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ARTICLES

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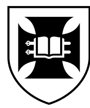

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EMBEDDING CULTURALLY SAFE PROCESSES, PRACTICES AND PERSPECTIVES IN THE PROGRAMS AND ACTIVITIES OF THE UNIVERSITY OF QUEENSLAND PRO BONO CENTRE

RUBY TRAUCNIEKS,* TAMARA WALSH,† FAYE AUSTEN-BROWN,‡ INDI MCKEOWN,§ CHRISTY GABIANA** AND GRACE BRUNTON††

Much has been written on Aboriginal and/or Torres Strait Islander law students' experiences in the classroom. Less has been written on their experiences in extracurricular programs. We undertook 17 interviews with staff, students and partners who work within and alongside a Centre that facilitates student and staff pro bono work. The aim of the research was to investigate what cultural safety means and how culturally safe practices could be embedded in pro bono projects. We found that what was needed was genuine, meaningful engagement with Aboriginal and/or Torres Strait Islander peoples, communities and organisations. Participants said that such engagement should involve deep listening, truth-telling, and relationships built on mutual respect and trust. They said that cultural safety is not something to be 'achieved', but rather something to be consistently and continually worked towards in a manner that benefits people of all races and cultural backgrounds.

I INTRODUCTION

The authors respectfully acknowledge the Yuggera and Turrbal peoples as the True Owners and Custodians of the lands on which we conducted this research,

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* LLB Student, TC Beirne School of Law, University of Queensland ('UQ') and a proud Bundjalung and Wakka Wakka woman. The authors are grateful to Devsi Patel and Daisy Rice for their research assistance and Chloe Ryan for her administrative assistance. This project was funded by the UQ Student–Staff Partnership Program. Ethical approval was obtained from the UQ Human Research Ethics Committee, Approval No. 2023/HE001313.

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and we acknowledge with gratitude the Aboriginal and/or Torres Strait Islander peoples that participated in this research.

Law students who identify as Aboriginal and/or Torres Strait Islander report that law school is alienating, isolating and hostile.[1] In recent years, the community of Aboriginal and/or Torres Strait Islander legal academics has grown,[2] and an increasing number of Aboriginal and/or Torres Strait Islander students are choosing to enter law school.[3] There is an important responsibility on law schools, and universities generally, to ensure that Aboriginal and/or Torres Strait Islander peoples feel culturally safe and to build the cultural awareness of all staff and students.[4]

Cultural safety has been defined as 'an environment which is safe for people; where there is no assault, challenge or denial of their identity, of who they are and what they need'.[5] It involves 'shared respect, shared meaning, shared knowledge and experience, of learning together with dignity, and truly listening'.[6] Cultural awareness requires 'knowledge and understanding of Indigenous Australian cultures, histories and contemporary realities',[7] as well as 'Indigenous protocols'.[8] The hope is that by increasing all individuals' cultural awareness, the cultural safety of those who have historically been marginalised or oppressed will be considered, fostered and enhanced.

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[1] Heather Douglas, 'The Participation of Indigenous Australians in Legal Education 1991–2000' (2001) 24(2) *University of New South Wales Law Journal* 485 ('The Participation of Indigenous Australians in Legal Education 1991–2000').

[2] Asmi Wood and Nicole Watson, 'Mirror, Mirror on the Wall, Who is the Fairest of Them All?' (2018) 28(2) *Legal Education Review* 1, 7.

[3] Harry Hobbs and George Williams, 'The Participation of Indigenous Australians in Legal Education, 2001–2018' (2019) 42(4) *University of New South Wales Law Journal* 1294, 1323.

[4] Amy Maguire and Tamara Young, 'Indigenisation of Curricula: Current Teaching Practices in Law' (2015) 25(1) *Legal Education Review* 95, 96. We note that not all are supportive of cultural competency discourses. For example, Pon argues that cultural competency, 'like new racism', 'other[s] non-whites without using racialist language' and is merely a 'shift away from racial exclusionary practices based on biology to practices based on culture': Gordon Pon, 'Cultural Competency as New Racism: An Ontology of Forgetting' (2009) 20(1) *Journal of Progressive Human Services* 59, 61.

[5] This definition was first proposed by a group of nurses in New Zealand: Robyn Williams, 'Cultural Safety —What Does It Mean for Our Work Practice?' (1999) 23(2) *Australian and New Zealand Journal of Public Health* 213. See also Anne-Katrin Eckermann et al, *Binan Goonj: Bridging Cultures in Aboriginal Health* (Elsevier Australia, 3rd ed, 2010).

[6] Williams (n 5).

[7] Universities Australia defines cultural competence as 'Student and staff knowledge and understanding of Indigenous Australian cultures, histories and contemporary realities and awareness of Indigenous protocols, combined with the proficiency to engage and work effectively in Indigenous contexts congruent to the expectations of Indigenous Australian peoples': Universities Australia, *Guiding Principles for Developing Indigenous Cultural Competency in Australian Universities* (Report, October 2011) 3 ('*Guiding Principles for Developing Indigenous Cultural Competency*').

[8] Ibid 3. See also Ambelin Kwaymullina, 'Teaching for the 21st Century: Indigenising the Law Curriculum at UWA' (2019) 29 *Legal Education Review* 1, 17.

The importance of promoting 'cultural competency' in the tertiary education sector has been formally recognised by Universities Australia.[9] In 2011, Universities Australia published its *Guiding Principles for Developing Indigenous Cultural Competency in Australian Universities*, which recommended that Indigenous cultural competency be included as a formal graduate attribute.[10] Many universities have implemented this recommendation.[11] Furthermore, universities now have Reconciliation Action Plans ('RAPs'), and there is a detailed Australian Institute of Aboriginal and Torres Strait Islander Studies *Code of Ethics for Aboriginal and Torres Strait Islander Research* ('*AIATSIS Code of Ethics*'),[12] which governs academic research. These developments place a new onus on law schools — and other schools and faculties — to ensure their students are culturally aware and respectful.

There are 'pockets of progress' within some universities[13] and there is a growing body of literature on how cultural competency can be enhanced within and through the law curriculum.[14] Scholars have emphasised the need to embed Indigenous perspectives throughout the curriculum, as well as discussing the ways in which the legal system perpetuates the disadvantage and marginalisation experienced by Aboriginal and/or Torres Strait Islander peoples.[15] This must be done sensitively, to avoid 'othering' Indigenous perspectives and normalising 'whiteness'.[16] Diversity within and between marginalised groups should be emphasised to ensure all students confront their cultural biases and reflect on principles of 'equity, social justice and anti-racism.'[17]

Despite the increased attention on cultural competency in the tertiary education sector, gaps in our knowledge remain. The focus of existing research appears to be students' classroom experience —we know very little about how Aboriginal and/or Torres Strait Islander students experience extracurricular and clinical legal education programs. There also remains a 'dearth of research into the experiences of Indigenous people in the legal profession.'[18] Watson (in her

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[9] Maguire and Young (n 4) 96.

[10] *Guiding Principles for Developing Indigenous Cultural Competency* (n 7) 9.

[11] Some more recently than others. For example, the University of Queensland ('UQ') added 'culturally capable' as a graduate attribute in 2023: University of Queensland 'Graduate Statement and Graduate Attributes Guideline' *Policy and Procedures Library* (Policy Document) <https://policies.uq.edu.au/document/view-current.php?id=234>.

[12] See Australian Institute of Aboriginal and Torres Strait Islander Studies, *Code of Ethics for Aboriginal and Torres Strait Islander Research* (Report, 2020) ('*AIATSIS Code of Ethics*').

[13] Wood and Watson (n 2) 15.

[14] See, eg, Annette Gainsford, Marcus Smith and Alison Gerard, 'Accrediting Indigenous Australian Content and Cultural Competency within the Bachelor of Laws' (2021) 31(1) *Legal Education Review* 59; Thalia Anthony and Melanie Schwartz, 'Invoking Cultural Awareness Through Teaching Indigenous Issues in Criminal Law and Procedure' (2013) 23(1) *Legal Education Review* 31; Kwaymullina (n 8).

[15] Anthony and Schwartz (n 14) 35; Maguire and Young (n 4) 111.

[16] Kwaymullina (n 8) 7; Anthony and Schwartz (n 14) 39.

[17] Maguire and Young (n 4) 97; Anthony and Schwartz (n 14) 35.

[18] Wood and Watson (n 2) 6.

article with Wood) calls for more research into the experiences of Aboriginal and/or Torres Strait Islander law students, noting that without it, we will not know whether law schools have become culturally safe spaces.[19]

We at the Pro Bono Centre (the 'Centre') at the University of Queensland ('UQ') wanted to learn more about how Aboriginal and/or Torres Strait Islander students experience our programs, and how we could better ensure the cultural safety of our activities. In this paper, we describe a research project that we undertook to inform our approach. We interviewed students, staff and project partners to determine how we could improve our programs to promote cultural awareness among our students and ensure Aboriginal and/or Torres Strait Islander peoples felt safe when working with us. We learned that cultural competency is not something that can be 'achieved' but rather is something that universities, students and the legal profession should continuously work towards. This requires genuine partnerships and relationships to be built over time with Aboriginal and/or Torres Strait Islander peoples, organisations and communities.

II Research Context: The UQ Pro Bono Centre

The UQ Law School was established in 1936 which makes it the sixth-oldest law school in Australia. The UQ Pro Bono Centre was established in 2008, and provides students at UQ with an opportunity to use their developing professional skills for the public good through volunteer work for community legal centres and non-government organisations. Students undertake a wide range of tasks for our external partners, including direct-client work, research and writing. The Centre also runs the clinical legal education program. Our clinical program consists of nine external clinics, which run every semester at community legal centres across Brisbane.[20]

At the time we undertook this research, all Centre staff were non-Indigenous, and we decided to undertake a research project to inform ourselves about what steps we needed to take to improve the cultural safety of our programs. Consistently with the *AIATSIS Code of Ethics*, we were committed to increasing the contribution of Indigenous knowledge to Australian research,[21] so we wanted to recruit Aboriginal and/or Torres Strait Islander students as researchers,[22] and we were committed to speaking directly with as many

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[19] Ibid 12.

[20] The Centre runs nine external clinics across seven community legal centres in Brisbane. Two of those clinics are the Culturally Safe Criminal Law Practice Clinic (run by YFS Legal) and the Deaths in Custody Clinic (run by Prisoners' Legal Service).

[21] *AIATSIS Code of Ethics* (n 12) 3.

[22] The Australian Institute of Aboriginal and Torres Strait Islander Studies *Code of Ethics for Aboriginal and Torres Strait Islander Research* states that '[t]o demonstrate merit, Aboriginal and Torres Strait Islander research should be led by Indigenous people': ibid 17 [2.4]–[2.6].

Aboriginal and/or Torres Strait Islander peoples who work with or alongside the Centre as possible.

In 2023, the year of the Voice referendum, we were funded by the University to undertake a semester-long Student-Staff Partnership project to determine how we could embed culturally safe practices in the Centre's work.[23] Staff from the Centre partnered with five students from the Law and Social Work schools, two of whom are Aboriginal and/or Torres Strait Islander, to investigate what cultural safety means and what steps we could take to ensure we create a culturally safe space for our students, staff and partners.

The Centre often engages with Aboriginal and/or Torres Strait Islander students, academics, lawyers and community members. Many students who undertake pro bono work will go on to work in community legal centres or other legal settings where they will interact with Aboriginal and/or Torres Strait Islander professionals and clients. Cultural safety is critical for students' professional development, but it is also important for their personal development. Universities are important sources of socialisation and therefore have a responsibility to ensure graduates are culturally aware and respectful.[24]

In 2023, UQ added 'cultural capability' to its list of graduate attributes. Specifically, it states:

> Graduates will have an understanding of, and respect for, Australian Aboriginal and Torres Strait Islander and global Indigenous peoples' values, cultures, and knowledge. They will have an appreciation of cultural and social diversity and work with a sense of social and civic responsibility towards a more just and equitable society.[25]

The addition of this graduate attribute was an important development at UQ. However, there was no accompanying information provided to academics on what this would mean for teaching and learning. Through this project, we sought to fill gaps in our own knowledge about how to achieve 'cultural capability' through our pro bono and clinical programs.

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[23] At UQ, Student-Staff Partnerships are offered as a means for students and staff to work together on a project to 'transform the student experience' and 'amplify the student voice' in UQ's teaching, learning or governance systems: University of Queensland, 'Student-Staff Partnership Project', *Careers and Employability* (Web Page) <https://employability.uq.edu.au/ssp-projects>.

[24] See also Kathleen Butler and Anne Young, 'Indigenisation of Curricula — Intent, Initiatives and Implementation' (Conference Paper, Australian Universities Quality Forum, July 2009).

[25] University of Queensland, 'UQ Graduate Statement and Graduate Attributes Outline', *Policies and Procedures* (Policy Document, 23 May 2023) <https://policies.uq.edu.au/document/view-current.php?id=234>.

III Our Study

A *Method*

The *AIATSIS Code of Ethics* states that the principle of Indigenous self-determination is 'fundamental' to Australian research.[26] With this in mind, we sought to genuinely and meaningfully engage with Aboriginal and/or Torres Strait Islander peoples, and to authentically represent their voices through this research.[27] We invited key stakeholders — students, staff and partners — to participate in an interview. We put a call out to all Aboriginal and/or Torres Strait Islander students through the law-school newsletter inviting them to participate. We approached Aboriginal and/or Torres Strait Islander staff and external partners who were known to us and asked them if they would participate. We then approached a select group of non-Indigenous staff and students with a demonstrated interest in cultural safety to participate. All participants were students, members of the legal profession, or university staff.

We acknowledge that there are some limitations to our approach. We note that some law students may choose not to identify as Aboriginal and/or Torres Strait Islander at university. It is unfortunate that we were not able to canvas their experiences. Further, not all Aboriginal and/or Torres Strait Islander students at our law school wanted to participate. We acknowledge that some individuals may have chosen not to participate due to past experiences of racism within the university. We also recognise that many already carry a heavy cultural load.[28] We were conscious of this, and wanted to avoid adding to it through this research.

Our research was undertaken in the second half of 2023, around the time of the Voice referendum. Unfortunately, this meant that many of the Aboriginal and/or Torres Strait Islander peoples we invited to participate were unable to assist because of their existing commitments, and the cultural and personal load they were carrying. We are grateful to all Aboriginal and/or Torres Strait Islander peoples who agreed to be interviewed during such a difficult time.

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[26] *AIATSIS Code of Ethics* (n 12) 12.

[27] Ibid 18–19 [2.5]–[2.6].

[28] Cultural load is the '(often invisible) additional workload borne by Aboriginal and Torres Strait Islander people in the workplace'. 'Indigenous-related work demands' can include an expectation that Aboriginal and/or Torres Strait Islander peoples educate others about racism and provide advice on reconciliation measures: see generally Diversity Council of Australia, 'Aboriginal and Torres Strait Islander Peoples — Leading Practice', *Diversity Council Australia* (Web Page) <https://www.dca.org.au/resources/aboriginal-and-torres-strait-islander-peoples/aboriginal-and-torres-strait-islander-peoples-leading-practice>.

We obtained ethical clearance from the relevant university ethics committee, and all team members undertook UQ's Core Cultural Learning modules (online cultural competency training) before undertaking the interviews.[29]

The interviews were semi-structured in nature. All participants were asked to comment on some key issues. They were:

- What is cultural safety?
- How can we ensure that our projects and activities are culturally safe?
- How can we ensure that we involve Aboriginal and/or Torres Strait Islander peoples in our activities without increasing their cultural load?

In addition to these questions, the participants who identified as Aboriginal and/or Torres Strait Islander were asked:

- Have you ever felt culturally safe, or culturally unsafe?
- What does 'cultural load' mean to you?
- How could you be better supported by the Centre and the university generally, particularly when the cultural load becomes too much?

B *Participants*

A total of 17 interviews were conducted. Thirteen participants identified as Aboriginal and/or Torres Strait Islander (76%). Eight participants were students, four were university staff, and five were individuals external to the university. Nine participants identified as male, and eight identified as female. No other genders were represented.

We were mindful of the importance of ensuring that research pertaining to Aboriginal and/or Torres Strait Islander peoples is 'founded on a process of meaningful engagement'.[30] We provided participants with a choice as to how they wished to be interviewed — in person, or online — and we ensured that Aboriginal and/or Torres Strait Islander researchers conducted, or were present at, as many interviews as possible. We acknowledge that each participant has ownership of data pertaining to them.[31] Consistent with this principle, we approached as many of the Aboriginal and/or Torres Strait Islander participants as possible and provided them

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[29] The *AIATSIS Code of Ethics*, Principle 1.13 requires that members be 'able to demonstrate a level of cultural competency': (n 12) 14.

[30] Ibid 14 [1.5]. At the same time, it was important for us to ensure that the identifying members of the research team did not undertake more than their fair share of the burden. We discuss cultural load further at Part IVC.

[31] Ibid 13 [1.3], 18 [2.1], 19 [2.7],22 [4.3]. See also Maggie Walter and Michele Suina, 'Indigenous Data, Indigenous Methodologies and Indigenous Data Sovereignty' (2019) 22(3) *International Journal of Social Research Methodology* 233.

with a draft of this article and an opportunity to provide feedback on it. Unfortunately, not all participants could be reached as some had moved on and we did not have current contact information for them. We also gave each participant a choice (both before the study and on completion of the draft article) as to whether they wished to be personally identified in this paper or not. All agreed not to be personally identified.

C *Data Analysis*

All of the interviews were transcribed verbatim by team members, and the transcripts were reviewed by at least one other team member to ensure their accuracy.

We then conducted a reflexive thematic analysis of the transcripts in accordance with Braun and Clarke's methods.[32] We started by familiarising ourselves with the entire dataset by reading and rereading the transcripts. Codes were manually allocated to relevant segments of data — segments included phrases, sentences or paragraphs of speech. The codes were ascribed inductively based on the project aims and interview questions. Themes were generated from the codes and reviewed during the write-up process.

The findings reported in the next section draw on participant quotes that are representative of the generated themes. This is consistent with Principle 2.5 of the *AIATSIS Code of Ethics*, which states that Indigenous voices should be represented in the analysis and communication of research results. We use quantifying terms to illustrate the strength of particular themes, however we recognise that each individual we spoke with held different views and perspectives[33] and our aim is to reflect the diversity of views that were expressed.

We acknowledge that individuals who identify as Aboriginal and/or Torres Strait Islander hold their own views on language. We respect individuals' choices on this, so we have retained participants' own language. Some refer to 'First Nations' peoples, others use the word 'Indigenous', others 'Aboriginal' or 'Aboriginal and Torres Strait Islander'. We have used the phrase 'Aboriginal and/or Torres Strait Islander' because we consider this language to be most inclusive. We also use the word 'Indigenous' at times, particularly when comparing Indigenous and non-Indigenous issues and perspectives.

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32 Virginia Braun and Victoria Clarke, *Thematic Analysis: A Practical Guide* (Sage Publications Ltd, 2022).

33 *AIATSIS Code of Ethics* (n 12) 13 [1.2].

IV Findings

Three broad themes were generated from our analysis: definitions and examples of cultural (un)safety; how cultural safety can be generated or enhanced within law school co-curricular programs; and minimising cultural load. Several sub-themes were also generated, and they are each discussed in turn.

A *Definitions and Examples of Cultural (Un)Safety*

1 *What Cultural Safety Looks Like*

Participants agreed that cultural safety requires 'listening', 'empathy' and 'understanding'. They recognised that to feel safe, a space must be 'judgement-free'. Participants said that to create culturally safe spaces, individuals need to 'unpack' their own culture, and be willing to implement suggestions from those who are 'in the cultural know'. One participant said:

> [E]veryone has their cultural biases … [it's] looking from the inside and go, well, I understand where I come from. I understand that some of my privileges have actually disadvantaged this culture. But now I can understand. And also, then you can work together in that space, with a little bit of empathy, a little bit of understanding.

Several participants, particularly those who identified as Aboriginal and/or Torres Strait Islander, noted that cultural safety was not just an issue for them, but also for people from other cultural backgrounds. They observed that university is a 'melting pot' that comprises 'all sorts of different people'. They suggested that cultural safety was about 'anti-racism' and that we should promote cultural safety 'for everybody, and not just for First Nations people.'

Participants emphasised that not all racism is 'overt'. Indeed, Aboriginal and/or Torres Strait Islander peoples said that much of the racism they encountered at university was 'unconscious' or 'implicit'. Often it was the result of misinformation, or a lack of understanding and knowledge of Aboriginal and/or Torres Strait Islander history and culture. Some participants noted that feelings of unsafety can result from *how* views are represented, not just *what* is said. For example, if Aboriginal and /or Torres Strait Islander matters are discussed in a lecture, but only 'quickly', this can be experienced as 'dismissive'. Participants said that cultural safety in a university goes beyond what is, or is not, said in the classroom, and that how staff 'deal with Indigenous students … outside of the classroom' is equally important.

One non-Indigenous participant suggested that one way of measuring cultural safety is to gauge 'how our community and our First Nations people value their relationship with us … whether they feel safe coming to us'. Consistent with this, when one participant was asked 'what does cultural safety look like?', they said: 'Visually, it looks like having Aboriginal academics in law and having

Indigenous students in law — but you don't get that unless people feel supported.'

2 *Cultural Safety at Our University, Law School and Centre*

Current students, past students and staff who identified as Aboriginal and/or Torres Strait Islander said that the Aboriginal and Torres Strait Islander Studies Unit was 'probably about as culturally safe for a First Nations person as you can get' and one described it as 'the bastion of cultural safety at uni'. They valued the 'community-focused' feel of the unit, as well as the services it offers to students such as tutoring and study spaces. There was not a single participant who said anything negative about the unit — everyone agreed this was a place of safety for them.

Some current students said that the Pro Bono Centre was a safe place for them, although we note that Centre staff were often present at the interview so that may have influenced responses. Participants noted the 'social justice' emphasis of the Centre and observed that 'the vibe is just very welcoming. It's very relaxed. It's interested in your contribution and wanting to help each other'. One participant remarked:

> [I]f you're offering something to help people, that's already coming from a good place. You're not asking people to give you anything. So many people come to Indigenous communities and Indigenous people with an extractive mindset where they think they're going to get something.

Participants described the Centre's clinical legal education program as an important mechanism for furthering cultural awareness and knowledge, 'building allies' and providing students with the tools they need to 'call things out' within their friendship groups and workplaces. Non-Indigenous students observed that 'most people who did clinic had a lot more cultural competency training than they'd received in any other course.'[34] Students also observed that they acquired cultural knowledge almost accidentally through the Centre's projects. For example, one non-Indigenous student who had participated in the Centre's Deaths in Custody project[35] said 'there was actually a fair bit of stuff that came from doing the activity that I think engendered a lot of cultural awareness'.

Current students who identified as Aboriginal and/or Torres Strait Islander spoke positively about their experiences at UQ law school. For example, one current student remarked, 'I don't think I personally ever felt unsafe in the law school', and another said, 'I haven't really experienced anything [negative] from

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34 Students are required to complete UQ's core cultural competency (online) modules prior to commencing clinic.

35 Deaths in Custody Project, 'About Us', *The Deaths in Custody Project* (Web Page) <deaths-in-custody.project.uq.edu.au>. This project is now run in partnership with Prisoners' Legal Service (Qld).

staff, to be honest.' Aboriginal and/or Torres Strait Islander students said they 'generally' had 'positive experiences' and felt 'really supported by the law school and the university generally'. They spoke positively about law school staff and their sensitivity to cultural matters. One participant said: 'There's been a few key people and I have felt like a genuine respect from them and an empathy there, which is really nice.' Another said: 'I get the vibe that the professors are very aware of the issues.' The students also generally approved of the way relevant areas of law were taught. In relation to native title, one student said: 'the lady that I had teaching it, I think she did a lovely job ... she explained the importance of it [native title], not just what it was.' In relation to *Mabo (No 2)*,[36] which is taught in first year, students said this material was 'taught quite well' and 'approached with sensitivity.'

Having said this, some Aboriginal and/or Torres Strait Islander staff and partners did describe situations where they had felt culturally unsafe at UQ and at other universities. Their concerns related mostly to the lack of Aboriginal and/or Torres Strait Islander staff, particularly in senior academic and leadership positions, and the 'exhausting' cultural load they were expected to bear. Cultural load is discussed in detail below.

3 *Cultural Unsafety as a Student*

Although most of the Aboriginal and/or Torres Strait Islander students we interviewed spoke positively about their experiences at university, some disclosed that, at times, they had felt culturally unsafe. For example, one student said that 'walking into the law school' was 'intimidating' and that, at first, they 'felt like I didn't fit in.' While the Aboriginal and/or Torres Strait Islander students acknowledged that this may be the case for other students as well, they felt the 'competitive imposter syndrome atmosphere of law school' was 'probably something that will disproportionately affect Indigenous students.' Another participant observed that Aboriginal and/or Torres Strait Islander peoples may feel that they 'don't really fit into a university system' because universities 'are built on a very individualistic way of thinking — whereas, for Aboriginal people, it's all about relationality and as a collective, we do things for our collective.' Another participant noted: 'The very institutions [universities] themselves sit on stolen land, so the institution at that base level is already unethical.'

Several participants said that negative experiences in the classroom typically resulted from interactions with other students rather than staff. Such encounters involved 'the odd student in a class saying something ... you know, just a super ignorant comment based on an entitlement and a complete lack of understanding about core issues.' One participant described an experience they had where another student had objected to a lecturer's explanation of *Mabo (No 2)*: '[T]his

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36 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

bloke sitting next to me ... he's literally saying how he thinks the decision in *Mabo* was wrong ... he actually went up to [the lecturer] and said, "but like the land was dead set uninhabited because there was no laws".'

Aboriginal and/or Torres Strait Islander participants said that the risk of these kinds of interactions affected their learning. One said:

> I've always had to kind of sit there wondering like when someone is going to make an insensitive comment or just start, you know, saying things around me without realising that I'm Indigenous about Indigenous people. And just having that constant fear all the time, it sucks.

They said these experiences were not 'really the fault of the university, though, kind of just the individual.' However, participants also said that lecturers played an important role in modelling appropriate behaviour. One non-Indigenous participant observed that 'a lot of the conventional ways we teach may make people feel unsafe, or [that] their experience is not well recognised or reflected within the existing curriculum.' One Aboriginal and/or Torres Strait Islander student observed that they felt safer in classrooms with fewer students: '[T]hose seminars where there's more personal interaction ... in small environments like that, I do feel culturally safe and just being able to express myself.'

Further to their experiences at university, several participants reported feeling culturally unsafe in their workplaces. These workplaces were legal and corporate in nature, commonly large law firms. Students said they felt like a 'massive imposter', or a 'fish out of water', and described being in a 'constant state of discomfort' in these types of workplaces. One said: 'you just look around at that firm — really just a bunch of really privileged white people'. Many described feeling 'quite isolated' and alone: 'I'm like the only Indigenous one'. One observed: 'there wasn't a community around me, whether they were First Nations or non-Indigenous.'

Some Aboriginal and/or Torres Strait Islander participants said they felt like a 'diversity hire': that 'we're hiring you because you're Indigenous'. Several others said they were expected to participate in committees and events related to Aboriginal and/or Torres Strait Islander peoples and issues. One student described what happened when they started at an unnamed 'corporation' as a student intern:

> [W]hen I went in, they didn't even tell me. They just said, 'oh, we're going to ask you a couple of questions, like, how can we improve our workplace' ... I think that's okay if they have good intentions and they actually want to learn. However, it's just a little bit of an uncomfortable space for an intern, for you to not give them any notice, and you're asking them whether or not they consent ... Like, of course I'm going to say yes. And of course I'm going to talk to a bunch of senior people about it. But it was just the most uncomfortable situation where I felt like I had to speak on behalf of all Aboriginal and Torres Strait Islander people for this corporation.

Another Aboriginal and/or Torres Strait Islander participant described a similar experience:

> [O]ne time I was in a law firm and they have the reconciliation committee. And I knew nothing about it, like it was literally the day of, and they were like 'you're coming to the meeting, right?' ... I would have been more than happy to go and be a part of that. But it was that expectation, that automatic assumption that you have to be a part of this.

As was the case with peers in the classroom, some unsafe interactions with workmates were reported by participants. Again, participants stressed that 'it wasn't the organisation, it was one particular person, really'.

Participants also described feeling unsafe at court. Some noted that Acknowledgements of Country are not generally done in court, and that lawyers who represent Aboriginal and/or Torres Strait Islander clients generally do not 'acknowledge their [the client's] mob' in court.

B *How to Create or Enhance Cultural Safety*

Participants emphasised that cultural safety was something to be worked towards, rather than a task to be completed. Several participants observed that 'nobody is ever culturally competent' but rather 'the journey' is a 'continuous one'. Several participants, particularly those who identified as Aboriginal and/or Torres Strait Islander, noted that cultural safety needed to extend to people of all races. They said that culturally safe processes should be 'built by a diverse range of opinions and perspectives so that it's welcoming for all.'

1 *The Importance of Relationships*

When we asked our participants how cultural safety could be enhanced, they commonly discussed the importance of developing 'honest', 'meaningful', 'longer-term' relationships with Aboriginal and/or Torres Strait Islander peoples. In particular, they spoke of the need for 'mutual respect', 'inclusivity', 'connection' and 'deeply listening to each other'. One participant remarked: 'Aboriginal culture is an oral culture ... put that pen down, put that book down, and go and get to know — build a relationship first.'

There were two types of relationships that participants said needed to be developed and nurtured. The first was relationships between Aboriginal and/or Torres Strait Islander students and university staff. Participants who identified as Aboriginal and/or Torres Strait Islander emphasised the importance of open and ongoing communication between Aboriginal and/or Torres Strait Islander students and staff — students wanted to be listened to and consulted with on how their cultural safety could be enhanced. Several participants suggested that regular opportunities to meet and engage, with academic leaders and one

another, should be available by holding 'drop-in sessions', or 'one-on-one check ins' with 'certain staff members every once in a while'.

Participants also emphasised the importance of building relationships with local Aboriginal and/or Torres Strait Islander organisations and Elders. Genuine community engagement was considered to be very important for cultural safety. Several participants said that universities should make an effort to engage in 'community events', as well as holding their own events 'to do with Aboriginal and Torres Strait Islander issues'.

Aboriginal and/or Torres Strait Islander participants emphasised the importance of 'look[ing] beyond the people in your institution' and undertaking 'more consultation with community'. They suggested 'identifying the First Nations community organisations in your area and around the university and being a meaningful part of that — not just going in for six months or 12 months — it needs to be ongoing.' Participants suggested that knowing who the local Elders are, building relationships with them, including them in university activities and 'having yarns' with them was important, noting of course that they should be paid for their time. As one participant remarked: 'It's actually doing more than just having the RAP. It's more than just having the flags at the front counter. It's more than just having some nice art. It's actually about doing the hard yards.'

2 *Truth-Telling*

Several participants emphasised the importance of truth-telling to cultural safety. One participant said: 'I think capacity building starts with truth-telling. It starts with acknowledging the place that Aboriginal people have been put in because of colonisation.'

Several participants discussed the importance of being educated about the history of your local area. One participant said: 'Essential, I suppose, just would be an awareness — awareness of colonial history, and that there's still a gap to be closed in that there are still issues faced by First Nations people in Australia.'

Participants agreed that it was important for everyone to understand culture — to have 'a basic understanding of what is cultural ... what is culture and what does it mean'. This encompassed a 'basic general knowledge of Aboriginal culture' but also a knowledge of individuals' own culture. Participants felt that non-Indigenous people could benefit from learning about other cultures because 'they can learn that their western ways of doing things aren't necessarily the only way of doing things'. This, they said, was 'part of the truth-telling process'. One participant who identified as Aboriginal and/or Torres Strait Islander remarked:

> [I]f you can embed ... knowledge of the ways in which Indigenous peoples and peoples of diverse ethnic and racial backgrounds think feel, live and how they are safely integrated from their perspective ... then you give the whole endeavour of cultural safety a much more sustainable and better propositioned foundation.

3 *Cultural-Awareness Training*

There was general agreement amongst participants that cultural-awareness training was crucial, however there were different views on how it should be delivered. Participants said there should be 'a variety of training' through 'different mediums and different ideas' and that 'you can't just have one person's idea of what's cultural safety.'

Whilst some participants believed that 'you can't get competent from engaging with the computer', others said they had completed online training that was 'quite good'. Online modules that were 'brief', 'vague' or 'self-assessed' with 'not much follow-up on the content' were considered inadequate. Participants wondered whether people could be trusted to 'participate in it meaningfully' or whether it was a 'tick box exercise'.

Several participants said that in-person 'workshops', where training was conducted in small groups, were most effective.[37] They acknowledged that this form of cultural-awareness training was expensive and resource intensive. Nevertheless, some participants said this was an important 'investment' in students' 'cultural competency' and that universities were best placed to make this investment. One participant said: 'The university has resources that are near to boundless ... you are so much more well-resourced than the community legal centres that you are engaging with and sending your student volunteers out to.'

Other participants made suggestions on how online modules could be improved. They said that online modules should be a compulsory onboarding activity for all staff, and 'ongoing' or 'continual' after that. One participant suggested that individuals could be more effectively assessed. For example, they could be required to do a 'reflection piece at the end' or answer 'weird questions to ensure that they watch the video'. One participant suggested that staff complete the modules together in small groups at 'lunchbox sessions' so people could 'do the module ... and then have a yarn about it'.

Several participants observed that cultural awareness training was best conducted 'off site' and 'On Country'. They described 'tours' and 'day trips' On Country they had taken with students and staff as 'really, really beneficial' because they allowed individuals to be 'immerse[d] in an Indigenous culture and Indigenous ways of knowing, being, doing and learning'. Alternatively, one participant suggested having 'family or Elders or something like that, or community organisations, come down, like once a year' because this would foster a genuine connection. As one participant said: 'I mean, it's one thing to do an online module. That you can really skip in advance and say, "yes, I've done it" and

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37 Two participants provided the example of BlackCard training and described it as 'fantastic': Black Card, 'Our Impact', *BlackCard* (Web Page) <https://www.theblackcard.com.au/>.

tick that box. But to actually sit in a room with Aboriginal people and listen and feel. [There's] a really vast difference.'

One participant felt that more targeted training needed to be delivered to non-Indigenous teaching staff. They acknowledged the importance of cultural knowledge and awareness, but felt it was also important to 'provide the resources for staff to learn, providing supports to help them change their courses, to help them understand appropriate ways of teaching'. They felt that having Aboriginal and/or Torres Strait Islander peoples available to talk to staff and provide advice on these matters would enable cultural safety to be 'structurally embedded' across the university.

4 *Culturally-Sensitive Teaching*

Participants observed that small changes could be made immediately in university settings to improve cultural safety. Some said that the presence of 'culturally authoritative pieces of artwork from local community' could enhance feelings of cultural safety. Others noted the importance of using 'culturally sensitive language'. Several participants said that an Acknowledgement of Country should be given before meetings and classes 'every single time', with 'sensitivity'. However, not all participants agreed that this should be 'a requirement'. One participant emphasised that the idea behind giving an Acknowledgement of Country was to 'clear the energy in the room and make everything kind of at peace' and, therefore, 'if someone's not willing to do that and they don't realise the meaning behind it and the reasons for it, well, that's kind of on them — that's their decision.'

Participants agreed that the way in which material is delivered to students can enhance, or detract from, a sense of cultural safety amongst Aboriginal and/or Torres Strait Islander people. Many noted the importance of openly recognising and respecting diversity. One Aboriginal and/or Torres Strait Islander student suggested that acknowledging students' diversity could promote mutual respect and address the risk of 'insensitive comments' being made by other students:

> [E]ven in the first lesson [the teacher could say:] 'You're all a diverse bunch of students. And I know that we all come from different places. Some are Indigenous to Australia, some are Australian, some are from overseas. But I want you to all treat each other, you know, with the same level of respect … there may even be an Aboriginal person sitting next to you.'

There were some cultural matters that participants felt should be deliberately and overtly taught to students. In particular, it was agreed that law students should be encouraged to 'reflect on the role that the law plays, has historically played and continues to play today, in the dispossession of First Nations people, their experiences of racism, discrimination, oppression in an ongoing way and trying to connect.' Two participants said that students should be taught about Aboriginal

and/or Torres Strait Islander ways of being, including the importance of 'relationality' and community.

Several participants said that 'Indigenous specific examples' should be raised across all areas of law 'to kind of highlight some of the issues that are actually happening in the real world.' Participants noted that while cultural matters tended to be 'taught very respectfully', 'there's a lot of courses where Aboriginal issues just don't feature at all'. They felt that 'Indigenising the curriculum' meant ensuring that 'Indigenous culture, perspectives, case examples, experiences are incorporated into every law course within a law school, and not just in obvious subjects.' Participants said that this needed to be done in a genuine and meaningful way. As one participant remarked: 'If it's just a dot point' that 'sends a message to students' — there are 'silent messages in that'.

Some participants raised the lack of Indigenous voices in legal education. One non-Indigenous participant explained:

> [A]cademics have a very important role to play in not only how they present information, when they incorporate Indigenous perspectives into a course … but also the credibility and authority that academics pay to Indigenous scholars and community voices on those types of topics.

Student participants agreed that they would benefit from having more Aboriginal and/or Torres Strait Islander guest lecturers. One said: 'bring in Elders, UQ can pay them to give guest lectures'. Participants said that hearing people 'talking about their experiences' could be transformative: 'you learn so much from someone else's lived experience'. One participant, a non-Indigenous student, described one guest lecture they attended:

> [T]he lady who was Indigenous came in and like the lecture was basically like … a yarning circle. It was good to see how it actually works in person … I think we were practising cultural safety in that way, but we didn't even realise we were. We were just learning from someone and their experiences of life.

C *Minimising Cultural Load*

Throughout the interviews, participants raised the tension between ensuring that programs are 'co-designed' with Aboriginal and/or Torres Strait Islander peoples, while also being mindful of the cultural load that is already borne by identifying individuals.

Participants agreed that 'we have so much Indigenous or First Nations expertise … already within the university ecosystem.' They noted the importance of 'getting Aboriginal and Torres Strait Islander students involved in the way we shape these processes and listening to their suggestions'. They also noted the:

> [V]ery important need to be in regular contact with Aboriginal and Torres Strait Islander colleagues over these issues … you don't want to be replicating potentially the

> kind of colonial dynamics where you're the non-Indigenous person who just knows what's best and what's right, and you don't speak to Indigenous colleagues.

However, participants said there is 'also a need to recognise how much work First Nations colleagues and students are called on to do, expected to do, in this space.' Participants who identified as Aboriginal and/or Torres Strait Islander provided myriad examples of cultural load they already carried. They said there was 'constantly' an 'expectation' that they would 'be on RAP committees', 'organise events', 'contribute to conversations and policies and provide feedback', 'do the Acknowledgement [of Country]' and be the 'single source of information' on 'Indigenous issues' (an 'encyclopedia of Aboriginality'). One participant said:

> It's anything from, you know, explaining what NAIDOC is, to reconciliation, to being the person that they call on to sit on every single committee, because you're the token black ... getting asked to do the Acknowledgement of Country ... having to be the Aboriginal expert on everything, because you're Aboriginal, you're expected to know everything Aboriginal, right?

Many participants said they were 'happy to share our culture' and 'happy to do these things ... but when do we say enough is enough?' Several Aboriginal and/or Torres Strait Islander participants described the cultural load they carried as 'exhausting' and often uncompensated. One said: 'it's an expertise, it's a special knowledge that we come with, but we're expected to contribute for free.' Another said:

> If you had an employment consultant come in or a HR consultant come in, you pay those people ... But when it comes to developing RAPs or developing policies or anything else, then they expect the First Nations staff to contribute without any extra pay.

Students who identified as Aboriginal and/or Torres Strait Islander said that a 'nice balance' had been struck by the UQ law school in being 'open to have you do certain things, but there's not been that pressure or expectation that you have to do it.' One said:

> I think the law school's been pretty good with not having a huge expectation around it. I have done things with the law school — scholarship kind of things like photoshoots and interviews — but I think it was always approached with a genuine understanding that if you don't have capacity for it, that's okay.

However, several participants experienced significant cultural load within their workplaces. They said that while 'working with Indigenous students and staff is a joy — there's no load there', they felt burdened 'when it's a non-Indigenous organisation asking me to do extra work, to help them further their own journey'. They said they felt an 'obligation' to help, but at times it could get 'too much'.

When asked how their cultural load could be reduced or managed, they suggested that non-Indigenous people 'ask but not push it'. They were willing to 'put [their] time and energy into it' but they wanted to be free to say no without

being 'demonised'. One participant suggested that a network of allies could help shoulder the load:

> [W]e need to have a lot more allies stepping up into this space to carry some of that load for us ... if we had something more similar to what they have as an [LGBTIQ] ally network ... having that visibility out there so that people can actually go to another non-Indigenous person who can carry that load as well.

Another participant warned that having an 'army of allies' should not be seen as 'the end goal':

> You wanna be auntie, you wanna be sis, you wanna be a bungee. You don't wanna be an ally ... But you can't be a sis or a bungee unless you're a competent ally first ... It's not us versus them. It's all of us together.

Certainly, there was agreement that universities should be proactive in easing the cultural load carried by Aboriginal and/or Torres Strait Islander staff and students. Participants said this could be done by appropriately remunerating people, perhaps through a 'cultural loading'. Participants also said that universities should 'take responsibility' for ensuring 'they're educating their students on how to be more culturally safe, on how to be more culturally respectful'. Likewise, non-Indigenous participants recognised the importance of 'taking responsibility for our learning'. One non-Indigenous student said: 'I think it should be my responsibility to be more aware and to be a bit more proactive in my learnings about Indigenous Australians and Indigenous culture.' A non-Indigenous staff member said: 'I think I have a responsibility to commit as an ongoing learner to always reform and work on my culturally safe practice.'

Participants also recognised the need to support Aboriginal and/or Torres Strait Islander peoples to become law students, stay in law school and become legal practitioners. Several participants observed that 'we need more mob in the profession' but the 'attrition rate for First Nations law students' remains high.

Participants said that universities, and the Centre specifically, 'needs to make a commitment to support and provide those opportunities for our First Nations law students.' One participant observed that 'a lot of our mob don't have those family connections or other connections' so 'volunteering experience' was hard to secure. Ensuring that Aboriginal and/or Torres Strait Islander students are prioritised for these opportunities could assist them to be 'in a more equal position'. As one participant said, 'it's the responsibility of everyone in the profession to make sure that we get more mob through.'

V Discussion

Research undertaken in the early 2000s indicated that almost three quarters of all Aboriginal and/or Torres Strait Islander law students did not complete their law

degree.[38] This is likely to have improved over the last 20 years,[39] however available evidence suggests that retention rates are substantially lower for Aboriginal and/or Torres Strait Islander law students.[40] Our participants noted how important it is that more Indigenous people enter the legal profession, but we must first ensure they stay in law school. An important aspect of the law school experience at UQ is involvement in volunteer work through the Pro Bono Centre.

Our participants spoke generally about university and law school, as well as their experiences in corporate workplaces. All of this provides important information to us on the cultural safety of the Centre's programs because student volunteers engage with each of these systems as part of the Centre's activities — they attend classes and workshops, volunteer at non-Indigenous organisations and corporations, and work closely with their peers on group projects. We must ensure that all of these interactions are culturally safe for Aboriginal and/or Torres Strait Islander students, and that all law students understand the importance of creating culturally safe environments for future clients.

We found that what happens in the classroom remains central to law students' experience of cultural safety. Indigenous scholars have attributed high-attrition rates to law school culture and curriculum,[41] and our participants agreed with this assessment. Recent reviews have concluded that, while Indigenous perspectives are included in some core subjects — such as property law and foundations of law — they have not been embedded across the law curriculum.[42] As Wood and Watson observe, it seems that while there has been a 'gradual filtering of Indigenous people's perspectives into the curricula' over time, true 'cultural change within law schools ... remains elusive.'[43]

Non-Indigenous legal scholars have also observed that there is more work to be done to embed Aboriginal and/or Torres Strait Islander perspectives in law curricula. As Vines notes, incorporating 'Indigenous issues into all aspects of

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[38] Australian Government, Panel of the Review of Higher Education Access and Outcomes for Aboriginal and Torres Strait Islander People, *Review of Higher Education Access and Outcomes for Aboriginal and Torres Strait Islander People* (Final Report, 12 July 2012) 8.

[39] Australian Government, Department of Education, *Indigenous Cultural Competency for Legal Academics Program* (Final Report, 2019) vii ('*Indigenous Cultural Competency*').

[40] Ibid 1.

[41] Phillip Rodgers-Falk, *Growing the number of Aboriginal and Torres Strait Islander Law Graduates: Barriers To the Profession* (Research Report, September 2011) 1–3; Council of Australian Law Deans, *Learning and Teaching in the Discipline of Law: Achieving and Sustaining Excellence in a Changed and Changing Environment* (Final Report, 2009) 32; Nicole Watson, 'Indigenous People in Legal Education: Staring Into a Mirror Without Reflection' (2005) 6(8) *Indigenous Law Bulletin* 4; Heather Douglas, 'Racism in Legal Education: Towards Indigenisation' (2005) 6(8) *Indigenous Law Bulletin* 12 ('Racism in Legal Education').

[42] *Indigenous Cultural Competency* (n 39) vii. Gainsford, Smith and Gerard (n 14) stress the need for a 'whole of curriculum approach': 65. See also Kwaymullina (n 8) where the process of Indigenising the law curriculum at the University of Western Australia is detailed.

[43] Wood and Watson (n 2) 1.

the curriculum' should be 'automatic'.[44] Yet, Saul observes that Aboriginal and/or Torres Strait Islander peoples and legal systems have made only 'marginal appearances' and 'have seldom been treated as compulsory subjects in their own right.'[45] This is unfortunate, given that several non-Indigenous scholars have documented the ways in which they have successfully incorporated Indigenous perspectives into their core units.[46] Saul notes that notions of 'statehood, colonisation and decolonisation, self-determination, legal personality and treaty-making' are all highly relevant to the study of public international law.[47] Anthony describes an innovative approach to the teaching of torts that focuses on Stolen Generations cases,[48] and Anthony and Schwartz discuss the ways in which cultural awareness can be embedded in criminal law and procedure courses.[49]

Our participants noted that attention must be paid not only to what is taught, but also to what is not taught, and *how* classes are taught. As Otto observes, '[w]hat is included and excluded' in law classes 'and whether a chosen topic or issue is marginalised or given prominence, sends very powerful messages to students'.[50] Anthony states that incorporating issues pertaining to Aboriginal and/or Torres Strait Islander peoples into the law curriculum requires a 'systematic approach', and 'is not simply a matter of sprinkle in a few cases and stir.'[51] As well as hidden messages, there is also a risk of 'deficit thinking' by framing Aboriginal and/or Torres Strait Islander experiences negatively.[52] This can be addressed by privileging Indigenous knowledges and voices and drawing

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[44] Prue Vines, 'Putting Indigenous Issues into the Curriculum: Succession and Equity' (2012) 4 *Ngiya: Talk the Law* 46.

[45] Ben Saul, 'Indigenous Peoples, Laws and Customs in the Teaching of Public and Private International Law' (2012) 4 *Ngiya: Talk the Law* 63.

[46] See also Gary Meyers, 'Two Examples of Incorporating Indigenous Issues in Law School Curricula: Foundation Year Courses and Electives in Environmental / Natural Resources Law (2008) 7(9) *Indigenous Law Bulletin* 6.

[47] Saul (n 45) 64.

[48] Thalia Anthony, 'Frameworks for Including Indigenous Issues in Torts: Stolen Generations Case Study' (2012) 4 *Ngyia: Talk the Law* 30.

[49] See Anthony and Schwartz (n 14).

[50] Dianne Otto, 'Handmaidens, Hierarchies and Crossing the Public–Private Divide in the Teaching of International Law' (2000) 3 *Melbourne Journal of International Law* 46.

[51] Anthony (n 48). Anthony suggests an activity where students are asked to consider whether a case outcome would be different had the subject children been non-Indigenous, for example, as a means of highlighting the impacts of systemic racism and disadvantage: 44. See also Gainsford, Smith and Gerard (n 14) 65.

[52] *Indigenous Cultural Competency* (n 39) 22; Kwaymullina (n 8) 8–9; Anthony and Schwartz (n 14) 37; Phil Falk, 'Law School and the Indigenous Student Experience' (2005) 6(8) *Indigenous Law Bulletin* 8, 8.

on Indigenous narratives to demonstrate the resilience of Aboriginal and/or Torres Strait Islander peoples and to recognise and share their cultural wisdom.[53]

Vines creates a rule in her classroom that a non-Indigenous source should not be used if an Indigenous one is available.[54] This is an important step towards recognising the value of Indigenous scholarship and increasing its prominence, however some academics feel ill-qualified to include Indigenous perspectives in their courses.[55] Repositories of Indigenous resources and materials may address these concerns. Wood notes that such collections should include film, music and art as well as other information resources.[56] Of course, such resources should be used in a culturally respectful way, and only with the specific permission of the traditional owners.[57] Burns also notes that academics should be able to access cultural mentoring and sources of Indigenous authority including Indigenous colleagues and Elders.[58] Universities need to commit to increasing their engagement with Indigenous communities and Elders, and these relationships must be 'long-term' and 'mutually beneficial'.[59] Of course, any involvement that Aboriginal and/or Torres Strait Islander peoples have with universities must be remunerated, and funds are required to support this.

Participants in our study commented on the unwelcoming, alienating nature of law school and it is clear that relationships with peers can still be experienced as unsafe for Aboriginal and/or Torres Strait Islander students. Watson said of her law school experience 20 years ago that there were 'few spaces in which I could survive' and that she had to 'create a new persona that breathed only black-letter law.'[60] Particularly concerning is an experience she described where a lecturer made an offensive, racist comment when teaching an

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53 Janet Mooney et al, *Indigenous Online Cultural Teaching and Kinship Project* (Final Report, 2017); Ken Nobin et al, *Relationships Are Key: Building Intercultural Capabilities for Indigenous Postgraduate Coursework Students and Their Teachers* (Final Report, 2013); Tony Wain, *Creating Cultural Empathy and Challenging Attitudes Through Indigenous Narratives* (Final Report, 2013).

54 Vines (n 44) 51.

55 Brydie-Leigh Bartleet et al, *Enhancing Indigenous Content in Arts Curricula Through Service Learning With Indigenous Communities* (Final Report, 2014) 92; Marcelle Burns, 'Are We There Yet? Indigenous Cultural Competency in Legal Education' (2018) 28(2) *Legal Education Review* 1, 3; Irene Watson, 'Some Reflections on Teaching law: Whose Law? Yours or Mine?' (2005) 6(8) *Indigenous Law Bulletin* 23.

56 Asmi Wood, 'Incorporating Indigenous Cultural Competency Through the Broader Law Curriculum' (2013) 23(1) *Legal Education Review* 57, 64–5. See also Kwaymullina (n 8) 29–30.

57 Martin Nakata, 'Indigenous Knowledge and the Cultural Interface: Underlying Issues at the Intersection of Knowledge and Information Systems' (2002) 28(5) *International Federation of Library Associations and Institutions Journal* 281.

58 Burns (n 55) 25.

59 As Irene Watson observes, 'the majority of traditional owners/custodians of knowledge are located outside the tertiary sector': Watson (n 55) 2. See also Gainsford, Smith and Gerard (n 14) 60.

60 Gainsford, Smith and Gerard (n 14) 60. See also Burns (n 55) 11; Falk (n 52) 9. Similar observations have been made by African-American scholars: see Bennett Capers, 'The Law School as a White Space' (2021) 106(7) *Minnesota Law Review* 7, 11.

administrative law class.[61] We were pleased to find that the Aboriginal and/or Torres Strait Islander students who participated in our research spoke positively of their experiences with law school staff. They said they felt supported by academics and school leaders, however they still experienced unsafe interactions with their peers in the classroom.

Academics have a profound responsibility to ensure the cultural safety of their students in class, including by appropriately and sensitively engaging with Aboriginal and/or Torres Strait Islander knowledges, but also by acting as role models in their personal interactions with students.[62] Scholars have previously noted the damaging effects that a single student can have on a teacher's attempts to deliver material in a culturally sensitive manner.[63] Vines suggests that rules of respect should be established explicitly in the classroom to make it clear at the outset that 'disrespectful statements will not be tolerated'.[64] She suggests that if a student makes an insensitive remark in class, repeating it back to them can encourage reflection by both the individual and the class as a whole.[65] Burns and colleagues agree that it is important to encourage dialogue and engagement between Indigenous and non-Indigenous students, on an individual and group level, but that Indigenous students must feel safe to do this and should never be 'looked upon as an authority on everything Indigenous.'[66]

It has been recognised elsewhere that Aboriginal and/or Torres Strait Islander Studies Units make a significant contribution to students' feelings of cultural safety on campus,[67] and our participants spoke very positively about their experiences with the Unit at UQ. Wood, and Burns and colleagues, separately note the importance for Indigenous people of having a safe place to 'practice your own culture without fear of being ridiculed or being put down or bullied or harassed about it'.[68] However, Watson notes (in her article with Wood) that a risk of focusing on student programs for Aboriginal and/or Torres Strait Islander students to help them 'fit in' may detract from the overall goal of 'institutional change'.[69] Douglas further observes that such Units do not absolve individual schools of responsibility for supporting their Indigenous students; she says

61 Watson (n 41) 4.

62 *Indigenous Cultural Competency* (n 39) 19; Sally Kift et al, *Curriculum Renewal in Legal Education* (Final Report, 2013) 51–2.

63 Vines (n 44) 46; Douglas, 'Racism in Legal Education' (n 41) 14; Kevin Dolman, 'Indigenous Lawyers: Success or Sacrifice' (1997) 4(4) *Indigenous Law Bulletin* 4, 5; Wood and Watson (n 2) 8.

64 Vines (n 44) 50. As to the dangers of classroom discussions: see *Indigenous Cultural Competency* (n 39) 17.

65 Vines (n 44) 61.

66 See generally *Indigenous Cultural Competency* (n 39). See also Falk (n 52) 10.

67 *Indigenous Cultural Competency* (n 39) 17; Burns (n 55) 22.

68 Wood (n 56) 64; *Indigenous Cultural Competency* (n 39) 17.

69 Wood and Watson (n 2) 9. See also Kim Brooks, 'The Daily Work of Fitting in as a Marginalised Lawyer' (2019) 45(1) *Queen's Law Journal* 157. Brooks concludes that strategies used by lawyers to fit in 'may give rise to real harm' by masking the 'power that exclusion continues to have': 164, 191.

schools should be 'guided' by these Units but that 'other types of support mechanisms need to be institutionalised.'[70]

When it came to our own programs, participants said they felt safe within the Centre, and they recognised the incidental cultural learning that can take place when engaging in pro bono work and clinical legal education. Evans and colleagues have described the potential for clinical legal education to contribute to individuals' cultural competency by exposing students to different perspectives and experiences.[71] Maguire and Young note that having contact with Indigenous clients assists students to 'engage on emotional and empathic levels, rather than just on an intellectual level.'[72] This has certainly been our experience.

We run several clinical placements at UQ, and they all operate out of metropolitan community legal centres. Several participants in our study raised the value of On Country learning, and this led us to consider the potential for running clinical placements in rural, regional and remote areas.[73] Some On Country placements are described in the literature.[74] For example, Cassidy describes On Country study tours she developed with a view to making 'Indigenous legal issues "real" for the students', and to 'ensure that certain "myths" about Indigenous Australians are dispelled.'[75] These study tours included visits to Aboriginal communities where students experienced Indigenous culture, language and food, and visited sacred sites. They also visited sites of Aboriginal detention and heard from someone with lived experience of the Stolen Generations. While student numbers were necessarily small, and the project was 'incredibly time-consuming', Cassidy reflects that 'the outcomes for the students justify the effort' and confirms that 'ongoing relationships' were forged.[76] While experiential learning is widely recognised as being beneficial for students, the potential to engage with Aboriginal and/or Torres Strait Islander communities through clinical legal education programs remains underexplored.

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70 Douglas, 'The Participation of Indigenous Australians in Legal Education 1991–2000' (n 1) 511.

71 Adrian Evans et al, *Strengthening Australian Legal Education By Integrating Clinical Experiences: Identifying and Supporting Effective Practices* (Final Report, 2013). See also Kift et al (n 61); Narelle Bedford et al, 'Developing Indigenous Cultural Safety in Law: Clinical Legal Education as a Method for Getting it Done' (2024) 34(1) *Legal Education Review* 111.

72 Maguire and Young (n 4) 115.

73 The Centre now offers Regional, Rural and Remote clinical offerings over Summer: University of Queensland, 'Regional, Rural and Remote (RRR) Project' *UQ Law School Pro-Bono* (Web Page) <https://law.uq.edu.au/pro-bono/rrr-project>. Note that 'On Country' learning involves situating oneself on lands of cultural significance: see further Uncle Charles Moran, Uncle Greg Harrington and Norm Sheena, 'On Country Learning' (2018) 10(1) *Design and Culture* 71.

74 See William Fogarty and Robert Schwab, 'Education, Land and Learning' (2012) 4 *Ngiya: Talk the Law* 98; Julie Cassidy, 'The Classroom "In Country": Experiential Learning of Indigenous Legal Studies' (2012) 4 *Ngiya: Talk the* Law 79. Adrian Evans et al (n 71) also discuss the importance of developing clinical programs in collaboration with Indigenous organisations and leaders: 70.

75 Cassidy (n 74) 79.

76 Ibid 97.

Participants in our study made several other suggestions on how cultural safety could be improved through extracurricular programs in law. They noted the value of local place-based learning, and this has also been discussed in the literature.[77] Pro bono programs could make a significant contribution towards enhancing individuals' local cultural knowledge and providing much needed legal and related services to local Indigenous communities. Our participants emphasised that this required us to build genuine, long-term relationships with Aboriginal controlled organisations and Elders within our community. Our participants' focus on relationships is consistent with the importance of 'relatedness' as a core principle of Indigenous ways of knowing, being and doing.[78] Burns and colleagues found that cultural competency was 'primarily about fostering meaningful cross-cultural dialogue' and that 'the process' was more important than the 'nomenclature.'[79] Connections to community can also increase our knowledge about Aboriginal ways which can in turn address cultural biases.

Sadly, we found that internships and paid work opportunities in corporate settings could expose Aboriginal and/or Torres Strait Islander students to racism and other culturally-unsafe experiences. Consistently with Morley's observations, our participants said these experiences of cultural unsafety often take the form of questions about their heritage and culture.[80] It seems that it is still common for Aboriginal and/or Torres Strait Islander students to be treated as a 'manifestation of their culture' and expected to 'represent it' in corporate environments.[81] This was an important finding for us because some of our programs are undertaken within law firms' pro bono practices and at barristers' chambers. It must also be recognised that universities sometimes adopt corporate cultures themselves; while maintaining students' cultural safety is high on universities' agendas (at least formally), Indigenous academics report high rates of burnout and excessive cultural load.[82] The cultural safety of both staff and students must be acknowledged and considered by those in leadership positions.

Our participants agreed that cultural-competency training assists in addressing some of these concerns, but they said it should be ongoing and

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[77] Brydie-Leigh Bartleet et al (n 55) 110.

[78] Karen Martin, 'Ways of Knowing, Being and Doing: A Theoretical Framework and Methods for Indigenous and Indigenist Re-search' (2003) 27(76) *Journal of Australian Studies* 203; *Indigenous Cultural Competency* (n 39) v.

[79] *Indigenous Cultural Competency* (n 39) 16; Burns (n 55) 21.

[80] Harriet Morley, 'Breaking the Barriers: Victorian Indigenous Lawyers' (2007) 81(8) *Law Institute Journal* 18, 21, 26. See also Debbie Bargaillie, *Unmasking the Racial Contract: Indigenous Voices on Racism in the Australian Public Service*, Aboriginal Studies Press, 2021, 79, 94–8.

[81] *Vines* (n 44) 52.

[82] *Indigenous Cultural Competency* (n 39) 17; Wood and Watson (n 2) 8; Kwaymullina (n 8) 12–13. Although, we agree with Douglas that it is critical that law schools employ more Indigenous academics: see Douglas, 'Racism in Legal Education' (n 41) 16.

'properly integrated' to ensure it is meaningful and purposeful.[83] Online modules are popular, but other methods of training should be available as well, particularly those that encourage engagement with Aboriginal and/or Torres Strait Islander peoples and promote self-reflection.

Like our participants, Watson (in her article with Wood) cautions us against assuming that 'cultural competence' is achievable.[84] We learned that increasing cultural awareness should be ongoing and embedded in our programs. We agree with Watson that our goal as legal academics should be to ensure students are knowledgeable about Indigenous laws and the failure of settler law to protect Indigenous peoples and communities.[85] As clinical educators, we also assume responsibility for ensuring our students engage with Aboriginal and/or Torres Strait Islander peoples on 'emotional and empathic levels', develop skills in reflective practice and communication, and create environments that are socially and emotionally safe for clients from all cultural groups.[86]

VI Conclusion

As part of this project, the research team developed a 'road map' for embedding cultural safety in our programs. Key goals included:

- Identifying local Elders and local Aboriginal and/or Torres Strait Islander organisations and committing to developing long-term relationships with them;
- Ensuring wide dissemination of existing cultural awareness modules, whilst also exploring options for additional cultural training through Aboriginal and/or Torres Strait Islander owned and operated organisations;

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[83] *Indigenous Cultural Competency* (n 39) 9. See also Stephen Kinnane et al, '*Can't Be What You Can't See': The Transition of Aboriginal and Torres Strait Islander Students into Higher Education* (Final Report, 2014) 70.

[84] Wood and Watson (n 2) 10–11; Kwaymullina (n 8) 29.

[85] Wood and Watson (n 2) 10. See also Kwaymullina (n 8) 22–3.

[86] Marcelle Burns and Jennifer Nielsen, 'Dealing with the "Wicked" Problem of Race and the Law: A Critical Journey for Students (and Academics)' (2018) 28(2) *Legal Education Review* 1, 17; Burns (n 55) 25; Maguire and Young (n 4) 115. See also Marcelle Burns, Simon Young and Jennifer Nielsen, 'The Difficulties of Communication Encountered by Indigenous Peoples: Moving Beyond Indigenous Deficit in the Model Admission Rules for Legal Practitioners' (2018) 28(2) *Legal Education Review* 1, 1–2.

- Ensuring students who are Aboriginal and/or Torres Strait Islander have an opportunity to identify as such when applying for projects with the Centre;[87]
- Supporting Aboriginal and/or Torres Strait Islander students to attend conferences and other professional networking events; and
- Drafting an Acknowledgement of Country for use by the Centre.

The Acknowledgement of Country was drafted in these terms:

> We acknowledge the Yuggera and Turrbal people as the True Owners and Custodians of this land, the waters and the skies. We pay our respects to their Ancestors and their descendants who continue cultural and spiritual connections to Country.
>
> We acknowledge that the TC Beirne School of Law sits on stolen land, sovereignty was never ceded, and no treaty has been negotiated.
>
> We acknowledge the Traditional Law and Lore which was practised upon this land for millennia before the common law was forced upon it, and which continues to be practised today. We acknowledge the injustices faced by Aboriginal and Torres Strait Islander peoples and communities as a result of settler law. We recognise their valuable contributions to Community through activism and advocacy and to wider Australian and international society.

Cultural load was a theme that permeated this research — not just in the interviews, but behind the scenes as well.[88] While it was important to us that the views of the Aboriginal and/or Torres Strait Islander members of our research team were prominent in the design and execution of the research, we did not want this to translate into 'more work' for them. Team members built trusting relationships throughout the process,[89] and there was an 'honest exchange of ideas',[90] however we are not certain that the correct balance was struck. Throughout the research process, it seemed that the Aboriginal and/or Torres Strait Islander team members did undertake more than their fair share of the work. We humbly acknowledge that we did not always 'get it right', [91] but through

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87 As one of Morley's interviewees observes, for Aboriginal and/or Torres Strait Islander students 'it's not an even playing field. Many of our [Indigenous] law graduates ... haven't had the opportunities that many other law graduates have had': Morley (n 80) 22. For this reason, Aboriginal and/or Torres Strait Islander students should be prioritised for clinical and pro bono placement.

88 Douglas documented the cultural load of students way back in the 1990s: Heather Douglas, 'This Is Not Just About Me: Indigenous Students' Insights About Law School Study' (1998) 20(2) *Adelaide Law Review* 315. See also Heather Douglas and Cate Banks, 'From a Different Place Altogether: Indigenous Students and Cultural Exclusion at Law School' (2000) 15 *Australian Journal of Law and Society* 42.

89 *AIATSIS Code of Ethics* (n 12) 14 [1.6].

90 Ruby Traucnieks, *Possibilities of Partnership and Cultural Safety* (Speech, University of Queensland, 12 October 2023).

91 We feel encouraged by Burns and Nielsen's (n 86) acknowledgement that they also 'did not always "get it right"' and we note their commitment to modelling humility: 28.

this project, we learned the importance of honest communication and creating a culture of openness to allow for the airing and addressing of these matters.

The impact of cultural load on Aboriginal and/or Torres Strait Islander participants is an important issue for all researchers, but particularly those who engage regularly with Aboriginal and/or Torres Strait Islander peoples. Ensuring we maintain genuine relationships with Aboriginal and/or Torres Strait Islander peoples, seeking and embedding their perspectives, while also minimising their cultural load, is a difficult balance to strike. One of our participants said this research project was an example of cultural load, however others spoke positively about the interview process, and said that having the chance to reflect provided them with some ideas that they would take back to their organisations and colleagues. This is consistent with Te Aho and Morse's experience — they said an unintended outcome of their research was that individuals engaged in a 'cathartic and liberating sharing of experiences'.[92]

Our findings are specific to their context, and it is important that investigations such as this are conducted at other universities, and in other schools. While we made some important findings in respect of our Centre, School and University, there is a diversity of experiences and perspectives to be shared. Our participants emphasised this, and often reminded us that they spoke only for themselves and of their own experiences. We learned the importance of building local relationships to address local concerns, and that discussions should be ongoing and long-term. We encourage all law schools to facilitate similar conversations as we all continue to build cultural competency and create culturally safe spaces for students, staff and partners.

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92 Linda Te Aho and Bradford Morse, *Indigenous Cultural Competency for Legal Academics Program Final Evaluation Report* (Final Report, 2018) 14.

Polygamy: Proper or Primitive? Possible Pathways to Permitting the Practice in Australia

Michail Sergeev Ivanov*

This article examines the history of polygamy, globally and particularly within Australia. It traces the emergence of marriage as an institution, including the institutionalisation of monogamy and displacement of polygamy as a social norm in most parts of the Western world. It finds that polygamy can be an egalitarian practice when its foundations are not religious, regardless of whether those enjoying the practice are themselves religiously motivated. The article proposes for the legalisation of polygamy under the Marriage Act 1961 (Cth) *and* Family Law Act 1975 (Cth) — *the two primary Australian statues governing marriages. Modelled on the Supreme Court of New Zealand's decision in* Mead v Paul *[2023] NZFLR 75, this article proposes to recognise polygamous marriages — those between three or more persons — as sets of couples.*

I Introduction

Polygamy is akin to bestiality,[1] 'deplorable'[2], 'inconsistent with [Australian] culture'[3] and would 'destabilise and alter society'.[4] Words of this calibre are used in Australian public discourse about polygamy[5] to shoot down the prospect of it ever making its way into Australia and, by association, the Australian legal system. True it is that, historically and at present, states which legally recognise polygamy tend

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1. See Bridie Jabour, 'Cory Bernardi Links Same-Sex Marriage to Polygamy and Bestiality Again', *The Guardian* (online, 18 June 2013) <https://www.theguardian.com/world/2013/jun/18/cory-bernardi-same-sex-bestiality>.
2. Frederick John Nile, 'Polygamy Un-Australian Says Rev Nile' (Media Release, Christian Democratic Party, 24 June 2008).
3. See Peter Veness, 'Polygamous Relationships Unlawful: Govt', *The Age* (online, 25 June 2008) <https://www.theage.com.au/national/polygamous-relationships-unlawful-govt-20080625-2wix.html>.
4. See Edward M Gomez, 'Polygamous Marriages, in Australia?', *SFGate* (online, 26 June 2008) <https://web.archive.org/web/20171009093329/http://blog.sfgate.com/worldviews/2008/06/26/polygamous-marriages-in-australia/>.
5. Commonwealth, *Parliamentary Debates*, House of Representatives, 26 October 1905, 4188 (King O'Malley).

DOI: 10.38127/uqlj.v44i1.10015

to foster relationships which are sexually discriminatory, oppressive or abusive.[6] But such circumstances represent only a few strokes of a painting composed over the course of millennia. There is no universally accepted relationship structure, neither in Australia nor elsewhere.[7] Indigenous Australians have customarily practised polygamy, only to have their customs suppressed by the imposition of Christian doctrine.[8] Muslim migrant communities and, potentially, polyamorous groups also make use of polygamy.[9] With a person being allowed to enter multiple de facto relationships simultaneously[10] and to have their foreign polygamous marriages recognised for the purpose of initiating proceedings,[11] it would not be so great a leap to legalise polygamy.

To make an informed judgement as to whether polygamy should be legalised, one must appreciate the history of polygamy. This includes the manner through which it has been moulded to suit a particular social group, for better or worse. An examination of multiple-partner relationships and marriages throughout selected historical periods shows polygamy's rise and fall from being a widely socially and legally acceptable relationship structure. This article asks whether polygamy in Australia can be legalised so as to take the form of an egalitarian relationship structure. In posing this question, the article posits that the 'law should not inhibit the formation of family relationships'.[12] People should be at liberty to choose their relationship structure, so long as all parties involved fully consent and nobody's fundamental rights or freedoms are encroached upon.[13] Hence, in part, the need for it to be conductive to egalitarianism, whether or not monogamy is. In fact, monogamous marriages can be egalitarian, but, in

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6 Thom Brooks, 'The Problem with Polygamy' (2009) 37(2) *Philosophical Topics* 109, 111; Daniel Seligson and Anne EC McCants, 'Polygamy, the Commodification of Women, and Underdevelopment' (2022) 46(1) *Social Science History* 1, 13; Tsoaledi Daniel Thobejane and Takayindisa Flora, 'An Exploration of Polygamous Marriages: A Worldview' (2014) 5(27 P2) *Mediterranean Journal of Social Sciences* 1058, 1060.

7 Walter M Gallichan, *Women Under Polygamy* (Holden & Hardingham, 1914) 13.

8 Ann McGrath and Winona Stevenson, 'Gender, Race, and Policy: Aboriginal Women and the State in Canada and Australia' (1996) 71 *Labour History* 37, 49.

9 'Polygamy: How Common Is Polygamy in Australia? And How Does It Work?', *Insight* (Special Broadcasting Service, 29 May 2012) <https://web.archive.org/web/20171020085449/http://www.sbs.com.au/news/insight/tvepisode/polygamy> ('Polygamy: How Common?'); Samantha Maiden, 'Wedded Welfare Bliss for Muslims', *The Daily Telegraph* (Sydney, 11 December 2016) 7; Maria Pallotta-Chiarolli, Peter Haydon and Anne Hunter, '"These Are Our Children": Polyamorous Parenting' in Abbie E Goldberg and Katherine R Allen (eds), *LGBT-Parent Families: Innovations in Research and Implications for Practice* (Springer, 2013) 117, 125.

10 *Family Law Act 1975* (Cth) s 4AA(5)(b) ('*FLA*').

11 Ibid s 6.

12 Australian Law Reform Commission, *Multiculturalism: Family Law* (Discussion Paper No 46, January 1991) ix [3].

13 Ibid.

practice, are not always so.[14] Polygamy deserves attention because, though it is a relationship structure favoured by few, its adoption may grow in time. Its legalisation would place it on equal footing with monogamous marriage and grant the polygamous the same rights as the monogamous. In addition, with legalisation there may be a societal shift in people's perception of polygamy and willingness to outwardly adopt a polygamous lifestyle.[15] This article grounds the discussion in an Australian context, though never losing sight of those states where polygamy is a legally recognised and acceptable relationship structure.

The answer to the question posed above is developed across six substantive parts. Part II lays out the structure of the article, provides a set of definitions for the essential terms used throughout and explains Australia's secular order. Part III presents a brief and selective history of polygamy. Because a complete history of polygamy is beyond the scope of this article, only the most pivotal periods and events through which polygamy was shaped are considered. Part IV establishes the social history of polygamy in an Australian domestic context. Particular attention is given to the customary relationships of Indigenous Australians. In Part V, the reader is asked to reflect on the information so far presented and consider whether proposing to legalise polygamy is a fanciful suggestion which, if implemented, would bring immoral and undesirable consequences. On the assumption that polygamy is to be legalised in Australia, Part VI suggests how that reform could be enacted. Part VII concludes by answering the question posed by this article: whether polygamy in Australia can take the form of an egalitarian relationship structure and, if so, how. This article finds that polygamy in Australia can be an egalitarian practice and should be legalised by amending the *Marriage Act 1961* (Cth) ('*Marriage Act*') and *Family Law Act 1975* (Cth) ('*FLA*'), the two primary statutes overseeing marriage law. The proposed reform is based upon the Supreme Court of New Zealand's decision in *Mead v Paul*.[16] Polygamy's legalisation is nevertheless subject to a proviso. There is a need for further study of polygamy's (not legally recognised) prevalence and effects on families, including children, in Australia, as well as the interest of polyamorists and others to engage in polygamy, should it be legal.

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14 Christine R Schwartz and Hongyun Han, 'The Reversal of the Gender Gap in Education and Trends in Marital Dissolution' (2014) 79(4) *American Sociological Review* 605, 608, 623–4; John K Antill, Sandra Cotton and Susan Tindale, 'Egalitarian or Traditional: Correlates of the Perception of an Ideal Marriage' (1983) 35(2) *Australian Journal of Psychology* 245, 254.

15 Noting the differences between polygamous and same-sex marriage, see, eg, Lixia Qu and Jennifer Baxter, 'Rise in Same-Sex Couples Living Together since Changes to Marriage Act' (Media Release, Australian Institute of Family Studies, August 2023) <https://aifs.gov.au/media/rise-same-sex-couples-living-together-changes-marriage-act>. See also MV Lee Badgett et al, 'A Review of the Effects of Legal Access to Same-Sex Marriage' [2024] *Journal of Policy Analysis and Management* 1, 18.

16 *Mead v Paul* [2023] NZFLR 75 ('*Mead*').

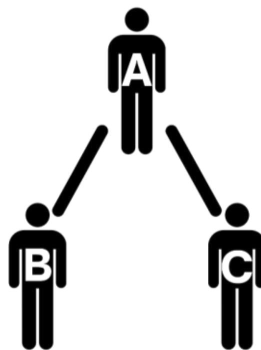
II Preface

This article only concerns itself with the potential for legalising polygamy in Australia. Reference is made to other jurisdictions in order to consider the nature of the practice elsewhere and how it could affect Australian society if legalised. Yet, the argument advanced applies only to the social and legal systems of Australia. Importantly, this article does not extensively explore bigamy; rather, it is discussed only insofar as it showcases the perception of, and its historical conflation with, polygamy. Bigamy is also mentioned in Part V due to its necessary reform if polygamy were to be legalised. In order properly to address the argument advanced in this article, key terms must be defined.

A *'Polyamory'*

'Polyamory' refers to a relationship, other than a multiple-spouse marriage, between three or more persons, regardless of the persons' sex or sexuality.[17] The term also includes the practice of participating in multiple separate relationships simultaneously.[18] For instance, person A has a relationship with person B and, at the same time, a separate relationship with person C (see Figure 1). The distinction between polyamory and polygamy is particularly important for the historical discussion that follows because of the references made to multiple-partner relationships that existed prior to the institution of marriage having been formed.

Figure 1: An example of a polyamorous relationship



17 *Macquarie Dictionary* (online at 9 August 2023) 'polyamory' (def 1); Theodore Bennett, 'The Inclusion of Others? Polygamy and Australian Law' (2019) 32(3) *Australian Journal of Family Law* 266; Nikó Antalffy, 'Polyamory and the Media' (2011) 8(1) *Scan: Journal of Media Arts Culture* 7:1–13 <http://scan.net.au/scn/journal/vol8number1/Niko-Antalffy.html>.

18 Leehee Rothschild, 'Compulsory Monogamy and Polyamorous Existence' (2018) 14(1) *Graduate Journal of Social Science* 28, 42.

B *'Polyanthropy'*

Inconsistent and differing terminology surrounds polygamy.[19] For the purposes of this article, 'polyanthropy' defines the practice of simultaneously having multiple spouses, regardless of the spouses' sex or sexuality. For example, if a man marries another man and a woman, that is referred to as an instance of polyanthropy. Polyanthropy, therefore, falls under the umbrella of polygamy, alongside polygyny and polyandry.

C *'Polygyny' and 'Polyandry'*

'Polygyny' is the practice of a man simultaneously having multiple wives,[20] whereas 'polyandry' is the practice of a woman simultaneously having multiple husbands.[21]

D *'Polygamy'*

'Polygamy', then, means a legally- or customarily-recognised marriage between three or more persons,[22] whether it be polygynous, polyandrous or polyanthropous. 'Polygamy' is the umbrella term and refers to any multiple-spouse marriage.[23]

E *'Monogamy' and 'Bigamy'*

'Monogamy', on the other hand, means a legally- or customarily-recognised marriage between only two spouses.[24] It also means the practice of being in a relationship, other than marriage, with only one person.[25] Lastly, 'bigamy' means

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[19] Brooks (n 6) 116; Seligson and McCants (n 6) 3; Shelley Park, 'Polyamory Is to Polygamy as Queer Is to Barbaric?' (2017) 20(1) *Radical Philosophy Review* 1, 3–4; Vanessa von Struensee, 'The Contribution of Polygamy to Women's Oppression and Impoverishment: An Argument for Its Prohibition' (2005) 12(1–2) *Murdoch University Electronic Journal of Law* 1, 1.

[20] Stephanie Kramer, 'Polygamy Is Rare around the World and Mostly Confined to a Few Regions', *Pew Research Center* (Web Page, 7 December 2020) <https://www.pewresearch.org/short-reads/2020/12/07/polygamy-is-rare-around-the-world-and-mostly-confined-to-a-few-regions/>; *Macquarie Dictionary* (n 17) 'polygyny' (def 1).

[21] Gerald D Berreman, 'Pahari Polyandry: A Comparison' (1962) 64(1) *American Anthropologist* 60, 60; *Macquarie Dictionary* (n 17) 'polyandry' (def 1).

[22] *Macquarie Dictionary* (n 17) 'polygamy' (def 1); Emily J Duncan, 'The Positive Effects of Legalizing Polygamy: Love Is a Many Splendored Thing' (2008) 15(2) *Duke Journal of Gender Law & Policy* 315, 315.

[23] Bennett (n 17) 266; Erin Fowler, 'A Queer Critique on the Polygamy Debate in Canada: Law, Culture, and Diversity' (2012) 21 *Dalhousie Journal of Legal Studies* 93, 93.

[24] Rothschild (n 18) 29; *Macquarie Dictionary* (n 17) 'monogamy' (def 1).

[25] *Macquarie Dictionary* (n 17) 'monogamy' (def 2).

the criminal offence of purporting to marry a person whilst simultaneously being in a marriage with another person.[26]

F *'Sex' and 'Sexuality'*

For the avoidance of doubt, when used, the term 'sex' refers to 'the quality of being male, female or intersex'.[27] The term 'sexuality' refers to one's sexual preference; for example: heterosexuality, homosexuality or bisexuality.[28]

G *'Indigenous'*

When reference is made to 'Indigenous Australians', or the 'Indigenous', that means those persons who were, or are descendants of, the first inhabitants of Australia.[29] The term, used in this context, includes Aboriginal Australians and Torres Strait Islanders.[30]

H *Secular State*

To preface the historical discussion of polygamy, it is pertinent to note the legal foundations for secularism in Australia.[31] The term 'secular', as used in this article, denotes the separation, albeit not the prohibition, of religion from the state's establishment of societal order.[32] Secularism remains a difficult to define concept and its operation in Australia has been the subject of academic debate.[33] Australia, as a secular state, cannot be isolated from the religious tenets of British colonial law, which led to the state's establishment.[34] Australian secularity operates to normalise those religious tenets.[35] Section 116 of the *Australian*

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[26] Bennett (n 17) 266; *Macquarie Dictionary* (n 17) 'bigamy'; Theodore Bennett, 'Why the Bigamy Offence Should Be Repealed' (2019) 41(3) *Sydney Law Review* 359, 359.

[27] *Macquarie Dictionary* (n 17) 'sex' (def 2).

[28] *Macquarie Dictionary* (n 17) 'sexuality' (def 2).

[29] 'Indigenous Australians: Aboriginal and Torres Strait Islander People', *Australian Institute of Aboriginal and Torres Strait Islander Studies* (Web Page, 12 July 2020) <https://aiatsis.gov.au/explore/indigenous-australians-aboriginal-and-torres-strait-islander-people>.

[30] Ibid.

[31] For a comprehensive discussion of secularity in Australia, see Tom Frame, *Church and State: Australia's Imaginary Wall* (UNSW Press, 2006).

[32] *Macquarie Dictionary* (n 17) 'secular' (def 5).

[33] Holly Randell-Moon, 'The Secular Contract: Sovereignty, Secularism and Law in Australia' (2013) 23(3) *Social Semiotics* 352, 352.

[34] Ibid 355.

[35] Ibid.

Constitution establishes a secular order for the Commonwealth, albeit not the State governments:[36]

> The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.[37]

Section 116 was, in part, a result of the numerous denominations of Christianity present in Australia following settlement.[38] It was not necessarily a sign of secularism; indeed, the *Constitution*'s Preamble expresses the States' reliance 'on the blessing of Almighty God'.[39] Australians still celebrate Christmas as a public holiday[40] and the Lord's Prayer is read in Parliament by the President each day.[41] The relationship between state and religion is one moulded by Christian conceptions of that relationship.[42] Australia is not secular in the sense of being areligious ('laicism'); rather, its *Constitution* ensures religious equality and prevents one religion from dominating the rest, establishing the state and its laws as neutral in matters of religion.[43] Still, this secularity allows the state to mould laws based on religious conviction.[44] Invariably, the Church interacts with the state, though there is no established state church.[45] Tom Frame terms this a 'religiously pluriform', rather than secular, state.[46]

In *Hyde v Hyde*,[47] Lord Penzance in the Court of Probate and Divorce of England and Wales held that 'marriage, as understood *in Christendom*, may … be defined as the voluntary union for life of one man and one woman, to the exclusion of all others', such that a polygamous union was not a 'marriage' under English law.[48] Despite not being law in Australia, the definition in *Hyde v Hyde* has been largely adopted, whereby the 'Christian ideal of monogamous lifelong union' has formed the basis of marriage laws.[49]

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[36] Ibid 356; Gonzalo Villalta Puig, 'Parliamentary Prayers and Section 116 of the *Australian Constitution*' (Papers on Parliament No 51, Parliamentary Library, Parliament of Australia, July 2009) 78.

[37] *Australian Constitution* s 116.

[38] Randell-Moon (n 33) 357.

[39] *Australian Constitution* Preamble; Frame (n 31) 51.

[40] Randell-Moon (n 33) 358.

[41] Puig (n 36) 1; Carolyn Evans, 'Religion and the Secular State in Australia' in Javier Martínez-Torrón, W Cole Durham and Donlu D Thayer (eds), *Religion and the Secular State: National Reports* (Complutense University of Madrid Faculty of Law, 2015) 87, 87.

[42] Frame (n 31) 11.

[43] Ibid 52, 83; *Attorney-General (Vic) ex rel Black v Commonwealth* (1981) 146 CLR 559, 613.

[44] Evans (n 41) 95.

[45] Frame (n 31) 7, 94.

[46] Ibid 83.

[47] *Hyde v Hyde* (1866) LR 1 P&D 130.

[48] Ibid 133.

[49] Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws* (Report No 31, 11 June 1986) 140–1 [234]–[235]; Michael Quinlan, 'Marriage, Tradition, Multiculturalism and the Accommodation of Difference in Australia' (2016) 18(1) *University of Notre Dame Australia Law Review* 71, 84.

As the 2021 Census shows, there is an increasing diversity of religions in Australia, with 10% of Australians following a religion other than Christianity, up 5.1% from 2001.[50] At the same time, 38.9% of Australians do not follow any religion — a 22.2% increase since 2001[51] — whereas 43.9% are affiliated with Christianity — a 24.1% decrease since 2001[52] — demonstrative of an increasingly secular society. It is with understanding this secularism that the history of polygamy in Australia as described in Part III can be truly appreciated. Yet, in comprehending what polygamy and monogamy truly mean, it is necessary to establish how they came about historically beyond Australia.

III Primates and Polygamy: A Brief History

This Part provides a brief overview of polygamy. One could dedicate multiple tomes to the exploration of the practice and the possible reasons for its emergence. This Part by no means aims to cover every aspect of the history of polygamy. Rather, it concisely considers: (A) the prehistorical existence of multiple-partner relationships; (B) the emergence of marriage as an institution, going back to the time of the Babylonian Empire in Mesopotamia; (C) the role of theism in shaping conceptualisations of polygamy, and; (D) the extent and effects of polygamy at present. All of these areas are relevant to the law reform proposed in Part V to the extent that they show how polygamy is shaped by the circumstances in which it is found.

A *Prehistoric Partnerships*

In *The Descent of Man*, Charles Darwin hypothesised that:

> the most probable view is that [man] aboriginally lived in small communities, each with a single wife, or if powerful with several, whom he jealously guarded against all other men. Or he may not have been a social animal, and yet have lived with several wives, like the gorilla.[53]

Darwin's view is generally supported by anthropological studies conducted since.[54] The Australopithecus who lived between 5 million–1.8 million BCE, for

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[50] 'Religious Affiliation in Australia', *Australian Bureau of Statistics* (Web Page, 7 April 2022) <https://www.abs.gov.au/articles/religious-affiliation-australia>.

[51] Ibid.

[52] Ibid.

[53] Charles Darwin, *The Descent of Man, and Selection in Relation to Sex* (Princeton University Press, 1981) 362.

[54] Marina E Adshade and Brooks A Kaiser, 'The Origin of the Institutions of Marriage' (Working Paper No 1180, Department of Economics, Queen's University, August 2008) 3; Wataru Nakahashi and Shiro Horiuchi, 'Evolution of Ape and Human Mating Systems' (2012) 296 *Journal of Theoretical Biology* 56, 57.

instance, is said to have had multiple sexual partners without any long-term pair bonding.[55] Monogamy suited some, such as those inhabiting savannahs, where the safety of a group unit would have otherwise been difficult to ensure.[56] That was so because a man's protection of his harem and their children in an arid environment would have been far more burdensome than if the man were in a monogamous relationship.[57] The existence of prehistoric polyamory (as marriage did not exist) is understood by some to have resulted from a disproportionality between the sexes.[58] Namely, the greater number of women than men in polygynous communities and the preponderance of men in polyandrous communities.[59] The contemporary prevalence of polyandry in hunter-gatherer societies suggests it might have existed in similar prehistoric societies.[60] The existence of polyamory in humans can, perhaps, also be explained by the sexual dimorphism of men.[61] Where the males of a certain species are bigger in comparison to the females, there is a correlation with that species being more polygynous (though not necessarily polyandrous) than monogamous.[62] However, the sexual dimorphism of a human is lower than that of our primate relatives.[63] For instance, human males are approximately 15% heavier than females, whereas male gorillas are approximately 100% heavier than females.[64] This lower human sexual dimorphism correlates to a monogamous tendency.[65] Serial monogamy is thought to have existed amongst hunter-gatherer societies; but that must be distinguished from polyamory to the extent that if, for example, a man had five sexual partners in a year, those partners would not have necessarily known each other.[66] Invariably, monogamy and polyamory would have each been represented throughout history.[67]

Though it seems to have been a part of human life since its inception, one can never know the extent to which our oldest ancestors were polyamorous.[68] A more

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55 Adshade and Kaiser (n 54) 3; Nakahashi and Horiuchi (n 54) 57.

56 Adshade and Kaiser (n 54) 4.

57 Ibid.

58 Gallichan (n 7) 13.

59 Ibid.

60 Katherine E Starkweather and Raymond Hames, 'A Survey of Non-Classical Polyandry' (2012) 23(2) *Human Nature* 149, 153.

61 Walter Scheidel, 'A Peculiar Institution? Greco-Roman Monogamy in Global Context' (2009) 14(3) *The History of the Family* 280, 281.

62 Ibid.

63 Ryan Schacht and Karen L Kramer, 'Are We Monogamous? A Review of the Evolution of Pair-Bonding in Humans and Its Contemporary Variation Cross-Culturally' (2019) 7 *Frontiers in Ecology and Evolution* 230:1–10, 4.

64 Ibid.

65 Ibid.

66 Ibid.

67 Ibid 7.

68 Edward Adamson Hoebel, *The Law of Primitive Man: A Study in Comparative Legal Dynamics* (Harvard University Press, 1954) 290; Schacht and Kramer (n 63) 1.

recent practice which humanity better understands and which is central to this article is that of marriage.

B *Marriage in Mesopotamia*

Marriage has always been underpinned by economic factors, such as the title to property and division of labour.[69] As an institution, marriage has historically served the wealthy who wished to pass on their status and property.[70] In the Babylonian Empire, the 18th century BCE Code of Hammurabi permitted polygamy and concubinage.[71] Wife purchase was allowed and each wife was ranked by superiority.[72] Nevertheless, the concubines and children of a Babylonian husband were held in high regard and were to be supported if a husband separated from his concubine.[73]

During the 5th century BCE, marriage in Mesopotamia was noticeably different based on social class.[74] Whereas the non-elite often cohabitated and had children before marriage, the elite never did.[75] For the elite, a father would marry off his daughters and make sure they did not have children before marriage, because that could cast legal doubts over whether they are the father's true heirs.[76] The written record of a marriage, which formed its contractual nature, stemmed from a need to clarify the rights of each person.[77]

In Ancient Greece, multiple simultaneous sexual partnerships by both men and women were socially acceptable.[78] At that time, descent was matrilineal.[79] Polygamy was present in Greece in the 8th century BCE, as well as throughout Eurasia and Africa in the 5th century BCE, though by that time it was no longer documented in Greece.[80] During the Hellenistic Era (323 BCE–30 BCE), after the collapse of the Greco-Macedonian Empire, the Seleucid and Ptolemaic dynasties

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69 Stephanie Coontz, *Marriage, a History: How Love Conquered Marriage* (Penguin Books, 2006) 65–6, 69; John Witte Jr, *Church, State, and Family: Reconciling Traditional Teachings and Modern Liberties* (Cambridge University Press, 2019) 13 ('*Church, State, and Family*').

70 Belinda Hewitt and Michelle Brady, 'Marriage Has Changed Dramatically throughout History, but Gender Inequalities Remain', *The Conversation* (online, 15 November 2018) <http://theconversation.com/marriage-has-changed-dramatically-throughout-history-but-gender-inequalities-remain-106346>; Joseph Henrich, Robert Boyd and Peter J Richerson, 'The Puzzle of Monogamous Marriage' (2012) 367(1589) *Philosophical Transactions of the Royal Society B* 657, 657.

71 Gallichan (n 7) 26–7.

72 Ibid; *Code of Hammurabi* arts 138, 145.

73 Gallichan (n 7) 30–1; *Code of Hammurabi* art 137.

74 Caroline Waerzeggers, 'Changing Marriage Practices in Babylonia from the Late Assyrian to the Persian Period' (2020) 7(2) *Journal of Ancient Near Eastern History* 101, 109.

75 Ibid 116.

76 Ibid.

77 Ibid 114.

78 Frederick Engels, *The Origin of the Family, Private Property, and the State* (Pathfinder Press, 1972) 30.

79 Ibid.

80 Seligson and McCants (n 6) 10.

each employed polygamy as a diplomatic measure.[81] Kings established ties with other rulers when they acquired multiple wives.[82] Jealousy and deceit stained such marriages and led to numerous fatal conflicts between spouses.[83]

As farming emerged, slavery was born.[84] The fruit of that slave labour, including the slaves themselves, was vested in the man.[85] The man thus held a superior status, wherein a patrilineal system was conducive to him passing down his inheritance to his children.[86] In a matrilineal family, the man's children did not inherit his property.[87] Instead, the deceased's siblings, nieces or nephews were the inheritors.[88] This problem effectively put an end to matriliny and the associated superiority of the woman as the person through whom a child's parentage could be traced.[89] With the end of matriliny, polygamy could no longer be a widespread practice.[90] For, to ensure that a man's children were his heirs, he exercised dominance over his wife and demanded her obedience, so that he could guarantee her fidelity.[91]

C *Theism and Polygamy*

The establishment of monogamy as the norm throughout Europe was further shaped by the widespread institutionalisation of Christianity. Before the introduction of Christianity, European states were mostly monogamous in practice.[92] Yet, in Roman law, a man could elect between having one wife or several concubines.[93] Christianity's emergence in Greco-Roman law led to the adoption of an exclusively monogamous and life-long definition of marriage.[94] Christianity sought to encourage lasting and equal marriages, thus denouncing divorce and polygamy.[95] It then became the official religion of the Roman Empire under Theodosius I's rule in 380 CE.[96] In this way, monogamy was strengthened and institutionalised, leading to its acceptance throughout much of the world,

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81 Coontz (n 69) 60.
82 Ibid.
83 Ibid.
84 Engels (n 78) 65–6.
85 Ibid 66–7.
86 Ibid.
87 Ibid.
88 Ibid 67.
89 Ibid 60–1.
90 Ibid 68.
91 Ibid 69.
92 Martha Bailey and Amy J Kaufman, *Polygamy in the Monogamous World: Multicultural Challenges for Western Law and Policy* (Praeger, 2010) 70.
93 Witte Jr, *Church, State, and Family* (n 69) 18.
94 Ibid.
95 Coontz (n 69) 86; Witte Jr, *Church, State, and Family* (n 69) 18.
96 Coontz (n 69) 87.

which continues today.[97] Augustine of Hippo's teachings were fundamental in shaping the Christian idea of marriage throughout Europe, the Americas and Australasia.[98] Having had several concubines himself, Augustine converted to Christianity in 386 CE and thereafter wrote some of the most important texts on the ideals of Christian life.[99] One of Augustine's relevant maxims was that 'all that is born of concubinage is sinful flesh'.[100]

As theologian Ron Du Preez finds, across the Old and New Testaments, there are 33 cases of polygamy.[101] In the Old Testament, six of Israel's leaders were said to have more than one wife: Abraham, Jacob, Gideon, Saul, David and Solomon.[102] Of these Biblical characters, most were negatively affected by their polygamous ways and God sought to reform them.[103] It is, therefore, only logical that Christian missionaries would condemn polygamy, in the same way that God has in the Bible.[104] Still, some defend polygamy on the basis of its biblical history.[105] Even with polygamy gaining the religious acceptance of Islam, Judaism and certain Christian denominations, polyandry has not been so fortunate.[106]

Polygamy is often associated with the Muslim population; and for good reason.[107] Under the Quran, Muslim men are permitted to have up to four wives.[108] Polyandry, however, is not allowed.[109] It is trite to observe that this inherently renders the practice inegalitarian.[110] Moreover, to the extent that it is practised at all, it is a right exercised mostly by those who can afford having multiple wives.[111]

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97 Scheidel (n 61) 289.

98 Witte Jr, *Church, State, and Family* (n 69) 41.

99 Ibid 30, 41; Augustine of Hippo, *Confessions and Enchiridion*, ed Albert C Outler (Christian Classics Ethereal Library, 2006) 38, 44.

100 Phillop Schaff (ed), *Nicene and Post-Nicene Fathers* (Christian Classics Ethereal Library, 2008) ser 1, vol 5, 774.

101 Ron Du Preez, 'Polygamy in the Bible with Implications for Seventh-Day Adventist Missiology' (DMin Dissertation, Andrews University, 1993) 135.

102 Ibid 134; Kramer (n 20).

103 Du Preez (n 101) 285; John Witte Jr, 'The Legal Challenges of Religious Polygamy in the USA' (2009) 11(1) *Ecclesiastical Law Journal* 72, 73.

104 Preez (n 101) 285.

105 Charles Amone, 'Polygamy as a Dominant Pattern of Sexual Pairing Among the Acholi of Uganda' (2020) 24(3) *Sexuality & Culture* 733, 745.

106 Rothschild (n 18) 33.

107 Thobejane and Flora (n 6) 1059.

108 Du Preez (n 101) 4; Omar M Khasawneh, Abdul Hakeem Yacin Hijazi and Nassmat Hassan Salman, 'Polygamy and Its Impact on the Upbringing of Children: A Jordanian Perspective' (2011) 42(4) *Journal of Comparative Family Studies* 563, 564; Kramer (n 20); *Quran,* Surah An-Nisa 4:3.

109 Thobejane and Flora (n 6) 1061.

110 Ibid 1062.

111 Bailey and Kaufman (n 92) 7.

An oft-cited reason for the allowance of polygamy in the Quran is the inequality which the Prophet Muhammad lived in and sought to overcome.[112] Concerned that men were taking as many women as they could, the Prophet (being polygynous Himself) imposed the limit of four wives — a number that is itself conditional on the man being able to treat each of them justly.[113] The status of women was thus improved.[114] The reputation of polygamy is inextricably tied with the perception of the Sharia law in Islamic jurisprudence as oppressive and patriarchal which allows for discriminatory practices, such as a women's incapacity to contract, where the value of a man's life is greater than a woman's.[115] It would nevertheless be ignorant to think that most Muslim women oppose polygamy.[116] Many find love in polygamy.[117]

The history of polygamy in the United States of America ('USA'), where, since colonisation, it has been illegal,[118] is of particular note. At present, an estimated 60,000 individuals in the USA engage in polygamy.[119] First recorded amongst the Indigenous people of Florida in the 16th century, multiple rebellions occurred because of conflicts between the polygamous ways of the Indigenous peoples and its opposition by Franciscan missionaries and Spanish colonisers.[120] Pressured by colonial governments throughout North America, the Indigenous largely stopped practising polygamy.[121]

In 1830, Joseph Smith established the Church of Jesus Christ of Latter-day Saints, and with it, Mormonism.[122] Smith claimed to have experienced a revelation that a man should have at least three wives to have a fulfilled afterlife.[123] The practice of polygamy was broadly adopted by the Mormons after the establishment of a Mormon population in Illinois in 1839, even more so after Utah

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[112] Michèle Alexandre, 'Lessons from Islamic Polygamy: A Case for Expanding the American Concept of Surviving Spouse So as to Include De Facto Polygamous Spouses' (2007) 64 *Washington and Lee Law Review* 1461, 1465 ('Lessons from Islamic Polygamy'); Sasha Marie Holden, 'The Polygamy Paradox: A Feminist Re-Understanding of Polygamy, Human Movement and Human Rights' (PhD Thesis, King's College London, 2018) 51.

[113] *Quran,* Surah An-Nisa 4:3; Alexandre, 'Lessons from Islamic Polygamy' (n 112) 1465; Michèle Alexandre, 'Big Love: Is Feminist Polygamy an Oxymoron or a True Possibility' (2007) 18(1) *Hastings Women's Law Journal* 3, 22 ('Big Love'); Bailey and Kaufman (n 92) 9.

[114] Gallichan (n 7) 47.

[115] Alexandre, 'Big Love' (n 113) 12–13.

[116] Ibid 4; Angela Campbell, 'How Have Policy Approaches to Polygamy Responded to Women's Experiences and Rights? An International, Comparative Analysis: Final Report for Status of Women Canada' in Angela Campbell et al, *Polygamy in Canada: Legal and Social Implications for Women and Children* (2005) 1, 10.

[117] Campbell (n 116) 10.

[118] Shayna M Sigman, 'Everything Lawyers Know about Polygamy Is Wrong' (2006) 16(1) *Cornell Journal of Law and Public Policy* 101, 108.

[119] Alexandre, 'Lessons from Islamic Polygamy' (n 112) 1463.

[120] Bailey and Kaufman (n 92) 39, 47–8.

[121] Ibid 7.

[122] Duncan (n 22) 317–18; Sigman (n 118) 111.

[123] Duncan (n 22) 315; Gallichan (n 7) 300–1.

church elder Orson Pratt publicly endorsed it in 1852.[124] This led to widespread condemnation by the media[125] and a systematic effort by successive governments to supress the practice.[126] Amidst an increase in polygamy amongst the Mormons, the *Morrill Anti-Bigamy Act of 1862* was passed.[127] It penalised polygamy and restricted the Mormon Church's ability to hold land.[128] The first Republican presidential candidate, John Charles Fremont, focused his campaign on overcoming the 'twin relics of barbarism — polygamy and slavery'.[129]

Mormon polygamy was more than a condemned religious practice — it was framed as a threat to 'white' civilisation.[130] Jurist Francis Lieber, for example, objected to polygamy for making Caucasians act Asiatic or African.[131] The Supreme Court of the United States adopted this view in the seminal case of *Reynolds v United States*[132] which established that religious belief cannot excuse a criminal indictment.[133]

In Canada, some Mormons of British Columbia practise polygamy, albeit illegally.[134] Canada sought to prevent a flow of the persecuted American Mormons by outlawing polygamy in 1892.[135] Polygamy was also practised by Indigenous Canadians who were prosecuted — or rather, persecuted — for entering into more than one marriage.[136] Today, polygamy in Canada is associated with the Fundamentalist Church of Jesus Christ of Latter-Day Saints, a Mormon sect, led by convict Warren Jeffs who is serving a life sentence for a number of heinous sexual offences.[137]

The influence of Christian missionaries across the world cannot be understated. Societies like the Church of England Zenana Missionary Society, which spread Christianity through India, Japan and China, condemned 'Mohammedanism' (Islam) as 'carnal' and 'gross'.[138] Polygamy, by association, received the same treatment.[139] The 20th century saw widespread prohibitions of

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124 Sigman (n 118) 112; Bailey and Kaufman (n 92) 83.

125 Sigman (n 118) 113.

126 Ibid 118.

127 Duncan (n 22) 317.

128 Ibid 318; *Morrill Anti-Bigamy Act of 1862*, ch 126, §§ 1–2, 12 Stat 501, 501.

129 Duncan (n 22) 317; Sigman (n 118) 114.

130 Martha M Ertman, 'Race Treason: The Untold Story of America's Ban on Polygamy' (2010) 19(2) *Columbia Journal of Gender and Law* 287, 295; Suzanne Lenon, 'Intervening in the Context of White Settler Colonialism: West Coast LEAF, Gender Equality and the Polygamy Reference' (2016) 6(6) *Oñati Socio-Legal Series* 1324, 1331.

131 Sigman (n 118) 127.

132 *Reynolds v United States*, 98 US 145, 164 (1878) ('*Reynolds*'); Lenon (n 130) 1330.

133 *Reynolds* (n 132) 166–7.

134 Fowler (n 23) 94.

135 Ibid 98; Lenon (n 130) 1332.

136 Fowler (n 23) 99; Bailey and Kaufman (n 92) 76.

137 Bailey and Kaufman (n 92) 95. See also *Reference re: Section 293 of the Criminal Code of Canada* [2011] BCSC 1588, where Bauman CJ declared that the prohibition of polygamy is consistent with the Canadian Charter of Rights and Freedoms due to polygamy's 'harm to women, to children, to society and to the institution of monogamous marriage': at [5].

138 Gallichan (n 7) 122.

139 Ibid 123.

polygamy, with states like Thailand, China and India forbidding the practice.[140] Though it is illegal in some Muslim-majority states including Türkiye and Tunisia, it remains legal in others, including Saudi Arabia, the United Arab Emirates, Iran, Pakistan, Indonesia and Malaysia.[141]

D *Polygamy at Present*

Polygamy is estimated to exist among 83% of societies in the world.[142] Pew Research Center nevertheless estimates that only 2% of the world's population currently lives in a polygamous household.[143] Polygamy, today, is most common throughout Africa, particularly sub-Saharan Africa.[144] It is also legal throughout much of the Middle East.[145] It is imperative to note that most studies of polygamy relate solely to polygyny.[146] For that reason, polygyny and polyandry are discussed separately below. All the other references to 'polygamy' are solely to polygyny.

In Africa, polygamy is most common throughout the 'polygamy belt' which stretches from Senegal to Tanzania.[147] Within the polygamy belt, the rates of polygamy (almost exclusively polygyny) vary from about 20–40%,[148] partly because of the differing rates of Islam.[149] Polygamy is generally in decline.[150] Its decline is partly attributable to colonial and missionary education and people's conversion to Christianity, both of which discouraged polygamy.[151] In former French West Africa, for instance, a 'dual church–state education system' operated to eliminate the practice.[152] In Zimbabwe, the end of colonial rule led to increased education of the native population, which improved their understanding of HIV/AIDS, but did not affect the rates of polygamy.[153] Similarly, the increased education of the Kenyan population in the 1980s did not have an

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[140] Thobejane and Flora (n 6) 1060; John Witte Jr, 'Why Two in One Flesh? The Western Case for Monogamy over Polygamy' (2015) 64 *Emory Law Journal* 1675, 1701 ('Why Two in One Flesh?').
[141] Khasawneh, Hijazi and Salman (n 108) 568; Bailey and Kaufman (n 92) 7.
[142] Du Preez (n 101) 3; Fowler (n 23) 96; Thobejane and Flora (n 6) 512; Witte Jr, 'Why Two in One Flesh?' (n 140) 1700.
[143] Kramer (n 20).
[144] Thobejane and Flora (n 6) 1060; Bailey and Kaufman (n 92) 8.
[145] Scheidel (n 61) 284.
[146] Fowler (n 23) 93.
[147] Kramer (n 20); Witte Jr, 'Why Two in One Flesh?' (n 140) 1701; James Fenske, 'African Polygamy: Past and Present' (2015) 117 *Journal of Development Economics* 58, 58.
[148] Luca Maria Pesando, 'Polygyny and Women's Status: Myths and Evidence' in Walter Leal Filho et al (eds), *Gender Equality* (Springer, 2021) 975, 975; Witte Jr, 'Why Two in One Flesh?' (n 140) 1701; Bailey and Kaufman (n 92) 14.
[149] Bailey and Kaufman (n 92) 19, 30.
[150] Pesando (n 148) 975.
[151] Fenske (n 147) 58, 70; Bailey and Kaufman (n 92) 14.
[152] Fenske (n 147) 70.
[153] Ibid 59.

effect on polygamy.[154] Areas close to Catholic or Protestant missions have a lower incidence of polygamy,[155] but higher education is not an impediment to its practice.[156] As such, education does not inherently reduce polygamy — rather, colonial and missionary education does.[157]

1 *Polygyny and its Problems*

Property and land ownership laws in polygynous societies have consistently been found to discriminate against women.[158] Part of that discrimination stems from the bride price paid to the bride's father, which causes the bride to enter a polygynous marriage and bear children at an early age.[159] In most polygynous societies, women also have no say as to whether their husband marries another, which, in turn, leads to women's opposition to polygyny.[160] Indeed, absent a wife's consent, the addition of another wife causes lasting trauma.[161] Competition and conflict is often rife in such marriages.[162] Women and their children compete for resources within the family.[163] Infertility, too, leads to rivalry.[164]

By virtue of their young marrying age, women in polygynous marriages are commonly less educated than their husbands and have fewer financial resources.[165] Yet, a polygynous wife might have more control over her earnings than a monogamous one.[166] Studies on the impact of polygyny on the mental well-being of children have not demonstrated any significant relationship between the two variables, although there is a slightly higher incidence of mental health issues in the children of polygyny.[167] In two studies of 210 and 182 Bedouin adolescents in Israel, respectively, Elbedour et al found that adolescents from monogamous families generally experienced a higher level of family cohesion and fewer psychopathological problems than those in polygamous families.[168] As to learning disabilities and intelligence, there is no difference between the children of

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154 Ibid.
155 Ibid 63.
156 Ibid 67.
157 Ibid 70.
158 Seligson and McCants (n 6) 13.
159 Ibid 16.
160 Pesando (n 148) 977.
161 Thobejane and Flora (n 6) 1060.
162 Pesando (n 148) 977.
163 Ibid.
164 Ibid 980.
165 Seligson and McCants (n 6) 16; Pesando (n 148) 978.
166 Pesando (n 148) 977.
167 Mohammad Al-Sharfi, Karen Pfeffer and Kirsty A Miller, 'The Effects of Polygamy on Children and Adolescents: A Systematic Review' (2016) 22(3) *Journal of Family Studies* 1, 7.
168 Salman Elbedour, William Bart and Joel Hektner, 'The Relationship between Monogamous/Polygamous Family Structure and the Mental Health of Bedouin Arab Adolescents' (2007) 30(2) *Journal of Adolescence* 213, 224.

monogamy and polygyny.[169] Family dysfunction is, however, higher in polygynous families.[170] In an analysis of 22 cross-sectional studies on the impact of polygyny on women's mental health, 15 studies found a higher prevalence of conditions such as anxiety, hostility and somatisation in polygynous wives.[171] Studies have also found children in polygynous families to be more nutritionally deficient due to a worse intrafamilial distribution of resources.[172]

What must be borne in mind is that studies into these matters are primarily carried out in Arab societies.[173] In sub-Saharan Africa, polygyny has been associated with higher levels of paternal education, unlike Arab societies.[174] In Arab culture, a man's first marriage is often arranged, so subsequent wives are shown more affection.[175] Further rejection of polygamy stems from its occurrence in societies which endorse female genital mutilation and discrimination against women.[176] That is to say, polygamy is shaped by custom, whether discriminatory or otherwise.[177] It is not an inflexible object. It is a creature which adapts to its environment. Its image reflects the social context in which it is grounded.

2 *Polyandry*

Through that process of adaptation comes polyandry. It is most common in Tibet, Nepal, parts of India and amongst the Sinhalese people of Sri Lanka.[178] In polyandrous marriages, wives are commonly shared between brothers.[179] This most common form of polyandry is termed 'fraternal polyandry'.[180] The prevalence of polyandry in Tibet has been rationalised on the basis of a house being seen as a 'moral person'.[181] Kinship is formed around the house which is

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169 Al-Sharfi, Pfeffer and Miller (n 167) 8.

170 Ibid 9.

171 LD Shepard, 'The Impact of Polygamy on Women's Mental Health: A Systematic Review' (2013) 22(1) *Epidemiology and Psychiatric Sciences* 47, 50.

172 Pesando (n 148) 982.

173 Al-Sharfi, Pfeffer and Miller (n 167) 13; Campbell (n 116) 6.

174 Al-Sharfi, Pfeffer and Miller (n 167) 13.

175 Campbell (n 116) 3.

176 Struensee (n 19) 4; Holden (n 112) 65.

177 Struensee (n 19) 8.

178 Berreman (n 21) 60; ER Leach, 'Polyandry, Inheritance and the Definition of Marriage' (1955) 55 *Man* 182, 183; Binod Pokharel, 'Changing Practices of Polyandry among the People of West-Northern Frontier of Nepal' (2018) 5 *Keanean Journal of Arts* 50, 51; Youba Raj Luintel, 'Agency, Autonomy and the Shared Sexuality: Gender Relations in Polyandry in Nepal Himalaya' (2004) 31(1) *Contributions to Nepali Studies* 43, 43 ('Agency, Autonomy and the Shared Sexuality'); Youba Raj Luintel, 'Locating Power in Polyandry: Sexuality and Property Regimes in Gender Relations in the Nepal Tibet Frontier Households' (M.A. Thesis, International Institute of Social Studies, 2000) ('Locating Power in Polyandry').

179 Leach (n 178) 182; Berreman (n 21) 60.

180 Berreman (n 21) 60.

181 Eveline Bingaman et al, 'Kinship and the State in Tibet and Its Borderlands: Introduction' (2021) 23(1) *Inner Asia* 2, 12.

shared by a set of brothers and their wife.[182] The extent of polyandry in these societies is unclear,[183] although it is likely not as uncommon as it is often thought.[184] A study by anthropologists Katherine Starkweather and Raymond Hames found polyandry in 53 societies outside of those in the Himalayas between India, Nepal and Tibet.[185] It is a practice found in a range of climates: deserts, tropics and the Arctic.[186] Julius Caesar, for instance, reported that groups of 'ten or twelve' Briton males, particularly brothers, would possess their wives in common; that is, the Britons practised polyandry.[187] The accuracy of this account has been debated,[188] but it shows that the discussion of polyandry is not limited only to the people inhabiting the Himalayas. As with polygyny, missionaries have historically sought to abolish polyandry. This is true of the Kagoro in Northern Nigeria, the Sinhalese of Sri Lanka and the Tibetans.[189]

Polyandry is generally a result of economic factors. When, say, two brothers share the same wife, their children would have a joint, rather than separate, interest in the inheritance.[190] If one of the brothers is in a polygynous or monogamous marriage, their property retention is eliminated.[191] Studies of polyandry in the Himalayas consistently cite the commonality of property as the main motivating factor.[192] The Pahari people practise polyandry as a patrilineal system where the husbands jointly hold all the property.[193] The wife refers to each of her spouses as 'husband' and the children refer to all of the men as 'father'.[194] The children's inheritance is derived from the spouses as a whole, not solely from their biological parents.[195] In contrast, amongst the Nyinba people of Nepal only one man is identified as a child's father.[196] Given that a birth certificate shows only one father

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182 Ibid.
183 Pokharel (n 178) 51.
184 Starkweather and Hames (n 60) 150; Adshade and Kaiser (n 54) 3.
185 Starkweather and Hames (n 60) 150.
186 Ibid 153; Juddha Bahadur Gurung, 'Rapid Cultural Change: A Case Study of Polyandry Marriage System among the Gurung Community from Upper Mustang, Nepal' (2013) 6 *Dhaulagiri Journal of Sociology and Anthropology* 75, 76.
187 Julius Caesar, *Cæsar's Commentaries on the Gallic and Civil Wars* (Harper & Brothers, 1859) 113; Engels (n 78) 34.
188 Eleanor Scott, 'Polyandry in Late Iron Age and Roman Britain: Myth or Reality?', *Eleanor Scott Archaeology* (Blog Post, 30 April 2018) <https://eleanorscottarchaeology.com/els-archaeology-blog/2018/3/6/polyandry-in-late-iron-age-and-roman-britain-myth-or-reality>.
189 Nancy E Levine and Walter H Sangree, 'Conclusion: Asian and African Systems of Polyandry' (1980) 11(3) *Journal of Comparative Family Studies* 385, 405.
190 Nancy E Levine and Joan B Silk, 'Why Polyandry Fails: Sources of Instability in Polyandrous Marriages' (1997) 38(3) *Current Anthropology* 375, 376; Berreman (n 21) 62.
191 Berreman (n 21) 64.
192 Gurung (n 186) 82.
193 Berreman (n 21) 61; Luintel, 'Agency, Autonomy and the Shared Sexuality' (n 178) 54.
194 Berreman (n 21) 62.
195 Ibid.
196 Levine and Silk (n 190) 379; Luintel, 'Locating Power in Polyandry' (n 178) 26.

and one mother, a child of polyandry cannot claim the property of a polyandrous marriage.[197] Such a division of property instead occurs customarily.[198]

For the Lama people of Nepal, fraternal polyandry is an extant, but declining, practice.[199] Likewise, as agriculturalism has declined amongst the Nyinba, who now have a broader variety of job offerings, so has polyandry.[200] For the Lama and Nyinba, property is held by the eldest brother, while all the brothers engage in the pastoral work.[201] If one brother is to abandon the polyandrous marriage, they would lose any claim to the property held by the eldest brother.[202] Notwithstanding the eldest brother's position, they are not superior to the other spouses; it is the wife who is the head of the family.[203] Indeed, Nyinba women are more marginalised in monogamous than polyandrous marriages.[204] They are more economically independent than their monogamous counterparts because their property is owned and inherited in common.[205] Polyandrous wives also have greater sexual freedom because the 'identification of individual fatherhood' does not matter.[206] Sex is also treated as a pleasurable, rather than purely reproductive act.[207] In Sinhalese customary marriages, the sexual rights of each husband and the proprietary rights of each child are indistinguishable.[208] Such marriages have been found to reduce sexual jealousy between partners,[209] although findings to the contrary have also been made.[210]

Another form of polyandry is the 'secondary marriage'.[211] A secondary marriage requires a wife to be in a primary monogamous marriage and then to enter into a secondary monogamous marriage without exiting the first-mentioned monogamous marriage.[212] The secondary marriage model allows, in essence, a woman to have a series of concurrent monogamous marriages.[213] It can also coexist with polygyny, such that each man may have multiple wives, whereas

197 Leach (n 178) 184.
198 Ibid.
199 Pokharel (n 178) 55.
200 Levine and Silk (n 190) 385.
201 Pokharel (n 178) 56.
202 Ibid.
203 Luintel, 'Locating Power in Polyandry' (n 178) 27–9; Luintel, 'Agency, Autonomy and the Shared Sexuality' (n 178) 50; Gurung (n 186) 85–6.
204 Luintel, 'Locating Power in Polyandry' (n 178) 51.
205 Ibid; Levine and Sangree (n 189) 390; Luintel, 'Agency, Autonomy and the Shared Sexuality' (n 178) 59.
206 Luintel, 'Agency, Autonomy and the Shared Sexuality' (n 178) 71.
207 Ibid.
208 Leach (n 178) 183.
209 Ibid 184; Berreman (n 21) 65; Pokharel (n 178) 55; Luintel, 'Agency, Autonomy and the Shared Sexuality' (n 178) 57.
210 Levine and Silk (n 190) 377; Henrich, Boyd and Richerson (n 70) 664.
211 Levine and Sangree (n 189) 400.
212 Ibid.
213 Ibid.

each wife may have multiple husbands in separate concurrent secondary marriages.[214] It is most common in Northern Nigeria,[215] despite having been abolished in 1968.[216] The secondary marriages of Northern Nigerians serve as a diplomatic tool, wherein members of tribal sub-groups are able to form a connection.[217] Inheritance, as in the Himalayas, is patrilineal.[218]

Where there is polyandry, there is polygyny.[219] The inverse cannot be said.[220] This complex history shows that polygamy is a flexible practice and one which has been moulded throughout history to accommodate the differences in values and proprietary interests of a particular society.[221] No one relationship structure suits all.

IV Polygamy in Australia

This Part provides a social, as opposed to legal, history of polygamy in Australia. It does not deal with law in substance; rather, it highlights the political rhetoric and socio-economic, cultural and religious factors that have led to the current state of the law, which is explored in Part V. It is important to appreciate this history because, if any law is to be reformed, one must reflect on how the present was shaped by the past and whether any reform is necessary to accommodate interests previously neglected.

A *Indigenous Australians and Polygamy*

Indigenous Australians traditionally practise polygamy, though it is almost exclusively polygyny.[222] A significant limitation in considering the historical rates of polygyny amongst Indigenous Australians is the absence of pre-settlement data.[223] There have, nevertheless, been some exceptional reports of polyandry.[224]

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214 Ibid 400–1.

215 Ibid 399.

216 Walter H Sangree, 'The Persistence of Polyandry in Irigwe, Nigeria' (1980) 11(3) *Journal of Comparative Family Studies* 335, 337.

217 Levine and Sangree (n 189) 401.

218 Ibid 406.

219 Ibid 403; Henrich, Boyd and Richerson (n 70) 659.

220 Henrich, Boyd and Richerson (n 70) 659.

221 Campbell (n 116) 8.

222 Ronald M Berndt and Catherine H Berndt, *The World of the First Australians: Aboriginal Traditional Life Past and Present* (Aboriginal Studies Press, 5th ed, 1996) 197; Adolphus Peter Elkin, *Australian Aborigines: How to Understand Them* (Angus & Robertson, 4th ed, 1970) 161.

223 Jeremy Long, 'Polygyny, Acculturation and Contact: Aspects of Aboriginal Marriage in Central Australia' in Ronald M Berndt and Australian Institute of Aboriginal Studies (eds), *Australian Aboriginal Anthropology: Modern Studies in the Social Anthropology of the Australian Aborigines* (University of Western Australia Press, 1970) 296 ('Aspects of Aboriginal Marriage in Central Australia').

224 Lorimer Fison and AW Howitt, *Kamilaroi and Kurnai* (Anthropological Publications, 1967) 147.

The Dieri of Central Australia historically presented such an example.[225] Amongst the Dieri, a husband would lend his wife to his tribal brothers, with each tribal brother bearing responsibility to care for her children.[226]

Each polygynous marriage is considered a new 'social unit' in the overall structure.[227] The number of wives can vary greatly.[228] Men commonly have secondary wives who, in turn, are the primary wives of the men's tribal brothers.[229] On Bathurst and Melville islands, reports show a maximum of twenty-nine wives.[230] In desert regions and Arnhem Land, the maximum is around six wives.[231] Monogamy is nevertheless the norm.[232] In 1933, Professor Adolphus Peter Elkin recognised 'social and economic ends', rather than sexual motivations, as leading to polygyny.[233] Those with many wives were given access to 'special trading monopolies'.[234] This, in turn, led to what would generally be considered undesirable practices. For instance, husbands could lend their wives without the wife's consent.[235] In such marriages, the wives were not equal to their husbands.[236]

An 1895 article in *The Queenslander* claimed that women in Indigenous polygamous marriages were subordinates and regarded 'as articles of personal property'.[237] The husband, the article stated, would kill his wives in fits of anger.[238] The article drew a comparison with 'civilised' European marriages in which husbands chastised their wives.[239] Anthropological studies of polygynous marriages from that time do not support such claims. With regard to wives being considered 'chattels', Professor Elkin notes that women abide by the scheme of being wedded to the members of other tribes.[240] He draws a comparison between that system and the historical arranging of marriages amongst European nobility.[241] In anthropologist Lorimer Fison's 19th century studies of the Gamilaraay and Gunaikurnai people (referred to by Fison as 'Kamilaroi and

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225 Starkweather and Hames (n 60) 155.

226 Ibid.

227 Berndt and Berndt (n 222) 206.

228 Ibid 202.

229 Elkin (n 222) 161.

230 Berndt and Berndt (n 222) 202.

231 Ibid.

232 Ibid.

233 'Legal Polygamy', *The Daily Telegraph* (Sydney, 20 April 1933) 1; 'Person: Elkin, Adolphus Peter', *The University of Sydney* (Web Page, 2016) <https://uniarchivesonline.sydney.edu.au/#/records/person/80>.

234 Berndt and Berndt (n 222) 202.

235 Ibid 189.

236 Ibid 208.

237 'The Australian Aborigines', *The Queenslander* (Brisbane, 1 June 1895) 1031.

238 Ibid.

239 Ibid.

240 Elkin (n 222) 157.

241 Ibid.

Kurnai'), he recognised marriage not as a contract, but as 'a natural state' of classes in a system of kinship.[242] It is not a system founded on the rights of a man or woman, but on those of a tribe's class structure.[243] Those classes then guide matters such as land inheritance.[244]

Fison summarised the laws of marriage in four points. First, marriage is communal — the men in one class of a tribe marry all the women in another class of that tribe.[245] Second, all tribe classes are exogamous — one cannot marry within the same tribal class.[246] Exogamous group marriages were the norm.[247] Spouses cohabited and marriages were not limited to two or three spouses.[248] Third, the wife remains in her tribal class after marriage.[249] Fourth, descent is traced maternally.[250] Fison's laws of marriage, which sought to explain kin classification through the concept of 'group marriage', have since been criticised.[251] It is now accepted, as Hiatt describes, that group marriage was not a widespread practice, although de facto group marriage did occur, albeit not as a 'total system', in regimes practising polygyny and wife-sharing (which amounted to polyandry).[252]

Looking to the Areyonga, Haasts Bluff-Papunya and Yuendumu people of Alice Springs, anthropologist Jeremy Long recorded varying rates of polygyny in 1970, with the number of wives per husband ranging from one to six.[253] Noting Lutheran mission evangelists' influence and contact with settlers for over thirty years, Long found a decline in polygyny rates, albeit not 'a very marked' one.[254] The Warlpiri people, who had contact with cattle stations and mining camps in the 1930s, remained more polygynous than the Papunya who had been acculturated through their additional contact with Lutheran mission evangelists during that period.[255] For the Warlpiri, where 'polygyny is the ideal', the percentage of polygynist

[242] Fison and Howitt (n 224) 127–8; Elkin (n 222) 144; Engels (n 78) 56–8.
[243] Fison and Howitt (n 224) 127–8; Quinlan (n 49) 102.
[244] Fison and Howitt (n 224) 127–8.
[245] Ibid 50.
[246] Ibid 52; Elkin (n 222) 147.
[247] Fison and Howitt (n 224) 159–60.
[248] Ibid.
[249] Ibid 52.
[250] Ibid 52, 108, 119, 156.
[251] Lester Richard Hiatt, *Arguments about Aborigines: Australia and the Evolution of Social Anthropology* (Cambridge University Press, 1996) 55.
[252] Ibid 54–5.
[253] Long, 'Aspects of Aboriginal Marriage in Central Australia' (n 223) 292–3.
[254] Ibid 295.
[255] Ibid.

individuals ranged from 19% to 53%.[256] Again, the incidence of polygyny was dependent on economic, as well as sexual, incentives.[257]

Australia, as a secular state which was religiously neutral, chose to deny and exclude the sovereignty and customs of the Indigenous population, which it framed as a competing authority.[258] As irony would have it, the *secular* Australian state forcibly separated Indigenous children from their families in order for *Christian churches* to 'civilise' them with *Christian* values.[259] To the extent that it can be ascertained from publications of the time, Christian missions exerted their 'greatest influence through the women and children'.[260] They acted as the government's vehicle to drive the Indigenous into assimilation.[261] In 1934, *Age* published an article titled 'Christianing the Aborigines', which emphasised the missionary influence upon the Indigenous, as well as the 'chief difficulties' of tackling polygamy[262] — a repeated sentiment.[263]

In 1960, Secretary for Aborigines of the Church Missionary Society, JB Montgomerie, expressed his mission to assimilate the Indigenous: 'Our chief concern is to get on with the job and train and prepare these native peoples for assimilation so that they can become normal citizens of the Commonwealth.'[264] To that end, missionaries were largely successful in reducing polygyny.[265] A search of every issue of the Christian mission newsletters *Our Aim* and *Evangel* reveals two articles substantially discussing polygamy. From 1943, 'Aboriginaldom' describes polygyny as a 'curse which blights the lives of these people'.[266] It highlights the plight of girls as young as five years of age who are taken as wives by young men.[267] In 1944, in 'The Liberation of Needa', WA Long shared the story of Needa, a young woman and 'victim' of polygamy, which was described as 'the Satanic bondage of heathen customs'.[268] '[T]he "war" against polygamy and other heathen customs has been approaching a climax', Long says, recounting how Needa was taken by the missionaries from her husband,

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256 MJ Meggitt, 'Marriage among the Walbiri of Central Australia: A Statistical Examination' in Ronald M Berndt and Catherine H Berndt (eds), *Aboriginal Man in Australia: Essays in Honour of AP Elkin* (Angus & Robertson, 1965) 146, 148–9.

257 Ibid 148–9, 155.

258 Randell-Moon (n 33) 360.

259 Ibid 360–1; McGrath and Stevenson (n 8) 49.

260 'Bathurst Island: Polygamous Aborigines', *The Sydney Morning Herald* (Sydney, 19 April 1934) 8.

261 Laura Rademaker, 'The Polygamy Question: Missions, Marriage, and Assimilation' (2019) 43(2) *Journal of Religious History* 251, 252; McGrath and Stevenson (n 8) 47.

262 'Christianing the Aborigines', *The Age* (Melbourne, 5 December 1934) 15.

263 'Bathurst Island: Polygamous Aborigines' (n 260) 4.

264 Rademaker (n 261) 252.

265 McGrath and Stevenson (n 8) 47.

266 WA Long, 'Aboriginaldom: Second Article on Old Customs Versus New Life' (1943) 37(3) *Our Aim* 13, 13.

267 Ibid.

268 WA Long, 'The Liberation of Needa' (1944) 37(9) *Our Aim* 11, 11.

Charlie.[269] Although the truthfulness of these stories cannot be proven, they show the fraught history Australia has had with polygamy. Acculturation, in general, contributed to a decline in polygyny.[270] As geographer Fay Gale found in her study of the impacts of city life on Indigenous Australians in Adelaide, urbanisation decreased rates of polygyny and marriage more broadly.[271]

B *Polygamy Across the Populace*

There is no established history of polygamy as a standard practice within the non-Indigenous Australian population. The number of non-legally recognised polygamous marriages in Australia cannot be identified and, to that end, there have not been any noteworthy studies.[272] In 1991, the Australian Law Reform Commission said of polygamy that it 'is alien to mainstream Australian culture and to the western European culture from which it derives.'[273]

For over forty years, large groups of Muslims have been migrating to Australia and Islam continues to grow.[274] In the 2021 Census, 813,392 individuals identified as Muslim.[275] Muslim Australians are not homogenous in terms of their background[276] and some may favour polygamy. Even with monogamy, many Muslim marriages entered into may not be registered because there is no such requirement under Islamic law, or simply because of a miscommunication or lack of initiative by the spouses.[277] The general media, such as the Special Broadcasting Service's *Insight*, has examined the existence of polygamy in Australia and reported on instances of polygamy in Indigenous, Lebanese Muslim and Sierra Leonean communities, as well as in the broader public.[278] Anecdotal evidence of weekly requests made to a Muslim Sheikh in Sydney for polygamous marriages

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269 Ibid.

270 Long, 'Aspects of Aboriginal Marriage in Central Australia' (n 223) 296.

271 Fay Gale, 'The Impact of Urbanization on Aboriginal Marriage Patterns' in Ronald M Berndt and Australian Institute of Aboriginal Studies (eds), *Australian Aboriginal Anthropology: Modern Studies in the Social Anthropology of the Australian Aborigines* (University of Western Australia Press, 1970) 305, 315; Witte Jr, 'Why Two in One Flesh?' (n 140) 1701.

272 Ann Black and Kerrie Sadiq, 'Good and Bad Sharia: Australia's Mixed Response to Islamic Law' (2011) 34(1) *University of New South Wales Law Journal* 383, 409; Quinlan (n 49) 100.

273 *Multiculturalism: Family Law* (n 12) 27 [3.43].

274 Jenny Richards and Hossein Esmaeili, 'The Position of Australian Muslim Women in Polygamous Relationships under the Family Law Act 1975 (Cth): Still "Taking Multiculturalism Seriously"?' (2012) 26(2) *Australian Journal of Family Law* 142, 146; Australian Bureau of Statistics, '2021 Census Shows Changes in Australia's Religious Diversity' (Media Release, 28 June 2022) <https://www.abs.gov.au/media-centre/media-releases/2021-census-shows-changes-australias-religious-diversity>.

275 'Religious Affiliation in Australia' (n 50).

276 Black and Sadiq (n 272) 385; Quinlan (n 49) 104.

277 Ann Black, 'Adaptations of Islamic Family Law for the Australian Context' (2016) 30(3) *Australian Journal of Family Law* 159, 169, 171–2.

278 'Polygamy: How Common?' (n 9).

further supports the existence of legally unrecognised polygamous arrangements.[279] Such relationships generally involve a legal marriage and an additional de facto partner who is treated as another spouse.[280] Despite calls for the recognition of polygynous marriages by the President of the Islamic Friendship Association of Australia, in 2008, former federal Attorney-General Robert McClelland vehemently denied any such possibility: 'There is absolutely no way that the Government will be recognising polygamist relationships'.[281]

A 2016 article in the *Sunday Telegraph* quoted a 'Muslim leader' who claimed to know Islamic sheikhs who had multiple legally unrecognised wives, but did not identify them out of fear.[282] Those who practise polygamy (albeit not legally) may fear condemnation, though it is otherwise legal to have multiple de facto partners.[283] The attitudes so far described are consistent with this sentiment.

Curiously, however, polyamory appears to be generally socially acceptable in Australia amongst young and middle-aged Australians, particularly those in the LGBT+ community who are open to exploring mutually- and consensually-polyamorous relationships with their partners.[284] The presence of polyamorous groups at the Sydney Gay and Lesbian Mardi Gras is, to an extent, a public display of its acceptability.[285] In saying this, the rates of polyamory in Australia are not clear. A 2014 Commonwealth Scientific and Industrial Research Organisation-published study found that just under 1% of its 5,323 respondents were in polyamorous relationships.[286] Polyamorist groups exist in every major city and they attract consistent media attention.[287] Ostracism of polyamorists occurs too and remains a social issue.[288] A chapter of *LGBT-Parent Families* presents a study of thirteen Australian parents who are part of polyamory support group

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279 Richards and Esmaeili (n 274) 157.

280 'Polygamy: How Common?' (n 9).

281 'No Recognition for Polygamous Marriage: A-G', *ABC News* (online, 25 June 2008) <https://www.abc.net.au/news/2008-06-25/no-recognition-for-polygamous-marriage-a-g/2483724>.

282 Maiden (n 9) 7.

283 *FLA* (n 10) s 4AA(5)(b).

284 Nell Geraets, 'What It's Really like to Be Non-Monogamous in Australia', *The Sydney Morning Herald* (online, 28 June 2024) <https://www.smh.com.au/lifestyle/life-and-relationships/what-it-s-really-like-to-be-non-monogamous-in-australia-today-20240611-p5jkx1.html>; Kellie Scott, 'Is One Romantic Partner Enough for You?', *ABC News* (online, 24 October 2017) <https://www.abc.net.au/news/2017-10-25/open-relationships-is-one-romantic-partner-enough-for-you/9034330>; Samantha Selinger-Morris, 'Easy as One, Two, Three: Are Throuples Becoming More Mainstream?', *The Sydney Morning Herald* (online, 2 February 2023) <https://www.smh.com.au/lifestyle/life-and-relationships/easy-as-one-two-three-are-throuples-normal-now-20230201-p5ch3i.html>.

285 Antalffy (n 17).

286 Juliet Richters et al, 'Who's Cheating? Agreements about Sexual Exclusivity and Subsequent Concurrent Partnering in Australian Heterosexual Couples' (2014) 11(6) *Sexual Health* 524, 528.

287 Bennett (n 17) 269; Antalffy (n 17).

288 Antalffy (n 17).

PolyVic.[289] The study found that polyamorous parents were hesitant to tell their children about their polyamorous lifestyle for fear of their children spreading word of it and being forcibly separated from their families.[290] Australian polyamorous families are often gay, lesbian or bisexual,[291] such that, if they were married, they would be polyanthropous. The stigmatisation of such families is one of the chief problems faced by the children of the polyamorous.[292] Polyamorous parents, nevertheless, enjoy the benefits of this structure, finding a 'greater ease of parenting'.[293] Still, children in polyamorous families can experience 'separation anxiety and grief' over their parents' partners if they leave.[294] Parents have sought to ameliorate that consequence by ensuring that their partners commit to their children's upbringing.[295] This anxiety, though less likely to occur in a polygamous family because of each spouse's long-term marital commitment (unlike a polyamorous family, where partners may be transient), is perhaps least likely to be found in a monogamous family.

Bigamy, too, has been a part of Australia's history. Often a case of individuals leading a double life or abandoning their current spouse and marrying another, it came into existence partly due to the inaccessibility of divorce for lower- and middle-class Australians.[296] Bigamy has been reported historically,[297] often wrongly referred to as polygamy,[298] which could have furthered the negative perception of polygamy. Courts in the mid-20th century framed it as a serious offence 'of vast importance'[299] — a sentiment which is faintly echoed today.[300] The introduction of the offence, like the prohibition on polygamy, was motivated and justified by reference to civilisation[301] and Christian conceptions of marriage.[302] It was seen as 'akin to blasphemy'.[303]

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289 Pallotta-Chiarolli, Haydon and Hunter (n 9) 117–18.

290 Ibid 121, 123.

291 Ibid 117.

292 Ibid 118, 120.

293 Ibid 125.

294 Ibid 126.

295 Ibid.

296 Bennett (n 26) 371.

297 'A Case of Polygamy', *The Age* (Melbourne, 18 June 1883) 1.

298 Ibid; 'Alleged Polygamy', *Sunday Times* (Sydney, 20 December 1908) 12; 'Charge of Polygamy', *Albury Banner and Wodonga Express* (Albury, 25 December 1908) 41.

299 Bennett (n 26) 359; *Thomas v The King* (1937) 59 CLR 279, 316 (Evatt J) ('*Thomas*'); *R v Bonnor* [1957] VR 227, 240 (O'Bryan J) ('*Bonnor*').

300 Bennett (n 26) 360; *Meena & Meena* [2021] FamCA 161, [10] (Macmillan J); *Chhibber & Kudva* [2014] FamCA 499, [11] (Macmillan J).

301 *Thomas* (n 299) 316.

302 Bennett (n 26) 377; *Bonnor* (n 299) 249.

303 Bennett (n 26) 369.

To this day, people continue to be charged with bigamy, albeit seldom.[304] The important distinction between bigamy and polygamy is the knowledge and, ideally, consent of one spouse in relation to the other.

There have not been any notable recent studies of traditional Indigenous or Islamic marriage practices in Australia.[305] Polygyny has continuously declined, partly because it was never legally recognised.[306] It is fair to say that polygamy is practised by few Australians,[307] but that should not, in and of itself, justify its illegality. Of course, if any reform is to occur, it must be approved by Federal Parliament.

C *Perceptions in Parliament*

In 1905, King O'Malley said that war is 'inseparable from a low state of civilization' and placed it in 'the same category as cannibalism, polygamy, and slavery'.[308] Then, in 1977, Edward Robertson, with respect to recognising Aboriginal law, aligned polygamy with child brides and killing.[309] In 2019, debates about Muslim migrants placed polygamy next to female genital mutilation and wife beating.[310] It is evident that polygamy has been used as an example of uncivilised and undesirable behaviour in multiple contexts.

In 1973, then-Minister for Aboriginal Affairs Gordon Bryant noted that the 'problem' of polygyny is 'solving itself'.[311] Recognising the Christian missionary influence, he claimed a decline in polygyny, largely due to it falling out of fashion.[312] Some years later, in 2013, during the marriage equality debate, Penny Wong said that to 'link marriage equality with polygamy and bestiality [does] nothing other than [promote] bigotry'.[313] Ironically, one could equally say that to link polygamy with bestiality would be bigoted. Statements of this nature show

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304 Daniel Jeffrey, 'This Man Allegedly Had Two Wives at the Same Time. He's Been Arrested for It', *Nine News* (online, 10 February 2023) <https://www.9news.com.au/national/western-australia-crime-man-arrested-alleged-bigamy-two-wives-australia-federal-police/d71c064a-6ff7-47dd-bba8-1be67190b61d>; Bennett (n 26) 360; *Bijarniya & Mahawal* [2022] FedCFamC1F 675, [10] (Strum J).

305 Quinlan (n 49) 107.

306 *Recognition of Aboriginal Customary Laws* (n 49) 136 [228].

307 Bennett (n 17) 268; Black and Sadiq (n 272) 409.

308 *Parliamentary Debates* (n 5) 4188.

309 Commonwealth, *Parliamentary Debates*, Senate, 20 October 1977, 1623 (Edward Robertson).

310 Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 11 February 2019, 4 (Mohammad Tawhidi).

311 Commonwealth, *Parliamentary Debates*, House of Representatives, 25 September 1973, 1444 (Gordon Bryant).

312 Ibid.

313 Commonwealth, *Parliamentary Debates*, Senate, 20 June 2013, 3505.

one thing — that polygamy is scorned by the Australian public because of its association with inequality and discrimination.[314]

So, it is with an understanding of this complex history that polygamy can be recognised as a fragment of Australian life which has, to some extent, always existed. Polygamy can be considered 'Australian' despite historical efforts to exterminate the practice. It is one that remains, but is condemned and likely hidden by those who engage in it for fear of that condemnation.

V *Polygamia Phantasmagoria*: The Problems of Polygamy and Misgivings of Monogamy

It may well seem fanciful and naïve to encourage the adoption of polygamy in Australia. What the reader must bear in mind is that there is no universally accepted relationship structure.[315] As stated earlier, people should be afforded the opportunity to choose a relationship structure for themselves. This Part presents an overview of the deficiencies of monogamy. It also addresses a number of criticisms levelled at polygamy and shows that polygamy is not inherently inegalitarian, such that the deficiencies found within must be eliminated, rather than the practice as a whole. Additionally, a distinction is drawn between the effects polygamy would have in Australia and its effects in other states at present. It is with this knowledge that the reader must approach the question in Part V as to how the law should be reformed.

A *The Misgivings of Monogamy*

The subordination of women is by no means confined to polygamy. In monogamous marriages, practices including foot-binding in China, tooth discolouration in Japan and the punishment of adultery as far back as the 12th century BCE in Assyrian laws show that to be true.[316] Such practices reinforce the perception of the wife as property[317] — a view not limited by time, location or the number of spouses. Monogamy does not guarantee sex equality, nor does polygamy.[318] Through the 18th and 19th centuries, women were considered the

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314 'Gender Equality and Polygamy Are Not Compatible', *The Sydney Morning Herald* (online, 26 June 2008) <https://www.smh.com.au/politics/federal/gender-equality-and-polygamy-are-not-compatible-20080626-2xf5.html>.

315 Gallichan (n 7) 13.

316 Coontz (n 69) 46–7; Gallichan (n 7) 252–3.

317 Gallichan (n 7) 252–3.

318 Zainab Naqvi, 'It's Women Who Suffer from a Lack of Recognition of Polygamous Marriage', *The Conversation* (online, 11 May 2016) <http://theconversation.com/its-women-who-suffer-from-a-lack-of-recognition-of-polygamous-marriage-56406>.

property of their husbands.[319] Yet, today we permit monogamy. The former legality of marital rape throughout Europe and the USA, as well as the arguable existence of a common law immunity to that effect in Australia[320] formed part of a monogamous marriage.[321] Yet, today we permit monogamy.

Professor of Law John Witte Jr finds monogamy to be natural because, throughout history, men have 'been more prone to extramarital sex', so marriages developed as 'enduring and exclusive' relationships.[322] It seems difficult to reconcile this idea with the reality of serial monogamy. In Australia, around 26% of marriages involve at least one spouse who has been in a previous marriage — a rate that has steadily increased since the late 1970s.[323] Divorce rates, though slightly decreasing since the late 1990s, are roughly three times higher than one hundred years ago when divorces were not as accessible and no-fault divorces were not permitted.[324] The nature of human relationships is changing.[325] Many engage in a series of monogamous relationships.[326] Likewise, polyamory in Australia (or at least its visibility) will continue to grow.[327] In the USA, approximately 1 in 9 people have engaged in polyamory.[328] Indeed, it is estimated that, in the USA, there are more polyamorists than gay or lesbian individuals.[329] To be clear, many polyamorists are non-heterosexual.[330]

B *Drawing a Distinction*

The studies of polygamy's social effects described in Part IID would not necessarily translate to an Australian context.[331] Unlike Australia, the Middle Eastern and African societies in which polygamy is found are not so ethnically or religiously diverse.[332] Additionally, unlike most states in which it is legal,

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319 Hewitt and Brady (n 70).

320 *PGA v The Queen* (2012) 245 CLR 355, 392–3 [100] (Heydon J).

321 Rothschild (n 18) 36.

322 John Witte Jr, 'Why Monogamy Is Natural', *The Washington Post* (Washington, 3 October 2012) 2.

323 Lixia Qu and Jennifer Baxter, 'Marriages in Australia', *Australian Institute of Family Studies* (Web Page, March 2023) <https://aifs.gov.au/research/facts-and-figures/marriages-australia-2023>.

324 Lixia Qu and Jennifer Baxter, 'Divorces in Australia', *Australian Institute of Family Studies* (Web Page, March 2023) <https://aifs.gov.au/research/facts-and-figures/divorces-australia-2023>.

325 Fowler (n 23) 100.

326 Ibid; Qu and Baxter, 'Marriages in Australia' (n 323); Qu and Baxter, 'Divorces in Australia' (n 324).

327 Bennett (n 17) 269.

328 Amy C Moors, Amanda N Gesselman and Justin R Garcia, 'Desire, Familiarity, and Engagement in Polyamory: Results From a National Sample of Single Adults in the United States' (2021) 12 *Frontiers in Psychology* 619640:1–12, 5.

329 Alicia N Rubel and Tyler J Burleigh, 'Counting Polyamorists Who Count: Prevalence and Definitions of an under-Researched Form of Consensual Nonmonogamy' (2020) 23(1–2) *Sexualities* 3, 22.

330 Moors, Gesselman and Garcia (n 328) 8.

331 Quinlan (n 49) 108.

332 Ibid.

polygamy in Australia would not be a product of religious law.[333] Of course, as with monogamy, there would be instances of abuse and inequality.[334] As with monogamy, it is the suppression of those adversities that must be sought, not the elimination of the practice in which they arise.[335] If marriage is divorced from its religious foundations[336] (whether or not the people entering monogamous or polygamous marriages are motivated by their religious beliefs) and it instead recognises the autonomy of the individuals wishing to be a part of that institution, then polygamy may well have a place in Australian society.[337]

Professor Thom Brooks presents several criticisms of polygamy which lead Brooks to conclude that it is inegalitarian in fact and theory.[338] Brooks' first substantive argument is that polygamy promotes gender inequality, such that it should be opposed.[339] He recognises in a note that 'pervasive gender inequality' may arise in monogamous marriages as well, albeit not to the extent found in polygamous marriages.[340] The synonymous use of 'polygamy' and 'polygyny' in literature on the topic has not helped in this respect.[341] The economic factors that have led to the adoption of gender roles and discrimination in monogamous marriages are not a reason to do away with monogamy.[342] Rather, those factors must be addressed, as they have been, in order to ensure an institution of marriage which places both spouses on equal footing.[343] Sex inequality is a result of disparities between the sexes which favour men in education, health and bargaining power.[344] It is more prominent in poor than in rich states.[345] The patriliny in states allowing polygamy furthers the sex inequality and shapes the nature of a marriage, whether monogamous or polygamous.[346] Similarly, sex-based violence is more acceptable in poorer states.[347] Women in the Middle East and North Africa have little freedom in controlling their lives and their labour

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[333] Andrew March, 'Is There a Right to Polygamy? Marriage, Equality and Subsidizing Families in Liberal Public Justification' (2011) 8(2) *Journal of Moral Philosophy* 246, 258.

[334] Ibid 260.

[335] Ibid.

[336] Witte Jr, 'Why Two in One Flesh?' (n 140) 1729.

[337] Quinlan (n 49) 108.

[338] Brooks (n 6) 118.

[339] Ibid 114–15.

[340] Ibid 119 n 14.

[341] Seligson and McCants (n 6) 3; March (n 333) 258.

[342] Gregg Strauss, 'Is Polygamy Inherently Unequal?' (2012) 122(3) *Ethics* 516, 524; Bennett (n 17) 282.

[343] Strauss (n 342) 524.

[344] Seema Jayachandran, 'The Roots of Gender Inequality in Developing Countries' (2015) 7(1) *Annual Review of Economics* 63, 64.

[345] Ibid.

[346] Ibid 77.

[347] Ibid 66.

force participation is low.[348] These are not circumstances brought about by polygamy, but ones in which polygamy finds itself.[349]

Brooks is critical of polygynous wives' inability to divorce another wife, leaving the husband as the only spouse with a right to divorce one of the wives.[350] This argument is true of polygynous marriage in fact, but it ignores the possibility for structural reform. Generally, in a polygamous marriage, only one central spouse can marry multiple others.[351] For example, in a polygamous marriage between three persons (A, B and C), person A, as the central spouse, is married to person B. Person A is also married to person C. Persons B and C, however, are not married to each other. This results in person A being the central spouse.[352] This issue can be overcome by requiring each spouse to be married to every other spouse (see Figure 2) in accordance with Strauss' 'polyfidelity' model.[353] In striking a balance, this model may not suit all wishing to be polygamous or those seeking to follow religious or cultural custom.[354] Nevertheless, it seems the most appropriate for a relationship structure conducive to egalitarianism which removes the concept of a central and peripheral spouse.[355] Unlike traditional polygamy, this model would be most conducive to polygamous unions between people who all have, for example, sexual relations with one another, as well as the shared rearing of children.[356] Alternatively, if a central spouse is to remain, Strauss' 'molecular polygamy' model could be used; whereby there remains a central spouse, but each peripheral spouse is allowed to have multiple spouses of their own.[357] In this way, each peripheral spouse can also act as a central spouse in another marriage of theirs.[358] The model's shortcoming lies in the lack of familial unity, as each spouse can keep their families separate.[359]

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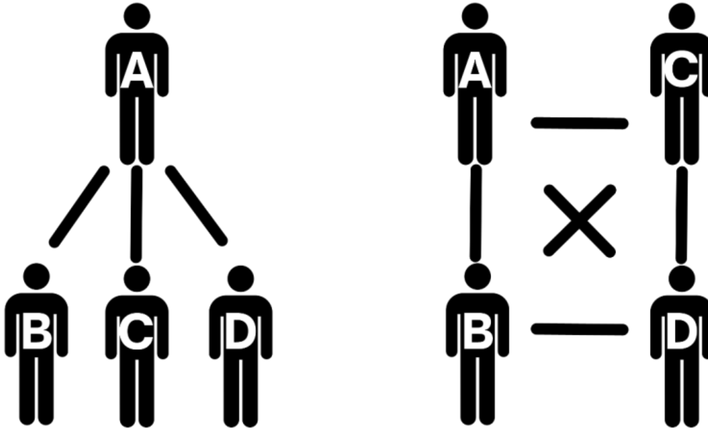
348 Ibid 66, 69.
349 Struensee (n 19) 12.
350 Brooks (n 6) 116.
351 Strauss (n 342) 517.
352 Ibid 524.
353 Ibid 534.
354 Ibid 525.
355 Ibid 517.
356 Ibid 536–7.
357 Ibid 534.
358 Ibid 540.
359 Ibid 542.

Figure 2: Two possible configurations of polygamy; the structure on the right being preferable, according to Strauss



The last substantial argument by Brooks worth noting is that polygamy discriminates against non-heterosexuals.[360] In his view, polygamy 'presuppose[s] that polygamous marriages are heterosexual marriages'.[361] That is true of societies where only polygyny is allowed, but the legalisation of polyanthropy would inherently change that. Legalising polygyny, whilst prohibiting polyandry and polyanthropy is inherently unequal and discriminatory.[362] But legalising polygamy as polyanthropy (covering all of its forms) would eliminate this issue.[363] This is all to say that polygamy is not inherently inegalitarian. We have made it so, but, in an Australian context, it can be fair and it can be conducive to ensuring Australians' freedom to enter the relationship structure they desire.

Monogamy is not inherently a virtue and polygamy is not inherently a vice.[364] Is it too awful to be lawful? Arguably, no. There is a need for more research of non-legal polygamous marriages in an Australian context to determine whether polygamy would necessarily bring about negative effects.[365] It is likewise necessary to estimate how many Australians are polyamorous and how many of them, if any, would want to marry in a polyanthropous manner. Discussions about polygamy's legalisation will grow, so it is essential that the options for reform be properly considered.[366]

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[360] Brooks (n 6) 116.
[361] Ibid 116–17.
[362] Strauss (n 342) 518, 544; Bennett (n 17) 279.
[363] Strauss (n 342) 518.
[364] Fowler (n 23) 107.
[365] Quinlan (n 49) 108.
[366] Bennett (n 17) 265; Witte Jr, 'Why Two in One Flesh?' (n 140) 1706; Rothschild (n 18) 49.

VI Putting Polygamy into Practice

Whatever the reader's view on polygamy may be, one should consider that it could be legal so that it provides an Australian the freedom to adopt a relationship structure of their choice. How polygamy is to be put into effect is of critical importance. If it would be contrary to the existing framework overseeing marriage, that is reason enough to resist its adoption. However, before any of the proposals discussed below can be put into effect, the implications of those proposals for other areas of law, such as social security, estate and taxation law, would need to be critically examined, although doing so is beyond the scope of this article.

This Part sets out several ways by which polygamy could be legalised at the federal level, being the most appropriate level for such reform,[367] and identifies one as the most appropriate. This is done across six sub-parts. First, (A) presents a brief overview of the main statutes overseeing marriages in Australia. Second, (B) addresses the Commonwealth's constitutional power to legislate for polygamy. Third, (C) discusses the existing system of relationship registration, with reference to polyamory and the implications for polygamy. Fourth, (D) presents the most appropriate reform to the offence of bigamy under the *Marriage Act*. Fifth, (E) presents the possibility of only recognising polygamy in customary marriages, but rejects that option for the reasons discussed. Sixth, (F) presents the most appropriate manner for legalising polygamy under the *Marriage Act*, based largely on the Supreme Court of New Zealand's decision in *Mead v Paul*.[368] This part also notes the necessary safeguards to ensure that it is not an inegalitarian or illiberal practice. Seventh, (G) explores the current recognition of foreign polygamous marriages.

A *The Acts*

The *Marriage Act* and *FLA* are the two primary statues at the federal level governing marriages and the disputes, settlements and related matters that might arise from them.[369] The *Marriage Act* did not initially define 'marriage'.[370] It was not until 2004 that 'marriage' was defined as 'the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.'[371] This definition reinforced the Christian conception of marriage in line with the definition of marriage in *Hyde v Hyde* (as discussed in Part IH).[372] The definition was then amended in 2017 to 'the

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[367] Bennett (n 17) 278.

[368] *Mead* (n 16).

[369] Bennett (n 17) 270–1.

[370] *Ghazel & Ghazel* (2016) 306 FLR 173, 176 [21] (The Court) ('*Ghazel*').

[371] See Marriage Amendment Bill 2004 (Cth) sch 1 item 1; *Ghazel* (n 370) 176 [24].

[372] Olivia Rundle, 'An Examination of Relationship Registration Schemes in Australia' (2011) 25 *Australian Journal of Family Law* 121, 175.

union of 2 people to the exclusion of all others, voluntarily entered into for life'.[373] This definition accommodated same-sex marriage.[374]

Whereas the *Marriage Act* effectively forbids polygamy under s 94, which establishes the offence of bigamy, the *FLA* recognises foreign polygamous marriages under s 6 for the purpose of initiating proceedings under the *FLA*.[375] The *FLA*'s recognition of foreign polygamous marriages, as well as multiple de facto relationships (which could include a combination of a de facto relationship and a marriage), is due to its remedial nature.[376] The *FLA* allows for maintenance and property settlements, which would be otherwise unavailable to the polygamous or polyamorous.[377] Those settlements are dealt with only between the two parties involved in each relationship, with consideration only of the interests of the two parties (rather than, for example, all parties in a polyamorous relationship).[378]

B *The Constitutional Power*

Before identifying any possibility for legalising polygamy, it must be established that the Commonwealth has the power to legislate. Section 51(xxi) of the *Australian Constitution* grants the Commonwealth the power to make laws with respect to 'marriage'.[379]

Shortly after the commencement of the *Marriage Act* in 1962, in *Attorney-General (Vic) v Commonwealth*,[380] the Attorney-General for Victoria sought a declaration that several sections of the *Marriage Act* were invalid, including s 94, which prescribes the offence of bigamy (discussed below at (D)).[381] The High Court unanimously found s 94 to be a valid law.[382] In doing so, Windeyer J elected to 'express no view on whether, theoretically, it would be within the power of the Commonwealth Parliament to make polygamy lawful in Australia.'[383] It nevertheless seemed to be within the scope of s 51(xxi) given that the Parliament merely *chose* to legislate for 'Christian marriage'.[384]

In the same year, then Attorney-General Sir Garfield Barwick said of the *Marriage Act* that it 'was devised to provide a modern code suitable to the condition of the Australian society and conformable to the Christian basis of the

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373 *Marriage Act 1961* (Cth) s 5(1) (definition of 'marriage') ('*Marriage Act*').
374 Bennett (n 17) 263.
375 *FLA* (n 10) s 6; *Marriage Act* (n 373) s 94.
376 Bennett (n 26) 375.
377 Ibid.
378 See, eg, *FLA* (n 10) ss 79, 90SM.
379 *Australian Constitution* s 51(xxi).
380 (1962) 107 CLR 529.
381 Ibid 539 (Dixon CJ).
382 Ibid 547, 551 (Dixon CJ), 558 (Kitto J), 575 (Menzies J), 600 (Windeyer J), 601 (Owen J).
383 Ibid 577 (Windeyer J).
384 Ibid 600 (Windeyer J).

life of the nation'.[385] He reasoned that polygamy would not be appropriate given 'the technical problems of adapting the machinery of English law to the polygamous marriage'.[386] That was not to suggest that it is beyond the scope of s 51(xxi).

In the 2013 case of *Commonwealth v Australian Capital Territory*,[387] the High Court had to determine whether the Commonwealth had the power to make a law with respect to same-sex marriage.[388] In issue was the *Marriage Equality (Same Sex) Act 2013* (ACT) which defined 'marriage' as 'the union of 2 people of the same sex to the exclusion of all others, voluntarily entered into for life'.[389] The *Marriage Equality (Same Sex) Act 2013* (ACT) was unanimously held to be inconsistent with the *Marriage Act*, such that the *Marriage Act* prevailed.[390] Relevant to this article, the Court unanimously found that polygamy is within the scope of the s 51(xxi) marriage power:

> Once it is accepted that 'marriage' can include polygamous marriages, it becomes evident that the juristic concept of "marriage" cannot be confined to a union having the characteristics described in *Hyde v Hyde* and other nineteenth century cases.[391]

Section 51(xxi) thus empowers the Commonwealth to legislate for polygamy.[392] Legalising polygamy would not 'fracture a skeletal principle of our legal system' — to adopt the words of Brennan J,[393] recognising that his Honour used them in the context of native title.[394] If anything, polygamy would be consistent with Australia's secular order.[395] That is not to advocate for a wholly secular practice of polygamy. On the contrary, if polygamy were permitted, the motivation behind it should not matter.

C *Relationship Registration*

Throughout Australia's jurisdictions, relationships can be formalised by way of registration.[396] Registration serves the purpose of proving the existence of a

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385 Sir Garfield Barwick, 'The Commonwealth Marriage Act 1961' (1962) 3(3) *Melbourne University Law Review* 277, 305.

386 Ibid 293.

387 (2013) 250 CLR 441.

388 Ibid 454 [9] (The Court).

389 Ibid 463 [39]; *Marriage Equality (Same Sex) Act 2013* (ACT) s 3 (definition of 'marriage' para (a)).

390 *Commonwealth v Australian Capital Territory* (n 387) 452 [1] (The Court).

391 Ibid 461 [33] (The Court).

392 Quinlan (n 49) 81.

393 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 29.

394 Ibid.

395 *Australian Constitution* s 116.

396 *Domestic Relationships Act 1994* (ACT) s 37E; *Relationships Register Act 2010* (NSW) s 5; *Relationships Act 2011* (Qld) s 5; *Relationships Register Act 2016* (SA) s 5; *Relationships Act 2003* (Tas) s 11; *Relationships Act 2008* (Vic) s 6; Rundle (n 372) 49.

relationship.[397] Importantly, as registration is governed by the states and territories, registration in one jurisdiction is not recognised in another.[398] Polyamory is legal insofar as it is not a criminal offence to be in multiple simultaneous relationships (not marriages). Additionally, under s 4AA(5)(b) of the *FLA*, a de facto relationship can exist 'even if one of the persons is legally married to someone else or in another de facto relationship'.[399] Notwithstanding its legality, a person can only register one relationship at a time, thus excluding polyamorous relationships from being registered.[400] This notion is consistent with the monogamous definition of marriage,[401] as well as the nature of a de facto relationship 'as a couple'.[402]

For those opposed to polygamy forming part of the institution of marriage, a viable alternative would be the allowance of multiple de facto relationship registrations — an amendment to be carried out across the states and territories. However, this approach is not particularly appealing because it would create a situation where de facto polygamy is no different in a legal sense from polyamory. It would also keep polygamy separate from the institution of marriage and its associated statutes, such as the *Marriage Act*. In this way, it would represent a lacklustre effort towards recognising polygamy. Whether multiple relationships should be capable of being registered so as to formalise polyamory is not an issue for this article to resolve. Suffice to say that it is not a viable option for the allowance of polygamy.

D *Breaking up with Bigamy*

The legalisation of polygamy necessarily requires that the offence of bigamy be either reformed or repealed.[403] The offence is contained in s 94 of the *Marriage Act*, which prescribes that: 'A person who is married shall not go through a form or ceremony of marriage with any person.'[404] Section 94(4) then prescribes that:

> A person shall not go through a form or ceremony of marriage with a person who is married, knowing, or having reasonable grounds to believe, that the latter person is married.[405]

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[397] Rundle (n 372) 53.
[398] Ibid 75.
[399] *FLA* (n 10) s 4AA(5)(b).
[400] Rundle (n 372) 66; Bennett (n 17) 292.
[401] *Marriage Act* (n 373) s 5(1) (definition of 'marriage').
[402] *FLA* (n 10) s 4AA(1)(c).
[403] Bennett (n 26) 361.
[404] *Marriage Act* (n 373) s 94(1). Note that 'a form or ceremony of marriage' has been interpreted as meaning the process 'by which valid marriages may be solemnized', such that, for example, customary Indigenous and solely religious marriages are unlikely to be captured by that concept: see *Attorney-General (Vic) v Commonwealth* (n 380) 557 (Kitto J); *Re Sambucco* [2022] VSC 699, [63] (Moore J).
[405] *Marriage Act* (n 373) s 94(4).

The penalty for each offence carries a five-year imprisonment term.[406] Importantly, s 94 operates to the exclusion of any State or Territory law prescribing the offence of bigamy.[407] New South Wales, Victoria, South Australia and Queensland continue to provide for their own criminal offences, although s 94 of *Marriage Act* supersedes those State and Territory laws.[408] This article is only concerned with the s 94 offence, as opposed to exploring each jurisdiction's offence. If any reform is to take place, the recommended changes to the *Marriage Act* would need to be reflected in existing State and Territory legislation so as to ensure that polygamy can be equally practised in each jurisdiction.

Relevantly, s 104 of the *Marriage Act* prescribes that: 'A person shall not give a notice to an authorised celebrant under section 42 ... if, to the knowledge of that person, the notice contains a false statement'.[409] The offence carries a six-month imprisonment term or five-unit penalty.[410] Under s 42(1)(c), a marriage shall not be solemnised unless each party has made a declaration in writing as to, among other matters, 'the party's conjugal status' and 'the party's belief that there is no legal impediment to the marriage'.[411] However, an unrecognised customary marriage, for example, might not be captured by the provision's mention of 'conjugal status' — in the same way that a de facto relationship would not be.[412] Section 104 therefore prohibits, among others, the circumstance of a spouse lying about having another spouse, or their prospective spouse having another spouse. The section is broad enough in scope to cover both s 94 bigamy offences described above.[413] If polygamy is legalised, s 104 would be a sufficient safeguard to ensure that one prospective spouse does not mislead another as to their conjugal status. That is to say that s 94 could be repealed in its entirety, whilst maintaining s 104. In this way, polygamy would not constitute a criminal offence by encapsulating bigamy, but protection would still be afforded to those who, for example, make a false statement that they are not married to another when they, in fact, are.

As the Australian Law Reform Commission recognised in 1991, 'if polygamous marriages were recognised, careful consideration would have to be given to the consequences in areas of government policy, such as immigration, tax and social security.'[414] Those are areas beyond the scope of this article, but, undoubtedly, any legalisation of polygamy would indirectly affect each of them as it does the offence of bigamy.

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406 Ibid ss 94(1), (4).

407 Ibid s 94(8); Bennett (n 26) 361.

408 *Crimes Act 1900* (NSW) s 92; *Criminal Code Act 1899* (Qld) sch 1 s 360; *Criminal Law Consolidation Act 1935* (SA) s 78; *Crimes Act 1958* (Vic) s 64; Bennett (n 26) 361–2.

409 *Marriage Act* (n 373) s 104.

410 Ibid.

411 Ibid s 42(1)(c).

412 For a discussion of s 42(1)(c), see *Victor & Melway* [2009] FamCA 125; *Kirvan & Tomaras* [2018] FamCA 171.

413 Bennett (n 26) 379.

414 *Multiculturalism: Family Law* (n 12) 28 [3.43].

E *Recognising Customary Marriages*

Another option for recognising polygamy in Australia in light of its historical background (as described in Part III) is to limit its recognition only to the customary marriages of Indigenous Australians.

Customary marriages are already recognised in the Northern Territory for limited purposes. Section 67A of the *Administration and Probate Act 1969* (NT), for example, provides that when an intestate Aboriginal person is survived by more than one spouse, the intestate's estate 'shall be divided into a number of parts equal to the number of spouses of that intestate'.[415] Each spouse is then entitled to one of those parts.[416] Section 3(2) of the *De Facto Relationships Act 1991* (NT) likewise recognises an Aboriginal or Torres Strait Islander's customary spouse as their de facto partner.[417] Nevertheless, customary marriages are not fully recognised as valid.

South Africa is an example of a jurisdiction in which they are.[418] Section 2(1) of the *Recognition of Customary Marriages Act 1998* provides that: 'A marriage which is a valid marriage at customary law ... is for all purposes recognised as a marriage.'[419] And then at s 2(4): 'If a person is a spouse in more than one customary marriage, all valid customary marriages entered into ... are for all purposes recognised as marriages.'[420] To enter a customary marriage, subject to certain exceptions, the prospective spouses must be above eighteen years of age and must both consent.[421] Customary marriages must then be registered.[422]

Papua New Guinea is another example of a jurisdiction in which, under s 3 of the *Marriage Act 1963*, polygynous customary marriages are recognised as 'valid and effectual for all purposes'.[423] A 'customary marriage' is not defined; instead, it is to be valid where it complies with tribe custom to which either of the parties belongs.[424] In Uganda, polygamy is expressly recognised in s 4(2) of the *Customary Marriage (Registration) Act 1973* and is also allowed under s 2 of the *Marriage and Divorce of Mohammedans Act 1906*.[425] Uganda's approach would be problematic if

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415 *Administration and Probate Act 1969* (NT) s 67A.

416 Ibid.

417 *De Facto Relationships Act 1991* (NT) s 3(2)(a).

418 June Sinclair, 'Family Law Processes in South Africa: Multiculturalism in a Developing Country and Some Comparisons with Australia' (2004) 18 *Australian Journal of Family Law* 219, 248.

419 *Recognition of Customary Marriages Act 1998* (South Africa) s 2(1).

420 Ibid s 2(4).

421 Ibid s 3(1).

422 Ibid s 4(1).

423 *Marriage Act 1963* (Papua New Guinea) s 3(2); Owen Jessep, 'The Governor-General's Wives: Polygamy and the Recognition of Customary Marriage in Papua New Guinea' (1993) 7(1) *Australian Journal of Family Law* 29, 30.

424 *Marriage Act* (n 423) s 3(1); Jessep (n 423) 31.

425 Amone (n 105) 734; *Marriage and Divorce of Mohammedans Act 1906* (Uganda) s 2 ('*Marriage and Divorce of Mohammedans Act*'); *Customary Marriage (Registration) Act 1973* (Uganda) s 4(2).

adopted in Australia because of the latter Act's application solely to persons 'professing the Mohammedan religion'.[426] If polygamy is permitted in customary and Muslim marriages, then it may as well be allowed for all.

In 1991, the Australian Law Reform Commission recommended the recognition of customary marriages for the purposes of 'maintenance and property' orders, but not as valid marriages.[427] Polygamous marriages, the Commission found, 'should not be recognised'.[428] The Commission recognised that 'the law should not inhibit the formation of family relationships and should recognise as valid the relationships people choose for themselves,' and noted it as an argument favouring the recognition of polygamy.[429] Indeed, this principle underpins this article's proposal for legalising polygamy. Nevertheless, the Commission refused to recognise polygamy on the basis of it being mostly an unequal practice and 'alien to mainstream Australian culture'.[430]

Part of the Commission's justification for refusing to recognise customary marriages as valid marriages was the difficulty in defining what a 'customary' marriage actually is.[431] This would require an inquiry into each Indigenous group in which a marriage was established, such that it would be a resource-consuming exercise.[432] This is a salient point and one which supports the legalisation of polygamy more broadly, rather than in a solely customary sense. That is, if polygamy is allowed more broadly, customary marriages can be incorporated into that structure without requiring an examination of each Indigenous group's specific customs. Further, the primary issue of recognising customary polygamous marriages remains — they are almost entirely polygynous, so their legalisation would be inherently discriminatory.[433] As such, rather than recognising purely customary marriages, it is more appropriate for polygamy to be recognised, which would allow for the accommodation of some (but not all) polygamous customary marriages.

F *Proposal*

A simple way of allowing de facto polygamy would be the allowance of multiple relationship registrations.[434] Though this would benefit those seeking to register a polyamorous relationship, it would not truly be allowing polygamy, because polygamy would still sit outside the institution of marriage, as same-sex

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426 *Marriage and Divorce of Mohammedans Act* (n 425) s 2.
427 Sinclair (n 418) 235; *Multiculturalism: Family Law* (n 12) ix [4].
428 *Multiculturalism: Family Law* (n 12) ix [5].
429 Ibid ix [3].
430 Ibid 27–8 [3.43].
431 Ibid 26 [3.37].
432 Ibid.
433 Jessep (n 423) 38.
434 Bennett (n 17) 287.

relationships once did. So, while de facto polygamy should be allowed, so too should a registered polygamous marriage. Section 88D(2)(a) of the *Marriage* Act, which provides that a foreign marriage is not valid if either spouse was already in a marriage recognised in Australia,[435] should necessarily be repealed to allow for the recognition of foreign polygamous marriages. Next, domestic polygamy must be addressed.

1 Mead v Paul

The Supreme Court of New Zealand case of *Mead v Paul*[436] shows a realistic approach through which polygamous marriages could be recognised. There, Fiona, Brett and Lilach were in a three-way relationship.[437] Brett and Lilach had married in 1993 and Fiona joined them in 2002 to form a polyamorous relationship.[438] This was, in effect, an instance of de facto polygamy. Fiona was the legal titleholder of the family home at issue.[439] The *Property (Relationships) Act 1976* (NZ), like the *FLA* in Australia, governs property settlements.[440] Under s 2D, a de facto relationship is defined as 'a relationship between 2 persons ... who live together as a couple'.[441] The Court was tasked with determining whether the *Property (Relationships) Act 1976* (NZ) governed the parties' relationship property rights.[442] Finding that a triangular relationship is not a 'qualifying relationship' in its three-way structure,[443] the Court held that a polyamorous relationship could be subdivided into couples to satisfy the definition of a de facto relationship.[444] It was not necessary that the relationship be 'exclusive'.[445] As such, Fiona could be in a separate de facto relationship with each of Brett and Lilach.[446] In the circumstances, Fiona did not have an intimate relationship with Brett, so it was unlikely they would be de facto partners, but the principle still remained.[447] Though there has not been any comparable case in Australia's courts, the Court's findings of law in *Mead v Paul* would likely be equally applicable in the Australian context.

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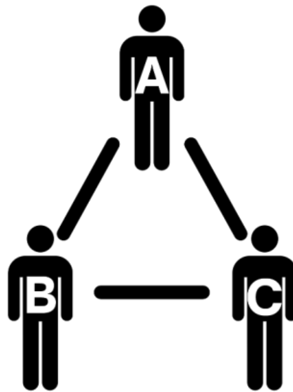
435 *Marriage Act* (n 373) s 88D(2)(a).
436 *Mead* (n 16).
437 Ibid 269 [2] (O'Regan, Williams and Kós JJ).
438 Ibid 269 [5].
439 Ibid 269 [2].
440 *Property (Relationships) Act 1976* (NZ) s 1C(1).
441 Ibid s 2D(1)(b).
442 *Mead* (n 16) 282 [47] (O'Regan, Williams and Kós JJ).
443 Ibid 283 [49].
444 Ibid 290 [82] (O'Regan, Williams and Kós JJ), 292 [94] (Glazebrook and Ellen France JJ).
445 Ibid 281 [42] (O'Regan, Williams and Kós JJ).
446 Ibid 288 [74].
447 Ibid.

2 *Redefining Marriage*

Mead v Paul shows that polygamy, like polyamory, can be seen as a collection of couples. In a three-way example: person A is with person B; person B is with person C; and person A is with person C (see Figure 3). Conceptualising polygamous marriages in this way would allow for a relatively straightforward addition to the existing institution based on coupledom. It would also prevent unnecessarily difficult divorces or property settlements since the spouses would be able to be divided into couples. In this way, if person A wishes to divorce person C but remain with person B, person A can divorce person C. Person A would have a property settlement with person C, but person B would not be involved in that settlement. Likewise, if person B divorces person C, their property settlement would not involve person A. That is to say, each property settlement would, as *Mead v Paul* contemplates, be dealt with through a division of couples.[448] Notwithstanding this model, as Ellen France J acknowledges, where there is a 'complex or varied relationship' involving multiple properties acquired at different times, there remains an uncertainty as to how such properties will be settled.[449]

Figure 3: A polygamous structure based on the treatment of polyamorous relationships in Mead v Paul



The definition of 'marriage' under the *Marriage Act* would require amendment to allow polygamy in any form. This could be done quite simply by removing the words 'to the exclusion of all others' so that it reads as 'the union of 2 people, voluntarily entered into for life'. In this way, a polygamous union could be subdivided into married couples. This would simplify the necessary legislative

448 Ibid 292 [89].

449 Ibid 294 [103] (Glazebrook and Ellen France JJ).

changes. The consequence of polygamy discriminating against the sexes can be avoided if polygamy as polyanthropy is allowed. In keeping with the definition referring to '2 people', there would not be any restraints on the sex or sexuality of the spouses — the ideal definition.

At present, under s 23(1)(a), a marriage is void where either party was, at the time of the marriage, lawfully married to another.[450] This sub-section would also necessarily need to be repealed to allow for polygamy. Likewise, s 6 of the *FLA*, which recognises a foreign polygamous marriage as a 'marriage', should be extended to all polygamous marriages, regardless of where they were entered into. In this way, s 6 would allow for all polygamous marriages, whether domestic or foreign, to be accommodated into the revised definition of 'marriage' proposed above.

3 *Consent and the Marriageable Age*

The oft-cited concern that polygamy is not consensual would not be an issue in an Australian context, because the *Marriage Act* already renders void those marriages which are not consensual.[451] The definition of a 'marriage' incorporates the requirement that it be 'voluntarily entered into'.[452] Additionally, under the Commonwealth *Criminal Code*,[453] causing a person to enter, or being a party to, a forced marriage is a criminal offence carrying an imprisonment term of seven years and nine years for an aggravated offence.[454] A forced marriage is one which was entered into by a party 'without freely and fully consenting'.[455] Needless to say, the concern of polygamous spouses being minors would also not be an issue. The *Marriage Act* prescribes an offence carrying a five-year imprisonment term for marrying a person under 18 years of age, except where the person is over 16 and has been authorised to marry by a judge.[456] Likewise, the *Criminal Code* deems a marriage entered into when either party was under sixteen years of age to be a forced marriage.[457]

G *Recognising Foreign Polygamy*

In Australia, polygamous marriages entered into abroad are recognised only under s 6 of the *FLA* in order for the spouses to be granted the same relief as those in a monogamous marriage:

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[450] *Marriage Act* (n 373) s 23(1)(a).
[451] Ibid s 23(1)(d); Quinlan (n 49) 78.
[452] *Marriage Act* (n 373) s 5(1) (definition of 'marriage').
[453] *Criminal Code Act 1995* (Cth) sch 1 ('*Criminal Code*').
[454] Ibid ss 270.7A–270.7B.
[455] Ibid s 270.7A(1)(a).
[456] See *Marriage Act* (n 373) ss 11, 12(1), 95(1).
[457] *Criminal Code* (n 453) s 270.7A(1)(b).

> For the purpose of proceedings under this Act, a union in the nature of a marriage which is, or has at any time been, polygamous, being a union entered into in a place outside Australia, shall be deemed to be a marriage.[458]

A *potentially* polygamous marriage can nevertheless be recognised as a marriage under the *Marriage Act* without recourse to s 6 of the *FLA*. In *Ghazel & Ghazel*,[459] the Full Court of the Family Court of Australia recognised such a marriage. Mr and Mrs Ghazel married in Iran and then in England.[460] Iranian law permitted a husband to have up to three additional wives, such that the Ghazels' marriage was *potentially* polygamous.[461] After migrating to Australia and attaining citizenship in 2007, the Ghazels lodged a joint divorce application.[462] This application only referred to their marriage in England.[463] In 2014, Mrs Ghazel sought a declaration that their Iranian marriage was valid under s 88D of the *Marriage Act* which provides for the recognition of foreign marriages.[464] The Court held that *potentially* polygamous marriages 'which are valid under the law of the place of celebration are prima facie required to be recognised'.[465] This was the case before and after the introduction of the 2004 definition of 'marriage'.[466] Mrs Ghazel's Iranian marriage was therefore declared valid.[467]

To extend that recognition to actually polygamous marriages would not be so burdensome. It would simply require that s 88D(2)(a), which prevents the recognition of a foreign marriage which was entered into while either spouse was already married,[468] be repealed. In its current state, s 88D(2)(d) of the *Marriage Act* prohibits the recognition of a foreign marriage if 'the consent of either of the parties was not a real consent'.[469] This is an appropriate safeguard that must remain and one which would bolster trust in polygamy, if it were legalised. It is by no means the case that if polygamy were legalised it would lead to the adversities found in states which permit it.[470] If polygamy were legalised as polyanthropy and the systems described above remain in place, then there is a real possibility for an egalitarian practice of polygamy.

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458 Bennett (n 17) 273; *FLA* (n 10) s 6.
459 *Ghazel* (n 370).
460 Ibid 174 [2]–[3] (The Court).
461 Ibid 174 [2].
462 Ibid 174 [4]–[5].
463 Ibid 174 [5].
464 Ibid 175 [8].
465 Ibid 180 [40].
466 Ibid 181 [50].
467 Ibid 181 [51].
468 *Marriage Act* (n 373) s 88D(2)(a).
469 Ibid s 88D(2)(d).
470 Bennett (n 17) 288.

VII Path of the Pendulum

As time passes, the pendulum continues to swing. What was once acceptable may go out of favour only to return later to acceptability. Change is inevitable. It is therefore necessary to consider how the Australian law can be reformed to accommodate the practice of polygamy. It is not a practice foreign to Australia, as shown through its history amongst the Indigenous and its adoption by certain Muslim migrants. Indeed, it may be well-placed as a marriage option for the polyamorous. From the time of the Australopithecus to Augustine of Hippo and to the present, polygamy has always played a part in human life. History has shown that, in a world in which there is no universally accepted relationship structure, polygamy is flexible and is moulded by the circumstances in which it is found. Admittedly, this has often been for the worse. The absence of consent and discrimination against women remain as adversities found in polygamous marriages across the Middle East. Yet, if people are to be afforded greater freedom in choosing their relationship structure, polygamy should be allowed. This article has shown that it can be legalised in a manner consistent with upholding every spouse's equality and wellbeing. Beyond merely recognising polygamy in customary or foreign marriages, it should be a right for all. It must take the form of polyanthropy so that any configuration of polygamy is possible. Bigamy must necessarily be done away with to bring those changes into effect. The notion of coupledom is so deeply entrenched in Australian family law, particularly in the *Marriage Act 1961* (Cth) and *Family Law Act 1975* (Cth), that a polygamous marriage would be best recognised as sets of couples. This would avoid a reworking of the current system. It would also likely simplify the resolution of any disputes, property settlements or divorces that may arise. Nevertheless, the implications for other areas of law — which are beyond the scope of this article — including social security, estate and taxation law must be assessed before any such proposal is enacted.

One substantive deficiency nevertheless supports the preservation of the equilibrium; namely, the absence of data as to the effects of polygamy on families in Australia. There is likewise a lack of information about who would want to practise polygamy. It is envisaged that, with a greater understanding of those matters, Parliament would be well-placed to determine the most appropriate method of allowing the practice.

POLICING POPULAR SOVEREIGNTY: ROYAL ASSENT TO AN ANTI-DEMOCRATIC OR INTOLERANT CONSTITUTIONAL AMENDMENT

HENRY PALMERLEE[*]

Should Australia's Governor-General refuse royal assent to an anti-democratic or intolerant constitutional amendment that has been approved at referendum? The limits on the Australian people's power to amend their own constitution have, to date, been the subject of limited scholarship. Through application of Yaniv Roznai's theory of constitutional unamendability, it is argued that political constitutionalism is a core tenet of the Australian constitutional order, a tenet which would likely call for a refusal of assent to an anti-democratic amendment. By contrast, Australia's relatively weak tradition of legal constitutionalism would not stand in the way of an intolerant alteration to the Australian Constitution*. Understanding the legitimate boundaries of the Governor-General's authority is an ongoing project in Australian constitutional theory. However, these issues can provide fresh insight on long-running academic debates about the role of Commonwealth vice-regal representatives and the source of the* Australian Constitution*'s authority.*

I INTRODUCTION

Vox populi, *vox Dei*.[1]

There never was a Democracy Yet, that did not commit suicide.[2]

The content of the *Australian Constitution* is controlled by the Australian people and their elected representatives. The referendum process in s 128 embodies Australia's strong tradition of popular sovereignty, but also raises the question posed by all constitutional amendment procedures: should it be possible to unmake or radically alter a constitution via amendment? In this article, I link that question to the Governor-General's reserve power to refuse assent to a

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1 Latin proverb, generally translated to 'the voice of the people is the voice of God'.

2 Letter from John Quincy Adams to John Taylor, 17 December 1814, <https://founders.archives.gov/documents/Adams/99-02-02-6371>.

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constitutional alteration, and examine certain circumstances in which the substance of an alteration might justify the refusal of assent.

Part II first surveys existing literature on the reserve power to refuse assent, and finds that constitutional referendums have, to date, been largely unaddressed by scholars. Part III then briefly summarises Yaniv Roznai's theory of unconstitutional constitutional amendments. The theory says that constitutional amendment powers are a form of delegated constituent power. By virtue of only being a subordinate power, the amendment of a constitution must always be subjected to an implicit limitation: that it cannot be used to create an entirely new constitution. I conclude this methodological section by suggesting that there is at least a prima facie case for the theory being applicable in the Australian constitutional context.

In Part IV, I focus on a specific element of Roznai's theory: the spectrum of unamendability. I suggest that the spectrum concept might be modified to better reflect imperfections in the historical use of constituent power. On this account, we calibrate the limits of the s 128 amendment power with reference to Australia's original exercise of constituent power during the framing and ratification process, thereby tailoring Roznai's theory to our context. This modification, I argue, allows us to square-the-circle between popular sovereignty and constitutional unamendability — two concepts which could otherwise stand in significant tension.

Finally, Part V applies Roznai's theory to investigate whether the Governor-General should refuse assent to a constitutional amendment that is either *fundamentally* (A) anti-democratic or (B) intolerant. For my purposes, an 'anti-democratic' amendment substantially limits procedural aspects of the democratic system of government; an 'intolerant' amendment negatively discriminates based on a given attribute.[3] I argue that Roznai's generalised theory can be applied in

3 I specify 'procedural aspects of the democratic system of government' here to emphasise that the article adopts a procedural (cf substantive) conception of the term '(anti)democratic'. A procedural definition of democracy is one which focuses solely on the institutions which guarantee legitimate electoral contestation and alternation of power — in other words, the institutions which ensure that 'parties lose elections': Adam Przeworski, *Democracy and the Market* (Cambridge University Press, 1991) 10. See further discussion of 'competition' in Joseph A Schumpeter, *Capitalism, Socialism, and Democracy* (George Allen & Unwin, 1942); and 'contestation' in Robert A Dahl, *Polyarchy: Participation and Opposition* (Yale University Press, 1971). This definitional issue is important because it enables a meaningful distinction to be drawn between 'democracy' and 'tolerance'. By contrast, substantive definitions of democracy often stipulate certain principles of equality as elements of democracy in a way that amalgamates 'democracy' and 'tolerance', terms which I will use in contradistinction. See, eg, Freedom in the World global report which provides a 'maximalist' substantive definition of democracy: Gerardo L Munck and Jay Verkuilen, 'Conceptualizing and Measuring Democracy: Evaluating Alternative Indices' (2002) 35(1) *Comparative Political Studies* 5, 28. To be sure, however, even on a procedural definition of what constitutes an 'anti-democratic' referendum, there will be examples which are simultaneously 'intolerant'. In the Australian context, Rosalind Dixon has written recently on 'responsive constitutionalism' and its

Australia via the concepts of legal and political constitutionalism. The *Constitution*'s commitment to controlling government power via *political* limitations is one of its core defining features. I conclude that an anti-democratic amendment would remove this defining feature, thereby creating a new constitution; an intolerant amendment, meanwhile, would not. The Governor-General would therefore be justified in refusing assent to an anti-democratic alteration because it is beyond the scope of the s 128 amendment power.

This article is primarily a piece of conceptual constitutional jurisprudence. While it is reassuring to imagine the head of state acting as a boundary-rider *in extremis*, my main objective is theoretical: to test unspoken assumptions about Australian constitutionalism. These include the extent of our *Constitution*'s liberal–democratic commitments; the Governor-General's proper role in Australian political life; and the power of 'the people' to radically remake their politico-legal compact. The powers of vice-regal representatives in Commonwealth countries are at once enormous and poorly understood, as the perennial controversy over the Whitlam Dismissal demonstrates. I submit in the following Part that existing work on reserve powers has little to say about the relationship between vestigial monarchy and constitutional amendment.

Despite its conceptual focus, this article's themes connect to contemporary anxiety regarding the use of democratic processes to effect anti-democratic or intolerant outcomes. The global trend of 'backsliding' in democratic polities has frequently taken the form of a 'constitutional coup' — a process that is formally legal, but which nevertheless results in a radically different constitutional order.[4] Moreover, while noting that s 128 does not provide for citizen-initiated constitutional amendments, other liberal societies have seen the use of direct-democratic mechanisms for intolerant purposes. In 2008 California passed Proposition 8, a successful citizen-initiated referendum banning same-sex marriage.[5] Switzerland held a successful referendum to ban the construction of

'*overlapping* commitments' to the 'democratic minimum core', on one hand, and 'thicker understandings of democracy, which emphasise…individual rights and democratic commitments', on the other: Rosalind Dixon, 'Responsive Constitutionalism in Australia' (2024) 52(3) *Federal Law Review* 359, 359–62 (emphasis added). The implications for my argument of this potential for overlap will be discussed in more detail below in Part V.

4 For example, Recep Tayyip Erdoğan's successful 2017 referendum which converted Türkiye into a heavily presidential system with power concentrated in the executive. On constitutional coups, see Kim Lane Scheppele, 'Constitutional Coups and Judicial Review: How Transnational Institutions Can Strengthen Peak Courts at Times of Crisis (With Special Reference to Hungary)' (2014) 23(1) *Transnational Law and Contemporary Problems* 51. On backsliding generally, see Nancy Bermeo, 'On Democratic Backsliding' (2016) 27(1) *Journal of Democracy* 5; Susan D Hyde, 'Democracy's Backsliding in the International Environment' (2020) 369 *Science* 1192; Larry Diamond, 'Democratic Regression in Comparative Perspective: Scope, Methods, and Causes' (2021) 28(1) *Democratization* 22; Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (Crown, 2018).

5 See, eg, Michael J Klarman, *From the Closet to the Altar: Courts, Backlash, and the Struggle for Same-Sex Marriage* (Oxford University Press, Oxford University Press paperback edition, 2014) ch 6.

Islamic minarets in 2009.[6] This global context has catalysed renewed academic interest in 'militant democracy' theory, which considers ways in which constitutional democracies might protect their democratic system from non-democratic actors.[7] This article aims to contribute to burgeoning Australian interest in militant democracy, and investigate the potential for the Governor-General to play a role in protecting Australian democracy from itself.[8]

II The Refusal of Royal Assent

Before it becomes law, a Commonwealth Bill that has passed both Houses of Parliament must receive royal assent, granted by the Governor-General on the monarch's behalf.[9] This Part briefly sketches the nature of the Governor-General's reserve power to refuse assent, and the existing literature addressing such refusal in the context of ordinary legislation. Constitutional referendums are then identified as an under-examined type of instrument to which the Governor-General might withhold assent.

Although royal assent is almost always granted to legislation, the Governor-General is more than a 'nodding automaton' performing a rubber-stamp function.[10] Vice-regal representatives retain a reserve power — a 'power exercisable by the Queen or the Governor-General, in appropriate circumstances, without or contrary to ministerial advice'[11] — to refuse assent to legislation. While some commentators have doubted whether this power exists at all, academic

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6 See, eg, Vista Eskandari and Elisa Banfi, 'Institutionalising Islamophobia in Switzerland: The Burqa and Minaret Mans' (2017) 4(1) *Islamophobia Studies Journal* 53.

7 Jan-Werner Müller, 'Protecting Popular Self-Government from the People? New Normative Perspectives on Militant Democracy' (2016) 19(1) *Annual Review of Political Science* 249, 251 ('Protecting Popular Self-Government from the People? New Normative Perspectives on Militant Democracy'). See generally Karl Loewenstein, 'Militant Democracy and Fundamental Rights, I' (1937) 31 *American Political Science Review* 417; Karl Loewenstein, 'Militant Democracy and Fundamental Rights, II' (1937) 31 *American Political Science Review* 638; Jan-Werner Müller, 'Militant Democracy' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 1253 ('Militant Democracy'); Anthoula Malkopoulou and Alexander Kirshner (eds), *Militant Democracy and Its Critics* (Edinburgh University Press, 2019).

8 For recent work on militant democracy in the Australian context, see Svetlana Tyulkina, 'Militant Democracy: An Alien Concept for Australian Constitutional Law' (2015) 36(2) *Adelaide Law Review* 517; Bohdan Bernatskyi and Marina Gorbatiuc, 'Protecting Australian Democracy: From Attempting to Ban the Communist Party to Resisting Foreign Interference' (2023) 15(2) *Australian and New Zealand Journal of European Studies* 33.

9 *Australian Constitution* s 58.

10 *Federation of Pakistan v Moulvi Tamizuddin Khan* (1955) PLD FC 240 (Munir CJ) (Federal Court of Pakistan).

11 Michael Crommelin, 'Powers of the Head of State' (2015) 38(3) *Melbourne University Law Review* 1118, 1123.

consensus largely accepts the existence of a reserve power to refuse assent.[12] Given the relative similarity of the role of vice-regal representatives across the Commonwealth, scholars have reflected on a global array of case studies to identify situations in which the power ought, or ought not, to be exercised. Mooted examples include where legislation is: passed in a procedurally defective manner, or; the Prime Minister has advised against giving assent, or; the vice-regal representative simply believes the legislation to be undesirable.[13] There has been no shortage of scholarly debate regarding the scope of the reserve power in various complex situations.[14]

Commentators have been especially interested in legislation that runs contrary to prevailing societal norms regarding democracy, rights, and political morality — in particular, anti-democratic or intolerant legislation. Such laws raise difficult questions about whether the Governor-General should play any role in evaluating the substance of Commonwealth laws. On this point, most Australian commentators have arrived at a similar conclusion: that the Governor-General should defer to the High Court's judgement regarding the law's constitutional validity.[15] Twomey, for example, argues that the Governor-General simply 'is not relevant' because the offending law would be dealt with by the High Court.[16] The refusal of assent was also contemplated by Kirby J, regarding any law 'which clearly offends basic constitutional norms'.[17] The Governor-General's role with respect to legislation that may contravene the *Constitution* is therefore limited to *non-justiciable* constitutional breaches.[18] The difficulty, as Tony Thomas observes, is identifying when such a non-justiciable breach would arise.[19]

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12 Anne Twomey, *The Veiled Sceptre* (Cambridge University Press, 2018) ch 9 ('*The Veiled Sceptre*'). Cf George Winterton, 'The Constitutional Position of Australian State Governors' in HP Lee and George Winterton (eds), *Australian Constitutional Perspectives* (Law Book Co, 1992) 274; Ivor Jennings, *Cabinet Government* (3rd ed, Cambridge University Press, 1959) 400.

13 For a comprehensive taxonomy of such possibilities, see Twomey, *The Veiled Sceptre* (n 12) ch 9.

14 See, eg, Anne Twomey, 'The Refusal or Deferral of Royal Assent' [2006] *Public Law* 580 ('The Refusal or Deferral of Royal Assent'); Kate Murray, 'Royal Assent in Victoria' (2008) 23(2) *Australasian Parliamentary Review* 41; Y Allard-Tremblay, 'Proceduralism, Judicial Review and the Refusal of Royal Assent' (2013) 33(2) *Oxford Journal of Legal Studies* 379; Greg Taylor, 'Two Refusals of Royal Assent in Victoria' (2007) 29(1) *Sydney Law Review* 85; Geoffrey Lindell, 'Assent or Refusal to Assent to Legislation — On Whose Advice?' (2009) 11(3) *Constitutional Law and Policy Review* 126.

15 Twomey, 'The Refusal or Deferral of Royal Assent' (n 14) 591. See further Murray (n 14) 56; Anne Twomey, 'Cutting the Gordian Knot: Limiting Rather than Codifying the Powers of a Republican Head of State' (Papers on Parliament No 9, Parliamentary Library, June 2009) 19 ('Cutting the Gordian Knot: Limiting Rather than Codifying the Powers of a Republican Head of State'); Tony Thomas, 'A Governor for the Seventh State: Codifying the Reserve Powers in a Modern Constitutional Framework' (1999) 29 *Western Australian Law Review* 225.

16 Twomey, 'Cutting the Gordian Knot: Limiting Rather than Codifying the Powers of a Republican Head of State' (n 15) 31.

17 *Durham Holdings v New South Wales* (2001) 205 CLR 399, 432.

18 See, eg, George Winterton, *Monarchy to Republic: Australian Republican Government* (Oxford University Press, 1986) 46.

19 Thomas (n 15) 233.

Constitutional referendums present one such possibility, since the High Court might decline to entertain a challenge to the substance of a referendum.[20] In this situation, the Governor-General could refuse assent to an anti-democratic or intolerant constitutional alteration supported by an affirmative vote at referendum. These questions regarding the role of the High Court are necessarily very difficult to answer conclusively in constitutional edge-cases, and it is unnecessary for my purposes to do so. However, even were the High Court to hear such a challenge, the Governor-General would have the earlier opportunity to counteract an objectionable constitutional alteration. There may well be no more important legal norm than protecting the *Constitution* — the supreme law of the land — from being undermined.[21] Hence, whether acting as a constitutional lone wolf or allied with the High Court, there appears to be a role for the Governor-General to play in reacting to an anti-democratic or intolerant alteration to the *Constitution*.

This subject has been addressed obliquely by some earlier scholars, who have considered the possibility of the Governor-General refusing to submit a constitutional alteration to the electors. The wording of s 128 suggests that such a possibility may be open to the Governor-General in circumstances where one House of Parliament has passed the proposed law twice (over the refusal or failure of the other House to do so).[22] More generally, Quick and Garran dismissed the idea that the Crown would intervene in any referendum besides those involving 'Imperial or international policy'.[23] However, the question of whether the reserve power to refuse assent should be exercised against an alteration which has passed at referendum has received very little attention. Is the people's control over the *Constitution* unlimited, or should the Governor-General, the most powerful and visible manifestation of monarchical rule, intervene to save Australian liberal democracy from itself? This issue — whether the reserve power to refuse assent could be exercised in response to an anti-democratic or intolerant alteration — has been under-theorised and will be the focus of the analysis that follows.

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[20] See Graeme Orr, 'The Conduct of Referenda and Plebiscites in Australia: A Legal Perspective' (2000) 11 *Public Law Review* 117; Graeme Orr, 'Electoral Reform as a Tonic for Referenda and Federalism: A Response to Professor Craven' (2005) 20(2) *Australasian Parliamentary Review* 83, 86; Graeme Orr and George Williams, 'Electoral Challenges: Judicial Review of Parliamentary Elections in Australia' (2001) 23(1) *Sydney Law Review* 53, 92–3.

[21] See generally Gary Lawson, 'Stare Decisis and Constitutional Meaning: Panel II: The Constitutional Case against Precedent' (1994) 17 *Harvard Journal of Law & Public Policy* 23.

[22] Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, 2009) 320–1. Aroney discusses the portion of s 128 which provides for a situation in which either house passes an amendment Bill by an absolute majority, and the other house rejects or fails to pass the Bill. In these circumstances, the Governor-General is empowered to submit the alteration to referendum if the first-mentioned house passes the Bill a second time, after a three-month period. See generally H V Evatt, 'Amending the Constitution' (1937) 1 *Res Judicatae* 264.

[23] John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 994.

III Roznai's Theory of Unconstitutional Constitutional Amendments

Can the democratic process be used to limit democracy?[24] Should a tolerant society tolerate intolerance?[25] Theorists since Alexis de Tocqueville have recognised liberal democracy's vulnerability to the majority will.[26] As Hannah Arendt described it, 'the so-called will of a multitude … is ever-changing by definition, and … a structure built on it as its foundation is built on quicksand'.[27] Considering whether royal assent should be refused to an alteration approved through a valid referendum enlivens the exceedingly difficult issue of setting principled limits on the people's power. A growing literature has sought to define the extent to which restraints can and ought to be applied to the content of constitutional amendments. Roznai has developed a comprehensive theory of 'unconstitutional constitutional amendments' that aims to address this question. In this Part, I briefly outline Roznai's theory before arguing that there is at least a prima facie case for the theory's applicability in the Australian constitutional context.

A *Roznai's Theory*

In broad terms, Roznai's theory of unconstitutional constitutional amendments proceeds via four key steps.[28] First, he canvases the idea of constituent power — the people of a nation's 'power to establish the constitutional order of [that] nation'.[29] Constitutions are established via an exercise of constituent power, an exercise which in turn creates 'constituted power' (power granted and conditioned by the constitution).[30]

Second, Roznai defines the power to amend the constitution as *sui generis*, existing in a discrete category somewhere between constituent and constituted power. Since it is exercised pursuant to the constitution, the amendment power

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24 For a detailed discussion of this 'democratic paradox', see Müller, 'Militant Democracy' (n 7).

25 Karl Popper, *The Open Society and Its Enemies* (Princeton University Press, 2013) 581. See further John Rawls, *A Theory of Justice* (Harvard University Press, 1999) 190–4.

26 Alexis de Tocqueville, *Democracy in America*, tr Harvey C Mansfield and Delba Winthrop (University of Chicago Press, 2000) vol 1 pt 2 ch 7. See further Edmund Burke, *Correspondence of Edmund Burke Between the Year 1774–1797*, ed Charles William, Earl Fitzwilliam and Sir Richard Bourke (Rivington, 1844) vol 3, 147; John S Mill, *On Liberty* (Batoche Books, 2001) 8–9.

27 Hannah Arendt, *On Revolution* (Penguin Books, 1963) 163.

28 See Adrienne Stone, 'Unconstitutional Constitutional Amendments: Between Contradiction and Necessity' (2018) 12(3) *Vienna Journal on International Constitutional Law* 357, 358–9.

29 Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press, 2019) 105 ('*Unconstitutional Constitutional Amendments*').

30 See, eg, Martin Loughlin, 'Constituent Power' in Martin Loughlin (ed), *The Idea of Public Law* (Oxford University Press, 2004) 99; Joel Colón-Ríos et al, 'Constituent Power and Its Institutions' (2021) 20(4) *Contemporary Political Theory* 926; Lucia Rubinelli, *Constituent Power: A History* (Cambridge University Press, 2020).

necessarily cannot be an exercise of the original constituent power. As Stephen Tierney describes it, when 'the referendum is provided for by the constitution, its process is regulated by that constitution, and its result takes effect within the normative order of that constitution.'[31] Constituent power has 'retired to the clouds' — it may still be exercised, but not through the existing constitution.[32] Instead of being either purely constituent or constituted power, Roznai views the amendment power as a form of delegated constituent power, held on trust by the body authorised to change the constitution.

This concept of delegation — a principal-agent relationship — is critical to understanding Roznai's theory. In Australia, 'the people' wear two different hats. They are both the principal who originally approved the *Constitution* using their constituent power; and the agent to whom the ability to amend the *Constitution* was then delegated. This will not be the case in all jurisdictions — in nations such as Hungary and India, Parliament holds the power to amend the constitution. However, due to the stringently 'popular' nature of Australia's constitutional amendment process, the Australian people have a dual character under Roznai's theory: they act as an agent if amending the *Constitution*, and the principal if creating an entirely new constitutional order.[33]

Third, because of its delegated nature, the amendment power cannot be used to overrule the original exercise of constituent power — in Australian constitutional terms, 'a stream cannot rise higher than its source'.[34] This is the case even where the constitution in question does not contain any *explicit* prohibition on amendment. The very fact of delegation, of constituent power being held 'on trust' by the amending authority, implies the existence of limitations on the sort of amendments that may be made.[35]

Fourth, Roznai argues that the content of these limitations varies from country to country, and depends on the 'fundamental core values or principles which form "the spirit of the constitution"'.[36] This is what he calls a 'foundational structuralist' account of constitutions — the view that constitutions:

> reflect certain basic political–philosophical principles, which form the constitution's foundational substance, its essence or spirit. The constitution is structured upon these basic principles and it is no longer the same without them. The destruction of the

[31] Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford University Press, 2012) 12–14.

[32] James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law* (Little, Brown, and Company, 1893) 5.

[33] This 'dual character' is analogous to, for example, the dual roles of a settlor-trustee. At different times, the same natural person may occupy different legal positions and exercise different powers flowing from those positions.

[34] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 258 (Fullagar J) ('*Communist Party Case*').

[35] But see Stone (n 28) 364–5.

[36] Roznai, *Unconstitutional Constitutional Amendments* (n 29) 142.

> constitutional core leads to the destruction of the entire constitution, even though particular constitutional provisions continue to be valid.[37]

As such, the delegated amendment power cannot be used to alter a constitution's fundamental core principles — to create a new constitution — because to do so is beyond the scope of that power. Only true constituent power, exercised via a process *outside* the constitution, can be used to dismantle the existing constitution and erect a new one in its place. In Australia, the people vote in a s 128 referendum in their capacity as trustees of the delegated constituent power. As such, they cannot use it to create a new constitution altogether.

Crucially, Roznai accounts for the intuition that an amendment power exercised by the people should be subject to less stringent limits. This intuition informs a 'spectrum of unamendability', premised on an assertion that 'the more similar the characteristics of the secondary constituent power are to those of a democratic primary constituent power … the less it is bound by limitations, and vice versa.'[38] By recognising that not all amending routes are equal, Roznai allows for greater or lesser degrees of unamendability.[39] The implications of the spectrum of unamendability will be explored more fully in Part IVA. In sum, Roznai's argument is that no constitutionally-prescribed amendment procedure is unlimited; but that the strength of the limitations varies depending on the democratic bona fides of the amendment process.

B *Applicability in Australia*

What Roznai advocates for is, in effect, a recognition of some basic structure in every constitution.[40] Basic structure doctrine, while orthodox in many jurisdictions, might be regarded with suspicion by Australian constitutional lawyers. This Part considers two potential objections to the application of Roznai's theory to the *Australian Constitution*, and three further concerns regarding the role of the Governor-General. Importantly, it is not the aim of this article to robustly defend the internal logic of Roznai's theory.[41] Instead, it seeks to demonstrate that it is not implausible to use the theory as an analytical lens

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37 Ibid 143.
38 Ibid 158.
39 Ibid 174.
40 Ibid ch 2.
41 For such analysis, see Alec Duncan, 'Unconstitutional Constitutional Amendments: The Limits of Amendment Powers Book Review' (2018) 16(1) *New Zealand Journal of Public and International Law* 101; Lech Garlicki and Zofia A Garlicka-Sowers, 'Unconstitutional Constitutional Amendments Mini Symposium: Yaniv Roznai, Unconstitutional Constitutional Amendments' (2018) 12(3) *Vienna Journal on International Constitutional Law* 307; Rehan Abeyratne, 'Unconstitutional Constitutional Amendments: The Limits of Amendment Powers Book Review' (2017) 1(2) *Indian Law Review* 182.

through which to consider the potential refusal of assent to constitutional alterations.

The most obvious objection is simply that the High Court has never endorsed basic structure doctrine and the concept of constituent power from which it is derived as applicable to Australia.[42] This point raises the preliminary issue of whether the High Court's power even includes ruling on the applicability of the concept of constituent power to Australia. The question is a fraught one because it opens the debate about whether constituent power is the correct theoretical lens with which to frame the power of 'the people' in a polity; and if so, what the term in fact means. We might view constituent power as an extra-legal phenomenon that exists anteriorly to institutions like courts.[43] Alternatively, constituent power might be thought of as an epistemic contingency rather than an empirical reality, 'a language used to make sense of and act upon democratic politics'.[44] To conclusively decide the nature of constituent power and its relationship to judicial power is beyond the reach of a single article — and indeed might be beyond the scope of judicial analysis.[45] While it would prove interesting ground for further scholarship, at present, I will note the interaction of constituent power theory and Commonwealth judicial power as an interesting but ultimately tangential point.

More presciently, our objector might rightly note that the opinion of Australia's leading jurists must surely be *relevant* to the question of basic structure doctrine's applicability, irrespective of one's views on the formal power of the High Court. This invites two further replies. Firstly, Australia is often described as a constitutionally 'frozen continent' in which successful alterations to the *Constitution* are few and far between.[46] As such, judicial silence regarding an issue which could have arisen on only eight occasions in 124 years is hardly surprising.[47] Such silence is especially unremarkable when one considers the historic 'unawareness of constituent power in the English-speaking world'.[48] Secondly, notwithstanding the lack of directly relevant jurisprudence, we might consider how the High Court in *Union Steamship Co of Australia Pty Ltd v King* left open the question of whether there are constraints on States' legislative power derived 'by reference to rights deeply rooted in our democratic system of

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[42] As to the debate regarding whether 'constituent power' is an appropriate conceptual lens to apply in Australia, see William Partlett, 'Remembering Australian Constituent Power' (2023) 46(3) *Melbourne University Law Review* 821; William Partlett, 'Australian Popular Political Constitutionalism' (2024) 52(2) *Federal Law Review* 156; cf George Duke and Carlo Dellora, 'Constituent Power and the Commonwealth Constitution: A Preliminary Investigation' (2022) 44(2) *Sydney Law Review* 199.

[43] Joel Colón-Ríos, *Constituent Power and the Law* (Oxford University Press, 2020) 4–8.

[44] Rubinelli (n 30) 29.

[45] Indeed, an entire field of legal scholarship is devoted to the nature of the 'judicial power' referred to in s 71 of the *Constitution*. A modern classic in the area is James Stellios, *The Federal Judicature: Chapter III of the Constitution* (LexisNexis Butterworths, 2nd ed, 2020).

[46] Geoffrey Sawer, *Australian Federalism in the Courts* (Melbourne University Press, 1967) 208.

[47] Australian Electoral Commission, *Past Referenda Fact Sheet* (Fact Sheet, 2012).

[48] Yaniv Roznai, 'The Boundaries of Constituent Authority' (2021) 52(5) *Connecticut Law Review* 1381, 1384.

government and the common law'.[49] It is certainly true that 'common law constitutionalism' lies at the fringe of legal scholarship in Australia.[50] Nevertheless, given the High Court's repeated references to the above-quoted passage from the judgment in *Union Steamship*, it is not entirely heterodox to suggest that there may be certain basal principles which undergird the *Constitution*.[51] In a similar vein, constitutional functionalist scholarship has devoted significant attention to constitutional values and advanced the case for their recognition by judges and practitioners.[52] Such basal principles or values could supply basic structure doctrine with work to do in the Australian context.[53]

It is true that, compared to jurisdictions like India in which Parliament exercises the amendment power, the relevance of basic structure doctrine is less immediately apparent. Since s 128 gives final say over a referendum to the people, it might appear that there is no need to protect one decision by the popular sovereign from subsequent amendment by that same popular sovereign. The key point to be remembered, however, is that 'the people' perform different roles at different times. Similarly to the dual roles of a settlor–trustee, the same actor may occupy different legal positions and exercise different powers flowing from those positions. As discussed above, original constituent power can never be exercised via a constitutional amendment procedure because that procedure takes place within the existing constitution's normative order. Even though the Australian people are the repository of constituent power, that power can only be exercised via an extra-constitutional process.

Hence, the consequence of an amendment that purports to create a new constitution is not that the people, having decided to don their 'constituent power' hat, change the constitutional settlement. Rather, the amendment will be invalid because a new constitution simply cannot be created via amendment. It will be argued in Part IV that the more appropriate place to account for the

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[49] (1988) 155 CLR 1, 10 (Mason CJ, Wilson, Brennan, Deane, Dawson and Gaudron JJ). See further Sir Owen Dixon, 'The Common Law as an Ultimate Constitutional Foundation' [1957] 31 *Australian Law Journal* 240.

[50] Lisa Burton Crawford and Jeffrey Goldsworthy, 'Constitutionalism' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 357, 377. See further William Gummow, 'Common Law' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 190; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 566 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) ('*Lange*').

[51] *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 636 (Dawson J); *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 72 (Dawson J); *Kruger v Commonwealth* (1997) 190 CLR 1, 79 (Toohey J); *South Australia v Totani* (2010) 242 CLR 1, 29 (French CJ); *Momcilovic v The Queen* (2011) 245 CLR 1, 216 (Crennan and Kiefel JJ) ('*Momcilovic*').

[52] See, eg, Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018); Ashleigh Barnes 'Constitutional Dignity post *Farm Transparency*' (2023) 45(4) *Sydney Law Review* 497 ('Constitutional Dignity post *Farm Transparency*').

[53] The application of basic structure doctrine in other common law jurisdictions was given detailed attention in *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545 562–8 (Zainun Ali FCJ) (Malaysian Federal Court).

intuition that there must be some relevant difference between, for example, India and Australia for basic structure purposes is when considering how broadly to define the irreducible core of those respective constitutions. I contend that a highly participatory, democratic amendment process results in fewer elements of a constitution lying beyond the reach of ordinary amendment procedure.

Another objection might be that Roznai's metaphor of trusteeship or delegation is inapposite to the nature of the amendment power in s 128. However, this metaphor has been used by judges and scholars alike in relation to governmental power. Justices Deane and Toohey describe how 'the powers of government *belong to*…the people of the Commonwealth', and McHugh J similarly argues that 'governments are the *agents* of the people'.[54] Leighton McDonald has opined that 'Parliament, rather than being sovereign, acts as a *trustee* of the people's ultimate sovereign power'.[55] Whether or not descriptors involving trusteeship or delegation are the most technically precise way to describe the s 128 amendment power, such language is clearly not alien to Australian constitutional discourse.

Beyond objections to Roznai's theory, there are at least three possible concerns about the role of the Governor-General in this context. The first is a practical question: would a government capable of presenting an anti-democratic or intolerant amendment appoint a Governor-General decent enough to oppose that amendment?[56] Although the government of the day does not always have occasion to advise His or Her Majesty on the appointment of a new Governor-General, this is certainly a legitimate concern. The government could also advise the monarch to dismiss the Governor-General and appoint a more pliable replacement.[57] We might even note that Parliament could simply ignore a refusal of assent, triggering a constitutional revolution.[58] While these political realist questions are undoubtedly important in an actual crisis scenario, I will assume for present purposes that the Governor-General would be willing and able to discharge their duty with respect to the granting of assent.

Secondly, s 128's existing guardrails might be argued to reduce the Governor-General's relevance in 'policing' referendum outcomes. For one, s 128 does not provide for citizen-initiated referendums. At least one house of Parliament would need to endorse an anti-democratic or intolerant amendment

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54 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 70 (Deane and Toohey JJ) ('*Nationwide News*') (emphasis added); *Ridgeway v The Queen* (1995) 184 CLR 19, 91 (McHugh J) ('*Ridgeway*') (emphasis added).

55 Leighton McDonald, 'The Denizens of Democracy: The High Court and the Free Speech Cases' (1994) 5 *Public Law Review* 160, 177 (emphasis in original).

56 I am grateful to Ron Levy for raising this objection.

57 On appointment and removal of the Governor-General see, eg, DR Elder and PE Fowler, *House of Representatives Practice* (Department of the House of Representatives, 7th ed, 2018) 2; Anne Twomey, 'The Unrecognised Reserve Powers' (High Court Public Lecture, High Court of Australia, 14 November 2012).

58 See Gary Jeffrey Jacobsohn and Yaniv Roznai, *Constitutional Revolution* (Yale University Press, 2020) ch 2.

Bill for the issue considered in this article to arise. Similarly, the double majority requirement — that a referendum be approved by a majority of electors in a majority of States — fastens a federalist constraint to the amendment procedure. One might argue that these procedural requirements are more appropriate — and less jurisprudentially contentious — safeguards for constitutional amendment.

However, the core issue motivating contemporary interest in militant democracy is not simply that governing by majoritarian direct democracy can produce undesirably outcomes. Rather, the problem is that in *any* democratic political system, regardless of the checks, balances, and decision-making procedures that are adopted, it is possible for a completely legal series of moves to radically undermine important democratic principles.[59] The fact that certain rules govern the process by which Australia's *Constitution* may be amended is no solution to this issue — it simply changes the path that a formally legally constitutional upheaval would need to take. Therefore, it is the Governor-General's position *outside* the democratic system, a sort of constitutional umpire, that makes the refusal of assent a possible last line of defence against a constitutional coup.

The final issue relating to the Governor-General's role is whether the rule of law would be undermined by their taking action to neutralise a referendum. On a Diceyan account, the rule of law abhors 'arbitrary power … [and] wide discretionary authority'[60] — descriptors which could be attached to the reserve powers. Some of the Framers were attentive to this dilemma, with Sir Joseph Carruthers expressing concern about 'the Federation [being] plunged into a broil through the Governor taking responsibility on his [sic] own shoulders'.[61] Making such a momentous constitutional decision would be especially difficult given potential issues about the partisanship of the Crown law officers (from whom the Governor-General would ordinarily receive legal advice).[62] Perhaps the most that Governor-General ought to do is encourage the High Court to intervene. Indeed, Roznai's analysis of unconstitutional constitutional amendments is aimed primarily at elaborating a theory of judicial review of such amendments.[63]

The strongest formulation of this objection — a blanket assertion that the reserve powers are inherently inconsistent with the rule of law — is difficult to

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59 Militant democracy theorists frequently cite Joseph Goebbels' remark that 'this will always remain one of the best jokes of democracy, that it gave its deadly enemies the means by which it was destroyed': quoted in András Sajó, 'From Militant Democracy to the Preventive State?' (2006) 27 *Cardozo Law Review* 2255, 2262.

60 AV Dicey, *The Law of the Constitution*, ed JWE Allison (Oxford University Press, 2013) 119, 233.

61 *Official Report of the National Australasian Convention Debates*, Adelaide, 19 April 1897, 915 (Joseph Carruthers).

62 See generally Anne Twomey, 'Advice to Vice-Regal Officers by Crown Law Officers and Others' (2015) 26(3) *Public Law Review* 193.

63 See Yaniv Roznai, 'Amendment Power, Constituent Power, and Popular Sovereignty' in Richard Albert, Xenephon Contiades and Alkmene Fotiadou (eds), *The Foundations and Traditions of Constitutional Amendment* (Hart Publishing, 2017) 46–8 ('Amendment Power, Constituent Power, and Popular Sovereignty').

defend.[64] The High Court has recognised that the *Constitution* was framed with the rule of law as a central concern, repeatedly describing it as a 'constitutional assumption'.[65] This fact alone militates strongly against a view that the office and associated powers of the Governor-General — themselves a part of the *Constitution* — are invariably inconsistent with the rule of law.

A more nuanced formulation of the objection could instead be that, *in some instances*, the rule of law would require the Governor-General not to exercise their reserve power to refuse assent. It is neither necessary nor feasible for this article to exhaustively catalogue all such instances. Specifically in relation to unconstitutional alterations, however, I suggest that the rule of law could actually be *enhanced* by the reserve power's exercise — or even its mere existence.[66] The High Court has recognised that the rule of law requires the existence of 'an authoritative decision-maker' on constitutional matters (usually the Court itself).[67] But if the High Court refused to adjudicate on a referendum's substance, the Governor-General would be the only actor capable of protecting Australian constitutionalism from a radically anti-democratic or intolerant expression of popular will.[68] Even were the High Court willing to hear the case, the situations we are considering are serious constitutional crises in which regular assumptions about political behaviour break down and unlikely alliances may be required.[69] In this vein, Quick and Garran endorsed the importance of insulating the *Constitution* from 'the designs of those who wish to disturb it by introducing revolutionary projects' and 'the risk of thoughtless tinkering and theoretical experiments'.[70] It seems no coincidence that the Sword of Damocles — or Twomey's 'veiled sceptre'[71] — is often used as a metaphor in relation to reserve powers, and also appears on the cover of Roznai's book.[72] The mere threat of assent being refused acts as a constant

64 For such a viewpoint see, eg, Aaron Kirkpatrick, 'To Dismiss, or Not to Dismiss?' (2019) 6 *Public Interest Law Journal of New Zealand* 102.

65 *Communist Party Case* (n 34) 193 (Dixon J). Numerous cases have cited this passage: *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 513–14 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ) ('*Plaintiff S157*'); *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 351 (Gleeson CJ and Heydon J), 441 (Kirby J); *Thomas v Mowbray* (2007) 233 CLR 307, 342 (Gummow and Crennan JJ); *Momcilovic* (n 51) 216 (Crennan and Kiefel JJ); *South Australia v Totani* (2010) 242 CLR 1, 42 (French CJ). See generally Scott Stephenson, 'Rights Protection in Australia' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 905, 926–7.

66 Twomey, *The Veiled Sceptre* (n 12) 1.

67 *Plaintiff S157/2002* (n 65) 514 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

68 See mob rule — *okhlokratia* — in Polybius, *Histories*, tr Robin Waterfield (Oxford University Press, 2010) 373.

69 See generally Jack M Balkin, *The Cycles of Constitutional Time* (Oxford University Press, 2020) 38; Keith E Whittington, 'Yet Another Constitutional Crisis?' (2002) 43(5) *William & Mary Law Review* 2093; Sanford Levinson and Jack M Balkin, 'Constitutional Crises' (2008) 157(3) *University of Pennsylvania Law Review* 707.

70 Quick and Garran (n 23) 989.

71 Twomey, *The Veiled Sceptre* (n 12) 43.

72 See, eg, Allard-Tremblay (n 14) 396.

reminder that the rule of law will fall on any political player acting in breach of the *Constitution* — even the people themselves.

It therefore seems unlikely that Roznai's theory is totally irreconcilable with Australian constitutional discourse. Moreover, there may be a role for the Governor-General to play in its application. The following Parts will accept the prima facie case for applicability of the theory, and examine how it would apply to two types of constitutional amendments: anti-democratic and intolerant alterations.

IV Reconciling Popular Sovereignty with Unamendability

In this Part, I argue that Roznai's concept of the 'spectrum of unamendability' may be used to reconcile popular sovereignty principles with the notion of constitutional unamendability in Australia. However, I first propose a small modification to his theory, through which the process of framing and ratifying the *Constitution* is compared to the contemporary amendment procedure. Given the latter's superior democratic credentials, I argue that the scope of the amendment power in s 128 will be limited only by the most fundamental constitutional principles. The next and final Part will then investigate whether there is such a principle that would render unconstitutional an intolerant or anti-democratic alteration.

A *Popular Sovereignty and Referendums*

Popular sovereignty is 'a central theme in modern political and legal theory', and serves as the theoretical grounding for Roznai's account of constituent power and the spectrum of unamendability.[73] For Roznai, popular sovereignty over constitution-making means that popular amendment powers, like those exercised through referendums, have a 'wider scope' of permissible amendments than do governmental amendment powers, such as super-majority legislation.[74] Popular sovereignty is also one of the most fiercely debated concepts in Australian constitutional theory, and has been the subject of spirited disagreement since Federation. While for Higgins 'the highest authority lying behind the Constitution was the people of the nation as a whole', Quick and Garran saw 'the people' as exercising only a 'quasi-sovereignty'.[75] Sir Owen Dixon, one of Australia's most celebrated jurists, was strongly opposed to the idea of popular sovereignty. In his canonical article on the origins of the Australian politico–legal system, Dixon stated stridently that the *Constitution*:

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[73] Richard Bourke, 'Introduction' in Richard Bourke and Quentin Skinner (eds), *Popular Sovereignty in Historical Perspective* (Cambridge University Press, 2016) 1.

[74] Roznai, *Unconstitutional Constitutional Amendments* (n 29) 164.

[75] Aroney (n 20) 326; Quick and Garran (n 23) 993.

> is not a supreme law purporting to obtain its force from the direct expression of a people's inherent authority to constitute a government. It is a statute of the British Parliament enacted in the exercise of its legal sovereignty over the law everywhere in the King's Dominions.[76]

This conservative view has been echoed by judges and scholars alike.[77] By contrast, the political communication cases saw an explosion in judicial rhetoric declaring the people to be 'the ultimate sovereign', recognising that 'ultimate sovereignty reside[s] in the Australian people' and that 'the *Constitution* ... depends on the will of the people'.[78] Academic commentators continue to debate whether such judicial statements correctly identify a 'radical relocation of sovereignty' post-*Australia Acts 1986* (UK) and (Cth), or rather form 'the essential constitutional warrant for our continued subordination to an elective dictatorship'.[79] Wading into this constitutional quagmire is beyond the scope of this article. All that is required for my current purposes is to recognise that 'popular sovereignty ... was a key element of the Framers' views', and that the concept occupies an important place in Australian constitutional discourse.[80] As such, to be useful in an Australian context, a theory of constitutional unamendability must be able to conceptualise the Governor-General's reserve power to refuse assent consistently with the popular sovereignty principles that underpin referendums. I argue that the spectrum of unamendability can perform this function.

At first blush, it seems difficult to see any role for the Governor-General in the deeply democratic amendment process prescribed by s 128, one which gives robust voice to the idea of popular sovereignty over the *Constitution*. As Sir Ninian Stephen described it, 'the referendum ... [is] the nearest approach to absolute democracy that mankind has yet achieved'.[81] The desirability of a vestigial Imperial head of state intervening in this process is not immediately obvious. However, we can reconcile popular sovereignty and constitutional unamendability through Roznai's concept of the spectrum of unamendability. The existence of this spectrum is grounded in 'the myth of "the people" as holders of constituent power' — in other words, popular sovereignty.[82] The spectrum is therefore defined by what Lior Barshack refers to as 'the intensity of

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76 Sir Owen Dixon, 'The Law and the Constitution' (1935) 51(4) *Law Quarterly Review* 590, 597.

77 Frank Hutley, 'The Legal Traditions of Australia as contrasted with Those of the United States' (1981) 55 *Australian Law Journal* 63, 64; Andrew Fraser, 'False Hopes: Implied Rights and Popular Sovereignty in the Australian Constitution' (1994) 16(2) *Sydney Law Review* 213.

78 *Ridgeway* (n 54) 91 (McHugh J); *Australian Capital Television Pty Ltd v Commonwealth (No 2)* (1992) 177 CLR 106, 137–8 (Mason CJ) ('*ACTV*'); *Nationwide News* (n 54) 216 (Gaudron J).

79 McDonald (n 55) 182; Fraser (n 77) 222.

80 Benjamin B Saunders and Simon P Kennedy, 'Popular Sovereignty, "the People" and the Australian Constitution: A Historical Reassessment' (2019) 30(1) *Public Law Review* 36, 51. See further Brendan Lim, 'Legitimacy' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 315.

81 Sir Ninian Stephen, 'The referendum as an Australian institution' [1998] *Canberra Historical Journal* 2, 2.

82 Roznai, *Unconstitutional Constitutional Amendments* (n 29) 169.

sovereign presence'.[83] The more substantive is the sovereign people's participation in the constitutional amendment process, the weaker will be the fetters on the amendment power itself.

This spectrum of unamendability is relevant for two reasons. Firstly — with modification in line with arguments proposed by Adrienne Stone — it allows us to square-the-circle between the importance of popular sovereignty to Australian constitutionalism and the possibility of the people being overruled by the Governor-General. Secondly, it means that the s 128 amendment power will only be constrained by the most fundamental of constitutional principles. While acknowledging the obscurity and contestability of the descriptor 'fundamental' in the context of constitutional principles or values, Part V will endeavour to show that political constitutionalism is a fundamental constitutional principle in Australia; while legal constitutionalism is not.

On Roznai's account, the more closely the amendment procedure resembles true popular constituent power, the more unconstrained the power to amend will be. He argues that this 'resemblance' is to be assessed with reference to three democratic desiderata — inclusion, participation, and deliberation — based on the growing recognition in democratic theory that 'process matters'.[84] An amendment process that more fully fulfils these desiderata will give more effective recognition to popular sovereignty because it gives voice to an 'actual, deliberate, free choice by society's members'.[85]

However, as Stone has recognised, this evaluation ignores the flip side of the constitutional coin: that the democratic credentials of the *original* exercise of constituent power also matter.[86] Stone suggests that we might instead compare the amendment power to the original procedure by which the relevant constitution was adopted. This modification to Roznai's theory is useful because it recognises the imperfect moral authority of a constitution whose framing involved 'deficiencies in the [original] exercise of the constituent power'.[87] Comparing the amendment power to the original, historically contingent exercise of constituent power will give a more nuanced perspective on the relationship between the amendment power and the relevant country's tradition of popular sovereignty than would the use of acontextual and abstract criteria. Historicising the evaluation of an amendment procedure also avoids the possibility of implicitly undermining an existing constitution — which was likely adopted using procedures which were imperfectly inclusive, participatory or deliberative.

With this modification, unamendability can both respect the central constitutional importance of the people *and* protect the *Constitution* they created

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83 Lior Barshack, 'Constituent Power as Body: Outline of a Constitutional Theology' (2006) 56 *University of Toronto Law Journal* 185, 201.

84 Roznai, 'Amendment Power, Constituent Power, and Popular Sovereignty' (n 63) 30.

85 Ibid 31.

86 Stone (n 28) 365–7.

87 Ibid 366.

from impermissible alteration. The permitted margin of change is calibrated with reference to Australia's autochthonous species of popular sovereignty rather than generalised, aspirational criteria. The exact breadth of this margin of change therefore depends on how closely the amendment measures up to the original exercise of constituent power — in Australia's case, the framing and ratification process. The next section will consider this measurement.

B *Section 128 and Constituent Power*

The framing and ratification process for the *Constitution* had undeniable popular virtue, and was 'by the standards of the times ... a remarkably democratic process'.[88] However, Brendan Lim and others have argued that 'it is important not the overstate the democratic credentials' of the framing process.[89] With only around 60% of eligible electors voting — a category which itself excluded most women and racial minorities — the extent to which 'the people' of Australia can be said to have approved the *Constitution* is dubious.[90] Moreover, the Western Australian Parliament nominated its own delegates (rather than putting their election to the people), and no representatives from Queensland participated in the Convention's 1897–8 sessions.[91]

By contrast, the modern referendum process is buttressed by the High Court's teleological view of Australian democracy. In the voting rights cases, the Court held that our voting system has reached a higher level of advancement through a system of universal adult suffrage — rights which cannot now be withdrawn.[92] On these grounds alone, our contemporary referendum procedure not only approaches the same level of popular involvement as the framing process — it is undeniably *more* democratic.[93] Hence, the amendment power in s 128 will only be extremely weakly limited. The content of these limitations will be supplied by principles that make up the 'irreducible core' of the *Constitution*, and whose abrogation would therefore create a new constitution.[94] As alluded to above, the narrowness of these limitations

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88 Cheryl Saunders, *The Constitution of Australia: A Contextual Analysis* (Bloomsbury, 2010) 11–2.

89 Lim (n 80) 312; Helen Irving, 'The People and Their Conventions' in Michael Coper and George Williams (eds), *Power, Parliament and the People* (Federation Press, 1997) 113.

90 GJ Lindell, 'Why Is Australia's Constitution Binding? — The Reasons in 1900 and Now, and the Effect of Independence' (1986) 16(1) *Federal Law Review* 29, 30. See further LF Crisp, *Australian National Government* (Longman Cheshire, 3rd ed, 1975) 12.

91 Lim (n 80) 312.

92 *Roach v Electoral Commissioner* (2007) 233 CLR 162 ('*Roach*'); *Rowe v Electoral Commissioner* (2010) 243 CLR 1 ('*Rowe*'). See generally Graeme Orr and George Williams, 'The People's Choice: The Prisoner Franchise and the Constitutional Protection of Voting Rights in Australia' (2009) 8(2) *Election Law Journal* 123.

93 Stone (n 28) 365–7. But see Ron Levy, 'Breaking the Constitutional Deadlock: Lessons from Deliberative Experiments in Constitutional Change' (2010) 34(3) *Melbourne University Law Review* 805, 806–810.

94 Roznai, *Unconstitutional Constitutional Amendments* (n 29) 141.

might be contrasted to those existing in a jurisdiction like India. The Indian amendment power is exercised by Parliament, rather than referendum, which has informed a wider range of implicit restrictions.[95]

As has been argued, if a constitutional amendment was to abrogate one such basic or fundamental principles, thereby creating a 'new' constitution, there is a case to be made for the Governor-General to exercise their reserve power to refuse assent. Assembling a comprehensive account of the fundamental essence of the *Australian Constitution* would provide fertile ground for an entire book (or several), and I do not propose to do so in this article. Nor will I attempt to precisely locate the threshold at which a given constitutional change can be described as having intruded upon that fundamental essence.[96] My more limited aim is to consider whether the *Constitution*'s irreducible core would be contravened by a fundamentally anti-democratic or intolerant alteration. Liberal democratic values are certainly not the only constitutional values that a theory of constitutional unamendability could protect. However — being both dearly held and increasingly fragile — these values are a compelling subject for contemporary analysis. The following analysis, it is hoped, will go some way towards developing a practical understanding of how Roznai's high-level theory might be applied in Australia.

V The Constitutionality of Fundamentally Intolerant or Anti-Democratic Amendments

This Part uses Roznai's theory to consider whether a fundamentally anti-democratic or intolerant amendment would be unconstitutional. As discussed above, I consider these types of amendment because they present an intriguing contrast: they are morally repugnant, but are also invulnerable to traditional constitutional grounds of invalidity. They therefore present a situation in which the Governor-General might have an important role to play in protecting the *Constitution* from impermissible alteration. For example, the reader might consider the Menzies government's referendum on banning the Communist Party to be a domestic example of an anti-democratic alteration.[97] A more implausible

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95 See, eg, Sudhir Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine* (Oxford University Press, 2011) ch 4. For a critical perspective, see Chintan Chandrachud, 'Constitutional Falsehoods: The Fourth Judges Case and the Basic Structure Doctrine in India' in Richard Albert and Bertil Emrah Oder (eds), *An Unamendable Constitution? Unamendability in Constitutional Democracies* (Springer, 2018) 149.

96 On this point in a theoretical sense — the application of the sorites or 'pile of sand' paradox to unconstitutional constitutional amendments — see Yaniv Roznai, 'The Straw That Broke the Constitution's Back? Qualitative Quantity in Judicial Review of Constitutional Amendments' in Alejandro Linares Cantillo, Camilo Valdivieso-León and Santiago García-Jaramillo (eds), *Constitutionalism: Old Dilemmas, New Insights* (Oxford University Press, 2021) 147.

97 See generally Michael Kirby, 'HV Evatt, The Anti-Communist Referendum and Liberty in Australia' 7(2) *Australian Bar Review* 93; George Winterton, 'The Significance of the *Communist Party Case*' (1992) 18(3) *Melbourne University Law Review* 630, 653–5.

scenario could involve a referendum to change the wording of ss 7 and 24 and remove the 'directly chosen' requirement which has given rise to (limited) implied rights to vote and to communicate on political matters. These two examples provide clear cases of how an amendment could attempt to unwind the *Constitution*'s commitment to representative government. However, the aim of this Part is not to consider whether a particular alteration to the *Constitution* would in fact be intolerant or anti-democratic. Instead, I use the descriptor 'fundamentally' to stand for *some* conceivable alteration to the *Constitution* that would fit these descriptors. My objective is to consider the *Constitution*'s basal commitments as revealed by judicial and scholarly exegesis, and whether any of these commitments are located within the *Constitution*'s definitional core.

While acknowledging the difficulty of marshalling conclusive authority on such a question, I look to 'constitutionalism' — the overarching conception of how a given polity empowers and limits governmental power — to help locate fundamental principles.[98] I argue that political constitutionalism is central to the *Constitution*'s identity, and would be undermined by an anti-democratic alteration. On this basis, the Governor-General may be justified in refusing assent to a fundamentally anti-democratic amendment. By contrast, Australia's weak tradition of legal constitutionalism would likely not stand in the way of an intolerant amendment.

However, before commencing this analysis it is important to recognise that anti-democratic and intolerant amendments are not mutually exclusive categories.[99] One could hypothesise many anti-democratic referendums also underpinned by sexism, xenophobia, or some other intolerant pathology — for example, undoing the outcome of *Roach v Electoral Commissioner* and enacting a racially discriminatory franchise.[100] In other words, intolerance and discrimination may well be deployed in an overtly anti-democratic manner. The upshot of this observation for the argument that follows is that I accept that an intolerant amendment could be refused assent, but only if it were *also* anti-democratic. My discussion of anti-democratic amendments therefore implicitly includes this combined 'anti-democratic and intolerant' category; while intolerant alterations considered in Part VB are *only* intolerant.

A *Fundamentally Anti-Democratic Amendments*

The *Constitution*'s strong commitment to political constitutionalism is a promising candidate for the sort of fundamental constitutional pillar that Roznai's theory requires. The term 'constitution', while clearly fraught, can generally be defined as a set of legal norms that regulate the establishment and

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[98] Chief Justice Robert French, 'The Future of Australian Constitutionalism' (Speech, Centre for Comparative Constitutional Studies, 27 November 2009) 4–6.

[99] I am grateful to one of the anonymous reviewers for emphasising this point.

[100] *Roach* (n 92).

the exercise of public power.[101] I adopt the view that constitutionalism is a broadly dichotomous concept, divided between *legal* and *political* constitutionalism. As previously discussed, legal constitutionalism is rooted in a view of government as a perpetually aspiring tyrant, Odysseus chained to the mast only by constitutional limitations. By contrast, Stephen Gageler (prior to his Honour's appointment to the bench) describes how political constitutionalism's fundamental thesis is that 'the *Constitution* sets up a system to enlarge the powers of self-government of the people of Australia through institutions of government that are structured to be politically accountable to the people of Australia'.[102] Government is not a separate entity whose power must be carefully limited through strong-form rights review and 'mutual frustration' between different branches and levels of government.[103] Rather, the state is also 'a positive force for the common good'.[104] Government is an extension of the sovereign people, and can be held accountable by them for its use of the power it has been granted.[105]

As in many Commonwealth jurisdictions, Australia's federal government is held to account through the conventions of representative and responsible government.[106] As evocatively described by Isaacs J, responsible government 'is part of the fabric on which the written words of the *Constitution* are superimposed'.[107] Harrison Moore's words in 1902 are also apposite:

> *The predominant feature* of the Australian *Constitution* is the prevalence of the democratic principle … The great underlying principle is that the rights of individuals are sufficiently secured by ensuring, as far as possible, to each a share, and *an equal share, in political power.*[108]

As such, political constitutionalism in Australia is synonymous with democracy. As Moore emphasised, the *Constitution* prioritises democratic participation and procedure as opposed to substantive, enumerated rights. In the UK — the archetypal example of common law political constitutionalism — it has been

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[101] Dieter Grimm, 'Types of Constitutions' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 98.

[102] Stephen Gageler, 'Beyond the Text: A Vision of the Structure and Function of the Constitution' [2009] (Winter) *Bar News: The Journal of the NSW Bar Association* 30, 7.

[103] Richard Hofstadter, 'The Founding Fathers: An Age of Realism' in Robert H Horwitz (ed), *The Moral Foundation of the American Republic* (University of Virginia Press, 2nd ed, 1979) 62, 67.

[104] James Stellios, 'Liberty as a Constitutional Value: The Difficulty of Differing Conceptions of "The Relationship of the Individual to the State"' in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018) 177, 180.

[105] Denise Meyerson, 'Equality' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 1053, 1054. See further JAG Griffith, 'The Political Constitution' (1979) 42(1) *Modern Law Review* 1.

[106] Benjamin B Saunders, 'Responsible Government, Statutory Authorities and the Australian Constitution' (2020) 48(1) *Federal Law Review* 4, 7–12, 17–26.

[107] *Commonwealth v Kreglinger & Fernau Ltd and Bardsley* (1926) 37 CLR 393, 413 (Isaacs J).

[108] Harrison Moore, *The Constitution of the Commonwealth of Australia* (John Murray, 1902) 327–9 (emphasis added).

argued that 'democracy *is* the constitution'.[109] While such a radical view is clearly not directly applicable in Australia, it nevertheless reflects the undeniable centrality of democracy to a political constitutional order. Democracy is not simply a beneficial feature of the *Constitution*; democracy is the essential component of Australian political constitutionalism.[110] An anti-democratic alteration to the *Constitution*, therefore, would fundamentally change how public power is established, granted, and conditioned. In other words, it would create a new constitution, which on Roznai's theory can only be accomplished by the exercise of the original manifestation of constituent power. As such, the Governor-General may well be justified in refusing assent to an anti-democratic alteration to the *Constitution*.

It is important to acknowledge that this conclusion is at least facially paradoxical. Arguing that an unelected head of state should interfere with democratic decisions runs counter to the classic political-constitutional ideals of placing minimal constitutional restraint on the democratic process. This theme of paradox pervades the literature on militant democracy because its core question — whether a democracy should act undemocratically to preserve democracy — is itself catalysed by other paradoxes, like Karl Popper's paradox of tolerance.[111] Popper's paradox states that, since unlimited tolerance of intolerant ideologies might ultimately lead to the erasure of tolerance itself, a tolerant society could (paradoxically) be required to act intolerantly towards intolerant views in order to preserve the society's tolerant character. Scholars are still working through the highly contested normative question of how militant democracy can be justified.[112] For present purposes, it is sufficient to make two observations. The first is that several prominent justificatory theories of militant democracy focus on a sort of 'representation reinforcement' as the objective of militant democracy. I use the term 'representation reinforcement' to describe these normative rationales because they are broadly similar to John Hart Ely's defence of judicial review in a democratic society.[113] Ely's theory of representation reinforcement holds that judicial review should focus on ensuring fair democratic processes by protecting politically marginalised groups from systemic exclusion. Similarities can be observed in the militant democracy literature. Lars Vinx argues

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109 Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, 2007) 5 (emphasis in original).

110 See, eg, Justice Patrick Keane, 'In Celebration of the Constitution' (Speech, National Archives Commission, 12 June 2008) 1–4 (in which his Honour famously described Australia's *Constitution* as a 'small brown bird').

111 Popper (n 25) 581. Müller notes the prevalence of discussion of paradox in militant democracy literature, but argues that concern about such paradoxes is frequently overblown both empirically and theoretically: Müller, 'Protecting Popular Self-Government from the People? New Normative Perspectives on Militant Democracy' (n 6) 251–3.

112 Jan-Werner Müller, 'A "Practical Dilemma Which Philosophy Alone Cannot Resolve"? Rethinking Militant Democracy: An Introduction' (2012) 19(4) *Constellations* 536, 537.

113 John Hart Ely, *Democracy and Distrust* (Harvard University Press, 1981).

for militant democracy to be deployed where necessary to protect citizens' equal chance to participate in the democratic process.[114] Alexander Kirshner views militant democracy as legitimate where used to help preserve a 'political system in which capable citizens can play a meaningful role' — which he defines in Robert Dahl's terms of 'polyarchy'.[115] As such, the paradox implicit in militant democracy can be approached similarly to the issue of unelected judges' democratic legitimacy: by focusing on its role in reinforcing democratic principles where the political process has malfunctioned in a manner deleterious to democracy itself. This is not to say that these arguments are correct, but simply to observe that navigating facially paradoxical institutional issues is neither an insoluble problem, nor one unique to militant democracy scholarship.

The second point is that, even if militant democracy is opposed to the Diceyan ideal of political constitutionalism, the very existence of Australia's *Constitution* demonstrates that the Framers did not envision such a model. I would observe further that protection of the democratic process by non-democratic actors like courts is already a familiar concept in Australian constitutionalism.[116] I will not explore this point in detail, but it is important to emphasise that Australia does not have an unadulterated system of political constitutionalism. Strict political constitutionalism is not the sole desideratum of Australian constitutional jurisprudence. As such, the mere fact that the refusal of assent posits an external constraint on the democratic process does not, without more, make it inappropriate to the Australian constitutional milieu. In the next section, I consider the constitutional implications of an intolerant amendment.

B *Fundamentally Intolerant Amendments*

A fundamentally intolerant amendment would be anathema to those constitutional systems which are deeply committed to *legal* constitutionalism.[117] The reader will recall that an intolerant amendment would introduce an alteration into the *Constitution* that negatively discriminated against a subset of the population based on a given attribute. Although legal constitutionalism technically only requires a written constitution, the term is mainly associated with strong-form rights review, a system whereby written or implied

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[114] Lars Vinx, 'Democratic Equality and Militant Democracy' (2020) 27(4) *Constellations* 685.

[115] Alexander S Kirshner, *A Theory of Militant Democracy: The Ethics of Combatting Political Extremism* (Yale University Press, 2014) 7. On polyarchy, see Robert Dahl, *Democracy and Its Critics* (Yale University Press, 1989).

[116] See *Lange* (n 50); *Roach* (n 92); *Rowe* (n 92).

[117] See John Rawls, *Political Liberalism* (Columbia University Press, 1993) 239. But see Samuel Freeman, 'Political Liberalism and the Possibility of a Just Democratic Constitution' (1994) 69 *Chicago-Kent Law Review* 619, 663–7.

constitutional rights are used by judges to invalidate laws and executive actions.[118] The *United States Constitution* is often cited as the archetypal example of legal constitutionalism, and has influenced many other constitutions.[119] Systems of strong-form review reflect a distrust in government and the belief that its powers must be limited in order to protect individual liberties.[120]

The *Australian Constitution*, by contrast, displays little concern with using legal limitations to prevent intolerant government action. This can be explained by two main factors: the racist attitudes of the Framers, and their philosophical suspicion of legal constitutionalism. On the first factor, the Framers rejected Inglis Clark's proposal for an equal protection clause precisely *because* it would prevent parliaments from enacting discriminatory legislation against 'Chinamen, Japanese, Hindoos and other barbarians [sic]'.[121] There was worry that such a clause could invalidate the planned *Commonwealth Franchise Act 1902* (Cth) which would deny voting rights to people of non-European backgrounds; as well as racialised State legislation like Victorian anti-Chinese factory regulations, and Western Australia's ban on Africans and Asians acquiring mining licences.[122]

While such a legacy is undoubtedly a 'stain' on the *Constitution*, the Framers' attitudes towards racial minorities are not conclusive determinants of the character of Australian constitutionalism.[123] Rather, at a broader level, the *Constitution* and its jurisprudence have been shaped by the Framers' suspicion of legal constitutionalism even after their odious social attitudes fell out of favour. It was scarcely conceivable that a Westminster-style parliament —the people's representative, the most venerable and ideal mode of democracy yet achieved — would be a threat to liberties.[124] On the contrary, Parliament would *secure* individual rights through the proper functioning of the political process. The Framers therefore made 'little or no

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[118] See generally Richard Bellamy, 'Political Constitutionalism' in Peter Cane and H Kumarasingham (eds), *The Cambridge Constitutional History of the United Kingdom* (Cambridge University Press, 1st ed, 2023) 59. In relation to strong-form rights review see, eg, Mark Tushnet, *Weak Courts, Strong Rights* (Princeton University Press, 2008). Cf Aileen Kavanagh, 'What's so Weak about "Weak-Form Review"? The Case of the UK Human Rights Act 1998' (2015) 13(4) *International Journal of Constitutional Law* 1008.

[119] See, eg, Lorraine E Weinrib, 'The Postwar Paradigm and American Exceptionalism' in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press, 2006) 84.

[120] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 129, 151 (Knox CJ, Isaacs, Rich and Starke JJ); *ACTV* (n 78) 186 (Dawson J). See generally Rosalind Dixon, 'Constitutional Drafting and Distrust' (2015) 13(4) *International Journal of Constitutional Law* 819.

[121] *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 3 March 1898, 1784 (Sir John Quick). See further John M Williams, '"With Eyes Open": Andrew Inglis Clark and Our Republican Tradition' (1995) 23(2) *Federal Law Review* 149, 175–8.

[122] John A La Nauze, *The Making of the Australian Constitution*, (Melbourne University Press, 1972) 231–2.

[123] Rosalind Croucher, 'Bringing Rights Home: Mapping an Agenda on Promoting, Protecting and Fulfilling Human Rights in Australia' (2021) 10(1) *Victoria University Law and Justice Journal* 11, 16.

[124] Haig Patapan, 'Competing Visions of Liberalism: Theoretical Underpinnings of the Bill of Rights Debate in Australia' (1997) 21(2) *Melbourne University Law Review* 497, 501.

attempt' to constitutionally enshrine an extensive list of civil or social rights;[125] they viewed doing so as both undesirable and unnecessary.[126]

Despite recent advances in implied freedom and Ch III jurisprudence, legal constitutionalism in Australia remains firmly focused on the political process.[127] For example, members of the High Court have recently referred to personal dignity as a constitutional value, one which grounds an individual's prerogative 'not [to be] held captive by an uninvited political message'.[128] On this approach, dignity is not dealt with in expansive liberal rights terms, but rather as a narrowly defined component of the democratic political process.[129] We might wonder whether this *dicta* implies that one's dignity is valued by the *Constitution* only insofar as it is important to the conduct of free elections. Additionally, many of Australia's established legal constitutional norms have been observed to be more concerned with protecting federalism than the rights of individuals.[130] The independent federal judiciary is empowered to restrain the central government so as to form the 'keystone of the federal arch', the ultimate stopgap to preserve the balance of federal power.[131] As Lisa Burton Crawford and Jeffrey Goldsworthy note, this is partly reflected by the fact that the explicit rights protections that are enshrined in the *Constitution* are binding on the Commonwealth but not the States.[132] Compared to those of other nations, Australia's *Constitution* is 'markedly utilitarian' in its emphasis on federalism and politics over substantive rights.[133] Many foundational rights which are not directly connected to the political process — for example, procedural fairness in courts and tribunals — enjoy little or no protection at the constitutional level.[134]

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125 Sir Robert Menzies, *Central Power in the Australian Commonwealth* (University Press of Virginia, 1967) 52.

126 Patapan (n 124) 501.

127 Crawford and Goldsworthy (n 50) 378. See further Stephen Gageler, 'Foundations of Australian Federalism and the Role of Judicial Review' (1987) 17(3) *Federal Law Review* 162.

128 *Clubb v Edwards* 267 CLR 171, 208–9 (Kiefel CJ, Bell and Keane JJ).

129 See further Scott Stephenson, 'Dignity and the Australian Constitution' (2021) 42(4) *The Sydney Law Review* 369; Bede Harris, 'Human Dignity and the Australian Constitution — a Critique' (2020) 17(1) *Canberra Law Review* 2. But see Ashleigh Barnes, 'Constitutional Dignity' (2023) 46(3) *Melbourne University Law Review* 683; Barnes; Barnes, 'Constitutional Dignity post *Farm Transparency*' (n 52).

130 See, eg, James Stellios, 'Using Federalism to Protect Political Communication: Implications from Federal Representative Government' (2007) 31(1) *Melbourne University Law Review* 239; Stellios, *The Federal Judicature: Chapter III of the Constitution* (n 45) ch 3.

131 *Official Report of the National Australasian Convention Debates*, Adelaide, 20 April 187, 953 (Sir Edmund Barton).

132 Crawford and Goldsworthy (n 50) 367.

133 Hugh Collins, 'Political Ideology in Australia: The Distinctiveness of a Benthamite Society' (1985) 114(1) *Daedalus* 147, 149.

134 On constitutional (under)protection of procedural fairness in Ch III courts, see Kieran Pender, 'Open Justice, Closed Courts and the *Constitution*; Australian and Comparative Perspectives' (2023) 42(2) *University of Queensland Law Journal* 155, 174–8. On legislative abrogation of procedural fairness in executive tribunals, see Henry Palmerlee, 'Taking Procedural Fairness Seriously: Structured Proportionality and Legislative Scrutiny' (2025) *University of New South Wales Law Journal* (forthcoming).

These two factors suggest strongly that the protection of non-political minority rights or interests is not a fundamental principle that would give content to Roznai's theory in the Australian context.[135] An intolerant alteration — while undoubtedly contrary to the current values of Australian society — would be unlikely to create a different constitution altogether. Constitutional intolerance therefore appears to fall within the scope of the 'delegated constituent power' in s 128.

VI Conclusion

This article has attempted to locate a role for the Governor-General in protecting Australian democracy from itself. By bringing Roznai's theory of unconstitutional constitutional amendments to bear on referendums, and giving it content through the notion of political constitutionalism, relatively principled limitations on the Australian people's constitutional authority begin to take shape. However, certainty will invariably be elusive when dealing with such axiomatic issues. These are matters that courts consider only rarely, and usually implicitly. Moreover, by their very nature the reserve powers awaken only in times of crisis and significant political uncertainty. If there are to be central principles that define the *Constitution*'s identity, political constitutionalism seems to be one prime candidate. But until the constitutional day of judgement arrives, our vision of such principles will be seen through a glass darkly.

135 While acknowledging the dictum that 'the personal is political', it seems plausible for constitutional purposes to draw a distinction between political and non-political rights/interests. There appears to be a relevant difference between, for example, the right to vote and the right to own property, or the right to marriage equality. This perspective is analogous to Dixon's distinction between the 'democratic minimum core', and 'thicker understandings of democracy, which emphasise … individual rights and democratic commitments': Dixon (n 3) 359–62, see also discussion above n 3.

Legal Pathology: Evaluating the High Court on Expert Evidence

Gary Edmond*

This article explains why the application of admissibility rules to the opinion of a forensic pathologist in Lang v The Queen *('*Lang*') (and forensic pathologists in* Velevski v The Queen*, and indirectly an anatomist in* Honeysett v The Queen*) seems insufficiently attentive to the expressed need for specialised knowledge and, inextricably, the actual abilities of those recognised as expert witnesses. The article explains why legal practitioners and judges should carefully attend to 'specialised knowledge', and treat independent evidence supporting specific abilities (in* Lang*, being able to discriminate between self-inflicted stab wounds and stab wounds inflicted by others) as a form of 'specialised knowledge'. Notwithstanding obiter in* Dasreef Pty Ltd v Hawchar*, it cautions against placing too much reliance on training, formal qualifications, general experience, and past legal practice. Courts, in particular, should be more sceptical about opinion evidence adduced by parties (especially prosecutors in criminal proceedings), the abilities of trial lawyers, judges and other fact-finders, as well as the effectiveness of trial safeguards and appeals.*

I Introduction

In *Lang v The Queen* ('*Lang*')[1] the High Court appears to have unified the law of expert opinion evidence across Australia. With respect to admissibility there now appear to be few differences between common law and uniform evidence law ('UEL') jurisdictions.[2] This article aims to briefly set out the main rules regulating admissibility in the aftermath of *Lang*. Then, it re-considers the application of these rules to the opinion in *Lang*; most prominently the requirements that expert opinion be substantially based on specialised knowledge and presented in a manner enabling rational evaluation. In so doing, it identifies potentially serious limitations with prevailing interpretations and applications of our admissibility rules and jurisprudence, particularly the heavy reliance on the expert's formal qualifications and general experience. Close examination of the opinion evidence adduced and deemed admissible in *Lang* provides a way of explaining why

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1 (2023) 278 CLR 323 ('*Lang*').

2 The uniform evidence law ('UEL') refers collectively to *Evidence Act 1995* (Cth); *Evidence Act 2011* (ACT); *Evidence Act 1995* (NSW); *Evidence (National Uniform Legislation) Act 2011* (NT); *Evidence Act 2001* (Tas); *Evidence Act 2008* (Vic).

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admissibility practices in our evolving adversarial systems require further refinement.

The appeal in *Lang* raised two grounds. First, the verdict was said to be 'unreasonable, or can not be supported having regard to the evidence'.[3] Thomas Lang was convicted by a jury in the Supreme Court of Queensland of the murder of Maureen Boyce (also 'the deceased') in her Kangaroo Point sub-penthouse in the early hours of 22 October 2015. The deceased was recovered from her bed with a large kitchen knife protruding from her abdomen. It was not in dispute that Mr Lang and the deceased were the only persons in the well-secured apartment at the time of her death. The issue at trial was whether the deceased was killed by Mr Lang or had killed herself.[4] There was circumstantial evidence which might have enabled a jury to convict Mr Lang, although reasonable minds might differ as to whether the prosecution case was capable of proving guilt beyond reasonable doubt.[5] This article is primarily concerned with a second related ground — the admissibility of *an* expert opinion adduced by the prosecutor.

The appellant asserted that a miscarriage of justice was caused by the wrongful admission of an opinion from a forensic pathologist, Dr Beng Beng Ong, working for Queensland Health Forensic and Scientific Services.[6] As part of his regular employment, Dr Ong attended the scene and subsequently performed an autopsy. At trial Dr Ong described the stab wound and explained how it might have been caused. He also offered an opinion on the central question of whether the wound was self-inflicted or inflicted by another person. To be clear, Dr Ong's suggestion that it was 'more likely' that the deceased's stab wound(s) was inflicted by another person was expressed quite modestly. Nevertheless, because of the way the case was prosecuted, the opinion directly addressed the ultimate issue in this criminal prosecution.

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3 *Lang* (n 1) 394 [245], 395 [249] (Jagot J); *Criminal Code Act 1899* (Qld) s 668E(1) ('*Criminal Code*').

4 Expressed in this way it was murder or acquittal. However, it was not for the jurors to prefer one version of events, but for the prosecutor to satisfy them that it was beyond reasonable doubt that Mr Lang killed Mrs Boyce: see Transcript of Proceedings, *R v Lang* (Supreme Court of Queensland, 273/2017, A Lyons SJA, 25 November 2020, 3:31pm) 4 (A Lyons SJA) ('Transcript Summing-Up'). In *Lang*, among other things, the jury were told their task was like 'putting together all the pieces of this puzzle': at 16. That characterisation unhelpfully implies a correct solution available *on the evidence*, as opposed to the real possibility of uncertainty or doubt.

5 The High Court of Australia and the Queensland Court of Appeal were satisfied that the verdict was safe (or available on the evidence) without the contested opinion. This includes the *Lang* dissentients: (n 1) 376 [186] (Gordon and Edelman JJ). Interestingly, I have not met anyone who agrees with this perspective.

6 While this article focuses on the opinion evidence of Dr Ong in *Lang*, other pathologists might have ventured similar opinions. In consequence, it is concerned with the legal recognition and regulation of opinion evidence, using the contested opinion in *Lang* as an example. On forensic pathology, see the sociological account by Stephan Timmermans, *Postmortem: How Medical Examiners Explain Suspicious Deaths* (University of Chicago Press, 2006).

This article considers how the High Court approached the admissibility of the contested opinion and, indirectly, the operation of adversarial trial procedures and safeguards. For, there is something artificial about focusing on admissibility without considering how evidence deemed admissible was (and is) presented, contested and understood at trial and on appeal. In considering the expert opinion in *Lang*, it is useful to recognise that this was a murder case where the trial actors, specifically prosecutor, defence counsel, solicitors and judge, were unusually well-positioned and prepared. It was the fourth time the forensic pathologist was publicly questioned about his opinion.[7]

This article is not intended as criticism of the performance of the expert witness.[8] The evidence — his testimony (and demeanour) — was largely dependent on questions posed by the lawyers. Admissibility was a legal question, for the lawyers and judges. It is easy to understand that when a highly trained and experienced forensic pathologist, such as Dr Ong, is asked to provide answers he or she endeavours to assist the court.[9] That such assistance might be conceived as appropriate is supported by the provision of similar opinions — about cause and manner of death, for example — in other settings, such as through written reports or testimony in coronial proceedings.[10] The focus of this article is on the *legal* reception and treatment of opinion evidence in criminal proceedings. It explains why the legal approach to admissibility in *Lang* does not enable us to determine whether Dr Ong or other forensic pathologists can reliably distinguish between stab wounds that were self-inflicted from those inflicted by another (or others). Rather than recriminate, the following sections aim to explain this lacuna, some of its implications for trials, along with the need for greater rigour in the application of admissibility rules, particularly around the need for opinions to be conspicuously based on specialised knowledge such that they will be presented (and challenged) in ways that enables them to be understood and rationally evaluated.

II Unifying the Common Law and the UEL

In *Lang* the High Court provided its clearest indication that the rules regulating the admission of opinion evidence at common law are substantially similar, and perhaps the same, as those operating in UEL jurisdictions.[11] Considering the admissibility of Dr Ong's contested opinion in the common law jurisdiction of

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7 Dr Ong was questioned at committal proceedings, the first trial, a pre-trial admissibility hearing, and the second trial.

8 I endorse the description of Dr Ong in *Lang* (n 1) 335 [20] (Kiefel CJ and Gageler J).

9 Expert witnesses do not necessarily know or understand the complex rules around admissibility.

10 It may be that (some) experts require more training about the scope of their expertise and legal responsibilities, but that is a separate matter.

11 See especially *Lang* (n 1) 332 [11] (Kiefel CJ and Gageler J).

Queensland, the High Court repeatedly referred to the statutory language of UEL s 79(1) and drew directly upon jurisprudence from leading UEL decisions.[12] While the text of s 79(1) of the UEL drew, to some degree, upon the pre-existing common law,[13] in *Lang* the High Court expressly relied on common law as well as UEL jurisprudence in a manner that appears to unify laws regulating the admission of expert opinion evidence throughout Australia.

Grounded in High Court authority — especially *Lang*, but also *HG v The Queen* (‘*HG*’),[14] *Velevski v The Queen* (‘*Velevski*’),[15] *Dasreef Pty Ltd v Hawchar* (‘*Dasreef*’),[16] *Aytugrul v The Queen* (‘*Aytugrul*’)[17] and *Honeysett v The Queen* (‘*Honeysett*’)[18] — this section provides a very succinct overview of what now appear to be the main admissibility requirements for expert opinion. In addition to the evidence having the capacity to rationally affect assessment of a fact in issue (ie, being logically relevant), the basic requirements seem to be, *first* and foremost, the opinion must be substantially based on ‘specialised knowledge’ (or specialist knowledge).[19] The High Court offered the following elaboration in *Honeysett*:

> The Macquarie Dictionary defines ‘knowledge’ as ‘acquaintance with facts, truths, or principles, as from study or investigation’ and it is in this sense that it is used in s 79(1). The concept is captured in Blackmun J’s formulation in *Daubert v Merrell Dow Pharmaceuticals Inc*: ‘the word “knowledge” connotes more than subjective belief or unsupported speculation. ... [It] applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds.’[20]

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12 See, eg, ibid 330 [6], 330–1 [7], 333 [13], 333–4 [15], 334 [16], 334–5 [17] (Kiefel CJ and Gageler J), 378–9 [193], 387–8 [221], 388 [222], 389 [223], 389 [224], 389 [225], 390 [228], 391 [230], 393–4 [242] (Gordon and Edelman JJ), 444 [422], 446 [430], 447 [431], 447 [433], 448 [434], 448 [435], 449 [438], 449 [439], 459 [470] (Jagot J).

13 See generally Australian Law Reform Commission, *Evidence* (Report No 38, June 1987).

14 (1999) 197 CLR 414 ('*HG*').

15 (2002) 76 ALJR 402 (‘*Velevski*’).

16 (2011) 243 CLR 588 (‘*Dasreef*’).

17 (2012) 247 CLR 170 (‘*Aytugrul*’).

18 (2014) 253 CLR 122 (‘*Honeysett*’).

19 With respect to relevance, the inclusion of ‘if accepted’ in the definition in UEL (n 2) s 55 cannot overcome the more fundamental (and prior) requirement of an ability to ‘rationally affect’. When it comes to opinions admitted via the exception provided by UEL s 79(1) and its common law equivalent — especially scientific, technical and biomedical opinions — the rational capacity of the evidence is dependent on the existence of ‘specialised knowledge’ for admission and not on what a jury might — in ignorance or error — accept about the capacity of the evidence.

20 *Honeysett* (n 18) 131 [23] (The Court) (emphasis added) (citations omitted) quoting *Daubert v Merrell Dow Pharmaceuticals Inc* 509 US 579, 590 (1993). See also *Lang* (n 1) 331 [9]–[10] (Kiefel CJ and Gageler J). The United States Supreme Court jurisprudence is discussed in Gary Edmond, ‘Supersizing *Daubert*: *Science for Litigation* and its Implications for Legal Practice and Scientific Research’ (2007) 52(4) *Villanova Law Review* 857, and relevant Canadian jurisprudence is discussed in Gary Edmond and Kent Roach, ‘A Contextual Approach to the Admissibility of the State’s Forensic Science and Medical Evidence’ (2011) 61(3) *University of Toronto Law Journal* 343.

Where the evidence is scientific, technical, or biomedical, 'known facts' or bases 'accepted as truths on good grounds' should be clearly linked to 'study or investigation'.[21]

Secondly, there is an expectation that the expert will possess 'training, study or experience' clearly related to the 'specialised knowledge'.[22] According to *Honeysett*, the witness's 'training, study or experience *must result in the acquisition of knowledge*'.[23] *Thirdly*, there must be reasoning capable of supporting each opinion.[24] It is the responsibility of the expert witness (and trial counsel) 'to furnish the Judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions so as to enable the Judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence'.[25] *Fourthly*, the strict form of the common law basis rule no longer applies. The question of whether the fact (or facts) underpinning an opinion is

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[21] *Honeysett* (n 18) 131 [23]. For an introduction to what is required to evaluate and understand forensic science and medicine evidence, see President's Council of Advisors on Science and Technology, Executive Office of the President, *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods* (Report, September 2016) ('*PCAST Report*'); Committee on Identifying the Needs of the Forensic Science Community, National Research Council, *Strengthening Forensic Science in the United States: A Path Forward* (National Academies Press, 2009) ('*NRC Report*').

[22] *Lang* (n 1) 446 [429], 448 [436] (Jagot J), 330 [6], 332 [10]–[11], 334 [16], 336[24] (Gordon and Edelman JJ); *R v Bonython* (1984) 38 SASR 45, 46-7 (King CJ) ('*Bonython*'); *HG* (n 14) 432 [58] (Gaudron J); *Velevski* (n 15) 416 [82] (Gaudron J), 426–7 [154] (Gummow and Callinan JJ). It might be that common law jurisdictions remain slightly more favourably disposed to opinions based on experience, because of references to 'knowledge or experience' from *Bonython* (and the relative ease of decision-making): *Bonython* (n 22) 46-7. See Gary Edmond and Kristy Martire, 'Knowing Experts? Section 79, Forensic Science Evidence and the Limits of "Training, Study or Experience"' in Andrew Roberts and Jeremy Gans (eds), *Critical Perspectives on the Uniform Evidence Law* (Federation Press, 2017) 80.

[23] *Honeysett* (n 18) 131 [23] (The Court) (emphasis added). There is a tendency, exemplified in *Lang,* to supplement, or replace, 'knowledge' with 'experience': see, eg, *Lang* (n 1) 330 [6] (Kiefel CJ and Gageler JJ) ('based on that person's specialised knowledge or experience'), 389 [224] (Gordon and Edelman JJ) ('knowledge which is not possessed by ordinary people, and which is "sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience"'), 448 [436] (Jagot J) ('whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience').

[24] *Lang* (n 1) 330 [7] (Kiefel CJ and Gageler J), 388[223], 392 [234] (Gordon and Edelman JJ). Particularly contested opinions. And, the reasons must be capable of supporting the opinion.

[25] *Davie v City of Edinburgh* 1953 SC 34, 40 (Lord Cooper) ('*Davie*'), quoted in *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705, 729 [59] (Heydon JA), in turn quoted in *Dasreef* (n 16) 624 [93] (Heydon J) and engaged in *Lang* (n 1) 388 [222] (Gordon and Edelman JJ). More generally, see *Hillstead v The Queen* [2005] WASCA 116, [48]–[49] (Wheeler JA); *Hevi Lift (PNG) Ltd v Etherington* [2005] NSWCA 42; *Bropho v Western Australia [No 2]* [2009] WASCA 94; *Stapleton & Hayes* [2011] FamCAFC 70; *MA v The Queen* [2013] VSCA 20; *R v Mahony* [2019] QCA 131 ('*Mahony*'); *Sidaros v The Queen [No 3]* [2021] ACTCA 31. This basic requirement should be explicitly addressed in expert reports.

proved is for the tribunal of fact.[26] *Fifthly*, prohibitions on opinions on the ultimate issue and common knowledge have been abolished, though where an expert opinion bears directly on the ultimate issue in proceedings, courts should 'exercise particular scrutiny'.[27] Expert opinions bearing on common knowledge will generally need to qualify or correct popular misapprehensions and (mis-)beliefs, otherwise they may not be relevant.[28] *Sixthly*, the probative value of opinion evidence must outweigh the danger of unfair prejudice to the defendant.[29] That is, the opinion 'taken at its highest' — which means its maximum *capacity* — must outweigh risks to the defendant from unfairness, misunderstanding or misuse, and procedural disadvantage.[30]

There are several additional considerations, not strictly admissibility rules, also worthy of attention in this context. In *Dasreef*, six members of the High Court suggested that with some types of opinion evidence, implicitly those from well-established domains, the need to closely scrutinise the opinion to determine whether formal admissibility requirements (the *first* to *fifth* requirements, above) have been satisfied might be expedited. The diagnostic opinions of medical practitioners, for example, were said to 'require *little explicit articulation or amplification* once the witness has described *his or her qualifications and experience*, and has identified the subject matter about which the opinion is proffered'.[31] This

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26 *Dasreef* (n 16) 605 [41] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). See also Australian Law Reform Commission, *Evidence (Interim)* (Report No 26, 1985) vol 1, 78–9 [161]; *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd* [2002] FCAFC 157.

27 *R v GK* (2001) 53 NSWLR 317, 326 [40] (Mason P). See also *Murphy v The Queen* (1989) 167 CLR 94, 110 (Mason CJ and Toohey J); *Aytugrul* (n 17); David Hamer, 'Expected Frequencies, Exclusion Percentages and "Mathematical Equivalence": The Probative Value of DNA Evidence in *Aytugrul v The Queen*' (2013) 45(3) *Australian Journal of Forensic Sciences* 271.

28 See *Smith v The Queen* (2001) 206 CLR 650; *Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd* (2007) 159 FCR 397. Though, see also UEL (n 2) ss 79(2), 108C.

29 *R v Christie* [1914] AC 545 ('*Christie*'); UEL (n 2) s 137. Section 137 only applies following an objection, notwithstanding the statutory language. Section 135, which applies to all parties, as well as in civil proceedings, strikes a different balance (favouring even more liberal admission) and incorporates concerns beyond fairness, such as efficiency.

30 *TKWJ v The Queen* (2002) 212 CLR 124, 154 [90] (McHugh J): 'In this context, prejudice means diverting the jury's attention from the issues to be determined in the case to the detriment of the accused.' Though, see Andrew Roberts, 'Probative Value, Reliability, and Rationality' in Andrew Roberts and Jeremy Gans (eds), *Critical Perspectives on the Uniform Evidence Law* (Federation Press, 2017) 63; David Hamer, 'The Unstable Province of Jury Fact-Finding: Evidence Exclusion, Probative Value and Judicial Restraint after *IMM v The Queen*' (2017) 41(2) *Melbourne University Law Review* 689; Gary Edmond, 'Icarus and the Evidence Act: Section 137, Probative Value and Taking Forensic Science Evidence "at Its Highest"' (2017) 41(1) *Melbourne University Law Review* 106.

31 *Dasreef* (n 16) 604 [37] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) (emphasis added). Cf Paul Meehl, *Clinical vs Statistical Predictions* (University of Minnesota Press, 1954). See also William Grove et al, 'Clinical versus Mechanical Prediction: A Meta-Analysis' (2000) 12(1) *Psychological Assessment* 19. The shortcut should not be used to facilitate the admission of controversial opinions, such as some opinions suggesting that babies were shaken or abused. See Keith Findley et al (eds), *Shaken Baby Syndrome: Investigating the Abusive Head Trauma Controversy* (Cambridge University Press, 2023).

admissibility 'shortcut' was used in *Lang* in a manner that, as we shall see, enabled the majority to limit their interest in 'specialised knowledge'.[32]

Another consideration follows the design of our adversarial system. For, the tribunal of fact (often a jury) is responsible for evaluating admissible expert opinions and 'resolving' expert disagreement. Where there is only one expert witness, when experts disagree, or there is controversy around the boundaries of expert knowledge, it is jurors who are expected to evaluate the expert testimony in the context of all the evidence presented, any judicial directions and warnings, and the burden and standard of proof.[33] Liberal admissibility practice, prosecutorial over-stepping, limited funding for defence work, weak performances by defence lawyers, and even gambles around strategy (eg, whether to call a rebuttal expert), place much of the responsibility for understanding, evaluating and integrating expert opinion on the tribunal of fact.

Finally, in most jurisdictions expert witnesses are formally required to acknowledge and adhere to practice directions.[34] Though not admissibility rules *per se*, compliance with codes of conduct and practice notes should be closely related to admissibility. In most cases, the expert report (or certificate) provides the primary means of determining whether admissibility requirements are satisfied; particularly, whether the opinion is based on specialised knowledge (and what that knowledge is and whether it is capable of supporting the opinion).[35]

III THE FORENSIC PATHOLOGY EVIDENCE IN *LANG*

Now, in the shadow of this admissibility jurisprudence, we turn to take a closer look at the opinion evidence and its treatment in *Lang*. Before proceeding to consider how the High Court majority applied the admissibility standards, it seems appropriate to consider the contested opinion and the associated reasons. In this

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32 It may be that 'fast-tracked' would be a more precise metaphor, but little appears to hinge on this distinction.

33 *Velevski* (n 15) 432 [180] (Gummow and Callinan JJ). In *Velevski*, Gleeson CJ and Hayne J did not decide the issue. For Gaudron J the judge must be satisfied that the 'jury could reach its own conclusions': at 417 [84]. Cf Scott Brewer, 'Scientific Expert Testimony and Intellectual Due Process' (1998) 107(6) *Yale Law Journal* 1535; Kristy Martire and Gary Edmond, 'How Well Do Lay People Comprehend Statistical Statements from Forensic Scientists?' in David Banks et al (eds), *Handbook of Forensic Statistics* (Chapman and Hall/CRC, 2020) 201.

34 See, eg, Supreme Court of Queensland, *Practice Direction No 124 of 2024: Evidence in Criminal Proceedings (Other than Sentences)*, 15 April 2024. This practice direction, modelled on Supreme Court of Victoria, *Practice Note SC CR 3: Expert Evidence in Criminal Trials*, 30 January 2017, was introduced after the trial and appeal in *Lang*. On practice directions more generally, see Jason Chin, Mehera San Roque and Rory McFadden, 'The New Psychology of Expert Witness Procedure' (2020) 42(1) *Sydney Law Review* 69; Gary Edmond, Kristy Martire and Mehera San Roque, 'Expert Reports and the Forensic Sciences' (2017) 40(2) *University of New South Wales Law Journal* 590.

35 *HG* (n 14) 427 [39] (Gleeson CJ).

Part, and for the purposes of the ensuing analysis, Dr Ong's testimony is divided into two main sections. The first includes his description of the stab wound, explanation of how the injury occurred, the effects of the injuries on the deceased, along with the attribution of a cause (or mechanism) of death. This section also includes Dr Ong's responses to a series of related or incidental issues about whether the deceased was conscious, her mobility, how long she might have retained consciousness and lived, and so forth. There was no objection, at trial or on appeal, to the admissibility of this evidence — descriptive, explanatory, interpretive, even speculative.[36] The sections thereafter focus on the contested opinion.

A *Uncontested Testimony*

Dr Ong was the state-employed forensic pathologist responsible for reviewing Mrs Boyce's unnatural death. He attended the scene, conducted an autopsy the following day, produced a report and testified in committal proceedings, a pre-trial hearing and in two trials. Most of Dr Ong's testimony was broadly consistent with death being the result of *either* suicide or homicide. For that reason, there was no challenge to the admissibility of most of his descriptions, explanations and opinions.[37] They were available to support the prosecution allegation of murder as well as the possibility of suicide.

Dr Ong concluded that Mrs Boyce died from loss of blood associated with a 'stab wound to the abdomen'.[38] He testified about encountering the body of a 68-year-old woman lying on a bed, beneath a sheet, with a large kitchen knife (195mm blade) protruding from her abdomen. There was a single entry wound (73mm x 24mm), though Dr Ong identified two groups of incisions — track A and track B — within the wound. The first — track A — was said to be composed of two internal tracks created by two ('plunging') movements of the blade while inside the wound. According to Dr Ong, the knife was then partially withdrawn (leaving about 40-50mm of the blade within the wound), rotated roughly 180 degrees, and then re-inserted, thereby creating track B — composed of three

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36 Some of the uncontested opinions, such as the nature of the wound and the way it was produced, could have been challenged because such interpretations are *not* straightforward. It is not easy to determine the number or order of internal cuts (or tracks). No method or explanation was provided for what was presented, and accepted by most of the judges, as pure description (or essentially descriptive). Discussed below in nn 37, 69, 199 and 200.

37 The boundaries around these categories can be remarkably porous. Where there is doubt or contestation, it is generally preferable to err on the side of caution by treating claims as interpretive (and therefore opinion) rather than to elide complexity through strict (and often artificial) definitions.

38 Beng Ong, *Autopsy Report* (Autopsy No SS15J1580, Queensland Health Forensic and Scientific Services, 3 February 2016) 14 <https://osf.io/h9zvb> ('*Autopsy Report*'). See also *Lang* (n 1) 337 [27] (Gordon and Edelman JJ), 396 [253], 452 [449] (Jagot J).

additional internal tracks with the blade facing in the opposite direction.[39] On recovery, the knife was protruding slightly from the deceased's back and the handle was partially inserted into the abdomen.

One of the internal tracks, said to be the first of track A, severed the liver, the bile duct, the inferior vena cava (a major vessel), and a renal vein.[40] This incision was said to have been fatal. The tracks comprising track B penetrated the chest cavity and resulted in an incision on the chest wall, a fracture of the 11th rib, a glancing facture of the 12th rib, and two additional exit wounds on the back.[41] Initially Dr Ong estimated that the force required to fracture the ribs 'was between mild to moderate'.[42] This was subsequently lowered to 'mild', and its significance downplayed, when he became aware that the deceased had osteoporosis.[43] Dr Ong estimated that 'it might have taken up to five seconds' to produce the wound — 'for the knife to be inserted, withdrawn, rotated and reinserted'.[44] There was blood on the deceased's left hand but no blood on her right hand; which was under the pillow on recovery of the body. Dr Ong testified that the bleeding would have increased after the vena cava was severed, and conceded — consistent with the suicide theory — that it was possible Mrs Boyce had used both hands initially (for the injuries associated with track A) but used only her left hand, for the second group of incisions (track B), once the profuse bleeding began.

Dr Ong testified that the deceased was alive, conscious and lying in her bed when stabbed. Her death, from loss of blood, was said to have taken minutes. Dr Ong was 'certain that none of the injuries could have immediately disabled the deceased or immediately prevented her from moving'.[45] He estimated that it could have been between 5 to 15 minutes before she lost consciousness and eventually died.[46] Based on toxicological results, Dr Ong reported the deceased's blood alcohol concentration as 0.049 and therapeutic levels of a range of medicines and metabolites associated with anxiety and depression. Dr Ong was of the opinion that these substances in the specific concentrations 'would not have

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39 *Lang* (n 1) 450 [442], 450 [444] (Jagot J). The knife was left in the body during transportation to the morgue, and Dr Ong made some limited concessions, pre-trial, around the possibility of the third minor track (in track B) having been modified by transportation.

40 Ibid 381 [204] (Gordon and Edelman JJ), 396–7 [255], 452 [449] (Jagot J); *R v Lang* [2022] QCA 29, [51] (Mullins JA, McMurdo JA and Brown J agreeing) ('*Lang QCA*').

41 *Lang* (n 1) 380 [199], 381–2 [204]–[205] (Gordon and Edelman JJ), 396 [255] (Jagot J); *Lang QCA* (n 40) [57] (Mullins JA).

42 *Lang* (n 1)363 [136], 380 [199], 381–2 [203]–[205], 393 [240] (Gordon and Edelman JJ), 397 [261] (Jagot J); *Lang QCA* (n 40) [56] (Mullins JA).

43 *Lang* (n 1) 380 [199] (Gordon and Edelman JJ). Rib damage was one of the factors noted in *Lang QCA* (n 40) [96] (Mullins JA).

44 *Lang* (n 1) 452 [449] (Jagot J).

45 Ibid 380 [200], 387 [220], 393 [239], 393 [240] (Gordon and Edelman JJ), 397–8 [261], 434 [394], 435 [396], 436 [398], 452 [449] (Jagot J).

46 Ibid 340 [40], 363–4 [140], 365–6 [146]–[148] (Gordon and Edelman JJ), 397–8 [261], 435 [395]–[396], 452 [449] (Jagot J).

prevented [her] from fighting an attacker'.[47] He testified that 'they do not play any role in her death'.[48] The deceased had a long history of mental illness (specifically bi-polar disorder and borderline personality disorder) along with episodes of suicidal ideation. The prosecutor called her treating psychiatrist to testify.

Helpfully, Jagot J provides a summary of the subjects on which Dr Ong 'gave evidence':

> (a) there were no observable defensive injuries on Mrs Boyce's body; (b) the injury to the inferior vena cava would have caused a 'fairly catastrophic' and 'profuse' haemorrhage severely impacting the body causing shock, probably within minutes, that is, within the first five minutes; (c) the degree of force required to inflict the wounds would have been mild to moderate; (d) the wounds may have taken up to five seconds to inflict; (e) the significant blood loss would not have occurred over the first five seconds but more slowly over time and it would have been at least a number of minutes before Mrs Boyce was weakened to the point of not being able to move; (f) the inferior vena cava is a major vessel and although it is difficult to estimate how a person withstands blood loss, there would be serious consequences (loss of consciousness) within a number of minutes, not seconds — it might have taken five minutes or it could have taken 15 minutes for unconsciousness to occur; (g) Mrs Boyce had an alcohol concentration in her blood of 0.049 per cent and the effect of this on her would be subjective, although the level is not very high; (h) Mrs Boyce had therapeutic levels of anti-depressants and anti-anxiety drugs in her system and Dr Ong would not know the combined effect of these drugs on her but these levels of drugs would not have prevented her from fighting back; and (i) a stab wound to the abdomen with a kitchen knife would induce a person's fight or flight response. As noted, Dr Ong also gave *the impugned evidence* ...[49]

B *The Impugned Evidence*

Now we consider the contested opinion. Relevant testimony is separated into examination-in-chief and cross-examination to enable readers to obtain a sense of what the prosecutor adduced, along with the burden that particular presentation imposed on the defendant (via defence counsel) and this accusatorial proceeding.

1 *Pre-Trial Hearing and Examination-in-Chief*

The contested opinion was proffered on two occasions during the re-trial. Initially, in a pre-trial hearing into its admissibility,[50] having described the wound, Dr Ong was asked about the opinion he expressed at the first trial:

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47 Ibid 365 [146] (Gordon and Edelman JJ); *Lang QCA* (n 40) [61] (Mullins JA).

48 Transcript of Proceedings, *R v Lang* (Supreme Court of Queensland, 273/2017, A Lyons SJA, 19 November 2020) 49 ('Transcript Trial Day 4').

49 *Lang* (n 1) 397–8 [261] (Jagot J) (emphasis added).

50 See *Criminal Code* (n 3) s 590AA.

[MR FULLER:] You were asked during the trial ... whether the injuries that you observed were self-inflicted or caused by another person? ...

[DR ONG:] My opinion was that given the injuries, *it is more likely that this injury is caused by another party, but I cannot rule out that is — that it can self-inflicted.*

Right. Now, what were the features that your observed, that contributed to you forming that opinion, please? --- I base this on *three major factors*. One is that I consider the experience that I've come across, but I mentioned I have about two or three stab wounds a year, and — but in addition, I do, during the — in the post-mortem room, I do — *we all* — those who are working — to look at other cases as well, so that it is - one is the experience, but the experience is — to me, there is a limit of how many cases you can see in one career. There is a limitation of — certain number of cases, so experience is there. The second is that, I go — when I deduce — is based on literature. In terms of literature there are two different types of literature. One is that — is well-described in the forensic textbooks — the — what are the features of self-inflicted stab wounds and what are the features of homicidal stab wounds, and in this instance, there are some features suggestive of homicidal stab wounds.

Her Honour: Such as? --- One is that they - - -

...

Sorry, the criteria is the number of stab wounds is relevant? --- One of them.

Right? --- The other one fairly minor — is that it has gone through the bed — the sheet. The stab wound has gone through the flat sheet that was over her, which is slightly unusual, but not uncommon. The third is, there is a lack of any other wounds to suggest the features of self-infliction stab wounds.

Sorry, self-infliction, right? --- Yeah, there is like a hesitation injuries.

So by that you mean, there's only one entry point and you would have thought there'd be other entry points? --- Yes.

...

Sorry, single stab entry or - - -? --- Single entry in the skin which sort of attracts [sic: tracks] internally. There — there — I — I've come across two reported case, and I think that that was pointed out during the first trial of — actually, it's a case that I was unaware which happens in our own centre.

...

All right. So you're now clarifying that there's knowledge of single entry and several tracks. Is that what you said? --- Yes.

You know of single entry, several tracks? --- Yes.

> All right? --- But, of course, these are fairly rare, but doesn't mean that it can't occur. And finally, the — the — the — the — the — the other conclusion that I made is the — I would say it's getting the logical sense of what has happened.[51]

As the reader will now see, the prosecutor offered even less to the jury.[52]

At trial, toward the end of his examination-in-chief, when asked whether there are 'factors that you take into account in determining whether this was a self-inflicted injury or not', Dr Ong invoked the collective 'we' in the following explanation of the contested opinion:

> Yes, it's often a — *a difficult issue* with respect to stab wounds to the abdomen. But — but *there are certain factors **we** take into account*. ***One*** is there — is there any issues such as the self-harm and I mentioned has the patient injuries — injuries elsewhere that may indicate self-harm, like incision to the wrist and so forth. ***Second*** is looking at the — the fact that the stab wound has occurred for the [indistinct]. This are — this has de — described in forensic texts and journals. And I believe these are *not very strong factors* to decide one way or another. The — I think in — in my determination, the — ***the strongest factor*** or — ***or the one that I take most into account*** is the ***multiplicity of the stab wounds***. I detected [indistinct] the two main directions and this include rotation of the blade. To — take into account that the — in the first instance — that is, track wound A — wider structures has been damaged or — or — sorry, involved. That is the main one I take into account is the inferior vena cava which will cause bleeding. A profuse amount of bleeding, and also even the liver substance itself. The liver itself, which is a very vascular organ, and also I take into account that — I mentioned the rotation of the blade and — and that it appears that some of the wounds, judging by the blood on her hand, that it's only — if — if it's self-inflicted, it — it may be only the — the left hand was involved, especially at the later stages. The — the initial stages, it's possible both hands can be involved because there's no bleeding yet. But after the bleeding has occurred, it was only the left hand that was — has bloodstains.[53]

This was the testimony, adduced by the prosecutor, presented as capable of supporting and explaining the contested opinion.

The contested opinion was then expressed as follows:

> And taking into account all this, *I would think that it is more likely that this wound caused by a — a second — a different person or a second — a different party*. But having said that,

[51] Transcript of Proceedings, *R v Lang* (Supreme Court of Queensland, 273/2017, A Lyons SJA, 9 November 2020) 19–21 (emphasis added) ('Transcript Pre-Trial Application'). This passage was partially quoted in *Lang* (n 1) 450 [442] (Jagot J).

[52] On this issue, see *Lang* (n 1) 378–9 [193], and especially at 380 [198] (Gordon and Edelman JJ). Gordon and Edelman JJ expressed concern about the reliance on 'some amalgam of evidence that was before, and not before, the jury' for the purposes of admissibility: 380 [199]. Cf Jagot J at 443 [421], which seems sound, subject to the concerns identified by Gordon and Edelman JJ being addressed.

[53] Transcript Trial Day 4 (n 48) 50 (emphasis added). The second, '[indistinct]', factor is discussed below in Part VC.

I think that I cannot completely eliminate the fact that it — it cannot be a self-inflicted injury.[54]

Notwithstanding that it was a rather weak opinion, couched as a qualified relative probability — '*I would think … it is more likely*' — it focused directly on the ultimate issue in the proceedings and implicated Lang.[55]

After a short recess, the prosecutor concluded his examination of Dr Ong by asking about the pain associated with the wounds:

Now, I assume that you've never stabbed yourself in the stomach, Doctor … Can you comment on the degree of pain, something sharp being inserted into the abdomen would cause? --- I — well, all I can say is it's probably painful.[56]

That was it.

2 *The Cross-Examination of Dr Ong*

Rather than provide a summary of the cross-examination, which constituted most of the engagement with the contested opinion and the reasoning elucidated through the trial process, the reader is encouraged to read the following extract from the transcript of the testimony presented to the jury.

[MS O'GORMAN:] As I understood it, the **first factor** that you said that you took into account was any features suggesting self-harm? --- [DR ONG:] Yes.

And I think you mentioned the word 'cutting'? --- Or incision, yes. …

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Were you inferring then, in terms of features of self-harm, to cuttings that had occurred at the time of the death or are you talking about things like previous -

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54 Ibid (emphasis added). This and the previous passage are extracted in *Lang* (n 1) 382–3 [207] (Gordon and Edelman JJ), 451–2 [447] (Jagot J). They were summarised by Kiefel CJ and Gageler J at 339 [35]: 'He concluded after a lengthy analysis of the nature of the wound with an expression of the opinion that although he could not "completely eliminate" the possibility of a self-inflicted injury "it [was] more likely that [the] wound [was] caused by a … different person".' See also at 383 [208] (Gordon and Edelman JJ): 'The transcription of this crucial part of Dr Ong's evidence was not perfect. And it provided very little *detail* as to how his expertise had been applied to the factors to which he had had regard in order to reach his opinion.' Qualification to the expression of the opinion (eg, 'more likely', or restricting opinions to 'similarities', as in *R v Tang* (2006) 65 NSWLR 681), should not be used to avoid confronting the question of whether there is relevant specialised knowledge.

55 Although, the inability to 'completely eliminate' the alternative, might be seen to modify the qualification. In *Autopsy Report* (n 38) 12, the opinion is expressed in a stronger form: 'There are no definite features excluding self-infliction in this instance. However, *there were features showing that the stab wound was inflicted by a second party*' (emphasis added). There follows a list of four factors said to be in favour of 'inflicted by a second party', followed by four supplementary factors.

56 Transcript Trial Day 4 (n 48) 56. See also *Lang* (n 1) 363 [138], 365–6 [147] (Gordon and Edelman JJ), 452 [448] (Jagot J).

evidence of previous attempts of self-harm, like cutting of the wrists? --- It'll be both here.

10

Both? Okay. So let's deal with the ones at the time. You said you were looking for both. What's the significance of any cuttings that you might have seen that were fresh? --- It will tell that there has been attempt to self-harm, and because there — these wounds in addition to the fatal wounds — eventually
15 fatal wounds, that I consider this — other wounds to be a failure in an attempt to take one's life.

All right. So you're talking really about any injuries that you might have observed that were suggestive of a previous attempt to take her life? --- Yes.

20

Okay. And if you had found any evidence of previous - a previous attempt by her to take her own life, that would have been a factor presumably which weighed more towards this being more likely to have been self-inflicted? --- Yes.

25 Because, as I understand the reasoning, if there is a history of self-harm, or attempts of self-harm that might be an indicator of future behaviour, ie, a further attempt at self-harm? --- Yes.

Okay. Now, do you know anything about Mrs Boyce's mental health history? ---
30 No. ...

Are you aware that Mrs Boyce has been diagnosed with bipolar disorder? --- No.

All right. Are you aware whether Mrs Boyce has ever spoken in the past of
35 committing suicide? --- No.

And are you aware of an incident which involved her son being called to intervene as she was, it seems, stepping on a chair on the edge of her balcony, on that apartment you went to on the 20th floor? --- No.

40

If you were aware of those masters — and we're talking about this first factor, the features suggesting previous self-harm, as an indicator of future behaviour. Would they have weighed in your mind as making it more likely that this was inflicted — self-inflicted rather than by somebody else? --- I will definitely take
45 this into consideration, but at the end of course, I will look at the — the entire feature on this — all the features on it entirely and rather than just one feature on its own. ...

The **second factor** ... was the perforation of the sheet — the fact that the knife
50 had pierced the sheet and then the skin and into the body? --- Yes.

Can I just confirm that essentially what your evidence is about is that it's a neutral feature. Sometimes it occurs in suicides, sometimes it doesn't occur in suicides? --- It does occur more often in suicides, but it's not a very strong

55 feature. ...

Then you spoke about the number of the stab wounds being the **third factor**? ---- Yes.

60 And just again for precision and for my sake, of course, we're only talking about one external stab wound aren't we? --- Yes.

All right. And then the four, or possibly five internal tracks? --- Yes.

65 Okay. Now, the number of stab wounds is an equivocal feature with respect to whether or not an injury is inflicted by somebody else or self-inflicted, isn't it? --- l think that the general and as best — I emphasise this only: a general acceptance is that the more stab wounds than the — it's more likelihood that it's done be a different party.

70

Okay. So a large number of stab wounds is more likely to be done by a different party? --- Yes. Another party, yes.

Another party. One stab wound is more consistent with suicide? --- I think it's
75 just equivocal. ...

And one stab wound with internal tracks is also just equivocal? --- I think you have to go into the minutiae of the — the stabbing. Because of this case, I've looked through what is available in the literature. I think that — I've actually
80 found, so far, three cases that has a self-inflicted injury that has multiple tracks inside a single stab wound. One of them is actually one of our case - - -

Yes? --- - - - in the past. That particular case, I think that is a stab wound through the chest. I think there was three tracks. The second one in the — that
85 was in the literature — there's no detail. He- they just say that one — a case with three stabs, three tracks, so I know nothing about that — no detail. The - the third one has some details. There was actually five tracks. Again, it's into the chest. Three of the tracks did not enter the chest cavity. One did, but did not cause any major injuries. And I think the last one has caused some major injuries, either
90 to — I can't remember offhand but it's either to the heart or one of the major vessels of the — supplying the heart. So in — in — in all this — by listing those two cases, the — the — the — the — the main thing I — I notice is that there's only one track in all those cases that caused a major injury that can cause death. That is, in other words, the other tracks are not severe enough to — to kill, and
95 of course, all those tracks were — there's no involvement in rotation of it.

All right. I might've just slipped off at the end. Did you say in all of those cases there was no - - - ? --- There doesn't appear from the description — there's no — there doesn't appear to be any rotation of a blade here.

100

Okay. So no rotation, but a number of internal tracks within one external stab wound? --- Yes.

Okay. And were there two different cases that you described to us or three
105 different cases? --- Two. The third one is — is just a — is just a general description of a — a case with three stab wounds and nothing more to — to it, so I have no details on the case.

Okay. So one of them involved only a bare report. The other two were — you had
110 some more details about? --- Yes. One case was fairly detailed in their report, in the — in the journal. The other one was, of course, a — one of our cases so I have access to it.

When you say one of your cases, it was a — it was a case dealt with at the John
115 Tonge Centre? --- Yeah, sorry. It was not — not my case but one of my colleagues, yeah.

Okay. And in each of those cases, it was deemed that the death was suicide, not a death caused by a second person? --- Yes.

120

Can we talk about the difference, if any, between a single entry wound with a number of tracks like you've just explaining to the jury and a single entry wound with a number of internal tracks plus rotation of the knife. Is there any difference between the two scenarios in your mind? Is one more likely to be suicide or
125 homicide? --- I think that it would play a role because there'd be a — a slight delay in — in the blade being rotated, yes. ...

Is it because — and so the next fate — factor was the rotation of the knife which is why I'm interested to talk about these together. Is the fact of rotation of the
130 knife significant in your mind because it might cause more pain that if there had just been stabs within one direction? --- It's not just the, I think, pain. It's just the — the features of it. I mean, if you have two stabs in one direction and these stabs — they will eventually kill. I agree with you that in a — initial instance, it may not be immediately fatal. And the we have a — a de — a slight delay because
135 there's a rotation of the blade.

Sure? --- And further plunging in a different direction. And — and that is a bit — that is odd. That is not common and I have not found any case of report of stabbing inj — injuries by this means.

140

Okay. So when you say you haven't found any reported cases of that, what you mean is that you haven't seen any that have involved that mechanism you've talked about — a single entry wound, a couple of stabs, the rotation, a couple more stabs — being discussed in the literature? --- Yes.

145

And you haven't yourself dealt with a case like that? --- Yes.

Okay. Is it the fact of the delay that would have been necessary to turn the blade what is significant in your mind; is it? --- I think this — it does play a part in my
150 decision, yes.

What else — what else is there? I'm just trying to understand the significance of the rotation of the knife? --- And — and of course, the multiple tracks. Although I've quoted three cases, these are only three cases in multiple cases that we have
155 experienced, you know.

I understand. What I'm trying to get at is as I understand it, in your mind it's significant that there has been rotation of the knife? --- Yes.

160 And I'm just trying to understand why that's significant. As I understand it, you've said it's significant in part because there might have — well, there would've been some delay to turn the handle. What's the — any other significance of it? --- I Just find that it's — that if a person needs to — in an attempt to — to self inflict injuries — that it — that — that the injurer would
165 take the trouble to rotate a blade, rather than just plunge it in different directions.

Okay. And is that's the sum total of it, of the significance of it? --- Yes. Looking at it, yes.

170 Okay. It did — or would, wouldn't it, serve a — quite a very real practical purpose in the sense that is one was intent on killing oneself in that manner, then you are more likely to achieve that aim, aren't you, if you have a number of stabs in your body that if you just have one or two? --- Yes, I've — I've seen — like I said, I've seen — I've personally have — I've performed autopsies on a self-inflicted
175 victim, more that 20, 30 stab wounds. But - - -

Sorry. Can I just stop you, just to make sure I understand. Did you say that you've performed autopsies on bodies that had died by suicide where had — there had been more than 20 or 30 stab wounds? --- Or multiple stab wounds, yes.
180

Okay. But what was the number that you said? --- Offhand. l can't remember but I'm sure it's more than 10, maybe 20.

Okay. And they've been suicides - - -? --- Yes.
185

- - - cases like that? --- But — all these stabs are — they're fairly superficial, you know.

Superficial? --- Mmm.
190

It'd be painful, nonetheless though, because it's the pain, the nerve endings on the skin that contain the pain receptors; isn't it? --- I would think so, yes. ...

As I understand it, your evidence is that one of the factors that you take into

195 account is the fact that there has been a rotation of the knife? --- Yes.

Because — and maybe if you could just explain it to me one more time. You thought that that's not something that somebody would do? --- It's not — definitely not commonly found, and it's fairly unusual. And, like I said, I've never
200 come across a case, but - - -

Okay? --- - - - it does not mean that it cannot occur.

Doesn't mean it can't occur. Can I just take a little bit of time to explore the
205 significance of the fact that it's not commonly found. There's a lot of literature that deals with death by sharp wounds, or incisions, aren't there? --- Yes.

And that literature, probably obviously enough, deals with unusual cases? --- Yes.
210
And you would be aware that there are highly unusual ways that people choose to kill themselves? --- Yes. ...

All right. The number of the stab wounds then — and I'm moving backwards of
215 course, because we started with the fact of the rotation of the knife. Then you talked about the number of the stab wounds, and we confirmed, of course, that that's the tracks within the body. You've agreed that that could, physically, have been self-inflicted? --- Yes.

220 And I think you said that although multiple stab wounds on the body are consistent with wounds inflicted by a second person, they can also be self-inflicted. And you gave examples of having done autopsies involving multiple stabs? --- Yes.

225 So that feature is really a neutral feature, isn't it? --- I wouldn't say it's a neutral feature. When there's multiple stab wounds this always points towards a — a possible second party involvement, but it's definitely not a definite feature to — for me to make up my mind.

230 Okay, And, in fact, none of the feature are definite, either by themselves or in combination? You told Mr Fuller [Crown Prosecutor] that before lunch? --- Yes.

Finally, can I just ask whether, in your opinion, there are in fact some other features which make this case more consistent with self-infliction rather than
235 infliction by another person? We've touched on some of them, but I just want to confirm. Firstly, the lack of defensive injuries on the deceased's body? --- Yes. ...

Okay. And, of course, we talked about the apparent lack of struggle, and that would be a feature which, in your view, would weigh more in favour of this being
240 a suicide than a death occasioned by a second person? --- Yes.

That's the cross-examination of this witness. Thank you, your Honour.[57]

IV The High Court Response to the Contested Opinion

According to Kiefel CJ and Gageler J and Jagot J, Dr Ong's contested opinion was admissible.[58] Dr Ong was a qualified forensic pathologist and fellow of the Royal College of Pathologists Australasia. Across a long career he had performed thousands of autopsies and encountered about two or three stab wounds each year. Dr Ong referred to textbooks, journals and literature, as well as the 'acceptance' of his approach among forensic pathologists. For Kiefel CJ and Gageler J:

> The opinion of Dr Ong was demonstrated by his evidence in chief at the trial to have been founded substantially on specialised knowledge of the interpretation of incised injuries acquired through long experience as a specialist forensic pathologist and through reading of literature on incised injuries within the specialised field of forensic pathology. *Nothing in the evidence he gave in the pre-trial hearing or in cross-examination in the trial undermined that foundation.*[59]

Acknowledging that Dr Ong's testimony was not ideal, or even at times clear, for Kiefel CJ and Gageler J, residual admissibility issues were more appropriately addressed through discretionary exclusion — discussed in Part VG.[60]

According to Jagot J:

> [I]t cannot merely be assumed that Dr Ong, in giving any part of his evidence, was not basing his opinions on his specialist qualifications and work of 25 years as a forensic pathologist.[61]
>
> [I]t must be recalled that that Dr Ong has worked as a forensic pathologist for some 25 years. He had performed anywhere between about 4,000 to 5,000 autopsies.[62] ... While Dr Ong always looked at the 'whole picture', as explained, he did so through his expert perspective.[63]

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57 Transcript Trial Day 4 (n 48) 70–6 (emphasis added) ('Cross-Examination'). The ellipses and line numbers are mine. Subsequent references will be to these line numbers. Parts of this exchange are quoted in the High Court judgments: see, eg, *Lang* (n 1) 384–5 [211]–[212], 386–7 [216]–[219] (Gordon and Edelman JJ), 453 [454], 454 [456] (Jagot J).

58 *Lang* (n 1) 329 [1] (Kiefel CJ and Gageler J), 395 [248] (Jagot J).

59 Ibid 329 [3] (Kiefel CJ and Gageler J) (emphasis added).

60 On clarity, see *Lang* (n 1) 335 [20], 336 [24] (Kiefel CJ and Gageler J), 383 [208] (Gordon and Edelman JJ). On privileging the position of the jurors (if not the stenographers), see 364–5 [143], 376–7 [186] (Gordon and Edelman JJ), 455 [460] (Jagot J).

61 Ibid 455–6 [461] (emphasis added).

62 Ibid 456–7 [463].

63 Ibid 457 [465].

> It is unexceptional that Dr Ong would bring to bear all his expertise to say that this sequence of events was 'odd' for a self-inflicted injury (and, by necessary implication, not so odd for an injury inflicted by another)[64]

> The fact that Dr Ong had not identified such a sequence of events in either a suicide or a homicide caused by stabbing does not mean that his evidence was not based on his expertise and does not mean his evidence lacked a rational foundation. The essence of expertise is the capacity to reason from facts based on specialist training, study, or experience. … The lack of an identical case of either suicide or homicide does not mean a forensic pathologist such as Dr Ong is incapable of providing an admissible expert opinion. He is entitled to bring to bear all his specialist training, study, or experience to form an opinion without being able to point to an identical or even similar case.[65]

> Dr Ong's opinion as to the likelihood of the fatal wounds being inflicted by another person rather than self-inflicted was not cloaked 'with a spurious appearance of authority', and thereby did not involve any risk that 'legitimate processes of fact-finding may be subverted'.[66]

The remainder of the article challenges the majority's applications of the law to the contested opinion, particularly the casual substitution of general experience as a forensic pathologist and the provision of reasons for specialised knowledge.

V Problems with Admissibility Practice in *Lang* (and *Velevski*)

In their dissent, Gordon and Edelman JJ were on the right path. In finding the contested opinion inadmissible they were unwilling to place heavy reliance on training and experience, the *Dasreef* shortcut, or treat the testimony as 'weak' but sufficient:[67]

> The problem for Dr Ong's opinion on this issue, and the reason that it was both inadmissible and of no weight, is that he failed to expose how his expertise was the substantial basis for connecting the facts to which he referred to this opinion. … The entirety of the justification for Dr Ong's contested opinion therefore rested upon the third factor that was the subject of cross-examination, which concerned the multiple tracks within the single stab wound and the rotation of the knife. But the only instances of multiple tracks within a single stab wound that Dr Ong said that he had read of were in suicides. He had never seen any. And Dr Ong had never seen or read about an instance where a knife had been rotated in the wound.[68]

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64 Ibid 458 [467].
65 Ibid 458–9 [469].
66 Ibid 459 [470] (emphasis added) (citations omitted). See also 450 [443]–[444]. Justice Jagot's approach to the literature resembles the trial judge's description from the pre-trial hearing: see *R v Lang* [2020] QSCPR 26, [27]–[29] (A Lyons SJA).
67 Cf *Lang* (n 1) 334–5 [17] (Kiefel CJ and Gageler J).
68 Ibid 392 [234], 392–3 [238]. See also 387 [220], 390 [229], 391 [231].

What follows is a detailed explication of these and other problems. It identifies limitations with the contested opinion and associated reasons that are not susceptible to repair or mitigation through legal procedures.

A *Distinguishing Opinions and Taking 'Specialised' Seriously*

To begin, it is useful to undertake a little conceptual and definitional work. The lawyers and judges in *Lang* did not distinguish between the different types of opinions proffered by Dr Ong. This is unfortunate because closer engagement might have generated a more cautionary attitude to the opinions, especially those with the most extended inference chains.

Dr Ong expressed a wide variety of opinions, but if we limit our focus to the stab wound, we can identify three opinions featuring different kinds of inference. Moving from fairly direct to more indirect (and complex) inferences, let's begin with the description of the wound. Here, Dr Ong was engaged in interpreting anatomical damage. He described the features of the wound — multiple internal tracks along with bone, organ, tissue and blood vessel damage.[69] A second, and more interpretive, opinion was concerned with the mechanism of injury — how features of the wound might have been caused. Relying on his interpretation of the wound and the knife embedded in the deceased, Dr Ong postulated that the wound was caused by multiple plunges and a partial rotation of the blade while the deceased was lying on her side, her body partially bent.[70] These first two opinions are closely linked to the damage observed and the knife recovered; though, the second suggests the mechanism of cutting. Last is the contested opinion. This third interpretation is radically different to the other two. It is not limited to describing or explaining features of the wound, and operates at a higher level of abstraction, drawing upon experience, feature comparisons with other wounds and other cases (see Part VE), as well as other features of the body and the scene (some potentially beyond the scope of forensic pathology: see Part VF).[71]

While it might be reasonable, or ordinarily expected, for a forensic pathologist to express opinions about illness and injury and their relationship to

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[69] *Lang* (n 1) 330 [5] (Kiefel CJ and Gageler J). Kiefel CJ and Gageler J indicated that 'much' of Dr Ong's evidence was descriptive and so evidence of fact. See also 391 [232] (Gordon and Edelman JJ): 'expert factual evidence'. Where a forensic pathologist inspects and describes a wound (or a fingerprint examiner a fingerprint), he or she is involved in an interpretative process and does not perceive the wound (or the print) like a lay person. See more generally Charles Goodwin, 'Professional Vision' (1994) 96(3) *American Anthropologist* 606; Charles Goodwin, 'Seeing in Depth' (1995) 25(2) *Social Studies of Science* 237, and the discussion in nn 37, 199 and 200, above and below.

[70] Dr Ong explicitly described this as a 'postulation' during examination-in-chief: see Transcript Trial Day 4 (n 48) 33.

[71] These interpretations are sometimes described as 'manner of death', including accident, murder, suicide, natural and undetermined.

death (eg, from loss of blood), the third opinion is of a different order.[72] Forensic pathologists, or a sub-group of forensic pathologists, *might* be able to reliably determine whether wounds (or some types of wounds) attributed to bladed instruments were self-inflicted or inflicted by others on the basis of specific features of the wound (and/or surrounding circumstances), but this would require formal studies, the systematic collection and analysis of data, the preparation and evaluation of a method or protocol based on 'factors' shown to be significant, along with rigorous testing of those who use it to ascertain ability and accuracy.[73] None of this was undertaken (or required) in *Lang*.[74]

An important related point, flowing directly from the jurisprudence (and statutory language with respect to the UEL) is that 'specialised' is used to qualify, indeed focus, the requirement of knowledge.[75] To be admissible, the opinion must be substantially based not on general knowledge but on a particular area or specialisation relevant to the opinion. The Court's heavy reliance on experience and the characterisation of forensic pathology as a discipline concerned with death investigation — which includes deaths by stabbing — resulted in very limited attention being directed to the question of whether general training, study or experience as a forensic pathologist provided access to specialised knowledge capable of resolving whether stab wounds were self-inflicted or inflicted by others. Reliance on the *Dasreef* shortcut — particularly Dr Ong's 'specialist qualifications' and experience — facilitated admission but at the cost of attention to relevant specialised knowledge.

Courts should be wary of treating members of a profession as though they each possessed all of the 'specialised knowledge' of the entire domain and its sub-fields, especially where: the domain is expansive (such as forensic pathology — concerned with *all* death); personal experience with the specific issue is limited; the particular interpretation is difficult or controversial; and there are no specific

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72 Keith Findley and Dean Strang, 'Ending Manner-of-Death Testimony and Other Opinion Determinations of Crime' (2022) 60 *Duquesne University Law Review* 302.

73 Kiefel CJ and Gageler J characterised the multiple stab wound and rotation as the two factors relied upon: *Lang* (n 1) 336 [22]. Justice Jagot referred, at different levels of generality, to three and two factors: 450 [443], 451 [447]. Gordon and Edelman JJ identified three: 383–4 [210]. The Queensland Court of Appeal, in contrast, identified five: *Lang QCA* (n 40) [96] (Mullins JA). There is overlap, but limited consistency, around the main factors identified by trial counsel, the trial judge and appellate courts. Factors expressly relied upon include: the multiple stab wound, the lack of hesitation wounds; the pierced sheet; the internal tracks; rotation; the impact on the ribs; the 'delay' and associated pain; the rarity of the features; the oddness of the wound and circumstances; blood on one hand; the literature; three other cases; general experience; and the contention that four of the incisions were 'excessive' because the first was fatal.

74 On protocols, see *NRC Report* (n 21) 6: 'Often there are no standard protocols governing forensic practice in a given discipline. And, even when protocols are in place, they often are vague and not enforced in any meaningful way. ... These shortcomings obviously pose a continuing and serious threat to the quality and credibility of forensic science practice.'

75 *Lang* (n 1) 332–3 [12] (Kiefel CJ and Gageler J).

references to protocols, relevant literatures or systematic reviews.[76] To put this another way, we might wonder whether Dr Ong (or any of his colleagues) is in a position to express reliable (ie, non-speculative) opinions on whether a deceased person: shot themselves or was shot by another; fainted and drowned in a bath or was drowned by another; slipped or was pushed from a cliff; self-immolated or was set on fire; over-dosed intentionally or accidentally or at the hands of another; crashed their bicycle or was hit by a car; fell from a tree onto a rock or was hit with the rock, and so on and so forth.[77] Recalling the definition from *Honeysett*, does exposure to some of these types of death enable a forensic pathologist to provide an opinion in relation to who caused them that can be said to be based on 'specialised knowledge'?

B *'The Strongest Factor'? A 'Multiple Stab Wound' (and Its Components)*

According to Jagot J, Dr Ong identified the main factors relied upon by 'forensic pathologists' during his examination-in-chief:

> While Dr Ong clearly identified that the issues 'we' (meaning forensic pathologists) considered were (a) injuries elsewhere that may indicate self-harm, like an incision to the wrist, and (b) the multiplicity of stab wounds (which was the strongest factor in his view), the balance of his evidence in answer to this question is difficult to follow.[78]

Dr Ong described Mrs Boyce's injury as a multiple stab wound and characterised this as 'the strongest factor' underpinning the contested opinion.[79] When asked whether multiple stab wounds was 'a neutral feature' he demurred, explaining that, for forensic pathologists this factor '*always points towards* a — a *possible second party involvement'*.[80] Elsewhere he testified: 'I think that the general and as best — I emphasise this only: a *general acceptance* is that the more stab wounds than the — it's more likelihood that it's done by a different party.'[81] Accepting

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76 For an accessible introduction, see EunJin Ahn and Hyun Kang, 'Introduction to Systematic Review and Meta-Analysis' (2018) 71(2) *Korean Journal of Anesthesiology* 103. Consider the ranking of 'levels of evidence' in Figure 1, where 'case reports' are considered weak evidence.

77 See, eg, *Mahony* (n 25).

78 *Lang* (n 1) 451–2 [447] (Jagot J). In terms of justification, elsewhere Jagot J referred to reliance on literature and the witness's experience: at 450 [441], 450 [443]. Perhaps in an attempt to address the 'balance of his evidence', Jagot J quoted Dr Ong's responses to questions posed about the pain he attributed to the wound: at 452 [448]. This is the final exchange extracted in Part IIIB above. On representation, see Jonathan Potter, *Representing Reality: Discourse, Rhetoric and Social Construction* (Sage, 1996).

79 Transcript Trial Day 4 (n 48) 50. See also Umberto Eco and Thomas Seboek (eds), *The Sign of Three: Dupin, Holmes and Peirce* (Indiana University Press, 1984).

80 Cross-Examination (n 57) lines 227-8.

81 Ibid lines 67-69 (emphasis added). But compare lines 173-192. On 'acceptance', see Gary Edmond, 'Deflating *Daubert*: *Kumho Tire Co v Carmichael* and the Inevitability of General Acceptance (*Frye*)' (2000) 23(1) *University of New South Wales Law Journal* 38.

that the interpretation of stab wounds is 'difficult', several issues arise from these characterisations.[82]

Initially we might ask whether the particular wound ought to be classified as a multiple stab wound.[83] There was no meaningful engagement with the definitional question: what constitutes a multiple stab wound? Should a single wound with internal tracks — especially if such cases are (extremely) rare — be treated as a multiple stab wound? This is not a pedantic issue of nomenclature. If the wound is invested with significance because multiple stab wounds in some way suggest that a person was (more likely, though not definitively) stabbed by someone else, we need to be confident that the wound is of a type that is capable of supporting the inference. We also need to know something about the empirical (ie, statistical) foundations for the probabilistic claim. Like the jurors, we are not provided with the definition of a multiple stab wound from the literature said to ground the reliance that forensic pathologists ('we') place on this factor. We are not referred to any literature or data set that supports the classification, let alone the general inference.[84]

In Dr Ong's autopsy report, among the factors that are said to support the contested opinion, the first is:

> The stab wound consists of two major directions. In addition, there were further thrusts in each major direction. In order to inflict the second major track, the blade had to be rotated. There appear to be fairly excessive movement of the knife especially when the first stab component (direction) was potentially fatal.[85]

There are no references here, or elsewhere in the 'Interpretation' of the evidence in the autopsy report, to the injury being a multiple stab wound.[86]

Further difficulties emerge from features of the wound — the internal tracks and rotation — being invested with significance. The apparent rarity of internal

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[82] *Lang* (n 1) 382–3 [207] (Gordon and Edelman JJ), 451 [445] (Jagot J).

[83] Geoffrey Bowker and Susan Star, *Sorting Things Out: Classification and Its Consequences* (MIT Press, 1999).

[84] *Lang* (n 1) 382–3 [207] (Gordon and Edelman JJ), 451 [447], 452–3 [450]–[453] (Jagot J). At 450 [441], Jagot J states that 'Dr Ong was familiar with the relevant literature and had examined the literature with specific regard to the minutiae of this stabbing.' But, there are no references to any specific literature and limited evidence of 'literature with specific regard to the minutiae of this stabbing' in the trial transcript or autopsy report.

[85] *Autopsy Report* (n 38) 12. Among the other enumerated factors are: the force; the blood only on the left hand; and the first stab was said to have inflicted the major injuries making the deceased 'less capable' of inflicting the remaining damage. There were no references to multiple stab wounds in the brief summary of the forensic pathology evidence in the first appeal. See *R v Lang* [2019] QCA 289, [8]–[10] (The Court): 'A number of factors including the direction of blade tracks, the absence of blood on the deceased's dominant hand, that the stabbing was through a sheet and the absence of any hesitation marks caused Dr Ong to favour the involvement of a second party in the stabbing, but not conclusively so.'

[86] This might raise questions as to whether the significance attached to the multiple stab wound at trial was based on literature or experience (at this earlier time). Diachronic shifts in emphasis might bring reliance on experience into question.

tracks (in reported suicides) and the inability to locate another instance of rotation were used to suggest that the injuries were not self-inflicted.[87] This involves moving from attributing significance to 'a multiple stab wound' to attributing significance to individual features (or components) of the particular wound.[88] The three cases 'available in the literature' were said to document internal tracks in single entry stab wounds accepted as 'self-inflicted' — with, respectively, three, three and five tracks. These cases were characterised as the '*only three cases* in multiple cases that *we have experienced*'.[89] Dr Ong seems to imply that what is important in these cases is the fact that one track caused the fatal injury and no rotation of the blade was observed. Putting aside uncertainty surrounding the way the three cases were located, what can we reasonably infer from them?[90] Are three cases, or these three cases, meaningful? Are tracks significant with respect to suicide by stabbing, let alone stab wounds inflicted by another? Similarly, is rotation, even if (highly) unusual, diagnostic or even meaningful, when attempting to distinguish between self-infliction and infliction by another?

What is missing here (apart from a more systematic review of the literature and any relevant databases) is symmetry: evidence that internal tracks and/or rotation in a single wound is more common in knife wounds inflicted by others. For, internal tracks and/or rotation might also be rare in wounds inflicted by others and so non-diagnostic. Dr Ong's testimony presents us with a tiny and statistically insignificant set of cases (n=3), the representativeness of which is uncertain, in conjunction with no consideration of internal tracks and rotation in wounds inflicted by others (the comparator). One of the problems with the (implicit) reasoning offered by Dr Ong is that it appears to conflate not having seen (or encountered) internal tracks and rotation of a knife with these particular features being meaningful with respect to determining manner of death. The type of incision in *Lang* might well be rare, but does that reveal anything about who

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87 In some instances there is uncertainty as to whether a case classified as suicide is actually suicide or something else, because we have no idea about the accuracy of the opinions and ground truth is unknown. I have sometimes referred to this issue as '(reported) suicides' or the expert's 'belief'; but this problem is corrosive of experience. The problem is compounded by social and religious sensitivities associated with some conclusions by forensic pathologists and coroners. These problems are longstanding: see Emile Durkheim, *Suicide: A Study in Sociology*, tr John Spaulding and George Simpson (Routledge & Kegan Paul, 1952).

88 Cross-Examination (n 57) lines 77-95.

89 Ibid lines 154-5 (emphasis added). There are no references to these cases in the autopsy report. See also *Lang* (n 1) 386 [217] (Gordon and Edelman JJ). '[O]ur case', mentioned by Dr Ong during cross-examination, refers to a non-published multi-track stab wound in a (reported) suicide from the John Tonge Centre — the mortuary for Queensland Health Forensic and Science Services.

90 Cross-Examination (n 57) lines 79-81, 137-46, 194-202.

might have inflicted it?[91] At no stage did Dr Ong explain *how* internal tracks assist in determining whether the wounds were self-inflicted.[92]

When asked 'about the difference, if any, between a single entry wound with a number of tracks ... and a single entry wound with a number of internal tracks plus rotation of the knife' with respect to 'suicide or homicide', Dr Ong answered 'I think that it would play a role because there'd be a — a slight delay in — in the blade being rotated'.[93] When asked about whether the significance attributed to the partial withdrawal, rotation and re-insertion of the blade was related to pain, Dr Ong answered that it was more than the pain.[94] These explanations, and the description of the later internal thrusts as 'excessive' in the autopsy report, confer a curious anatomical understanding (and rationality) upon a lay person who might have killed herself with a knife (perhaps while unwell).[95]

Under cross-examination Dr Ong supplemented the significance he attached to the pain and the difficulty understanding why a person might kill themselves in this particular way, with the apparent rarity of the wound: 'It's not — definitely not commonly found, and it's fairly unusual. And, like I said, I've never come across a case'.[96] But, the fact that a wound is unusual, or even unique, reveals little, if anything, about whether it was self-inflicted. Dr Ong appears to be speculating.[97] Why, he wonders, would a person 'take the trouble to rotate a blade, rather than plunge it in different directions'?[98] Once again, Dr Ong's testimony did not raise or address the alternative proposition, specifically: why would someone attacking, or trying to kill, with a knife rotate the blade (or be more likely to rotate the blade than a person attempting suicide, particularly in the absence of resistance)?[99] This asymmetrical orientation and the lack of explanation, in

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91 *Lang* (n 1) 386–7 [218] (Gordon and Edelman JJ). It is difficult to understand the significance apparently attributed to one track being fatal and the stabbing continuing beyond infliction of the (potentially) fatal injury — but see (n 169).

92 Dr Ong's reasoning was described by Kiefel CJ and Gageler J as 'inductive' and 'inferential': *Lang* (n 1) 336 [21], 336 [24]. Ironically, applying non-statistical reasoning, it would have been just as easy — though no more rigorous — to present the 'only three' cases of suicide with internal tracks as supporting suicide in *Lang* — another case with internal tracks within a single stab wound. See *Lang* (n 1) 392–3 [238] (Gordon and Edelman JJ).

93 Cross-Examination (n 57) lines 125-6, 134-5.

94 Ibid lines 128-135, 160-165.

95 *Autopsy Report* (n 38) 12.

96 Cross-Examination (n 57) lines 137-9, 199-202.

97 Rather than knowledge, some of the answers have the appearance of post hoc rationalisation.

98 Cross-Examination (n 57) lines 163-5; *Lang* (n 1) 387 [219], 393 [240] (Gordon and Edelman JJ). Cf *Lang* (n 1) 456 [462], 458 [468] (Jagot J). Among historians, particularly historians of science and natural philosophy, this kind of 'psychologism' tends to be controversial. Consider RG Collingwood's concept of 're-thinking' in his posthumous *The Idea of History* (Oxford University Press, 1945) and the critical reception of Frank Manuel, *A Portrait of Isaac Newton* (Harvard University Press, 1968). In more general terms Hans Gadamer speaks of hermeneutic 'horizons' in *Truth and Method* (Continuum Books, 1975).

99 This is consistent with a logical approach to the issue, notwithstanding the Bayesian resonances.

conjunction with apparent incomprehension, all suggest the absence of specialised knowledge.

Recourse to the delay and associated pain attributed to the particular wound is also curious.[100] Rotation of the blade appears to assume significance because it 'unnecessarily' prolonged the stabbing and so presumably increased the pain — though perhaps for a second or two. Interestingly, duration of the stabbing and subjective assessment of the pain experienced were not included among the factors Dr Ong advanced as significant when asked about his contested opinion.[101] On prompting, at the conclusion of examination-in-chief, he indicated: 'all I can say is it's probably painful'.[102] Later, Dr Ong appears to have surprised defence counsel when, in accepting that multiple stab wounds could be self-inflicted, he referred to personal experience with '10, maybe 20 cases' of (what he believed were) suicide where 'there had been more than 20, 30 stab wounds'.[103] The attribution of pain to the wound in *Lang* is not distinguished from these cases of suicide where the deceased inflicted large numbers of apparently painful wounds (20-30 incisions), or the three cases with three to five internal tracks. This begs the question: why is the time taken, perhaps five seconds, considered informative and used to support stabbing by another person in *Lang*, when cases treated as suicide, involving multiple painful incisions, appear to sometimes extend over similar or even longer periods of time?[104] How does the time taken to inflict injuries enable, or help, a forensic pathologist to determine whether the wound was self-inflicted? Without more, the 'delay' from rotation (and the tracks), does not obviously support the conclusion or appear to be based on specialised knowledge.

Dr Ong was also said to have relied on the 'oddness' of the wound (and the wounding). Justice Jagot works to redeem Dr Ong's inability to find another death with a similar wound and the significance he attaches to that 'failure':[105]

> Further, while Dr Ong had found three cases of suicide with one stab wound and multiple internal tracks, none of these involved partial withdrawal and rotation of the knife. Those facts, partial withdrawal and rotation of the knife before replunging the knife in a different direction, would have involved some delay which Dr Ong found 'odd'. It is plain that, in context, Dr Ong meant that he found this 'odd' in respect of a suicide. While he said he had found no reported cases of 'a single entry wound, a couple

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[100] Cross-Examination (n 57) lines 124-6, 131-5, 148-50, 163-5.

[101] Pain (as a factor or reason) may overlap with hesitation wounds, such that some factors may not be independent.

[102] *Lang* (n 1) 452 [448] (Jagot J).

[103] Cross-Examination (n 57) lines 172-5, 181-2. These and other estimates are imprecise.

[104] Ibid lines 191-2.

[105] This seems to operate in a similar way to the alleged failure to find another mother who had lost four young children in the circumstantial case against Folbigg. See Thomas Bathurst, 2022 Inquiry into the Convictions of Kathleen Megan Folbigg (Report, 8 November 2023) 87 [357], 91 [380], 110 [494], 132 [602], 159 [770], 169 [829], 332–3 [1565], though compare 117–18 [522] and the ultimate findings.

> of stabs, the rotation, a couple more stabs' in the literature (and, by this, Dr Ong should be understood to have meant no cases at all in the literature, whether murder or suicide), that does not mean that his evidence — that he found the injuries and how they had been inflicted (multiple stabs causing multiple internal wound tracks with a partial withdrawal and rotation of the knife before reinsertion of the knife) 'odd' for a self-inflicted injury — was not based on his expertise.[106]

The forensic pathologist's *impression* of the wound as 'odd' is said to be 'based on his expertise' where the rarity (or exceptional nature) of the wound is invested with meaning.[107] We are left to wonder why in the absence of empirical evidence these features of the injury are characterised as 'odd' and treated as significant.[108] Without more, we cannot substitute the rarity or oddness of an event for a postulated cause.[109]

We might reasonably wonder why, out of all the information available to Dr Ong, he placed most reliance (at trial) on the wound as a multiple stabbing. The jury were told that forensic pathologists considered this to be significant, but were not provided with insight into its significance or even what constituted a multiple stabbing. Moreover, it was not the fact of multiple stabs (which were said to be supported by other forensic pathologists and the literature), but rather sub-features of the particular wound and its effects — the internal tracks, rotation, delay and ensuing pain — and his difficulty comprehending that were invested with subjective significance when Dr Ong was asked to explain his opinion.[110]

C *Evaluating Various factors: Inclusion, (Relative In)Significance and Elision*

> I will definitely take this into consideration, but at the end of course, I will look at the — the entire feature on this — all the features on it entirely and rather than just one feature on its own.[111]

Dr Ong described his approach and the contested opinion in terms of what was 'generally accepted' when trying to understand 'all the features' and the 'whole picture' of death by incision.[112] However, when we start to probe the range of factors and considerations available to him, the observer is left to wonder why

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[106] *Lang* (n 1) 457–8 [466]. See also at 455–6 [461], reproduced earlier.

[107] Cross-Examination (n 57) line 137-9.

[108] This is part of feature (or pattern) comparison, discussed in Part VE below.

[109] See the exemplary reasoning of Coldrey J in *R v Matthey* (2007) 177 A Crim R 470.

[110] Cf *Lang* (n 1) 375 [182] (Gordon and Edelman JJ): 'Dr Ong accepted [that] people sometimes commit suicide in "highly unusual ways" and "very extreme ways"'.

[111] Cross-Examination (n 57) lines 44-7.

[112] Ibid lines 67-9. See also Transcript Trial Day 4 (n 48) 71: 'I'll take into consideration this and I will — but my final interpretation — or my interpretation will be based on looking at the whole picture rather than just on one factor alone'. This also applies to the claim of trying to understand 'the logical sense of what has happened': *Lang* (n 1) 335–6 [21] (Kiefel CJ and Gageler J), 450–1 [444]–[445], 458 [467] (Jagot J).

some were included and others excluded, why some were invested with significance and others treated as insignificant. Initially, this section reviews the two additional factors advanced by Dr Ong during examination-in-chief, before turning to consider the curious lack of engagement with a range of factors which, on their face, appear to provide more direct insight into who might have killed Mrs Boyce.[113]

Earlier we saw how Jagot J described 'the multiplicity of stab wounds' and evidence of 'self-harm' as two factors accepted by forensic pathologists.[114] Drawing on the testimony from the admissibility hearing, defence counsel and Gordon and Edelman JJ indicated that the knife piercing the bedsheet was the '[indistinct]' factor raised by Dr Ong during his examination-in-chief (see Part IIIB above).[115] Let's examine these residual factors before turning to consider additional factors that may or may not have been incorporated into the formation of the contested opinion.

During examination-in-chief Dr Ong advanced hesitation wounds and evidence of previous self-harm as issues forensic pathologists would consider when trying to determine whether wounds were self-inflicted:

> Q: You spoke of also looking for signs that may be linked to suicide?
>
> A: Yes. On the body, sometimes they may have additional injuries around the site of the stab. This is known as hesitation injuries. It usually occurs when — any injury — making a decision to — to — to stab may — may — may — may do some stabbings at around the vicinity of the stab wound — of — of the eventual stab wound just to — well, *some people* will see — to test the pain, to see how painful before — before being brave enough to make the plunge. There may be other signs of self-harm injuries elsewhere.[116]

When present, hesitation wounds seem to be invested with significance — though forensic pathologists might disagree as to whether a particular injury ought to be characterised as 'hesitation'.[117] Where, as in *Lang*, there are no hesitation wounds, that absence is not necessarily significant.[118] For, in relation to suicides by knife, we are told that it is not uncommon for wounds to be inflicted without hesitation on a first attempt. Dr Ong's testimony is not entirely clear on this point; though he appears to accept that the absence of these injuries is 'not very strong' evidence.[119] Nevertheless, the absence of hesitation wounds appears to be among

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[113] I accept that this 'common sense' might be misguided, but we require knowledge and reasoning to overcome it.
[114] *Lang* (n 1) 451–2 [447] (Jagot J).
[115] See also *Lang QCA* (n 40) [96] (Mullins JA).
[116] *Lang* (n 1) 383–4 [210] (Gordon and Edelman JJ) (emphasis added).
[117] Consider the discussion in Part VE below.
[118] Cf *Lang* (n 1) 455–6 [461] (Jagot J).
[119] Cross-Examination (n 57) lines 11-6; *Lang* (n 1) 392 [236] (Gordon and Edelman JJ).

the few ‘factors’ incorporated into the ‘whole picture’ analysis supporting the contested opinion.[120]

Another factor identified by Dr Ong was the knife piercing the sheet before entering the deceased’s abdomen:

> Although the transcription of his evidence in chief did not reveal the second factor that Dr Ong took into account, he said, in cross-examination, that he took into account as a factor that the knife had pierced the sheet before moving into the skin and the body. But he said that this was a factor that ‘does occur more often in suicides, but it’s not a very strong feature’. He concluded that this factor was neutral.[121]

If piercing the sheet is more common in suicides than homicides — which seems counter-intuitive (discussed in Part VE) — why is this factor treated as ‘neutral’? Why is the knife through the sheet not used to support suicide, even if only weakly?[122] Why is the wound, treated as a multiple stabbing, invested with greater significance than the pierced bedsheet — which is also advanced as one of the salient factors? The reasons for attributing significance, or relative significance, to the three factors advanced by Dr Ong is not explained. We might be able to imagine why some factors are privileged, but there is no explanation of the relative weightings of the three factors said to be drawn from the literature as somehow and to some degree illuminating.

These problems are compounded when we introduce a broader range of potential factors and considerations. For, the three factors pro-actively advanced and expressly relied upon by Dr Ong are not the only *biomedical* factors capable of casting light on who killed Mrs Boyce.[123] In other cases — such as *Velevski*, considered in Part VE — forensic pathologists placed heavy reliance upon different factors. Dr Ong’s claim that the contested opinion was holistic becomes difficult to understand when, during cross-examination, he acknowledged the potential significance of additional factors. On the available record, it is uncertain whether these factors were somehow incorporated into his largely opaque subjective calculus.[124]

Let’s start with the ‘lack of defensive injuries’. We are told that ‘Dr Ong accepted that the lack of defensive injuries on the deceased’s body, with no evidence of any attempt to grab the knife or ward off an attacker, and the apparent lack of a struggle were features that would weigh in favour of the stab wounds

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120 Notwithstanding *Lang* (n 1) 452–3 [450], 457 [464] (Jagot J), it is not obvious, on the transcript, if, where or how other factors were taken into account.

121 Ibid 385 [215] (Gordon and Edelman JJ).

122 When would it be considered sufficiently positive (or negative) to act upon and on what basis? None of this is explained.

123 Once again, it is uncertain whether these are issues for the forensic pathologist or the jury. And, whether some are task (ir)relevant — issues to be considered in Part VF below.

124 The trial judge instructed the jury that Dr Ong’s ‘was not an opinion that took into account all of the evidence in this trial’: Transcript Summing-Up (n 4) 15.

being self-inflicted'.[125] This might make sense intuitively, but we, like the jury, are left to wonder why the absence of defensive wounds on the deceased's hands and forearms was not included among the primary factors relied upon in the attempt to determine who did the stabbing? Dr Ong acknowledged that the absence of defence wounds and the lack of a struggle 'would weigh in favour of' suicide, but does not appear to have incorporated them into his 'whole picture' analysis? If he did, how, and where? If the lack of defence wounds supports suicide, on what basis is this evidence dismissed or treated as less significant than the multiple stab wound, the tracks, rotation of the blade and five seconds of pain? Reasoning requires explanation, and this includes the need to explain why apparently inconsistent evidence should, or can, be rejected or discounted. That need is acute where, as in this case, lack of resistance appears to be more objective (or direct) than the extended inferential chains associated with the attribution of the wound and its sub-features to a manner of death. Acknowledging, during cross-examination, that some evidence favoured an opposing perspective, specifically suicide, is not the same as incorporating that evidence into an evaluation or explaining why it can be discounted.[126]

But there is more. Via the toxicological results, Dr Ong was aware of the alcohol and the metabolites of psychiatric drugs in the deceased's blood. He testified that diazepam can be taken 'to lessen anxiety', amlodipine is 'an antihypertensive', Olanzapine 'is also a drug I think to lessen anxiety, or psychiatric use', and Venlafaxine 'is supposed — for similar purpose'.[127] His conclusion was that the volume of alcohol and therapeutic doses of pharmaceuticals would not have prevented the deceased from feeling pain or 'fighting back or attempting to move away from an attacker'.[128] The difference in weights between the deceased (74kg) and Mr Lang (100kg) was said not to be sufficient to prevent an attempt to 'ward off an attacker'.[129] On the evidence, the deceased was conscious and capable of resisting.[130]

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125 *Lang* (n 1) 454 [459] (Jagot J). See also at 366 [148] (Gordon and Edelman JJ), 397–8 [261] (Jagot J); Cross-Examination (n 57) lines 235-6.

126 In *Autopsy Report* (n 38) 13, along with the iteration of a (stronger) version of the contested opinion and factors (and supplementary factors), the following appears, though without further explanation: 'The scene indicated that the deceased had been stabbed at the site where she was found. There was no evidence of any injuries caused by a struggle'. There are references to the absence of defence injuries and psychiatric drugs in the more descriptive part of the report, but they do not feature among the reasons for the interpretation associated with the contested opinion.

127 Transcript Trial Day 4 (n 48) 48.

128 *Lang* (n 1) 366–7 [149] (Gordon and Edelman JJ), 435–6 [397] (Jagot J). Dr Ong also accepted that 'a stab' might induce a 'fight or flight response'. See also *Lang QCA* (n 40) [67] (Mullins JA). The absence of fight or flight response does not obviously inform the contested opinion, and Dr Ong was not asked about whether a victim might 'freeze' — an idea, apparently, first introduced in the prosecutor's closing submissions. Concepts such as 'fight or flight' are not obviously within the knowledge and expertise of forensic pathologists.

129 *Lang* (n 1) 436 [398], 454 [459] (Jagot J).

130 Ibid 363 [138], 363-4 [140] (Gordon and Edelman JJ).

Notwithstanding the toxicological results, Dr Ong testified that he was unaware of the deceased's mental illness.[131] In cross-examination he accepted that mental illness might be significant and had he known he would 'definitely take this into consideration'.[132] That answer is curious. While Dr Ong may not have known about the deceased's medical history — that is, the specific diagnosis and symptoms (including suicidal ideation and impulsiveness) — but the toxicological report provided a strong hint of mental illness. Once again, it is unclear why an apparently significant factor (for him) appears to have been overlooked or not followed up, and so effectively discounted.[133] By way of contrast, the deceased's osteoporosis was taken into consideration, in relation to moderating the force required to inflict the wounds, when Dr Ong was told about this aspect of Mrs Boyce's medical history.[134] It might be that psychiatric histories are beyond scope for a forensic pathologist, although that possibility is not suggested by Dr Ong's responses.[135]

Moving away from the biomedical evidence, suicide seems to have been supported by the deceased's extraordinarily passive behaviour while she was apparently conscious and able to move in the minutes after the wound was inflicted, her not taking advantage of a landline telephone adjacent to the bed to call for assistance, evidence suggesting the scene had not been tidied or cleaned, and the absence of Mr Lang's DNA under her fingernails.[136] It was also supported by more remote forensic science evidence, including: none of the deceased's blood being found elsewhere in the apartment (the sinks, drains and pipes were tested); there were no wounds on Mr Lang which might have resulted from a struggle with the deceased; and no DNA or fingerprints matching him were recovered from the knife.[137] None of this material is conspicuous in the formation of the contested opinion and associated reasoning.

This other evidence, though particularly the absence of defence wounds and the potential significance of mental illness given Dr Ong's testimony, introduces

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[131] Cross-Examination (n 57) lines 29-30.

[132] Ibid lines 44-7.

[133] The prosecutor's reliance on statistical evidence, about the frequency of suicide among persons with mental illness, was the subject of a successful appeal to the Court of Appeal, resulting in the second trial: see *R v Lang* [2019] QCA 289.

[134] *Lang* (n 1) 380 [199] (Gordon and Edelman JJ).

[135] Cross-examination (n 57) lines 44-47. Part of the problem with this evidence, which suggests the lack of specialised knowledge, is the lack of clarity about what matters and why. See generally Thomas Gieryn, *Cultural Boundaries of Science* (University of Chicago Press, 1999).

[136] *Lang* (n 1) 361 [130] (Gordon and Edelman JJ), 397 [259], 432–3 [387] (Jagot J); *Lang QCA* (n 40) [61] (Mullins JA). DNA matching Lang's was recovered from the deceased's chest, but their involvement in a consensual intimate relationship meant that this was treated as unhelpful on the fact in issue at trial.

[137] The positioning of the hands and respective bloodstaining was another factor in the mix, and one that might have favoured infliction by another: *Lang* (n 1) 351 [91], 383 [209], 392 [234] (Gordon and Edelman JJ), 451–2 [447] (Jagot J). It was given more prominence in Dr Ong's autopsy report: see *Autopsy Report* (n 38) 13.

an important issue which will appear again in relation to the discussion of cognitive bias — see Part VF. For present purposes, Dr Ong's concessions around the significance of factors which he did not consider, or do not feature in the reasons provided for the contested opinion, raises the question of why these were omitted and, more fundamentally, what is properly within scope when interpreting stab wounds. It raises unresolved questions about the method, specifically what information is required and which factors are important, for a *knowledge-based* opinion about whether knife wounds were self-inflicted.[138]

By way of overview, when thinking about the need for specialised knowledge and the factors and reasoning offered, I want to suggest that it was, and is, not possible to rationally evaluate Dr Ong's contested opinion. On inspection, the reasons and the handful of cases advanced are incapable of supporting it. In the absence of an identified method, let alone a validated method capable of reliably discriminating between wounds that were self-inflicted and those inflicted by others, it is not possible to make sense of the particular factors invested with (in)significance. Simultaneously, we have no means of approaching the seemingly significant evidence that was elided, or discounted, for reasons unknown. It is unclear why Dr Ong's intuitions around the oddness of a stab wound, even if we accept there is empirical evidence supporting the contention that multiple stab wounds are often associated with infliction by another, outweighs evidence necessitating much less inferential work — no defence wounds, no struggle and no attempt to move or call for help in the aftermath of an alleged attack.[139]

D *General Experience, General 'Acceptance' and 'the Literature'*

> Dr Ong said that his opinion was 'based on' his 'experience' as a forensic pathologist for about 25 years during which he had seen roughly two or three deaths from stab wounds a year and on the 'literature' concerning the typical features of self-inflicted stab wounds and those of homicidal stab wounds.[140]
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> Dr Ong explained that his main task as a forensic pathologist was performing autopsies for coronial inquiries to establish the cause of death. … He had performed

[138] *Lang* (n 1) 392 [236] (Gordon and Edelman JJ). See also National Commission on Forensic Science, *Ensuring That Forensic Analysis Is Based upon Task-Relevant Information* (Views Document, 2015) app ('*NCFS Views Document*'). Here, we might note that mental illness could be correlated with particular styles of knife wounds, such that (very) unusual wounds might be more likely where persons are mentally ill. This is yet another unknown. See generally Nancy Cartwright and Jeremy Hardie, *Evidence-Based Policy: A Practical Guide to Doing It Better* (Oxford University Press, 2012).

[139] An alert reader might wonder why the dismissive approach to the opinion evidence of a traffic engineer in *Fox v Percy* (2003) 214 CLR 118, was not conceived as a more appropriate legal response to the contested opinion in the face of behavioural and anatomical 'skid marks'.

[140] *Lang* (n 1) 335–6 [21]. See also 329 [3] (Kiefel CJ and Gageler J).

> about 4,000 to 5,000 autopsies in total, at a rate of about 160 to 200 cases a year, as well as supervising an additional 20 to 30 autopsies a year. Dr Ong was familiar with the relevant literature and had examined the literature with specific regard to the minutiae of this stabbing.[141]
>
> Dr Ong said he based this opinion on three major factors: (a) his experience with stab wounds; (b) his deductions from the literature; and (c) the lack of any hesitation wounds.[142]
>
> Dr Ong said he had found no literature on a single entry (external) wound, a couple of stabs, the rotation, and a couple of more stabs. He had also not dealt with a case like that.[143]
>
> He had looked at the literature and found three cases of a self-inflicted injury with multiple tracks inside a single stab wound. He noticed that in all those cases there was only one track that caused a major injury that resulted in death. He also said that in none of these cases was there a rotation of the knife.[144]
>
> Further, it cannot merely be assumed that Dr Ong, in giving any part of his evidence, was not basing his opinions on his specialist qualifications and work of 25 years as a forensic pathologist.[145]

Seven of nine judges responsible for considering the admissibility of the contested opinion accepted, some insisted, that Dr Ong's training and experience (or expertise) enabled him to express it.[146] However, having considered the factors relied upon (as well as those apparently discounted upon questioning), the precise utility of experience with respect to determining if stab wounds were self-inflicted remains elusive. Putting aside the absence of references to specific biomedical literature, and taking Dr Ong's references to other cases at face value, it is salutary to consider their value in drawing inferences from the assumed facts (particularly the interpretation of the wound).

Dr Ong referred to thousands of autopsies, including 2-3 stab wounds per year, and the three cases of (reported) suicide he located featuring a single wound with internal tracks. He also referred to cases of suicide he had encountered where the deceased had multiple incised wounds (up to 30), and testified that he had never encountered and had not heard of a stab wound where the blade had been rotated.[147] Dr Ong's experience and the cases he describes were mobilised as

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[141] Ibid 450 [441] (Jagot J).

[142] Ibid 450 [443] (Jagot J).

[143] Ibid 453 [455] (Jagot J).

[144] Ibid 453 [452] (Jagot J).

[145] Ibid 455–6 [461] (Jagot J). See also *Lang QCA* (n 40) [93]–[95], [100]–[104] (Mullins JA).

[146] There were different trial judges, though admissibility does not appear to have been raised at the first trial, where the defendant called his own expert witness. Similarly, Lang's first appeal did not raise the admissibility of Dr Ong's opinion, so those appellate judges are not included, with the exception of McMurdo JA who, anomalously, heard both appeals to the Queensland Court of Appeal.

[147] Cross-Examination (n 57) lines 141-6; *Lang* (n 1) 392–3 [238]–[239] (Gordon and Edelman JJ).

reasons implicitly capable of supporting the contested opinion. I want to suggest that Dr Ong's experience, the cases he identified, and his (and implicitly the professions') inexperience with tracks and rotation are individually and collectively incapable of providing an adequate basis for admission.[148] This is an important point because, as the epigraphs above suggest, they appear to have been uncritically accepted as satisfying the need for 'specialised knowledge'.[149]

Dr Ong *estimated* that he performed somewhere between 4,000 and 5,000 autopsies over 25 years.[150] Among these, he *estimated* encountering about two or three cases with stab wounds a year, one or two of which were reported as suicides.[151] The majority appear to overestimate the proportion of Dr Ong's work, and experience, concerned with stab wounds. Dr Ong's estimates refer to all deaths by stab wounds (and so may include incisions) to any part of the body. On the estimates provided, autopsies involving stab wounds — broadly conceived — consume less than 2 per cent of the total. Stab wounds are not a regular feature of Dr Ong's day-to-day work. This experience is further complicated when we distinguish between the description of stab wounds and even the cause and mechanism of death, from (more abstract interpretations involving) determinations as to whether stab wounds were self-inflicted or inflicted by another — ie, manner of death.[152] We are not told how many of the 50 or so cadavers with stab wounds encountered over a quarter of a century required (or resulted in) a determination as to whether they were self-inflicted.[153]

Even if Dr Ong (or any other forensic pathologist) had previously opined on the question of whether stab wounds were self-inflicted or inflicted by another (in a report for the coroner or in a court), that does not mean he (or others) can

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148 *PCAST Report* (n 21) 55.

149 I do not mean to suggest that Dr Ong has more or less experience with stab wounds than other forensic pathologists.

150 These figures are quoted in *Lang* (n 1) 377 [187] (Gordon and Edelman JJ), 450 [441], 456–7 [463] (Jagot J). Although, Dr Ong appears to have been practising for about 20 years (15 as a fellow of the RCPA) when he performed the autopsy in 2015. The legal focus on qualifications and experience as a forensic pathologist, along with the number of autopsies, is a classic instance of what cognitive scientists call 'attribute substitution', see Daniel Kahneman and Shane Frederick, 'Representativeness Revisited: Attribute Substitution in Intuitive Judgment' in Thomas Gilovich et al (eds) *Heuristics and Biases: The Psychology of Intuitive Judgment* (Cambridge University Press, 2002) 49.

151 *R v Lang* [2020] QSCPR 26, [13] (Lyons SJA); Transcript Pre-Trial Application (n 51) 9–10.

152 By way of analogy, I wonder how many lawyers and judges whose practice involved 1–2 per cent of tax or complex fraud cases, would consider themselves experts in those domains. (Noting that law, as a discipline engaged in textual hermeneutics, may be more homogenous than many other domains.) And, persisting with the analogy, I wonder how many of those lawyers and judges would be comfortable having their Italian sports cars serviced by mechanics who spent 98–9 per cent of her time working on Toyotas, Mazdas and SUVs.

153 Dr Ong appropriately acknowledged, in testimony, that 'there is a limit of how many cases you can see in one career.' We have no idea how many cases he saw where a determination of suicide versus homicide was contested. And, we have no idea how many of the determinations, by Dr Ong or other forensic pathologists, are correct.

reliably do it, or that the particular assumptions and 'method' are valid — ie, based on 'specialised knowledge'.[154] Being allowed to express an opinion — whether by a coroner or judge — is not the same as being capable of reliably discriminating between self-inflicted and other types of stab wounds.[155] Not everything done by experts, including experienced experts, is based on knowledge.[156] Here, identification by bite mark might afford a useful analogue.[157] For decades, in many jurisdictions, forensic dentists (and odontologists) were allowed to express opinions on whether a person's dentition matched a bitemark on a (usually deceased) human's skin.[158] Forensic dentists offered plausible sounding reasons (based on uniqueness of dentition, detailed comparisons of teeth and imprints on skin, biting experiments with replica teeth, and so on), employed technical biomedical language, possessed apparently relevant formal qualifications (including advanced degrees), formed specialist societies (eg, American Board of Forensic Odontology), developed consensus statements, and obtained experience performing bite mark comparisons and testifying in courts.[159] Yet, it turns out that bitemark comparison is not valid, and cannot be reliably performed.[160] Much of the extensive professional literature on

[154] Kristy Martire and Gary Edmond, 'Rethinking Expert Opinion Evidence' (2017) 40(3) *Melbourne University Law Review* 967.

[155] Treating coronial reliance or prior admission as sufficient is a form of bootstrapping, where what counts as 'knowledge' is deemed by legal fiat. On the 'illusion of knowledge', see Leonid Rozenblit and Frank Keil, 'The Misunderstood Limits of Folk science: An Illusion of Explanatory Depth' (2010) 26(5) *Cognitive Science* 521.

[156] Philip Tetlock, *Expert Political Judgment: How Good Is It? How Can We Know?* (Princeton University Press, 2006). See also the misguided surgery described in Archibald Cochrane and Max Blythe, *One Man's Medicine: An Autobiography of Professor Archie Cochrane* (British Medical Journal, 1989).

[157] I accept that the analogy has limitations, for there are a great many ways to wound with a bladed instrument.

[158] In the Chamberlain case, Australian courts allowed odontologists (including one from England) to opine on whether damage to a child's clothing might have been made by a dingo. In that case, a forensic pathologist (Professor James Cameron, University of London) opined — in the absence of a body — that Azaria Chamberlain's throat had been cut with a blade — possibly a scissor.

[159] Attempts to identify by bitemark involve pattern (or feature) comparison. See Erica Beecher-Monas, 'Reality Bites: The Illusion of Science in Bite-Mark Evidence' (2009) 30(4) *Cardozo Law Review* 1369, 1383; Mark Page, Jane Taylor and Matt Blenkin, 'Expert Interpretation of Bitemark Injuries: A Contemporary Qualitative Study' (2013) 58(3) *Journal of Forensic Sciences* 664; Mary Bush et al, 'Inquiry into the Scientific Basis for Bitemark Profiling and Arbitrary Distortion Compensation' (2010) 55(4) *Journal of Forensic Sciences* 976; Michael J Saks, 'Forensic Bitemark Identification: Weak Foundations, Exaggerated Claims' (2016) 3(3) *Journal of Law and the Biosciences* 538.

[160] *PCAST Report* (n 21) 9: 'PCAST finds that bitemark analysis is far from meeting the scientific standards for foundational validity. We note that some practitioners have expressed concern that the exclusion of bitemarks in court could hamper efforts to convict defendants in some cases. If so, the correct solution, from a scientific perspective, would not be to admit expert testimony based on invalid and unreliable methods but rather to attempt to develop scientifically valid methods.'

identification by bite mark — which tends to be based around individual cases rather than robust data sets, validation studies and rigorous proficiency testing — is misguided or misleading.[161] Similar, unexpected, results have been confirmed in other forensic domains.[162] So much for untested scientific, technical and biomedical experience.

As for recourse to 'the literature', there is not a single reference to, or explicit engagement with, publications that support the contested opinion or the reasons advanced for it in Dr Ong's testimony or his autopsy report — where a version of the contested opinion was initially expressed.[163] There are no references to secondary sources in testimony insistent that the three factors advanced (or 'the minutiae') are well-known and accepted:

> I go — when I deduce — is based on literature. In terms of literature there are two different types of literature. One is that — is well-described in the forensic textbooks — the — what are the features of self-inflicted stab wounds and what are the features of homicidal stab wounds, and in this instance, there are some features suggestive of homicidal stab wounds.[164]

To be clear, I am not doubting the existence of literatures around stab wounds and, more specifically, whether they were self-inflicted. Rather, I am drawing attention to the fact that the witness did not identify any of the literature said to support the contested opinion and its sub-components.[165] The prosecutor, the trial judge, and defence counsel did not probe allusions to the literature, textbooks, articles and journals, let alone how any literature or studies might have informed or constrained the contested opinion.[166] Where an opinion is challenged, especially an opinion attended by reasons said to be based in the literature and accepted by forensic pathologists, it would seem incumbent on the prosecutor and

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161 References to literature are important, but literatures may not report rigorous studies or be useful for resolving issues. Case reports would appear to have limited utility in this context.

162 See, eg, David White et al, 'Passport Officers' Errors in Face Matching' (2014) 9(8) *PLoS ONE* e103510:1–6; Royal Society and Royal Society of Edinburgh, *Forensic Gait Analysis: A Primer for Courts* (2017); Erik Randich, 'A Metallurgical Review of the Interpretation of Bullet Lead Compositional Analysis' (2002) 127(3) *Forensic Science International* 174; ABS Group, *Root and Cultural Cause Analysis of Report and Testimony Errors by FBI MHCA Examiners* (Report, August 2018); Committee on Evaluation of Sound Spectrograms, National Research Council, *On the Theory and Practice of Voice Identification* (National Academies Press, 1979); *Volpe v The Queen* [2020] VSCA 268.

163 This seems like a legal deficiency, at least in relation to admissibility. Questions of what a jury might legitimately make of any of this are (even) more complicated.

164 Transcript Pre-Trial Application (n 51) 19.

165 There are many references to the literature, cases mentioned in the literature, and to textbooks and articles, including in Cross-Examination (n 57) lines 202-6.

166 See the allusions in ibid lines 77-81, 83-6, 109-112, 141-4, 205-6, 208-9. This may be a consequence of the *Dasreef* 'shortcut' and the witness being a qualified medical specialist.

his witness to identify the literature which supports the assumptions, reasons, acceptance, ability to discriminate, accuracy and so forth.[167]

In the transcript and judgments reference is made to an article on 'incised injuries' written by Dr Ong.[168] Once again, the article is not identified. The real question is, of course, what significance this article has for the contested opinion and 'specialised knowledge' around whether the deceased's injury was self-inflicted. It is far from clear that the unnamed article addresses the ability to discriminate between who inflicted the wounds.[169] Knowledge of physiology, anatomy, and the ability to describe wounds, like previous experience with stab wounds and even being allowed to express opinions on whether stab wounds were self-inflicted, does not obviously translate into an ability to determine whether particular wounds were self-inflicted.[170]

A recent article in the *Proceedings of the National Academy of Sciences* written by members of the Academy's longstanding multidisciplinary Committee on Science, Technology and Law warned against over-reliance on training and experience:

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[167] See *Tuite v The Queen* (2015) 49 VR 196, and more generally *Davie* (n 25). On prosecutors and expert evidence, see Gary Edmond, '(Ad)Ministering Justice: Expert Evidence and the Professional Responsibilities of Prosecutors' (2013) 36(3) *University of New South Wales Law Journal* 921.

[168] *R v Lang* [2020] QSCPR 26, [12] (Lyons SJA).

[169] The article appears to be Beng-Beng Ong, 'The Pattern of Homicidal Slash/Chop Injuries: A 10 Year Retrospective Study in University Hospital Kuala Lumpur' (1999) 6(1) *Journal of Clinical Forensic Medicine* 24. As the title suggests, the article examines a small group of slash/chop deaths in Kuala Lumpur between 1987-96. The article does not focus on, or explain, the ability to discriminate between suicide and homicide, but takes that ability for granted. Nevertheless, the study depends on forensic pathologists being able to reliably distinguish homicide from other types of death, but there is no discussion of the basis of the distinction or the problem of 'ground truth' — how does the forensic pathologist *know* these deaths were homicide? While some of the deaths might unquestionably be homicide (eg, those observed by multiple witnesses or featuring cuts to the back), ground truth is a serious methodological problem in this and many forensic pathology publications. Forensic pathologists routinely proceed on the basis that their interpretations of cause or manner of death (or similar interpretations provided by others) are correct. This is a problem, because we must be assured that all of the deaths are homicide before we can draw reliable inferences from the data. The cases assembled for the Malaysian study provide limited insight into these issues. The article divides the 'homicides' according to whether they were 'intentional'. Again, there is no explanation of how a forensic pathologist might know. Just under half of the total cases in the sample (n=37) were said to feature more than five cuts (16/27 of the 'intentional' slash/chops), less than a third featured cuts to the 'trunk' (12/37), and just under half featured defence injuries (16/37). There is also a conspicuous interest in identifying the 'the fatal blow'.

[170] On the limited transfer of expertise, see Fernand Gobet, *Understanding Expertise: A Multidisciplinary Approach* (Red Globe Press, 2016). Though, see also Bethany Growns et al, 'Jack of All Trades, Master of One: Domain-Specific and Domain-General Contributions to Perceptual Expertise in Visual Comparison' (2024) 9 *Cognitive Research: Principles and Implications* 73; Alice Towler et al, 'Diverse Types of Expertise in Facial Recognition' (2023) 13(1) *Scientific Reports* 11396.

> While few could deny the value of experience, it cannot substitute for empirical evaluation of validity, assessed through carefully designed studies to determine the probability that a forensic method provides the correct answer.[171]

What was required in *Lang* was evidence — drawn from validation studies — that the method (and factors) relied on by Dr Ong was capable of supporting the opinion proffered. Members of the National Academy of Sciences ('NAS') Committee suggested that courts in the United States have tended to adopt a '"trust the examiner" zeitgeist' rather than a '"trust the scientific method" approach'.[172] Like many commentators, the Committee lamented the 'abdication of gatekeeping responsibility'.[173]

In trying to understand Dr Ong's opinions, all of the pro-admissibility judges directed their attention to formal qualifications, the number of autopsies he had performed over his career as well as his experience with cases involving stab wounds.[174] They took comfort from a literature that was not identified, let alone produced. This is important, because the issue is not really how many autopsies he has performed (which mostly do not involve stab wounds or murder). Nor is it a question of how many stab wounds he has encountered. Rather, what we need to know is whether he (and others) can *reliably distinguish* between self-inflicted stab wounds and stab wounds inflicted by others.[175]

E *Comparing the Reasoning, Literature and Jurisprudence from* Velevski

Another way of problematising the reasons offered in *Lang,* along with judicial responses to expert opinion more generally, without a long technical excursion into the biomedical literature, is to contrast those reasons with factors advanced

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171 Thomas D Albright et al, 'Science, Evidence, Law, and Justice' (2023) 120(41) *Proceedings of the National Academy of Sciences* e2312529120. See also *PCAST Report* (n 21) 55.

172 Albright et al (n 171). See also Jonathan J Koehler et al, 'Science, Technology, or the Expert Witness: What Influences Jurors' Judgments about Forensic Science Testimony' (2016) 22(4) *Psychology, Public Policy and Law* 401. This has resonances with Sir Owen Dixon's observations, quoted by Kiefel CJ and Gageler J in *Lang* (n 1) 333 [13]: 'However valuable intuitive judgment founded upon experience may be in diagnosis and treatment, it requires the justification of reasoned explanation when its conclusions are controverted'; and by Gordon and Edelman JJ at 390 [227]. See also Justin Gleeson, 'The Judge, the Advocate and the Expert Witness: Revisiting the Seminal Views of Sir Owen Dixon in the Modern Context' (2016) 48(4) *Australian Journal of Forensic Sciences* 366.

173 See, eg, Chris Maxwell, 'Preventing Miscarriages of Justice' (2019) 93(8) *Australian Law Journal* 642; Gary Edmond, 'Forensic Science Evidence and the Conditions for Rational (Jury) Evaluation' (2015) 39(1) *Melbourne University Law Review* 77.

174 *Lang* (n 1) 335–6 [21] (Kiefel CJ and Gageler J), 377 [187] (Gordon and Edelman JJ), 450 [441], 456 [463] (Jagot J).

175 In terms of the UEL, what is the 'specialised knowledge' on which the contested opinion is substantially based? See Martire and Edmond, 'Rethinking Expert Opinion Evidence' (n 154); Edmond, 'Conditions for Rational (Jury) Evaluation' (n 173).

by *one* of the forensic pathologists in *Velevski*.[176] In that case, the forensic pathologist (Dr Bradhurst) who attended the crime scene and conducted autopsies on Snezana Velevski and her three young children, came to the conclusion that the mother had cut the throats of the children before cutting her own throat in a locked bedroom of the family home. Snezana's husband, Ljube Velevski, was subsequently convicted of killing Snezana and their children. The prosecutor called five forensic pathologists, most senior to Dr Bradhurst. All but Dr Bradhurst and a forensic pathologist called by the defence thought it more likely that the husband had killed them all.[177] At trial and on appeal the primary focus was on the mother's death because the other deaths — unquestionably murders — were not illuminating on the issue of Mr Velevski's guilt.

Among the many complicated interpretations and issues raised by *Velevski* I want to draw attention to three. In doing so, I am initially drawing on detail provided in Gaudron J's dissenting judgment. When explaining the reasons for preferring suicide to homicide, Dr Bradhurst relied on three main factors, namely:

- the absence of evidence of any struggle;
- the superficial parallel cuts along the edges of the main wound which, he said, were 'consistent with [it] being self-inflicted rather than with being carried out by someone else'; and
- 'the absence of typical defence type injuries.'[178]

The reader might note the striking difference between these factors and emphases and those expressly relied upon by Dr Ong. The first and third of these were also present in *Lang*, but do not feature among the factors identified and invested with significance. Dr Bradhurst attached considerable weight to the 'tranquillity of the scene' and the absence of defence wounds. In *Velevski* there

[176] A systematic review wound be vastly preferable. The Evidence-Based Forensics Initiative is conducting such a review in order to determine what the relevant research literature is capable of supporting: see Jason M Chin et al, 'Systematic Review: The Reliability of Indicators that may Differentiate between Suicidal, Homicidal, and Accidental Sharp Force Wounds' (Article, MetaResearch Open Review, 1 April 2025) <https://metaror.org/kotahi/articles/23/index.html>. Here, I am using a methodological approach with resonances to 'methodological symmetry' from the strong programme in the sociology of scientific knowledge. See David Bloor, *Knowledge and Social Imagery* (Routledge & Kegan Paul, 1976). One advantage with this approach is that it draws exclusively on materials (from *Velevski*) that were readily available to all of the lawyers and judges involved in *Lang*.

[177] Relying on images of the scene and autopsy, the other, more senior, forensic pathologists each suggested that Snezana was murdered.

[178] *Velevski* (n 15) 414 [70]. Here I am interested in the factors (and reasons) advanced for the decision. It is not my intention to suggest that Dr Bradhurst was correct or to criticise the other forensic pathologists in their reliance on different factors and reasons.

was disagreement as to whether 'parallel cuts' were hesitation wounds.[179] Notwithstanding some difficulty explaining aspects of the physical evidence (including the depth of the wound, the location of foetal blood and the displacement of the bed), the factors listed above were presented by Dr Bradhurst as decisive. In *Lang*, in contrast, the multiple stab wound was foregrounded as the most important factor, whereas two of the primary factors relied upon (by Dr Bradhurst) in *Velevski* were relegated to the background.

Secondly, extracted in the judgment of Gummow and Callinan JJ is part of a chapter written by Professor Stephen Cordner, a prominent Australian forensic pathologist, and at the time Director of the Victorian Institute of Forensic Medicine. This is the only time in *Velevski* or *Lang* where we confront actual biomedical literature. The text by Cordner, apparently part of a literature review, is revealing because of what is mentioned and what is absent.

> *Suicidal injuries*
>
> Suicidal injuries usually occur in what are called 'sites of election'. Sites involving incised wounds from sharpened implements such as razors include the wrists, front of elbows and forearms, front and sides of neck and occasionally the groin. *Wounds may be single but are often multiple and grouped together*, and there may be a regularity or symmetry to the pattern. For example, the wounds are often parallel to each other, and often of similar severity, although there may be a number of 'tentative' marks adjacent to the more significant wounds. The injured site, by definition, must be accessible. The clothing is usually spared.
>
> It is not usually difficult to distinguish a suicidal and homicidal 'cut' throat. The former often has the characteristic tentative or hesitant relatively superficial incisions, usually at the lateral end of the deeper wounds. The presence of other suicidal injuries, the absence of injuries associated with an assault together with circumstances indicating a suicide, including the location of the weapon, will assist with resolving the issue. Suicidal stab wounds may be accompanied by 'tentative' marks.
>
> Vanezis and West (1983) reported on 21 fatal cases of self-stabbing. In fifteen cases, tentative or hesitation injuries were present. In a further two cases, such marks were evident in the clothes but not on the body, emphasising the importance of examining the clothing. *Often the clothing is completely spared*. The common sites of election are the chest and abdomen, the exact location sometimes depending on the victim's knowledge of anatomy. [180]

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[179] Other forensic pathologists thought the 'peaceful' scene might suggest a clean-up or some tidying — of which there was no direct evidence. Once again, we might wonder whether this is within scope for forensic pathologists. And, how we avoid it being considered (and so factored in) by forensic pathologists *and* the tribunal of fact.

[180] *Velevski* (n 15) 427 [159] (Gummow and Callinan JJ) (emphasis added). The source referred to in the final paragraph is Peter Vanezis and Iain West, 'Tentative Injuries in Self Stabbing' (1983) 21(1) *Forensic Science International* 65.

In this extract *on suicides* we find reference to common sites of fatal stabbings ('chest and abdomen'), hesitation injuries and previous attempts, defence wounds (eg, 'injuries associated with an assault') as well as 'multiple' wounds from 'sharpened implements' being 'grouped together'. This last observation is intriguing. Given the description, an attentive reader might wonder whether multiple stab wounds are particularly diagnostic or ought to be considered the most important factor in favour of homicide in *Lang*. There are no references in the extract to the rotation of sharpened implements or internal tracks, though we are told that clothing is often 'spared'. The sparing of clothing can be read in a manner that is inconsistent with Dr Ong's characterisation of the pierced bedsheet (in testimony).[181] There are no references to bedsheets, but the discussion of clothing suggests that persons who commit suicide often remove clothes to avoid obstructions when inflicting wounds. Incongruously, a factor described as supporting suicide, though said to be neutral in its application in *Lang*, on this literature would appear to be more closely associated with the infliction of wounds by another. Cordner's description of 'sparing' the clothing and the need to examine clothing, along with the findings by Vanezis and West (1983), might have been invoked *in support of Dr Ong's contested opinion*.

It is not my intention to endorse Dr Bradhurst's approach or Professor Cordner's chapter (which does not describe a method), but recourse to *Velevski* opens Dr Ong's reasons — the reliance placed on particular factors and the weightings assigned to them — to further question.[182] We might reasonably wonder whether the literature on the significance of particular features of death caused by stabbing has significantly changed over the last decade or two. Or, as also seems open, when we consider the opinions of forensic pathologists in *Velevski* and other cases, there is relatively limited agreement about the interpretation and significance of a wide range of potential factors. This short detour, a mere skimming of a more extensive literature and set of practices and beliefs, opens the possibility that factors and reasons relied upon by Dr Ong might

[181] Dr Ong made a written statement about the bedsheet which is prima facie inconsistent with the testimony reproduced in *Lang* (n 1) 459 [470] (Jagot J). Having identified *four* factors said to be in favour of the wound being 'inflicted by a second party', the *Autopsy Report* continues: 'Other features indicating less likelihood of a self-inflicted injury were as follows: The stab wound had perforated through the bed sheet and not directly to the body. It is more common for self-inflicted injuries to be directly inflicted onto the body rather than through an intermediary object.': (n 38) 13. I do not mean to suggest that this apparent inconsistency is a major point, though it may evidence confusion in the testimony, or its transcription, or both. See *Lang* (n 1) 385 [215], 392 [237] (Gordon and Edelman JJ), 396 [254], 453 [451] (Jagot J).

[182] See also Stephen Cordner, 'The Peden Case and Expert Witnesses' (December 1990) 153(11–12) *Medical Journal of Australia* 643, 644. In the extract above, Professor Cordner asserts that distinguishing between suicidal and homicidal 'cuts' to the throat is 'not usually difficult'. We might wonder about the evidence supporting this claim, and how to determine when a case has moved into the more difficult category.

not be entirely consistent with the literature alluded to.[183] We cannot say anything more conclusive on the basis of a short extract from a single chapter written two decades earlier, but the characterisation of what is 'accepted' among forensic pathologists in *Lang* might not capture a more complex, refractory and divided realm of knowledge *and ignorance*.[184]

Thirdly, the appeal in *Velevski* simultaneously exposes a subsequently obscured realm of legal scepticism around the ability of forensic pathologists to reliably discriminate between self-inflicted wounds and wounds inflicted by others. The view of a former President of the Victorian Court of Appeal, quoted in *Velevski*, is worth repeating, not least because it touches upon the question of who might be able to offer opinions and what might be required to do so:

> I must confess to some difficulty in comprehending how a person, medically qualified or not, by merely observing wounds, can express an opinion that they have been 'self-inflicted'. However, I am prepared to accept that such a body of knowledge exists. ... What is clear, however, is that such body of knowledge does not derive from recognised principles of medical science, but rather from the study of characteristics and patterns of wounds from which one may infer, by comparison with recognised standards, that the wounds being studied are themselves self-inflicted. ... In a real sense, as I understand it, the claimed expertise is derived from empirical data in much the same way as those who claim an expertise in analysing and interpreting blood stains to determine their source of origin, whence they emanate and the force of impact required to produce them. ... In general terms, the law's own experience suggests that expressions of opinions that a wound or wounds are self-inflicted are those expressed with full knowledge of surrounding circumstances; for example the history given by the victim or the knowledge that the victim was found in circumstances suggesting self-harm, etc.[185]

Writing before Victoria embraced the UEL in 2008, Winneke P recognised what many others have not: the ability to discriminate between self-inflicted and other types of wounds involves feature (or pattern) comparison and requires the careful collection and analysis of empirical data (rather than a handful of cases). Interestingly, the issue was touched upon by Kiefel CJ and Gageler J in *Lang*:

> [I]t amounted to a process of inferential reasoning throughout which Dr Ong was engaging in a comparison of the features of this stab wound with what he had seen and

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183 Even general acceptance does not prove knowledge or ability. It was not until formal testing demonstrated that they could not accurately identify biters based on marks on skin that the prevailing acceptance was disturbed. It is worth noting that not even empirical evidence changed the beliefs and confidence of a minority of forensic odontologists.

184 All of the forensic pathologists who testified in *Velevski* were willing, and presumably felt entitled, to express opinions about who inflicted the wounds.

185 *Velevski* (n 15) 427 [155] (Gummow and Callinan JJ) quoting *R v Anderson* (2000) 1 VR 1, 22–3 [55]. Ordinarily, 'surrounding circumstances' are for the tribunal of fact. Where experts (and judges) do not manage access to information, trials and appeals featuring the opinions of forensic pathologists (and other experts) may encourage double-counting — a form of irrationality — as both experts and the tribunal of fact are separately influenced by them.

> read of the features of stab wounds made in the past by people who had wanted to kill themselves and by people who had been killed by others.[186]

Reviewing feature-comparison procedures used by forensic scientists in 2016, President Obama's Advisory Committee for Scientific and Technology ('PCAST') insisted on the need for validated methods: 'For forensic feature-comparison methods, establishing foundational validity based on empirical evidence is thus a *sine qua non.* Nothing can substitute for it.'[187] And:

> Subjective [feature-comparison] methods require particularly careful scrutiny because their heavy reliance on human judgment means they are especially vulnerable to human error, inconsistency across examiners, and cognitive bias. In the forensic feature-comparison disciplines, cognitive bias includes the phenomena that, in certain settings, humans may tend naturally to focus on similarities between samples and discount differences and may also be influenced by extraneous information and external pressures about a case. [188]

President Winneke's analogy with blood stain analysis, given that Dr Ong was engaged in subjective feature comparison and interpretation, is revealing.[189] Recent empirical studies evaluating actual abilities, rather than the self-serving claims, of those conducting blood pattern analysis, suggests that accuracy is significantly lower than historically claimed (and legally accepted).[190] President Winneke also noted, in an era before contextual and cognitive bias appeared, albeit faintly, on judicial 'radars', that the attribution of a cause usually depends on 'surrounding circumstances' — ie, factors beyond the wound, on which medical doctors may possess few advantages over jurors.

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186 *Lang* (n 1) 336–7 [24] (Kiefel CJ and Gageler J).

187 *PCAST Report* (n 21) 6. PCAST's first recommendation was to validate feature comparison methods. Its eighth recommendation to the United States Federal Judiciary states: 'Federal judges, when permitting an expert to testify about a foundationally valid feature-comparison method, should ensure that testimony about the accuracy of the method and the probative value of proposed identifications is scientifically valid in that it is limited to what the empirical evidence supports.'

188 *PCAST Report* (n 21) 5. Endorsing the *NRC Report* (n 21), PCAST concluded: 'The 2009 report found that shortcomings in the forensic sciences were especially prevalent among the feature-comparison disciplines, many of which, the report said, lacked well-defined systems for determining error rates and had not done studies to establish the uniqueness or relative rarity or commonality of the particular marks or features examined.'

189 Just a few years earlier John Winneke QC had been counsel for Lindy and Michael Chamberlain at the Morling Royal Commission: see *Royal Commission of Inquiry into Chamberlain Convictions* (Report, June 1987).

190 See, eg, Austin Hicklin et al, 'Accuracy and Reproducibility of Conclusions by Forensic Bloodstain Pattern Analysts' (2021) 325 *Forensic Science International* 110856. In *Mahony* (n 25), relied upon in *Lang QCA* (n 40), the Queensland Supreme Court and Court of Appeal treated a forensic pathologist's opinions on blood spatter as unproblematic.

F *What about Exposure to Contextual Information and Cognitive Biases?*

In the previous extract from PCAST, President Obama's scientific advisers expressed concerns about the vulnerability of forensic scientists to human factors, particularly a range of cognitive biases.[191] Lawyers and courts are yet to fully appreciate the threat to interpretations — including the opinions of those with demonstrable expertise using validated methods — posed by gratuitous exposure to contextual information, suggestions, confirmation and so on. Like most cases involving the opinions of forensic pathologists (and many other expert witnesses), in *Lang* the lawyers and judges do not appear to have considered the implications for the contested opinion introduced by Dr Ong's attendance at the scene and exposure to potentially biasing information. Forensic pathologists, in part because of the complexity and breadth of their work, but also because of pervasive beliefs about special abilities flowing from medical training and experience, have been resistant to addressing the implications of human factors.[192] Unfortunately, empirical evidence confirms that forensic pathologists (like forensic scientists, jurors and judges) are vulnerable to context effects and cognitive biases unconsciously influencing their interpretations.[193]

Scientific studies have repeatedly demonstrated how exposure to extraneous information has the potential to dramatically change the way experts (and non-experts) interpret evidence.[194] This information is often described as *task*- (or domain-) *irrelevant* because it is not required to perform some specific analysis.[195] Exposure to task-irrelevant information threatens to bias the analyst's interpretation. Interpretation is particularly vulnerable to the influence of task-irrelevant information where the stimuli are ambiguous, involve difficult causal

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[191] Expert Working Group on Human Factors in Latent Print Analysis, *Latent Print Examination and Human Factors: Improving the Practice through a Systems Approach* (Report, February 2012) vi: 'The study of human factors focuses on the interaction between humans and products, decisions, procedures, workspaces, and the overall environment encountered at work and in daily living. Human factors analysis can advance our understanding of the nature of errors in complex work settings.' See also Linda T John, Janet M Corrigan and Molla S Donaldson (eds), *To Err Is Human: Building A Safer Health System* (National Academy Press, 1999).

[192] William Oliver, 'Cognitive Bias in Medicolegal Death Investigations' (2015) 5(4) *Academic Forensic Pathology* 548; Itiel Dror, 'No One Is Immune to Contextual Bias — Not Even Forensic Pathologists' (2018) 7(2) *Journal of Applied Research in Memory and Cognition* 318. Dan Simon describes the reasoning processes in forensic pathology as abductive: 'complex, sprawling, iterative and open-ended': 'Minimizing Error and Bias in Death Investigations' (2019) 49(2) *Seton Hall Law Review* 255, 277.

[193] See Itiel Dror et al, 'Cognitive Bias in Forensic Pathology Decisions' (2021) 66(5) *Journal of Forensic Science* 1751, and the ensuing correspondence, including John Morgan, 'Wrongful Convictions and Claims of False or Misleading Forensic Evidence' (2023) 68(3) *Journal of Forensic Science* 908; Allison Harris and Maya Sen, 'Bias and Judging' (2019) 22(1) *Annual Review of Political Science* 241.

[194] For an overview, see Glinda S Cooper and Vanessa Meterko, 'Cognitive Bias Research in Forensic Science: A Systematic Review' (2019) 297 *Forensic Science International* 35.

[195] See *NCFS Views Document* (n 138) app.

attributions, or methods are vague (or untested). For a forensic pathologist, task-irrelevant information might include: some aspects of a visit to the scene; being told police suspicions; receiving the results of forensic tests; knowing about suspects and their relationships; and, even details about the demographics (especially age, gender and race) of dead persons and suspects.[196] Forensic pathologists should endeavour to develop empirically based frameworks specifying what is required to perform specific analyses (based on validation studies) and design resource-sensitive processes, such as blinding, sequential unmasking or selective task splitting, to manage unnecessary cognitive contamination and reduce error.[197] The double-blinded clinical trials used to evaluate pharmaceuticals and therapeutic products, are among the best known of these kinds of procedures.

Exposure to contextual and task-irrelevant information can change the way biomedical professionals interpret and report injuries. A study of physical anthropologists and their responses to skeletal damage is informative.[198] Experienced forensic anthropologists were presented with high-quality professional images of human bones along with information about the circumstances of their recovery. One group was told the bones were from a mass grave associated with a modern site of conflict (eg, Sarajevo). A second group was told the same bones were recovered from a 19th century cemetery. A third group was provided with no contextual information. The results? Interpretations of the bones in the photographs were influenced by the contextual information provided. The physical anthropologists who were told the bones were from a mass grave were far more likely (than the other groups) to attribute damage to pre-mortem trauma, especially where the damage was ambiguous. They were also more likely to characterise bones with no conspicuous damage as showing signs

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[196] Some, though certainly not all, of this might be difficult for forensic pathologists to manage or avoid.

[197] See Simon (n 192) for a discussion of complexities and a range of pragmatic responses. See generally, Christopher Robertson and Aaron Kesselheim (eds), *Blinding as a Solution to Bias: Strengthening Biomedical Science, Forensic Science, and Law* (Academic Press, 2016); Dan Krane et al, 'Sequential Unmasking: a Means of Minimizing Observer Effects in Forensic DNA Interpretation' (2008) 53(4) *Journal of Forensic Science* 1006. 'Task-splitting' involves organising work so that relevant issues or information are captured, but not in ways that are likely to contaminate individual interpretations. This might involve a case manager triaging information. For example, different forensic pathologists might attend the scene and perform the autopsy. The pathologist attending the scene (or a case manager) can inform the pathologist conducting the autopsy about any task *relevant* information while shielding her from task irrelevant information and context.

[198] Sherry Nakhaeizadeh et al, 'The Power of Contextual Effects in Forensic Anthropology: A Study of Bias Ability in the Visual Interpretations of Trauma Analysis on Skeletal Remains' (2014) 59(5) *Journal of Forensic Sciences* 1177. Subsequent studies suggested that biasing might be cumulative: see Sherry Nakhaeizadeh et al, 'Cascading Bias of Initial Exposure to Information at the Crime Scene to the Subsequent Evaluation of Skeletal Remains' (2018) 63(2) *Journal of Forensic Sciences* 403.

of possible trauma.[199] Those who were told the bones were older were more likely to interpret the damage as post-mortem. Both of these groups diverged significantly from interpretations of the bones by members of the control group.[200] Here, we can observe how exposure to information can unwittingly bias and change interpretations and, in some circumstances, should even lead us to question claimed abilities[201] — in this example the ability to reliably interpret skeletal damage *and* its causes.

In relation to *Lang*, one way to think about the risks posed by contextual and cognitive bias is to consider what Dr Ong knew (or expected) when forming the contested opinion as well as what happened in the aftermath (with respect to confirmation bias).[202] It is unclear from the legal records when (and on what basis) the contested opinion emerged or precisely what was known at that time — a situation reflecting the prevailing legal indifference to human factors — but even a few hypothetical examples might help to distil some of the potential vulnerabilities.[203] It seems likely, from his attendance at the scene and interaction with investigators, that Dr Ong knew there were only two persons in the apartment when Mrs Boyce died.[204] Dr Ong may have known about Mr Lang's relationship with the deceased being strained and possibly coming to an end, and perhaps the evidence associated with a disagreement.[205] This is precisely the kind of task-irrelevant information which might unconsciously transform an attribution of

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[199] We might legitimately wonder if such exposures would lead them to report that such possibilities were 'more likely'. Moreover, this particular result bears directly on the claim by Kiefel CJ and Gageler J, that descriptions of damage are factual rather than interpretation: see above n 69.

[200] There may be legitimate questions around what precisely is task-irrelevant in different analyses. We should remember that the only difference between the various conditions in this study was the provision of contextual information. The contextual information changed (ie biased) the way the bones were interpreted, and even their description.

[201] This may be complicated by (un)certainty about the accuracy of the information, and whether others — such as judges or the tribunal of fact — might also have access to the same information and even be asked to consider it as part of their fact-finding.

[202] One of the additional dangers involves the forensic pathologist placing conscious reliance on information, such as the three cases and the oddness of the wound, 'typically in the honest belief that it is relevant, reliable and diagnostic.' See Simon (n 192) 302.

[203] The lawyers and judges do not attend to the conditions of opinion formation.

[204] *Autopsy Report* (n 38) 13, following a version of the contested opinion, states: 'The interpretation is based on the circumstances as given to me including the visit to the scene, post-mortem examination, including post-mortem CT scan finding and toxicological results.' We might reasonably wonder: if forensic pathologists can reliably distinguish between self-inflicted stab wounds and stab wounds inflicted by others, do they need to know that there were two people in the apartment? And, is that knowledge, and insight into the relationship, likely to influence — whether consciously or unconsciously — their interpretations? We might also note that the presence of others, and ease of opportunity, are not among the factors (or reasons) advanced in *Lang* or *Velevski*.

[205] Dr Ong spoke to police when giving a briefing at the scene: Transcript Trial Day 4 (n 48) 15. When testifying in the second trial, Dr Ong presumably knew that Lang had been convicted by a jury, succeeded on appeal, and that the prosecutor was determined to proceed again.

suicide, or uncertainty, into an attribution of homicide.[206] Dr Ong presumably received the toxicological results (before completing his autopsy report) and so was aware of the presence of therapeutic doses of drugs ordinarily used to manage mental illness.[207] Dr Ong may have been exposed to much of the evidence presented to the jury, albeit in more or less elaborate forms. He may have been exposed to the beliefs of detectives and prosecutors (over time). The risks flowing from exposure to task-irrelevant information were compounded by the unusual wound and apparent difficulty of the task, as well as uncertainty around the factors required to make an accurate determination (along with their relative weightings).

A serious problem for fact-finding in trials and appeals is our inability to retrospectively determine if an expert's opinion has been unconsciously biased — whether influenced or potentially determined — by task-irrelevant information. This seems to be a largely unrecognised problem. By and large courts pretend that well-studied, and so scientifically notorious, biases, such as expectation, confirmation and hindsight, belief preservation, overconfidence, base-rate neglect, and the illusion of consistency are non-issues; easily transcended by highly trained and experienced experts or overcome by adversarial trial safeguards such as cross-examination and judicial directions.[208] Empirical study demonstrates the vulnerability of all persons and the high likelihood that traditional trial safeguards are routinely ineffective.[209] Cognitive contamination cannot be corrected through retrospective attempts to identify exposure(s) to task-irrelevant information, explaining the risks to cognition to the tribunal of fact, or directing it to take them into account or ignore the potentially biasing information. For, how does a jury take into account the danger that information might have influenced a highly experienced expert; or even unconsciously *determined* her opinions? Difficulties are compounded where the expert or prosecutor treats the introduction of cognitive bias as little more than a desperate attack on the witness's integrity, character and credibility.[210] To be clear, the prevailing legal attitudes and responses are

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[206] To be clear, information about the relationship is task-irrelevant to the forensic pathologist's interpretation of the body, but it is not irrelevant to the facts in issue and should be considered by the tribunal of fact. The forensic pathologist's opinion — developed using a valid method that limits exposure to task-irrelevant information — should be incorporated into the tribunal of fact's evaluation of the overall case.

[207] This may have been complicated by an awareness that statistical evidence, about the frequency of suicides among persons with mental illnesses, had been deemed inadmissible by the Queensland Court of Appeal in upholding Lang's appeal following an earlier trial: see *R v Lang* [2019] QCA 289.

[208] Emily Pronin, Daniel Y Lin and Lee Ross, 'The Bias Blind Spot: Perceptions of Bias in Self Versus Others' (2002) 28(3) *Personality and Social Psychology Bulletin* 369.

[209] See Gary Edmond and Mehera San Roque, 'The Cool Crucible: Forensic Science and the Frailty of the Criminal Trial' (2012) 24(1) *Current Issues in Criminal Practice* 51; Gary Edmond et al, 'A Warning about Judicial Directions and Warnings' (2023) 44(1) *Adelaide Law Review* 194; Gary Edmond et al, 'Forensic Science Evidence and the Limits of Cross-Examination' (2019) 42(3) *Melbourne University Law Review* 858.

[210] In some jurisdictions, these kinds of questions can lift the defendant's character shield: see *R v Yaryare* [2020] EWCA Crim 1314, [69]–[73], [99]–[110] (Fulford LJ).

incompatible with the description of the risks and recommendations by PCAST, the NAS and the Forensic Science Regulator (UK).[211]

Perhaps even more invidious, how do courts prevent the information which may have biased experts from also contaminating the interpretations of jurors and judges?[212] This is a largely unrecognised problem for adversarial proceedings, especially where an expert's opinion is closely related to the ultimate issue and presented as independent evidence. Where an expert is unnecessarily exposed to (and potentially biased by) task-irrelevant information they are trespassing on the jurors' prerogative.[213] It is the jurors who are required to consider all of the evidence — including evidence that is, or should be, task-irrelevant to the expert — and to evaluate it according to directions and the law. Where experts do not manage their exposure to task-irrelevant information (or do not have a clear idea of information that is task-*relevant* — ie, 'within scope' and so required — for some analytical task), there are real risks that this information will unwittingly influence their interpretations *and be re-used* — in the sense of being open to double-counting and circular reasoning — by the tribunal of fact in its own fact-finding.[214] In these circumstances the jury hears the (unwittingly) contaminated opinion as well as the evidence contaminating it. The contaminating evidence is routinely characterised as independent (separate strands in evidence theory) or treated as though the tribunal of fact is capable of keeping it independent in its fact-finding. The resulting risk of double-counting is rarely identified or considered, even though apart from blinding the expert or excluding their contaminated opinions, there appear to be no reliable means of mitigating dangers.[215]

Peak scientific bodies have repeatedly warned experts and courts about the dangers that cognitive bias poses to forensic science and medicine evidence. Consider the following description by PCAST:

> Cognitive bias refers to ways in which human perceptions and judgments can be shaped by factors other than those relevant to the decision at hand. It includes 'contextual bias', where individuals are influenced by irrelevant background information; 'confirmation bias', where individuals interpret information, or look for new evidence, in a way that conforms to their pre-existing beliefs or assumptions; and

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[211] See *PCAST Report* (n 21) 31–2; *NRC Report* (n 21), recommendations 5 and 6; Forensic Science Regulator, *Cognitive Bias Effects Relevant to Forensic Science Examinations: Issue 2* (Guidance, 2020).

[212] Gary Edmond, 'Against Jury Comparisons' (2022) 96(5) *Australian Law Journal* 315.

[213] The results of such trespassing cannot be repaired, and may not even be identifiable, retrospectively.

[214] William Thompson, 'What Role Should Investigative Facts Play in the Evaluation of Scientific Evidence?' (2011) 43(2–3) *Australian Journal of Forensic Science* 123, 131. Consider, for example, the absence of defensive injuries. Was this a factor for the forensic pathologist or for the jury? If the forensic pathologist relied upon it (or even was exposed to it) how do we keep the strands independent if the tribunal of fact is told about both the absence as well as the contested opinion *informed* by it?

[215] Gary Edmond, 'Investigators, Cognitive Bias and Double-Dipping: Misunderstanding Opinion Evidence in Trials and Appeals' (2023) 97(8) *Australian Law Journal* 543.

> 'avoidance of cognitive dissonance', where individuals are reluctant to accept new information that is inconsistent with their tentative conclusion. The biomedical science community, for example, goes to great lengths to minimize cognitive bias by employing strict protocols, such as double-blinding in clinical trials.[216]

This passage could be used as a 'key' to understanding the contested opinion, particularly the way factors were selected, weighed, privileged and elided.[217]

G *What about Mandatory and Discretionary Exclusion?*

Interestingly, Kiefel CJ and Gageler J suggested that Dr Ong's contested opinion might have been excluded on the basis that its probative value was outweighed by the danger of unfair prejudice to the defendant — the test prescribed by *R v Christie* ('*Christie*'),[218] the common law analogue to UEL s 137. In so doing, they even adverted to the danger of a 'white coat effect':

> The prejudicial effect which might in an appropriate case be required to be weighed against the probative value of an expert opinion has properly been recognised to be capable of including a risk that a jury might give the opinion more weight than it deserves by reason of a perception of the status of the expert — the so-called 'white coat effect' — or by reason of difficulty in assessing information of a technical nature.[219]
>
> Absent a clearer explanation of Dr Ong's process of reasoning, his opinion about whether the features of the wound which he identified were more consistent with stabbing by someone else *might legitimately have been thought to have carried little more weight than the opinion that could be expected to be formed by a layperson* once apprised through the technical description by Dr Ong of the same features of the wound. That *weakness* might well have been thought to have gone to the admissibility of Dr Ong's opinion had the argument been advanced that its probative value was outweighed by its prejudicial effect.[220]

Nevertheless, the fact that the *Christie* discretion was not raised at trial or on appeal is revealing. Following *IMM v The Queen*,[221] the credibility of the witness and the reliability of the evidence are not taken into account when determining '*the extent to which* the evidence could *rationally* affect the assessment of the probability of

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216 *PCAST Report* (n 21) 31; *NRC Report* (n 21) 122: 'Human judgment is subject to many different types of bias, because we unconsciously pick up cues from our environment and factor them in an unstated way into our mental analyses.' See also Keith A Findley and Michael S Scott, 'Multiple Dimensions of Tunnel Vision in Criminal Cases' [2006](2) *Wisconsin Law Review* 291.

217 See also Daniel C Murrie et al, 'Are Forensic Experts Biased by the Side That Retained Them?' (2013) 24(10) *Psychological Science* 1889.

218 (n 29).

219 *Lang* (n 1) 334–5 [17].

220 Ibid 337 [25] (emphasis added). See also at 387–8 [221] (Gordon and Edelman JJ). Several trial judges have privately suggested to me that this is the great hope afforded by *Lang*.

221 (2016) 257 CLR 300.

the existence of a fact in issue'.[222] Perversely, courts have largely rejected the need to engage with validity and reliability, and other indicia of trustworthiness, when endeavouring to determine the 'the extent' or capacity of opinions said to be based on scientific, technical or biomedical knowledge.[223] Indifference to knowledge, and insensitivity to the very information that informs the maximum capacity of a method, procedure or ability, means that probative value is necessarily a judge's best guess — informed by what they think a jury might (reasonably) do. Some judges imagine that the maximum value is the opinion being correct — because a jury might adopt that view. When weighed against pro-admissibility maxima, lawyers have struggled to persuade trial judges of the dangers of unfair prejudice flowing from the admission of speculative or experience-based opinions proffered by those with advanced degrees, official titles and formal positions (usually with state agencies). The problem has been compounded by a naïve, indeed anti-scientific, optimism in the effectiveness of cross-examination, defence experts and judicial directions and warnings.[224]

As for the spectre of the 'white coat effect', a reader might wonder: if the opinion is admitted because it is substantially based on 'specialised knowledge', where is the danger? Here we can see how 'shortcuts' such as admitting the opinion of a highly trained and experienced medical specialist without carefully attending to the evidence base (ie, specialised knowledge), compromise other checks and balances. Justice Jagot emphatically rejected any suggestion that the contested opinion was 'cloaked "with a spurious appearance of authority"'.[225]

But what else was there?

VI Conclusion: The Need to Know about Validity, Accuracy and Ability

This article is intended to be primarily political and institutional in its orientation. It suggests that the contested opinion and reasons supporting it were inadequate for a criminal prosecution and so should not have been adduced by the prosecutor or admitted. This is not the same thing as criticising forensic pathology, or forensic pathologists (eg, *Velevski*) or a forensic pathologist (eg, *Lang*). Although, we might wonder whether forensic pathologists as a college have been sufficiently attentive to the knowledge base supporting some opinions as well as

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222 See UEL (n 2) Dictionary pt 1 (definition of 'probative value').

223 *NRC Report* (n 21) 9, 87, recommended addressing the following fundamentals:

> (1) the extent to which a particular forensic discipline is founded on a reliable scientific methodology that gives it the capacity to accurately analyse evidence and report findings and (2) the extent to which practitioners in a particular forensic discipline rely on human interpretation that could be tainted by error, the threat of bias, or the absence of sound operational procedures and robust performance standards.

224 See n 209 above.

225 *Lang* (n 1) 459 [470] (Jagot J).

the threats posed by contextual and cognitive bias.[226] Forensic pathologists should not mistake legal reception (or admission) and judicial recognition for epistemic support. In the absence of validated methods, forensic pathologists should be much more willing to state: 'I do not know'. Courts and the communities they serve will be assisted by appropriate confessions of ignorance and uncertainty.[227]

When it comes to *knowledge*, and especially when a putative ability is involved, we should expect those called as scientific, technical or biomedical experts to be able to direct our attention to validated methods or published support. There should be evidence that knowledge claims are sound, that methods work, and that those claiming an ability possess a demonstrable advantage over the tribunal of fact.[228] They should be able to assist the court with empirically based insights into the method, limitations, uncertainties and error — drawn from formal testing. In addition, we must be attentive to the dangers posed by contextual and cognitive bias. For, when experts are engaged in difficult interpretations, they are especially vulnerable to the influence of task-irrelevant information. An important benefit of formally validating a method is that it provides a clear indication of what information is required and so ought to be available to the analyst, what is not required and should be avoided and, vitally, how an opinion might be expressed and evaluated. In *Lang* and *Velevski*, the apparent absence of an identifiable (and valid) method meant that highly trained and experienced forensic pathologists do not seem to have provided an evidence-based account of the most salient factors, their relative significance, or the limits of what they might consider (especially issues on the peripheries or beyond forensic pathology, such as the significance of tidiness, mental illness, or relationship histories). There were apparently no attempts to manage exposure to task-irrelevant information.

I can imagine some lawyers and judges protesting that I am over-reading 'knowledge' and, in effect, expecting too much — perhaps imposing my own counsel of perfection.[229] Or, that I am a 'splitter' endlessly, and unnecessarily, breaking expertise into unrealistic and unachievable components (or individual

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[226] See also Simon Cole et al, *Medicolegal Death Investigation and Convicting the Innocent* (Report, August 2024), and in Australia, Drew Rooke, *A Witness of Fact: the Peculiar Case of Chief Forensic Pathologist Colin Manock* (Scribe Publications, 2002); *R v Keogh [No 2]* [2014] SASCFC 136; *Gilham v The Queen* (2012) 224 A Crim R 22; *Folbigg v R* [2023] NSWCCA 325; Emma Cunliffe, *Murder, Medicine and Motherhood* (Hart Publishing, 2011).

[227] See, eg, Professor Cordner's reports and testimony in *R v Matthey* (2007) 177 A Crim R 470; *R v Klamo* (2008) 18 VR 644 and across the Folbigg saga.

[228] *Smith v The Queen* (2001) 206 CLR 650.

[229] See Tetlock (n 156).

tasks).[230] My retort is: to the extent that courts hope to be part of a post-Enlightenment rational project, they cannot — without good reasons — overlook what is actually required with respect to knowledge and expertise.[231] I have consciously drawn on the definition of 'knowledge' from *Honeysett*.[232] When it comes to opinions said to be based in scientific, technical and biomedical disciplines, there is not much that can now legitimately be claimed as knowledge that has not been formally evaluated and published. When it comes to skills and abilities, they should be capable of demonstration. Research confirms that expertise is surprisingly parochial.[233] Being good at one thing does not necessarily translate into being good at something else, even where the tasks appear similar or related.[234] Similarly, the admission (and admissibility) of opinions about who killed Snezana in *Velevski* tells us nothing about whether Dr Ong (or the forensic pathologists from *Velevski*) is able reliably to discriminate between self-inflicted and other kinds of stab wounds.[235]

It is not my intention to suggest that expert opinion needs to be correct (for admission), only that the procedures (or approaches) must be *known* to be of value and the expert proficient with them.[236] Because forensic scientists and forensic pathologists do not usually know whether specific interpretations are correct — they do not typically receive the unremitting feedback from the world handed to cardiac surgeons (with live patients), architects and engineers (who design and build things), and most scientists (who conduct experiments to test theories) — we should be very interested in independent evidence of organised knowledge, methods that have been formally evaluated, and evidence (beyond non-systematic experience) of personal ability with specific tasks and skills. With respect to the opinions of scientific, technical and biomedical experts, relevance

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230 See Gobet (n 170). Contrast 'lumpers', who think that expertise is expansive. The terms 'splitters' and 'lumpers' are associated with classification (of species) in Linnaean taxonomy. See Harriet Ritvo, *The Platypus and the Mermaid: And Other Figments of the Classifying Imagination* (Harvard University Press, 1997); Gunnar Broberg, *The Man Who Organized Nature: The Life of Linnaeus* (Princeton University Press, 2023).

231 Particularly given the technical limitations of most lawyers, judges and fact-finders.

232 Courts, to the extent that maintain socio-legal legitimacy, cannot disregard what happens in other epistemic domains, particularly the mainstream sciences. Senior courts might distinguish some legal uses of knowledge but these must be explained and principled.

233 K Anders Ericsson (eds), *The Cambridge Handbook of Expertise and Expert Performance* (Cambridge University Press, 2006).

234 Certified latent fingerprint examiners, for example, are not necessarily significantly more accurate than ordinary persons when asked to compare faces in images, shoeprints or to interpret blood spatter. See Growns et al (n 170)

235 President Winneke's scepticism seems sound. Interestingly, because both parties relied on the opinions of forensic pathologists on the manner of Snezana's death, there was no actual challenge to their admissibility in *Velevski*.

236 Foundationally valid and valid as applied. Questions around how accurate a method (and practitioner) ought to be for admission, and whether validation studies are applicable to addressing admissibility and evaluation are legal issues for the courts.

and admission should not be satisfied by what a judge (or jury) might happen to believe about a profession, method, expert or opinion.

In developing its jurisprudence around the admission of scientific, technical and biomedical expert opinion evidence, the High Court has rarely addressed the most salient question. That question is whether the expert — no matter how qualified, experienced, senior, confident or persuasive — can actually do *the specific task* (and how accurately and how do we know).[237] In consequence, and at great public expense, expert opinion evidence in Australia is all too frequently contested around proxies that do not necessarily shed light on the fundamental issue(s). *Lang* is exemplary. Legal practitioners and courts have repeatedly wasted public (and private) money. They have distracted those engaged in fact-finding and unwittingly subverted the provision of fair trials. In the absence of insight into ability and accuracy (and limitations and human factors), the utility of an expert opinion for fact-finding is uncertain. That uncertainty cannot be rehabilitated through criminal proceedings and trial safeguards. Only scientific study suffices. The legal standards regulating scientific, technical and biomedical opinion evidence across Australia, particularly the requirement that opinions be substantially based on specialised knowledge, should be applied in ways that direct attention to criteria that actually matter.

[237] This was not asked in *Honeysett* (n 18). In consequence, we do not know if Professor Henneberg is more capable or more accurate at identifying persons from images than ordinary persons. Just as we do not know if Dr Ong (or any other forensic pathologist) is better than jurors at determining whether some wounds were self-inflicted.

THE 25TH WA LEE EQUITY LECTURE

TOUR OF CONTEMPORARY DEVELOPMENTS AND ISSUES IN EQUITY

5 NOVEMBER 2024, BANCO COURT, SUPREME COURT OF QUEENSLAND

THE HON JUSTICE JULIE WARD*

I INTRODUCTION

I am honoured to have been invited to deliver the 25th WA Lee Lecture at the University of Queensland on the lands of the Jagera people and the Turrbal people (the traditional custodians of Meanjin (Brisbane)), whose elders I acknowledge. Apart from the fact that equity (whether conceived of as an area of study, practice, and/or a mode of conscience) is very dear to my heart (as a former Chief Judge in Equity), it is a privilege to be able to pay tribute to a formidable equity scholar whose texts grace the bookshelves of judges, academics, practitioners and students alike.

The now retired (but still academically astute) Professor Tony Lee was born in Wales in 1930 and educated in law at Manchester University. Professor Lee practised widely across England and Wales before arriving at the University of Queensland in 1965 as a Senior Lecturer. Retiring from that position in 1989, Professor Lee continued in the law variously as either an adjunct professor, visiting professor, a chair on faculty boards, or later as a part-time Commissioner of the Queensland Law Reform Commission.

As I studied law at the University of Sydney, I do not have the good fortune to be able to count myself as one of Professor Lee's students but I was fortunate enough to speak with him briefly when preparing this paper and I can attest to his continuing interest in trusts (and his concern that equity not be reduced to some statutory formulation). Of Professor Lee's various works, I need only mention his *pièce de résistance*, *Principles of the Law of Trusts*,[1] which surely never remains on the shelf long enough to collect dust; and of which he has only recently retired as co-editor.

* President of the Court of Appeal, Supreme Court of New South Wales. I wish to acknowledge and thank my Researchers in the Court of Appeal, Isaac Morgan and Oscar Clark, for their invaluable research and proofing assistance in the preparation of this paper. All errors are mine!

[1] HAJ Ford and WA Lee, Law Book Co, *The Law of Trusts*. Now a looseleaf service, the first edition was published as HAJ Ford and WA Lee, *Principles of the Law of Trusts* (Law Book Co, 1983).

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Last time I delivered a paper in this Banco Court in Queensland it was on the topic of 'Fragmenting Equities'. Today, in step (I hope) with the array of distinguished speakers who have given this lecture before me, I look forward to taking you around the grounds (so to speak), on a tour of some of the contemporary developments and issues in equity as at 2024, which speak in my opinion to the dynamic nature of equity.

I make the disclaimer in advance that I have drawn heavily on some recent decisions of my own Court (the NSW Court of Appeal) but I also make the caveat that we are awaiting the High Court's consideration of two of those decisions. Whichever way the High Court decides, the grant of special leave in those cases at least validates my belief that they raise novel issues worth discussion in this lecture.[2]

II *Jaken* — Fiduciary Duties Owed by Successor Trustee to Former Trustee

I will begin with one such decision, in respect of which special leave was granted earlier this year, the matter having been heard by the High Court in the last couple of months.

In *Jaken Properties Australia Pty Ltd v Naaman* ('*Jaken*'), the NSW Court of Appeal considered whether fiduciary duties are owed by a successor trustee to its predecessor trustee.[3] Of particular interest in this case is the divergence in views between Leeming JA (no mean academic in the area of equity and trusts himself), with whom Kirk JA agreed, providing additional reasons, and Bell CJ. It will come as no surprise that there is much interest in our Court on the High Court's conclusion on this issue. It should probably also come as little surprise that English academics have also weighed in on the controversy (I was interested, for example, to hear the views of Professor Charles Mitchell on this topic when he was in Sydney recently).

Although you may be familiar with the facts, it is worth noting the following. The case concerns a family trust, in respect of which the first appellant (Jaken Properties Australia Pty Ltd, 'Jaken'), had replaced the former trustee (Jaken Property Group Pty Ltd, 'JPG'). The respondent (Mr Anthony Naaman), was a judgment creditor of JPG, for a sum over $3.4 million. There was no dispute between the parties that Mr Naaman could be subrogated to the rights of JPG to be indemnified out of trust assets for liabilities incurred by it, including the judgment debt. However, Mr Naaman's complaint was that Jaken had (improperly) transferred trust assets to other parties, such that there were now insufficient assets to satisfy the judgment debt. Mr Naaman contended that Jaken, as the successor trustee, owed a fiduciary duty to JPG, as the former trustee

[2] For my consideration of each of these High Court cases, see the Postscript to this article in Part VI.

[3] (2023) 112 NSWLR 318 ('*Jaken*').

(broadly speaking a duty not to deal with trust assets so as to jeopardise the former trustee's entitlement to an indemnity out of the assets).

The key issue on appeal was whether a successor trustee owes a *fiduciary* obligation to a former trustee not to deal with trust assets so as to destroy, diminish, or jeopardise the former trustee's entitlement to be indemnified from those assets.

There was no dispute as to the fact that a successor trustee owes obligations of some kind to the former trustee; rather, the question was whether those obligations were of a fiduciary nature. The significance of whether those obligations were fiduciary or not was that the primary judge had found that Jaken had transferred trust assets to third parties who knew of the trustee's fraudulent design. On a finding that the obligation was fiduciary in character, those third parties who (knowingly) received trust assets or who assisted in their transfer would be personally liable pursuant to the principles set out in *Barnes v Addy*.[4]

The primary judge (Kunc J) had found that the obligation was fiduciary in character. His Honour summarised his conclusion on the issue as such:

> JPG (and, by subrogation, Mr Naaman) was entitled to follow those assets into the hands of third parties (other than bona fide purchasers for value without notice) who will hold them on a constructive trust imposed by the court in aid of JPG's proprietary interest in the [trust] assets.[5]

Jaken submitted that the course adopted by the primary judge constituted a 'radical development of the law' that was unsupported by authority, devoid of reasoning, and wrong in principle.[6]

A *Leeming JA*

Leeming JA, with whom Kirk JA agreed, concluded that a successor trustee does not owe fiduciary obligations to a former trustee.[7]

Leeming JA observed that disputes between former and successor trustees are far from unusual but concluded that a fiduciary obligation of the sort propounded by Mr Naaman had not been established. His Honour commenced by noting the rights of the former trustee that were common ground between the parties, being an entitlement to apply for judicial sale or to appoint a receiver over trust assets in aid of its right of indemnity; and that this entitlement sufficed to enable the former trustee to obtain interlocutory relief to prevent the transfer of trust assets.[8] His Honour, in considering the case law on the effect of a receivership order, pointed out that many authorities spoke of the limited entitlement conferred by the former trustee's rights over the trust assets, often

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4 (1874) LR 9 Ch App 244.
5 *Jaken* (n 3) 337 [69] (Leeming JA).
6 Ibid 330 [36].
7 Ibid 356 [141].
8 Ibid 348 [116].

described as a 'charge or lien'.[9] Here, though, Leeming JA referred to the sui generis nature of the former trustee's proprietary rights; and cautioned against deploying general principles relating to charges or liens.[10] Given this, his Honour proceeded on the basis of first principles when considering the nature of the former trustee's interest in the trust property.

At the outset, Leeming JA made the point that merely having custody and administration of property on behalf of others does not convert a person into a trustee; giving the example of a trustee holding Torrens system land on trust which is mortgaged.[11] Although the mortgagee has a proprietary interest in land which takes priority over the beneficial interest of the beneficiaries, it cannot prevent an *in specie* distribution to beneficiaries. The trustee does not owe fiduciary obligations to the mortgagee; and no constructive trust will be imposed.

His Honour, citing those well-known cases *Hospital Products v United States Surgical Corporation*[12] and *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd*[13] noted that the critical feature of a fiduciary relationship is that the fiduciary undertakes to exercise a power for or on behalf of another person, in the interests of that person.[14] His Honour considered it difficult to see how the successor trustee could be seen to be exercising the trustee's power for or on behalf of the former trustee.[15] It was noted that the successor trustee has duties to the beneficiaries and may be compelled to exercise its powers for their benefit,[16] such as in the case of a *Saunders v Vautier* direction.[17] His Honour emphasised the difficulty of reconciling the fiduciary obligation owed to a former trustee with the fiduciary obligations owed to the beneficiaries.[18]

On the point of vulnerability (which was acknowledged by all three judges to be a relevant consideration), Leeming JA considered that the former trustee is no less vulnerable than any other creditor with a security interest recognised in equity, again pointing to the rights available to the former trustee; namely that it can protect its security (such as by caveat or injunction) and can enforce it through judicial sale.[19]

A final point of discomfort for Leeming JA was the issue as to when the fiduciary obligation would arise; as the successor trustee may not be aware of the existence or extent of the former trustee's claim for indemnity.[20] In oral submissions before the Court of Appeal, counsel for Mr Naaman had argued that

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[9] Ibid 350 [121].
[10] Ibid 351 [125].
[11] Ibid 353 [131].
[12] (1984) 156 CLR 41.
[13] (2010) 241 CLR 1.
[14] *Jaken* (n 3) 355 [140].
[15] Ibid.
[16] Ibid.
[17] See *Saunders v Vautier* [1841] 4 Beav 115.
[18] *Jaken* (n 3) 355 [140] (Leeming JA).
[19] Ibid.
[20] Ibid.

the fiduciary duty arose upon the successor trustee learning of the existence and size of a realistic claim for indemnity from the former trustee; a position that Leeming JA described as 'decidedly odd', and distinct from any recognised category of fiduciary duty.[21]

Ultimately, his Honour emphasised the strength of the remedies available to the predecessor trustee, even without the imposition of a fiduciary obligation over the relationship.[22] The former trustee has an entitlement (sustained by its proprietary aspect) to have recourse to assets in the hands of third parties with notice of the successor trustee's breach of duty. Leeming JA concluded that it was unnecessary to superimpose a fiduciary duty between the current and former trustees, and wrong to reason that because equity would grant relief on the application of a former trustee, the former trustees are owed a fiduciary obligation by their successor.[23]

Leeming JA therefore summarised his findings on this issue as follows. As a starting point, JPG was entitled to be indemnified for liabilities properly incurred in the office of trustee. While in office, JPG had legal title to trust assets, which it could use to indemnify itself. Following its removal from office, JPG continued to have recourse to trust assets to discharge those liabilities. Although not through ownership in law, it could apply to the Court for the appointment of a receiver. At that point, Jaken held the assets on trust, subject to JPG's prior ranking entitlement to have recourse to them, which could be vindicated by the appointment of a receiver. However, none of those matters gave rise, in his Honour's opinion to a fiduciary obligation owed by Jaken as successor trustee to JPG as the former trustee.

This finding had obvious consequences for the claims of liability for knowing receipt or assistance pursuant to the principles in *Barnes v Addy*. However, on the facts of this case, Mr Naaman as a creditor of the trust was nonetheless entitled to have recourse to trust assets, including pursuant to statutory prohibitions on the voluntary alienation of land with the intent to defraud creditors.

B *Kirk JA*

Kirk JA, who agreed with Leeming JA, added some brief remarks on the character of the obligation owed to the successor trustee.

Kirk JA acknowledged the relevance of vulnerability in considering whether to recognise a fiduciary duty, comparing it to the importance of vulnerability in determining the existence of a duty of care at common law.[24] (I have not time here to discuss the latest decision of the High Court on the existence and scope of a

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21 Ibid.
22 Ibid.
23 Ibid 356 [141].
24 Ibid 372 [230] (Kirk JA).

duty of care in tort in the context of claims for recovery of pure economic loss — see *Mallonland v Advanta Seeds Pty Ltd* ('*Mallonland*') where Edelman J, straying into the area of animal husbandry — 'we should not attempt to breed from a mule' — was highly critical of the concept of a duty of care based on 'salient features' in the context of such claims.)[25]

In *Jaken*, Kirk JA emphasised that there are many circumstances in which a party is vulnerable to the actions of another, but where there is no fiduciary duty (nor any duty of care), pointing, for example, to the interests of a mortgagor who will be vulnerable to how a mortgagee exercises a power of sale.[26] Similarly, his Honour noted, the mortgagee will be vulnerable to the way in which the mortgagor makes use of the subject property.[27] However, in general, vulnerability alone will not be sufficient to cause a fiduciary duty to arise; the interests of the vulnerable person are deemed to be sufficiently protected by their other legal rights.

Kirk JA, echoing Leeming JA, questioned how the relationship of former trustee and successor trustee could be distinguished from other circumstances in which one person holds property in which another has some interest, such as a mortgagee, or a person with some security interest, charge or equitable lien.[28] To apply a fiduciary relationship here, his Honour stated, would represent a significant expansion of the role of fiduciary duties.[29] Kirk JA also noted the 'decidedly odd' nature of Mr Naaman's ultimate submission, being that the fiduciary duty would come into existence upon the successor trustee having notice of a 'realistic' claim; and contrasted this with the established categories of fiduciary relationships, whose existence is dependent on the nature of the relationship, rather than by notice of some claim.[30] His Honour also emphasised the discomfort with which a fiduciary duty owed to a former trustee would sit with the fiduciary duty owed to the beneficiaries of the trust.[31]

C *Bell CJ*

The Chief Justice, in dissent, agreed with the primary judge's conclusion that a fiduciary obligation was owed by Jaken to JPG (and that it had been breached), with the consequence that third party knowing assistants should be pursuable for equitable compensation under the *Barnes v Addy* principles.[32]

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25 (2024) ALR 25, [58] ('*Mallonland*').
26 *Jaken* (n 3) 372 [230] (Kirk JA).
27 Ibid 372 [231].
28 Ibid 372 [232].
29 Ibid.
30 Ibid 373 [234].
31 Ibid 373 [236].
32 Ibid 321 [3] (Bell CJ).

The Chief Justice set out the chief concern of fiduciary law, as described by the late Justice Paul Finn,[33] then a Professor at the Australian National University, being to impose standards of acceptable conduct on one party to a relationship for the benefit of the other, where the one has a responsibility for the preservation of the other's interests, noting that its function, therefore, is to secure the paramountcy of one side's interests.[34]

While Bell CJ acknowledged that vulnerability is not 'the touchstone of fiduciary obligation', his Honour emphasised that it was a relevant factor.[35] The Chief Justice noted the importance of vulnerability in particular relationships, such as the fiduciary obligation owed by a mortgagee holding surplus proceeds of sale.[36] In considering another example, being the fiduciary obligations owed by a bailee to a bailor, his Honour stated that it would scarcely be a 'radical step' to recognise that a successor trustee is under a similar obligation when in custody of trust assets which are charged in equity with its predecessor's right to recoupment.[37]

The Chief Justice emphasised several aspects of the relationship, including that the predecessor's beneficial interest takes priority over the interests of the ordinary beneficiaries.[38] In contrast with the majority, his Honour viewed it as anomalous that a successor trustee's duty to those with an inferior interest in the trust property (being the beneficiaries) would be fiduciary, while its prior-ranking duty to the predecessor trustee is not.[39] His Honour also called attention to the fact that the former trustee was now entirely out of possession of the trust assets.[40] While acknowledging the rights of the predecessor trustee to approach the court, his Honour said that the former trustee may often be wholly ignorant of its successor's intention; meaning that its right of indemnity may be diminished or even rendered worthless by unilateral action before it could seek the aid of a court.[41]

Also in contrast to the majority, Bell CJ had no concern with the issue as to when the fiduciary obligation would arise; and accepted Mr Naaman's submission that the obligation would arise no later than when the successor trustee became aware of the former trustee's claim to indemnity.[42] The Chief Justice also saw no difficulty in reconciling the fact that the successor trustee would owe fiduciary duties to both the beneficiaries and the former trustee, his Honour there noting the longstanding rule

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33 PD Finn, 'The Fiduciary Principle' in TG Youdan, *Equity, Fiduciaries and Trusts* (Carswell, 1989) 3, 32; see generally Paul Finn, *Fiduciary Obligations* (The Federation Press, 2016).
34 *Jaken* (n 3) 323–4 [8] (Bell CJ).
35 Ibid 326 [17].
36 Ibid 326 [19].
37 Ibid 326–7 [20].
38 Ibid.
39 Ibid 328–9 [29].
40 Ibid 326–7 [20].
41 Ibid 327 [23].
42 Ibid 328 [28].

that a trustee is not required to make a distribution to a beneficiary to the extent that the beneficiary has outstanding obligations to the trust.[43]

In concluding, the Chief Justice (describing the 'important difference' in his analysis from that of Leeming and Kirk JJA) noted that, while the majority emphasised that the former trustee's interest is in the nature of a charge *over* the trust assets, he placed greater weight on the characterisation of the interest as a beneficial interest *in* the trust estate.[44] Given that starting position, and noting the superiority of the interest over the interests of the beneficiaries (to whom fiduciary duties *are* owed), his Honour viewed it as surprising that the superior interest should not be protected by a fiduciary obligation.[45]

D *Mohseni Article*

In a recent article by a lecturer at the University of Sydney, Mr Aryan Mohseni, consideration was given, in advance of the hearing before the High Court, of the issue raised by the conflicting judgments in the Court of Appeal.[46]

Mohseni commences by considering the characterisation of a *current* trustee's interest in trust property (in the context of its right of indemnity) and points to the 'absurdity' of having a charge over property in respect of which one is the legal owner.[47] He argues that the current trustee's right of indemnity is simply an incident of ownership, as the trust property cannot be determined until the trustee has recouped its proper expenses.[48]

Mohseni sees the reality of a current trustee's indemnity as simply an expression of trust accounting and argues that this is critical to how the former trustee's interest should be characterised, especially given Mr Naaman's contention that the former trustee 'retains' a beneficial interest.[49] As the current trustee's indemnity is but an incident of their absolute ownership, Mohseni opines that the current trustee has a 'beneficial interest' in the assets only in a superficial estate, with the result that there is no 'retention' of the beneficial estate on the transfer of legal title to the successor trustee.[50] He argues that there is therefore a fundamental shift in the nature of the indemnity upon this transfer, as the former trustee, no longer having title to the assets, is instead afforded an equitable lien which is afforded by equity to allow it to recoup expenses properly

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43 Ibid 329 [30].
44 Ibid 330 [33].
45 Ibid.
46 Aryan Mohseni, 'Trustees' Indemnities and Fiduciary Duties: The High Court Appeal in *Naaman v Jaken Properties Australia Pty Ltd*' (2024) 46(3) *Sydney Law Review* 373.
47 Ibid 376.
48 Ibid.
49 Ibid 377.
50 Ibid.

incurred to improve a fund now in the hands of another.[51] By way of example reference is made to the equitable liens of liquidators, partners and petitioners for a winding-up over a resulting fund.[52]

Mohseni emphasises the importance of looking to the actual function of the former trustee's equity, rather than labels such as 'beneficial interest' or 'charge' (noting that the relevant right here is the right to have the trust property applied to the trustee's expenses).[53] As such, he cautions against usage of the phrase 'beneficial interest' as it is no more than a beneficial interest commensurate with the former trustee's entitlement to be indemnified from the trust property;[54] in this case, the right to seek judicial sale and interlocutory relief to that effect (such as the appointment of a receiver); describing it as a right to go *into*, not to enjoy, the property. Mohseni sees this as particularly relevant to Bell CJ's dissent, since a fundamental aspect of the Chief Justice's characterisation of the obligation was that the former trustee's interest was, like the beneficiaries' interests, a beneficial interest in the trust property.[55]

The point of difference, implicit in Mohseni's argument, is that the former trustee's so-called 'beneficial interest' is limited to its right of indemnity; and is distinct from the full beneficial interest enjoyed by the beneficiaries of the trust. Relatedly, Mohseni notes that the former trustee can trace into disbursed assets irrespective of whether a fiduciary relationship exists between it and the successor trustee.[56] He posits that, if trust assets were disbursed with the intention to defraud creditors, this would constitute fraud on a power (a topic to which I shall shortly turn).[57] Mohseni argues that, as a disbursement that goes beyond power is invalid and void, the assets (if not in the hands of a bona fide purchaser) are still characterised as trust property; and therefore susceptible to the former trustee's right to seek judicial sale.[58]

Mohseni concludes his analysis by questioning whether it is even necessary to ask, for the purposes of establishing *Barnes v Addy* liability against third party recipients, whether any duty owed to the former trustee was fiduciary in character.[59] The argument presented is that *Barnes v Addy* liability does not require the original breach to have been a breach of a fiduciary duty of no-conflict or no-profit.[60] Here, Mohseni notes analogous situations, such as where third parties interfere with a solicitor's equitable lien (where courts have enforced the solicitor's

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[51] Ibid 378.
[52] Ibid.
[53] Ibid 379.
[54] Ibid.
[55] Ibid 379–380.
[56] Ibid 383.
[57] Ibid.
[58] Ibid.
[59] Ibid 384.
[60] Ibid.

right of recourse against the interfering party).[61] It does not appear that this argument was put to the Court of Appeal, though Leeming JA did hint at the possibility of a former trustee bringing a derivative action to restore the trust fund.

E *Discussion*

Mr Mohseni's encouragement to focus on the limited content and function of a party's equity, rather than seeking to categorise and label it (and then, he would argue, syllogistically reason as to the consequences), coheres with the caution expressed by Leeming and Kirk JJA against a hasty widening of the categories of fiduciary relationships. If the former trustee's right to seek judicial power of sale, along with the statutory entitlement under s 37A of the *Conveyancing Act 1919* (NSW) to set aside a transfer of trust assets intended to defraud creditors, provides sufficient protection for the trustee's rights of exoneration and reimbursement, there is scope for one to question whether a fiduciary obligation is necessary to be recognised. As Kirk JA has noted, there are numerous relationships with analogous vulnerability that do not attract fiduciary obligations (see also Leeming JA's observations on this issue).[62]

On the other hand, is there merit for the dissenting view as to the protection of the superior interest of the former trustee over the interests of beneficiaries?

The case is an interesting reminder to view equitable interests through the rights that they confer, rather than by reference to the taxonomical category within which they fall. As noted earlier, we must await the decision of the High Court on this issue.[63]

F Halabi

As an additional note on *Jaken*, the case of *Equity Trust (Jersey) Ltd v Halabi* ('*Halabi*') in the Privy Council offers further judicial consideration of the nature of a former trustee's rights in relation to trust assets.[64] The case involved a priority dispute between former and successor trustees of a discretionary trust the liabilities of which substantially exceeded its assets. Equity Trust, the former trustee, had argued that its rights of recourse to the fund should take priority over other creditors, including Halabi, on a first in time basis. Equity Trust had been unsuccessful before the Royal Court of Jersey but was successful on appeal to the Court of Appeal of Jersey. The matter ultimately came before the Privy Council. *Halabi* was heard concurrently with a case from Guernsey, in which the Guernsey

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61 Ibid 385.

62 *Jaken* (n 3) 372 [230] (Kirk JA), 331 [38] (Leeming J).

63 See Postscript, Part VI below.

64 [2022] UKPC 36 ('*Halabi*').

Court of Appeal had held that the claims of a former trustee had priority over those of successor trustees, and that trustee claims had priority over creditors claiming through them as subrogated to their lien.

As a preliminary issue, the Privy Council held that a trustee's right of indemnity confers a proprietary interest, in the form of an equitable lien; and that this proprietary interest survives the transfer to the successor trustee.[65] However, the Privy Council overturned the Courts of Appeal of both Jersey and Guernsey, with the majority concluding that the former and successor trustees' interest in the trust assets rank *pari passu* where those assets are insufficient to meet the claims made by or through the trustees pursuant to their indemnities.[66]

Lord Briggs (with whom Lord Reed and Lady Rose agreed) considered the nature and purpose of the trustee's lien, concluding that successive trustees' liens were not intended to be in competition with each other.[67] Where the trust assets were inadequate to satisfy the indemnities, the trustees had suffered a 'shared misfortune' in a single continuing institution, and as such should recover *pari passu*. It was significant to Lord Briggs that the trustees' lien was the vehicle for trust creditors to be repaid, by subrogation to the lien; to expect creditors to be aware of the various dates of appointment and determine priority on that basis was, to his Lordship, contrary to justice, fairness, equity and common sense.[68]

Lady Arden, agreeing but writing separately, concluded that to adopt 'first in time' would be inconsistent with equitable principle.[69] Her Ladyship also noted the disadvantage successor trustees would be under, given the difficulty they might have in determining or verifying the various liabilities of former trustees.[70] This lack of visibility, with earlier liabilities given priority, may, in Lady Arden's view, have a 'very damaging effect' on the willingness of persons to do business with a trust.[71]

Lord Richards and Sir Nicholas Patten (with whom Lord Stephens agreed), dissented, emphasising that the right of indemnity exists to protect the personal position of each trustee by giving them a right to seek an order for judicial sale; and contrasted this to a lien representing security for the payment of a debt.[72] As such, the interest of successive trustees are competing and fall under the general principle granting first in time priority.[73]

A common thread throughout the judgments (including the dissent) was a focus on the characterisation of the right of indemnity as an equitable lien over the trust assets. As in the Mohseni article to which I have referred above, the Privy Council emphasises that the proprietary interest conferred on a trustee (whether

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65 Ibid [166] (Lord Richards and Sir Nicholas Patten), [3] (Lord Reed).
66 Ibid [4].
67 Ibid [254] (Lord Briggs).
68 Ibid [277].
69 Ibid [313].
70 Ibid [290] (Lady Arden).
71 Ibid.
72 Ibid [70]–[105] (Lord Richards and Sir Nicholas Patten).
73 Ibid [210].

former or current) is in the limited form of an equitable lien. Though the question of any fiduciary obligations as *between* the former and successor trustees was not an issue before the Privy Council, the conclusions reached do align with the majority position of Leeming and Kirk JJA in *Jaken*, and with the position advocated for by Mohseni.

Halabi was specifically cited in Leeming JA's judgment in *Jaken*, in which his Honour noted that the decision is inconsistent with a fiduciary duty being owed in relation to the former trustee's entitlement to have recourse against trust assets.[74] If a fiduciary duty were owed in relation to those assets, then the pro-rata ranking of the interests of former and successor trustees upheld by the Privy Council would have been replaced by priority being given to the former trustee's entitlement. As Leeming JA acknowledges, arguments along the lines of those advanced in *Jaken* were not addressed to the Privy Council in *Halabi*.[75] His Honour considered that this reflected the novelty of the argument, and reflected what his Honour suggested was the associated low likelihood that a fiduciary relationship would be recognised.[76]

Of course from a practical point of view what these cases illustrate is the importance of outgoing trustees to secure indemnification before control of the trust passes to the incoming trustee (or, to adopt an analogy that might have had some force in *Mallonland* — to shut the door before the horse, or mule, has bolted).

III Fraud on a Power and the Proper Purpose Rule

I now turn to a discussion of the doctrine of fraud on a power, touched on briefly by Mr Mohseni in his article regarding *Jaken*, and which has been the subject of some academic and judicial consideration of late, including a decision of the Privy Council and a scholarly article from barrister, Dr Jessica Hudson.

A *Meaning of 'Fraud on a Power' in Contemporary Australian Law*

The origins of the doctrine go back to the English cases of *Topham v Duke of Portland* and *Vatcher v Paull*.[77] Fraud on a power is defined in *Vatcher v Paull* as an equitable doctrine prohibiting the exercise of a power, in certain circumstances, for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power. A power, such as a trustee power, must only be exercised with good faith and sincerity, having regard only to the purpose and object of the power. The use of the word 'fraud' can be misleading in this context:

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74 *Jaken* (n 3) 354 [137] (Bowen LJ).
75 Ibid.
76 Ibid.
77 (1869) 5 Ch App 40, 59 (Lord Hatherley and Sir Giffard LJ); (1915) AC 372, 378 (Lord Parker of Waddington).

'fraud on a power' does not indicate any dishonesty, but simply action beyond the implied scope of a conferred power.

The doctrine's express adoption in Australia was seen in the High Court decision of *Ngurli v McCann* (Williams ACJ, Fullagar and Kitto JJ), which cited both *Vatcher v Paull* and *Topham v Duke of Portland* in which their Honours described the doctrine as follows:

> The term fraud in connection with frauds on a power does not necessarily denote any conduct on the part of the appointor amounting to fraud in the common law meaning of the term or any conduct which could be properly termed dishonest or immoral. It merely means that the power has been exercised for a purpose, or with an intention, 'beyond the scope of or not justified by the instrument creating the power', per Lord Parker in *Vatcher v Paull*. 'The Court will not allow him' (that is the appointor) 'to interpret the donor's intention in any other sense than the Court itself holds to be the true construction of the instrument creating the power; and a literal execution of the power, with a purpose which it does not sanction, is regarded as a fraud on the power', per Hatherley LC in *Topham v Duke of Portland*.[78]

This sentiment, regarding the meaning of 'fraud' in this context, has been repeated in more recent case law. The Western Australian Court of Appeal, citing *Ngurli v McCann*, further elaborated on the doctrine in *Mercanti v Mercanti*,[79] stating:

> in the context of the equitable doctrine of fraud on a power, a power of variation conferred on a trustee by the trust deed must not be exercised for a purpose, or with an intention, beyond the scope of or not justified by the trust deed. The power can be exercised only for the purpose for which it is conferred and not for any extraneous or ulterior purpose.[80]

The focus of the doctrine on the purpose of the underlying power is clear and is particularly visible in one of the more recent Australian decisions on this topic, being the judgment of Brereton JA in *Baba v Sheehan*.[81] There, his Honour described the doctrine as requiring that a power be exercised bona fide for the purpose for which it was conferred.[82] His Honour repeated, from *Vatcher v Paull*, the foundation of the doctrine, being that it 'operates to avoid the exercise of a power where it has been exercised for a purpose, or with an intention, beyond the scope of, or not justified by, the instrument creating the power'.[83] Relevantly, Brereton JA went on to say that 'such an exercise of power for an extraneous purpose is invalid and void',[84] there citing *Vatcher v Paull* and *Mills v Mills*.[85] In *Mills v Mills*, Dixon J stated that 'fiduciary agents' must not exercise a power for a

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78 (1953) 90 CLR 425, 438 (Williams ACJ, Fullagar and Kitto JJ).
79 (2016) 50 WAR 495, [244]–[245] (Buss P).
80 (2016) 340 ALR 290, [245] (Newnes and Murphy JJ).
81 (2021) 151 ASCR 462.
82 Ibid [5] (Brereton JA).
83 Ibid [6].
84 Ibid.
85 (1938) 60 CLR 150, 185 (Dixon J).

purpose foreign to the power, describing it as an application of the 'general doctrine' expressed by Lord Northington in *Aleyn v Belchier*.[86]

Brereton JA concluded that the concern of the doctrine is therefore on 'the purpose for which the power is conferred on its repository'.[87] While the language of 'fraud on a power' is employed throughout these judgments, the emphasis by all judges is that the relevant conduct is distinct from dishonesty or immorality, and the focus is on the purpose of the power. This sets the stage for the recent developments in the area, which have advocated for a change in terminology.

B Grand View v Wong — *Privy Council*

Another name for the doctrine is the 'proper purpose rule', which controls the exercise by a trustees of their powers (whether conferred on them by general law or by the trust instrument) by requiring that the power be exercised for the purpose for which it was conferred. Some secondary sources, such as Thomson Reuter's Practical Law service, describe 'fraud on a power' as another, albeit misleading, name for the proper purpose rule.[88]

The propriety of those descriptors as labels for the doctrine was the subject of a recent decision of the Privy Council, namely, *Grand View Private Trust Co Ltd v Wen-Young Wong* ('*Grand View*').[89]

Grand View related to two trusts in Bermuda, set up by brothers Wang Yung-Ching and Wang Yung-Tsai. The first of these was a fully discretionary trust set up for the benefit of the brothers' family. The second was a purpose trust for the perpetuation of the brothers' business, along with some charitable purposes; relevantly, it conferred no benefit on family members. In 2005, the trustees of the discretionary trust excluded the family members from the beneficial class of the trust, and added the trustee of the purpose trust as the sole beneficiary. All assets of the discretionary trust were then appointed to the trustee of the purpose trust. The trustees justified their action on their powers in the trust deed, which permitted them to add or remove 'any person or class or description of persons' to the beneficiaries of the trust. Various heirs of the brothers brought proceedings against the trustees seeking to restrain the action.

At first instance, the Supreme Court of Bermuda found for the heirs, concluding that in removing the family beneficiaries, the trustees had altered the 'substratum' of the discretionary trust, as its underlying character was an irrevocable settlement for the benefit of family members. The trustees were successful in their appeal to the Bermuda Court of Appeal, which held that there

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86 Ibid, citing *Aleyn v Belchier* (1758) 28 ER 634.

87 *Baba v Sheehan* (n 81) [7] (Brereton JA).

88 Thomson Reuters, *Practical Law* (online at <https://uk.practicallaw.thomsonreuters.com>) 'proper purpose rule'.

89 [2022] UKPC 47 ('*Grand View*').

was no standalone rule that an exercise of trust powers could be set aside on the basis that it affected the 'substratum' of the trust. The Court of Appeal also held that the exercise of power had been for a proper purpose, and that it could be used without regard to the interests of the existing beneficiaries.

Finally, the Privy Council allowed the family members' appeal, holding that the amendments to the beneficial class of the trust was void.[90] While agreeing with the Court of Appeal that there the substratum rule did not exist as a freestanding, absolute rule which would in all cases circumscribe powers of amendment, Lord Richards (which whom Lords Hodge, Sale and Burrows and Lady Rose agreed) emphasised that the underlying purpose of the trust was of central importance in determining whether the actions were within power.[91]

Lord Richards noted the general view that, in the case of fiduciary powers conferred on a trustee of a trust with identified beneficiaries, those powers must be exercised to further the interests of the beneficiaries.[92] In considering the power to add or exclude beneficiaries, a power Lord Richards described as one with the capacity to effect 'significant' or 'fundamental' changes to the trust, the relevant question is whether it is intended for the power to have any purpose that goes beyond simply furthering the interests of the beneficiaries.[93] Here, the context of the particular trust is key; in this case, a consideration of the trust instrument and circumstances surrounding it revealed the purpose of the trust, being to benefit the brothers' heirs. As such, the transfer of trust assets to the trustee of a purpose trust from which the family members would receive no benefit, could not be for a proper purpose.

As to the effect of that finding, Lord Richards noted the debate as to whether the purported exercise of power would be void or voidable; however in that case the parties agreed that the decision would be void.[94] This does align with the apparent Australian position on the issue, with Brereton JA in *Baba v Sheehan* stating that an exercise of power for an improper purpose would be 'invalid and void';[95] however, I will return to the issue of void and voidability.

As could be foreseen in even the earliest decisions on this topic, the Privy Council was critical of the use of the term 'fraud on a power', due to the potential application of the proper purpose rule even to good faith and genuine actions by a trustee. Lord Richards noted the description of 'fraud on a power' as 'historical language' by the New Zealand Supreme Court in *Kain v Hutton*,[96] and the remarks of Lord Sumption in *Eclairs Group Ltd v JKX Oil & Gas plc* that it was an

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90 Ibid [128] (Lord Richards).
91 Ibid [114].
92 Ibid [120].
93 Ibid [121].
94 Ibid [122].
95 *Baba v Sheehan* (n 81) [6] (Brereton JA).
96 [2008] NZLR 589, [46] (Tipping J).

'inappropriate' term.[97] His Lordship went so far as to advise that the Privy Council 'considers that there is much to be said for discarding this historical language and referring instead to the proper purpose rule'.[98] Joel Nitikman KC, a Canadian lawyer and author, in his provocatively titled article 'Goodbye and Good Riddance to the Doctrines of "Fraud on a Power" and "the Entire Substratum" — Now if Only We Could Figure Out the "Proper Purpose" Rule', has concluded that, in the aftermath of *Grand View*, the only relevant question is whether the exercise of power is within the scope of power as written; with the doctrines of 'fraud on a power' and 'substratum' to be discarded in their entirety.[99]

C *Dr Hudson's Article*

To conclude the discussion of fraud on a power and the proper purpose rule, I briefly return to the question of the effect of the doctrine. I will do so by reference to an article written by Dr Jessica Hudson, formerly an Associate Professor and now an Adjunct Associate Professor at the University of New South Wales Faculty of Law and Justice. One argument set out in her article is that the effect of fraud on a power can be described as neither void or voidable.[100]

Dr Hudson suggests that the more important question is as to the priority of equity's response to the improper exercise, which will be determined by the interaction between the doctrine and the type of power purportedly exercised.[101] The scope of the article encompasses a broad sweep of private powers, considering institutions such as companies and agency in addition to express trusts. However, for the purposes of this lecture I will confine myself to Dr Hudson's commentary on express trusts.

As a preliminary point, Dr Hudson emphasises that the doctrine should be viewed as, at least in principle, imposing a *disability* rather than a *duty* on the holder of the power, such that the object of the power enjoys a correlative immunity from exercise (ie, the object's legal relations cannot be changed by the purported exercise of the power for an improper purpose).[102] Subsequently, Dr Hudson notes the importance of the context of the power, stating that in some settings the doctrine imposes an actual disability, and actually confines the scope of the power, while in other contexts does not confine the scope of the power, but generates an equity for relief as if the donee were disabled; something she

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[97] [2015] UKSC 71, [15] (Lord Sumption).

[98] *Grand View* (n 89) [56] (Lord Richards).

[99] Joel Nitikman, 'Goodbye and Good Riddance to the Doctrines of "Fraud on a Power" and "the Entire Substratum" — Now if Only We Could Figure Out the "Proper Purpose" Rule' (2023) 29(3) *Trusts & Trustees* 248, 252.

[100] Jessica Hudson, 'One Thicket in Fraud on a Power' (2019) 39(3) *Oxford Journal of Legal Studies* 577.

[101] Ibid.

[102] Ibid 579.

describes as an 'in-principle disability'.[103] Dr Hudson therefore advocates against an approach aiming to characterise the effect of fraud on a power as either void or voidable, arguing that the better approach is to look to whether an actual or in-principle disability is imposed, which allows for consideration of the type and priority of the equity for relief that is generated.[104]

A key aspect of the argument is the importance of distinguishing between various powers. In respect of powers to vary, create, or extinguish the equitable interest under a trust, Dr Hudson argues that the doctrine does operate to define the scope of such powers.[105] The effect of the proper purpose rule is therefore to render the purported exercise ineffective, with an actual disability imposed on the holder of the power, such that the object of the power enjoys an immunity from the fraudulent exercise.[106]

The basis for this argument is that powers that vary, create, or extinguish equitable interests are effective only to the extent that a court would order the person holding title to the relevant property to act in accordance with the exercise of the power.[107] In the case of a fraudulent exercise of power, a court would not make such an order. In this sense, Dr Hudson argues that the purported exercise of power, if for an improper purpose, is ineffective.[108] In cases involving fraud on a power and express trusts, beneficiaries have been able to rely on their pre-existing equitable interest, such as to assert a proprietary claim to seek recovery of property (as in the cases of *Foskett v McKeown* and *Akers v Samba Financial Group*,[109] or to assert the priority of their equitable title (as in *Daubeny v Cockburn*, *In Re Marsden's Trust* and *Cloutte v Storey*).[110] That the exercise of power for an improper purpose is ineffective is also demonstrated by the fact that ratification from the beneficiary is not possible. Rather than being effective, but capable of being set aside, the purported exercise of power is ineffective from the outset.

In contrast, Dr Hudson considers the power of a trustee to deal with the legal title to the trust property; in this case, fraud on a power does not prima facie limit the scope of the power.[111] As the power to deal with trust property is an incident of the trustee's title, the scope of the power is therefore determined by the applicable law (for example, where the trust property is land, by the law of real property). However, where fraud on a power may give effect to an *in-principle* disability is where the doctrine has disabled the exercise of the separate power to overreach the beneficiary's interest. As the scope of the power to overreach *is* defined by the proper purpose rule (as with other powers to vary or extinguish equitable interests),

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[103] Ibid.
[104] Ibid.
[105] Ibid 583.
[106] Ibid 584.
[107] Ibid.
[108] Ibid 585.
[109] [2001] 1 AC 102, 127 (Lord Millett); [2017] UKSC 6.
[110] (1816) 1 Mer 626 (Ch); (1859) 4 Drewry 594 (Ch); [1911] 1 Ch 18 (CA).
[111] Hudson (n 100) 585.

the power to deal with legal title may become subject to an in-principle disability where it would represent a fraudulent use of the power to overreach.

By example, in cases such as in *Wong v Burt*, where a trustee transfers title to trust property to third parties for an improper purpose, although the transfer itself is not rendered ineffective, and the third party does receive title, the beneficiaries are able to rely on their pre-existing equitable interest to seek recovery of the property.[112] Dr Hudson uses this example to demonstrate that the labels of void and voidable are not helpful — the trustee's dealing with title is 'voidable', in the sense that the transfer is effective in conferring title, but can also be described as 'void', due to the doctrine's disabling of the trustee's power to overreach.[113]

Dr Hudson acknowledges the consequences of her argument, being that a default preference arises for the trust beneficiary's equitable interest as against third parties with later equitable interests, rather than a mere equity to set aside the transaction which may be deferred in priority.[114] Dr Hudson defends this position by noting the presence of equitable discretionary factors which still provide protections for a third party, and the strong policy justification for a default preference in favour of the trust beneficiary, particularly the position that equity should acknowledge and protect the institution of the express trust.[115]

In recent significant cases to consider fraud on a power, the discussion of the effect of the doctrine has either been a non-issue (such as in *Grand View*) or, when considered in any depth (for example in *Pitt v Holt*),[116] has largely been confined to a discussion of whether the purported exercise of power is void or voidable. Dr Hudson's article goes beyond that question and has interesting implications for the future of this doctrine; as Dr Hudson herself acknowledges, the analysis she propounds may somewhat disturb the current state of the law relating to priority contests.[117] As with the 'slimmed-down' approach to the rule itself proposed by the Privy Council in *Grand View*, it will be interesting to see over the coming years to what extent, if any, Australian courts adopt Dr Hudson's proposed approach to the consequences of the proper purpose rule.

IV *Kramer v Stone* — Standards of Knowledge in Equitable Estoppel

Moving away from trustee duties but returning to the theme of New South Wales Court of Appeal decisions in respect of which special leave has been granted, I will conclude by touching on the case of *Kramer v Stone* ('*Kramer*'), which most

[112] [2004] NZCA 174.
[113] Hudson (n 100) 588.
[114] Ibid 591.
[115] Ibid 591–2.
[116] [2013] UKSC 26.
[117] Hudson (n 100) 602.

interestingly (at least to my mind) concerned the requisite standard of knowledge on the part of the representor for an estoppel by encouragement to be made out.[118] As with *Jaken*, the High Court, having heard the appeal in September, is currently reserved. In the High Court the argument (by reference to the transcript) appeared to be put somewhat differently than it was in the Court of Appeal. In the High Court it was said that there were two cascading propositions — first, that in the field of proprietary estoppel by encouragement, the equity arises in favour of an intended donee from the conduct of the donor *after* the element of encouragement that is said to give rise to the relevant unconscionability and, second that in a case where the only conduct of the donor after making the voluntary promise is said to be knowledge of the detrimental reliance, constructive knowledge is insufficient for that purpose.

This case involved a dispute around a farming property in the Hawkesbury region of New South Wales, owned by the late Dame Leonie Kramer (formerly a Professor of Literature at the University of Sydney), following the death of her late husband Dr Harry Kramer. Under Dame Leonie's final will, the property was left to her daughter, Hilary, the first appellant.

However, Mr David Stone, the respondent, brought proceedings alleging that he was entitled to the property on the basis of an equitable estoppel. Mr Stone had farmed the property under an oral share farming agreement since 1975, and claimed that Dame Leonie had made a representation to him that he would receive the property on her death, following earlier representations made by Dr Harry Kramer to similar effect.

The primary judge (Robb J), finding for Mr Stone, held that the property was held on constructive trust for him, on the basis of an equitable estoppel arising out of the representation made by the deceased.[119] The primary judge agreed that Mr Stone had relied on the representation to his detriment; and found that Dame Leonie 'ought reasonably to have assumed'[120] and 'ought to have known' that Mr Stone had continued with the share farming agreement on the expectation that he would inherit the property.[121] The primary judge specifically addressed the standard of knowledge required of the representor, stating that:

> subjective knowledge on the part of the representor is not essential, provided that a reasonable person in the position of the representor would understand that it was probable that the representee was engaging in the conduct in the expectation that the representation would be realised.[122]

This was in reliance on the statements of Deane J in *Commonwealth of Australia v Verwayen* ('*Verwayen*') that 'a critical consideration will commonly be

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[118] (2023) 112 NSWLR 564 ('*Kramer*').
[119] *Stone v Kramer* (Supreme Court of New South Wales, Robb J, 10 November 2021) [252].
[120] Ibid [234].
[121] Ibid [251].
[122] Ibid [234].

that the allegedly estopped party knew or intended or clearly ought to have known that the other party would be induced by his conduct to adopt, and act on the basis of, the assumption'.[123]

On appeal brought by Hilary and her co-executor before a court constituted by Leeming JA, Kirk JA and me, a key issue was whether it was necessary for there to have been a finding of actual knowledge by Dame Leonie that Mr Stone had acted to his detriment (where constructive knowledge had been made out).

The appellants contended that, for a case of estoppel by encouragement, actual knowledge is required; there citing the judgment of Brennan J in *Waltons Stores v Maher* ('*Waltons Stores*'),[124] and its explicit acceptance in the New South Wales Court of Appeal in the cases of *DHJPM v Blackthorn Resources* ('*DHJPM*') per Meagher JA,[125] and *Doueihi v Construction Technologies Australia* per Gleeson JA.[126] The appellants argued that the requirement in a *Dillwyn v Llewelyn* proprietary estoppel case,[127] that the representor knew or intended that the representee would act to their detriment, had its genesis in Lord Kingsdown's dissent in *Ramsden v Dyson*,[128] which was quoted with approval by both Brennan J in *Waltons Stores* and Meagher JA in *DHJPM*.[129] The appellants emphasised that Brennan J's matters necessary to establish an equitable estoppel included the requirements that 'the plaintiff acts or abstains from acting in reliance on the assumption or expectation' and that the defendant 'knew or intended him to do so'.[130]

As to the 'clearly ought to have known' formulation applied by the primary judge, in reliance on Deane J's judgment in *Verwayen*, the appellants noted that his Honour's statement of the general doctrine of estoppel by conduct has not been accepted by either this Court or the High Court,[131] noting Gleeson JA's decision in *Doueihi* and the decisions of Dawson and McHugh JJ in *Giumelli v Giumelli*.[132] The appellants, characterising this case as an orthodox proprietary estoppel case, involving an estoppel by encouragement, argued that the primary judge was bound by *DHJPM* to apply the test of actual knowledge or intention articulated by Brennan J in *Waltons Stores*, and erred in applying the constructive knowledge test as in Deane J's formulation in *Verwayen*.[133]

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123 (1990) 170 CLR 394 ('*Verwayen*').
124 (1988) 164 CLR 387 ('*Walton Stores*').
125 (2011) 83 NSWLR 728 ('*DHJPM*').
126 (2016) 92 NSWLR 247 ('*Doueihi*').
127 (1862) 4 De G F & J 517.
128 (1866) LR 1 HL 129.
129 *Kramer* (n 118) [172].
130 Ibid.
131 Ibid [176].
132 (1999) 196 CLR 101.
133 *Kramer* (n 118) [177] (Ward P).

A *Ward P*

I considered that the fundamental issue was:

> whether, in the case of an estoppel by encouragement (where, ex hypothesi, there has been an express or implied representation made by the defendant capable of establishing the necessary element of encouragement), it is necessary that the defendant have actual knowledge of the acts undertaken in (detrimental) reliance on the representation, i.e., knowledge of the acts (or abstention of acts) of reliance 'after' the making of the representation.[134]

In a case of estoppel by encouragement, the question of the representor's knowledge of reliance goes to whether departure from the representation would be unconscionable so as to warrant equitable intervention to prevent the defendant resiling from the representation. It seemed to me, therefore, that knowledge of acts in reliance on the representation is a necessary element for a proprietary estoppel by acquiescence (since it is the knowledge and standing by that engages the conscience of the party sought to be estopped) but not necessary in an estoppel by encouragement, where the conscience has been sufficiently engaged through the encouragement made by the representation in the first place.[135] I considered that this approach resolved the seeming conflict between the approaches by Deane J in *Verwayen* and Brennan J in *Waltons Stores*, and also enabled cohesion with the standard of proof borne by a plaintiff in proving the detrimental reliance (which is also an objective standard).[136]

As the focus of equitable estoppel is on unconscionability, knowledge of the acts undertaken in detrimental reliance on the representation or promise is relevant, but not essential, in a case of estoppel by encouragement — the encouragement in making the representation should be sufficient to satisfy the requirement of unconscionable conduct, where there has in fact been reasonable reliance on the representation.

On the facts of *Kramer*, it was (and is) my view that the primary judge's finding that the deceased ought to have known of the detrimental reliance did not demonstrate error in the finding of estoppel by encouragement.[137] The question of the representor's knowledge of the detrimental reliance, whether actual or constructive, went to the unconscionability of the estate resiling from the representation; as such, it was not necessary for me to express any concluded view in that case as to whether such knowledge must be actual or constructive.[138]

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134 Ibid [197].
135 Ibid [200].
136 Ibid [199].
137 Ibid [203].
138 Ibid [202].

B *Leeming JA*

Leeming JA, agreeing but writing separately on this point, did express a view as to the standard of knowledge required. His Honour also identified the key issue as: 'whether a claim based on estoppel by encouragement was available if it were not shown that the representor ... had actual knowledge of the plaintiff's ... assumption'.[139]

His Honour considered that while the point was not yet settled, the weight of authority suggested that actual knowledge is not necessary.[140]

Leeming JA considered Brennan J's judgment in *Waltons Stores*,[141] being as it was the foundation of the appellants' argument, noting in particular Brennan J's reference to, and approval of, passages from the judgment of Dixon J in *Thompson v Palmer*.[142] It is clear from that passage that Dixon J distinguished between cases of estoppel by encouragement, where the assumption is brought about by an express representation, and estoppel by silence, where the assumption is known to but uncorrected by the defendant. Consistently with that distinction, it was in the context of an equitable estoppel arising by silence in which Brennan J insisted upon knowledge.

Where the inducement comes about not by standing by as the plaintiff laboured under an incorrect assumption, but because of the representor's own positive encouragement, the element of inducing the assumption may be satisfied by the encouragement alone; here Leeming JA emphasised the significance of the words 'or intended him to do so' in Brennan J's judgment.[143] Leeming JA's view was that Brennan J's requirement that 'the defendant knew or intended him to do so' was a disjunctive, intended to capture first, cases of silence where the defendant *knew* that the plaintiff was labouring under an incorrect assumption, and second, cases of encouragement where the defendant *intended* the plaintiff to hold the assumption.[144] In a case where the plaintiff's assumption has been brought about by the defendant's own express assumption, his Honour stated, the weight of authority suggests that actual knowledge of that assumption is not necessary.[145]

Noting the debate as to whether there had been assimilation into a single equitable estoppel, Leeming JA (as did I), emphasised the distinction between the two species of proprietary estoppel — estoppel by encouragement and by acquiescence — and, relevantly, distinguished between the tests for those two species.[146] His Honour stated that, in a case where the equitable estoppel could be supported by silence, Brennan J's judgment in *Waltons Stores* makes it clear that

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139 Ibid [278] (Leeming JA).
140 Ibid [291].
141 Ibid [285].
142 (1933) 49 CLR 507, 547 (Dixon J).
143 *Kramer* (n 118) [287] (Leeming JA).
144 Ibid [288].
145 Ibid [291].
146 Ibid [293].

knowledge is required; however, in a case of positive encouragement, it is artificial to require that the defendant both knew that they had encouraged the plaintiff to adopt an assumption, *and* knew that the plaintiff had relied on the encouragement.[147] Leeming JA here noted the example of two landowners, both of whom had made the same representations to their neighbours, who had then acted upon it, and queried why one should be in a different position if they were thereafter absent from the country and had no means of knowing what steps the neighbours had taken.[148]

Leeming JA (as, again, did I), favoured the dismissal of the appeal, and concluded that the weight of authority favoured the primary judge's conclusion that actual knowledge of detrimental reliance is not required in a case where the defendant's own positive encouragement brought about the plaintiff's assumption.[149]

C *Conclusions*

What Leeming JA and I emphasised was that the focus in any specie of equitable estoppel must be on unconscionability; specifically, whether the departure by the defendant from an assumption adopted by the plaintiff was or would be unconscionable. It is logical, therefore, that any knowledge requirements on the part of the defendant depend on how that assumption was formed. In a case of express and intentional encouragement, then it will likely be unconscionable for the representor to resile from the assumptions they have created, regardless of their actual knowledge of the steps taken pursuant to that assumption. In contrast, where the estoppel involves a defendant standing by in silence as the plaintiff labours under an incorrect assumption, it is of course necessary that the defendant had knowledge of that assumption.

This position has been explicitly advocated for (if not so clearly by courts) by academics for some time. As noted by Leeming JA,[150] Professor Andrew Robertson stated in 1988 in the *Monash University Law Review* that, '[i]t is only in cases where the representor has not actively induced the adoption of the relevant assumption that questions of knowledge or intention become relevant'.[151]

Again, we await the High Court's view on this issue with interest (if, on the somewhat revised formulation put to the High Court, this arises for determination).[152]

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147 Ibid [294].
148 Ibid.
149 Ibid [295].
150 Ibid [294].
151 Andrew Robertson, 'Knowledge and Unconscionability in a Unified Estoppel' (1998) 24 *Monash University Law Review* 115, 117.
152 See Postscript, Part VI below.

V Conclusion

I have spoken before about the etymological derivation of equity (the Roman *aequitas*) and have observed that on some accounts the contemporary principles of equity can be traced back even further than ancient Rome.[153]

The articulation by Aristotle of the justification for equity as a 'correction'[154] or 'rectification'[155] of law where it is deficient on account of its universality accords with Professor Lee's emphasis, in his telephone conversation with me before this talk on 'conscience' as the foundation of equity or equitable principle. The bright thread of equity as 'a correction of [common] law' can readily be seen in more modern notions of equity (see, for example, Lord Ellesmere's judgment in *The Earl of Oxford's Case*,[156] which has been regarded as the 'wellspring of equity in modern English law').[157]

The continuing development of equity, even after hundreds of years, is nothing short of remarkable. So, for example, the doctrine of fraud on a power, 300 years after it was created by what Mr Nitikman KC described as 'one judge's off-the-cuff remark',[158] now sees a significant overhaul, at least in respect of terminology, and likely also through a simplification of the approach taken to an allegation of fraud on a power — or, should I say, improper purpose. Even since *Grand View*, the historical language of fraud on a power has continued to be used in Australia (for example, in *Soulos v Pagones*, albeit in passing),[159] so it will be interesting to see if both the terminology and approach advocated for by the Privy Council are adopted in this jurisdiction if a case arises in which it is a central issue. I am similarly intrigued to see whether a case arises in the coming years that requires a court to give any consideration to Dr Hudson's arguments regarding the effects of the doctrine.

All of which is goes to say that the future for debate by academics and lawyers as to equitable principle remains bright! And the apocryphal length of the Chancellor's foot (which in my day was generally shod with quite fashionable shoes if I do say so myself!) will remain relevant for quite some time (to quote John Selden's well-known aphorism for equity's measure).

My thanks to the Queensland Gives (Queensland Community Foundation) chaired by the Hon Margaret McMurdo AC and to the University of Queensland (and particularly Professor Rick Bigwood) and other sponsors for the opportunity to present this lecture. I am indeed honoured that this is the first to have been presented by a guest lecturer from outside your beautiful State!

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[153] See Catharine Titi, *The Function of Equity In International Law* (Oxford University Press, 2021) 17.
[154] Aristotle, *Nicomachean Ethics*, tr Roger Crisp (Cambridge University Press, 2004) 100.
[155] Aristotle, *Nicomachean Ethics*, tr Terence Irwin (Penguin, 1999) Book V ch 10.
[156] (1615) 1 Chan Rep 1.
[157] Gary Watt, *Equity Stirring* (Hart, 2009) 67.
[158] Nitikman (n 999) 248.
[159] [2023] NSWCA 243, [243] (Ward P).

VI Postscript

Since this paper was delivered, the High Court has handed down its decisions in the two appeals referred to in my paper where judgment was reserved at the time (*Jaken* and *Kramer*). In both cases the appeal was dismissed by a majority of the High Court. In view of their importance to the modern development of equity in Australia, I briefly address those decisions.

A Kramer v Stone

In *Kramer v Stone*, the High Court on 11 December 2024, by majority (Gageler CJ, Gordon, Edelman and Beech-Jones JJ) dismissed Kramer's appeal. Justice Gleeson dissented.[160]

The appellants in the High Court proceeded on two bases: first, that the equity in cases of estoppel by encouragement 'arises… from the conduct of the donor after the making of the voluntary promise',[161] thus requiring some act of further encouragement after the making of the promise or representation; and, second, that constructive knowledge of detrimental reliance is insufficient to establish unconscionability, at least where knowledge is the only matter which would support an unconscionability finding.

Neither of those propositions was accepted by the majority.[162]

As to the first (that there must be further subsequent encouragement after the promise), the majority said this inappropriately transposed the principles concerning the circumstances in which equity is said to perfect an imperfect gift.[163] As to the second (that actual knowledge of reliance on the promise is required), the majority said that this erroneously conflated the principles of estoppel by encouragement from a promise with the principles concerning estoppel by acquiescence.[164] Thus, the majority considered that it is the act of positive encouragement, together with the expectation (or knowledge thereof) that the promise would be relied upon in the general (detrimental) manner upon which it was relied, which binds the conscience of the promisor, so as to give rise to the equity.

As noted above, Gleeson J dissented, departing from the majority on the first of the propositions relied upon by the appellants. Her Honour considered that the first contention (that it was necessary for there to be conduct of encouragement after the promise) was correct.[165]

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160 (2024) 99 ALJR 126.
161 *Corin v Patton* (1990) 169 CLR 540, 557 (Mason CJ and McHugh J).
162 *Kramer v Stone* (n 160) [34]–[35] (Gageler CJ, Gordon, Edelman, Beech-Jones JJ).
163 Ibid [44].
164 Ibid.
165 Ibid [68].

Her Honour considered that a series of cases, including *Dillwyn v Llewelyn* and *Giumelli v Giumelli*,[166] established the principle that, for proprietary estoppel by encouragement, something more than a promise and detrimental reliance upon the promise is required.[167] As such, her Honour found that the promisor must encourage the promisee's reliance upon the relevant expectation or belief through acts subsequent to the promise; the corollary to this being that it thereby denies the creation of estoppel by mere reliance or an executory promise to do something.[168]

Her Honour considered that such a requirement recognised that a voluntary promise would rarely be sufficient to induce an assumption that a promisee will inherit a property so as to bind the promisor to that voluntary promise (referring in this context to what was said in *Waltons Stores* .[169]

The majority decision in *Kramer* thus confirms the position under Australian law as to the elements required to establish estoppel by encouragement.

B Naaman v Jaken Properties Australia Pty Ltd

On 5 February 2025, in *Naaman v Jaken Properties Australia Pty Ltd* the High Court handed down its decision on the *Jaken* appeal, dismissing the appeal.[170] Their Honours were more divided on this appeal. Gageler CJ, Gleeson, Jagot and Beech-Jones JJ were in the majority; Gordon, Edelman and Steward JJ in dissent.

The question posed to the High Court, as it was to the Court of Appeal, was whether a fiduciary obligation is owed by a successor trustee in respect of the entitlement of the former trustee to indemnification out of trust assets or a commensurate beneficial interest in trust assets following the former trustee's replacement by the successor trustee.

The majority answered this question in the negative,[171] explaining that the answer lay in the limited and focused nature of the trustee's entitlement to indemnification out of the trust assets, that being an entitlement to have the trust assets applied for the purpose of recouping expenditure or exonerating liability properly incurred by the trustee.[172] Their Honours went on to say that:

> Once the nature of the entitlement is appreciated to be so limited and so focused, there is insufficient justification for superimposing on the entitlement to indemnification and commensurate beneficial interest in the trust assets retained by a former trustee a personal fiduciary obligation on the part of the successor trustee to the former

166 (n 124); (n 132).
167 *Kramer v Stone* (n 160) [93] (Gleeson J).
168 Ibid [94].
169 Ibid [68], [95], citing *Waltons Stores* (n 124) 406.
170 *Naaman v Jaken Properties Australia Pty Ltd* (2025) 99 ALJR 295.
171 Ibid [6] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ) ('*Jaken 2025*').
172 Ibid [12].

> trustee, either generally or upon the successor trustee becoming aware of the former trustee having a claim to indemnification.[173]

Though noting the semantic indeterminacy of attempting neatly to ascribe nomenclature to the nature of the interest, referring to *Halabi*, their Honours characterised the trustee's interest in the trust assets as akin to a charge.[174] However, they noted this characterisation is not of the synallagmatic or conventional kind,[175] referring to *Carter Holt Harvey Woodproducts Australia Pty Ltd v The Commonwealth*.[176]

The majority noted that the equitable remedies which are attendant with breaches of fiduciary obligation, namely, equitable compensation and account, are not available to the former trustee; and that the final order that a court of equity would make on the application of a trustee to enforce its entitlement, though *in personam*, would not concern any pre-existing obligation on the part of the successor trustee — rather, it would enforce the entitlement of the former trustee of the kind as described above.[177] The majority pointed out that the interim steps a court of equity may take to prevent the destruction, diminution or otherwise jeopardising of this equitable entitlement by a successor trustee likewise did not depend for their making on any pre-existing obligation on the part of the successor trustee to the former trustee,[178] referring to *Lemery Holdings Pty Ltd v Reliance Financial Services Pty Ltd*.[179] At [30], their Honours emphasised that:

> The important point for present purposes is that it is unnecessary to postulate the successor trustee owing any obligation to the former trustee for a court of equity to be able to protect the former trustee's entitlement to indemnification out of and commensurate beneficial interest in the trust assets from being destroyed, diminished, or jeopardised by any conduct of the successor trustee. Whether a successor trustee owes any fiduciary obligation to a former trustee in respect of the entitlement to indemnification out of trust assets or the commensurate beneficial interest in the trust assets is accordingly to be answered at the level of equitable principle in the context of the absence of such need.

The majority expressly rejected the reliance by the appellant on the notions of vulnerability and incoherence which had found favour with Bell CJ in the Court of Appeal.[180]

As to the argument by reference to vulnerability (founded on the reality that a former trustee is at risk of a successor trustee dealing with the trust assets in a manner adverse to the former trustee's entitlement to indemnification and

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173 Ibid.
174 Ibid [22].
175 Ibid [20]–[21].
176 (2019) 268 CLR 524, 560.
177 *Naaman v Jaken Properties Australia Pty Ltd* (n 170) [27] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ).
178 Ibid [29].
179 (2008) 74 NSWLR 550, 561 (Brereton J),
180 *Naaman v Jaken Properties Australia Pty Ltd* (n 170) [41].

commensurate beneficial interest without notice to the former trustee and therefore without the former trustee having an opportunity to approach a court of equity to seek an interlocutory injunction or the appointment of a receiver to protect the former trustee's entitlement to indemnification), the majority said that this was the inevitable consequence of the transmission of the trust assets from one trustee to the other,[181] and that 'vulnerability is not the touchstone of a fiduciary relationship'.[182]

The majority said that vulnerability is relevant to the existence of a fiduciary relationship only to the extent that the vulnerability in question is suggestive of a responsibility on the part of the putative fiduciary to act in the interests of the vulnerable party to the exclusion of the interests of the putative fiduciary,[183] and that the vulnerability of a former trustee to an unnotified dealing with the trust assets by a successor trustee

> is no more suggestive of a responsibility on the part of the successor trustee to act solely in the interests of the former trustee than the vulnerability of a chargee under a conventional equitable charge to an unnotified dealing with the charged property by the chargor is suggestive of a responsibility on the part of the chargor to act solely in the interests of the charge'[184]

this being 'in truth no more than a complaint that the equitable remedies available to a former trustee are inadequate'.[185]

As to the argument by reference to incoherence, the majority considered that this came down

> to an assertion that for a successor trustee to owe fiduciary obligations to a cestui que trust but not to owe a fiduciary obligation to a former trustee would be anomalous given that both have beneficial interests in the trust assets and would be especially anomalous given that the beneficial interest of the former trustee takes priority over that of the *cestui que* trust.[186]

They further said that the basis for that perception of anomaly is removed once it is recognised that, as has been explained, the beneficial interest of the former trustee is of a different nature from the beneficial interest of the cestui que trust.[187]

At [46], the majority considered the absence of anomaly to be even more apparent having regard to the fact that the successor trustee, by reason of its own entitlement to indemnification, has its own beneficial interest in the trust assets of the same nature as the beneficial interest of the former trustee. Their Honours

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181 Ibid [42].
182 Ibid [43].
183 Ibid.
184 Ibid [44].
185 Ibid.
186 Ibid [45].
187 Ibid.

said that notice could be taken of the co-existence of the beneficial interests of the former trustee and of the successor trustee without needing to examine whether the two interests rank *pari passu* or whether the interest of the former trustee takes priority over the equivalent interest of the successor trustee (referring to *Halabi*).

The minority held that there was a fiduciary obligation as the appellant had contended, saying that this arose because the relationship between the successor trustee and the former trustee was one by which the successor trustee assumes a responsibility to the former trustee as would reasonably entitle the former trustee to expect that the successor trustee will act in relation to the trust assets in the interests of the former trustee to the exclusion of its own or a third party's interest.[188] The minority said that it was an obligation not to allow the successor trustee's personal interests to conflict with its objectively assumed duty of loyalty to the former trustee when dealing with assets to which the former trustee has an equitable proprietary right, noting that the conflict principle is the irreducible core of the fiduciary obligation.[189] Their Honours considered that the fact that the former trustee's right of exoneration out of the trust assets for the expenses or liabilities incurred by the trustee takes priority over the claims of beneficiaries reinforced the fiduciary nature of the obligation not to deal with the trust estate so as intentionally to destroy, diminish or jeopardise the former trustee's entitlement to be indemnified from the trust estate.[190]

At [92], the minority emphasised that the issue in the appeal was not resolved by looking only at the nature or extent of the former trustee's rights against the trust fund or only by recognising that the successor trustee holds property in which the former trustee has a preferred equitable proprietary interest. Rather, the minority said that it was to be the issue is to be decided by recognising, first, that the former trustee had an existing right of exoneration out of the trust property (not merely a contingent right) which gave rise to equitable proprietary rights in relation to the trust estate and, second, that the successor trustee was bound to prioritise that right over the claims of the beneficiaries of the trust.

At [94], the minority appears to have accepted the incoherence argument, saying that

> [i]t is peculiar indeed if the critical feature of a fiduciary relationship — an undertaking to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense — supported only a fiduciary relationship with the beneficiaries of the trust and not with the former trustee whose equitable proprietary

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188 Ibid [54] (Gordon, Edelman and Steward JJ).

189 Ibid.

190 Ibid [55].

> interest in relation to the trust assets, objectively apparent to the successor trustee, is given legal priority over that of the beneficiaries.

And at [95], their Honours addressed the argument as to vulnerability, saying that:

> where a person has undertaken to perform a function for, or has assumed a responsibility to, another as would thereby reasonably entitle that other to expect that they will act in that other's interest to the exclusion of their own or a third party's interest, such a relationship may be fiduciary. The objective undertaking of an express trustee, even of a bare trust, is to act in relation to the trust assets in the interests of those holding equitable proprietary rights in relation to those assets. The relationship is one in which the former trustee relevantly stands in the same position of vulnerability as the beneficiaries of the trust with respect to its equitable proprietary interests in relation to the trust assets, as to which the successor trustee has accepted responsibility. Put in different terms, in circumstances where no positive obligation is owed to either a former trustee or beneficiaries, the nature and content of the rights in substance are the same and it does not matter whether the successor trustee is described as holding the trust property *for* the beneficiaries or the former trustee, or *subject* to the interest of the beneficiaries or the former trustee (emphasis in original).

As noted in my paper, the issue here determined by the High Court has obvious ramifications for claims against third party knowing recipients of trust funds in circumstances as arose in *Jaken*, since the absence of a fiduciary duty precludes *Barnes v Addy* liability arising.

'EMPLOYMENT OR NOTHING': AN ANALYSIS OF *BIRD V DP* AND THE AUSTRALIAN APPROACH TO VICARIOUS LIABILITY IN CASES OF INSTITUTIONAL ABUSE

DOUGLAS FREEBURN*

This article concerns the extent to which institutions should be held vicariously liable for abuse perpetrated by non-employees. Recently, in Bird v DP *('*Bird*'), the High Court of Australia confirmed that a relationship of employment is a precondition to vicarious liability attaching to a defendant (subject to limited exceptions). Contrary to developments in overseas jurisdictions, the Court refused to expand the doctrine to encapsulate relationships 'akin to employment'. This article first details the doctrine of vicarious liability and its application to institutional abuse cases. It then compares the historical approach in Australia to that adopted in the United Kingdom and Canada. Finally, it focuses upon the decision in* Bird *and analyse the competing arguments as to the appropriateness of the binary 'employment or nothing' test.*

I INTRODUCTION

There is a scourge of sexual abuse in institutional settings. This insidious, 'widespread evil' has had profound and devastating effects on victims.[1] It is corrosive to the social fabric; eating away at trust and confidence held by the public in organisations charged with the protection of society's most vulnerable.

While victims are increasingly litigating claims of institutional abuse, perpetrators are often impecunious and have less capacity than the institutions they serve to effectively compensate claimants. In many instances, the only mechanism available to victims for meaningful recourse is the pursuit of organisations through the doctrine of vicarious liability.

However, in cases of institutional abuse, the application of vicarious liability is famously uncertain. At its heart, the doctrine of vicarious liability is a creature

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1 *Various Claimants v Catholic Child Welfare Society* [2013] 2 AC 1, 25 [83] (Lord Phillips, Baroness Hale, Lord Kerr, Lord Wilson, Lord Carnwath JJSC agreeing) ('*Christian Brothers*').

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of policy, borne of perceptions of justice, fairness and a need to distribute risk. The doctrine was traditionally applied to 'master and servant' relationships between tortfeasors and defendants. Over the centuries, the weight of precedent sank the doctrine deeper and deeper into that foundation. Until relatively recently, it was generally understood that a relationship of controlled employment was a necessary precursor to a finding of vicarious liability.

But the rise in institutional abuse claims has exposed fissures in the conceptual foundations of the vicarious liability. So often in institutional settings, the relationships between defendants and abusers fall outside the employment paradigm. Priests of a diocese; volunteers of a college; brothers of a holy order — courts have been confronted with non-employment relationships that are nevertheless responsive to policy concerns said to underlie the doctrine.

In the face of these challenges, apex courts in other common law jurisdictions have uprooted vicarious liability from its strict master–servant foundations and expanded the concept to encapsulate relationships 'akin to employment'. In those jurisdictions, the enquiry has been untethered from so-called 'artificial' and 'semantic' distinctions based upon the legal status of the relationship.[2]

For so long, it was uncertain as to whether Australian jurisprudence would follow this trend. While it was assumed that, subject to limited exceptions, vicarious liability remained contingent upon a strict contract of employment, no superior court had confronted the issue directly.

The question was recently answered. In *Bird v DP* ('*Bird*'),[3] the High Court of Australia laid to rest any prospect of a redrawing of vicarious liability in Australia, refusing to expand the test to relationships between defendant and tortfeasor that are 'akin to employment'. In doing so, a plurality explicitly disavowed the justifications that had underpinned expansion of the doctrine elsewhere in the common law world.

This article focusses upon the first stage of the common law test for vicarious liability — namely, the assessment of whether the relationship between tortfeasor and defendant is capable of attracting liability. The doctrine and its history in Australia and overseas will be outlined. I will then focus on the decision in *Bird* and analyse the competing arguments as to whether institutions should be capable of being held vicariously liable for abuse perpetrated by non-employees.

There exist powerful criticisms of a conception of vicarious liability allowing for relationships 'akin to employment'. As the plurality in *Bird* observed, there is a lack of any clear and stable legal principle for a redrawing of the kind undertaken overseas. On the other hand, it has been argued that the binary approach of making vicarious liability contingent upon a tortfeasor's employment status allows, in effect, the tail to wag the dog. Where a non-employment relationship nevertheless possesses the same fundamental qualities that make employment

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2 *Bazley v Curry* [1999] 2 SCR 534, 556 [36] (McLachlin J for the Court) ('*Bazley*').
3 (2024) 98 ALJR 1349 ('*Bird*').

responsive to the policy rationales underpinning vicarious liability, why should the doctrine be excluded?

II Vicarious Liability

Vicarious liability in tort is 'an unusual form of liability'.[4] It arises when the law holds a defendant responsible for the torts of another, although the defendant is himself free from personal blameworthiness.[5] The doctrine involves 'secondary liability based on attribution of liability, not attribution of the acts, of a wrongdoer to a defendant'.[6] Vicarious liability is a species of strict liability in the sense that it is not contingent upon fault on the part of the defendant. However, it is not a personal liability and is not dependent upon the defendant owing any duty to a claimant.[7] Importantly, the fact that a wrongful act in question is a criminal offence does not preclude the possibility of vicarious liability.[8]

A *A Two-Stage Enquiry*

There are two stages of the vicarious liability enquiry.[9] The first is directed at the relationship between defendant and tortfeasor, requiring the relevant relationship to be one capable of giving rise to vicarious liability. The second stage concerns the connection between that relationship and the commission of the tort by the tortfeasor.[10] Much confusion in this area of law derives from a conflation of these two stages.

Vicarious liability is, classically speaking, incident to the relationship of controlled employment — traditionally described as that of 'master and servant'.[11] In instances where the tortfeasor is clearly an employee of the defendant, stage one to the enquiry will be satisfied; the main issue will be whether the employee committed the tort in the course of his employment (stage two).

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[4] *BXB v Trustees of the Barry Congregation of Jehovah's Witnesses* [2024] AC 567, 572 [1] (Lord Burrows JSC, Lord Reed PSC, Lord Hodge DPSC, Lord Briggs and Lord Stephens JJSC agreeing) ('*BXB*').

[5] Carolyn Sappideen and Prue Vines (eds), *Fleming's The Law of Torts* (Lawbook, 10th ed, 2011) 437 [19.10] ('*Fleming*').

[6] *Bird* (n 3) 1361 [44] (Gageler CJ, Gordon, Edelman, Steward and Beech-Jones JJ).

[7] *BXB* (n 4) 572 [1].

[8] *Prince Alfred College Inc v ADC* (2016) 258 CLR 134, 159 [80] (French CJ, Kiefel, Bell, Keane and Nettle JJ) ('*Prince Alfred College*').

[9] *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2022) 275 CLR 165, 199–200 [82] (Kiefel CJ, Keane and Edelman JJ); *Christian Brothers* (n 1) 12 [21]; *BXB* (n 4) 573 [4].

[10] *Bird* (n 3) 1362 [46] (Gageler CJ, Gordon, Edelman, Steward and Beech-Jones JJ), 1371 [81] (Gleeson J).

[11] *Fleming* (n 5) 440 [19.30].

B *Foundations in Policy*

The modern doctrine of vicarious liability is afflicted by 'logical and doctrinal imperfections'.[12] There is a lack of 'clear or stable principle which may be understood as underpinning the development of this area of the law'.[13] Vicarious liability is not a product of 'analytical jurisprudence',[14] nor does it derive from any 'deduction from legalistic premises'.[15] The doctrine is, at its heart, a creature of policy.

Because of its foundations in policy, vicarious liability has been characterised as a 'unstable principle' lacking a 'coherent basis'.[16] It has been observed that '[v]icarious liability in the law of torts is, above all, a subject fashioned by judges at different times, holding different ideas about its justification and social purposes, or no idea at all'.[17]

The rationales said to underlie the doctrine of vicarious liability derive from early conceptions of the master and servant relationship. They can largely be distilled into three primary policy considerations.

The first is termed 'enterprise risk' or 'enterprise liability'.[18] A person who puts a risky enterprise into the community may fairly, it is said, be held responsible when those risks ripen into loss or injury.[19] There is said to be justice in an enterprise who takes the benefit of activities carried on by a person integrated into its organisation also bearing 'the cost of harm wrongfully caused by that person in the course of those activities'.[20] The enterprise risk theory has largely underpinned the expansion of vicarious liability in other Commonwealth jurisdictions (discussed below). In the recent decision of the Supreme Court of the United Kingdom in *Armes v Nottinghamshire County Council*, Lord Reed JSC (with whom the other members of the Court agreed) boldly described the rationale as being the 'most influential idea in modern times'.[21]

The second (closely related) consideration pertains to the master having 'deeper pockets' than the tortfeasor and being a 'more promising source of recompense than his servant who is apt to be a "man of straw" without

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12 *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161, 173 [33] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) ('*Sweeney*').

13 Ibid 166–7 [11].

14 *Darling Island Stevedoring & Lighterage Co Ltd v Long* (1957) 97 CLR 36, 56–7 (Fullagar J) ('*Darling Island*').

15 *Fleming* (n 5) 438 [19.10].

16 *Prince Alfred College* (n 8) 148 [39] (French CJ, Kiefel, Bell, Keane and Nettle JJ).

17 *New South Wales v Lepore* (2003) 212 CLR 511, 612 [301] (Kirby J) ('*Lepore*').

18 *BXB* (n 4) 584 [47].

19 See *Christian Brothers* (n 1) 21–2 [64], 24 [75]; *John Doe v Bennett* [2004] 1 SCR 436, 445 [20] (McLachlin CJ for the Court) ('*Bennett*').

20 *Armes v Nottinghamshire County Council* [2018] AC 355, 381 [67] (Lord Reed JSC, Baroness Hale of Richmond PSC, Lord Kerr and Lord Clarke JJSC agreeing) ('*Armes*').

21 Ibid.

insurance'.[22] Imposing liability on the master is said to promote 'wide distribution of tort losses', the master being a more 'suitable channel for passing losses on through liability insurance and higher prices'.[23]

As to the third concern, the doctrine is said to have 'admonitory value', with deterrent pressures most effectively brought to bear 'on larger units like employers who are in a strategic position to reduce accidents by efficient organisation and supervision of their staff'.[24] It has been said to be 'seriously unjust to leave the burden of the damage, and thus of prevention of harm, on the victim'.[25] By holding the master liable, the law is said to furnish 'an incentive to discipline servants guilty of wrongdoing'.[26]

Much has been written about the flaws in these rationales. There are competing concerns 'not to foist undue burdens on business enterprise'[27] combined with 'a hesitation to make one person responsible for another's misconduct involving a taint of moral delinquency'.[28] In *Cox v Ministry of Justice* ('*Cox*'),[29] Lord Reed JSC (Lord Neuberger PSC, Baroness Hale DPSC, Lord Dyson MR and Lord Toulson JSC agreeing) observed, in relation to the second policy concern, that '[t]he mere possession of wealth is not in itself any ground for imposing liability' and, in relation to the issue of insurance, that 'employers insure themselves because they are liable: they are not liable because they have insured themselves'.[30] As to the third concern, it has been argued that to justify vicarious liability by deterrence is to import elements of fault or quasi-fault liability — elements antithetical to the liability being 'vicarious'.[31] In *New South Wales v Lepore* ('*Lepore*'), Kirby J characterised deterrence as being, in the context of that specific case, 'less persuasive' than other rationales.[32]

While the above policy considerations have attracted extensive attention in academia and in overseas courts, the High Court of Australia has been resistant to accepting them as a basis for vicarious liability. In *Hollis v Vabu Pty Ltd* ('*Hollis*'), a majority spoke of a responsibility attaching to enterprises for harms caused in the conduct of the enterprise, and particularly, responsibility for harms caused by persons who are 'identified as representing that enterprise'.[33] However, in subsequent decisions, members of the Court made statements that appeared to

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22 *Fleming* (n 5) 438 [19.10]. See also *Jacobi v Griffiths* [1999] 2 SCR 570, 589 [29] (Binnie J for Cory, Iacobucci, Major and Binnie JJ).
23 *Fleming* (n 5) 438 [19.10].
24 Ibid.
25 *Lepore* (n 17) 613 [305] (Kirby J).
26 *Fleming* (n 5) 438 [19.10].
27 Ibid 437 [19.10]. See also *Bazley* (n 2) 551 [26].
28 *Fleming* (n 5) 455 [19.130].
29 [2016] AC 660.
30 Ibid 669 [20].
31 JW Neyers, 'A Theory of Vicarious Liability' (2005) 43 *Alberta Law Review* 287, 293–6.
32 *Lepore* (n 17) 613 [305].
33 (2001) 207 CLR 21, 40 [42] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ) ('*Hollis*').

cast doubt on the use of the enterprise risk theory as a basis for development of the common law in Australia.[34]

C *Legislative Reform*

While legislative reform is outside the scope of this article, the author acknowledges statutory extension of no-fault liability in many jurisdictions — including changes rendering religious institutions liable for torts committed by priests.[35] Much of this reform has been undertaken in response to recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse.[36]

III Overseas Expansion

In other common law jurisdictions, the law of vicarious liability has been 'on the move'.[37] What was once a 'relatively clear and well-settled picture of vicarious liability' has been redrawn and expanded.[38] Apex courts in England and Canada have recognised relationships outside the employment paradigm as being capable of giving rise to vicarious liability. This has been done largely in response to claims of sexual abuse in institutional contexts where the relationships between defendants and abusers so often fall outside the 'master and servant' archetype.

In England, the relationships capable of giving rise to vicarious liability have been expanded to include those 'akin to employment'.[39] Consequently, in that jurisdiction, the test at stage one to the enquiry is said to be whether the relationship between the defendant and the tortfeasor was one of employment or, alternatively, a relationship akin to employment.[40]

This new approach was confirmed in *Various Claimants v Catholic Child Welfare Society* ('*Christian Brothers*')[41] where an institute of Christian brothers was held vicariously liable for child sexual abuse occasioned by its members at a school.

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34 *Sweeney* (n 12) 166–7 [11] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

35 See *Civil Liability Act 2002* (NSW) ss 6G–6H, as inserted by *Civil Liability Amendment (Organisational Child Abuse Liability) Act 2018* (NSW); *Civil Liability Act 2002* (Tas) ss 49I–49J, as inserted by *Justice Legislation Amendment (Organisational Liability for Child Abuse) Act 2019* (Tas).

36 The commission considered parliamentary reform to be the proper and appropriate vehicle for ensuring institutional accountability and redress for the harms committed by members and employees: see *Royal Commission into Institutional Responses to Child Sexual Abuse: Redress and Civil Litigation* (Report, September 2015) 61–78.

37 *Christian Brothers* (n 1) 11 [19].

38 *BXB* (n 4) 573 [3].

39 See *Christian Brothers* (n 1) 18 [47], adopting the approach in *E v English Province of Our Lady of Charity* [2013] QB 722 ('*E*').

40 *BXB* (n 4) 573 [3], 587 [58].

41 *Christian Brothers* (n 1).

Despite the lack of any contract of employment binding the brothers to the institute, the relationship between those parties was sufficiently akin to that of employment to satisfy stage one. The relationship was said to share 'essential elements' of an employment relationship including a hierarchical structure, the brothers being subject to the directions and rules of the institute, and the brothers acting in furtherance of the institute's objectives.[42] The Supreme Court justified its adoption of the 'akin to employment' test on the grounds that the policy objective underlying vicarious liability is 'to ensure, in so far as it is fair, just and reasonable, that liability for tortious wrong is borne by a defendant with the means to compensate the victim'.[43]

The 'akin to employment' test has been followed and developed in subsequent cases.[44] In *Various Claimants v Barclays Bank plc*,[45] Baroness Hale (Lord Reed PSC, Lord Hodge DPSC, Lord Kerr and Lord Lloyd-Jones JJSC agreeing) confirmed that, in contrast to other areas of law, 'the distinction between people whose relationship is akin to employment and true independent contractors' was determinative for the purposes of vicarious liability. Despite expansion of the doctrine, it was said to be 'going too far down the road to tidiness' to, in effect, recognise the latter category of relationship as being capable of enlivening the doctrine.[46] Her judgment confirms, as Lord Burrows JSC later put it, that the distinction between independent contractors and employees remains of 'crucial importance'.[47] Baroness Hale also cautioned against eliding 'the policy reasons for the doctrine of the employer's liability for the acts of his employee … with the principles which should guide the development of that liability' into relationships akin to employment.[48]

There is some indication that, at least in England, the expansion of vicarious liability has come to rest. In *BXB v Trustees of the Barry Congregation of Jehovah's Witnesses*,[49] Lord Burrows JSC (with whom the other members of the Court agreed) said: 'The idea that the law still needs tailoring to deal with sexual abuse cases is misleading. The necessary tailoring is already reflected in, and embraced by, the modern tests.'[50]

The Supreme Court of Canada has similarly expanded the concept of vicarious liability to encompass a wider set of relationships analogous to that of employment. In that jurisdiction, the enquiry at stage one focusses upon whether the relationship between the defendant and the tortfeasor is

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[42] Ibid 20 [56].
[43] Ibid 15 [34].
[44] See *Cox* (n 29); *Mohamud v Wm Morrison Supermarkets plc* [2016] AC 677; *Armes* (n 19); *Various Claimants v Barclays Bank plc* [2020] AC 973 ('*Barclays Bank*').
[45] *Barclays Bank* (n 44).
[46] Ibid 988 [29].
[47] *BXB* (n 4) 585 [50].
[48] *Barclays Bank* (n 44) 984 [16].
[49] (n 4).
[50] Ibid 598 [58].

'sufficiently close'.[51] Application of the doctrine is said to be 'animated by the twin policy goals of fair compensation and deterrence that underlie the doctrine, rather than by artificial or semantic distinctions'.[52]

In *John Doe v Bennett* ('*Bennett*'),[53] the Supreme Court found a diocesan episcopal corporation vicariously liable for sexual assault perpetrated by a priest on boys in his parishes. This was the outcome despite the priest not being under any contract of employment. The Court held that the relationship between a bishop and a priest in a diocese was 'akin to an employment relationship',[54] inasmuch as the priest took a vow of obedience to the bishop and the bishop exercised extensive control over the priest's activities. This form of arrangement was held to be capable of attracting liability.

IV The Australian Position before Bird

Prior to *Bird*, it was uncertain as to whether the High Court of Australia would reciprocate the overseas recasting of vicarious liability. While it had been widely understood that, save for some narrowly defined exceptions, the only relationship capable of giving rise to vicarious liability is that arising from a contract of employment, this had not been tested conclusively.

Historically, the High Court has drawn a sharp distinction between employees and independent contractors. An independent contractor carries out their work, not as the representative of another, but as a principal in their own enterprise.[55] Thus, the 'general rule' has long been that a defendant is not vicariously liable for a tort committed by an independent contractor.[56] This 'central conception' was cast by a majority of the High Court as being 'too deeply rooted to be pulled out'.[57]

The decision in *Colonial Mutual Life Assurance Society Ltd v The Producers & Citizens Co-operative Assurance Co of Australia Ltd* ('*Colonial Mutual Life*')[58] is seen as a high watermark of vicarious liability in Australia. In that case, a party who engaged an agent (an independent contractor) to solicit for the creation of legal relationships between that party and others was held to be vicariously liable for slanders made by the agent in the course of that engagement.

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51 *Bennett* (n 19) 445 [20].
52 *Bazley* (n 2) 556 [36].
53 (n 19).
54 Ibid 449 [27].
55 *Colonial Mutual Life Assurance Society Ltd v The Producers & Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41, 48 (Dixon J).
56 *Hollis* (n 33) 36 [32] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ); *Sweeney* (n 12) 191 [100] (Kirby J).
57 *Sweeney* (n 12) 173 [33] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).
58 (n 55).

In a real sense, the reasoning in *Colonial Mutual Life* ran afoul of the orthodox position that vicarious liability hinges upon employment. However, any exception established by that decision has proved to be a limited one. A majority of the High Court in *Sweeney v Boylan Nominees Pty Ltd* ('*Sweeney*')[59] later clarified that the conclusion reached in *Colonial Mutual Life* depended 'directly' upon 'the identification of the independent contractor as the principal's agent (properly so called)'.[60] Additionally, the ratio of *Colonial Mutual Life* was said to be confined to a specific set of circumstances — that is, engagement of the contractor as the agent of the principal to bring about legal relations between the principal and third parties.[61] The majority in *Sweeney* emphasised that no authority, including *Colonial Mutual Life*, 'established the principle that A is vicariously liable for the conduct of B if B "represents" A (in the sense of B acting for the benefit or advantage of A)'.[62]

Before *Bird*, the decision in *Prince Alfred College Inc v ADC* ('*Prince Alfred College*')[63] was the leading High Court authority on vicarious liability in the context of institutional sexual abuse. That case concerned assault perpetrated on a student by a boarding housemaster employed by the appellant college. The victim alleged that the college was vicariously liable for the wrongful acts of the housemaster. While it was ultimately unnecessary for the Court to finally determine the issue of liability, French CJ, Kiefel, Bell, Keane and Nettle JJ recognised that the requirement that the tortfeasor's wrongful act be committed in the course or scope of employment has remained a 'touchstone' for vicarious liability.[64] The plurality concluded that liability may arise where the role given to the employee, and the nature of the employee's responsibilities, had the effect that the employment not only provided an opportunity, but also was 'the occasion,' for the commission of the wrongful act by the employee.[65] This has been referred to as the 'special role' criterion.

Critically, in *Prince Alfred College*, the perpetrator was an employee. Properly understood, the special role criterion identified by the plurality was relevant to stage two of the test for vicarious liability — that is, the connection between the employment relationship and the act or omission in question. As Jagot J in *Bird* later identified, the test propounded in *Prince Alfred College* did not 'constitute a separate feature enabling vicarious liability to be established in respect of the conduct of a person who is not an employee'.[66]

As much was recognised by the Supreme Court of Victoria in *PCB v Geelong College*.[67] That decision concerned abuse perpetrated by a non-employee at a

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59 (n 12).
60 Ibid 170 [22] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).
61 Ibid.
62 Ibid 172 [29].
63 (n 8).
64 Ibid 149 [41].
65 Ibid 159–60 [80]–[81].
66 *Bird* (n 3) 1401 [238].
67 *PCB v Geelong College* [2021] VSC 633.

'House of Guilds' operated by the defendant, Geelong College. In finding that the College was not vicariously liable for the tortious conduct committed by the non-employee, O'Meara J made important observations about the effect of *Prince Alfred College.* His Honour explained:

> In my view, the presence of a relationship of employer and employee is a necessary intermediate step or foundation in the reasoning of the High Court in *Prince Alfred College*. I do not read that reasoning as supporting any proposition to the effect that the intermediate step may be removed, and a vicarious liability for the criminal acts of another imposed, merely by searching for what might in general terms be described as being a 'special role' to be discerned by reference to a multifactorial analysis untethered to any distinct, assigned or formal relationship between the parties.[68]

O'Meara J's observations undoubtedly reflected the conventional understanding in Australia pre-*Bird* that, subject to limited exceptions, employment was a precondition to vicarious liability attaching to a defendant.

V *Bird v DP*

A *Victorian Court of Appeal*

The primacy of the employment relationship to vicarious liability was called into question when, in 2023, the Victorian Court of Appeal published its decision in *Bird v DP* ('*Bird VSCA*').[69] In dismissing an appeal against a decision of Forrest J,[70] the Court recognised a non-employment 'sui generis' relationship between a priest and a diocese as being capable of giving rise to vicarious liability. The case concerned sexual assault occasioned upon the respondent (then a child) by a Catholic priest, Bryan Desmond Coffey. The respondent sued the Diocese of Ballarat, alleging that it was vicariously liable for Coffey's assaults. It was uncontentious that Coffey, in his role as assistant priest under the Diocese, was neither an employee of the Diocese, nor was he an independent contractor engaged by it. No relationship of employment arose because the Diocese lacked 'immediate control or supervision' over Coffey's activities.[71]

The Court of Appeal observed that the relationship between a diocese and a priest was 'necessarily, sui generis'.[72] It did not exist in the context of a commercial relationship or a purely social relationship. Instead, 'the relationship [was] founded in the context of the hierarchical system of a Diocese of the Roman Catholic Church'.[73] In many ways, the relationship between Coffey and the

68 Ibid [303] (O'Meara J).
69 *Bird v DP* (2023) 69 VR 408 ('*Bird VSCA*').
70 *DP v Bird* [2021] VSC 850 ('*Bird VSC*').
71 Ibid [211].
72 *Bird VCSA* (n 69) 438 [120] (Beach, Kaye and Niall JJ).
73 Ibid.

Diocese echoed the relationship recognised as being 'akin to employment' in the English *Christian Brothers* decision.

Controversially, the Court of Appeal found stage one of the enquiry to be satisfied. It held that the sui generis relationship between Coffey and the Diocese was one which, in an appropriate case, would render the Diocese vicariously liable for any tort committed by Coffey in his role as an assistant priest within the Diocese.[74]

This conclusion was reached through a multi-factorial analysis of the relationship between Coffey and the Diocese — untethered to the existence of any employment relationship. While Coffey was not, in a strict legal sense, an employee of the Diocese, he was said to be 'a representative', 'the servant' and 'an emanation' of the institution.[75] The Court placed emphasis on the relationship being 'governed by a strict set of normative rules', enabling Coffey 'to embody the Diocese in his pastoral role' and permitting the Diocese to exercise a degree of control over Coffey.[76] The Court also observed that Coffey was subject to instruction, supervision, transfer and sanction by the Diocese.[77] He was dependent on the Church and his livelihood was provided for.[78]

The Court sought to justify its method by reference to Dixon J's judgment in *Colonial Mutual Life*. It contended that Dixon J's judgment in that case established that, 'in an appropriate case, a relationship may give rise to vicarious liability on the part of a principal, notwithstanding the tortfeasor was not an employee of the principal'.[79] The Court of Appeal found that, based on the approach of Dixon J, 'the extent to which the tortfeasor presented as an emanation of the principal' was a 'central factor' in determining whether stage one was satisfied.[80]

This component of the Court of Appeal's judgment was controversial at the time. The agency relationship identified in *Colonial Mutual Life* was far removed from the 'sui generis' relationship between Coffey and the Diocese. Prior to *Bird*, no superior court had recognised a relationship of this kind as being capable of giving rise to vicarious liability.

Having found that stage one was satisfied, the Court of Appeal proceeded to consider stage two of the vicarious liability enquiry. In doing so, it applied the test from *Prince Alfred College*. The Court found that the position of power and intimacy vested in Coffey as an assistant priest of the parish 'provided him not only with the opportunity to sexually abuse the respondent, but also the occasion for the commission of those wrongful acts'.[81] Liability was established and, for a moment, jurisprudence in Australia seemed on the precipice of change.

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[74] Ibid 441 [130].
[75] Ibid 440–1 [128]–[129].
[76] Ibid 439–40 [125].
[77] Ibid.
[78] Ibid 440 [129].
[79] Ibid 437 [114].
[80] Ibid 435 [104].
[81] Ibid 446 [148].

B *High Court of Australia*

However, any prospect of expansion to vicarious liability in this country proved to be short-lived. On appeal, the High Court unanimously decided to overturn the Court of Appeal's decision. On the question of whether the boundaries of vicarious liability should be expanded in Australia beyond a relationship of employment, all justices — save for Gleeson J — answered 'no'.

Gageler CJ, Gordon, Edelman, Steward and Beech-Jones JJ penned the plurality judgment. Their Honours were explicit that, in Australia, 'a relationship of employment is a necessary precursor to a finding of vicarious liability'.[82] There was said to be a lack of 'stable' or 'solid' foundation for any expansion of the doctrine or for its bounds to be redrawn.[83] Difficulties in clearly defining the breadth of vicarious liability could not themselves, it was said, form 'a proper basis' for its extension.[84]

The plurality acknowledged that the relationship between Coffey and the Diocese 'exhibited certain features that resembled that of a relationship of employer and employee'.[85] However, their Honours expressed concern that, in the absence of clear or stable principle, 'expanding the threshold requirement to accommodate relationships that are "akin to employment" would produce uncertainty and indeterminacy'.[86]

The plurality was critical of overseas approaches, observing that the rationale for the doctrine's expansion in England depended upon 'contestable policy choices and the allocation of risk', which were said to be 'matters upon which minds might differ' and not 'a sound basis for determining and developing the law of vicarious liability'.[87]

Reference was made to the judgments in *Hollis* and *Sweeney* where the Court had refused to extend the boundaries of vicarious liability to include independent contractors or to develop the principle solely by reference to policy considerations. To expand the doctrine required, the plurality said, that those decisions be revisited and overruled.[88] Citing the Court's statements in *Sweeney*, the plurality rejected that *Colonial Mutual Life* justified 'the attribution of Coffey's conduct to the Diocese or the Bishop under the rubric of "vicarious liability"'. [89]

Jagot J, in separate reasons, reached conclusions consistent with those of the plurality. In her Honour's view, previous High Court authority stood firmly

[82] *Bird* (n 3) 1362 [45].
[83] Ibid 1373 [48].
[84] Ibid 1368 [67].
[85] Ibid 1367 [64].
[86] Ibid 1367 [65].
[87] Ibid 1367 [62].
[88] Ibid 1363 [49].
[89] Ibid 1359 [33].

against extension of the principles of vicarious liability and there was otherwise no basis for expansion of the doctrine.[90]

On the threshold issue, Gleeson J disagreed. In a separate judgment (discussed in more detail below), her Honour argued that relationships akin to employment should be capable of attracting vicarious liability. Her Honour described the case as 'a missed opportunity for the Australian common law to develop in accordance with changed social conditions and in tandem with developments in other common law jurisdictions'.[91]

Gleeson J was critical of the plurality's conclusion that there was 'no adequate foundation for the development of the law of vicarious liability'.[92] Her Honour contended that existing case law governing the doctrine of vicarious liability did not foreclose the extension of the doctrine to relationships akin to employment.[93]

According to Gleeson J, features indicative of employment could be 'seen in the Diocese's appointment of Coffey as an assistant parish priest'.[94] By reason of such features, and because Coffey could not be classified as an independent contractor, the relationship between Coffey and the Diocese was, it was said, fairly described as 'akin to employment'.[95]

Notwithstanding Gleeson J's conclusion that the relationship between the Diocese and Coffey was capable of attracting vicarious liability, her Honour held that the Diocese was not liable for the assaults inflicted upon DP. This was because, her Honour said, '[t]he torts were therefore not committed in the course of Coffey's performance of his role as assistant parish priest'.[96] In other words, the second stage of the enquiry was not satisfied.

VI Criticisms

The following is a summary of the arguments against the 'employment or nothing' approach affirmed by the plurality in *Bird*. Though the plurality's reasoning is compelling and, in the author's view, largely consistent with previous High Court authority, there are nevertheless strong criticisms that can be made of the conclusions reached. As will be seen, some (but not all) of these arguments were advanced by Gleeson J in her Honour's reasons.

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90 Ibid 1401 [241].
91 Ibid 1371 [79].
92 Ibid 1372 [85].
93 Ibid 1371 [79].
94 Ibid 1385 [159].
95 Ibid 1387 [176].
96 Ibid 1387–8 [177]–[183].

A *The 'Judicial Whim' Paradox*

A concern uniting the plurality was the perceived lack of legal foundation for expansion of the doctrine. It was said that difficulties in clearly defining the breadth of vicarious liability could not themselves form 'a proper basis' for its development.[97] Reference was made[98] to the following statement by Gaudron and McHugh JJ in *Breen v Williams*:

> Advances in the common law must begin from a baseline of accepted principle and proceed by conventional methods of legal reasoning. Judges have no authority to invent legal doctrine that distorts or does not extend or modify accepted legal rules and principles. Any changes in legal doctrine, brought about by judicial creativity, must 'fit' within the body of accepted rules and principles.[99]

The plurality's unwillingness to permit notions of justice and fairness to drive progression in the law of vicarious liability reflect broader concerns about judges acting upon 'judicial whim' rather than legal principle.[100] Common law courts have warned against developing principle 'as an expedient reaction to the problem confronting the court' rather than proceeding in an incremental and principled way.[101]

While it is difficult to resist the plurality's conclusion that there was 'no solid foundation for expansion of the doctrine or for its bounds to be redrawn',[102] it does raise something of a paradox. As the High Court has repeatedly observed, there has never been any clear principled foundation for vicarious liability at all. Vicarious liability, and its application, has 'not grown from a single, logical legal rule' but instead 'from judicial perceptions of individual justice and social requirements that vary over time'.[103] Justification for the doctrine 'has long been accepted as ultimately based on legal policy'.[104] Thus, just as there is no coherent basis to expand the breadth of the principle beyond employment, there is arguably no principled justification for strictly limiting it to that relationship. Beyond the weight of history, it is difficult to identify any reason why the mere existence of a contract of employment should be determinative.

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97 Ibid 1368 [67].
98 Ibid.
99 *Breen v Williams* (1996) 186 CLR 71, 115.
100 To adopt the language of Kirby J in *Lepore* (n 17) 612 [301].
101 *E* (n 39) 761 [54] (Ward LJ).
102 *Bird* (n 3) 1363 [48].
103 *Lepore* (n 17) 611 [300] (Kirby J).
104 Ibid 612 [300] (Kirby J).

B *Policy as a Basis for Expansion*

The plurality's judgment was, in essence, a rejection of the notion that policy should dictate development in the law of vicarious liability. Their Honours said: 'Whether or not true vicarious liability can be explained by any theory based on a relationship of employment, a relationship of employment has always been a necessary precursor in this country to a finding of vicarious liability'.[105]

While the plurality's reticence can be understood, there is a compelling argument that, in this 'unusual' domain grounded purely in value judgments, it is appropriate for the same rationales that led to entrenchment of the doctrine in the common law to also inform its development. If the only justification for vicarious liability is policy, and policy allows for A, why should the doctrine be restricted to B?

It has been recognised that, in any re-expression of the common law, it is 'normal' to have regard to considerations of policy, as well as to legal authority and principle.[106] In addition to vicarious liability, the common law is replete with examples of the infusion of legal principle with human conceptions of fairness and justice. In the United Kingdom, 'high principles of public policy'[107] led to the recognition of a standalone cause of action for restitution of tax paid by a citizen to a public authority pursuant to an unlawful demand.[108] In the context of administrative law, courts regularly make 'qualitative judgments' about what the legislature should be taken to intend in conferring powers on the executive — particularly where there is an absence of any affirmative indication of such intention. For example, the common law ordinarily implies a condition that statutory power be exercised with procedural fairness to those whose interests may be adversely affected.[109] These qualitative judgments cannot be justified solely by reference to legal deductive reasoning. They are, to a large degree, traceable to human conceptions of fairness and dignity.[110]

However imperfect an analogy between vicarious liability and the above domains might be, these examples illustrate how development of the common law sometimes requires judges to make some initial move in logic that is not otherwise justified by established legal principle. To adjust for changing social conditions and values, the law has, from time to time, pulled itself up by its own bootstraps. As Kirby J observed in *Lepore*, when apex courts are called upon to respond to a new

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105 *Bird* (n 3) 1363 [48] (citations omitted).

106 *Lepore* (n 17) 611 [300] (Kirby J).

107 *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2014] EWHC 4302 (Ch), [315] (Henderson J).

108 *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70, discussed (but not followed) by the High Court of Australia in *Redland City Council v Kozik* (2024) 98 ALJR 544.

109 See, eg, *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 100 [39] (Gaudron and Gummow JJ); *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 666[97] (Gummow, Hayne, Crennan and Bell JJ).

110 See James Allsop, 'The Foundations of Administrative Law' (Whitmore Lecture, Sydney, 4 April 2019) 15–16.

problem for society, ‘it is inevitable that, as in the past, the common law will give an answer exhibiting a mixture of principle and pragmatism’.[111]

If, contrary to the plurality’s reasoning, one accepts that development to the law of vicarious liability can be guided by the foundational policy rationales, the question becomes whether those theories favour — or at least, do not preclude — the ‘akin to employment’ approach. As identified below, there are strong arguments that they do.

C *Justification for ‘Employment or Nothing’ in Policy*

It is difficult to identify anything in the policy justifications for vicarious liability that would support a strict limitation to employer–employee relationships. To the author’s knowledge, there is nothing in any formulation of the enterprise risk theory, the deeper pockets rationale or the objective of deterrence that bespeaks a sharp restriction of this kind.

In *Hollis*, the plurality listed features of an employment relationship that distinguished it from an independent contracting arrangement.[112] These features mirrored many of those identified in *Christian Brothers* that, in the Supreme Court’s view, rendered it ‘fair, just and reasonable’ to impose vicarious liability.[113] The factors from both *Hollis* and *Christian Brothers* (as adjusted by more recent case law)[114] include, but are not limited to, the following:

a. The tortfeasor is integrated in, and not independent from, the defendant. This may be demonstrated by the existence of ‘a hierarchy of seniority’ into which the tortfeasor’s role fits.

b. The tortfeasor is subservient to and dependent on the defendant (both in relation to livelihood and for ‘tools of trade’).

c. The defendant has exclusive access to the services of the tortfeasor and/or the tortfeasor lacks capacity to undertake other vocations.

d. The tortfeasor undertakes work that is integral or central to the defendant’s enterprise.

e. The defendant has a high degree of control exercisable over the tortfeasor, and capacity to organise and supervise the tortfeasor’s activities.

f. The defendant presents the tortfeasor as being an emanation or representative of the defendant.

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111 *Lepore* (n 17) 611 [300].

112 *Hollis* (n 33) 42–5 [48]–[57].

113 *Christian Brothers* (n 1) 20 [56] .

114 See *BXB* (n 4) 587 [58].

Arguably, any kind of relationship — employment or otherwise — that exhibits these traits is responsive to the policy rationales that underlie vicarious liability. Notions of justice and fairness advanced by the enterprise risk theory are not attracted to any specific legal category of relationship. Rather, the theory answers to conditions where a defendant places a risky enterprise in the community into which the tortfeasor is integrated, and where the tortfeasor acts for the benefit of that enterprise. Similar observations were made by Gleeson J. Her Honour said the enterprise risk the theory justified and provided 'a principled basis' for expansion of the doctrine to relationships akin to employment.[115]

As to deterrence, an enterprise's ability to 'to put in place the necessary preventive and supervisory precautions'[116] to prevent abuse does not depend upon the legal status of its relationship those integrated within its organisation. Thus, to limit vicarious liability to the employment domain arguably blunts the admonitory value of the doctrine, particularly in religious settings where sui generis relationships between defendants and tortfeasors are so common. Eradication of abuse requires 'powerful motivation acting upon those who control institutions', particularly those charged with the care and protection of society's most vulnerable.[117] That motivation is, arguably, not sufficiently supplied by the narrow view of vicarious liability affirmed in *Bird*.

The fact that employment relationships will, by definition, satisfy the criteria identified above is, arguably, not a reason to restrict vicarious liability to that category. Where some other species of relationship exhibits the same features, it is difficult to identify any principled basis for its exclusion. For the law to deny liability based solely upon the absence of a contract of employment is, in a sense, to disregard the true substance of the relationship between tortfeasor and defendant.

The above analysis reflects the view expressed by Gleeson J. Her Honour referred to categories of relationship that,

> 'when whittled down to their essence, possess the same fundamental qualities as those which inhere in employer-employee relationships', so that it is anomalous not to impose vicarious liability for torts committed in the course of the relationship.[118]

In the view of her Honour, the legal basis of a relationship is immaterial and 'does not provide a satisfactory explanation for imposing liability on an organisation in one case, and for not imposing liability on that organisation in the other'.[119]

The outcome in *Bird* illustrates the bluntness of a binary employment or nothing approach. It was uncontentious that the relationship between Coffey and the Diocese exhibited many features of conventional employment. Indeed, it is

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115 *Bird* (n 3) 1374 [94].

116 *Lepore* (n 17) 613 [305] (Kirby J).

117 *Bazley* (n 2) 555 [32].

118 *Bird* (n 3) 1372 [86], quoting *Ng Huat Seng v Munib Mohammad Madni* [2017] 2 SLR 1074, 1097 [63] (Sundaresh Menon CJ for the Court) (Court of Appeal).

119 *Bird* (n 3) 1374 [95].

difficult to conceive of any employment relationship closer than the 'sui generis' relationship that confronted the High Court.

Gleeson J opined there was no reason to distinguish a diocese from any other organisation in the context of enterprise risk. Her Honour emphasised that members of Catholic religious orders have limited 'individual capability to compensate victims of any personal injuries for harm that they might inflict in the course of the organisation's work'.[120] The functions of an enterprise in absorbing, controlling and spreading risks were said to be of particular importance.

Though religious organisations like the Diocese may lack the capacity to directly control priests, there are other forces at work. Priests act in subservience not only to the institution, but the faith itself. Religious dogma dictates a priest's day-to-day behaviours more than any conventional employment relationship. It restricts their autonomy, speech, and personal life. It controls who they marry, the clothes they wear and the entities they worship. Priests in Coffey's position stand 'as representatives of the Church's values' and are required to 'embody them always'.[121]

Conceivably, the reason institutions like the Diocese do not closely supervise priests' work is that a higher level of supervision already exists. Coffey was subservient to the word of God and the dictates of canon law, not merely the directions of his supervisors within the Diocese. In a very real sense, by virtue of his vows to the Church, these were sources of immediate control and supervision. While the Diocese did not supervise Coffey's adherence to the faith in an immediate sense, the Diocese was an emanation of the Catholic Church at large — an institution claiming to be the faith's authoritative source. When all of this is considered, there is something illusory in the conclusion that the Diocese lacked 'immediate control or supervision' over Coffey.[122] The connection between the two actors was arguably 'closer than that of an employer and its employees'.[123] To describe the relationship between Coffey and the Diocese as being 'akin to employment' is, if anything, to underplay its proximity.

However, as the plurality judgment in *Bird* makes clear, these special features of the priest–diocese relationship are almost certainly irrelevant in the absence of any contract of employment. Priests in the position of Coffey are treated upon something of a fiction — as if they are independent and operating their own enterprise. For these reasons, one could argue that to make such fine distinctions between employment and non-employment determinative in the context of vicarious liability is an 'artificial' and 'semantic' exercise.[124] There is a compelling case to be made that, despite the absence of a binding contract of employment, a relationship bearing the salient features of any typical employment relationship should nevertheless be capable of giving rise to vicarious liability.

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120 Ibid 1374 [96].
121 *Bird VSC* (n 70) [240].
122 Ibid [211].
123 *Christian Brothers* (n 1) 20 [58].
124 Cf *Bazley* (n 2) 556 [36].

D *Uncertainty and Indeterminacy*

In *Bird*, the plurality expressed concern that 'expanding the threshold requirement to accommodate relationships that are "akin to employment" would produce uncertainty and indeterminacy'.[125] While it is difficult to argue with this conclusion, three points can be made.

First, even with a limitation to employment relationships, there is a degree of uncertainty and indeterminacy built into the first stage of the vicarious liability enquiry. As cases like *Hollis* make clear, whether a tortfeasor is an employee can often be a complex question requiring the same kind of multi-factorial analysis used overseas in determining whether a relationship is akin to employment.

Second, as has been demonstrated in the United Kingdom, the 'akin to employment' threshold is an onerous one. The expanded test 'does not undermine the traditional position that there is no vicarious liability where the tortfeasor is a true independent contractor in relation to the defendant'.[126] The mere fact that a tortfeasor's conduct was intended to benefit a defendant or was undertaken to advance some objective of the enterprise will not suffice. More is required.

Finally, it must be borne in mind that claimants must still satisfy stage two of the vicarious liability enquiry — that is, on the basis of the test adopted in *Prince Alfred College*, it must be proved that the relevant relationship provided the opportunity and occasion for the tortious conduct. The closeness of the connection between the relationship between the defendant and the tortfeasor and the act of abuse requires 'a strong causative link'[127] and provides 'an objective, rational basis for liability and for its parameters'.[128]

VII Alternative Rationales for Vicarious Liability

Some commentators have proposed new justifications to better explain vicarious liability and its traditional limitation to employment relationships. Neyers contends that existing rationales erroneously focus upon the relationship between the master and the tort victim and 'the goals that would be achieved if liability were imposed'.[129] Instead, it is argued, the most compelling justification for the doctrine lies solely in the relationship between the employer and employee — specifically, 'in the employer's implied promise in the contract of employment to indemnify the employee for harms (including legal liability) suffered by the employee in the conduct of the employer's business'.[130] Indeed, to look at

[125] *Bird* (n 3) 1367 [65].
[126] *BXB* (n 4) 587 [58].
[127] *Christian Brothers* (n 1) 26 [86].
[128] *Prince Alfred College* (n 8) 148 [40] (French CJ, Kiefel, Bell, Keane and Nettle JJ).
[129] Neyers (n 32) 301.
[130] Ibid.

vicarious liability through this lens would justify why the tortfeasor must be an employee — since if the tortfeasor is not an employee, they will not have a right of indemnity from the person sought to be made vicariously liable.

However, to the author's knowledge, no common law court has sought to rationalise vicarious liability in this way. To do so would serve to narrow the scope of the doctrine beyond even the restrictive interpretation adopted in Australia. Principally, it is difficult to reconcile intentional or criminal misconduct by an employee as falling within an employer's implied indemnity.

VIII Tort Theory

In both Australia and overseas, limited attention has been paid to tort theory and its interface with the 'akin to employment' test. Commentators have drawn a distinction between the master's tort theory and the servant's tort theory of vicarious liability.[131] Under the master's theory, a master is liable because the *acts* of a servant are attributed to the master. The servant's theory holds instead that the *liability* of the servant is attributed to the employer. While the servant's theory is seen to have precedence in Australia, its capacity to justify the imposition of vicarious liability has been challenged by some including, most notably, Robert Stevens.[132]

In *Darling Island Stevedoring & Lighterage Co v Long*,[133] Kitto J appeared to endorse the master's theory, suggesting that vicarious liability was 'not a liability substituted for that of the servant'. A master's liability, his Honour asserted, is a 'separate and independent liability' that exists 'not because the servant is liable, but because of what the servant has done'.[134] However, in the same decision, Fullagar J observed that master's theory had not prevailed in Australia, stating:

> The rule is, in my opinion, rightly stated, as it always is, in terms of liability and not in terms of duty. The liability is a true vicarious liability: that is to say, the master is liable not for a breach of a duty resting on him and broken by him but for a breach of duty resting on another and broken by another.[135]

Arguably, the servant's theory places greater emphasis on stage one to the vicarious liability enquiry. Given that, on the servant's theory, the liability of the employer is contingent mainly upon the liability of the employee, much depends on the nature and closeness of the relationship between those parties, and whether it is sufficient to justify attributing the liability of one to the other, and less upon the relationship between the employer and the tortious act(s). Conversely, the

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131 See Joachim Dietrich and Iain Field, 'Statute and Theories of Vicarious Liability' (2019) 43(2) *Melbourne University Law Review* 515, 517.

132 Robert Stevens, *Torts and Rights* (Oxford University Press, 2007) 244; Robert Stevens, 'Vicarious Liability or Vicarious Action?' (2007) 123(Jan) *Law Quarterly Review* 30.

133 *Darling Island* (n 14).

134 Ibid 61.

135 Ibid 57.

master's theory focusses more on stage two of the enquiry, asking whether the acts of the tortfeasor are sufficient to impose liability upon the defendant.

In the author's view, expanding the scope of stage one to encapsulate relationships 'akin to employment' represents closer alignment to the master's theory, freeing the enquiry from questions of employment and allowing liability to hinge more readily upon the nature of the acts themselves.

The decision in *Bird* arguably tends in the opposite direction, signalling the continued relevance of the servant's theory in Australia. Though the plurality did not mention the theory by name, they nevertheless characterised 'vicarious liability in its true or proper sense' as a 'secondary liability based on attribution of liability, not attribution of the acts, of a wrongdoer to a defendant'.[136]

IX Conclusion

The decision in *Bird* has provided clarity to the law of vicarious liability in Australia. It makes clear that, contrary to other parts of the common law world, employment remains a precondition to the application of vicarious liability in this jurisdiction. As the plurality's reasoning demonstrates, there exist powerful arguments against uprooting the doctrine from its master and servant foundations. However, notwithstanding the decision, the appropriateness of a binary 'employment or nothing' test at the first stage of the vicarious liability enquiry remains controversial. In conditions where the relationships between abusers and institutions so often fall outside the employment paradigm, this controversy will no doubt continue into the future.

[136] *Bird* (n 3) 1361 [44].