSTRALIA

Abstract

In Australia, people are increasingly using the internet and online social media platforms to source sperm or seek a person with whom to co-parent a child — known as 'elective co-parenting'. In this article, we examine these emerging informal avenues of family creation that, in some instances, circumvent the use of regulated fertility clinics. We argue that it is timely for the law, regulatory bodies, and the broader community to pay closer attention to the legal and ethical problems that may arise using these risky methods of family creation. This article is a call for action — we make some suggestions for legislative reform, greater public access to assisted reproductive treatment, public donor banks, and better awareness of family creation in wider society. By doing so, this might mitigate the use of informal avenues for family creation. Further, we argue that the law needs to keep pace to accurately reflect the dynamic and evolving nature of the family unit, which to date, it has either been unable or unwilling to do. This argument is especially relevant to the needs and preferences of non-traditional families.

I Introduction

What does *family* mean? Scholars have long discussed the origins and evolution of the meaning of family.[1] Recently, Alan Brown proposed that family is 'central to our understanding and experience of human

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1 Some scholars have observed that there is a lacuna in the law in relation to the lack of a single or unified statutory or common law definition of 'family': see Alison Diduck and Felicity Kaganas, *Family Law, Gender and the State: Cases and Materials* (Hart Publishing, 3rd ed, 2012) 12–19. Jonathan Herring offers five definitions of 'family' that the law could adopt: see Jonathan Herring, *Law Express: Family Law* (Pearson Education, 7th ed, 2015).

existence'.[2] However, despite the ideology and experience of family having a profound impact on the lives of individuals, Scott Coltrane and Elaine Leeder suggest that the term itself is not easily definable, and has many variations across disciplines and literature.[3] Over the past few decades, the concept of family has perhaps been best understood to resemble the archetypal 'nuclear family'.[4] John Muncie and Roger Sapsford go so far as to state that the idea of the nuclear family 'retains a potency such that all other forms tend to be defined with reference to it'.[5] There are several definitions to describe the traditional nuclear family. One definition that we provide below illustrates the composition of the nuclear family as

> a young, similarly aged, [w]hite, married heterosexual couple with a small number of healthy children living in an adequate home. There is a clear division of responsibilities in which the male is primarily the full-time breadwinner and the female primarily the caregiver and perhaps a part-time or occasional income earner.[6]

Jon Bernardes notes that this perception of the nuclear family is unrealistic.[7] We extend this further and contend that the notion of the nuclear family in contemporary Australia is wholly inaccurate. Ideology and community attitudes towards what family means and family configurations have significantly evolved over time.[8] Today, the methods individuals or couples might use to conceive a child and create a family are changing. The definition and understanding of the concept of family, attribution of legal parentage, and the (re)construction of the role of a parent within the scope of the law require ongoing development, and where necessary, reform.[9] What makes a family and/or a parent today, arguably defies the normative definition and rather requires more flexibility in its representation. This is a topical issue of growing academic, public, and policy debate with increasing social awareness.[10]

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2 Alan Brown, *What Is the Family of Law? The Influence of the Nuclear Family* (Hart Publishing, 2019) 21.

3 Scott Coltrane, *Gender and Families* (AltaMira Press, 2000) 5; Elaine Leeder, *The Family in Global Perspective: A Gendered Journey* (SAGE Publications, 2004) 1–2. For further discussion on the variety of definitions of the term 'family', see ibid 21–44.

4 Lawrence Stone, 'The Rise of the Nuclear Family in Early Modern England: The Patriarchal Stage' in Charles E Rosenberg (ed), *The Family in History* (University of Pennsylvania Press, 1975) 13. Cf Valerie Lehr, *Queer Family Values: Debunking the Myth of the Nuclear Family* (Temple University Press, 1999) 1–13.

5 John Muncie and Roger Sapsford, 'Issues in the Study of "the Family"' in John Muncie et al (eds), *Understanding the Family* (SAGE Publications, 1995) 7, 10.

6 Jon Bernardes, *Family Studies: An Introduction* (Routledge, 1997) 3.

7 Ibid.

8 See Brown (n 2) 19–76.

9 See ibid.

10 For example, there is growing awareness of same-sex and queer (LGBTQIA+) families in broader society: see Deborah Dempsey, 'Same-Sex Parented Families in Australia' (Research Paper No 18, Child Family Community Australia, Australian Institute of

The High Court was recently compelled to consider the evolving nature of the family unit in *Masson v Parsons* ('*Masson*').[11] The case propelled controversial and ethically-fraught issues into the judicial realm — matters traditionally confined to discussion in areas such as health, ethics, sociology, and philosophy. In this landmark decision, the High Court ruled that a man who provided sperm using home insemination,[12] resulting in the birth of a child, with the intention to co-parent was legally considered a 'parent' of the child within the meaning of the *Family Law Act 1975* (Cth) ('*FLA*')[13] and not merely a sperm donor.

Masson shone a spotlight on the contentious issue of legal parentage and provided a platform for the deconstruction of the hetero-normative nuclear family.[14] The judiciary gave serious consideration to the meaning of contemporary families — we contend that this arguably challenged hegemonic family structures — and is likely to have given greater recognition to same-sex and gender-diverse families (LGBTQIA+ families).[15] The ruling in *Masson* and its potential future implications sent ripples through the legal profession, causing some concern among single

Family Studies, 2013); 'LGBTIQ+ Families: Services, Resources and Links', *raisingchildren.net.au* (Web Page, 13 April 2022) <https://raisingchildren.net.au/grown-ups/family-diversity/LGBTIQ-families/LGBTIQ-families-services>.

11 (2019) 266 CLR 554 ('*Masson*'). See also: Katy Barnett, 'Masson v Parsons', *Opinions on High* (Blog Post, 2 July 2019) <https://blogs.unimelb.edu.au/opinionsonhigh/2019/07/02/masson-v-parsons/>; Fiona Kelly and Hannah Robert, 'Legal Parentage and Assisted Conception Following the High Court's Decision in *Masson v Parsons*' (2019) 33(2) *Australian Journal of Family Law* 144; Felicity Bell, 'What Does It Mean To Be a Parent? High Court Delivers Clarity in Sperm Donor Case' [2019] (58) *Law Society Journal* 89.

12 Artificial insemination is the deliberate introduction of prepared (washed) sperm into the cervix or uterine cavity of a woman with the intention of achieving a pregnancy without sexual intercourse. There are several types of artificial insemination — they include in vitro fertilisation ('IVF') and intrauterine insemination that are performed by fertility specialists in clinics. This involves the use of fresh sperm provided by the woman's partner or frozen sperm from the partner or a donor. Home insemination is a method of achieving pregnancy without the use of fertility clinics. A common method of home insemination is intracervical insemination which involves the use of a needle-less syringe to inject sperm near the cervix.

13 See: *Family Law Act 1975* (Cth) ss 4, 60H, 69VA ('*FLA*'); *Masson* (n 11) 586 [55]. For further discussion of this case and its impact, see below Part IV.

14 *Masson* (n 11).

15 Ibid. We note that language used to describe different LGBTQIA+ people and language used by different parts of LGBTQIA+ communities evolves over time and can differ across cultures and generations. 'LGBTQIA+' is an initialism that stands for lesbian, gay, bisexual, transgender, queer/questioning, intersex, asexual, and which attempts to be inclusive. However, many other terms, such as non-binary and pansexual, are also used to describe people's experiences of their gender, sexuality, and physiological sex characteristics.

women and lesbian couples who had conceived a child using donor sperm.[16] *Masson* exemplifies the importance of the law keeping pace with the dynamic and evolving nature of the family unit, which we argue, to date, it has either been unable or unwilling to do. This argument is especially relevant to the needs and preferences of non-traditional families.[17]

A *Aims and Structure of the Article*

In this article we examine two emerging avenues being used by individuals and couples in the creation of families that circumvent regulated fertility clinics and, in some cases, the law. Increasingly, people are turning to informal sperm donation or elective co-parenting in Australia and other jurisdictions such as the United Kingdom and the United States. These informal avenues are facilitated and accessed using the internet and social media platforms. In Part II, we concentrate on the use of co-parenting websites and the associated legal implications in family creation. We also consider informal and unregulated sperm donation via the internet and social media sites, such as Facebook, which are used to assist individuals in conceiving a child.

We focus on the laws of the State of Victoria in this article because a predominant part of our discussion is concentrated on a critique of the recommendations made by Michael Gorton in the *Final Report of the Independent Review of Assisted Reproductive Treatment* ('*Review*') — released by the Victorian Government in 2019.[18] In Part III, we explore some of the reasons why people elect to engage in potentially risky practices outside the scope and protection of the law and regulation to conceive a child. In Part IV, we examine some of the relevant legislation to family creation including: (1) the *FLA*; (2) the *Status of Children Act 1996* (NSW) ('*SOCA (NSW)*'); (3) the *Assisted Reproductive Treatment Act 2008* (Vic) ('*ART Act*'); and (4) the *Child Support (Assessment) Act 1989* (Cth) ('*CSA Act*'), to gain a better understanding of the legal landscape and any potential deficits in the existing legislation that may impact family creation using informal avenues. We then turn to consider the ethical implications of using informal methods of family creation in Part V. We argue that it is timely for law and regulatory bodies to pay closer

16 See Julie Redman and Tayla Inglis, 'Thinking of Being a Sperm Donor? Do You Need a Sperm Donor Agreement?' (2022) 44(4) *Law Society of South Australia Bulletin* 14; Johanna Heaven, 'Recent High Court Decision Surrounding the Meaning of "Parent" Sparks Uncertainty: Masson v Parsons' (2019) 27(9) *Australian Health Law Bulletin* 146; Hannah Robert and Fiona Kelly, 'High Court Judgment Still Leaves Donor-Conceived Families in Limbo about Who Is a Legal Parent', *The Conversation* (online, 21 June 2019) <https://theconversation.com/high-court-judgment-still-leaves-donor-conceived-families-in-limbo-about-who-is-a-legal-parent-119171>.

17 We use this term 'non-traditional families' to describe a broad range of families, including LGBTQIA+ families, particularly those which may include same-sex couples or single persons who are unable to conceive a child without some form of intervention.

18 Michael Gorton, *Helping Victorians Create Families with Assisted Reproductive Treatment: Final Report of the Independent Review of Assisted Reproductive Treatment* (Report, May 2019) ('*Review*').

attention to the legal and ethical problems that may arise due to the increasing use of informal sperm donation and elective co-parenting facilitated by the internet and social media platforms.

It can reasonably be argued that decisions relating to the creation of families should not warrant intrusion from the law or regulators — given their intimate nature. However, we posit that there is potential for significant harm and risk to all parties involved where there is legal ambiguity and limited, or a lack of, access to assisted reproductive services, donor sperm, eggs, or embryos (donor gametes), or adequate information. Therefore, in Part VI we propose a number of recommendations to address some of the potentially problematic legal and ethical issues that we identify when using informal methods of family creation. We then make our concluding remarks in Part VII.

II Informal Trends in Creating Families

In March 2021, a British television series, *Strangers Making Babies*, aired on Channel 4.[19] In the series, two fertility experts sought to assist hopeful individuals wanting to become parents by finding a match — a person to have a child with — 'without the complication of finding love first'.[20] The television series embarked on helping individuals create families with a platonic partner, with the sole intention to co-parent a child.

The series pitched itself as a 'baby-making revolution',[21] noting that in the United Kingdom alone there are 'currently 70,000 people signed up to co-parenting sites, looking for platonic partners to have children with'.[22] The four-part series was not without controversy and polarised opinion amongst its viewers. Some were critical about its concept and aims.[23] Despite being labelled an 'exploitative reality show, pseudo-social experiment and business pitch for a future co-parent matchmaking empire',[24] it was perhaps most successful in showcasing the dynamic and diverse

19 *Strangers Making Babies* (Channel Four Television Corporation, 2021) <https://www.channel4.com/programmes/strangers-making-babies>.

20 'Strangers Making Babies', *All 4* (Web Page, 31 March 2021) <https://www.channel4.com/programmes/strangers-making-babies>.

21 Annaleigh Rose Clarke, 'Strangers Making Babies Episodes and All about Channel 4's New Series', *TellyMix* (online, 30 March 2021) <https://tellymix.co.uk/tv/576212-strangers-making-babies-episodes-and-all-about-channel-4s-new-series.html>.

22 Ibid.

23 See Rishma Dosani, 'Strangers Making Babies Viewers Convinced the "World Has Gone Mad" over New Co-Parenting Series', *Metro* (online, 23 March 2021) <https://metro.co.uk/2021/03/23/strangers-making-babies-fans-convinced-the-world-has-gone-mad-14294801/>.

24 Rachael Sigee, 'Strangers Making Babies, Channel 4, Review: There's Space on TV To Examine a Modern Families — This Is Not It', *iNews* (online, 23 March 2021) <https://inews.co.uk/culture/television/strangers-making-babies-channel-4-review-927173>.

nature of the family structure to a mainstream audience. Additionally, the television series nationally publicised elective co-parenting as an emerging method of creating a family. For many viewers, the series may have been their first encounter with often nuanced or complex issues that can arise concerning parentage and parental responsibility in the context of non-traditional families. In this context, 'non-traditional families' might include same-sex couples, or single women or men, who are unable to conceive a child without some form of intervention such as assisted reproductive technology ('ART').

In the following discussion, we briefly discuss ART and the *Review* — which sought to make reforms to assist Victorians in the creation of a family using ART. It is important to briefly consider this, as we later go on to argue that greater access to ART and the implementation of the recommendations made in the *Review* might have gone some way in mitigating the use of informal methods of family creation as currently practised.

A *Assisted Reproductive Technology*

Over four decades ago the introduction of ART in Australia was considered a 'reproductive revolution' in medical science.[25] It changed the social, political, and legal construct of the family unit.[26] Initially, ART was limited in its accessibility in Victoria to heterosexual couples hoping to conceive a child, although this changed over time.[27] A shift in social and community attitudes, along with law reform, saw its availability broaden to include others, notably single women and lesbian couples.[28] According to the University of New South Wales Report, *Assisted Reproductive Technology in Australia and New Zealand 2019*, 16,927 births in Australia and New Zealand resulted from some form of ART treatment in 2019.[29] It has been reported elsewhere that the birth of almost one child in every Australian classroom has occurred using some form of ART.[30] We speculate these figures will increase

25 Peter Singer and Deane Wells, *The Reproduction Revolution: New Ways of Making Babies* (Oxford University Press, 1984).

26 Neera Bhatia and Lily Porceddu, 'Emptying the Nest Egg To Fill the Nursery: Early Release of Superannuation To Fund Assisted Reproductive Technology' (2021) 44(2) *University of New South Wales Law Journal* 513, 515.

27 Ibid.

28 See *McBain v Victoria* (2000) 99 FCR 116. Justice Sundberg held that a woman did not have to be married or in a de facto relationship to qualify for treatment for infertility under the *Infertility Treatment Act 1995* (Vic): at 123 [20]. See also Kristen L Walker, 'Equal Access to Assisted Reproductive Services: The Effect of *McBain v Victoria*' (2000) 25(6) *Alternative Law Journal* 288, 288.

29 Jade E Newman, Repon C Paul and Georgina M Chambers, *Assisted Reproductive Technology in Australia and New Zealand 2019* (Report, National Perinatal Epidemiology and Statistics Unit, University of New South Wales, September 2021) 4.

30 'Almost One in 20 Babies in Australia Born through IVF', *UNSW Newsroom* (online, 6 September 2020) <https://newsroom.unsw.edu.au/news/health/almost-one-20-babies-australia-born-through-ivf>.

over time, due to the rapid developments in reproductive technologies and their widespread social acceptance.

The growth of the ART industry has not been without its own challenges and controversies, which we have discussed elsewhere.[31] A wholesale review of ART, the fertility industry, and several areas in need of reform in relation to family creation were highlighted in the *Review*.[32] We argue that the *Review* was a catalyst for broader social discussion about the modern family construct and the need for greater inclusivity of non-traditional families.

Additionally, the *Review* highlighted some of the outdated assisted reproductive treatment legislation in Victoria.[33] This was perhaps one of the first major milestones towards regulatory and legislative reform to reflect and recognise the modern Australian family, at least in Victoria. The *Review* was commissioned by the Victorian Government and its findings were published in May 2019. The issues raised and addressed in the *Review* have set a benchmark for improving the provision, access, and regulation nationally. The *Review* made 80 recommendations to improve 'access, affordability, quality of care and support, understanding of infertility and treatments, respect for diverse family preferences, and the need for the highest standards of ethical practices in this field [of ART]'.[34]

These recommendations were made after consultations with a wide range of stakeholders.[35] An issue identified in the *Review*, and recommended for reform, was the outdated perceptions of the family unit and the use of discriminatory language in the *ART Act*, noting that the language used is not reflective of the evolving family unit today.[36] The *Review* called for amendments to the legislation to make it more inclusive and accessible.[37] For example, it was recommended that the legislation 'be amended to remove any discrimination against married women who wish to access assisted reproductive treatment following separation'.[38] That is, the legislation 'should ensure that where a married couple have separated, the consent of a person who would otherwise meet the definition of a partner is not required to undertake treatment, provided that their gametes are not used without specific

31 See Bhatia and Porceddu (n 26) 513.

32 *Review* (n 18).

33 Ibid 3–4.

34 Ibid 173.

35 The public consultation period involved more than 120 stakeholders: Michael Gorton, *Helping Victorians Create Families with Assisted Reproductive Treatment: Interim Report of the Independent Review of Assisted Reproductive Treatment* (Report, October 2018) 1 ('*Interim Report*'). These stakeholders included, but were not limited to 'clinics, practitioners, lawyers, regulators, parents and intended parents, donors, surrogates, and donor-conceived people': ibid 3. Additional consultation was also conducted following the release of the *Interim Report* (n 35): ibid 4–5.

36 *Review* (n 18) 1–2. See also *Interim Report* (n 35).

37 *Review* (n 18) 61–8.

38 Ibid vi, recommendation 4.

consent'.[39] Another significant recommendation, that was implemented in 2020 was the removal of the requirement for couples to undergo police and child protection order checks as they were recognised as being discriminatory.[40]

While the *Review* is progressive and promising, as some of the examples above highlight, only a small number of the 80 recommendations have been implemented. A final handful of reform recommendations were implemented recently and are reflected in the *Assisted Reproductive Treatment Amendment Act 2021* (Vic) ('*ART Amendment Act*').[41] However, we are not convinced that this is sufficient. We argue that the implementation of a small number of recommendations over a staggered period of time — almost four years since the *Review* was published — is disheartening. As we discuss later, had more of the recommendations been given serious and meaningful consideration in a timely manner, they might have gone some way in mitigating the use of risky options such as informal sperm donation or co-parenting websites in family creation. In Parts II(B)–(C), we consider these informal practices of creating a family outside the scope of the regulated fertility clinic environment.

B *Elective Platonic Co-Parenting Using the Internet*

Elective co-parenting is a 'relatively new phenomenon'.[42] It is, however, becoming an increasingly attractive option for single people, not in a sexual relationship, or co-habiting, but seeking to have a child together, usually wanting to raise a child in separate households.[43] Choosing this type of family creation and subsequent parenting arrangement differs from the traditional notion of co-parenting involving

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39 Ibid vi–vii, recommendation 4. See also *Interim Report* (n 35) 47. Under the *Assisted Reproductive Treatment Amendment Act 2021* (Vic) ('*ART Amendment Act*') where a woman and her partner separate before the treatment procedure is carried out, consent given by the woman and her partner is taken to be withdrawn on their separation: at s 14, inserting *Assisted Reproductive Treatment Act 2008* (Vic) s 20A ('*ART Act*').

40 See *Assisted Reproductive Treatment Amendment Act 2020* (Vic). These amendments removed the requirement that a woman and her partner, if any, and parties to a surrogacy arrangement must undergo a criminal records and child protection order check prior to accessing fertility treatment under the *ART Act*. In practice, this means that ART providers are no longer required to ask a woman seeking treatment and her partner, if any, or parties to a surrogacy arrangement to: (1) undergo a criminal records check; (2) arrange for a child protection order check to be undertaken by the Department of Health and Human Services; or (3) assess the checks to determine whether any offences or orders detailed in the checks give rise to a presumption against treatment.

41 For further discussion of these amendments, see below Part III.

42 V Jadva et al, '"Friendly Allies in Raising a Child": A Survey of Men and Women Seeking Elective Co-Parenting Arrangements via an Online Connection Website' (2015) 30(8) *Human Reproduction* 1896, 1897.

43 Ibid 1897–8.

pre-existing parents entering into a co-parenting arrangement for a child after separation or dissolution of a marriage.[44] While elective co-parenting has been common for some time amongst LGBTQIA+ communities,[45] it is now being used more generally.[46] This method of family creation often circumvents the need for donor sperm banks, and in some instances the involvement of a regulated fertility clinic in situations where people decide to try to conceive via home insemination.[47]

A growing number of co-parenting websites[48] and online forums[49] have arisen facilitating opportunities for like-minded people seeking to create non-traditional families to meet or be matched. Many co-parenting sites operate globally, with some online sites in Australia, the United Kingdom, and the United States serving multiple purposes — as co-parenting and sperm donation sites.[50] Sites such as 'CoParents.com' and 'Co-ParentMatch.com' have thousands of members across Australia, the United Kingdom, and the United States, and aim to provide 'a common ground to free sperm donors',[51] and 'a global community … who all share one common goal of becoming a parent'.[52] Likewise, 'PollenTree.com'[53] has approximately 20,000 members in the United States alone and 30,000 in the United Kingdom.[54] Similar to conventional dating sites, members can post information as to what they are seeking in a prospective parent for the purposes of co-parenting. This might include preferences about ethnicity, sexuality, and geographic location.[55]

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44 Ibid 1897.

45 Ibid; Joyce Harper et al, 'Using an Introduction Website To Start a Family: Implication for Users and Health Practitioners' (2017) 7(4) *Reproductive Biomedicine and Society Online* 13, 13–15; Charlotte J Patterson, 'Children of Lesbian and Gay Parents' (1992) 63(5) *Child Development* 1025, 1026, 1038.

46 See Jadva et al (n 42) 1897.

47 Ibid 1900; Harper et al (n 45) 13–15.

48 Sometimes referred to as 'introduction sites': see Harper et al (n 45) 14. See, eg, 'A Sperm Bank Alternative', *Co-ParentMatch: Find Your Perfect Parenting Partner* (Web Page) <https://www.co-parentmatch.com/> ('A Sperm Bank Alternative').

49 See, eg: 'Forum', *CoParents.com* (Web Page) <https://www.coparents.com/forum/>; 'Prospective Lesbian Parents (PLP) VIC', *Facebook* (Web Page) <https://www.facebook.com/groups/plpaustralia>.

50 Harper et al (n 45) 14.

51 'Become a Parent!', *CoParents.com* (Web Page) <https://coparents.com/>.

52 'A Sperm Bank Alternative' (n 48).

53 'The Fertility Network for Future Parents and Co-Parents', *PollenTree.com* (Web Page) <https://pollentree.com/>.

54 Emma Willing, '"Strangers Making Babies": The Rise and Legal Implications of Platonic Co-Parenting', *Spear's* (online, 26 August 2021) <https://www.spearswms.com/strangers-making-babies-the-rise-and-legal-implications-of-platonic-co-parenting/>.

55 See, eg, 'Profiles: Australia', *Co-ParentMatch: Find Your Perfect Parenting Partner* (Web Page) <https://www.co-parentmatch.com/Profiles.aspx?c=australia>.

C *Informal Sperm Donation Using Online Platforms and Marketplaces*

Online informal sperm donation has been described as a 'phenomenon enabled by online platforms (social media or introductory websites) that provide direct connections between sperm donors and recipients, facilitating donation [or sale of sperm] outside of formal [clinics or banks]'.[56]

Social media groups advertise those seeking to source or to donate sperm. At the time of writing, there are more than 2,000 members of the social media group 'Sperm Donors Uk Only',[57] 3,000 members of the 'FREE Sperm Donors + Donation UK', [58] and 15,000 members of Australia's 'Sperm Donation Australia' group.[59] The administrator of the Australian Facebook group reportedly facilitated the birth of 437 children in 2020 alone via informal sperm donation.[60] Similar to elective co-parenting sites, donors can upload photos, a brief description of themselves, medical history, and preferred method of donation (artificial or natural insemination).[61] Potential recipients can indicate interest or request further information.[62] It has been observed by Joyce Harper et al that sophisticated online sites readily 'ship sperm worldwide for home insemination'.[63] Most commonly, sperm is delivered in

56 Nicole Bergan and Céline Delacroix, 'Bypassing the Sperm Bank: Documenting the Experiences of Online Informal Sperm Donors' (2019) 29(5) *Critical Public Health* 584, 584.

57 'Sperm Donors Uk Only', *Facebook* (Web Page) <https://www.facebook.com/groups/298143140707365/?ref=br_rs>. See also Hussein Kesvani, 'Inside the British Black-Market for Homegrown Sperm', *MEL Magazine* (online, 15 September 2018) <https://melmagazine.com/en-us/story/inside-the-british-black-market-for-home-grown-sperm>.

58 'FREE Sperm Donors + Donation UK', *Facebook* (Web Page) <https://www.facebook.com/groups/FreespermdonorsAIonlyUK>. See also Kesvani (n 57).

59 'Sperm Donation Australia', *Facebook* (Web Page) <https://www.facebook.com/groups/spermdonationaustralia/members>.

60 Henrietta Cook and Farrah Tomazin, 'The Man behind Australia's Private Sperm Donor Boom', *The Age* (online, 23 May 2021) <https://www.theage.com.au/national/victoria/the-man-behind-australias-private-sperm-donor-boom-20210521-p57u1q.html>.

61 Ally Foster, 'Experts Warn against Murky World of Private Sperm Donation in Australia', *News.com.au* (online, 23 Feb 2021) <https://www.news.com.au/lifestyle/parenting/pregnancy/experts-warn-against-murky-world-of-private-sperm-donation-in-australia/news-story/c8e1b697cbb4566b4cdecabbd8e593db>. Natural insemination is a term that is used to describe sexual intercourse between a sperm donor and a female recipient for the purposes of achieving a pregnancy.

62 Ibid.

63 Harper et al (n 45) 13.

syringes ready for home insemination via kits purchased online.[64] Home insemination kits are available online via shopping websites such as Amazon.[65]

On 19 February 2017, the mobile phone app 'Just a Baby' was launched by app developer Paul Ryan at the Sydney Gay and Lesbian Mardi Gras Fair Day.[66] The app operates in a similar way to the dating app Tinder, with a location-driven swiping interface allowing people to meet potential egg or sperm donors, surrogates, or those seeking to enter co-parenting arrangements.[67] Ryan notes that people using the app may eventually seek assistance from fertility clinics if the need arises in the creation of a family.[68] The app has been met with criticism by fertility experts.[69] Additionally, concern has been raised about sperm being sold via online marketplaces, such as Gumtree, with evocative advertisements containing catchy tag lines for 'penetrative sex without [a] condom' such as: '"want to get pregnant", which offers "Guaranteed results!" … [and] [l]ooking for a guy to get me pregnant …'.[70] Ingrid Holme has referred to this as the 'black-market' for sperm given its forbidden and unlawful sale.[71] It is difficult to attribute the increasing prevalence of informal sperm donation to one specific cause, as it is likely the result of a culmination of interposing factors encouraging individuals or couples to pursue this avenue or co-parenting arrangements, rather than using regulated fertility clinics. It is the consideration of these factors to which our discussion now turns.

III Contributing Factors for Using Informal Sperm Donation and Elective Co-Parenting To Create Families

We consider that there might be a range of contributing factors as to why individuals or couples might turn to informal and risky methods of family creation.

64 Kesvani (n 57).

65 Ibid; 'Spermix Private, Insemination Kit', *Amazon.co.uk* (Web Page) <https://www.amazon.co.uk/MeDesign-MED1000005-Spermix-Private-Insemination/dp/B0041MFXWS>.

66 'Our Stories', *Just a Baby* (Web Page) <https://www.justababy.io/media/>.

67 Marina Kamenev, 'The Sperm Drought', *The Monthly* (online, August 2019) <https://www.themonthly.com.au/issue/2019/august/1564581600/marina-kamenev/sperm-drought#mtr>.

68 Ibid.

69 Briana Fiore, 'WA Entrepreneur Says His Just a Baby App Has Facilitated 1,000 Births, but AMA Urges Caution', *ABC News* (online, 7 September 2022) <https://www.abc.net.au/news/2022-09-07/just-a-baby-app-ivf-sperm-donor-1000-births/101408256>; 'Just a Baby App That Matches Hopeful Parents Criticised by Fertility Experts: The App Promises To "Find Someone To Help You Make a Baby"', *Goodto Know* (online, 25 May 2017) <https://www.goodto.com/family/just-a-baby-app-2975>.

70 Ingrid Holme, 'Sperm Exchange on the Black Market: Exploring Informal Sperm Donation through Online Advertisements' (2017) 1(1) *Sexuality, Gender, and Policy* 31, 42.

71 Ibid 34–7.

These include, amongst other factors which we discuss below: (1) the excessive cost and long waitlists for the use of ART via regulated fertility clinics; (2) a shortage of sperm donors; and (3) a lack of diversity of donors. We reiterate that the use of informal practices in family creation might have been mitigated if more of the *Review*'s recommendations were implemented, or had been implemented earlier.

A *The Prohibitive Cost of ART*

The Fertility Society of Australia and New Zealand estimates that one in six couples in Australia and New Zealand experience infertility.[72] Additionally, single people or same-sex couples may also seek assistance to conceive a child. In Australia, fertility clinics are commercially and profit-driven businesses, with several listed on the ASX.[73] The revenue generated by the fertility industry in Australia, as of May 2019, was more than $550 million annually.[74] It was expected to grow to $630 million by 2022.[75] In August 2019, the industry was predicted to be worth more than $65 billion globally by 2026.[76]

While the business of babies is booming, access to ART in Australia via regulated fertility clinics is prohibitively expensive. At the time of writing, an initial in vitro fertilisation ('IVF') cycle costs approximately $10,532 leaving individuals $5,478 out of pocket after a Medicare rebate of $5,054.[77] Due to the significant cost, some individuals or couples have sought early access to their superannuation funds for assisted reproductive treatment,[78] or are choosing a less expensive means altogether,

72 'One in Six Couples Suffer from Infertility', *Fertility Society of Australia and New Zealand* (Web Page) <https://www.fertilitysociety.com.au>.

73 See, eg: 'Monash IVF Group Limited: MVF', *ASX* (Web Page) <https://www2.asx.com.au/markets/company/mvf>; 'Healius Limited: HLS', *ASX* (Web Page) <https://www2.asx.com.au/markets/company/hls>. See generally: 'Monash IVF Group', *Monash IVF Group* (Web Page, 2022) <https://www.monashivfgroup.com.au/>; 'Healius', *Healius* (Web Page, 2022) <https://www.healius.com.au/>.

74 *Review* (n 18) 12.

75 Ibid.

76 'The Fertility Business Is Booming', *The Economist* (online, 8 August 2019) <https://www.economist.com/business/2019/08/08/the-fertility-business-is-booming>. See also 'Fertility Services Market: Global Industry Trends, Share, Size, Growth, Opportunity and Forecast 2022–2027', *Research and Markets* (Web Page, August 2022) <https://www.researchandmarkets.com/reports/5647776/fertility-services-market-global-industry?utm_source=dynamic&utm_medium=BW&utm_code=nhjscq&utm_campaign=1321362+-+Global+Fertility+Services+Market+Report+2019-2024+-+Analysis+by+Cause+of+Infertility%2c+Procedure%2c+Service%2c+End-user+%26+Region&utm_exec=joca220bwd>.

77 'IVF Treatment Costs', *IVF Australia* (Web Page) <https://www.ivf.com.au/ivf-cost/ivf-costs> ('IVF Treatment Costs').

78 For further discussion of these issues in detail, see generally Bhatia and Porceddu (n 26).

such as sourcing sperm online and home insemination. Both raise a number of ethical and legal concerns.

Amendments to the *ART Act* will allow more people in Victoria to access low-cost fertility treatments. This will include a broadened range of professionals who will be able to perform artificial insemination. The final suite of reform recommendations from the *Review* has recently been implemented.[79] One recommendation implemented is that nurses and other trained health professionals can carry out artificial insemination provided it is under the supervision and direction of a doctor in an assisted reproductive treatment clinic.[80] Additionally, the reform suggestion to scrap the requirements for people to undergo counselling at a registered assisted reproductive treatment clinic has also been implemented.[81]

The Victorian Government recently began the rollout of public fertility services.[82] The program is currently small in scale, operating from two metropolitan hospitals with specific eligibility for access to free public fertility services.[83] A person must: be a resident of Victoria, hold a Medicare card, and have a specialist or GP referral.[84] Further, eligibility criteria state that at the time of treatment the person must be a maximum age of 42 years old, and there is a lifetime cycle limit of two IVF or intra-cytoplasmic sperm injection cycles per person.[85] For some hopeful individuals or couples, this might assist in creating a family, however, for others, these criteria might be considered too restrictive, especially where fertility treatments are used by those that are over the age of 42 years or indeed where there is a need for several cycles of fertility treatment due to infertility conditions. Once fully operational, the rollout is estimated to assist up to 4,000 Victorians annually with an average annual cost saving of $10,000.[86]

While these services are welcomed, the *Review* recommendations for such were made almost four years ago,[87] and the rollout of the full suite of services will take

79 See *ART Amendment Act* (n 39).

80 Ibid s 6. See also *ART Act* (n 39) s 8.

81 *ART Amendment Act* (n 39) s 8. See also *ART Act* (n 39) s 13.

82 'Public Fertility Care Services', *Victorian Department of Health* (Web Page, 14 October 2022) <https://www.health.vic.gov.au/public-health/public-fertility-care-services> ('Public Fertility Care Services').

83 Ibid.

84 Ibid.

85 Ibid.

86 Ibid. Services will include: '[d]onor services through the establishment of Victoria's first public sperm and egg bank', '[a]ltruistic surrogacy services', '[f]ertility preservation where medical treatment may compromise fertility including cancer treatment and gender reassignment treatment', and '[g]enetic testing where people are known carriers of serious medical conditions'.

87 *Review* (n 18) xx–i, recommendations 41–4.

time with limitations on who can access the services.[88] From a cost perspective, for comparative purposes, individuals might be more attracted to sourcing sperm online via donation or even unlawfully purchasing sperm on the black-market, with home insemination kits costing as little as $46.15,[89] as opposed to those of out-of-pocket costs, conservatively, at approximately $5,478 for one cycle of IVF at a regulated fertility clinic.[90] With no guarantee of success through IVF, some people may choose the avenue of informal sperm donation, costing significantly less in comparison.[91]

B *Elective Co-Parenting: Biological Connection to Parents and Potential Siblings (without Romantic Relationship)*

Several international studies have explored the motivations of individuals that have used co-parenting sites for family creation.[92] Vasanti Jadva et al surveyed 61 men and 41 women who used the United Kingdom co-parenting site Pride Angel ('Jadva et al study').[93] There was a mix of heterosexual, lesbian/gay, and bisexual participants, ranging from ages 18–54 and of various ethnicities.[94] The primary motivation for using the site was to ensure that any child born as a result would have two biological parents in their life.[95] Further, participants wanted to know the person who had provided the sperm or egg to create the child, rather than using anonymously donated gametes.[96] Most participants were seeking single co-parents or a gay/lesbian couple.[97] Also, most participants had established expectations about what they sought from potential co-parents ranging from friendship to partnership and lastly, civil, good, or positive relationships.[98] Further, most of those surveyed preferred home insemination (by artificial means) as a method of conceiving a child[99] — presumably saving on assisted reproductive treatment costs.

88 'Public Fertility Care Services' (n 82).

89 'New Standard Insemination Kit', *Pride Angel* (Web Page) <https://www.prideangel.com/Shop/Insemination-Kits/Standard-Insemination-Kit-1.aspx>.

90 'IVF Treatment Costs' (n 77).

91 We note that there are potentially serious health risks to recipients and any child born by sourcing informal sperm donation online rather than using regulated clinics, as there is no screening of informal sperm donations: see generally Stephen Whyte, David A Savage and Benno Torgler, 'Online Sperm Donors: The Impact of Family, Friends, Personality and Risk Perception on Behaviour' (2017) 35(6) *Reproductive BioMedicine Online* 723.

92 See, eg: Jadva et al (n 42) 1896; Harper et al (n 45) 13–15. See also Bergan and Delacroix (n 56) 584.

93 Jadva et al (n 42) 1898.

94 Ibid.

95 Ibid 1899.

96 Ibid.

97 Ibid.

98 Ibid 1903.

99 Ibid 1900.

An Israeli study comprising ten heterosexual women, who co-parented with gay men, revealed that their desire to do so arose from a wish to raise a child to have both a 'mother' and a 'father'.[100] For female participants, co-parenting also enabled the parenting burden to be shared with another adult and increased financial security.[101] Additionally, a small Belgian study of nine gay and lesbian participants by Cathy Herbrand found that a desire to have biologically related children, and for the children to know one another, was a key determination in elective co-parenting.[102]

The Jadva et al study revealed that individuals preferred using online introduction sites as it allowed them to set restrictions and filters on matters such as medical history and co-parenting expectations.[103] However, this might put the parties at risk. Some elective co-parenting arrangements might be made where the parties agree to simple blood tests, but more rigorous screening for genetic conditions, for example, is not performed. Alternatively, a person entering such an arrangement may misrepresent screening results of family history of genetic conditions to the other party.

C *Shortage of Sperm Donors*

Recently, Australia has seen a significant decrease in sperm donations made to regulated fertility clinics. In 2020, the Victorian Assisted Reproductive Treatment Authority ('VARTA') reported an annual 21% decrease in sperm donors, noting 335 donors on 1 July 2020 compared to 424 in the year prior.[104] One clinic reported a 90% decrease in sperm donor inquiries during the COVID-19 pandemic.[105] According to VARTA, the demand for donor sperm has outstripped supply by single women and same-sex couples seeking to conceive a child.[106] One Victorian clinic noted

100 Dorit Segal-Engelchin, Pauline I Erera and Julie Cwikel, 'Having It All? Unmarried Women Choosing Hetero-Gay Families' (2012) 27(4) *Affilia* 391, 395. See ibid 1897.

101 Segal-Engelchin, Erera and Cwikel (n 100) 396. See Jadva et al (n 42) 1897.

102 Cathy Herbrand, 'Les Normes Familiales à L'épreuve du Droit et des Pratiques: Analyse de la Parenté Sociale et de la Pluriparentalité Homosexuelles' (PhD Thesis, Université Libre de Bruxelles, 2008). See Jadva et al (n 42) 1897.

103 Jadva et al (n 42) 1900.

104 Victorian Assisted Reproductive Treatment Authority, *VARTA: 2020 Annual Report* (Report, 2020) 28.

105 Shona Hendley, 'Too Many Women, Not Enough Sperm: The Victorian Donor Dilemma', *The Sydney Morning Herald* (online, 17 September 2022) <https://www.smh.com.au/lifestyle/health-and-wellness/too-many-women-not-enough-sperm-the-victorian-donor-dilemma-20220906-p5bfqy.html>.

106 Beau Donelly, 'Victoria Clinic Sperm Demand Prompts Calls To Use Overseas Donors', *The Age* (online, 10 November 2014) <https://www.theage.com.au/national/victoria/victoria-clinic-sperm-demand-prompts-calls-to-use-overseas-donors-20141110-11jxmj.html>; Nicola Berkovic, 'Baby Backlog: COVID-19 Causes Plunge in IVF Donors as Demand Increases', *The Australian* (online, 26 December 2020) <https://www.theaustralian.com.au/nation/baby-backlog-covid-causes-plunge-in-ivf-donors-as-demand-increases/news-story/2b2e44eeb220a5a5dcc0101158b4b176>.

'a three-month waitlist' in 2019 for women seeking the use of ART.[107] VARTA has noted that, in 2019, the largest cohort of women seeking donor sperm were single (54%), followed by those in same-sex relationships (32%), and lastly those in heterosexual relationships (13%).[108] In the discussion below in Parts III(C)(1)–(3), we explore three contributing factors that might influence individuals to source sperm online: (1) potential donors' perspectives; (2) the impact of COVID-19 and its restriction of travel and the importation of gametes; and (3) regulatory changes to donor anonymity.

1 *The Donor's Experience*

Some online sperm donors (generally donating informally) are principally motivated by altruism,[109] whilst others opt to donate informally because they want to know some information about the prospective parents of the child born of their sperm.[110] A study by Nicole Bergan and Céline Delacroix found that donors felt that informal donation allowed greater control over the process, which regulated clinics could not provide,[111] and allowed them to be a gatekeeper with personal agency.[112] When donating through regulated fertility clinics, donors effectively relinquish control of their gametes and are provided limited information about the recipient and any resulting offspring.[113] Some donors in the study wanted to pass on genetic characteristics and continue their genetic lineage,[114] whilst others were motivated by money.[115] Accordingly, donors may be electing to donate via informal channels online where they have control as to who they donate sperm to — a choice that

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107 Kamenev (n 67).

108 Victorian Assisted Reproductive Treatment Authority, 'Victorians Warned about Risks of Informal Sperm Donation' (Media Release, 2020) <https://www.varta.org.au/resources/news-and-blogs/media-release-victorians-warned-about-risks-informal-sperm-donation> ('VARTA Media Release').

109 U Van den Broeck et al, 'A Systematic Review of Sperm Donors: Demographic Characteristics, Attitudes, Motivations and Experiences of the Process of Sperm Donation' (2013) 19(1) *Human Reproduction Update* 37, 48.

110 See Bergan and Delacroix (n 56) 587.

111 See Nicolette OM Woestenburg, Heinrich B Winter and Pim MW Janssens, 'What Motivates Men To Offer Sperm Donation via the Internet?' (2016) 21(4) *Psychology, Health and Medicine* 424, 426–7.

112 Bergan and Delacroix (n 56) 587.

113 See Whyte, Savage and Torgler (n 91) 724.

114 Bergan and Delacroix (n 56) 591. See also: T Freeman et al, 'Online Sperm Donation: A Survey of the Demographic Characteristics, Motivations, Preferences and Experiences of Sperm Donors on a Connection Website' (2016) 31(9) *Human Reproduction* 2082, 2084; Woestenburg, Winter and Janssens (n 111) 427.

115 Bergan and Delacroix (n 56) 585. See also Samantha Yee, '"Gift without a Price Tag": Altruism in Anonymous Semen Donation' (2009) 24(1) *Human Reproduction* 3, 6–7. This is not relevant to Australia, where all donations to fertility clinics must be made altruistically: 'Reimbursement', *Sperm Donors Australia* (Web Page) <https://www.spermdonorsaustralia.com.au/how-to-donate/reimbursement/>.

would otherwise be out of their control — allowing them to consider whether the recipient would be a 'fit mother'.[116]

2 *Donor Anonymity*

On 1 March 2017, Victoria retrospectively removed donor anonymity making it the second jurisdiction in the world to do so.[117] This legislation, the *Assisted Reproductive Treatment Amendment Act 2016* (Vic), allowed people conceived of donor eggs or sperm to legally obtain identifiable information about their donors. Specifically, while anonymous donation has not been permitted in Victoria since 1998,[118] under the new legislation, donor-conceived people born using gametes anonymously donated prior to 1998 are able to apply for identifiable information about their donor — even if the donor had not consented to being identifiable.[119]

We contend that the explicit removal of donor anonymity may be one contributing factor to the shortage of sperm donors.[120] In light of this, potential donors might be less willing to donate in the knowledge that donor-conceived persons might be more likely to seek identifiable information about them when they turn 18 years of age,[121] leading to some shortage of sperm donors in regulated fertility clinics. Additionally, with a decreasing donor sperm pool, the diversity of available donations is limited, resulting in individuals or couples seeking sperm donors with specific racial, cultural, or linguistically diverse characteristics through informal channels such as sourcing sperm online.[122]

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116 Bergan and Delacroix (n 56) 587.

117 Fiona Kelly et al, 'From Stranger to Family or Something in Between: Donor Linking in an Era of Retrospective Access to Anonymous Sperm Donor Records in Victoria, Australia' (2019) 33(3) *International Journal of Law, Policy and the Family* 277, 279.

118 See Fiona Kelly and Deborah Dempsey, 'The Family Law Implications of Early Contact between Sperm Donors and Their Donor Offspring' (2016) 98(1) *Family Matters* 56, 57.

119 See *Assisted Reproductive Treatment Amendment Act 2016* (Vic) s 23, repealing *ART Act* (n 39) s 63, inserting *ART Act* (n 39) ss 63(1), 63B(1).

120 Berkovic (n 106).

121 The *Assisted Reproductive Treatment Amendment Act 2016* (Vic) came into force in Victoria in March 2017: at s 2(2). VARTA manages a voluntary register and a central register. The voluntary register exists as a free tool to facilitate contact between individuals linked through donor conception treatment if two people have listed themselves on the register and have matched. Medical history, one's family tree, information about interests, hobbies and personality as well as photographs and videos can be lodged on the register for access by the matched donors, donor-conceived adults, parents and relatives. The central register is an outreach service which involves the payment of a fee to obtain information: 'Donor Conception Register Services', *VARTA* (Web Page, 2021) <https://www.varta.org.au/donor-conception-register-services>.

122 See Jaya Keaney and Tessa Moll, 'Fertility Care in the Era of COVID-19' (Briefing Paper No 4, ADI Policy Briefing Papers, 2020) 5.

3 *Impact of COVID-19 and Sperm Donation Shortage*

An existing shortage of donor gametes (sperm, eggs, and embryos) has been further exacerbated by the global COVID-19 pandemic.[123] Some fertility clinics experienced a decrease in sperm donations due to state lockdowns.[124] This is especially pertinent to Victoria having undergone several lockdowns.[125] As discussed earlier, this has had a 'supply and demand' impact on fertility clinics with a recent surge in the number of single women and same-sex female couples seeking to conceive a child, however, unable to proceed with assisted reproductive treatments due to donor sperm shortages in fertility clinics.[126]

Due to their scarcity in Australia, gametes might be imported from overseas. However, with national and international border closures during the height of the pandemic, imported gametes remained offshore and inaccessible — potentially leaving individuals and couples with no chance of starting fertility treatment to conceive a child. According to Jaya Keaney and Tessa Moll, the global pandemic 'intensified economic and geopolitical inequalities' in fertility care, with '[m]any intending parents hav[ing] had their fertility treatment interrupted due to international border closures'.[127]

To seek approval to import donor gametes from any interstate counterpart, a Victorian fertility clinic must complete an application which is submitted to VARTA, in accordance with s 36 of the *ART Act*.[128] However, the legislation does not provide specific determining factors that VARTA must consider when approving donor gamete or embryo applications.[129] Thus, the process might be considered unduly vague, impacting an individual's ability to access donor gametes and further contributing to donor gamete shortages. Given the shortage of sperm donated through

123 Emily McPherson, 'Australian IVF Clinics Can't Keep Up with the Demand for Donor Sperm: Here's Why', *9News* (online, 11 June 2022) <https://www.9news.com.au/national/why-australian-ivf-clinics-cant-keep-up-with-the-demand-for-donor-sperm/61bffa87-6f2b-491e-8afd-bbe94ba390ac>.

124 Ibid.

125 See 'The Timeline', *Lockdown Stats Melbourne* (Web Page, 6 November 2021) <https://lockdownstats.melbourne/timeline/>.

126 See: Berkovic (n 106); McPherson (n 123).

127 Keaney and Moll (n 122) 2.

128 See 'Importing and Exporting Donor Material', *VARTA* (Web Page, 2022) <https://www.varta.org.au/regulation/importing-and-exporting-donor-material>.

129 Cf *ART Act* (n 39) s 36.

regulated fertility clinics[130] and the impact of age and fertility success,[131] people might feel compelled to turn to riskier avenues such as online informal sperm donation or co-parenting arrangements in order to start a family.

In January 2022, the Victorian Government placed a blanket ban on IVF treatment, cancelling IVF treatments and defining such treatments as 'non-urgent elective surgeries', in order to divert resources to COVID-19 healthcare.[132] This led to public outcry among IVF patients and there were calls for its immediate reinstatement.[133] Arguably, this is another demonstration of 'geopolitical inequalit[y]' in fertility care.[134] An online petition garnered more than 135,000 signatures[135] and the Victorian Government promptly reinstated IVF.[136]

D *Donor's Withdrawal of Consent*

Single women or lesbian couples might use informal sperm donation instead of regulated fertility clinics as donors have been able to withdraw consent to the use

130 'Figures from VARTA show that there were only 335 sperm donors available in Victoria at the start of the financial year, down from 424 at the start of 2018–19. There were also fewer sperm donors recruited this year (81) compared with the previous year (128)': Henrietta Cook and Farrah Tomazin, 'Sperm Drought Fuels Unregulated Online Market and Sex Assault Concerns', *The Age* (online, 22 May 2021) <https://www.theage.com.au/national/victoria/sperm-drought-fuels-unregulated-online-market-and-sex-assault-concerns-20210521-p57u0s.html> ('Sperm Drought'). '[C]linics are reporting that demand for donor sperm is outstripping supply, which may be prompting some people to seek donors through unregulated channels': Victorian Assisted Reproductive Treatment Authority, 'VARTA Media Release' (n 108).

131 The success rate of each IVF cycle in women under the age of 30 is approximately 29% which drops to 16.5% in women between the ages of 35–9 and 5.2% between the ages of 40–4. The chances of a woman conceiving a child naturally between the ages of 19–25 decrease by almost half when age increases to 30–5: Lindsay Wu, 'IVF Success in Older Women is Low: Can New Insights into Egg Cell Ageing Reverse This?', *UNSW Newsroom* (online, 12 February 2020) <https://newsroom.unsw.edu.au/news/health/ivf-success-older-women-low-%E2%80%93-can-new-insights-egg-cell-ageing-reverse>.

132 See Kristian Silva, 'Reinstate IVF Treatment, Victorian Woman Pleads as Government Halts Non-Urgent Elective Surgeries', *ABC News* (online, 18 January 2022) <https://www.abc.net.au/news/2022-01-18/victoria-ivf-treatments-paused-90-days/100763802>.

133 Ibid.

134 Keaney and Moll (n 122) 2.

135 'Reinstate Fertility/IVF Treatments in Victoria: An Essential Service for Many', *Change.org* (Web Page, 2022) <https://www.change.org/p/daniel-andrews-reinstate-fertility-ivf-treatments-in-victoria-an-essential-service-for-many>.

136 'Andrews Apologises for Ban, Reinstates Victorian IVF Services', *Sky News* (online, 20 January 2022) <https://www.skynews.com.au/australia-news/coronavirus/andrews-apologises-for-ban-reinstates-victorian-ivf-services/video/9a1c5b7a68cf977259a3842638afba19>.

of gametes created using their genetic material. In 2021, it was reported that some Victorian fertility clinics were compelled to destroy embryos created using donor sperm/eggs as donors had withdrawn consent for their use, causing significant financial and emotional distress to those undergoing IVF.[137] This significant issue has been reformed under the *ART Amendment Act* to provide greater certainty to fertility clinic patients. The amendment provides that a person who has donated gametes may *only* withdraw consent to the use of the gametes *up until* they are used in a treatment procedure or are used to form an embryo.[138] Even with the reform, individuals might opt for informal sperm donation and home insemination as it does not pose any risk of confusion or error in donated sperm being destroyed. Alternatively, they may opt for elective co-parenting where both parties proactively seek to parent a child together using home insemination — without the emotional or financial uncertainty or risk of sperm being destroyed.

E *Limits of Sperm Donation for Family Creation via Regulated Clinics*

Section 29(1) of the *ART Act* provided that no more than '10 women' could undergo assisted reproductive treatment using donor eggs, sperm or embryos produced using the same donor. The reason for this was to limit the risk of donor-conceived people who shared the same donor to unknowingly enter into a relationship with their sibling and conceive a child, sharing the same blood line (consanguinity).[139] The effect of this '10 limit' rule, however disadvantaged lesbian couples who might have *both* wished to carry a child using the same donor sperm to create genetic siblings. This is because they were not considered as one family, rather, each woman was considered independently and separately as two different families. However, this has been amended in the legislation to include exceptions to the offence for use of donated gametes in treatment procedures in s 29(1) of the *ART Act* which may result in more than 10 women having children who are genetic siblings.[140] Previously, this might have been a reason for lesbian couples to elect to source sperm online, where a limitation on donation would perhaps not be a primary concern. People may still

137 Henrietta Cook and Farrah Tomazin, 'IVF Clinics Forced To Destroy Embryos Due to "Cruel and Crushing" Laws', *The Age* (online, 27 June 2021) <https://www.theage.com.au/national/victoria/ivf-clinics-forced-to-destroy-embryos-due-to-cruel-and-crushing-laws-20210625-p584ac.html>.

138 *ART Act* (n 39) s 20(1A)(a), as amended by *ART Amendment Act* (n 39) s 13.

139 Under recently amended legislation in Victoria, a donor can donate to 10 'families' as opposed to the previous 10 'women' rule: see *ART Amendment Act* (n 39) s 19, amending *ART Act* (n 39) s 29(2). This enables existing families to create siblings related to their existing children using the same donor. Further, it allows both women in a same-sex female relationship to have children using the same donor, even if the 10 women limit has been reached. For other jurisdiction family creation limits using donor sperm see: *New South Wales Assisted Reproductive Technology Act 2007* (NSW) s 27(3); 'Human Reproductive Technology Act 1991: Human Reproductive Technology Directions 2021' in Western Australia, *Western Australian Government Gazette*, No 112, 23 June 2021, 2663, 2664 [8.1].

140 *ART Act* (n 39) s 29(3), as inserted by *ART Amendment Act* (n 39) s 19.

choose to use informal avenues to source sperm where they are reluctant to use fertility clinics due to cost, waitlists, or where there is a preferred donor who is not registered with a fertility clinic.

This is, however, of concern, and risky in terms of the number of children created by a sperm donor. One report from the Donor Sibling Registry in Queensland found that prior to the family limits guidelines one donor's sperm was used to create 48 children.[141] The risk of consanguinity is not farfetched, as in this case the children created by this prolific donor discovered they were neighbours in a Brisbane suburb.[142] Fiona Kelly notes that there are in fact 'clusters of "rainbow suburbs" with sizeable LGBTI populations', which record 'potentially high rates of reproductive assistance'.[143] She also states that the parents 'all send their children to the same schools — often intentionally'.[144] Thus, the chances of donor-conceived children meeting others born of the same donor is relatively high.

F *Unwanted Side Effects of IVF*

Home-based informal methods of conception may be more attractive as they can avoid invasive pre- and post-procedures such as egg retrieval for IVF that occur via regulated fertility clinics. Further, a range of side effects from such treatments might be avoided; these might include effects such as: soreness or bruising from injections, nausea, breast tenderness, bloating, hot flushes, mood swings, fatigue, allergic reactions, pelvic and abdominal pain and emotional stress. More serious issues arising from IVF treatment can include ovarian hyperstimulation syndrome, where the body responds to the medication adversely, which in rare circumstances can cause death.[145] Informal methods of sourcing sperm online and home insemination by tracking ovulation dates might be an attractive method of family creation without the invasive procedures, the unpleasant side effects, and the additional risks associated with IVF treatment via regulated clinics.

We have discussed a range of contributing factors as to why individuals or couples might resort to using informal methods of family creation such as informal sperm donation. We have also noted that the demand for informal sperm donation might decrease in the future with amendments to the *ART Act*. While this is favourable, this only provides a small window to a much broader issue that requires further examination. In the section below we turn to discuss the relevant legislation and legal implications when using informal avenues for family creation.

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141 Kamenev (n 67).

142 Ibid.

143 Ibid.

144 Ibid.

145 Ning Wang et al, 'Sudden Death Due to Severe Ovarian Hyperstimulation Syndrome: An Autopsy-Centric Case Report' (2021) 42(1) *American Journal of Forensic Medicine and Pathology* 88.

IV The Legal Landscape

In Part III we discussed a range of factors that might influence individuals and couples to seek informal methods of family creation — namely informal sperm donation or elective co-parenting facilitated by the internet and/or social media platforms. In this Part, we explore the legal implications of using potentially risky strategies in family creation.

In 1990, Australia ratified[146] the *Convention on the Rights of the Child* ('*CRC*').[147] It is bound by art 3 which states that '[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'.[148]

Accordingly, the *FLA* provides that the overall objective relating to children is to 'ensure that the best interests of children are met',[149] and also provides that the interests of a child are paramount when making a parenting order with respect to a child.[150] Further, the *ART Act* provides that 'the welfare and interests of persons born or to be born as a result of treatment procedures are paramount' in administering and carrying out functions under that Act.[151]

The primary intention of the aforementioned legislation is to ensure that the child's interests are principal. The status of a child's parents is critical in ensuring a child's best interests are met under various legislation, given the substantial responsibilities and rights conferred on parents including all 'powers, responsibilities and authority which, by law, parents have in relation to children'[152] under ss 61B–61C of the *FLA* and the responsibility to pay child support pursuant to s 77 of the *CSA Act*.[153] These Acts provide presumptions as to what is in the child's best interests or require factors for consideration in determining what is in a child's best interests. For example, it is in the child's best interests to have a meaningful relationship with both parents according to the *FLA*.[154] Our discussion now returns to the High Court

146 '11. Convention on the Rights of the Child', *United Nations Treaty Collection* (Web Page, 14 October 2022) <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4>.

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

148 Ibid art 3(1).

149 *FLA* (n 13) s 60B(1).

150 Ibid s 60CA.

151 *ART Act* (n 39) s 5(a).

152 *FLA* (n 13) s 61B.

153 *Child Support (Assessment) Act 1989* (Cth) ss 5 (definition of 'liable parent'), 77 ('*CSA Act*').

154 See *FLA* (n 13) s 60CC(2)(a).

decision in *Masson* discussed in Part I above, highlighting the importance placed on the definition of a parent in relation to the presumptions discussed above.

A *Who Is a Parent: Masson*

The decision in *Masson* resulted in the High Court broadening the definition of 'parent' under the *FLA* and the *SOCA (NSW)*, and therefore altering its application in Australia. While here the *SOCA (NSW)* is state legislation pertaining to New South Wales, we note that other Australian jurisdictions have similar legislation with consistent provisions.[155]

As briefly discussed in the Introduction of this article, Robert Masson provided sperm to Susan Parsons for the purposes of conceiving a child by way of artificial insemination.[156] The intention of the parties was to co-parent a child.[157] The procedure proved successful, and a baby girl was born.[158] Masson's name was entered as the 'father' on the birth certificate.[159] Parsons, having found a partner since the birth of the baby, sought to relocate with the child and her new partner to New Zealand.[160] Masson initiated proceedings in the Family Court seeking orders to restrain the relocation of the child on the basis that he shared parental responsibilities and the child was to spend time with him on a fortnightly basis.[161] Parsons argued that Masson was merely a sperm donor and not a parent of the child.[162]

Parsons argued that s 14(2) of the *SOCA (NSW)* should apply which provides an irrebuttable presumption that a person who provides their genetic material for artificial insemination is considered a sperm donor and is not the father of a child born as a result if they are not in a relationship with the mother as at the time of insemination.[163] An in-depth analysis of the legislation and the definition of 'parent' ensued. Initially, Cleary J found Masson was a parent,[164] but on appeal to the Full Court of the Family Court by Parson, the primary judge's ruling was overturned.[165]

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155 *Parentage Act 2004* (ACT); *Status of Children Act 1978* (NT); *Status of Children Act 1978* (Qld); *Family Relationship Act 1975* (SA); *Status of Children Act 1974* (Tas); *Status of Children Act 1974* (Vic); *Artificial Conception Act 1985* (WA).

156 *Masson* (n 11) 564 [3].

157 Ibid.

158 Ibid.

159 Ibid.

160 Ibid 564 [3]–[4].

161 Ibid 564–5 [3]–[4].

162 *Parsons v Masson* (2018) 334 FLR 381, 397 [95] (Thackray J, Murphy J agreeing at 400 [114], Aldridge J agreeing at 400 [115]) ('*Masson (Full Court)*').

163 *Masson v Parsons* (2017) 58 Fam LR 1, 12 [98].

164 Ibid 13 [102].

165 See *Masson (Full Court)* (n 162) 391 [48]–[49] (Thackray J, Murphy J agreeing at 400 [114], Aldridge J agreeing at 400 [115]).

On further appeal to the High Court, the decision was again overturned, with the High Court concluding Masson was the parent of the child.[166]

It is prudent to examine the *FLA* and *SOCA (NSW)* that were considered in *Masson* before examining the respective Court interpretations and arrivals at their conclusions. We will then turn to examine the definition of 'parent' in the context of informal avenues of family creation, paying particular attention to elective co-parenting.

1 *The SOCA (NSW)*

The *SOCA (NSW)* replaced the *Children (Equality of Status) Act 1976* (NSW) and was designed to bring 'parentage presumptions which apply in relation to children born as a result of artificial conception procedures up to date with current medical technology' and 'promote consistency in registration of findings of parentage across Australia'.[167] The *SOCA (NSW)* was designed to 'allow presumptions about a child's parentage to be made in a broader range of circumstances, depending upon the circumstances in which the child is conceived'.[168] We explore these presumptions below. Section 14(2) of the *SOCA (NSW)* provides:

> **14 Presumptions of parentage arising out of use of fertilisation procedures**
>
> (2) If a woman … becomes pregnant by means of a fertilisation procedure using any sperm obtained from a man who is not her husband, that man is presumed not to be the father of any child born as a result of the pregnancy.

Section 14(4) further provides that '[a]ny presumption arising under subsections (1)–(3) is irrebuttable'.

On a literal reading of this provision, it appears that any male who has provided sperm for artificial insemination with the intention of co-parenting the child born as a result, is presumed — irrefutably — not to be the father of that child. Rather, the presumed parents of a child born as a result of artificial insemination are the woman who gives birth to the child and her partner — whether that partner is female or male.[169]

The *SOCA (NSW)* does provide that a man is the presumed parent of a child born as a result of artificial procedures if 'the man executes a formal paternity acknowledgment or any other instrument acknowledging that he is the child's father'.[170] It also provides that a person is a presumed parent if their name is entered on the

166 *Masson* (n 11) 586 [55]–[56].

167 New South Wales, *Parliamentary Debates*, Legislative Council, 29 May 1996, 1 (Jeffrey William Shaw).

168 Ibid 2.

169 See *Status of Children Act 1996* (NSW) ss 14(1)–(1A), (6) ('*SOCA (NSW)*').

170 Ibid s 13(1).

child's birth certificate,[171] although we note both are 'rebuttable presumption[s]'.[172] By virtue of s 17(2) of the *SOCA (NSW)*, the irrebuttable presumption in s 14 is to prevail where irrebuttable and rebuttable presumptions conflict. The High Court took the view that ultimately the *SOCA (NSW)* did not apply in the case and it was to be determined in accordance with the *FLA*.[173] We, therefore, now consider provisions under the *FLA*, specifically s 60H and its provisions regarding artificial insemination procedures.

2 *The FLA*

Under s 60H(1) of the *FLA* where a child is born as a result of artificial conception procedures, the person with whom the woman is either married to or in a de facto relationship with, is a parent of the child, and the person who provided the genetic material is not. Section 60H(3) says that where state legislation provides that a man is a parent, whether or not he provided genetic material, then he too is a parent for the purposes of the *FLA*.

However, the above provisions in s 60H do not capture those in co-parenting circumstances. Accordingly, the High Court in *Masson* was clear that if the 'class … of persons' is not covered in the provisions in s 60H, then 'the question of whether a person is a parent of a child born of an artificial conception procedure depends on whether' they are a parent in accordance with the ordinary meaning of 'parent'.[174] The High Court concluded that s 60H is not an exhaustive list of people who may have parental responsibilities.[175] The Court said s 60H expands the definition of parent, rather than confines it,[176] summarising that

> whether a person qualifies under the *Family Law Act* as a parent … is a question of fact and degree to be determined according to the ordinary, contemporary Australian understanding of 'parent' and the relevant circumstances of the case at hand.[177]

Thus, co-parenting arrangements will not be captured expressly by s 60H and therefore the facts of each co-parenting arrangement will require consideration to determine if the man is a 'parent' as in *Masson*. However, this case did not consider situations where a man has not had the opportunity (and is therefore unable to produce evidence) of playing a key father-figure role in a child's life.

171 Ibid s 11(1).

172 Ibid s 15(2).

173 *Masson* (n 11) 585 [52].

174 Ibid 580 [44].

175 Ibid 572 [26].

176 Ibid 574 [28].

177 Ibid 574 [29].

In our illustrative case example, Masson was included on the child's birth certificate as the 'father'.[178] He spent considerable time with the child,[179] was called 'Daddy' by the child[180] and had a close bond with the child.[181] All these factors allowed the High Court to conclude that he was a 'parent' in the ordinary meaning of the word.[182] While this decision was rational, it might have limited application. There arguably remains some uncertainty as to whether a man who provides sperm to a woman or couple with the intention of co-parenting will be considered a parent without court intervention to determine so. This will be especially pertinent in cases where the facts are distinguishable from *Masson*, where the man (sperm donor) has not formed a relationship with the child and does not meet the definition of 'parent' within the ordinary meaning of the word. Nevertheless — whilst the decision in *Masson* is welcomed for its recognition of contemporary families — we consider that there is a need for further consideration and discussion to bring existing legislation in line with the common law, and provide more certainty for co-parents.[183]

B *Parenting Orders*

A parenting order can be framed around a range of issues generally under the *FLA*.[184] These include matters pertaining to the person(s) with whom a child lives, the time a child spends with a person, and the parental responsibility for a child.[185] Additionally, a parenting order can take into consideration the communication a child has with another person and the maintenance of a child.[186] The best interests of the child are the paramount consideration in making a parenting order,[187] and the following are considered by a court in determining what is in the best interests of the child: 'the benefit to the child of having a meaningful relationship with both of the child's parents';[188] 'any views expressed by the child';[189] the nature of the parents' and others' relationships with the child;[190] 'the extent to which each of the child's parents has taken, or failed to take, the opportunity' to participate in

178 See above n 159 and accompanying text.

179 See *Masson v Parsons* (2017) 58 Fam LR 1, 19 [171]–[172].

180 Ibid 4 [9].

181 *Masson* (n 11) 564 [3].

182 Ibid 585–6 [54]–[55].

183 See below our discussion in Part IV(C) and our recommendations in Part VI.

184 *FLA* (n 13) s 64B(2).

185 Ibid ss 64B(2)(a)–(c). Regarding the presumption of equal shared parental responsibility when making a parenting order, see generally at s 61DA.

186 Ibid ss 64B(2)(e)–(f).

187 Ibid ss 60CA, 65AA.

188 Ibid s 60CC(2)(a).

189 Ibid s 60CC(3)(a).

190 Ibid s 60CC(3)(b).

long-term decision making and 'to spend time with the child';[191] and the extent to which a parent has fulfilled their 'obligations to maintain the child'.[192]

Section 65C of the *FLA* outlines the potential classes of applicants for a parenting order:

> **65C Who may apply for a parenting order**
>
> A parenting order in relation to a child may be applied for by:
>
> (a) either or both of the child's parents; or
>
> (b) the child; or
>
> (ba) a grandparent of the child; or
>
> (c) any other person concerned with the care, welfare or development of the child.[193]

However, a parenting order cannot be obtained prior to the child's birth.[194] If the person is not a 'parent', the presumptions with respect to children and parenting orders do not apply. This might be an issue for men in co-parenting arrangements who are presumed not to be parents under the *SOCA (NSW)*.[195] Additionally, the *FLA* considers the role of parents in relation to the best interests of the child. For example, one of the objects of pt VII of the *FLA* is 'ensuring … that the best interests of children are met by'[196] 'ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child'.[197]

The underlying principles of this object are:

- 'children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together';[198]

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191 Ibid s 60CC(3)(c).

192 Ibid s 60CC(3)(ca).

193 Ibid s 65C.

194 It is established under the *FLA* that the definition of 'child' does not include the term foetus, unborn child or any other word referring to a child in utero. Therefore, the Family Court has no jurisdiction to make orders pertaining to unborn children: see *Talbot v Norman* (2012) 275 FLR 484, 489 [40]–[41].

195 See below our discussion in Part V(B).

196 *FLA* (n 13) s 60B(1).

197 Ibid s 60B(1)(a).

198 Ibid s 60B(2)(a).

- 'children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives)';[199]

- 'parents jointly share duties and responsibilities concerning the care, welfare and development of their children';[200]

- 'parents should agree about the future parenting of their children';[201] and

- 'children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture)'.[202]

Further, in certain circumstances, a court must consider making an order that a child is provided with equal time or substantial and significant time with each of its parents, if it is determined to be in the best interests of the child and it is reasonably practicable.[203] We argue the definition of parent needs to clearly encompass men in co-parenting arrangements. If there is ambiguity around their status as a parent, the presumptions such as the presumption regarding equal shared parental responsibility at s 61DA of the *FLA*, for example, may not be applied by a court. In turn, this may affect the ability of a co-parenting father to obtain a court order for the child to spend significant or substantial time with him. This lack of clarity arguably operates to ignore the best interests of a child — contrary to obligations under the *CRC* — if the co-parenting father is held not to be a parent. What is demonstrative of legislation not operating appropriately is that none of the above are an issue where the child is conceived via natural insemination as opposed to artificial insemination. The intentions of two sets of co-parents may be identical, but the legal rights and responsibilities are completely different. The same issues arise with the legislation that governs child support in Australia, which we discuss in Part IV(C) below.

C *Child Support*

The *CSA Act* is designed to ensure that children receive a proper level of financial support from their parents,[204] and stipulates that 'parents of a child have the primary duty to maintain the child'.[205] The same definition is adopted to define a 'parent' when referring to a child born because of the use of artificial conception procedures, as is used to define a person as a parent under s 60H of the *FLA*.[206] Therefore, as discussed above, the definition of 'parent' is crucial to the operation of this legislation

199 Ibid s 60B(2)(b).

200 Ibid s 60B(2)(c).

201 Ibid s 60B(2)(d).

202 Ibid s 60B(2)(e).

203 Ibid ss 65DAA(1)–(2).

204 *CSA Act* (n 153) s 4(1).

205 Ibid s 3(1).

206 Ibid s 5 (definition of 'parent' para (b)).

and therefore the definition under s 60H of the *FLA* could be clearer to ensure the *CSA Act* operates how it is intended.

Since *Masson*, potential legal uncertainty has been clarified and the legal position is less ambiguous: parents can include anyone within the ordinary meaning of the word in certain circumstances.[207] If the definition of 'parent' under s 60H of the *FLA* on which the *CSA Act* relies is clear, this provides further clarity around who is therefore obliged to support a child financially. Prior to the High Court's decision, however, a man who intended to co-parent could have been considered a 'sperm donor' if the child was conceived via artificial insemination and may not have been obliged to support the child financially, despite any opposing intention. If the child was conceived by natural insemination the man would be considered a parent and have financial responsibilities to the child which might pose an issue where the man donates his sperm with no intention to co-parent. The legislation, despite its intention to ensure every child is financially secure, requires greater consideration. This is an issue in relation to informal sperm donation arrangements and should be subject to further legal and academic discussion. The issue might still be clouded in relation to the application of the law and the legal differences arising from artificial versus natural insemination, which might have the following implications:

- a sperm donor with no intention to co-parent might be obliged to pay child support if the conception was natural but would not be if the conception was via artificial means; and

- a man providing his sperm for the intention to co-parent might not be financially obliged to look after a child if the conception is performed artificially but might be so obliged if conception is natural.

Whilst the High Court's decision in *Masson* acknowledges the male as a parent in circumstances where there is intent to co-parent the child born as a result of the giving of his sperm, there remains some uncertainty. For example, a sperm donor who intended to co-parent but, for some reason, chooses or is unable to 'parent' in accordance with the ordinary meaning of the word could arguably still be required to financially maintain the child. When the intention of the legislation is to ensure a child is maintained by its parents, this raises the potential question as to how the legislation operates in practice. Having considered the legal landscape, we now turn to consider the ethical implications of informal methods of family creation.

V The Ethical Implications

In Part IV, we highlighted several legal implications under existing legislation related to family creation and noted the importance of the High Court ruling in *Masson*, which we view as a positive shift towards recognition of non-traditional families. However, there are ethical implications that require exploration in relation to the use of informal sperm donation and elective co-parenting.

207 *Masson* (n 11) 572–3 [26]–[27], 574 [29].

A *Informal Sperm Donation*

In Parts II and III we considered informal sperm donation arrangements in detail. We noted that they tend to be based on sperm either being donated or sold without formal legal arrangements or contracts. The primary purpose of using an informal environment is probably to circumvent regulated fertility clinics or sperm banks. Of concern, however, is the absence of protections to safeguard donors, recipients, and donor-born children.

1 *Lack of Screening of Sperm Donors and Donated Sperm*

Prior to donating sperm via regulated fertility clinics and sperm banks, the donor is subject to routine screening processes. These include testing and screening for

> HIV, hepatitis B and C, syphilis, Human T-lymphotropic Virus (HTLV) 1+2, cytomegalovirus (CMV), cystic fibrosis, karyotype, blood group, Fragile X syndrome (FXS), Spinal Muscular Atrophy (SMA), thrombophilia and full blood count (FBC).[208]

Further tests are conducted to check for chlamydia and gonorrhoea.[209] If the sperm passes the required testing, the donor can then begin to donate.[210]

Informal sperm donation is problematic and raises ethical and moral concerns. There is a lack of rigorous requirements or ability to screen donated sperm. Of concern is that some donors who have been rejected from donating through regulated fertility clinics or sperm banks due to failing relevant tests discussed above have gone on to donate informally. Scholars have also found that individuals who were reluctant to participate in the mandatory medical screening processes donated informally too.[211] The obvious consequence is that unsafe and unscreened sperm with potential transmissible disease or genetic conditions is being used, putting the recipient and the potential child at risk.[212]

Further, there is no avenue to vet the information that has been provided by informal sperm donors, and it is unlikely that there are any screening processes or any obligation for donors to disclose information to the recipients.[213] Thus, informal

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208 'Becoming a Sperm Donor: Step-By-Step Guide', *Sperm Donors Australia* (Web Page) <https://www.spermdonorsaustralia.com.au/how-to-donate/donation-steps/> ('Becoming a Sperm Donor').

209 Ibid.

210 Ibid.

211 Kévin Lavoie, Isabel Côté and Francine de Montigny, 'Assisted Reproduction in the Digital Age: Stories of Canadian Sperm Donors Offering Their Gametes Online via Introduction Websites' (2018) 26(2) *Journal of Men's Studies* 184, 189, 193–4.

212 See also Harper et al (n 45) 15.

213 See generally IVF Australia, *Using a Sperm Donor* (Booklet, 13 February 2017) 3 <https://www.ivf.com.au/sites/ivfa/files/2019-10/cln-096_using_a_sperm_donor_14feb17_0.pdf>.

avenues of sperm donation via the internet and social media platforms operate on an honour and trust system, meaning potential family histories of disease, for example, are undisclosed where they would otherwise be discovered by fertility clinics and sperm banks and disclosed to the recipient.

An additional issue relates to the lack of checks and balances regarding the donor's identity when using informal channels of family creation. Regulated fertility clinics require donations to occur at the fertility clinic to confirm the donor's identity as a way of guaranteeing the source of the donation.[214] However, with informal sperm donation, there is a level of uncertainty about whether the donated sperm belongs to the person professing to have made the donation. This leaves the sperm donor, recipient and potential donor-conceived child at risk. There are no assurances that the information provided about their genetic information, health, or their ethnicity is accurate via informal channels of donation. An example here can be found from Japan, where a woman has attempted to sue the sperm donor she found online for $4 million for fraud and has given the child born up for adoption claiming she suffered 'emotional distress' after learning that he had lied about his ethnicity, marital status, and university education.[215]

2 *Personal Safety of Donor Recipients*

People seeking informal sperm donors online might also be risking their personal safety in situations where they agree to meet donors in person after disclosing their personal details.[216] One woman reported allegations of sexual assault to VARTA 'against a man who offered to donate sperm informally' which were forwarded to police.[217] Also, there have been cases where women have been pressured towards natural insemination (sexual intercourse) by potential donors once they meet despite initially agreeing to artificial insemination.[218] Kelly observes that women 'end … up feeling quite trapped' and '[s]ome pursue … [sexual intercourse] because they presume it will result in conception'.[219] In the United Kingdom, the regulatory body, Human Fertilisation and Embryology Authority, has warned that '[u]nregulated "fertility" websites … are exploiting vulnerable women and risking users' health and finances'.[220] It has been reported that the unregulated sperm market is 'being

214 See 'Becoming a Sperm Donor' (n 208).

215 Hannah Sparks and NY Post, 'Woman Puts Baby Up for Adoption after Sperm Donor Lied about Ethnicity and Education', *News.com.au* (online, 14 January 2022) <https://www.news.com.au/lifestyle/real-life/true-stories/woman-puts-baby-up-for-adoption-after-sperm-donor-lied-about-ethnicity-and-education/news-story/ca7e27ae9414a8fe232c1ade684f7ec7>.

216 See also Foster (n 61).

217 Victorian Assisted Reproductive Treatment Authority, 'VARTA Media Release' (n 108).

218 Cook and Tomazin, 'Sperm Drought' (n 130).

219 Ibid.

220 'Times Article on Unregulated Fertility Sites Quotes Natalie Gamble', *NGA Law* (Blog Post, 19 July 2010) <https://www.ngalaw.co.uk/blog/2010/07/19/times-article-on-unregulated-fertility-sites-quotes-natalie-gamble>.

used by men searching for nostrings [sic] unprotected sex'.[221] While conceiving a child and creating a family are important human experiences, we do not believe they should come at the cost of any woman's health and safety.[222]

3 *Lack of Formal Record Keeping of Children Conceived Using Donated Sperm*

In Victoria the regulatory body VARTA and fertility clinics work together to ensure they maintain formal records of donations made, who they are made by, how many live births result and the details of the donor-conceived child.[223] There is no formal avenue to collect such data through informal sperm donations. As we have discussed earlier, this may pose a risk of consanguinity amongst donor-conceived children later in life.

Regulated fertility clinics limit the number of children created using donor sperm in accordance with legislation and guidelines.[224] There are no such requirements for informal sperm donation. Under the *ART Act*, fertility clinics are required to keep records so that donor-conceived children can access information about their identity, genetic history, family medical history and who they are related to.[225] We consider informal sperm donation to be a kind of 'wild west' — a lawless state where nothing is governed or monitored. There have been reported cases in the media of men who have fathered hundreds of children by making informal sperm donations, including one case concerning a man who fathered 600 children at his own fertility clinic.[226] We anticipate there would be considerable difficulty trying to enforce record keeping with respect to informal sperm donation, and if attempted would drive the practice of informal sperm donation even further underground. Nevertheless, a register to establish the number of men who informally donate sperm was proposed to the Victorian Government recently but was rejected.[227]

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221 Ibid.

222 See also Esther Han, 'Bioethicists Raise Alarm about Conflicts of Interest in Australia's IVF Industry', *The Sydney Morning Herald* (online, 1 November 2017) <https://www.smh.com.au/healthcare/bioethicists-raise-alarm-about-conflicts-of-interest-in-australias-ivf-industry-20171101-gzcp8z.html>.

223 See 'Donor Conception Register Services', *VARTA* (Web Page, 2021) <https://www.varta.org.au/donor-conception-register-services>.

224 See above our discussion in Part III(E). There are variations in different states and territories: see National Health and Medical Research Council, *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* (Guidelines, 20 April 2017).

225 See *ART Act* (n 39) s 51.

226 Rebecca Smith, 'British Man "Fathered 600 Children" at Own Fertility Clinic', *The Telegraph* (online, 8 April 2012) <https://www.telegraph.co.uk/news/9193014/British-man-fathered-600-children-at-own-fertility-clinic.html>. See also Foster (n 61).

227 Farrah Tomazin and Henrietta Cook, 'No Register for Private Sperm Donors after Victorian Government Rejects Suggestion', *The Age* (online, 24 May 2021) <https://www.theage.com.au/national/victoria/no-register-for-private-sperm-donors-after-victorian-government-rejects-suggestion-20210524-p57unh.html>.

We argue that this was a poor decision, and while not all informal donors are likely to register, some may be willing to, which is better than the current position. We do think there is a need for further discussion about this issue within the broader community and by policy makers, given the enormity of consanguinity and health and safety concerns. In Part V(B) below we consider some of the ethical implications as they pertain to elective co-parenting.

B *Co-Parenting*

1 *Recognition of Intentions To Co-Parent*

Some co-parenting websites advocate for people to enter co-parenting arrangements for the upbringing of any child conceived[228] — although they are unlikely to be legally binding. The is due to the Federal Circuit and Family Court of Australia's lack of jurisdiction to make orders pertaining to an unborn child.[229] The *FLA* can only make orders with respect to a 'living' child, and it has been established in historical case law that this does not extend to a foetus.[230] Orders can be made once the child is born,[231] however there remains uncertainty and potential risk for circumstances to change or any agreements to be altered or revoked between the period of a child's conception and birth.

2 *Discrimination*

There is a need for further exploration of the wording in the legislation, which we consider discriminatory. The *SOCA (NSW)*, for example, contains provisions such as: 'A child born to a woman is presumed to be a man's child if, at any time during the period beginning not earlier than 44 weeks and ending not less than 20 weeks before the birth, the man and the woman cohabit but are not married.'[232] We argue that this language is outdated and does not reflect society today or the diverse range of family situations and circumstances.

Further, we argue the legislation is discriminatory to men who choose to engage in co-parenting arrangements. This is because the state legislation deems a woman who has given birth to the child from artificial insemination procedures, even if not biologically her child, as the parent of that child.[233] To the contrary, men in co-parenting arrangements arguably start off with the presumption of a sperm donor with no parental rights or responsibilities.[234] This is the case unless the man

228 'Legalities of Co-Parenting', *Co-ParentMatch* (Web Page) <https://www.co-parentmatch.com/Legalities-of-Co-Parenting.aspx>.

229 *Talbot v Norman* (2012) 275 FLR 484, 489 [40]–[41].

230 Ibid 487–9 [21]–[41].

231 See ibid 488 [34].

232 *SOCA (NSW)* (n 169) s 10.

233 Ibid ss 14(1)(b), 14(1A)(b).

234 Ibid s 14(2).

has previously been in a romantic relationship with the woman[235] or if the child is conceived by natural insemination (given s 14 of the *SOCA* would not be enlivened as it applies to situations of artificial insemination[236]) in which case their legal position is different.

It is worth noting, for example, that the *SOCA (NSW)* does contemplate scenarios where two parents who are not in a romantic relationship are considered 'parents' for the purposes of the legislation, however the scope is limited to instances where the parties to a marriage have separated.[237] We argue that if the legislation recognises co-parenting arrangements in some instances, it should recognise co-parenting arrangements in all instances. This would at least lead to greater consistency surrounding recognition of co-parenting arrangements.

3 *Where a Woman Changes Her Mind on a Co-Parenting Arrangement*

In *Masson*, whether Masson was considered a parent was evaluated with respect to the number of years he had spent engaged and involved in the child's life.[238] The decision in the case does however leave open issues pertaining to scenarios where a man has been denied the opportunity to demonstrate 'parentage' for the court to adequately assess the relationship between man and child. This is problematic in instances where the mother has decided not to continue the co-parenting arrangement prior to the birth of the child and does not insert the man's name on the birth certificate as 'father' or allow the man to meet the child once born. In such cases, the man may face a significant challenge in establishing he was the intended parent and not a sperm donor.

4 *Where a Man Changes His Mind on a Co-Parenting Arrangement*

In the same vein, if the man decides against a co-parenting arrangement and refuses to support a child financially, the mother might have to carry the financial support of the child alone. It has not been established at law how these situations would be decided, and the court has no jurisdiction prior to the birth of a child to make any orders relating to the child's parentage or care.[239] Of interest and relevance here is that these risks and consequences do not apply if the parties conceived the child via natural insemination.[240]

235 See ibid s 14(1)(a).

236 See ibid s 3(1) (definition of 'fertilisation procedure').

237 Ibid s 9(4).

238 See *Masson* (n 11) 564 [3].

239 See above nn 229–30 and accompanying text.

240 See above Part IV(C).

5 *Best Interests of a Child*

Sections 60B(1) and 60CC(2) of the *FLA* provide that the best interests of a child are met, amongst other things, by ensuring they have meaningful relationships with each of their parents. If better protections are not in place to ensure the intentions of co-parenting arrangements are respected and recognised, it is arguable the best interests of the child born might be ignored — an outcome contrary to the agreement Australia committed to several decades ago under the *CRC*. We now turn to the penultimate Part of this article where we make a range of recommendations in relation to informal avenues of family creation.

VI Recommendations

As a consequence of the myriad of legal and ethical issues that arise in this area of law, we welcome the implementation of the small number of recommendations from the *Review* since its publication in May 2019. We argue that if the *Review* recommendations had been given greater consideration and had been implemented in a timely manner, they might have gone some way in mitigating against people using risky options of family creation. Further, we argue that the recent amendments under the *ART Amendment Act* do not go far enough to ensure greater access, equity, and adequate reform to reflect the diverse array of contemporary Australian families. We make a number of recommendations below which mirror some of those in the *Review* and some go further to recommend legislative reform.

A *Greater Public Accessibility to ART and Availability of Donor Gametes*

This recommendation is twofold. First, we call for a serious and meaningful discussion within the broader community, and amongst clinicians, fertility clinics and policymakers to work towards greater public access to regulated fertility clinics for ART and donor gametes via a public bank. We acknowledge that steps have been taken in Victoria towards greater public access to fertility services and public sperm and egg banks.[241] The rollout has just commenced and will take several years for its full implementation and there are strict eligibility criteria for access to services. This a move in right direction, nevertheless, where possible we call for eligibility and access to public fertility services to be broadened to capture and assist a diverse range of individuals and couples seeking to create families.

Second, we recommend easier gamete importation processes. Under the current *ART Act* importation of donor materials into Victoria requires approval from VARTA.[242] As noted in Part III(C)(3), the legislation pertaining to importation does not specify the determining factors for VARTA to consider when approving donor gamete or embryo applications. The 2019 *Review* recommended that a simpler streamlined process be implemented to approve the importation of donor gametes

241 See above our discussion in Part III(A).

242 *ART Act* (n 39) s 36.

into Victoria.[243] However, the *ART Amendment Act* did not implement the recommendation to make the importation of donor gamete process simpler or to amend the current legislation 'to set out the criteria that need to be satisfied in order to import gametes and embryos into Victoria, through a certification process that attests' to certain matters being satisfied.[244]

We suggest the *Review* recommendation be reconsidered. Making the process of gamete importation simpler might mitigate against people resorting to using online sperm donation, and instead consider accessing available gametes via regulated fertility clinics, where appropriate checks and screenings can be conducted.

B *Further Removal of Discriminatory Language and Redefining 'Parent' in Legislation*

The *ART Amendment Act* modifies some discriminatory language in the legislation. This is welcomed as it has started to reflect diverse and non-traditional family creation. For example, under s 5 of the *ART Amendment Ac*t additional obligations ensure that a person is not to be discriminated against based upon their relationship status, gender identity, or sex characteristics.[245]

However, further reform is required. Independent political party leader Fiona Patten sought additional amendments while they were being discussed at the parliamentary Bill stage. These included: counselling to be made optional for women and their partners undergoing assisted reproductive treatment and the removal of the requirement for same-sex couples to obtain a letter from a doctor stating they are unable to become pregnant in order to undergo assisted reproductive treatment — both are demeaning and discriminatory to those in same-sex relationships.[246]

Although these modest and rational amendments would have made important and meaningful differences to the lives of same-sex couples in family creation, neither was included. We recommend that they should be considered. Further, the same principles should be applied to the *FLA* and the *SOCA (NSW)* and its equivalents in other jurisdictions, removing the outdated language that does not reflect current norms and attitudes of modern Australia. For example, s 24 of the *Status of Children Act 1978* (Qld) only contemplates heterosexual marriages in providing for presumptions of parentage 'arising from marriage'. Given these legislative instruments are interrelated, we recommend a consistent approach should be taken to remove discriminatory language across each piece of legislation to ensure language and terminology is inclusive and accurately represents present day society.

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243 *Review* (n 18) xxvii, recommendation 56.

244 Ibid.

245 See *ART Amendment Act* (n 39) s 5(c), amending *ART Act* (n 39) s 5(e).

246 Victoria, *Parliamentary Debates*, Legislative Council, 7 October 2021, 3635–6 (Fiona Patten).

1 *Redefinition of 'Parent'*

We recommend the definition of 'parent' should be given further consideration to ensure those in co-parenting arrangements do not have any uncertainty about their parentage status, or their 'duties, powers, responsibilities and authority … in relation to children'.[247] Ultimately, the legislation recognises 'the benefit to the child of having a meaningful relationship with' their parents,[248] and acknowledges that a child has the 'right to maintain personal relations' with its parents 'on a regular basis'.[249] The *CSA Act* is designed to ensure a child is adequately maintained financially by its parents also.[250] The definition of 'parent' should operate to ensure those legislative objectives are met, not ignored. A broad definition of 'parent' which encompasses co-parenting arrangements could alleviate this issue. However, we note that this is an ambitious suggestion. It would also require an increased regulatory approach or involvement of the courts prior to conception to ensure that the intentions of the parties to the agreement are clear. There is the possibility that an increased regulatory approach might deter the pursuit of formal methods of family creation and/or drive informal methods further underground. It would however be preferable at this stage for more open dialogue about these informal practices.

We also recommend further exploration surrounding the differences concerning legal rights and responsibilities of a parent depending on whether a child is conceived artificially or is conceived naturally when the intention of the individuals is the same. As discussed in Part IV, under the current operation of the legislation there are clear legal rights and responsibilities when a child is born via natural conception, however the law is not entirely clear and remains ambiguous when a child is born as a result of artificial insemination (despite the decision in *Masson*). This requires greater clarity. While the core objective of the relevant legislation rests on the pillar of the 'best interests of the child',[251] it appears that maintaining a relationship with a parent or financial maintenance is currently determined based on the method of conception. We therefore suggest that the definition should be suitably broadened to capture arrangements facilitated by other means — such as elective co-parenting, or other emerging trends where both parties are in agreement and meet progressive societal values.

C *Better Education and Awareness of Informal Avenues of Family Creation*

There is a need for greater public, political and academic awareness of informal channels of family creation and the potential risks that it poses. This is especially pertinent to informal sperm donation and the risks to health, safety and wellbeing to the recipient and potential child born of such an arrangement. The most obvious

247 *FLA* (n 13) s 61B.

248 Ibid s 60CC(2)(a).

249 Ibid s 60CC(3)(e).

250 See above n 204.

251 See above nn 149–51 and accompanying text.

starting point for this is for broader community conversations and awareness about the risks attached with informal sperm donation via the internet and social media platforms or elective co-parenting arrangements that are poorly formed. Further, awareness campaigns would be welcomed via VARTA and other regulatory bodies.

We note that a register for informal sperm donors to record their details involves a risk of driving the risky and informal practice further underground, although there might be some donors who are amenable to registering. This type of register would complement the current formal register used by regulated fertility clinics. Even if used by a limited number of informal sperm donors it would go some way to reduce risks of consanguinity and ensure donor-conceived children have the same access to information, whether their conception was facilitated by informal or formal process.

VII Conclusion

We have highlighted two emerging and informal avenues of family creation that are likely to circumvent regulated fertility clinics. There is a need for further consideration and possible legislative reform to accurately reflect contemporary Australian families. Further, we recommend greater public access to fertility services and donor gametes, consideration to redefine the meaning of 'parent' in the law and better education, and awareness for the public of the significant risks involved with informal methods of family creation.

We contend that the creation of new life is often precarious and emotionally fraught. It should not be further clouded by ambiguity or commenced with unnecessary risks that might be attached to practices such as online sperm donation or elective co-parenting. Additionally, informal family creation might endanger the lives and wellbeing of potential parents, donors, and any child conceived. It is timely for a range of stakeholders — including those seeking to start families, those wishing to donate gametes, fertility clinics, and regulatory bodies such as VARTA — to engage in wider community consultation about informal methods of family creation. This is especially important when considering the potential legal, social and psychological impact on the lives of all parties involved.

*Claudia Floreani**

PROACTIVE REGULATION OF NEW TECHNOLOGY: MITOCHONDRIAL DONATION LEGISLATION IN AUSTRALIA

> 'At this moment it is incumbent on this government to give Australian parents the choice and opportunity to have children free from severe disease through the use of reproductive technology and to reduce the burden of disease for future generations. It is also essential that we remain at the forefront of advances in both medical science and reproductive technology. We cannot sit by complacently when the health and lives of Australian children are at stake and when the opportunity to provide hope and medical support is now with us.'[1]

I Introduction

In recent years, the use of in vitro fertilisation ('IVF') and other assisted reproductive technologies ('ART') in Australia has increased.[2] As with any new technology, this increased use necessitates adequate, responsive, and transparent legislation and regulation. This is in order to maintain public confidence in science and ensure that best practices are followed. A recent example of such legislation is the *Mitochondrial Donation Law Reform (Maeve's Law) Act 2022* (Cth) ('*MDLR Act*').[3] Part II of this article will examine the technical background of ART in general, and mitochondrial donation more specifically. Part III will explore both the contents and legislative history of the new *MDLR Act*. Part IV will canvass the wider discourse that surrounded the passing of the *MDLR Act*, within the context of the role of scientific regulation in general. Finally, some concluding thoughts will be offered in Part V. In summary, this new legislation is the product of many experts

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1 Commonwealth, *Parliamentary Debates*, House of Representatives, 24 March 2021, 3281 (Greg Hunt, Minister Assisting the Prime Minister for the Public Service and Cabinet and Minister for Health and Aged Care) ('Second Reading Speech').

2 Ashley M Eskew and Emily S Jungheim, 'A History of Developments To Improve in Vitro Fertilization' (2017) 114(3) *Missouri Medicine* 156; Jade E Newman, Repon C Paul and Georgina M Chambers, *Assisted Reproductive Technology in Australia and New Zealand 2019* (Report, National Perinatal Epidemiology and Statistics Unit, University of New South Wales, September 2021) vi, 4.

3 *Mitochondrial Donation Law Reform (Maeve's Law) Act 2022* (Cth) ('*MDLR Act*').

working together on a complex topic to produce a progressive piece of technical regulation.

II Technical Background

Mitochondrial donation is a technique used in conjunction with IVF. There are already existing legislative frameworks that govern IVF use in Australia.[4] However, newer techniques are still being examined by the legislature in an ongoing process. This article will comment on the legislative framework coming into force which regards mitochondrial donation, as recently enacted through the *MDLR Act* in April 2022.

Mitochondrial donation is a technique used to replace faulty mitochondria with healthy donor mitochondria.[5] The mitochondria are small organelles inside every cell that contain their own subset of circular mitochondrial DNA ('mtDNA').[6] Mitochondria are inherited maternally and as such, the paternal mitochondria are irrelevant to the risk of the offspring being affected as they are not passed on to the offspring.[7] The main function of the mitochondria is to create energy for the cell, which is in turn used to allow organs to function and everyday bodily functions to occur.[8] Therefore, the consequences can be dire when mitochondria are faulty.

Mitochondrial diseases 'vary in presentation and severity, but common symptoms include developmental delays, seizures, weakness and fatigue, muscle pain, vision and hearing loss, multiple organ failure and heart problems; leading to morbidity and in severe cases, premature death'.[9] As such, these diseases impact substantially on a person's quality of life. In addition, there is no known cure for mitochondrial diseases, with treatment options limited largely to management of symptoms.[10]

Mitochondrial disease can be treated through mitochondrial donation which, as mentioned above, involves replacing faulty mitochondria with working mitochondria. The procedure is done in conjunction with IVF.[11] The technique involves

4 *Prohibition of Human Cloning for Reproduction Act 2002* (Cth); *Research Involving Human Embryos Act 2002* (Cth).

5 Mitochondrial Donation Expert Working Committee, National Health and Medical Research Council, *Expert Statement* (Report, 11 March 2020) 4, 12 ('*Mitochondrial Donation Expert Statement*'); Marie A Dziadek and Carolyn M Sue, 'Mitochondrial Donation: Is Australia Ready?' (2022) 216(3) *Medical Journal of Australia* 118, 118.

6 *Mitochondrial Donation Expert Statement* (n 5) 12; Dziadek and Sue (n 5) 118.

7 Revised Explanatory Memorandum, Mitochondrial Donation Law Reform (Maeve's Law) Bill 2021 (Cth) 72 ('Revised Explanatory Memorandum').

8 Dziadek and Sue (n 5) 118; *Mitochondrial Donation Expert Statement* (n 5) 12.

9 Revised Explanatory Memorandum (n 7) 72.

10 Ibid; *Mitochondrial Donation Expert Statement* (n 5) 4, 12.

11 Revised Explanatory Memorandum (n 7) 2.

'combining the nuclear DNA from a male and female with healthy mitochondrial DNA from a donor egg'.[12] There are different methods, namely maternal spindle transfer ('MST') and pronuclear transfer ('PNT').[13] Regardless of the method, the outcome is such that every cell in the offspring contains the donated, healthy mitochondria, and the technique, in essence 'seeks to reduce the risk of a child inheriting mitochondrial disease from a woman carrying genes that cause the condition'.[14] That being said, there is a risk of the faulty mitochondria still 'carrying over' into the embryo[15] and therefore the carryover rates need to be monitored.[16] However, if successful, the procedure has a *lasting impact* on the offspring and all of their future children (if the offspring is female).[17] The procedure is sometimes referred to as creating 'three-parent' babies, as technically the resultant offspring contains nuclear DNA from the mother and father, as well as mtDNA from the donor.[18] However, it would be more accurate to refer to this as '2.002-parent IVF', due to the comparatively minimal amount of mtDNA compared to nuclear DNA.[19] This is crucial to the ethical issues concerning the technique and underpins some of the key legal challenges as well. In summary, the technique is irreversible, immutable, inheritable, and done before the resultant offspring can give any type of consent to the procedure.

III Legislative History

The *MDLR Act* passed both houses of federal Parliament on 30 March 2022. However, much work was done prior to this — this legislation was not rushed through Parliament, nor was it partisan in nature. Before discussing the *MDLR Act,* it is worth noting that mitochondrial donation was legalised in the United Kingdom in 2015,[20] with the first licences permitting mitochondrial donation issued in late

12 *Mitochondrial Donation Expert Statement* (n 5) 12; Revised Explanatory Memorandum (n 7) 72.

13 *Mitochondrial Donation Expert Statement* (n 5) 12; Dziadek and Sue (n 5) 118.

14 *Mitochondrial Donation Expert Statement* (n 5) 12.

15 Dziadek and Sue (n 5) 118.

16 John Christodoulou, Submission No 12 to Senate Community Affairs References Committee, Parliament of Australia, *Science of Mitochondrial Donation and Related Matters* (3 May 2018) 3; ibid 119.

17 Revised Explanatory Memorandum (n 7) 83.

18 Jessica Hamzelou, 'Exclusive: World's First Baby Born with New "3 Parent" Technique', *New Scientist* (online, 27 September 2016) <https://www.newscientist.com/article/2107219-exclusive-worlds-first-baby-born-with-new-3-parent-technique/>.

19 David Thorburn and John Christodoulou, '3-Parent IVF Could Prevent Illness in Many Children (But It's Really More Like 2.002-Parent IVF)', *The Conversation* (online, 11 November 2019) <https://theconversation.com/3-parent-ivf-could-prevent-illness-in-many-children-but-its-really-more-like-2-002-parent-ivf-126591>.

20 *The Human Fertilisation and Embryology (Mitochondrial Donation) Regulations 2015* (UK) SI 2015/572.

2017.[21] This is relevant as the process followed in the United Kingdom has similarities to the process undertaken in Australia. This similarity in approach could be due to similar cultural views, social groups, and parliamentary systems. In the United Kingdom, the passage of the legislation followed lengthy consultation with the scientific community, as well as members of the wider population. There is currently only one facility in the United Kingdom, the Human Fertilisation and Embryo Authority ('HFEA'), that is licensed to treat patients with this technique.[22] The HFEA encourages follow-up appointments in order to continue to study the way the technique affects children born of it, but these follow-up appointments are not mandatory.[23]

Following the passage of legislation in the United Kingdom, Australia began considering the technology more seriously. In March 2018, the Senate referred the matter to the Senate Community Affairs References Committee ('Senate Committee'). The terms of reference included:

> (a) the science of mitochondrial donation and its ability to prevent transmission of mitochondrial disease;
>
> (b) the safety and efficacy of these techniques, as well as ethical considerations;
>
> (c) the status of these techniques elsewhere in the world and their relevance to Australian families;
>
> (d) the current impact of mitochondrial disease on Australian families and the healthcare sector;
>
> (e) consideration of changes to legal and ethical frameworks that would be required if mitochondrial donation was to be introduced in Australia;
>
> (f) the value and impact of introducing mitochondrial donation in Australia; and
>
> (g) other related matters.[24]

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21 Gráinne S Gorman et al, 'Mitochondrial Donation: From Test Tube to Clinic' (2018) 392(10154) *The Lancet* 1191, 1191.

22 Ibid; 'Mitochondrial Donation Treatment', *Human Fertilisation & Embryology Authority* (Web Page) <https://www.hfea.gov.uk/treatments/embryo-testing-and-treatments-for-disease/mitochondrial-donation-treatment/> ('Mitochondrial Donation Treatment').

23 'Mitochondrial Donation Treatment' (n 22).

24 Senate Standing Committees on Community Affairs, 'Terms of Reference', *Parliament of Australia* (Web Page, 2018) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/MitochondrialDonation/Terms_of_Reference>.

The Senate Committee then considered written submissions, held public hearings, and produced a final report.[25] This report had four substantive chapters, which considered disease burden, science, ethics, and regulation. The four overall recommendations from the Senate Committee were: (1) the necessity of public consultation; (2) tasking a National Health and Medical Research Council ('NHMRC') Expert Committee to answer key scientific questions; (3) the need to engage with the Council of Australian Governments ('COAG') Health Council; and (4) the need to explore facilitating access for Australian patients to existing United Kingdom services.[26]

To implement the second recommendation from the Senate Committee, the matter was referred to a NHMRC Expert Committee ('NHMRC Committee') which conducted an inquiry throughout 2019–20.[27] The NHMRC Committee provided advice on the legal, regulatory, scientific, and ethical issues that had been identified earlier, and was chaired by Associate Professor Bernadette Richards.[28] The NHMRC Committee produced two key reports: (1) a *Consultation Report* that highlighted social and ethical issues; and (2) an *Expert Statement* that commented on the scientific perspective. The *Expert Statement* discussed the need for further research, commenting:

> There were differing views within the Committee as to whether the current risks and scientific unknowns are such that it would be appropriate at this time to consider mitochondrial donation for introduction into Australian clinical practice.[29]

This uncertainty underpins the eventual legislative framework, with a proposed two-stage approach to be adopted to implement the legislation.[30] The two-stage approach was born out of another public consultation process, conducted during early 2021.[31] This consultation process consisted of a two-question survey, for which

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25 Senate Community Affairs References Committee, Parliament of Australia, *Science of Mitochondrial Donation and Related Matters* (Report, June 2018) ('*Science of Mitochondrial Donation Report*').

26 Ibid ix–x.

27 The NHMRC Committee was established under s 39 of the *National Health and Medical Research Council Act 1992* (Cth). See 'Mitochondrial Donation Expert Working Committee', *NHMRC: Building a Healthy Australia* (Web Page) <https://www.nhmrc.gov.au/about-us/leadership-and-governance/committees/mitochondrial-donation#:~:text=The%20Mitochondrial%20Donation%20Expert%20Working%20Committee%20('the%20Committee'),Mitochondrial%20Donation%20and%20Related%20Matters%20)>.

28 *Mitochondrial Donation Expert Statement* (n 5) 38–9.

29 Ibid 4.

30 Department of Health (Cth), *Public Consultation on the Approach To Introduce Mitochondrial Donation in Australia* (Consultation Summary Report, 23 March 2021) 3 ('*Public Consultation Summary Report*').

31 Ibid.

74 responses were received, and consideration of an additional set of 27 written submissions.[32] The survey was based on a public discussion paper released by the Department of Health.[33] The paper suggested a two-stage approach. The first stage comprises legalisation for research and training purposes and the selection and licencing of a pilot program for families impacted by mitochondrial disease. The second stage more broadly permits mitochondrial donation in clinical practice, depending on the outcome of the first stage.[34] The result of the 2021 consultation largely supported the two-stage approach suggested by the government in response to previous findings.[35]

After much debate in the lower house, where the Mitochondrial Donation Law Reform (Maeve's Law) Bill 2021 (Cth) was put to a conscience vote due to 'issues such as privacy of parents and children, creation and destruction of embryos, ensuring informed consent, donor rights and the newness of the science',[36] the final Bill was eventually sent to the Senate on 2 December 2021.[37]

A *Structure of the MDLR Act*

The *MDLR Act* passed the Senate on 30 March 2022[38] and received royal assent on 1 April 2022.[39] The final version of the *MDLR Act* primarily amends the pre-existing legislative framework, which consisted of the *Prohibition of Human Cloning for Reproduction Act 2002* (Cth), *Research Involving Human Embryos Act 2002* (Cth) and *Research Involving Human Embryos Regulations 2017* (Cth).[40]

The *MDLR Act* contains five types of licenses as outlined in ss 28A(a)–(e) of the *MDLR Act*:

(a) pre-clinical research and training licences;[41]

(b) clinical trial research and training licences;[42]

32 Ibid 4.

33 Ibid; Revised Explanatory Memorandum (n 7) 3, 85.

34 Revised Explanatory Memorandum (n 7) 3, 76–9.

35 *Public Consultation Summary Report* (n 30) 2–3.

36 Second Reading Speech (n 1) 3279.

37 Commonwealth, *Parliamentary Debates*, House of Representatives, 1 December 2021, 11293–304; Commonwealth, *Parliamentary Debates*, Senate, 2 December 2021, 7142–4.

38 Commonwealth, *Parliamentary Debates*, Senate, 30 March 2022, 577–88.

39 *MDLR Act* (n 3) s 2.

40 The *MDLR Act* also amends the *Therapeutic Goods (Excluded Goods) Determination 2018* (Cth) and *Freedom of Information Act 1982* (Cth).

41 *MDLR Act* (n 3) s 28A(a). See also at s 28C.

42 Ibid s 28A(b). See also at s 28D.

(c) clinical trial licences;[43]

(d) clinical practice research and training licences; and[44]

(e) clinical practice licences.[45]

These licenses allow for both research and clinical use of mitochondrial donation. The licenses will be offered with a two-staged approach, as outlined prior. This is a crucial part of the acceptance of the *MDLR Act*, and it is likely that the research phase could last as long as 10 years. Another important aspect of the *MDLR Act* is that mitochondrial donation recipients can apply to the Secretary of the Department of Health, once they are 18 years old, to receive information about their donor.[46] This has important implications for the individual patient, who has the right to 'know their genetic origins', which can have implications for their health and sense of identity.[47]

IV Arguments and Wider Discourse

The wider discourse relates mainly to three key issues: (1) creating human embryos that may then later be discarded; (2) creating heritable, germline changes in cells; and (3) the imperative upon doctors and scientists to continue to innovate and solve medical challenges for the good of patients. This discourse includes contributions not only from scientists and ethicists, but also religious groups, affected families, and members of the general public.[48]

43 Ibid s 28A(c). See also at s 28E.

44 Ibid s 28A(d). See also at s 28F.

45 Ibid s 28A(e). See also at s 28G.

46 Ibid s 29A(4).

47 Dziadek and Sue (n 5) 119.

48 Anna Salleh, '"Maeve's Law" Passes Senate Hurdle to Legalising Mitochondrial Donation through IVF', *ABC News* (online, 31 March 2022) <https://www.abc.net.au/news/science/2022-03-31/maeves-law-passes-senate-mitochondrial-donation/100954484>; Sarah Martin, 'Controversial Mitochondrial Donation Legislation Passed after Conscience Vote', *The Guardian* (online, 1 December 2021) <https://www.theguardian.com/australia-news/2021/dec/01/controversial-mitochondrial-donation-legalised-after-conscience-vote>; 'Mitochondrial Donation Now Legal in Australia', *Australian Genomics* (Web Page, 31 March 2022) <https://www.australiangenomics.org.au/mitochondrial-donation-now-legal-in-australia/?utm_source=rss&utm_medium=rss&utm_campaign=mitochondrial-donation-now-legal-in-australia>; Marilyn Rodrigues, 'Bishops Warn of Risks of Mitochondrial Donation Tech', *The Catholic Weekly* (online, 21 March 2021) <https://www.catholicweekly.com.au/bishops-warn-of-risks-of-mitochondrial-donation-tech/>.

A *The Use (and Destruction) of Human Embryos*

Throughout both the research phase and the clinical phase, human embryos would need to be made and then potentially discarded.[49] This is no different to 'regular' IVF, where embryos are destroyed on a routine basis,[50] however it is nonetheless controversial. Primarily, these concerns arise from religious groups, who are opposed to the needless creation and destruction of human life.[51] For example, the Australian Christian Lobby submitted that '[e]xperimentation on human embryos is problematic' and to do so represents instrumentalisation 'of the embryo for experimentation and destruction rather than implantation where it can fulfil its unique and dynamic destiny'.[52] However, certain methods can be chosen in order to reduce the waste of human embryos. For example, during the PNT method, two fertilised eggs are created and then one is destroyed. In contrast, the MST method involves the creation of only one fertilised egg which is then used.[53] Inherently however, regardless of the method adopted, the necessary research phase will consist of the destruction of many embryos due to the necessary clinical trials and further research.[54] This is a key sticking point for both conversative and religious groups. However, as is demonstrated by the passage of the *MDLR Act*, and the continued use of IVF, this concern is not held by a vocal majority in Australia.[55]

B *Creating Heritable Changes*

One of the primary concerns surrounding mitochondrial donation (of both a scientific and ethical nature) is that of heritability. For example, the NHMRC noted concerns regarding heritable changes inherited by future generations through mitochondrial donation:

> These concerns may relate to the future unknown impact of heritable changes, the inability for future generations to give consent to these changes, the

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49 *Science of Mitochondrial Donation Report* (n 25) 55–7 [4.4]–[4.12].

50 Ibid 57 [4.11]–[4.12].

51 Ibid 55–6 [4.4]–[4.9]; Australian Christian Lobby, Submission No 51 to Senate Community Affairs References Committee, Parliament of Australia, *Science of Mitochondrial Donation and Related Matters* (16 May 2018) 6–7.

52 Australian Christian Lobby, Submission No 51 to Senate Community Affairs References Committee, Parliament of Australia, *Science of Mitochondrial Donation and Related Matters* (16 May 2018) 6.

53 However, this does not necessarily ensure zero destruction of embryos. See Lyndsey Craven et al, 'Scientific and Ethical Issues in Mitochondrial Donation' (2018) 24(1) *The New Bioethics* 57, 65; Hamzelou (n 18).

54 *Science of Mitochondrial Donation Report* (n 25) 57 [4.11]; Craven (n 53) 65.

55 The courts in Australia have demonstrated reluctance to heed to religious groups on the topic of IVF. See, eg: *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372; *McBain v Victoria* (2000) 177 ALR 320; Kristen L Walker, 'Equal Access to Assisted Reproductive Services' (2000) 25(6) *Alternative Law Journal* 288.

> implications of changing a person's genetic makeup, and the potential use of the technology in ways that cause harm or are unacceptable to the community. … [A] girl born following mitochondrial donation will have a different mitochondrial genome to her mother, and one that may be inherited by her own children.[56]

There is a technical question as to whether this amounts to 'germline genetic modification', as this term is used in other key legal documents such as the United Nations Educational, Scientific and Cultural Organization ('UNESCO') *Universal Declaration on the Human Genome and Human Rights*.[57] However, scientists in Australia reached a consensus in the NHMRC *Expert Statement* that the technical definition of this is irrelevant, as it is clear that the technique can result in changes that are inherited by future generations.[58] The permanency of these changes to future generations raises serious questions. These are primarily concerns regarding the preservation of human health across generations, especially if unknown adverse effects begin to arise at some point in the future.[59] In addition, the rights of the unborn child ought to be considered, as a medical decision is being made for the child without their consent.[60]

There is a way to avoid the donor mtDNA being 'inherited' by the next generation, by restricting resultant offspring to males, given that the transmission of mtDNA occurs through the maternal line and only very rarely through the paternal germline.[61] But this, in turn, has serious ethical imperatives about access to healthcare between the sexes, and whether sex selection should and could be permitted under legislation.[62]

C *Imperative To Innovate*

Even amongst those in opposition to the legislation, most agreed that 'it's important to start the research and to have legislation that allows that to occur'.[63] There are still many key scientific questions left to answer. These include, but are not limited to: (1) 'whether compatibility between the nuclear and mtDNA [is] important'; (2) 'how the mutant mtDNA [is] distributed as cells replicate and divide after fertilisation'; and

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56 National Health and Medical Research Council, 'Mitochondrial Donation Issues Paper: Ethical and Social Issues for Community Consultation' (Issues Paper, 2019) 14 ('Mitochondrial Donation Issues Paper').

57 United Nations Educational, Scientific and Cultural Organization, *Universal Declaration on the Human Genome and Human Rights*, 29 C/Res. 16, 29th Comm, 29th sess, 26th plen mtg (1998, adopted 11 November 1997) vol 1.

58 *Mitochondrial Donation Expert Statement* (n 5) 15–21.

59 *Science of Mitochondrial Donation Report* (n 25) 71–3 [4.78]–[4.89].

60 Ibid 66–8 [4.56]–[4.61]; Plunkett Centre for Ethics, Submission No 30 to Senate Standing Committees on Community Affairs, Parliament of Australia, *Science of Mitochondrial Donation and Related Matters* (14 May 2018) 3–4.

61 *Mitochondrial Donation Expert Statement* (n 5) 5.

62 Revised Explanatory Memorandum (n 7) 84.

63 Commonwealth, *Parliamentary Debates*, Senate, 9 February 2022, 103 (Sam McMahon) ('Senate Second Reading Speech').

(3) 'does mitochondrial donation result in significant changes to the development of the embryo, compared with normal embryo development'.[64] These questions were reflected in a number of the submissions to the Senate Committee in 2018.[65]

The difficulty lies in the paradox that before more research is conducted, the answers to these questions will not be known. However, in order to do more research, new licenses need to be granted, and the research needs to be allowed. As such, the question becomes one of whether Australia wishes to be a leader in this field or not. Medical research has an important role to play in the Australian economy, and legalising new technology responsively can reduce the phenomenon of 'brain drain'. By the inclusion of a research-intensive phase (Stage One), Parliament has impliedly acknowledged this need for further research coupled with the imperative to innovate in Australia. Another important consideration is that if Australia fails to adequately innovate, and keep up with global practice, this is an invitation for 'IVF tourism', which in turn 'opens a number of legal and ethical issues that will not only affect the parents but also the offspring'.[66] In essence, a crucial takeaway was summarised by Senator Sam McMahon, who observed that, 'We can go ahead with phase 1, but it needs to come back to the parliament rather than just be delegated to a minister to make regulations on.'[67] When it comes time to grant clinical licenses, any research or clinical findings ought to be thoroughly re-evaluated.

V Concluding Thoughts

In conclusion, while the area is legally, scientifically, and ethically complex, it is clear that mitochondrial donation has the potential to bring a large benefit to families affected by mitochondrial disease. That being said, key scientific questions remain yet to be answered before the technique ought to be used in widespread clinical practice. The *MDLR Act* provides for just this; a sound framework to allow the beginning and continuation of the research phase for a number of years, followed by the potential for clinical use, when deemed appropriate. It is a great example of responsive science policy-making, where new developments are facilitated rather than restricted. Australia has developed a clear, nuanced and substantial legislative

64 'Mitochondrial Donation Issues Paper' (n 56) 15.

65 John Carroll and Mike Ryan, Submission No 19 to Senate Standing Committees on Community Affairs, Parliament of Australia, *Science of Mitochondrial Donation and Related Matters* (11 May 2018); Australian Academy of Science, Submission No 35 to Senate Standing Committees on Community Affairs, Parliament of Australia, *Science of Mitochondrial Donation and Related Matters* (May 2018); Wellcome Centre for Mitochondrial Research, Submission No 45 to Senate Standing Committees on Community Affairs, Parliament of Australia, *Science of Mitochondrial Donation and Related Matters*.

66 Jus St John, Submission No 31 to Senate Standing Committees on Community Affairs, Parliament of Australia, *Science of Mitochondrial Donation and Related Matters* (9 May 2019) 4.

67 Senate Second Reading Speech (n 63) 104.

framework, and this in and of itself is a positive development. In summary, this legislation is a display of well-considered, thought-out legislation on a technical health subject. Provided the stringent framework is followed, the *MDLR Act* could be a basis upon which to model the regulation of other similarly controversial health techniques.

Aeron Leyesa and Janice Yong***

DEUS EX MINISTER: *DJOKOVIC V MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS* (2022) 397 ALR 1

I Introduction

Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs ('*Djokovic*')[1] considered the legality of the exercise of the personal power or 'God-like power' under s 133C(3) of the *Migration Act 1958* (Cth) ('*Migration Act*').

'God-like power' is a term used to describe the 'non-delegable, non-reviewable and non-compellable' discretion afforded to the Minister by provisions of the *Migration Act*.[2] These powers were originally intended as a 'compassion[ate] and humane response' to balance the strict statutory visa criteria.[3] However, throughout the years, the God-like powers have expanded to include the refusal and cancellation of visas, such as s 133C(3).[4] Christopher Evans summarised the overall difficulty with judicial review of the God-like powers:

> The [*Migration Act*] is unlike any Act I have seen in terms of the power given to the minister to make decisions about individual cases. I am uncomfortable with that not just because of a concern about playing God but also because of the lack of transparency and accountability for those ministerial decisions …[5]

This case note reiterates the breadth of the personal power conferred on the Minister and highlights that there is nothing novel about the Court's approach in *Djokovic*. *Djokovic* is simply a restatement of the accepted wisdom in Australian administrative law — that the opinion of judges on what are considered public policy matters

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1 (2022) 397 ALR 1 ('*Djokovic*').

2 Lauren Bull et al, *Playing God: The Immigration Minister's Unrestrained Power* (Report, 2017) 6.

3 Ibid 2.

4 Ibid 10.

5 Commonwealth, *Parliamentary Debates*, Senate, 19 February 2008, 31 (Christopher Evans, Minister for Immigration and Citizenship), quoted in Samuel C Duckett White, 'God-Like Powers: The Character Test and Unfettered Ministerial Discretion' (2020) 41(1) *Adelaide Law Review* 1, 29–30.

is restricted to an assessment of their legality, not their merits. Despite its seeming banality, however, the decision in *Djokovic* still warrants discussion as it highlights the inadequacy of existing accountability mechanisms against the increasing use of the Minister's so-called God-like powers as a populist tool.

II Background: No Vaxx for Novak

The applicant, Novak Djokovic, was granted a Class GG Subclass 408 Temporary Activity Visa. On 5 January 2022, he arrived in Australia to compete in the Australian Open Tennis Championship.[6] Upon arrival, he was questioned by officers of the Department of Home Affairs ('DHA').[7] Djokovic indicated to an officer that he had not been vaccinated against COVID-19.[8] Among other supporting documentation, Djokovic provided evidence as to the reason for his non-vaccinated status, namely, his recent COVID-19 infection.[9] Despite this, however, the DHA still decided to cancel Djokovic's visa under s 116(1)(e)(i) of the *Migration Act*.[10] The provision stipulates for a *delegable* power to cancel a visa if an officer is satisfied that:

> **116 Power to cancel**
>
> (1) …
>
> …
>
> (e) the presence of its holder in Australia is or may be, or would or might be, a risk to:
>
> (i) the health, safety or good order of the Australian community or a segment of the Australian community;[11]

The DHA officer provided reasons for the decision, saying that

> [u]nder the *Biosecurity Act 2015* [(Cth)], there are requirements for entry into Australian Territory. These requirements include that international travellers make a declaration as to their vaccination status … [p]revious infection with COVID-19 is not considered a medical contraindication for COVID-19 vaccination in Australia.[12]

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6 *Djokovic* (n 1) 3 [1].

7 Ibid 3 [2].

8 Ibid 10 [47].

9 Ibid.

10 Ibid 3 [3].

11 *Migration Act 1958* (Cth) s 116(1)(e)(i) ('*Migration Act*').

12 Chris Johnston and Rosa Torrefranca, 'Cancellation Court! Djokovic Rallied To Secure Release before the Ministerial Discretions Proved a Winner' (2022) 44(3) *Law Society of South Australia Bulletin* 24, 24.

Following this decision, Djokovic was taken into immigration detention.[13] Given that Djokovic was refused immigration clearance, he was not considered to have entered Australia and his visa was, therefore, cancelled 'prior to entry'.[14] This had the effect of limiting his appeal options to the Federal Circuit and Family Court of Australia ('FCFC').[15] In his application, Djokovic submitted that the DHA officer's decision 'was affected by a variety of jurisdictional errors'.[16] These included:

- failure to give the requisite notice under s 119(1);[17]
- error in the purported formation of the state of satisfaction in the decision to cancel the visa;[18]
- error in failing to consider the evidence of the applicant's medical contraindication;[19]
- failure to consider representations made by Djokovic in response to the notice;[20]
- illogicality / irrationality as to extenuating circumstances; and[21]
- procedural unfairness and unreasonableness.[22]

On 10 January 2022, Judge Kelly issued consent orders in favour of Djokovic based on grounds of procedural unfairness and unreasonableness.[23] The order was that the DHA officer's decision be quashed[24] and that Djokovic be released immediately from immigration detention.[25] The Minister for Home Affairs conceded that the officer's decision to proceed with questioning and to cancel Djokovic's visa was unreasonable, on the basis that:

13 Ibid 24.

14 Ibid.

15 Ibid.

16 Novak Djokovic, 'Applicant's Outline of Submissions', Submission in *Djokovic v Minister for Home Affairs*, MLG35/2022, 8 January 2022, 3 [9].

17 Ibid 7–9 [24]–[29].

18 Ibid 9 [30]–[32].

19 Ibid 10–11 [33]–[35].

20 Ibid 21–4 [77]–[91].

21 Ibid 24–6 [92]–[98].

22 Ibid 26–34 [99]–[132].

23 Order of Judge A Kelly in *Novak Djokovic v Minister for Home Affairs* (Federal Circuit and Family Court of Australia, MLG35/2022, 10 January 2022) Notation [A].

24 Ibid [1].

25 Ibid [3.1].

(1) at 5:20am on 6 January 2022 the applicant was told that he could have until 8.30am to provide comments in response to a notice of intention to consider cancellation under s 116 of the *Migration Act 1958* (Cth);

(2) instead, the applicant's comments were then sought at about 6:14am;

(3) the delegate's decision to cancel the applicant's visa was made at 7.42am;

(4) the applicant was thus denied until 8.30am to make comments;

(5) had the applicant been allowed until 8:30am, he could have consulted others and made further submissions to the delegate about why his visa should not be cancelled.[26]

On the same day, counsel for the Minister for Home Affairs informed the Court that the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs ('Minister') — the respondent in the present proceedings — may consider whether to exercise a personal power of cancellation pursuant to s 133C(3) of the *Migration Act*.[27] Unlike the delegable power under s 116(1)(e)(i), there was no requirement upon the Minister in exercising his powers under s 133C(3) to afford Djokovic procedural fairness.[28] It was as a courtesy to the Court that Judge Kelly was informed that the Minister was considering this course of action. It was then fortuitous that this enabled Djokovic to make representations to the Minister against the taking of this course of action, an opportunity the Minister was under no legal obligation to furnish.

Late Friday afternoon, on 14 January 2022, the Minister eventually exercised his personal power to cancel Djokovic's visa under s 133C(3) of the *Migration Act*.[29] The Minister did so on the basis that Djokovic's presence in Australia may be a risk to the health of the Australian community in that it could foster disregard for the need to isolate following the receipt of a positive COVID-19 test result.[30] Thereafter, Djokovic sought urgent interim relief in relation to the Minister's decision.[31] The urgency was due to Djokovic being scheduled to play in the Australian Open the following Monday.[32]

On the same day, the FCFC transferred the proceedings to the Federal Court of Australia.[33] This was confirmed by O'Callaghan J the following day and, as a result,

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26 Ibid Notation [A].

27 Ibid Notation [C]; *Djokovic* (n 1) 2–3 [6].

28 *Migration Act* (n 11) s 133C(4); *Djokovic* (n 1) 4 [8].

29 *Djokovic* (n 1) 4 [9].

30 Ibid 31 [58].

31 Ibid 4 [11].

32 Ibid.

33 Ibid [13]. See *Federal Circuit and Family Court of Australia Act 2021* (Cth) s 153(1).

the Federal Court gained jurisdiction over the matter.[34] Chief Justice Allsop then directed that this jurisdiction be exercised by a Full Court.[35] In view of its urgency, the application was heard on Sunday, 16 January 2022.[36]

III The Case

A *Applicable Law*

Section 133C(3) of the *Migration Act* provides:

> **133C Minister's personal powers to cancel visas on section 116 grounds**
>
> …
>
> (3) The Minister may cancel a visa held by a person if:
>
> (a) the Minister is satisfied that a ground for cancelling the visa under section 116 exists; and
>
> (b) the Minister is satisfied that it would be in the public interest to cancel the visa.[37]

The power of cancellation under s 133C(3) is a personal power that is not capable of being exercised by a delegate of the Minister, but exists only for the Minister's consideration and is exercised personally.[38] The personal power has three main elements: (1) satisfaction; (2) risk to health, safety and good order; and (3) public interest, which are discussed below.

1 *Satisfaction*

The Minister must be *satisfied* of the matters in sub-ss (a)–(b), as set out above. This signifies that the ability to exercise the personal power is contingent upon the Minister holding a requisite state of mind — it is a jurisdictional fact.[39] The Minister need *not* prove that the elements of s 133C(3) are *in fact* made out — only that, in the Minister's subjective opinion, they are. However, the case law makes it clear that satisfaction is 'not an unreviewable personal state of mind'.[40] It must be

34 *Djokovic* (n 1) 4 [13]. See *Federal Court of Australia Act 1976* (Cth) s 32AD(3).

35 *Djokovic* (n 1) 5 [15]. See *Federal Court of Australia Act 1976* (Cth) s 20(1A).

36 *Djokovic* (n 1) 4 [16].

37 *Migration Act* (n 11) ss 133C(3)(a)–(b).

38 *Djokovic* (n 1) 4 [6].

39 Ibid 5 [21], citing *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611, 651 [131] (Gummow J) ('*Eshetu*').

40 *Djokovic* (n 1) 5 [21].

reached on 'proper material or lawful grounds'.[41] In order to do so, the Minister: (1) must act 'in good faith';[42] (2) must base their decision on 'some evidence';[43] and (3) must be reasonable or logical.[44] However, the case law also makes it clear that the Court should only interfere if the decision 'is so lacking a rational or logical foundation'.[45] Section 133C(3), therefore, provides the Minister with a broad power that is extremely difficult to challenge. This difficulty is demonstrated in *Minister for Immigration and Multicultural Affairs v Eshetu* ('*Eshetu*').[46] In that case, Gummow J emphasised that 'where the criterion … turns upon factual matters upon which reasonable minds could reasonably differ, *it will be very difficult to show that no reasonable decision-maker could have arrived at the decision in question*'.[47]

2 *Risk to Health, Safety and Good Order*

The notion of risk involves an assessment of future possibilities.[48] This assessment requires the Minister to draw 'inferences from known facts'.[49] Further, such inferences must be based on 'reasonable conjecture within the parameters set by the historical facts'.[50] Meanwhile, the meaning of 'health and safety' were considered self-explanatory in *Djokovic*.[51] In relation to 'good order', the Court said that the term 'must be construed in the context in which it appears, that is, juxtaposed to the words "the health, safety" of the Australian community'.[52] As such

> it requires there to be an element of a risk that the person's presence in Australia might be disruptive to the proper administration or observance of the law in Australia or might create difficulties or public disruption in relation to the values, balance and equilibrium of Australian society.[53]

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41 Ibid.

42 Ibid 6 [25], quoting *Buck v Bavone* (1976) 135 CLR 110, 118 (Gibbs J).

43 *Djokovic* (n 1) 6 [28], quoting *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* (2021) 395 ALR 403, 408 [17] (Keane, Gordon, Edelman, Steward and Gleeson JJ).

44 *Djokovic* (n 1) 6 [26], citing *Boucaut Bay Company Ltd (in liq) v Commonwealth* (1927) 40 CLR 98, 101 (Starke J).

45 *Djokovic* (n 1) 7–8 [34], citing *Minister for Immigration and Citizenship v SZDMDS* (2010) 240 CLR 611, 648 [130] (Crennan and Bell JJ).

46 *Eshetu* (n 39).

47 *Djokovic* (n 1) 6 [27], citing ibid 654 [137] (Gummow J) (emphasis added).

48 *Djokovic* (n 1) 8 [38].

49 Ibid 9 [39], quoting *Lewis v Australian Capital Territory* (2020) 271 CLR 192, 209 [35] (Gageler J).

50 *Djokovic* (n 1) 9 [39], quoting *MZAPC v Minister for Immigration and Border Protection* (2021) 390 ALR 590, 599 [38] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

51 *Djokovic* (n 1) 9 [40].

52 Ibid, quoting *Tien v Minister for Immigration and Multicultural Affairs* (1998) 89 FCR 80, 93–4 (Goldberg J).

53 Ibid.

3 *Public Interest*

The term 'public interest' has a broad and almost unlimited meaning. In *South Australia v O'Shea*,[54] Brennan J explains that this is because

> [w]hen we reach the area of ministerial policy giving effect to the general public interest, we enter the political field. In that field a Minister or a Cabinet may determine general policy or the interests of the general public free of procedural constraints …[55]

In other words, the determination of what is in the public interest is a 'matter of political responsibility'.[56] There is an assumption that Ministers will be accountable to Parliament and, in turn, to the people. This assumption is based on Australia's system of responsible government. This will be explained in further detail in Part IV(B) of this case note.

B *The Minister's Decision*

There was no statutory obligation for the Minister to justify his decision. Nonetheless, the Minister provided a 10-page Statement of Reasons that were carefully drafted.[57]

In relation to the risk to health, the Minister agreed with Djokovic's submission that the latter 'posed a negligible risk of infection to others'.[58] Despite this, the Minister was still satisfied that Djokovic may be a risk to the health of the Australian community on the basis that the latter has a well-known anti-vaccination stance;[59] and that vaccination is central to, and has proven successful in Australia's COVID-19 response.[60] In essence, the Minister's basis was not that Djokovic himself poses a risk to health. Rather, the risk to health derives from what others' perception of his views on vaccination may be.[61]

The Minister considered 'that the orderly management of the pandemic … is a component of the good order of the community'.[62] This is due to 'the adverse community-wide consequences' of failing to manage the effects of the pandemic.[63] As such, the Minister was satisfied that Djokovic's reputation has — among other

54 (1987) 163 CLR 378.

55 Ibid 411 (Brennan J).

56 Ibid.

57 *Djokovic* (n 1) 22 [103].

58 Ibid 10–11 [48].

59 Ibid 11 [53].

60 Ibid 12 [54].

61 Ibid 12–13 [56].

62 Ibid 14 [63].

63 Ibid.

things — 'the potential to undermine the efficacy and consistency' of Australia's COVID-19 response.[64]

The abovementioned 'health and good order' points were also considered in determining whether it was in the public interest to cancel Djokovic's visa and, therefore, do not require repetition.[65]

Additionally, the Minister considered other factors that are perceived to be part of the exercise of his personal power, namely:

- the purpose of Djokovic's visit;
- the degree of hardship that he and his family will suffer;
- his previous compliance with the Department; and
- the legal and diplomatic consequences of cancelling his visa.[66]

In the end, the Minister was still satisfied that the reasons for cancelling the visa outweighed those against.[67]

C *Issues*

Djokovic raised three grounds in relation to the decision:

1. The Minister's decision had binary outcomes. It was illogical, irrational or unreasonable for the Minister to only consider the effect of Djokovic's presence in Australia, but not the effect of his deportation. It follows that the decision was affected by jurisdictional error.

2. The Minister cited no evidence that supported his finding that Djokovic's presence in Australia may 'foster anti-vaccination sentiment'. Therefore, it was not open for the Minister to find that Djokovic may be a risk to the health and good order of the Australian community or that it is in the public interest to cancel his visa.

3. The Minister did not seek Djokovic's view on vaccination and, instead, relied on media reports. Therefore, it was not open for the Minister to make a finding that Djokovic has a well-known anti-vaccination stance.[68]

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64 Ibid 14 [64].

65 Ibid 15 [65].

66 Ibid 16–17 [68].

67 Ibid.

68 Ibid 17–18 [69].

D *Federal Court Decision*

The unanimous judgment by Allsop CJ, Besanko and O'Callaghan JJ dismissed all three grounds. In doing so, their Honours highlighted the accepted wisdom in Australian administrative law that it is the 'legality or lawfulness' of the decision — not its 'merits or wisdom of the decision' — that is the subject of an application for judicial review.[69]

In relation to the third ground, their Honours held that it was 'plainly open' for the Minister to find that Djokovic is against vaccination based on the views that he has expressed publicly and the fact that he had not chosen to be vaccinated for over a year since they have become available.[70] Their Honours further held that the fact that the Minister had not specifically asked Djokovic of his present stance 'only meant that there was no express statement to the contrary of what could be inferred to be his attitude' until his arrival in Australia.[71]

Addressing the second ground, their Honours held that the Minister relied on some evidence in finding that Djokovic's presence in Australia may 'foster anti-vaccination sentiment'.[72] Their Honours alluded to material referred to by the Minister in his reasons that anti-vaccination groups portrayed Djokovic 'as a hero and an icon of freedom of choice'.[73] They also acknowledged that the Minister's reasons included the encouragement, not just of anti-vaccination groups, but also of people who may be uncertain of their views on vaccination.[74] However, their Honours concluded that the encouragement of the latter group did not need evidence — it may simply be inferred 'from common sense and human experience'.[75]

Regarding the first ground, their Honours held that the Minister was not required to consider the two binary outcomes contended by Djokovic.[76] This is because the words of the *Migration Act* directed the Minister's attention to the 'presence' of the visa holder.[77] As such, there was no obligation to consider the consequences of the holder being removed from Australia.[78]

69 Ibid 5 [17].

70 Ibid 19 [74].

71 Ibid 19 [75].

72 Ibid 19–20 [78]–[90].

73 Ibid 19 [79].

74 Ibid 19 [80].

75 Ibid 20 [82].

76 Ibid 21 [95].

77 Ibid 21 [96] (emphasis omitted).

78 Ibid.

IV Comment

A *The Minister's God-Like Power*

The Federal Court noted:

> Another person in the position of the Minister may have not cancelled Mr Djokovic's visa. The Minister did. The complaints made in the proceeding do not found a conclusion that the satisfaction of the relevant factors and the exercise of discretion were reached and made unlawfully.[79]

This demonstrates the Minister's broad discretionary power in cancelling visas, depending on whether he was satisfied that Djokovic's presence in Australia 'may be or would or might be such a risk' to the health, safety or good order of the Australian community.[80] The statutory language of 'may be, or would or might be, a risk to' in s 116(1)(e)(i) suggests a 'speculative and low level of potential risk' that may be sufficient to enliven satisfaction in the Minister.[81] As Djokovic's application was for judicial review, the Court did not consider the merits or wisdom of the Minister's decision; nor did it remake the decision.[82] 'The task of the Court was … to rule upon the lawfulness or legality of the decision by reference to the complaints made about it'.[83] This means that the Full Court did not consider whether Djokovic, *in fact*, was a risk to the 'health, safety or good order' of the Australian community; but merely whether the Minister was satisfied — in good faith, with some evidence, and reasonably — that *there was a possibility* that Djokovic's presence would pose a risk to the health or good order of the Australian community.[84]

In order to achieve a positive outcome in judicial review, Djokovic needed to demonstrate that the decision of the Minister was unreasonable, by 'demonstrating that there has been some form of jurisdictional error'.[85] However, as their Honours noted, '[t]he characterisation of a decision or state of satisfaction as legally unreasonable is not easily made'.[86] This is particularly where reasons that are provided demonstrate 'a justification for that exercise of power'.[87] The Minister in *Djokovic* provided a Statement of Reasons that were 'evidently carefully' drafted, even though he was

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79 Ibid 23 [105].

80 Ibid 5 [20].

81 Johnston and Torrefranca (n 12) 28.

82 *Djokovic* (n 1) 5 [17].

83 Ibid.

84 Ibid [20].

85 White (n 5) 31.

86 *Djokovic* (n 1) 7 [33]. See also: *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 377–8 [111]–[113] (Gageler J); *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1, 24 [70(d)] (Griffiths J).

87 White (n 5) 32, citing *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541, 574 [84] (Nettle and Gordon JJ).

not obliged to.[88] As such, the Court did not find the satisfaction of the Minister had been 'reached unreasonably or was not capable of having been reached on proper material or lawful grounds',[89] as the Minister had before him material that could convince him to cancel Djokovic's visa. The Court found that there was a lawful satisfaction for the purpose of the statute, and there was no jurisdictional error in the Minister's decision.[90]

This demonstrates the sheer breadth of the Minister's personal power under s 133C(3), which has led to the power being described as God-like.

B *The Need for a More Robust Accountability Mechanism*

While these broad ministerial powers exist to moderate the strict statutory criteria in appropriate cases, the breadth of the powers can only be accepted if there are sufficient accountability mechanisms to oversee their exercise. The chief accountability mechanism available is Australia's system of responsible government.[91] Such system promotes the primacy of 'political responsibility', that is, Ministers will always be accountable to Parliament who, in turn, will be accountable to the people.[92] According to Stephen Gageler, responsible government is 'premised on a linear concentration of power', which would ensure that the will of the electors would 'always in the end assert itself as the predominant influence in the country'.[93] In other words, responsible government is a form of 'democratic control'.[94] Given this context, it is, therefore, ironic that the exercise of the God-like powers is now characterised as 'authoritarian',[95] and 'creating … both the possibility and perception of corruption'.[96] This can only suggest that the accountability mechanism that responsible government provides is no longer adequate.

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88 *Djokovic* (n 1) 22 [103].

89 Ibid 5 [21].

90 Ibid, citing *Eshetu* (n 39) 651 [131] (Gummow J).

91 RS Parker, 'The Meaning of Responsible Government' (1976) 11(2) *Politics* 178, 178. See also: *Egan v Willis* (1998) 195 CLR 424, 451 [42] (Gaudron, Gummow and Hayne JJ); *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 463 [217] (Gummow and Hayne JJ).

92 Parker (n 91) 179.

93 Stephen Gageler, 'Foundations of Australian Federalism and the Role of Judicial Review' (1987) 17(3) *Federal Law Review* 162, 169, quoting AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, 1960) ch 1.

94 Parker (n 91) 179.

95 Andrew Higgins, 'Novak Djokovic through Australia's Pandemic Looking Glass: Denied Natural Justice, Faulted by Open Justice and Failed by a Legal System Unable To Stop the Arbitrary Use of State Power' (2022) 42 *Civil Justice Quarterly* (forthcoming).

96 Senate Select Committee on Ministerial Discretion in Migration Matters, Parliament of Australia, *Inquiry into Ministerial Discretion in Migration Matters* (Report, March 2004) xix.

Indeed, RS Parker has acknowledged that the significant growth of government over the years has continued to present obstacles to the efficacy of responsible government.[97] Christos Mantziaris notes that forms of executive action may 'simply remove the conduct of government from the view of Parliament [and, thus, the people]'.[98] Lauren Bull et al commented: 'we do not know what our government is doing in our name'.[99] This presents an obvious problem as the 'Parliament and the people can only conduct their scrutiny of the executive … if they *know* what the executive is doing'.[100] In the context of the Minister's God-like powers for example, this can happen when the Minister — absent any statutory requirement to do so — does not provide reasons for their decisions.[101] In the past, an attempt has been made at bolstering political responsibility by establishing an independent parliamentary committee to oversee the exercise of the God-like powers by the Minister.[102] This attempt, nevertheless, failed and, to date, has yet to be realised.[103]

With this in mind, courts present an alternative form of accountability that should complement political responsibility.[104] Mantziaris explains:

> While the main arenas for the political responsibility relationship are the Parliament, the electoral process and the public discussion of political affairs, the forum for the executive's legal responsibility is the court and the modern system of administrative tribunals.[105]

Nonetheless, legal responsibility still operates on the assumption that its political counterpart not only holds primacy but also remains adequate.[106] This, therefore, provides an explanation as to why judicial review is of a limited nature. It has been highlighted that the problem with this assumption is that it allows the executive to further escape liability.[107] As such, Mantziaris asserts that

> the proper response of the court should be to look at the way in which both political and the legal responsibility for the relevant activity is performed. Where it sees that neither relationship provides a remedy for an executive

97 Parker (n 91) 179.

98 Christos Mantziaris, 'The Executive: A Common Law Understanding of Legal Form and Responsibility' in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (Federation Press, 2003) 125, 140.

99 Bull et al (n 2) 1.

100 Mantziaris (n 98) 133 (emphasis in original).

101 *Djokovic* (n 1) 22 [103].

102 Bull et al (n 2) 2–3.

103 Ibid 3.

104 Mantziaris (n 98) 136–9.

105 Ibid 136.

106 Ibid 141.

107 Ibid.

> wrong, it must strive to see what it can do to maintain the overall responsibility relationship.[108]

In other words, the emphasis on judicial review should be on the actual efficacy of accountability, rather than on any blind assumption about the primacy and adequacy of political over legal responsibility. However, given the Courts' 'incremental and precedent-bound manner of operation',[109] such a cultural shift would not occur on its own, and would naturally require legislative intervention.[110] Until then, there remains a huge gap between the increasing exercise of executive activity such as the God-like powers and the measures to keeping the executive accountable.

C *Vox Populi(st)?*

Those in favour of the *Djokovic* decision may describe it as a testament to the unyielding strength of Australia's COVID-19 response and border integrity, where rules were not 'bent for the benefit of the rich and powerful'.[111] On the same morning that the first decision was handed down, the then Prime Minister of Australia, Scott Morrison, tweeted: 'Rules are rules, especially when it comes to our borders. No one is above these rules.'[112] Indeed, in the event that Djokovic had won, a 'one rule for them and another [rule] for the rest of us' public chatter would have inevitably ensued.[113] Nonetheless, this (over)emphasis on rules only makes it obvious that it is not the rule of law but, more aptly, the rule of populism, which seems to have subjected Djokovic to deportation.

It is notable that one critic of the Minister's decision regarding Djokovic's fate has said that it had 'no discernible policy' behind it.[114] Other unvaccinated tennis players with the exact same paperwork were allegedly initially allowed into the country without trouble.[115] In relation to previous exercises of the God-like powers, this appears to be a step further in the wrong direction. Andrew Higgins notes that, in detaining asylum seekers — although 'cruel' — there is at least an identifiable policy in that it was designed to curb attempts at making dangerous sea journeys to

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108 Ibid 143.

109 Ibid.

110 A similar cultural shift happened in 1975–82 upon 'the enactment of the federal "administrative law package"': ibid 138.

111 Joshua Jowitt, 'Novak Djokovic: The Legal Problem of Having One Rule for Some, Another for Everyone Else', *The Conversation* (online, 12 January 2022) <https://theconversation.com/novak-djokovic-the-legal-problem-of-having-one-rule-for-some-another-for-everyone-else-174655>.

112 @ScottMorrisonMP (Twitter, 6 January 2022, 8:26 am ACDT) <https://twitter.com/ScottMorrisonMP/status/1478848008363991049>, archived at <https://perma.cc/5F3Q-D7YV>.

113 Jowitt (n 111). See also Higgins (n 95) 3.

114 Higgins (n 95) 12.

115 Ibid 3.

Australia.[116] The *Djokovic* decision, in contrast, was clearly motivated by populist pressure.[117] Put bluntly, it was a golden opportunity for an unpopular government to gain much-needed political mileage months before an impending election.[118] While there is some justification to the Minister's decision that Djokovic's presence in Australia 'may foster anti-vaccination sentiment',[119] one wonders if the decision would have been made at all if such high political stakes were not in play. This is especially salient when considering that, prior to the cancellations, the Prime Minister has publicly indicated that granting a vaccination exemption to Djokovic 'was a matter for the state government of Victoria'.[120] As another critic points out, the federal government 'made a final decision that seems to be in line with community sentiment and, just possibly, the government's internal polling'.[121] In a way, this appears to comply with the orthodox notion that the God-like powers are a 'matter of political responsibility',[122] albeit in its most rudimentary sense. However, one does not need to be an expert in law or political science to perceive how a conflation between democracy and populism can become problematic.

But what makes the situation worse is that the usual subjects of these God-like powers are not influential people like Djokovic, to whom visa cancellation simply constitutes a minor inconvenience. Instead, they are asylum seekers to whom a visa cancellation is the difference between a life of opportunity or misery.[123] Hence, a tweet by the Asylum Seeker Resource Centre, soon after the *Djokovic* decision, is fitting:

> That #Djokovic has just lost before the Federal Court shows how untouchable the Ministers god like powers are. When a multimillionaire tennis player can't

116 Ibid 12.

117 Ibid. See also 'Novak Djokovic: Australian Open Vaccine Exemption Ignites Backlash', *BBC News* (online, 5 January 2022) <https://www.bbc.com/news/world-australia-59876203>.

118 Higgins (n 95) 4; David Cohen, 'Scott Morrison's Stance on Novak Djokovic and the Australian Open: Public Health Strategy or Election Campaigning?', *College Green Group* (Blog Post, 12 January 2022) <https://collegegreengroup.com/scott-morrison-australia-novak-djokovic-tennis-showdown/>; Steve McMorran, 'Some Say Politics at Play in Djokovic Detention in Australia', *The Diplomat* (online, 8 January 2022) <https://thediplomat.com/2022/01/some-say-politics-at-play-in-djokovic-detention-in-australia/>.

119 *Djokovic* (n 1) 17 [69].

120 Shaimaa Khalil 'Novak Djokovic: Is His Vaccine Saga an Unforced Error for Australia?', *BBC News* (online, 10 January 2022) <https://www.bbc.com/news/world-australia-59923332>.

121 David Crowe, 'The Political Cost of Letting Djokovic Stay Was Too High for Morrison', *The Age* (online, 14 January 2022) <https://www.theage.com.au/politics/federal/the-political-cost-of-letting-djokovic-stay-was-too-high-for-morrison-20220114-p59oc4.html>.

122 See above n 56.

123 See generally Bull et al (n 2).

> win against the Minister do you now understand why 70 refugees are still locked up 9 years later. He is their judge & jailer.[124]

V Conclusion

Djokovic is in some ways a simple application of established case law in relation to the God-like powers which reaffirms the limited nature of judicial review in Australia. It reiterated that the Court would not overrule the Minister's decision if such a decision was based on findings of fact supported by logical grounds. While the exercise of the God-like power is reviewable, there is clearly a high threshold to reach for the Court to overrule the Minister's decision.

Under s 133C(3) of the *Migration Act*, the Minister was not required to afford natural justice to Djokovic in exercising his power. The fact that Djokovic was able to make submissions to the Minister in advance of the cancellation was purely a result of informing the Court, as a necessary courtesy, that the Minister was considering this course of action. As such, *Djokovic* invites future arguments as to whether s 133C(3) should be amended to effectively afford natural justice. Additionally, it also invokes a broader discussion as to whether the God-like powers are appropriate at all.

The Minister provided reasons for his decision 'perhaps in anticipation of a legal challenge and the publicity of the case'.[125] However, this does not always happen as there is no requirement in the *Migration Act* for the Minister to do so. As such, the fact that this case was able to go on with the expedition and clarity that it did was really fortuitous. The Minister's reasons considerably aided the Court in determining whether the Minister's decision was supported by logical grounds. Thus, *Djokovic* also invites discussions about future reform in this area — surely the least an individual whose visa is cancelled under this power is entitled to expect are reasons for the decision.

This case note demonstrated that the Court's reluctance to intervene, combined with the current system's inability to offer a robust form of accountability, is a two-ingredient recipe for disaster. It leaves the exercise of the God-like powers to executive whim, susceptible to populist pressure, and with exceptionally limited capacity for affected individuals to challenge a decision that can have enormous impacts on their life (well beyond the consequences experienced in this case by Djokovic).

More succinctly, this case note demonstrates that we need *deus ex* Minister — we need to purge God out of the Minister.

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124 @ASRC1 (Twitter, 16 January 2022, 5:29 pm ACDT) <https://twitter.com/ASRC1/status/1482608328350253059>, archived at <https://perma.cc/SC6W-5UF5>.

125 Johnston and Torrefranca (n 12) 27.

Chelsea Chieng and Marilee Hou***

PUTTING EMPLOYERS ON NOTICE: *KOZAROV V VICTORIA* (2022) 399 ALR 573

I Introduction

Since the late 1990s, claims for psychiatric injury against employers have continued to increase in prevalence.[1] However, despite the cultural and regulatory shift towards recognition of mental health issues,[2] research suggests that 'employees typically suffer in silence' in the workplace.[3] Studies have found that employees are 'significantly more likely to under-report' mental illnesses compared to other health conditions,[4] and that mental illness continues to 'remain hidden and largely unmanaged in the workforce'.[5] This phenomenon of under-reporting may be attributed to factors such as the prevailing stigma surrounding mental illness,[6] or the fear of losing one's job.[7]

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1 Robin Young, 'Stress Related Injuries Also Relevant as OHS Consideration' (2010) 62(8) *Keeping Good Companies* 485, 485.

2 Productivity Commission, *Mental Health* (Report No 95, 30 June 2020) vol 2, 301 ('*Productivity Commission Mental Health Report*').

3 Teladoc Health, 'Tackling a Global Mental Health Crisis in the Workplace: How Employees View Mental Health at Work and What Employers Can Do To Help' (Paper, 2019) 1.

4 Prashant Bharadwaj, Mallesh M Pai and Agne Suziedelyte, 'Mental Health Stigma' (2017) 159(1) *Economics Letters* 57, 58. See also Ruth E Marshall et al, 'Mental Health Screening amongst Police Officers: Factors Associated with Under-Reporting of Symptoms' (2021) 21(1) *BMC Psychiatry* 135:1–8.

5 Young (n 1) 486. See also: Anthony LaMontagne, 'Burnt Out, Hate Your Job? Well, the Going Just Got Tougher', *Sydney Morning Herald* (online, 27 December 2009) <https://www.smh.com.au/politics/federal/burnt-out-hate-your-job-well-the-going-just-got-tougher-20091226-lfn8.html>; Felix O Chima, 'Depression and the Workplace: Occupational Social Work Development and Intervention' (2005) 19(4) *Employee Assistance Quarterly* 1, 1.

6 Rina Hastuti and Andrew R Timming, 'An Inter-Disciplinary Review of the Literature on Mental Illness Disclosure in the Workplace: Implications for Human Resource Management' (2021) 32(15) *International Journal of Human Resource Management* 3302, 3302, 3307.

7 Young (n 1) 486.

Employers have a non-delegable common law duty of care to take all reasonable steps to provide a safe system of work.[8] This involves taking steps to avoid exposing employees to unnecessary risks of injury.[9] Injury relevantly includes physical injury as well as psychiatric injury. To prove a claim of negligence for work-related psychiatric injury, an employee must establish that their employer: (1) was placed on notice of a reasonably foreseeable risk of psychiatric injury;[10] (2) breached their duty of care by failing to take reasonable steps to reduce the risk;[11] and (3) the breach caused the employee's psychiatric injury.[12]

Previously, the leading decision in this area was *Koehler v Cerebos (Australia) Ltd* ('*Koehler*'),[13] where the High Court of Australia effectively placed the onus on employees to establish the existence of evident warning signs that place the employer on notice of the reasonably foreseeable risk of injury.[14] The plurality in *Koehler* stated:

> [T]he employer engaging an employee to perform stated duties is entitled to assume, in the absence of evident signs warning of the possibility of psychiatric injury, that the employee considers that he or she is able to do the job.[15]

The complexities in establishing work-related psychiatric injury caused by the negligence of the employer were highlighted in the recent High Court decision of *Kozarov v Victoria* (2022) 399 ALR 573 ('*Kozarov*'), which sought to distinguish *Koehler*. Whilst negligence cases must be considered against their own facts,[16] *Kozarov* provides useful clarification on employer obligations with respect to preventing psychiatric injury — particularly when the nature of work presents an obvious risk to psychiatric health. Considered in light of an increased focus on mental wellbeing in Australian workplaces,[17] the High Court decision in *Kozarov* puts employers on notice that they must take risks to the psychiatric health of their employees seriously.

8 *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44, 53 [19] ('*Koehler*').

9 *Kozarov v Victoria* (2020) 294 IR 1, 102 [467] (Supreme Court of Victoria) ('*Kozarov (Supreme Court)*').

10 *Kozarov v Victoria* (2022) 399 ALR 573, 577 [12] (High Court of Australia) ('*Kozarov*').

11 Ibid 592–3 [85]–[89].

12 Ibid 591 [81], 593–4 [90]–[97].

13 *Koehler* (n 8).

14 Ibid 57 [36] (McHugh, Gummow, Hayne and Heydon JJ).

15 Ibid.

16 *Kozarov (Supreme Court)* (n 9) 8 [2].

17 *Productivity Commission Mental Health Report* (n 2) vol 2, 301.

II Background and Litigation History

Zagi Kozarov commenced proceedings in the Supreme Court of Victoria against her employer, the State of Victoria, for psychiatric injury she suffered in the course of her employment. At first instance, Jane Dixon J found in favour of Kozarov, awarding her damages for pain and suffering, past economic loss, and loss of future earnings, totalling to $435,000.[18] This award was overturned by the Victorian Court of Appeal, and subsequently restored by the High Court.

A *Background Facts*

Kozarov was employed by the State of Victoria as a solicitor in the Victorian Office of Public Prosecutions' ('OPP') Specialist Sexual Offences Unit ('SSOU') between June 2009 and April 2012.[19] Kozarov worked on 'cases of an abhorrent nature involving child rape and offences of gross depravity', including graphic content, explicit child pornography and witness statements.[20] In February 2012, Kozarov was diagnosed with post-traumatic stress disorder ('PTSD') as a result of her 'cumulative exposure to vicarious trauma in SSOU casework'.[21] Additionally, Kozarov was later diagnosed with major depressive disorder ('MDD') as a corollary of the PTSD.[22] Kozarov claimed that her injuries were caused by the 'ongoing' and 'repeated exposure to a high volume of child sexual offence cases' during her employment in the SSOU.[23] She alleged that there was an 'unsafe system of work' and a failure by the OPP 'to take reasonable steps to protect her from harm'.[24]

Kozarov's case centred upon the argument that '[t]here were numerous signs … that [she] was at risk of harm'.[25] Kozarov relied upon the following 'evident signs'[26] to argue that the State of Victoria was placed on notice of a reasonably foreseeable risk of injury:

(1) she signed an SSOU staff memorandum to management 'detailing [the staff members'] urgent concerns about the pressures and workload in the unit';[27]

(2) she was 'outspoken at staff meetings … regarding her hypervigilance and abnormally protective parenting practices as a result of her work';[28]

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18 *Kozarov (Supreme Court)* (n 9) 171 [777].

19 *Kozarov* (n 10) 587 [63] (Gordon and Steward JJ).

20 Ibid 590 [74].

21 Ibid 587–8 [63].

22 Ibid.

23 *Kozarov (Supreme Court)* (n 9) 9 [4].

24 Ibid 9 [5].

25 *Kozarov* (n 10) 588 [64].

26 *Koehler* (n 8) 57 [36] (McHugh, Gummow, Hayne and Heydon JJ).

27 *Kozarov (Supreme Court)* (n 9) 9 [8], 129 [578(a)].

28 Ibid 129 [578(b)].

(3) she was 'known to be carrying an excessive file load … involving a high proportion of child complainant cases' and 'frequently took work home';[29]

(4) she displayed 'observable signs of emotional involvement in some of her cases';[30]

(5) she avoided taking on a child incest case ('Lim') 'because she was struggling with her existing case load';[31]

(6) her manager, Mr Brown, knew she left work 'suddenly during the Lim trial after an episode of dizziness' and was subsequently absent from work for 17 days;[32]

(7) whilst on leave, she became aware that the child complainant in the Lim case attempted suicide, 'causing her distress';[33]

(8) when she returned to work, Mr Brown 'told her that he and others believed she was not coping in the SSOU' and that she became 'less reliable';[34]

(9) she had a 'highly emotive and agitated reaction' to her disagreement with Mr Brown following his comments about her not coping;[35]

(10) her professional relationship with Mr Brown ruptured, and she expressed 'disappointment in her former mentor';[36]

(11) her 'personality and demeanour were observed to have changed' and management saw her in tears at times;[37]

(12) she called a meeting with the OPP Legal Practice Manager to 'discuss grievances' and 'sought improvements on … junior staff being exposed to challenging material';[38] and

(13) she applied to combine her annual leave and long service leave, then applied to extend her long service leave and ultimately communicated she was unable to return to work at the SSOU 'because of how the work was affecting her'.[39]

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29 Ibid 129 [578(c)].

30 Ibid 129 [578(d)].

31 Ibid 129 [578(e)].

32 Ibid 129 [578(f)].

33 Ibid 129 [578(g)].

34 Ibid 129 [578(h)].

35 Ibid 129 [578(i)].

36 Ibid 129 [578(j)].

37 Ibid 130 [578(k)].

38 Ibid 130 [578(l)].

39 Ibid 14 [42], 130 [578(m)].

B *Supreme Court of Victoria*

The trial judge found in favour of Kozarov. Justice Dixon held that the State of Victoria was on notice as to risks to Kozarov's mental health,[40] which required it to implement 'specific measures or a specific system of work in response to the risk'.[41] The reasonable steps identified were formulated based on the SSOU's own Vicarious Trauma Policy which was never properly implemented or followed.[42] They included making a welfare inquiry,[43] and offering Kozarov a rotation to a position outside of the SSOU to prevent further exposure to sexual offence cases.[44] Justice Dixon found that

> [v]iewed prospectively … a reasonable person in the position of [the State of Victoria] would have adverted to the evident signs … and observed that she was failing to cope with her allocated work and that her mental health was at risk.[45]

As the reasonable steps identified were not taken, Dixon J held that the State of Victoria breached its 'duty to avoid foreseeable harm to an employee's mental health'.[46] Further, her Honour also held that if such reasonable steps had been taken, Kozarov would have accepted an offer of rotation, preventing the further exacerbation of her PTSD and MDD, ultimately satisfying the element of causation.[47]

C *Victorian Court of Appeal*

The State of Victoria sought leave to appeal Dixon J's decision on two grounds: (1) that the trial judge erred in finding that the State of Victoria was on notice as to the risk of injury ('notice finding');[48] and (2) that the trial judge erred in finding that Kozarov would have accepted an offer of rotation had one been made ('rotation finding').[49]

Regarding the first ground, the State of Victoria argued that the trial judge's decision 'involved impermissible "litigious hindsight"' by erroneously failing to consider the evidence in the context of what was known at the time.[50] However, the Victorian Court of Appeal dismissed the first ground of appeal, upholding the

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40 Ibid 128–30 [578]–[579], 140 [622].

41 Ibid 140 [624].

42 Ibid 9 [7].

43 Ibid 148 [660].

44 Ibid 154 [691].

45 Ibid 140 [623].

46 Ibid 133 [593].

47 Ibid 163 [733], 164 [739].

48 *Victoria v Kozarov* (2020) 301 IR 446, 450 [7] ('*Kozarov (Court of Appeal)*').

49 Ibid 450 [8].

50 Ibid 466 [70], citing *Koehler* (n 8) 55–6 [28] (McHugh, Gummow, Hayne and Heydon JJ).

trial judge's notice finding.[51] Whilst accepting that each of the 13 evident signs '[w]hen viewed in isolation … might not individually constitute relevant notice', the Court of Appeal held that Dixon J took the correct approach by considering the matters in combination and in the context of the work performed by Kozarov.[52] For example, the Court of Appeal reasoned that the evident signs provided context for the disagreement between Kozarov and her manager, Mr Brown.[53] In this context, the Court of Appeal stated that Kozarov's highly emotional reaction to the disagreement 'did not occur in isolation or "out of the blue"', but rather 'in the context of the nature, content and volume of the workload that she was bearing'.[54] Thus, her reaction 'would fairly be viewed as a clear indication, which should have been taken as a warning sign to [the State of Victoria], that all was not well with the plaintiff's emotional state at that time'.[55]

However, the appeal was allowed on the second ground relating to the rotation finding, overturning the first instance decision and ruling in favour of the State of Victoria. Central to the Court of Appeal's finding was the fact that Kozarov did not give evidence that she would have agreed to an offer of rotation out of the SSOU.[56] Thus, the Court of Appeal held that the trial judge's conclusion that Kozarov would have accepted a rotation offer involved a 'significant degree of hypothesis' and was 'based on inferences'.[57] Their Honours placed particular reliance upon Kozarov's statement that she was 'passionate about continuing [her] work' in the SSOU,[58] as well as the fact that she was seeking promotion and had signed a contract for a permanent position in the SSOU.[59] Thus, the Court of Appeal concluded that Kozarov failed to prove on the balance of probabilities 'that the appropriate exercise of care by [the State of Victoria] would have resulted in [Kozarov] accepting a rotation out of the SSOU'.[60]

III High Court Decision

Kozarov appealed to the High Court, seeking to overturn the Court of Appeal's decision to allow the appeal. The State of Victoria, by Notice of Contention, contended that the Court of Appeal erred in upholding the notice finding.[61] By way of four separate judgments, comprising: (1) Kiefel CJ and Keane J; (2) Gageler and

51 Ibid 470 [76].

52 Ibid.

53 Ibid 470–1 [79].

54 Ibid 471 [79].

55 Ibid.

56 Ibid 477 [104].

57 Ibid.

58 Ibid 478 [108].

59 Ibid 479 [109].

60 Ibid 479 [110].

61 *Kozarov* (n 10) 579 [25].

Gleeson JJ; (3) Gordon and Steward JJ; and (4) Edelman J, the High Court unanimously allowed the appeal, deciding in favour of Kozarov and setting aside the Court of Appeal's orders.

A *The Notice Finding*

With respect to the notice finding, the High Court found that the State of Victoria 'failed to establish error or injustice of any kind on the part of the trial judge or the Court of Appeal in making and maintaining the notice finding',[62] and that 'no sufficient reason … [was] shown for reaching a different conclusion'.[63] Whilst the High Court unanimously upheld the notice finding, each separate judgment offered differing reasons.

The High Court (with the exception of Gordon and Steward JJ) clarified that the 'assumption … in *Koehler* should not be taken to detract from the obligation of an employer … to exercise reasonable care to avoid a foreseeable risk of psychiatric injury',[64] and where 'the nature and intensity of the SSOU's work carried an obvious risk of psychiatric injury from exposure to vicarious trauma',[65] the question of reasonable foreseeability is answered in the affirmative.[66]

Justices Gageler and Gleeson upheld the notice finding as the 'preferable conclusion'.[67] Their Honours referred to the evident signs, notably Kozarov's 'genuine emotional distress'[68] following her dispute with Mr Brown, which 'was a significant indicator of possible work-related psychiatric injury'.[69] Their Honours further commented that Kozarov took on 'an unnecessary evidentiary burden' on the issue of foreseeability by attempting to establish 'evident signs' as required by *Koehler*.[70] Justices Gordon and Steward upheld the notice finding with reference to the 'inherently difficult nature of the work carried out by Ms Kozarov', which 'ought to have put [the State of Victoria] on notice that Ms Kozarov was at risk of psychiatric injury in the continued performance of her work'.[71] However, their Honours did not comment on the principles from *Koehler*.

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62 Ibid 584 [49] (Gageler and Gleeson JJ). See also 578–9 [19] (Kiefel CJ and Keane J), 588 [67] (Gordon and Steward JJ), 598 [113] (Edelman J).

63 Ibid 588 [67] (Gordon and Steward JJ).

64 Ibid 580 [28] (Gageler and Gleeson JJ).

65 Ibid 579 [27] (Kiefel CJ and Keane J).

66 See above nn 64–5. See also ibid 596 [107] (Edelman J).

67 *Kozarov* (n 10) 585 [53] (Gageler and Gleeson JJ).

68 Ibid 584 [51].

69 Ibid 585 [54].

70 Ibid 580 [29]. See also *Koehler* (n 8) 57 [36] (McHugh, Gummow, Hayne and Heydon JJ).

71 *Kozarov* (n 10) 591 [80] (Gordon and Steward JJ).

Whilst Kiefel CJ and Keane J agreed with the orders proposed by Gageler and Gleeson JJ, their Honours did not agree with the significance the Court of Appeal placed on the evident signs to establish notice.[72] Their Honours warned that an employee's mere 'demand … for a reduction in their collective workload' should not be taken as a 'general proposition that an employer is duty-bound … to make enquiries as to [their] mental health'.[73] Their Honours considered that, 'as a general proposition, in an "ordinary" workplace a reasonable response by a reasonable employer to complaints of overwork would not, without more, require that the psychiatric health of employees be assessed'.[74] Nevertheless, their Honours agreed with the notice finding, given that the risks to Kozarov's mental health were 'readily apparent from the terms of the Vicarious Trauma Policy'.[75]

Finally, Edelman J delivered a separate judgment — agreeing with the reasoning of Gageler and Gleeson JJ, and Gordon and Steward JJ — providing additional guidance as to the conceptual approach that ought to be taken in this area of law.[76] Justice Edelman agreed that the State of Victoria was on notice, as a 'reasonable person in the position of [the State of Victoria] would have been aware of the risks'.[77] In making this finding, Edelman J referred to the Vicarious Trauma Policy,[78] the 'very nature and extent of the work of the SSOU',[79] and the '"evident signs" of psychiatric injury'.[80] For Edelman J, the 'foreseeable risk … was so great', and the 'likely extent of that foreseeable injury was so serious', that a reasonable response from the State of Victoria would have involved a compulsory rotation.[81] His Honour's judgment will be considered further in Part IV below.

The High Court's clarification regarding *Koehler* somewhat restored the common law principle that the question of *reasonable* foreseeability is a question of fact concerned with whether a reasonable person in the same circumstances would have foreseen a risk to Kozarov's psychiatric health. In Kozarov's circumstances, the risk was not only plainly obvious, but was also actually foreseen in the sense that the SSOU's own Vicarious Trauma Policy outlined those risks.[82] Chief Justice Kiefel and Keane J explained that *Koehler* was only concerned with whether the employer could have reasonably foreseen risk to the employee's psychiatric health

72 Ibid 577 [12] (Kiefel CJ and Keane J).

73 Ibid 577 [13].

74 Ibid 578 [15].

75 Ibid 575 [3].

76 Ibid 594–8 [99]–[113] (Edelman J).

77 Ibid 597 [110].

78 Ibid 596 [107].

79 Ibid.

80 Ibid 597 [110].

81 Ibid 597 [111].

82 Ibid 579–80 [27].

given the exigencies of the work.[83] The High Court in *Koehler* determined that regard should be had to the employment contract, and in circumstances where the employee had agreed to perform the work that caused the injury, the risk was not reasonably foreseeable absent other 'evident signs'.[84] In *Kozarov*, the State of Victoria's argument that the 'evident signs' relied on by Kozarov 'did not go beyond what would be expected in the ordinary course of [Kozarov's] work, including the inevitable experiences of vicarious trauma'[85] was rejected by the High Court — and rightly so.

B *The Rotation Finding*

On the second ground of appeal, the High Court unanimously found that the Court of Appeal erred in overturning the rotation finding and reinstated the trial judge's conclusion that, had Kozarov been offered rotation out of the SSOU she would have cooperated, which would have prevented the exacerbation of her psychiatric injury. Thus, for all seven justices, causation was made out.

Justices Gageler and Gleeson admitted that there was 'some ambiguity in the trial judge's reasons' as to whether rotation would have been the 'only option that would have avoided the exacerbation of [the] PTSD'.[86] However, their Honours ultimately found that the Court of Appeal erred in overturning the rotation finding for two reasons. First, the Court of Appeal disregarded relevant evidence in support of the rotation finding. This evidence included Kozarov's 'cooperative conduct' in seeking to be rotated,[87] and the expert evidence of Professor McFarlane which stated that a '"significant majority" of people' would follow 'medical advice given to them about the cause of a diagnosed serious illness' and would accept the advice to be rotated.[88] Second, the Court of Appeal failed to consider a reasonable person's self-interest to prevent psychiatric injury and accept advice to avoid those risks.[89] Justices Gageler and Gleeson held that 'it was inherently likely' for Kozarov to have acted 'self-interestedly in accordance with the advice' regarding the need to rotate out of the SSOU.[90] Further, their Honours referred to Dixon J's findings at trial that Kozarov's evidence was 'generally coherent and credible', and noted that the Court of Appeal should have considered the 'real possibility that the appellant's demeanour and credibility may have influenced the trial judge in making the rotation finding'.[91]

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83 Ibid 575 [2] (Kiefel CJ and Keane J).

84 *Koehler* (n 8) 57–8 [36] (McHugh, Gummow, Hayne and Heydon JJ).

85 *Kozarov* (n 10) 585 [52].

86 Ibid 586 [56] (Gageler and Gleeson JJ).

87 Ibid 586–7 [59].

88 Ibid 587 [59].

89 Ibid 587 [60], citing *Rosenberg v Percival* (2001) 205 CLR 434, 443 [24] (McHugh J).

90 *Kozarov* (n 10) 587 [60] (Gageler and Gleeson JJ).

91 Ibid.

For Gordon and Steward JJ, causation was the 'primary question', which their Honours analysed in detail.[92] Differing from the other judgments which focused on rotation, Gordon and Steward JJ framed the duty as requiring the State of Victoria to do '"almost everything" it could "short of forcing rotation"'.[93] Their Honours found that the State of Victoria breached their duty 'in a way which could be said to have *caused* the exacerbation and prolongation of Ms Kozarov's PTSD and subsequent development of MDD'[94] when they 'failed to intervene by making a welfare inquiry … and offering her occupational screening'.[95] Nonetheless, their Honours upheld the trial judge's conclusion that Kozarov would have cooperated with an offer of rotation, which would have reduced her trauma, since this inference had a 'greater degree of likelihood than any competing inference'.[96]

Justice Edelman upheld the rotation finding, noting that — had the State of Victoria taken the reasonable steps of making welfare enquiries and offering occupational screening — these steps would have revealed symptoms of PTSD, leading Kozarov to agree to rotation and thereby preventing exacerbation of her psychiatric injury.[97] Chief Justice Kiefel and Keane J did not expressly make a finding on this issue, but agreed with Gageler and Gleeson JJ's orders allowing the appeal.[98]

IV Comment

A *Distinguishing Koehler*

Kozarov's lawyer, Patricia Toop, explained that since 2005, *Koehler* had stood as the leading precedent in this area, which created significant difficulty for plaintiffs to prove negligence causing psychiatric injury in the workplace.[99]

Chief Justice Kiefel and Keane J were critical of the formulation and presentation of Kozarov's case, harshly describing it as 'unduly complicated', resulting in 'an artificially narrow view of her compensable injuries', and not a 'model to be emulated by others'.[100] Their Honours stated that Kozarov erroneously relied upon the *Koehler* decision and subsequent focus upon 'evident warning signs'.[101] Instead,

92 Ibid 588 [65] (Gordon and Steward JJ).

93 Ibid 591 [83].

94 Ibid 592–3 [88] (emphasis in original).

95 Ibid.

96 Ibid 593 [93].

97 Ibid 597 [112].

98 Ibid 579 [20] (Kiefel CJ and Keane J).

99 'Employer Liability for Psychiatric Injury', *The Law Report* (ABC Radio National, 26 April 2022) <https://www.abc.net.au/radionational/programs/lawreport/workplace-psychiatric-injury-v2/13854748>.

100 *Kozarov* (n 10) 575 [1] (Kiefel CJ and Keane J).

101 *Koehler* (n 8) 57 [36] (McHugh, Gummow, Hayne and Heydon JJ).

their Honours asserted that the State of Victoria's duty of care was 'readily apparent from the terms of the Vicarious Trauma Policy' and the stressful nature of the work, such that no evident warning signs were 'necessary to establish' a duty of care.[102] This view was also reflected in the judgments of Gageler and Gleeson JJ and Edelman J.[103]

Chief Justice Kiefel and Keane J were arguably overly critical of Kozarov's approach, considering that the State of Victoria had raised *Koehler* as a defence in arguing that they could not have reasonably foreseen Kozarov's risk of injury due to her statement that she was 'passionate about continuing [her] work',[104] as well as the fact that she had sought promotion and signed a permanent employment contract.[105] Thus, it arguably would have been remiss of Kozarov not to address *Koehler* in her submissions. Irrespectively, whilst the reference to evident warning signs was not required to establish a duty of care in this context, these factors were nevertheless relevant to the elements of breach and causation.

The difficulty regarding proof of negligence in the case of psychiatric injury was explained by Keane JA in *Hegarty v Queensland Ambulance Service* ('*Hegarty*'):[106]

> [W]hile an employer owes the same duty to exercise reasonable care for the mental health of an employee as it owes for the employee's physical well-being, special difficulties may attend the proof of cases of negligent infliction of psychiatric injury. In such cases, the risk of injury may be less apparent than in cases of physical injury. Whether a risk is perceptible at all may in the end depend on the vagaries and ambiguities of human expression and comprehension. Whether a response to a perceived risk is reasonably necessary to ameliorate that risk is also likely to be attended with a greater degree of uncertainty; the taking of steps likely to reduce the risk of injury to mental health may be more debatable in terms of their likely efficacy than the mechanical alteration of the physical environment in which an employee works.[107]

On the basis of these difficulties, courts have adopted a narrow approach in determining foreseeability and causation, largely stemming from the decision in *Koehler*. For example, *Hegarty*, decided shortly after *Koehler*, concerned an ambulance driver who suffered PTSD caused by repeated exposure to vicarious trauma.[108] The Queensland Court of Appeal disagreed with the trial judge's finding that, if supervisors had been properly trained, they would have recognised signs of stress and

102 *Kozarov* (n 10) 575 [3] (Kiefel CJ and Keane J).

103 Ibid 579–80 [26]–[29] (Gageler and Gleeson JJ), 594 [99], 595 [103] (Edelman J).

104 *Kozarov (Court of Appeal)* (n 48) 478 [108].

105 Ibid 479 [109].

106 [2007] QCA 366 ('*Hegarty*').

107 Ibid [41].

108 Ibid [34].

dysfunction.[109] Focusing on the employee's 'dignity'[110] and 'entitlement to privacy',[111] Keane JA considered that a reasonable response from supervisors was to treat Mr Hegarty's complaints as a claim for improvement in conditions of employment.[112] Similarly, in *Taylor v Haileybury*,[113] Beach J found that a teacher who had a heavy workload and was under considerable stress had contractually agreed to do the work.[114] The employer had no reason to regard expressions of frustration to show a risk to psychiatric health.[115]

In *Kozarov*, the High Court's departure from *Koehler* (and the cases which followed *Koehler*) was subtle, but significant. The message is clear that, in occupations where there is an obvious risk to psychiatric health, an employer cannot assume that the employee is coping absent evident signs to the contrary. However, it is unclear how courts in the future will distinguish an obvious risk like in *Kozarov*, from occupations where *Koehler* still requires evident signs of risk. This is because the High Court decided *Kozarov* on its unique facts, and did not specify any other forms of employment which are 'inherently and obviously dangerous to the psychiatric health of the employee'.[116] Given the extreme nature of Kozarov's work, involving continuous exposure to highly graphic and disturbing content, it is likely that the 'inherently and obviously dangerous'[117] threshold would be difficult to meet. Ideally, the decision in *Kozarov* would also extend to any persons working in traumatic and stressful jobs, such as paramedics, emergency health care workers, military personnel and police. However, it is currently unclear whether *Kozarov* would extend to such occupations.

Justice Edelman's judgment included additional observations which may be indicative of a potential change in approach where courts are more willing to treat psychiatric injuries more similarly to physical injuries. First, his Honour said:

> [T]he employer's duty to ensure the '[p]rotection of mental integrity from the unreasonable infliction of serious harm'[118] is imposed by law … [i]n this sense, it is no different from the employer's duty to protect an employee's physical integrity … [i]t has long been recognised that psychiatric injury 'is just as really

109 Ibid [97].

110 Ibid.

111 Ibid.

112 Ibid [97]–[98] (Keane JA).

113 [2013] VSC 58.

114 Ibid [143].

115 Ibid [141].

116 *Kozarov* (n 10) 576 [6].

117 Ibid.

118 Ibid 595 [103] (Edelman J), quoting *Tame v New South Wales* (2002) 211 CLR 317, 379 [185] (Gummow and Kirby JJ).

> damage to the sufferer as a broken limb … [and] equally ascertainable by the physician'.[119]

Also significant is Edelman J's comment with respect to the Court of Appeal's finding that Kozarov would not have cooperated with a rotation out of the SSOU. His Honour said:

> [A]n employer will not comply with the common law duty to ensure a safe place of work by acquiescing in the refusal of an employee to be rotated from a position that, by reason of some physical characteristic of the employee, involves a high risk of serious physical injury to that employee. Psychiatric injury is no different.[120]

Justice Edelman's remarks in obiter are in stark contrast to Keane JA's observations in *Hegarty* and may be indicative of the court's willingness to reconsider *Koehler* entirely. This concept is expanded on below in the context of statutory regulation. However, Kiefel CJ and Keane J's dissent in this respect — which are more reflective of Keane JA's observations in *Hegarty* — should also be noted:

> In addition, generally speaking, employees intent upon career advancement have a strong and legitimate interest in preserving their privacy so far as their ability to cope with the personal challenges of the work is concerned. It is poignant in this regard that Ms Kozarov, who was actively seeking promotion in the SSOU, kept from her managers the knowledge that she was seeking help from a psychologist. She was, of course, entitled to do so. But for the same reasons of personal autonomy and privacy that entitled her to keep to herself what passed between her and her psychologist, her managers were not duty-bound to seek to elicit this information from her simply by reason of her participation in collective complaints by the staff of the SSOU about being overworked and stressed as a result.[121]

B *The Future of Assessing Psychiatric Risk*

The High Court's decision in *Kozarov* is timely against the background of recent developments in work health and safety ('WHS') laws and regulation. The 2018 review into Australia's model WHS laws revealed that psychological health had been 'neglected' in the broader WHS framework.[122] The review recommended that the model WHS regulations be amended to deal with 'how to identify the psychosocial risks associated with psychological injury and the appropriate control measures

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119 *Kozarov* (n 10) 595 [103] (Edelman J), quoting *Owens v Liverpool Corporation* [1939] 1 KB 394, 400 (MacKinnon LJ).

120 *Kozarov* (n 10) 597 [111] (Edelman J).

121 Ibid 578 [17] (Kiefel CJ and Keane J).

122 Marie Boland, *Review of the Model Work Health and Safety Laws* (Final Report, December 2018) 33 <https://www.safeworkaustralia.gov.au/system/files/documents/1902/review_of_the_model_whs_laws_final_report_0.pdf>.

to manage those risks'.[123] In April 2022, Ministers responsible for WHS agreed to implement the recommendation.[124] Regulation 55D of the model regulations now requires employers to, as far as is reasonably practicable, eliminate or reduce psychosocial risks — having regard to a list of factors, including job demands and tasks.[125] Victoria's proposed amendments to their *Occupational Health and Safety Regulations 2017* (Vic) go a step further, requiring employers to put in place a prevention plan for identified psychological hazards, and for employers with more than 50 employees to provide a written report with respect to any psychological complaints received.[126] The proposed regulations are also more specific, in that the following are all listed as potential risks to an employee's psychological health and safety:

> Bullying, sexual harassment, aggression or violence, exposure to traumatic events or content, high job demands, low job demands, low job control, poor support, poor organisational justice, low role clarity, poor environmental conditions, remote or isolated work, poor organisational change management, low recognition and reward, poor workplace relationships.[127]

More broadly, there are significant costs to employers for poor employee mental health beyond a potential personal injury claim or breach of statutory WHS duty. A 2016 study found: (1) workers with psychological distress took four times as many sick days per month; (2) had 154% higher performance loss; and (3) cost employers an average of $6309 more per year than those without psychological

123 Ibid 35.

124 'Implementation of WHS Ministers' Agreed Response to the Review of the Model WHS Laws', *Safe Work Australia* (Web Page) <https://www.safeworkaustralia.gov.au/law-and-regulation/model-whs-laws/implementation-whs-ministers-agreed-response-review-model-whs-laws>.

125 Safe Work Australia, *Model Work Health and Safety Regulations* (at 14 April 2022) reg 55D <https://www.safeworkaustralia.gov.au/sites/default/files/2022-06/model_whs_regulations_-_14_april_2022.pdf> ('*Model WHS Regulations*').

126 Employers, employees and other interested parties were invited to make submissions on the proposed amendments to Victoria's OHS regulations prepared by WorkSafe Victoria: 'Proposed OHS Amendment (Psychological Health) Regulations', *Engage Victoria* (Web Page, 31 March 2022) <https://engage.vic.gov.au/proposed-psychological-health-regulations>. The proposed amendments are set out in *Occupational Health and Safety Amendment (Psychological Health) Regulations* (Exposure Draft) <https://www.vic.gov.au/sites/default/files/2022-03/Proposed-OHS-Amendment-%28Psychological-Health%29-Regulations%20%281%29.DOCX>.

127 This is set out in the examples listed under proposed reg 5 (definition of 'psychosocial hazard'): *Occupational Health and Safety Amendment (Psychological Health) Regulations* (Exposure Draft) 3 <https://www.vic.gov.au/sites/default/files/2022-03/Proposed-OHS-Amendment-%28Psychological-Health%29-Regulations%20%281%29.DOCX>.

stress.[128] Therefore, employers have a broader interest to take proactive steps to take care of their employees' mental health in addition to protecting themselves from litigation. Despite workplace psychological health traditionally receiving less attention than physical health and safety,[129] there has been a recent 'increase in focus on mental health, both at a population and workplace level'.[130] There is now a body of material accepting that factors such as excessive workloads create a risk to psychiatric health,[131] with more employers making commitments to promote better mental health.[132] Whilst employer liability for psychiatric injury is a complex issue, the shift towards better mental health suggests *Koehler* places an 'unnecessary evidentiary burden'[133] on litigants seeking recourse from employers who do not safeguard the mental health of their employees.

As a result of *Kozarov*, employees working in environments with an inherently obvious risk to psychiatric health no longer bear the burden of establishing evident warning signs to determine foreseeability of risk to psychiatric harm. Instead, in occupations like Kozarov's, the onus now shifts back to the employer to take reasonable steps to implement adequate measures to protect their employees' mental health.[134] This is incredibly important in this area of law, considering the lack of reporting of mental illness in the workforce, and the remaining stigma that prevents employees from disclosing their mental health concerns out of fear of discrimination or job loss.[135] However, it remains unclear the exact types of occupations *Kozarov* would apply to. As the law stands, *Koehler* may still have application in respect of occupations which do not meet the threshold of an inherently obvious risk to psychiatric health.

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128 Harry Bechner and Maureen Dollard, *Psychosocial Safety Climate and Better Productivity in Australian Workplaces: Costs, Productivity, Presenteeism, Absenteeism* (Report, November 2016) 8.

129 *Productivity Commission Mental Health Report* (n 2) vol 2, 301.

130 Black Dog Institute, 'Modern Work: How Changes to the Way We Work Are Impacting Australians' Mental Health' (White Paper, October 2021) 2.11 <https://www.blackdoginstitute.org.au/wp-content/uploads/2021/10/modern_work.pdf>.

131 Ibid 2.10; *Productivity Commission Mental Health Report* (n 2) vol 2, 301; *Model WHS Regulations* (n 125) reg 55D(2)(c); Safe Work Australia, *Work-Related Psychological Health and Safety: A Systematic Approach to Meeting Your Duties* (National Guidance Material, January 2019) <https://www.safeworkaustralia.gov.au/system/files/documents/1911/work-related_psychological_health_and_safety_a_systematic_approach_to_meeting_your_duties.pdf>.

132 *Productivity Commission Mental Health Report* (n 2) vol 2, 331–4.

133 *Kozarov (High Court)* (n 10) 580 [29].

134 Ibid.

135 Bharadwaj, Pai and Suziedelyte (n 4) 57; Marshall et al (n 4) 1; Young (n 1) 485–6.

V Conclusion

The High Court's decision to restore the $435,000 damages payout to Kozarov will have positive implications for future claimants in proving workplace psychiatric injury. Further, in distinguishing the 16-year-old *Koehler* decision for forms of employment that are inherently stressful and traumatic, the High Court has provided much needed practical clarity for plaintiffs and practitioners as to the correct approach required to litigate cases in this area.

In light of the High Court's decision in *Kozarov*, employers should be very cautious to assume that there is no risk to an employee's psychiatric health simply because the employee has agreed to perform the work. Considered in light of increased statutory regulation, employers are on notice that they must take active steps to protect employees from psychiatric harm. Thus, employers now ought to review their policies and relevant procedures carefully, to ensure they are adequately protecting the mental health of their employees and providing safe workplaces.

The High Court's decision in *Kozarov* will hopefully mark the continuance of increasing recognition and protection against psychiatric injury in the workplace. It will be most interesting to see the broader consequences of this decision, and how it may influence the recognition and prevention of psychiatric injury in other forms of traumatic and stressful employment. With an increased focus on the importance of mental health both generally and in the workplace, it is now well accepted that factors such as excessive workloads are a risk to psychiatric health. In such circumstances, the principles from *Koehler* require reconsideration. The High Court's departure from *Koehler* in *Kozarov* may be indicative of a willingness to fully reconsider *Koehler* in a future decision.

*Carlie Frantzis**

CARRYING ON A BUSINESS IN AUSTRALIA USING COOKIES: *FACEBOOK INC V AUSTRALIAN INFORMATION COMMISSIONER* (2022) 402 ALR 445

I Introduction

The decision of *Facebook Inc v Australian Information Commissioner* (2022) 402 ALR 445[1] ('*Facebook v AIC*') confirmed the decision of Thawley J of the Federal Court of Australia ('Federal Court') that Facebook Inc was carrying on a business in Australia which was connected to the Cambridge Analytica breach. The case involved consideration of the need for an 'Australian link' under the extra-territorial application of the *Privacy Act 1988* (Cth) ('*Privacy Act*')[2] — specifically whether Facebook Inc was 'carrying on a business' in Australia through the use of cookies and Graph API services. Cookies are small pieces of data stored on an electronic device (computer or mobile phone) and allow internet browsers or applications to track and save information about each user's session.[3] In contrast, a graph API is a facility which allows an individual to log into an application using their login details from another third party application,[4] for example an individual using their Facebook details to log in to Telstra.[5] In *Facebook v AIC*, the Full Federal Court ('FFC') also briefly considered whether Facebook Inc held or collected personal information for the purposes of the extra-territorial application. *Facebook v AIC* provides useful commentary regarding the extra-territorial application of the *Privacy Act*, which has not been litigated in detail previously. The decision is also very relevant given the federal government's review of the *Privacy Act* and proposed reform to modify the extra-territorial application of the *Privacy Act*, and generally to increase regulation of social media and online platforms.

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1 (2022) 402 ALR 445 ('*Facebook v AIC*').

2 *Privacy Act 1988* (Cth) ss 5B(1A), (3)(b)–(c) ('*Privacy Act*').

3 *Facebook v AIC* (n 1) 454–5 [39]–[40]; See also Salinger Privacy Consulting, 'Cookies and Other Online Identifiers' (Research Paper, 15 June 2020) ch 2, 14–15.

4 *Facebook v AIC* (n 1) 453 [35].

5 Ibid 456–9 [48]–[57].

II Background

A *Facts*

In early 2020, the Australian Information Commissioner ('AIC') commenced proceedings against Facebook Inc and Facebook Ireland (together, 'Facebook'). The AIC alleged that Facebook had, in relation to the Cambridge Analytica breach, committed serious and/or repeated interferences with privacy in contravention of the *Privacy Act*.[6]

The Cambridge Analytica breach occurred in the 2010s and involved the collection of personal data from millions of Facebook users without their consent by British consulting firm Cambridge Analytica, through an application known as 'This Is Your Digital Life'.[7] The application invited persons to log in using their Facebook account.[8] Users who logged in as such were asked for permission to access their personal information held by Facebook, as well as the personal information of their Facebook friends.[9] Under the terms which governed the use of the Facebook login, the application's developers were not permitted to use the information other than for the purposes of the application.[10] The developers breached this requirement by permitting the personal information to be used for political campaigns.[11]

The AIC alleged that 53 Facebook users in Australia installed the application and had their data provided. The personal information of over 300,000 people who had not installed the app, but were Facebook friends of the users, was also provided.[12]

The AIC alleged that Facebook Ireland and Facebook Inc both breached s 15 of the *Privacy Act*.[13] Section 15 of the *Privacy Act* provides that an organisation must not act, or engage in a practice, that breaches an Australian Privacy Principle ('APP').[14] The AIC alleged that APP 6 and 11.1(b) were breached.[15] APP 6 prevents an organisation which has collected information for a particular purpose from using or disclosing it for another purpose.[16] APP 11.1(b) requires an organisation which

6 *Privacy Act* (n 2) s 13G; *Australian Information Commission v Facebook Inc* (2020) 144 ACSR 88, 89 [1]–[2] ('*AIC v Facebook*'). See also Brendan Scott, 'If You Use Cookies in Australia Are You Carrying on a Business Here?' (2022) 24(8) *Internet Law Bulletin* 146, 146.

7 *Facebook v AIC* (n 1) 449–50 [15]–[16] (emphasis omitted).

8 Ibid 450 [17].

9 Ibid.

10 Ibid 450 [18].

11 Ibid.

12 Ibid 450 [19].

13 Ibid 450 [19]–[20].

14 See *Privacy Act* (n 2) sch 1 for an overview of the Australian Privacy Principles.

15 Ibid sch 1 cls 6, 11.1(b); *Facebook v AIC* (n 1) 450 [20].

16 *Privacy Act* (n 2) sch 1 cl 6.1; *Facebook v AIC* (n 1) 450 [20].

holds personal information to take reasonable steps to protect that information from unauthorised disclosure.[17]

B *Australian Information Commissioner v Facebook Inc*

The AIC commenced proceedings against Facebook Inc and Facebook Ireland on 9 March 2020.[18] The AIC alleged that Facebook Inc and Facebook Ireland contravened s 13G of the *Privacy Act*, which provides that an entity contravenes the section — and is therefore liable to a civil penalty — if it acted or engaged in a practice that was a serious and/or repeated interference with the privacy of an individual.[19]

As Facebook Inc is a 'person in a foreign country'[20] the AIC was required to show that they had a 'prima facie case' that Facebook Inc was carrying on a business in Australia, such that leave could be granted to serve proceedings overseas.[21]

Justice Thawley of the Federal Court accepted that the AIC had a prima facie case and therefore granted leave for the AIC to serve originating process documents on Facebook Inc in the United States.[22] Facebook then conditionally appeared to set aside the service, but Thawley J rejected this application.[23] Facebook Inc appealed Thawley J's decision to the FFC.[24]

C *Facebook Inc v Australian Information Commissioner*

In *Facebook v AIC*, the FFC confirmed Thawley J's previous decision that Facebook Inc was indeed carrying on a business in Australia.[25] Justice Perram focused on whether Facebook Inc had an 'Australian link' as required under s 5B(3) for the extra-territorial application of the *Privacy Act*. This in turn depended on whether: (1) Facebook Inc was carrying on a business in Australia; and (2) whether the personal information was collected or held by Facebook Inc in Australia.[26]

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17 *Privacy Act* (n 2) sch 1 cl 11.1(b); *Facebook v AIC* (n 1) 450 [20].

18 *AIC v Facebook* (n 6) 89 [1]–[2].

19 Ibid; *Privacy Act* (n 2) s 13G.

20 *Facebook v AIC* (n 1) 449 [12].

21 Ibid; *Federal Court Rules 2011* (Cth) rr 10.42, 10.43(1)–(4).

22 *AIC v Facebook* (n 6) 96 [40]; *Facebook v AIC* (n 1) 449 [12].

23 *Australian Information Commissioner v Facebook Inc [No 2]* [2020] FCA 1307, [198]; *Facebook v AIC* (n 1) 449 [12].

24 *Facebook v AIC* (n 1) 449 [12].

25 Ibid 481 [163].

26 *Privacy Act* (n 2) s 5B(3); *Facebook v AIC* (n 1) 450–1 [20]–[25].

III Comment

A *Carrying On a Business*

To determine whether Facebook Inc carried on a business in Australia, Perram J first considered the nature of the business being conducted by Facebook Inc, specifically the relationship between Facebook Inc and Facebook Ireland.[27] Facebook Inc provides the Facebook platform to users located in North America, whilst Facebook Ireland is a subsidiary of Facebook Inc and provides the Facebook platform to users located anywhere else in the world.[28]

Justice Perram considered that the evidence presented a prima facie case that Facebook Inc was engaged in the business of providing data processing services to Facebook Ireland.[29] This evidence was an agreement between Facebook Ireland and Facebook Inc entitled 'Data Transfer and Processing Agreement' ('Data Processing Agreement').[30] The Data Processing Agreement identified the data which Facebook Ireland was to transfer to Facebook Inc for processing, as well as the nature of the processing which Facebook Inc was to carry out.[31] Justice Perram was satisfied that this evidence sufficed in establishing that Facebook Inc was providing data processing services to Facebook Ireland and therefore proceeded in considering whether Facebook Inc was carrying on a business in Australia.[32]

The FFC concluded that Thawley J was correct in rejecting Facebook Inc's argument that, assuming it was conducting a business, it was not conducting a business in Australia. This is because the business being conducted by Facebook Inc included two elements under the Data Processing Agreement of installing the cookies on the users' devices and the provision to Australian application developers of an interface known as the Graph API.[33]

1 *Cookies and Graph API*

The FFC accepted that in the conduct of its business of providing data processing services to Facebook Ireland, Facebook Inc installed cookies on devices in Australia and this activity occurs in Australia.[34]

27 *Facebook v AIC* (n 1) 452–3 [28]–[34].

28 Ibid 449 [13].

29 Ibid 452 [29].

30 Ibid.

31 Ibid.

32 Ibid 453 [33].

33 Ibid 453 [35].

34 Ibid 456 [47].

Facebook Inc argued that expert evidence was necessary regarding the specific nature of cookies.[35] The FFC rejected this on the basis that the Data Processing Agreement (as well as other supporting documents) provided sufficient evidence that Facebook Inc installed cookies on terminal devices.[36]

Facebook also relied on the case of *Gebo Investments (Labuan) Ltd v Signatory Investments Pty Ltd*[37] ('*Gebo*') as authority for the proposition that a web page is not located where the user who accesses the web page is located.[38] Facebook Inc argued that the installation of a cookie involves purely an act of uploading some data and the corresponding download by the user.[39] This was rejected by Perram J, who held that there was prima facie evidence that cookies are 'small pieces of data that are stored on your computer' and they are not analogous to using browsers to examine documents located on servers outside of Australia.[40] Justice Perram therefore held that cases such as *Gebo* do not have any bearing on the significance of the location where the cookie installation occurs.[41] Justice Perram further held that 'cookies are central to the Facebook platform' and are not 'an outlier activity'.[42]

With respect to the Graph API, this is a facility which allows third party applications to utilise the Facebook login.[43] For example in the context of Facebook, this involved Telstra allowing customers to log in to the Telstra website using their Facebook login.[44]

Facebook Inc argued that it completes processes in the United States and Sweden which then subsequently result in the Facebook login being available for commercial use by developers in Australia via the Graph API.[45] Facebook Inc argued therefore that there was no evidence that anything was installed or operated in Australia through the Graph API.[46] This argument was rejected by the FFC which held that it was incorrect to focus on the precise internal mechanics of the Graph API and each individual login.[47] Instead, the necessary focus involved a consideration of the business of providing the Facebook login functionality to Australian developers and whether Facebook Inc, on behalf of Facebook Ireland, makes the Facebook login

35 Ibid 454 [38].

36 Ibid.

37 (2005) 190 FLR 209.

38 *Facebook v AIC* (n 1) 454 [39].

39 Ibid.

40 Ibid.

41 Ibid.

42 Ibid 455 [40], [43].

43 Ibid 453 [35].

44 Ibid 458–9 [56]–[57].

45 Ibid 457 [53].

46 Ibid.

47 Ibid 459 [59].

available to Australian developers in Australia.[48] The FFC held that this was clearly the case.[49]

It is interesting therefore to observe the distinction between the cookies and Graph API. Whilst the FFC considered that Facebook's main business was the installation and removal of the cookies in Australia, the FFC instead held that there was no installation of the Graph API in Australia, but rather focused on the business of providing the Facebook login functionality to Australian developers. Despite the distinction, Perram J's judgment provides clear commentary on the nature of cookies and the Graph API. It appears that the FFC was willing to take a relatively flexible approach in coming to the above conclusions, as they focused heavily on the Data Processing Agreement and other associated documents to determine that a business was being carried on. Despite this flexible approach, both Allsop CJ[50] and Perram J[51] emphasised the importance of context in determining the meaning of 'carrying on a business' from case to case.

B *Further Arguments*

Facebook Inc raised three further arguments contesting that they were carrying on a business in Australia. These three arguments were all rejected by the FFC, further supporting the flexible approach that the FFC adopted in determining whether an online entity is carrying on a business in Australia.

1 *Absence of Physical Indicia*

Justice Perram rejected Facebook Inc's argument that it was not carrying on a business in Australia as it had no physical presence in Australia (being no physical assets, customers, or revenues in Australia).[52] Given that Facebook's main business in Australia was the installation of cookies and management of the Graph API, this appears to be an appropriate conclusion by the FFC. Despite this, Perram J's analysis highlights the need for considering statutory context in coming to such conclusions.[53]

The FFC held that 'carrying on a business' is not defined in the *Privacy Act* and therefore its meaning is informed by the statute itself.[54] Considering the object of the *Privacy Act* and the Explanatory Memorandum to the Bill which introduced

48 Ibid.

49 Ibid 460 [65].

50 Ibid 447 [5]–[6].

51 Ibid 461–2 [70].

52 Ibid 461 [69].

53 Ibid 461–2 [70].

54 Ibid.

s 5B(3) of the *Privacy Act*,[55] the FFC held that the *Privacy Act* has 'as its focus a non-material concept' being information and therefore the meaning of 'carrying on a business' is not reliant on the need for physical presence.[56]

In making this argument, Facebook Inc again relied on the case of *Gebo*. This case provided that in the situation where a business simply has a website which is accessed by individuals outside the jurisdiction, then there is a need for physical activity in Australia through human instrumentalities in order for the entity to be carrying on a business.[57] Justice Perram highlighted that the situation in the case was distinct to that in *Gebo*, as the case did not simply involve management of a website.[58]

2 *Commercial Quality of Facebook's Activities*

Facebook Inc submitted that its activities in Australia lack a commercial quality because Facebook Inc is not engaged in any commerce in Australia.[59] Facebook Inc cited the case of *Luckins*.[60] In *Luckins*, the High Court left unanswered the question of whether a business is carried on in a particular location where there are no commercial activities undertaken.[61] Justice Perram decided it was appropriate to answer this question in the current proceedings.[62] Facebook Inc's business of providing data processing services to Facebook Ireland is conducted from its data centres which are not in Australia. Despite this, the FFC held that Facebook Inc was carrying on a business in Australia. The FFC considered the general description given by Mason J in *Hope v Bathurst City Council*[63] of the nature of the carrying on of a business as a collection of 'activities undertaken as a commercial enterprise in the nature of a going concern, that is, activities engaged in for the purpose of profit on a continuous and repetitive basis'.[64] The FFC considered that under this test, a company has been previously held to conduct a business where it undertakes a single commercial transaction in a place where it otherwise does not conduct

55 Explanatory Memorandum, Privacy Amendment (Enhancing Privacy Protection) Bill 2012 (Cth) 218.

56 *Facebook v AIC* (n 1) 461–2 [70]–[72].

57 Ibid 464 [80]–[81]. The need for human instrumentalities was rejected in the case of *Valve Corporation v Australian Competition Consumer Commission* (2017) 351 ALR 584.

58 *Facebook v AIC* (n 1) 465 [83].

59 Ibid 467 [93].

60 *Luckins (Receiver and Manager of Australian Trailways Pty Ltd) v Highway Motel (Carnarvon) Pty Ltd* (1975) 133 CLR 164 ('*Luckins*').

61 *Facebook v AIC* (n 1) 467 [94]–[95].

62 Ibid 467 [93].

63 (1980) 144 CLR 1.

64 *Facebook v AIC* (n 1) 467–8 [96].

business.[65] The FFC held that the position should be the same where a company does not engage in any commercial activity, but nonetheless conducts a business in a foreign jurisdiction.[66]

3 *Floodgates*

Facebook Inc argued that if the FFC were to conclude that the installation of cookies involves 'carrying on a business' in the absence of physical indicia, then this would open the floodgates for many online businesses in terms of breaching the *Privacy Act*.[67] The FFC stated that it was outside the scope of the judgment to consider the floodgates argument.[68] The FFC decision was only considering whether there was extra-territorial application of the *Privacy Act* to Facebook Inc, not the AIC's broader submission that Facebook Inc had committed a serious and/or repeated interference with privacy in potentially breaching the APPs in question. Justice Perram further stated that 'the menace of opened floodgates from which Facebook Inc was commendably keen to protect the Australian legal system, is in my view very much overstated'.[69]

The FFC's approach would 'open the floodgates' for the extra-territorial application of the *Privacy Act* to many online businesses, even simply those businesses with cookies in Australia. Such businesses will therefore need to be vigilant in their business practices. Again however, Allsop CJ[70] and Perram J[71] both emphasised the importance of context in determining whether a business is being conducted, which counters the 'floodgates' argument. In addition, the floodgates argument is premature, given that the AIC's proceedings against Facebook Inc regarding the Cambridge Analytica breach are yet to be heard. Nonetheless, it appears necessary that the FFC ruled in this way to ensure that in today's digital age, online businesses (both within and outside Australia) are respecting people's privacy and using personal information for its intended purpose.

C *Did Facebook Inc Hold or Collect Personal Information?*

As mentioned above, it was also necessary for the FFC to consider whether Facebook Inc held or collected personal information for the purposes of establishing that Facebook Inc had an 'Australian link' under s 5B(3) for the extra-territorial application of the *Privacy Act*. In contrast to the consideration of whether Facebook was carrying on a business, the FFC considered this issue briefly.

65 Ibid 467–9 [96]–[102], citing *Smith v Capewell* (1979) 142 CLR 509 and *Lowe v Cant* [1961] SASR 333.

66 *Facebook v AIC* (n 1) 469 [103].

67 Ibid 455–6 [44]–[45], 463 [75].

68 Ibid 455 [44]–[45].

69 Ibid 463 [75].

70 Ibid 447 [5]–[6].

71 Ibid 461–2 [70].

The AIC submitted that Facebook Inc directly collected the personal information through its caching servers, cookies and instantaneous transfer of personal information from Facebook Inc's data centres to Facebook Ireland.[72] The FFC held that the caching servers in Australia were not operated by Facebook Inc and therefore not used to 'collect' personal information.[73] The FFC also did not accept Thawley J's finding that it was inferable that Facebook Inc collected data from Australian users through instantaneous servers.[74]

The FFC ultimately found that there was a prima facie case that installing cookies on users' devices involved the collection of personal information. Justice Perram highlighted that cookies are involved in the process of creating targeted advertising and therefore it can be inferred that they were used for the collection of personal information by Facebook Inc.[75]

The FFC also held that Facebook Inc did not 'hold' the information.[76] Again, this was because Facebook Inc did not operate caching servers and did not possess or control the devices with the cookies.[77]

IV Case Impact and Broader Implications

The FFC therefore held that there was a prima facie case that Facebook Inc was carrying on a business in Australia and was collecting personal information through use of its cookies to establish an 'Australian link' under the *Privacy Act*.[78] The AIC therefore has jurisdiction to serve proceedings on Facebook with regards to the Cambridge Analytica breach.

Facebook v AIC provides useful commentary on s 5B(3) of the *Privacy Act* regarding the 'Australian link'. The decision is particularly helpful as s 5B(3) of the *Privacy Act* was introduced fairly recently in 2012 and had not been litigated. However, it is important to note that s 5B(3) may change. In 2020, the Attorney-General's Department commenced a review of the *Privacy Act* and published an Issues Paper for stakeholder submissions.[79] In October 2021, the Attorney-General's Department published a Discussion Paper explaining the recommended changes

72 Ibid 472 [119].

73 Ibid 474 [131].

74 Ibid 477–9 [144]–[151].

75 Ibid 476 [137].

76 Ibid 470–1 [108]–[114].

77 Ibid 479–81 [154]–[162].

78 *Privacy Act* (n 2) s 5B(3).

79 Attorney-General's Department, *Privacy Act Review* (Issues Paper, October 2020) ('Privacy Act Issues Paper').

to the *Privacy Act*.[80] The then Attorney-General's Department also released an exposure draft of the Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill 2021 (Cth) ('Online Privacy Bill').[81] The exposure draft of the Online Privacy Bill was not tabled in Parliament before the federal election in May 2022. The Attorney-General's Department is currently in the process of reviewing submissions on its Discussion Paper.[82] The current Attorney-General, Mark Dreyfus, has indicated that following review of the submissions by stakeholders on the Discussion Paper, the Attorney-General's Department will publish a final report of the proposed reforms to the *Privacy Act*.[83] The Attorney-General has indicated that the final report will be brought into the public domain for debate, prior to introducing the Bill in Parliament, in the coming months.[84]

The Online Privacy Bill recommended the removal of the requirement that an organisation has to collect or hold information from Australian sources under s 5B(3)(c). Instead, it has been suggested that this requirement is incorporated as a consideration of whether an organisation is carrying on a business in Australia under s 5B(3)(b).[85] The fact that the AIC only succeeded on one of three grounds regarding whether Facebook Inc was collecting or holding information supports the proposition that these proposed changes may be necessary, although these changes have not yet been considered by Parliament.

The proposed removal of the requirement under s 5B(3)(c) that an entity collects or holds information was recommended by the current AIC, Angelene Falk,[86] as part of the Attorney-General's Department's review of the *Privacy Act*.[87] The recommendation was made on the basis that the requirement to hold or collect information under the *Privacy Act* was considered a 'threshold issue' which can be resource-intensive to establish jurisdiction for the extra-territorial application.[88] Further, this recommendation was made to align the *Privacy Act* with New Zealand's privacy

80 Attorney-General's Department, *Privacy Act Review* (Discussion Paper, October 2021) ('Privacy Act Discussion Paper').

81 Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill 2021 (Cth) (Exposure Draft).

82 Tom Burton, 'Dreyfus Pledges Sweeping Data Privacy Reforms', *Australian Financial Review* (online, 29 June 2022) <https://www.afr.com/politics/federal/dreyfus-pledges-sweeping-data-privacy-reforms-20220627-p5awvw>.

83 Ibid.

84 Ibid.

85 Explanatory Paper, Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill 2021 (Cth) (Exposure Draft) 22–3 ('Explanatory Paper for Online Privacy Bill').

86 Angelene Falk, Office of the Australian Information Commissioner and Privacy Commissioner, Submission to the Attorney-General's Department, *Privacy Act Review: Issues Paper* (11 December 2020) 113–5.

87 Privacy Act Issues Paper (n 79); Privacy Act Discussion Paper (n 80) 159.

88 Falk (n 86) 114 [8.30]–[8.31]. See also: Explanatory Paper for Online Privacy Bill (n 85) 22; Privacy Act Discussion Paper (n 80) 159.

legislation,[89] the *Privacy Act 2020* (NZ). Considering these factors and the FFC's brief consideration of this issue, this reform seems appropriate.

Although the FFC adopted a broad interpretation in ruling that Facebook Inc was carrying on a business in Australia, it remains to be seen whether this does in fact expand the boundaries for the AIC to serve proceedings on foreign entities. This depends on the outcome of the AIC's case against Facebook Inc. The proceedings will involve a consideration of whether Facebook Inc did in fact breach the APPs in question, specifically whether Facebook Inc's actions amounted to a serious and/or repeated interference with the privacy of Australians under s 13G of the *Privacy Act* (as raised in the initial Federal Court proceeding).[90] This is the first case in fact to consider whether an organisation's actions amounted to a serious and/or repeated interference with privacy under s 13G of the *Privacy Act* and therefore, it will be interesting to see what eventuates.

If the AIC is successful in establishing that there has been a serious and/or repeated interference with privacy of Australian individuals under s 13G of the *Privacy Act*, then Facebook Inc will be liable to civil penalties. It is unclear whether any penalty will be calculated based on one single breach, or rather multiple breaches for each interference with privacy, by Facebook Inc. Either way, the penalties will arguably be significant given that the personal data of over 300,000 Facebook users was in fact obtained.

V Conclusion

The decision in *Facebook v AIC* indicates that the FFC is willing to adopt a flexible approach, considering context, in determining whether an online entity is conducting a business in Australia for the extra-territorial application of the *Privacy Act*. The flexibility of this approach seems appropriate in the digital age where it is becoming increasingly difficult to regulate the activities of online businesses. The decision also supports the federal government's approach to not only increase regulation of online businesses, but also to remove the requirement that an online business collects or holds information to establish an 'Australian link' for the extra-territorial application of the *Privacy Act*. It remains to be seen what eventuates with the AIC's proceedings against Facebook, but nonetheless *Facebook v AIC* touches on very relevant topics and provides insight into the likely future regulation of online businesses serving customers in Australia.

89 Falk (n 86) 115 [8.34].

90 *AIC v Facebook* (n 6) 89 [1]–[2].

*Michaela Puntillo**

WHAT DOES PARLIAMENT WANT? *DIRECTOR OF PUBLIC PROSECUTIONS (VIC) REFERENCE NO 1 OF 2019* (2021) 392 ALR 413

I Introduction

Recklessness is both a prominent and problematic concept,[1] that has been subject to extreme divergences of views as to its correct meaning.[2] The difficulty of identifying the correct meaning escalates when Parliament chooses not to define recklessness and leaves its meaning to the interpretation of the judiciary.

This has resulted in Australian courts adopting different meanings of recklessness[3] — which has been further complicated by each state jurisdiction possessing their own varying criminal law statutes and accompanying offences.[4] In the context of offences against the person, a point of contention arose following the High Court's decision of *Aubrey v The Queen* ('*Aubrey*')[5] concerning New South Wales legislation, where the Victorian decision of *R v Campbell* ('*Campbell*')[6] was distinguished as it contained a different standard of recklessness for a similar offence.

The flow-on effect of *Aubrey* on the Victorian equivalent serious injury offence arose in the case of *Director of Public Prosecutions Reference No 1 of 2019* (2021) 392 ALR 413 ('*DPP Reference No 1 of 2019*'), where the High Court was asked to reconsider the correctness of the *Campbell* decision. This case note explores the High Court's decision and the decisions of the courts below. In doing so, consideration is given to the application of the presumption of re-enactment — a principle

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1 See Adam Webster, 'Recklessness: Awareness, Indifference or Belief?' (2007) 31(5) *Criminal Law Journal* 272, 272–3.

2 *DPP (Vic) Reference (No 1 of 2019)* (2020) 284 A Crim R 19, 28 [32] (Maxwell P, McLeish and Emerton JJA) ('*DPP Reference No 1 of 2019* (VSCA)').

3 Webster (n 1) 272.

4 Lorraine Finlay and Tyrone Kirchengast, *Criminal Law in Australia* (LexisNexis Butterworths, 2nd ed, 2020) 5–7. The relevant statutes include: *Crimes Act 1900* (ACT); *Criminal Code 2002* (ACT); *Crimes Act 1900* (NSW); *Criminal Code Act 1983* (NT); *Criminal Code Act 1899* (Qld); *Criminal Law Consolidation Act 1935* (SA) ('*CLCA*'); *Criminal Code Act 1924* (Tas); *Crimes Act 1958* (Vic); *Criminal Code Act Compilation Act 1913* (WA).

5 (2017) 260 CLR 305 ('*Aubrey*').

6 [1997] 2 VR 585 ('*Campbell*').

of statutory interpretation that ultimately drives the High Court's decision to uphold the *Campbell* interpretation — even if *Aubrey* is the more principled approach.

II Background

Section 17 of the *Crimes Act 1958* (Vic) ('*Crimes Act*') came into force on 24 March 1986[7] and provided a new offence for causing serious harm:

> **17 Causing serious injury recklessly**
>
> A person who, without lawful excuse, recklessly causes serious injury to another person is guilty of an indictable offence.[8]

The new offence intended to simplify the earlier archaic assault offences adopted from the *Offences Against the Persons Act 1861* (UK).[9] In doing so, Parliament chose not to define 'recklessly' and left its meaning to a matter of judicial interpretation.[10] There have been several cases that have influenced the definition attributed to 'recklessness' in respect of s 17, or offences against the person generally.[11] These cases underpin the challenge against the correctness of *Campbell* in *DPP Reference No 1 of 2019*.

A *Relevant Case Law*

The meaning of 'recklessness' was considered in the case of *R v Crabbe* ('*Crabbe*'),[12] where the High Court regarded it to now be settled law that in respect of the common law offence of murder, a person will be found guilty if they 'act knowing that it is *probable* that death or grievous bodily harm will result'.[13] This decision was later relied upon in *R v Nuri* ('*Nuri*')[14] — when the Victorian Court of Appeal considered, for the first time, the meaning of recklessness in the offence of recklessly engaging

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7 See *Crimes (Amendment) Act 1985* (Vic) s 8.

8 *Crimes Act 1958* (Vic) s 17 ('*Crimes Act*').

9 The relevant Bill was the Crimes (Amendment) Bill 1985 (Vic). The pre-existing offences formed part of legislation recognised by the Victorian Parliament as becoming 'anachronistic over the passage of 120 years' — where the offences had become 'outdated' with a 'convoluted old drafting style' that was causing complexity and confusion: Victoria, *Parliamentary Debates*, Legislative Council, 25 September 1985, 201 (JE Kennan, Attorney-General). See also *DPP Reference No 1 of 2019* (VSCA) (n 2) 34–7 [61]–[68] (Priest JA).

10 *DPP Reference No 1 of 2019* (VSCA) (n 2) 37 [68].

11 See below Part II(A).

12 (1985) 156 CLR 464 ('*Crabbe*').

13 Ibid 469–70 (emphasis added).

14 [1990] VR 641 ('*Nuri*').

in conduct that may place a person in danger of death, contrary to s 22 of the *Crimes Act*.[15] The Victorian Court of Appeal decided, citing *Crabbe*, that 'conduct is relevantly reckless if there is foresight on the part of an accused of the probable consequences of his [sic] actions'.[16] In doing so, the Court chose not to follow the 'foresight of the *possibility* of harm' test that applied to the related repealed provisions.[17]

1 *Campbell*

In *Campbell*, the accused had been charged with three offences including recklessly causing serious injury contrary to s 17 of the *Crimes Act*.[18] Following conviction, the accused appealed on the ground that the trial judge misdirected the jury by providing conflicting directions as to the meaning of recklessness: the first being the accused 'fired the gun "knowing that serious injury will *probably* occur …"',[19] and, the second being that he did so 'knowing that serious injury *might* occur …'.[20]

The Victorian Court of Appeal agreed the trial judge misdirected the jury,[21] and held that the standard of recklessness required foresight of the accused 'that injury *probably* will result'.[22] Justice of Appeal Hayne and Crockett AJA reasoned this approach as adopting the 'spirit of the decision in *Crabbe*' where the 'same principles [were] relevant' even though *Crabbe* applied to common law murder.[23] Following the decision in *Nuri*, their Honours further considered that the adoption of a 'test of "probability" in a kindred section' should be followed, for the purpose of having a consistent meaning of recklessness throughout the *Crimes Act*.[24]

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15 See generally *DPP Reference No 1 of 2019* (VSCA) (n 2) 37–9 [72]–[73] (Priest JA). Section 22 was another new offence created by the *Crimes (Amendment) Act 1985* (Vic), at the same time as s 17, for the purpose of creating a general endangerment offence: *Nuri* (n 14) 643.

16 *Nuri* (n 14) 643, citing *Crabbe* (n 12) 464.

17 *DPP (Vic) Reference No 1 of 2019* (2021) 392 ALR 413, 422 [37] (Gageler, Gordon and Steward JJ) (emphasis in original) ('*DPP Reference No 1 of 2019*'); *DPP Reference No 1 of 2019* (VSCA) (n 2) 38–9 (Priest JA).

18 *Campbell* (n 6) 588 (Hayne JA and Crockett AJA).

19 Ibid 592 (Hayne JA and Crockett AJA) (emphasis in original).

20 Ibid (emphasis in original).

21 Ibid 592 (Hayne JA and Crockett AJA, Phillips CJ agreeing at 586).

22 Ibid 592–3 (emphasis added).

23 Ibid 593.

24 Ibid. The majority disregarded earlier Victorian authority favouring the 'possibility' test for intent because they 'concern[ed] the now repealed offences of unlawful and malicious wounding': at 593. Earlier authority referred to included: *R v Smyth* [1963] VR 737; *R v Kan* [1974] VR 759; *R v Lovett* [1975] VR 488.

2 *Aubrey*

In *Aubrey*, the High Court considered the meaning of recklessness in respect of the offence of 'maliciously inflicting grievous bodily harm' contrary to s 35(1)(b) of the *Crimes Act 1900* (NSW) — wherein s 5 defined 'maliciously' to include 'recklessly'.[25] The Court held that to prove the accused acted recklessly, there must be foresight of the possibility (opposed to probability) by the accused that sexual intercourse would result in the other person's contraction of the grievous bodily disease.[26] The joint judgment acknowledged the *Campbell* decision,[27] where the High Court said the probability test adopted in *Crabbe* was confined to the offence of murder — however accepting that the requirements in states 'may vary according to the terms of each [s]tate's legislation'.[28]

B *Presumption of Re-Enactment*

Guided by the judicial history of the meaning of 'recklessness', the majority decision of the High Court in *DPP Reference No 1 of 2019* ultimately rests upon the application of the presumption of re-enactment. The High Court recognised the longstanding authority for this tool of statutory interpretation in *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees*,[29] for

> the proposition that where … Parliament repeats words which have been judicially construed, it is taken to have intended the words to bear the meaning already 'judicially attributed to [them]'…[30]

Despite certain views that the presumption is 'of no great weight',[31] the presumption may have real force in circumstances of 'specialised and technical fields'[32] of law — that are generally subject to amendments, and those responsible for such amendments tend to be aware of relevant past judicial decisions.[33] Legislative

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25 *Aubrey* (n 5) 311–12 [1], [6] (Kiefel CJ, Keane, Nettle and Edelman JJ).

26 Ibid 327–9 [44], 328–9 [46]–[47], 331 [51] (Kiefel CJ, Keane, Nettle and Edelman JJ, Bell J agreeing at 331 [53]). The joint judgment maintained the longstanding judicial position as to the meaning of recklessness as being 'foreseeing the possibility of consequences and proceeding nonetheless': at 327–8 [44].

27 Ibid 328 [45].

28 Ibid 329 [47].

29 (1994) 181 CLR 96 ('*Alcan*').

30 Ibid 106 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ), quoting *Barras v Aberdeen Steam Trawling and Fishing Co Ltd* [1933] AC 402, 446.

31 *Flaherty v Girgis* (1987) 162 CLR 574, 594 (Mason ACJ, Wilson and Dawson JJ).

32 Thomas Prince and Perry Herzfeld, *Statutory Interpretation Principles* (Thomson Reuters, 2nd ed, 2020) 157.

33 Ibid. See also *DPP Reference No 1 of 2019* (n 17) 416–20 [10]–[30] (Kiefel CJ, Keane and Gleeson JJ).

history is a factor which tends to also strengthen the presumption's operation.[34] The awareness by Parliament of a particular judicial interpretation may also be evidenced by an 'expert review of the law and … case law' by a law reform commission or advisory committee.[35] This is particularly relevant because many of the aforementioned factors supporting the presumption's application are relied on by the majority in *DPP Reference No 1 of 2019*.[36]

III Decisions Below

A *County Court Trial*

In February 2017, following a fight in the streets of Melbourne, the accused was charged with recklessly causing serious injury contrary to s 17 of the *Crimes Act*.[37] During the fight, the accused kicked the victim in the head, resulting in serious injury to their skull and brain.[38] In submissions regarding the correct jury direction for the meaning of recklessness, the Victorian Director of Public Prosecutions ('DPP') submitted that the decision in *Campbell* is wrong; however, given the High Court confined its decision in *Aubrey* to New South Wales legislation, they considered the judge was 'probably bound by the Court of Appeal in *Campbell*'.[39] The trial judge held that they were bound to follow the decision in *Campbell* given its direct application to the relevant offence charged.[40]

B *Victorian Court of Appeal*

President Maxwell, McLeish and Emerton JJA, with whom Priest and Kaye JJA agreed, held that consistent with the trial judge, the correct interpretation of recklessness for the purposes of s 17 was the foresight of probability approach taken in *Campbell*.[41] The conclusion of the joint judgment relied upon the application of the re-enactment presumption, where subsequent amendments to the *Crimes Act* — increasing the maximum penalty for s 17 and 'creating a new "gross violence" version of the [s 17] offence' — demonstrated Parliament's awareness and endorsement

34 Prince and Herzfeld (n 32) 157; *Alcan* (n 29) 106; *Vella v Commissioner of Police for New South Wales* (2019) 269 CLR 219, 233 [19].

35 *DPP Reference No 1 of 2019* (n 17) 427 [51] (Gageler, Gordon and Steward JJ), quoting *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* (2015) 254 CLR 489, 503 [15].

36 See below Part IV(A).

37 *DPP Reference No 1 of 2019* (VSCA) (n 2) 33 [56] (Priest JA). The accused was also charged with intentionally causing serious injury pursuant to s 16 of the *Crimes Act 1958* (Vic).

38 *DPP Reference No 1 of 2019* (VSCA) (n 2) 33 [56].

39 Ibid 33 [57].

40 Ibid 33–4 [58].

41 Ibid 22 [5]–[6] (Maxwell P, McLeish and Emerton JJA, Priest JA agreeing at 34 [60], Kaye JA agreeing at 52 [127]).

of the *Campbell* interpretation.[42] Their Honours further considered the alternative definition of 'recklessness' proposed by the DPP as containing an unreasonableness qualification should remain a matter for Parliament.[43] For these reasons, the joint judgment considered it unnecessary for them to '*reach a concluded view*' about the correctness of *Campbell*.[44]

Both Priest and Kaye JJA, in their separate judgments, agreed with the reasons put forward by the joint judgment.[45] Their Honours additionally relied upon the settled nature of *Campbell* including how it has not attracted any judicial or academic criticism,[46] in addition to the probability test providing consistency to the meaning of recklessness throughout the *Crimes Act*.[47]

IV The Decision

By a slim majority, comprising Gageler, Gordon and Steward JJ, with whom Edelman J agreed, the High Court dismissed the appeal and held that the judicial interpretation of 'recklessness' in *Campbell* should continue to be followed in respect of s 17 of the *Crimes Act.* The decision was premised upon an application of the presumption of re-enactment and the unfairness of retroactively criminalising conduct by changing the meaning of 'recklessness'. Chief Justice Kiefel, Keane and Gleeson JJ dissented in a joint judgment. Despite the outcome, all three judgments identified the decision in *Campbell* as erroneous.[48]

A *The Majority*

Consistent with the Court of Appeal, the majority's decision relies upon application of the re-enactment presumption with reference to two amendments to the *Crimes Act* in 1997 and 2013. The 1997 amendments increased the maximum penalty for s 17 by 50% to 15 years' imprisonment.[49] The 2013 amendments included a revision of the definitions of 'injury' and 'serious injury', in addition to the insertion of ss 15A and 15B providing new gross violation offences.[50]

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42 Ibid 22 [5], 25–6 [119]–[126] (Maxwell P, McLeish and Emerton JJA).

43 Ibid 22 [5], 30–2 [39]–[51].

44 Ibid 25 [17] (emphasis added).

45 See ibid 50–1 [123], [125] (Priest JA), 55–6 [145], [147] (Kaye JA).

46 Ibid 49 [122] (Priest JA, Kaye JA agreeing at 55 [144]).

47 Ibid 49 [120]–[121] (Priest JA), 54–5 [141]–[143] (Kaye JA).

48 See *DPP Reference No 1 of 2019* (n 17) 416 [7] (Kiefel CJ, Keane and Gleeson JJ), 428–9 [57] (Gageler, Gordon and Steward JJ), 431 [66], 441 [100] (Edelman J). There is a slight difference in Edelman J's comments that rather refer to *Campbell* as being less principled than *Aubrey*: at 431 [66].

49 Ibid 424 [44] (Gageler, Gordon and Steward JJ).

50 Ibid 424–5 [46]–[47].

In terms of the re-enactment presumption, these amendments were identified by the majority as 'significant, substantive and direct'[51] — where Parliament was undoubtedly aware of the higher degree of culpability associated with the probability test by increasing the maximum penalty for s 17.[52] According to the majority, the nature of the 2013 amendments by establishing aggravated offences of ss 16 and 17 — involving an adoption of the elements of the existing offences with the additional gross violence element[53] — required Parliament to have considered the culpability and criminality of the existing offences to establish the more serious offences.[54] Strengthening the application of the presumption, the majority also relied upon the temporal proximity between the decision in *Campbell* and the 1997 amendments, being two years after.[55]

The majority also went a step further than the Court of Appeal in recognising that since 1997, criminal law has been a '"specialised and politically sensitive field" in the sense contemplated in *Electrolux Home Products Pty Ltd v Australian Workers' Union*[56]'.[57] This was premised upon the existence of a designated Minister and Department of State to Criminal Justice ('Department of Justice').[58] According to the majority, this amounted to it being 'no fiction' that Parliament, through the Department of Justice and the Attorney-General, had an awareness of 'decisions dealing with their portfolio'.[59]

In terms of Parliament's awareness of the *Campbell* interpretation, the majority referred to the existence of 'expert reviews and extensive consultation with key stakeholders in the criminal justice system'[60] prior to the 1997 and 2013 amendments. This included a Sentencing Advisory Council Report that the government '"carefully

51 Ibid 427 [53].

52 See ibid 424 [44], quoting *DPP Reference No 1 of 2019* (VSCA) (n 2) 25 [21].

53 *DPP Reference No 1 of 2019* (n 17) 425 [47]–[48]. The majority relied upon the Explanatory Memorandum to the amending Bill and the Second Reading Speech to support these assertions: at 425 [47]–[48].

54 Ibid 426 [50]. Section 17 was made the alternative verdict to s 15B: at 426 [50], citing *Crimes Amendment (Gross Violence Offences) Act 2013* (Vic) s 5.

55 *DPP Reference No 1 of 2019* (n 17) 428 [54] (Gageler, Gordon and Steward JJ).

56 (2004) 221 CLR 309 ('*Electrolux*').

57 *DPP Reference No 1 of 2019* (n 17) 428 [55] (Gageler, Gordon and Steward JJ), citing ibid 346–7 [81].

58 *DPP Reference No 1 of 2019* (n 17) 428 [55] (Gageler, Gordon and Steward JJ).

59 Ibid.

60 Ibid 428 [55], citing as examples: Victoria, *Parliamentary Debates*, Legislative Council, 27 May 1997, 1058 (Louise Asher); Sentencing Advisory Council, *Statutory Minimum Sentences for Gross Violence Offences* (Report, October 2011) vii ('*Statutory Minimum Sentences*').

considered"' in respect of the 2013 reforms[61] where the report expressly identified the probability test satisfying the element of recklessness, citing *Nuri*.[62] The majority therefore reasoned it as being 'difficult to imagine' that those involved in the field were unaware of significant decisions dealing with the meaning of recklessness — particularly when considering amendments that 'significantly and directly altered the nature and extent of the criminality and culpability of a contravention of s 17'.[63]

Even if the decision in *Campbell* was wrong, the majority considered the reliance on the *Campbell* interpretation of recklessness in successive amendments could not be put to one side.[64] Noting the decision in *Campbell* had consistently been followed for more than 25 years, the majority were reluctant to depart from such longstanding authority.[65] They considered it unfair to retrospectively change the meaning of recklessness — noting it could affect uncharged criminal conduct occurring prior to their decision, and have a 'flow-on effect' for other offences in the *Crimes Act*.[66] Any correction of the meaning of recklessness was up to the Victorian Parliament.[67]

B *The Minority*

In the minority, Kiefel CJ, Keane and Gleeson JJ, held that the presumption of re-enactment does not apply to the interpretation of recklessness within s 17 of the *Crimes Act*.[68]

The minority initially set out several legal propositions underpinning, but also undermining, the use of the presumption.[69] Their Honours noted it should not be used to 'perpetuate an erroneous construction of a statutory provision', [70] particularly in circumstances where the legislature's adoption of the judicial meaning assigned is less than 'tolerably clear'.[71] Reference was made to comments of Dixon CJ in *R v Reynhoudt*,[72] who considered it 'quite artificial' to take mere repetition of

61 *DPP Reference No 1 of 2019* (n 17) 425–6 [49] (Gageler, Gordon and Steward JJ), quoting Victoria, *Parliamentary Debates*, Legislative Assembly, 13 December 1012, 5550 (Robert Clark, Attorney-General).

62 *Statutory Minimum Sentences* (n 60) 4 [1.20].

63 *DPP Reference No 1 of 2019* (n 17) 428 [56] (Gageler, Gordon and Steward JJ).

64 Ibid 428–9 [57].

65 Ibid 429 [59].

66 Ibid.

67 Ibid 428–9 [57], [59].

68 Ibid 426–7 [51] (Kiefel CJ, Keane and Gleeson JJ).

69 See ibid 416–18 [10]–[17]. See further discussion above in Part II(B) about the re-enactment presumption.

70 Ibid 416 [11].

71 Ibid 416 [12].

72 (1962) 107 CLR 381 ('*Reynhoudt*').

a judicially considered phrase in legislation as approval.[73] Taking it one step further, the minority noted that amendments that do not re-enact the words in question or re-enact such words but fail to reconsider their meaning would seldom be taken as approval.

The minority rejected the application of the presumption in respect of the 1997 and 2013 amendments as evidencing legislative endorsement of *Campbell*. In respect of the 1997 amendment, the minority, disagreeing with the reasoning of the Court of Appeal,[74] considered there was no evidence to suggest the 'legislature turned its mind to *Campbell*' when deciding to increase the maximum penalty for various offences.[75] The minority instead noted the reform was a response to 'perceived public concern' and a dissatisfaction with sentencing levels for serious offences.[76] They also observed the amending provision made no reference to 'the word "recklessly" or to the s 17 offence more generally'.[77]

For the 2013 amendments, the repetition of the word 'recklessly' in s 15B was viewed as being in the context of creating a new offence — where no extrinsic materials indicated what the legislature intended 'recklessly' to mean.[78] The minority also disagreed that passages within the Sentencing Advisory Council Report could be relied on as evidencing Parliament's awareness of *Campbell*.[79] They observed the Council's Terms of Reference narrowed their advice to the operation of statutory minimum sentences and factors of gross violence rather than 'the merits of the proposed scheme'.[80]

The minority concluded that correcting the decision in *Campbell* would 'not be productive of substantial injustice' and the criminal justice system would be able to adapt as they did when *Campbell* overturned longstanding authority.[81] They accordingly viewed that such issues should not preclude the correction of a 'manifestly incorrect interpretation'.[82]

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73 *DPP Reference No 1 of 2019* (n 17) 747 [14] (Kiefel CJ, Keane, Nettle and Edelman JJ), quoting *Reynhoudt* (n 72) 388 (Dixon CJ).

74 See *DPP Reference No 1 of 2019* (VSCA) (n 2) 25–6 [21] (Maxwell P, McLeish and Emerton JJA).

75 *DPP Reference No 1 of 2019* (n 17) 419 [24] (Kiefel CJ, Keane, Nettle and Edelman JJ).

76 Ibid 418–19 [23].

77 Ibid 419 [24].

78 Ibid 419 [25].

79 Ibid 419–20 [26]–[27].

80 Ibid 420 [30].

81 Ibid 421 [34].

82 Ibid.

C *Edelman J*

Writing his own judgment, Edelman J agreed with the majority, however, 'not without considerable hesitation'.[83] His Honour's reasons were akin to the majority,[84] however, he never explicitly referred to the re-enactment presumption. His Honour rather concluded the result of *Campbell* should not be disturbed[85] and the decision itself was not 'plainly wrong'.[86] In addition, Edelman J spent time analysing the test for recklessness formulated in *Aubrey* — particularly the possible inclusion of a reasonableness assessment in the recklessness requirement.[87]

V Comment

The outcome of *DPP Reference No 1 of 2019* does not clarify the concept of recklessness as a matter of judicial interpretation — save as to Edelman J's analysis of the reasonableness consideration in the recklessness requirement put forward by the High Court in *Aubrey*.[88] Instead, the decision demonstrates the effect of the presumption of re-enactment as a principle of statutory interpretation, in further constraining the nature of judicial power.

Despite there being abundant authority in support of the operation of the presumption,[89] this case makes clear that its application is not straightforward and is subject to contextual considerations that may vary in each case. Many earlier cases applying the presumption were noted by the minority as a clear case of legislative adoption.[90] However, when there is less certainty, as was the case here, the discrepancy in the approaches of the majority and minority have resulted in the requisite threshold to satisfy application of the presumption remaining unclear.

The speculative nature of the presumption's application also remains a contentious point, where the majority's reasons relied upon inferences drawing upon the conduct of Parliament — with no express indication of Parliament endorsing the *Campbell* interpretation.[91] In their Honours' judgment, this extends to their reliance on the role of the Department of Justice and Attorney-General as a conduit for

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83 Ibid 430 [65] (Edelman J).

84 See ibid 438–40 [89]–[95], for consideration by Edelman J of legislative changes affecting s 17, and unfairness in departing from *Campbell*.

85 Ibid 436 [81] (Edelman J).

86 Ibid 431 [66].

87 Ibid 432 [69], quoting *Aubrey* (n 5) 350 [49].

88 See James O'Hara, 'Recklessness in Criminal Law: Possibilities and Probabilities' (2022) 46(1) *Criminal Law Journal* 67, 68.

89 See *DPP Reference No 1 of 2019* (n 17) 416 [10] (Kiefel CJ, Keane and Gleeson JJ).

90 Ibid 416–17 [12], citing *Alcan* (n 29) and *Electrolux* (n 56).

91 Cf *DPP Reference No 1 of 2019* (n 17) 418–19 [21], [23]–[25], 420 [31] (Kiefel CJ, Keane and Gleeson JJ).

Parliament's knowledge of particular judicial decisions dealing with meaning of 'recklessness'.[92] While such bodies are undoubtedly a well-regarded source of information for Parliament on criminal issues, is it a step too far to assume they brought the *Campbell* decision to Parliament's attention? Even so, such inferences were certainly still compelling, however, when weighed against the 'duty of appellate courts' to correct errors in the law,[93] at what stage should a court intervene — particularly when the entire Court accepted *Campbell* as erroneous.[94]

Moving forward, for the purposes of s 17, the High Court has left the decision in the hands of Parliament, as to whether they choose to adopt the *Aubrey* test or remain with the existing operation of *Campbell*. Given the greater infringement of individual liberties in criminal law[95] and possible flow-on effect of altering the standard of recklessness,[96] it is worthwhile that Parliament makes any such change since they will have the benefit of engaging in 'careful policy consideration[s]'.[97] Even so, this outcome still generates the unattractive consequence of inconsistency and incoherence across different Australian states in respect of the concept of recklessness in similar statutory offences.[98]

VI Conclusion

DPP Reference No 1 of 2019 provides some clarity as to the meaning of recklessness to be attributed to s 17 of the *Crimes Act*. It upholds the application of the *Campbell* interpretation, and therefore for the time being will not cause any injustice or inconvenience to the criminal justice system in Victoria. It is only a matter of time until we see whether the High Court correctly inferred the intentions of the Victorian Parliament. If it did not, it's entirely up to the power of the Parliament to clarify them.

The decision perpetuates inconsistency as to the meaning of 'recklessness' across state jurisdictions.[99] As it currently stands, the different ascribed meanings of the term include: in Victoria, a test of probable consequences;[100] in New South Wales, a test of possible consequences;[101] and, in South Australia[102] and at a Commonwealth

92 See ibid 428 [55] (Gageler, Gordon and Steward JJ).

93 Ibid 416–17 [12] (Kiefel CJ, Keane and Gleeson JJ).

94 See above n 48 and accompanying text.

95 See *DPP Reference No 1 of 2019* (n 17) 440 [96] (Edelman J).

96 Ibid 429 [59] (Gageler, Gordon and Steward JJ).

97 Ibid 441 [101] (Edelman J).

98 Ibid.

99 See ibid.

100 *Campbell* (n 6) 592–3 (Hayne JA and Crockett AJA).

101 *Aubrey* (n 5) 327 [44], 328–9 [46]–[47], 331 [51] (Kiefel CJ, Keane, Nettle and Edelman JJ, Bell J agreeing at 331 [53]).

102 *CLCA* (n 4) s 21 (definition of 'recklessly').

level,[103] a test of awareness of the 'substantial risk' of a person's conduct.[104] Any further consideration as to the meaning of 'recklessness' by Parliament should consider the test that would be most appropriate, and strive to achieve some sense of consistency. This case additionally raises new questions and a sense of uncertainty regarding the application of the presumption of re-enactment, as a tool of statutory interpretation. The presumption is a powerful tool that may constrain the exercise of judicial power to uphold the intentions of Parliament in the face of conflicting judicial authority. In these circumstances, uncertainty as to the exact threshold required for satisfying the presumption will, until clarified, create dissonance into the foreseeable future.

The outcome of *DPP Reference No 1 of 2019* is appropriate given the broader issues of policy and consequences that would attach to altering criminal liability. However, while understanding the intentions of Parliament is rarely black and white — the courts should not take this case as authority to refrain from correcting the law out of caution that it *might* not be what Parliament wants.

103 *Criminal Code Act 1995* (Cth) s 5.4.

104 Both tests also include an additional consideration that encapsulates there being no justifiable reason for engaging in the conduct despite the risk: *CLCA* (n 4) s 21 sub-s (b) (definition of 'recklessly'); *Criminal Code Act 1995* (Cth) ss 5.4(1)(b), 5.4(2)(b).

*John Logan**

REMARKS ON THE LAUNCH OF *KEEPING THE PEACE OF THE REALM*, AUTHORED BY SAM WHITE

I Introduction

In the foreword to my sometime associate, Sam White's recently published work, *Keeping the Peace of the Realm*, I sought to highlight a fundamental difference in a constitutional monarchy such as ours between the military and a civilian police force by the observation that '[t]he role of the military is to kill the Queen's enemies. The role of the police is to keep the Queen's Peace.'[1]

That observation was true in its generality in relation to their respective primary roles. But it was not wholly true of the military. I was reminded of that when looking at some personal service files, via the wonderful digital resource offered by the National Archives of Australia, for the purpose of preparing these remarks.

When (Dudley) Bruce Ross, a graduate of this University's Law School, later a King's Counsel, a Justice of the Supreme Court of South Australia and a Knight Bachelor,[2] enlisted in the Australian Imperial Force ('AIF') in Adelaide on 29 February 1916, the oath which he took bound him to 'resist His Majesty's enemies and cause His Majesty's peace to be kept and maintained'.[3] He served in France and Flanders in the ranks in the field artillery doing the former but not the latter.[4] Another later King's Counsel, Justice of that court and knight, George Coutts Ligertwood, after

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* The Honourable Justice J A Logan RFD, Judge of the Federal Court of Australia, President of the Defence Force Discipline Appeal Tribunal and Judge of the Supreme and National Courts of Justice of Papua New Guinea. This is an edited version of a speech which was given at the University of Adelaide Law School on 29 April 2022.

1 Justice JA Logan, 'Foreword' in Samuel White, *Keeping the Peace of the Realm* (LexisNexis, 2021) v, v.

2 'Australian Honours Search Facility: Judge Dudley Bruce ROSS', *Department of the Prime Minister and Cabinet* (Web Page) <https://honours.pmc.gov.au/honours/awards/1083082>.

3 'NAA: B2455, Ross Dudley Bruce', *National Archives of Australia* (Web Page) <https://recordsearch.naa.gov.au/SearchNRetrieve/Interface/ViewImage.aspx?B=8038277>.

4 Ibid.

whom this Law School's home building is named, took that same oath when he enlisted in the AIF in May 1918.[5]

II Role of the Military

Troops may be deployed in aid of a civil power but that is not the primary emphasis in their training. For example, '[t]he role of the Infantry is to seek out and close with the enemy, to kill or capture them, to seize and hold ground, repel attack, by day or by night, regardless of season weather or terrain'.[6]

There is nothing in this role statement about cleaning up after floods, fighting bushfires or preventing fellow citizens from crossing a state border or leaving hotel quarantine during a declared public health emergency. As members of a physically fit, disciplined force, soldiers can usually be relied upon to approach such tasks actively, enthusiastically, and for long hours in arduous conditions. There is no overtime in the army. But every hour spent on such tasks is an hour not spent in preparing to undertake their primary role.

In contrast, those who serve in a legacy force of Sir Robert Peel's London Metropolitan Police Force do have the primary role of keeping the Queen's peace and undertake training accordingly.

While each is a disciplined force, the core ethos of the military and the police are very different, and must be if each is efficiently to perform their primary roles.

A decision to deploy members of the Australian Defence Force ('ADF') in aid of a civil power is, under our system of government, one for the Australian government. It is always, I respectfully suggest, a serious thing.

The law governing the provision of such aid has not hitherto received much attention outside specialist branches within government. It is highly desirable that its content be conveniently detailed and critiqued in a readily available publication.

III Sam White's Book: *Keeping the Peace of the Realm*

This makes Sam's book a useful addition to legal literature. Although latterly he has served in the Australian Army Legal Corps, Sam earned his commission the

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5 'NAA: B2455, Ligertwood George Coutts', *National Archives of Australia* (Web Page) <https://recordsearch.naa.gov.au/SearchNRetrieve/Interface/ViewImage.aspx?B=8198948>; Howard Zelling, 'Ligertwood, Sir George Coutts (1888–1967)' in John Ritchie (ed), *Australian Dictionary of Biography* (Melbourne University Press, 2000) vol 15.

6 'Infantry Soldier', *Defence Jobs* (Web Page) <https://www.defencejobs.gov.au/jobs/army/infantry-soldier>.

hard way, as a general service officer. He then undertook his initial corps training as an infantry officer. More recently, he has pursued post graduate studies in law and seen, firsthand, how the processes within the Defence Department whereby requests for aid to the civil power are actioned.

Sam's membership of two of the great learned professions, the profession of arms and the legal profession, did not just make him well-placed to author this book but also to understand the tumultuous path through constitutional history in relation to the very existence of a standing army in countries of British heritage. It is impossible to divorce the subject of aid to the civil power from that understanding.

As Sam, I and everyone who has served in the ADF knows, absolute, apolitical subservience to the civil power is an article of faith. The resonance through history and into military training of the threat to democracy which the backing by the New Model Army of Oliver Cromwell's dictatorship represented is a loud one. As was that of the initial *Mutiny Act* after the Restoration in the mid-17th century,[7] a purpose of the *Defence Force Discipline Act 1982* (Cth) is to enforce that subservience within the ADF. It truly is a fraught thing for politicians to cultivate soldiers and the reverse is also true.

IV Conclusion

This Law School has a military law program, headed by Dale Stephens. He, too, is a member of the same two learned professions I have mentioned, although his membership of the profession of arms is in the Senior Service. That there is here such a program so headed makes it truly fitting that this book launch occur in this place. It gives me much pleasure now to do just that.

7 *Mutiny Act 1689*, 1 Wm & M, c 5.

*David Thomae**

KEEPING THE PEACE OF THE REALM

BY SAMUEL WHITE
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Justice John Logan's foreword of Samuel White's book, *Keeping the Peace of the Realm*, is in his inimitable style when he declares '[t]he role of the military is to kill the Queen's enemies. The role of the police is to maintain the Queen's peace.'[1] Thus, Justice Logan eloquently frames an important debate on the role of the military and its legal authority to operate domestically in circumstances short of war.

White's treatise on this topic is timely. We are coming out of almost three years of a once in a century pandemic, where the jurisprudential tension in Australia's federated constitutional democracy has strained the social cohesion of our country.[2] The impacts of climate change on the scale of natural disasters affecting Australia have seen the Australian Defence Force ('ADF') being used to support state and territory governments at a level never seen or contemplated.[3] During the 2019–20 bushfires, the Commonwealth Government used their powers under s 28 of the *Defence Act 1903* (Cth) ('*Defence Act*') to call out, for the first time in our history, 3,000 ADF

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* AM, BA (UNSW), MBA (USQ), LLB (QUT), GDLP (ANU), MIR (UQ). Major General, Australian Army; Commander, 2nd Division and Commander, Joint Task Force 629 (charged with coordinating the Australian Defence Force response to domestic operations).

1 Justice JA Logan, 'Foreword' in Samuel White, *Keeping the Peace of the Realm* (LexisNexis, 2021) v, v.

2 See generally Scott Stephenson, 'The Relationship between Federalism and Rights during COVID-19' (2021) 32(3) *Public Law Review* 222.

3 See: Chris Barrie, 'Climate Change, Security and the Australian Defence Force' (2016) 67(2) *United Service* 13, 15–16; Zoe Lippis, 'The *Defence Act 1903* (Cth): A Guide for Responding to Australia's Large-Scale Domestic Emergencies' (2022) 45(2) *Melbourne University Law Review* 596, 599; Josh Butler and Daniel Hurst, '"Near Persistent" Natural Disasters Placing Intense Pressure on Australian Defence Force', *The Guardian* (online, 19 September 2022) <https://www.theguardian.com/australia-news/2022/sep/19/near-persistent-natural-disasters-placing-intense-pressure-on-australian-defence-force>.

reservists for the conduct of domestic operations.[4] During the COVID-19 pandemic, the ADF was called upon to provide a myriad of domestic operations support tasks including assisting the state police for state and territory border controls, biosecurity control checkpoints, quarantine compliance management, contact tracing, and even supporting the aged care sector.[5] These tasks are not usually contemplated or within the scope of ADF capabilities, but a disciplined and professional ADF pivoted and carried them out with great empathy and humility.

The use of the ADF to do more than supporting the response to natural disasters in a domestic setting is more controversial. Armed soldiers in the streets of Australian cities have not been part of the contemporary Australian experience and would likely prompt vigorous political and community debate on the suitability of the ADF for the task — where police agencies have primacy for maintaining law and order and keeping 'the King's Peace'.[6] However, the geo-strategic circumstances of Australia have deteriorated to the extent that we find ourselves in a complex and potentially dangerous inflection point as serious as at any time since federation.[7] The *2020 Defence Strategic Update*[8] posited that the great power competition between the United States and China is challenging the stability of the post-World War II liberal rules-based order — where China's determination to achieve greater influence in the Indo-Pacific has the potential to undermine the stability of the region.[9] So called 'grey-zone' activities by nation-States challenge the orthodoxy of the distinction between 'peace' and 'war', blurring the lines to create legal and social challenges based on the premise that it is clear who a nation's adversary is.[10] The use of grey-zone methods such as non-attributable activities subverting democracy, actions across the cyber domain, economic pressure, and militarisation of infrastructure are examples of coercive statecraft below the threshold of military conflict.[11]

Keeping the Peace of the Realm is a timely examination of the legal complexities in the use of the ADF domestically, in circumstances short of a declared war. Sam prompts a scholarly debate on the sources of power to use the military in a constitutional federal democracy, with the inherent tension contained in s 119 of the

4 Cf *Royal Commission into National Natural Disaster Arrangements* (Report, 28 October 2020) 189–90. See also Lippis (n 3) 603–4.

5 Linda Reynolds, 'Expansion of ADF Support to COVID-19 Assist' (Media Release, Department of Defence, 1 April 2020); Linda Reynolds, 'Defence Provides Additional Assistance in Response to COVID-19' (Media Release, Department of Defence, 23 March 2020). See also Lippis (n 3) 608.

6 TA Critchley, *A History of Police in England and Wales* (Constable, rev ed, 1978) 5. See also W Paul, 'The King's Peace' (1927) 1(5) *Australian Law Journal* 131, 131–2.

7 See generally John Blaxland, 'A Geostrategic SWOT Analysis for Australia' (Discussion Paper No 49, Strategic & Defence Studies Centre, Australian National University, June 2019).

8 Department of Defence, *2020 Defence Strategic Update* (Report, 1 July 2020).

9 Ibid 11 [1.2]–[1.3], 14 [1.12].

10 Ibid 12 [1.5].

11 Ibid.

Constitution, which provides for the Commonwealth to 'protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence'.[12]

Chapter 1 frames the issues, emphasising the importance of pt IIIAAA of the *Defence Act* as the statutory power to use the ADF domestically and addressing the ambiguity surrounding the definition of 'domestic violence' — arising from the term's use in both the *Constitution* and the *Defence Act*.[13] Additionally, the 'internal security prerogative' is introduced as the focus of the book, to examine the use of the ADF beyond their requirements of responding to natural disasters and beneath the domestic violence threshold contained in the *Constitution*.[14]

Chapter 2 examines the Commonwealth executive power, derived primarily from s 61 of the *Constitution*. In doing so, White critically analyses the use of executive power for the purposes of using the military in domestic operations and describes the common law rights that act to limit a broad interpretation of the 'breadth and depth' of the application of s 61 including:[15] (1) bodily integrity; (2) freedom from false imprisonment; and (3) protection of one's property.[16] In circumstances where common law rights could easily be infringed by the ADF when carrying out tasks for domestic operations, the statement made by Gibbs CJ is noteworthy: 'It is fundamental to our legal system that the executive has no power to authorize a breach of the law and that it is no excuse for an offender to say that he acted under the orders of a superior officer.'[17] This offers a stark reminder to ADF members of the critical importance of understanding the legal authority behind their actions, particularly in domestic operations where the interplay between Commonwealth and state jurisdictions may create tension. The increasing technological capacity of the ADF in the electronic spectrum, space and intelligence, surveillance, and reconnaissance capabilities,[18] requires careful consideration of the legal authorities regarding domestic operations.

This is followed by Chapter 3, which provides a discussion on other sources of power for the operation of the ADF domestically. The Crown's prerogative powers of 'command and control',[19] 'war'[20] and 'internal security'[21] are succinctly described and countervailing views of their applicability and breadth are examined.

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12 See Samuel White, *Keeping the Peace of the Realm* (LexisNexis, 2021) 2–4 [1.4]–[1.7].

13 Ibid 2 [1.5].

14 Ibid 5 [1.13].

15 Ibid 13 [2.7].

16 Ibid 15–16 [2.13]. See generally at 13–16 [2.7]–[2.15].

17 *A v Hayden* (1984) 156 CLR 532, 540, quoted in ibid 15 [2.12].

18 See White (n 12) 15–16 [2.13]. See generally: *2020 Defence Strategic Update* (n 8) 36 [3.9]–[3.12]; Department of Defence, *Shaping Defence Science and Technology in the Intelligence Domain 2016–2026* (Domain Strategy, September 2017).

19 See White (n 12) 37–8 [3.15]–[3.20].

20 See ibid 34–6 [3.5]–[3.14].

21 See ibid 39–42 [3.21]–[3.33].

Chapter 4 brings the previous chapter's analysis of the Crown's prerogatives to Australia's federal constitutional construct, with a particular emphasis on a comparison to the definition of 'domestic violence' within the *United States Constitution*.[22] To assist in determining whether the 'internal security prerogative has fallen into desuetude', White helpfully discusses historical examples of the use of prerogative powers to authorise the employment of the ADF.[23] This includes: the 1949 Coalminer's Strike;[24] suppression of secessionist movements in the Territory of New Guinea in 1970;[25] the call-out of the ADF at Bowral for the Commonwealth Heads of Government Meeting ('CHOGM') following the Hilton Bombing;[26] and both the 2002 CHOGM and 2003 visit to Australia by the United States President, where Royal Australian Air Force fighter jets were authorised to shoot down civilian aircraft, if they endangered these head of state visits.[27] White concludes that the Commonwealth has used the internal security prerogative historically to authorise the use of the ADF domestically.[28]

Chapters 5 and 6 provide a detailed analysis of the internal security prerogative and the nationhood power, including whether they have been abridged by pt IIIAAA of the *Defence Act* and are no longer available to be exercised by the Commonwealth. White first concludes that the internal security prerogative has been abridged, but only in respect to the use of the ADF against domestic violence.[29] In terms of the nationhood power, White concludes that the abridgement does not affect the exercise of that power for a proper purpose.[30] These chapters are the crux of the issue examined by this book and provide a balanced analysis of the countervailing views of jurisprudence that have not yet been tested. When looked at in the context of Australia's geo-strategic environment, one is left with some doubt as to the legal clarity required for the ADF to be authorised to operate against grey-zone activities in a domestic setting.

Chapter 7 concludes by summarising the critical issue of where the Commonwealth's lawful authority to use the ADF domestically is derived from, highlighting the ambiguity that exists and discussing a potential roadmap to enact legislation to provide clarity. That clarity is needed in the current circumstances that Australia faces, and as the *2020 Defence Strategic Update* posits, the timeline for crisis and conflict can no longer be expected to be drawn out over a decade, bringing urgency

22 *United States Constitution* art IV § 4.

23 White (n 12) 74 [4.63]–[4.64].

24 See ibid 74–5 [4.65]–[4.67].

25 See ibid 75–6 [4.68]–[4.71].

26 See ibid 76–8 [4.72]–[4.77].

27 See ibid 78 [4.78]–[4.79].

28 Ibid 80 [4.85].

29 Ibid 104 [5.79].

30 Ibid 119–20 [6.50]–[6.51].

to the need for the Commonwealth to examine whether the current legal framework is fit for this purpose.[31]

Keeping the Peace of the Realm is essential reading for all involved in the integration and employment of the ADF on domestic operations in Australia. The increased use of the ADF for a broad spectrum of domestic operations and Australia's strategic circumstances provide an impetus for a better understanding of the constraints on the Commonwealth's legal authority to use the ADF domestically. The book is an excellent balance between the scholarly and the practical, and is readily accessible to laypersons who wish to understand the central issues of the book.

31 *2020 Defence Strategic Update* (n 8) 14 [1.13].

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