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Equality Rights as Human Rights: Reframing Discrimination Law to Advance Equality?

Alysia Blackham*

Equality rights can be positioned as human rights, in dedicated discrimination statutes, or as a part of employment law. This article interrogates whether this positioning makes a difference to equality rights in practice, drawing on comparative examination of legislation and case law from Australia and the United Kingdom. It represents the first detailed study of equality rights in human rights statutes in Australia. It concludes that the positioning of equality law can make a difference, though the potential benefits of reframing equality rights as human rights have not yet been fully realised in Australian jurisdictions.

I Introduction

Equality rights can be positioned as human rights, in dedicated discrimination statutes, or as a part of employment law. Equality law therefore sits in a liminal space at the boundaries of employment law and public law. In some jurisdictions, equality law is framed as being largely a creature of employment law, given its primary enforcement via labour courts and tribunals, and enactment in industrial statutes. In these jurisdictions, equality law might be perceived as a form of private law, akin to tort law, and primarily concerning the rights of private parties.[1] In other jurisdictions, though, equality law is positioned as being part of constitutional and human rights law, embedded in national constitutions, or part of human rights statutes. This is reflected, for example, in the growth of human rights instruments that include prohibitions of discrimination, such as the *International Covenant on Civil and Political Rights* ('ICCPR'), the *European Convention on Human Rights* ('Convention'), the *Charter of Fundamental Rights of the European Union* and, in Australia, statutes like the *Charter of Human Rights and*

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[1] See, eg, Sophia Moreau, 'Discrimination as Negligence' (2010) 40(supp 1) *Canadian Journal of Philosophy* 123; Sophia Moreau, *Faces of Inequality: A Theory of Wrongful Discrimination* (Oxford University Press, 2020) ('*Faces of Inequality*').

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Responsibilities Act 2006 (Vic) (‘*Charter*’).[2] Some jurisdictions sit at the intersection of these two approaches, with equality law having both employment and public law facets. Scholars and practitioners are divided as to whether this positioning makes a practical difference. Are those impacted by discrimination more likely to enforce their rights to equality, if the rights are seen as human rights, with broader significance?[3] Conversely, are employers more likely to comply with equality law, if it is seen as a species of employment law?[4]

This article considers what difference, if any, the positioning and framing of equality law makes in practice. It evaluates the possibilities and implications of (re)framing equality rights as human rights for the enforcement and effectiveness of equality law. The article provides the first detailed examination of equality rights in human rights statutes in Australia. This discussion is particularly pertinent given the Australian Human Rights Commission (‘AHRC’)’s and Parliamentary Joint Committee on Human Rights’s renewed call to adopt a statutory human rights Act in Australia.[5]

Drawing on a comparative doctrinal case study of equality rights in Australia and the United Kingdom (‘UK’), and comparing case law handed down in each jurisdiction, this article considers how the positioning and positionality of equality law affects the development and enforcement of equality rights. The UK is a particularly illuminating comparator for Australia in the context of equality rights: while both countries have a common legal tradition, and dedicated discrimination statutes, differences emerge in the protection of human rights. In Australia, human rights are protected by legislation in some jurisdictions; in the UK, statutory human rights law has the backing of the Convention. These differences in approach increase the potential for mutual learning,[6] reflecting a problem-solving or sociological approach to comparative analysis.[7] There is an underlying tension, though, in adopting a doctrinal method in this study, with its focus on court and tribunal decisions. Arguably, a focus on individual claims and cases undermines the de-personalisation that might be achieved by reframing equality rights as human rights (see Part II). Further, there is an argument that cases that

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[2] Respectively, *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953); *Charter of Fundamental Rights of the European Union* [2016] OJ C 202/393; *Charter of Human Rights and Responsibilities Act 2006* (Vic).

[3] See, eg, the discussion below of Alysia Blackham, *Reforming Age Discrimination Law: Beyond Individual Enforcement* (Oxford University Press, 2022) (‘*Reforming Age Discrimination Law*’).

[4] See, eg, the discussion below of Beth Gaze and Anna Chapman, ‘The Human Right to Non-Discrimination as a Legitimate Part of Workplace Law: Towards Substantive Equality at Work in Australia?’ (2013) 29(4) *International Journal of Comparative Labour Law and Industrial Relations* 355.

[5] This is considered in more detail in Part IV.

[6] Dagmar Schiek, ‘Enforcing (EU) Non-Discrimination Law: Mutual Learning between British and Italian Labour Law?’ (2012) 28(4) *International Journal of Comparative Labour Law and Industrial Relations* 489, 508.

[7] Esin Örücü, ‘Developing Comparative Law’ in Esin Örücü and David Nelken (eds), *Comparative Law: A Handbook* (Hart Publishing, 2007) 43, 52.

proceed to the courts and tribunals represent a failure to negotiate and resolve issues early. However, given case law represents a public record of how equality rights are adjudicated and applied, this focus on case law and judicial decisions represents a key entry point to examine the framing of equality law and its impact.

In Part II, I explore the potential benefits and drawbacks of framing equality rights as human rights, drawing on existing literature. In Part III, I position this discussion in relation to international human rights instruments, and how they articulate and protect equality rights. In Part IV, I explore the statutory human rights protections in place in selected Australian states and territories, and the way these instruments have influenced the legal development of equality rights, before turning to the UK in Part V. My focus in these parts is particularly (though not exclusively) on cases relating to work, as these cases best illustrate the different and multiple positionings that equality law might take (as employment rights, discrimination rights, and/or human rights). Part VI draws these comparative threads together, and Part VII concludes my analysis.

I argue that the framing of equality rights as human rights has the potential to enhance the process and reasoning in the adjudication of equality rights. While the framing of equality rights as human rights has not yet led to different judicial outcomes in Australia, it has affected the outcomes of claims in other jurisdictions. This article therefore offers new evidence of the importance of embedding equality rights as human rights in Australia, including through reform at the federal level.

II Framing Equality Rights as Human Rights

While the rationale of equality law is contested,[8] it is often grounded (at least, in part) in respecting and advancing human rights.[9] Human rights goals of equality law recognise the inherent equal worth and dignity of all people, irrespective of their protected characteristics.[10] A human rights approach would likely emphasise the broadest possible legislative protection from discrimination.[11] In practice, though, the legislative framework of equality law tends to be far more confined, including due to

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[8] See, eg, Hugh Collins, 'Discrimination, Equality and Social Inclusion' (2003) 66(1) *Modern Law Review* 16; Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford University Press, 2015); Moreau, *Faces of Inequality* (n 1); Sandra Fredman, *Discrimination Law* (Oxford University Press, 3rd ed, 2022); Blackham, *Reforming Age Discrimination Law* (n 3); Alice Taylor, *Interpreting Discrimination Law Creatively: Statutory Discrimination Law in the UK, Canada and Australia* (Hart Publishing, 2023) ('*Interpreting Discrimination Law Creatively*').

[9] See, eg, Simonetta Manfredi and Lucy Vickers, 'Retirement and Age Discrimination: Managing Retirement in Higher Education' (2009) 38(4) *Industrial Law Journal* 343, 344–5; Malcolm Sargeant, 'For Diversity, Against Discrimination: The Contradictory Approach to Age Discrimination in Employment' (2005) 21(4) *International Journal of Comparative Labour Law and Industrial Relations* 629 ('For Diversity'); Malcolm Sargeant, 'Distinguishing between Justifiable Treatment and Prohibited Discrimination in Respect of Age' [2013] (4) *Journal of Business Law* 398, 399.

[10] Sargeant, 'For Diversity' (n 9) 631.

[11] Blackham, *Reforming Age Discrimination Law* (n 3) 53.

extensive exceptions to the idea of 'equality' and the prohibition of discrimination.[12] Sandra Fredman argues, then, that equality law is primarily driven by economic considerations, not the intrinsic or human rights aims of discrimination law;[13] and Linda Dickens posits that human rights objectives are only pursued in equality law to the extent they are consistent with efficiency or economic ends.[14]

Prioritising human rights, and reframing equality rights as human rights, might therefore lead to a very different approach to equality law. Existing studies posit that reframing equality rights, to better emphasise their grounding in human rights, might offer three key benefits. First, it emphasises the public nature of inequality and discrimination, and the recognition of equality as a public good.[15] As I have argued elsewhere, reframing equality rights as human rights might enable a more holistic understanding of equality and discrimination, beyond a siloed view based on individual protected grounds, and therefore is better able to accommodate ideas of intersectionality in discrimination law.[16] This perspective offers a more authentic way of viewing discrimination, and can accommodate considerations of socio-economic inequality, which is often excluded as a protected ground from discrimination law.[17]

Second, in relation to enforcement, in a previous study of age discrimination law, I found that reframing equality rights as human rights might support the better enforcement of age discrimination law.[18] In particular, individuals who experienced age discrimination at work were unlikely to make a complaint, including for fear of stigma and being seen as a 'complainer'. Reframing equality rights as human rights might encourage individuals to make better use of legal processes, as those impacted by discrimination might see their experiences and the advancement of equality as having a broader significance.[19] As mentioned elsewhere, 'complaints are [then] cast as positive assertions of rights for the greater good, with broader significance'; this may motivate individuals to use legal processes.[20]

Third, adopting human rights instruments could have broader benefits for discrimination law. For example, Belinda Smith argues that Canadian discrimination law's grounding in human rights law influences how

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12 Alysia Blackham, 'A Compromised Balance? A Comparative Examination of Exceptions to Age Discrimination Law in Australia and the UK' (2018) 41(3) *Melbourne University Law Review* 1085, 1118–19.

13 Sandra Fredman, *Discrimination Law* (Oxford University Press, 2nd ed, 2011) 103–4, 106.

14 Linda Dickens, 'The Road Is Long: Thirty Years of Equality Legislation in Britain' (2007) 45(3) *British Journal of Industrial Relations* 463, 468–71.

15 Blackham, *Reforming Age Discrimination Law* (n 3) 246.

16 Ibid; Alysia Blackham and Jeromey Temple, 'Intersectional Discrimination in Australia: An Empirical Critique of the Legal Framework' (2020) 43(3) *University of New South Wales Law Journal* 773.

17 Blackham, *Reforming Age Discrimination Law* (n 3) 246; Margaret Thornton, 'Social Status: The Last Bastion of Discrimination' [2018] (1) *Anti Discrimination Law Review* 5.

18 Blackham, *Reforming Age Discrimination Law* (n 3) 246.

19 Ibid.

20 Ibid.

discrimination law is interpreted:[21] for Smith, the open-textured nature of Canadian discrimination law has led to a more purposive and sophisticated approach to judicial interpretation than in Australia.[22] Similarly, Alice Taylor argues that courts with an established role in human rights review (like those in Canada) are more likely to adopt a creative approach to the interpretation of discrimination law.[23] Taylor sees a creative interpretation as one which applies a substantive, pluralist and multidimensional view of equality. This is a more active, expansive and normative approach to statutory interpretation than purposive interpretation, and focuses on the values underlying discrimination law.[24] For Taylor, a creative approach to interpretation is necessary for discrimination laws to be effective.[25] Thus, building on Taylor's work, I posit that adopting a national human rights act for Australia might 'prompt a shift in how courts approach their judicial role', including in relation to statutory interpretation.[26] Overall, then, reframing equality rights as human rights might lead to three important shifts in our understanding of equality law: to emphasise a public and holistic understanding of inequality, to prompt the better enforcement of equality rights, and to support a more nuanced judicial interpretation of equality rights.

For some authors, though, discrimination law in Australia is already framed in terms of human rights. For example, Taylor sees discrimination law statutes in Australia, the UK and Canada as quasi-constitutional,[27] making discrimination law both public *and* private law.[28] However, only Canada has used this quasi-constitutional status to justify a creative interpretation of discrimination law.[29] Similarly, Beth Gaze and Anna Chapman see Australia's equality statutes as human rights statutes (as opposed to labour law statutes),[30] at the federal level, grounded in international obligations and the external affairs power.[31] For Gaze and Chapman, this may undermine the protections afforded by discrimination law. Until the adverse action provisions were introduced into the *Fair Work Act*

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[21] Belinda Smith, 'Rethinking the *Sex Discrimination Act*: Does Canada's Experience Suggest We Should Give Our Judges a Greater Role?' in Margaret Thornton (ed), *Sex Discrimination in Uncertain Times* (ANU E Press, 2010) 235, 246.

[22] Ibid 255–6.

[23] Taylor, *Interpreting Discrimination Law Creatively* (n 8) 8, 153.

[24] Ibid 9, 10, 27, 32.

[25] Ibid 2, 9.

[26] Alysia Blackham, '*Book Review: Interpreting Discrimination Law Creatively: Statutory Discrimination Law in the UK, Canada and Australia* by Alice Taylor' (2024) 46(2) *Sydney Law Review* 261, 264 ('*Interpreting Discrimination Law Creatively*').

[27] Taylor, *Interpreting Discrimination Law Creatively* (n 8) 153, 166; see also Vanessa MacDonnell, 'A Theory of Quasi-Constitutional Legislation' (2016) 53(2) *Osgoode Hall Law Journal* 508. MacDonnell sees 'quasi-constitutional legislation as implementing constitutional imperatives', including in relation to the conferral of rights: at 511.

[28] Taylor, *Interpreting Discrimination Law Creatively* (n 8) 152, 188.

[29] Ibid 152, 157.

[30] Gaze and Chapman (n 4) 355–6, 358.

[31] Ibid 358.

2009 (Cth), Gaze and Chapman argued that 'employment discrimination has been treated as a human rights matter and not as a legitimate and important matter for workplace law.'[32] The authors see this historical positioning — 'as a poor relation of employment law' — as inhibiting the effectiveness and legitimacy of discrimination law: 'where the industrial relations system regards employment discrimination as something outside its sphere, it is more difficult to combat workplace discrimination, and protection for workers vulnerable to discrimination is reduced.'[33] For Gaze and Chapman, framing equality rights as human rights serves to weaken and marginalise discrimination law. There is a live question, then, of whether framing and positioning equality rights as human rights is likely to be desirable and beneficial, or perhaps even harmful, to the advancement of equality.

In the UK, by contrast, scholarship is increasingly emphasising the role human rights can and should play in advancing labour law.[34] As Philippa Collins argues, 'Human rights possess a special normative weight in debates, both political and legal. ... The context of work is too central to our lives to allow it to be untouched by a concern for the human rights of workers.'[35] For Collins, a focus on human rights in the workplace resists the commoditisation of labour and reaffirms workers' dignity.[36] Human rights generally might therefore strengthen and provide moral force to labour law,[37] especially when seen as complimentary to and pluralistic with the other aims of labour law.[38] The same, perhaps, could also be said of framing equality rights as human rights.

III Equality Rights as Human Rights in International Law

Equality as a human right is embedded in international human rights law. In many instruments, equality is protected as both an inherent right in itself, as well as an enabling right for other human rights. The ICCPR, for example, includes an enabling equality right in article 2(1), which operates in relation to other ICCPR rights:

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex,

[32] Ibid 356.
[33] Ibid.
[34] See, eg, Colin F Fenwick and Tonia Novitz (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Hart Publishing, 2010); Philippa M Collins, *Putting Human Rights to Work: Labour Law, the ECHR, and the Employment Relation* (Oxford University Press, 2022).
[35] Collins (n 34) 4.
[36] Ibid.
[37] Ibid 35.
[38] Ibid 47.

> language, religion, political or other opinion, national or social origin, property, birth or other status.[39]

Article 26 further creates an independent right to effective protection against discrimination. It provides:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[40]

The Office of the High Commissioner for Human Rights has commented:

> Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights.[41]

The Human Rights Committee's view is that article 26 'provides in itself an autonomous right' which is not limited to Covenant rights.[42]

Non-discrimination is also an obligation in the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR'),[43] both in relation to Covenant rights, and more broadly. In relation to Covenant rights, article 2(2) says:

> The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[44]

Further, the ICESCR explicitly requires Covenant rights to be protected equally for men and women. Article 3 says:

> The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

The ICESCR also creates substantive rights to non-discrimination and equal opportunity in the context of work in relation to pay and progression.[45] These rights to non-discrimination are further developed in the *International Convention on the Elimination of All Forms of Racial Discrimination*,[46] the *Convention on the*

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39 *International Covenant on Civil and Political Rights* (n 2) art 2(1).

40 Ibid art 26.

41 Human Rights Committee, *General Comment No 18: Non-Discrimination*, 37th session (10 November 1989) [1].

42 Ibid [12].

43 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

44 Ibid art 2(2).

45 Ibid art 7.

46 *International Convention on the Elimination of All Forms of Racial Discrimination,* opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

Elimination of All Forms of Discrimination against Women,[47] and the *Convention on the Rights of Persons with Disabilities*.[48] These Conventions form one basis for statutory discrimination law at the federal level in Australia.[49] The elimination of discrimination in employment is also a fundamental International Labour Organization ('ILO') right at work.

Protection from discrimination is therefore a well-developed right in international instruments; some instruments also create rights to equality. For Fredman, 'equality' is best viewed as a multidimensional principle of substantive equality, which encompasses redressing disadvantage (the redistributive dimension), addressing stigma, stereotyping, prejudice and violence (the recognition dimension), facilitating participation, inclusion and voice (the participative dimension), and accommodating difference and structural change (the transformative dimension).[50] Dominique Allen and others therefore distinguish 'legal equality' — which recognises that not all are equal before the law, all are entitled to equal protection of the law, and positive measures might need to be taken to achieve substantive equality — from 'non-discrimination', which involves a decision not being made based on an irrelevant attribute.[51]

IV Human Rights and Equality: Australia

Australia has limited legislative protection of human rights at the federal level, with no human rights statute or legislated Bill of Rights. There is also minimal protection of human rights in the *Australian Constitution*. The key form of protection for human rights at the federal level arises from the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), which establishes the Parliamentary Joint Committee on Human Rights to examine Bills, legislative instruments and Acts for compatibility with human rights, and to report to Parliament.[52] The Act also requires statements of compatibility to be presented with new Bills and legislative instruments, assessing whether they are compatible with human rights.[53]

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47 *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

48 *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008).

49 See, eg, *Disability Discrimination Act 1992* (Cth); *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth).

50 Fredman (n 8) 29–44.

51 Dominique Allen, Janina Boughey and Dan Meagher, 'A Case for Recognising Non-Discrimination as a Fundamental Right at Common Law' (2023) 46(3) *University of New South Wales Law Journal* 902, 905–6, 907, citing *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 461, 478 (Gaudron and McHugh JJ).

52 *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 7.

53 Ibid ss 8, 9.

The AHRC has called for the enactment of a federal human rights Act,[54] including rights to recognition and equality before the law, and freedom from discrimination.[55] The AHRC's proposed Act would reflect a legislative dialogue model, focusing on interaction between the executive, legislature, and judiciary.[56] It would not involve constitutional protection of human rights, reflecting a degree of pragmatism regarding the difficulties of constitutional change under s 128 of the *Australian Constitution*, and a desire to maintain parliamentary supremacy.[57] As the AHRC summarises, 'a legislative model is the most pragmatic and compatible model with Australia's government structure and political norms. … [T]he passage of a legislative model does not exclude the entrenchment of those rights in the *Australian Constitution* at a future date'.[58]

A federal human rights statute was further endorsed by the Parliamentary Joint Committee on Human Rights's *Inquiry into Australia's Human Rights Framework*,[59] which recommended the adoption of a statutory human rights act, including equality rights,[60] enforceable via stand-alone complaints, with conciliation at the AHRC, and direct claims to the federal courts, with remedies including damages.[61] The Committee's illustrative Human Rights Bill 2024 would define 'discrimination' by reference to the grounds protected in existing federal discrimination laws and the *Fair Work Act 2009* (Cth), though the Committee notes that further consideration should be given to the definition of 'discrimination' to ensure it captures all relevant grounds. Allen and others have further argued that the common law should also recognise non-discrimination as a fundamental right.[62] However, the authors note that this would likely play a 'supporting' role to legislation.[63]

Human rights legislation is already in place in Victoria,[64] Queensland,[65] and the Australian Capital Territory ('ACT').[66] All three statutes reflect a dialogue model across the three 'arms' of government,[67] seeking to embed human rights

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[54] Australian Human Rights Commission, *Free and Equal: A National Human Rights Act for Australia* (Position Paper, December 2022).
[55] Ibid 17.
[56] Ibid 16.
[57] Ibid 70–1.
[58] Ibid 102.
[59] Parliamentary Joint Committee on Human Rights, *Inquiry into Australia's Human Rights Framework* (Report, May 2024).
[60] Ibid 300–1. See the Report's illustrative Human Rights Bill 2024 s 15: at 415–56.
[61] Ibid 309–10.
[62] Allen, Boughey and Meagher (n 51).
[63] Ibid 912.
[64] *Charter of Human Rights and Responsibilities Act 2006* (Vic).
[65] *Human Rights Act 2019* (Qld).
[66] *Human Rights Act 2004* (ACT).
[67] See also Tamara Walsh and Dominique Allen, 'Twenty Years of Human Rights Protection in the Australian Capital Territory: What Have We Learned?' (2024) 47(2) *University of New South Wales Law Journal* 391, 395.

in the development and scrutiny of legislation,[68] the way courts interpret legislation,[69] and the decisions and actions of public authorities.[70] While the human rights statutes in the ACT, Queensland and Victoria have close similarities, reflecting both international law and mutual learning across jurisdictions, there is also evidence of diversity and experimentation in these statutes.[71] First, in relation to the scope of protection, in the Victorian *Charter* the understanding of 'discrimination' is closely tied to that in discrimination law,[72] whereas in the ACT and Queensland the scope of the protection could be broader than that under discrimination law,[73] including by opening up protection for new protected grounds or characteristics. Second, in relation to enforcement, in the ACT, claimants have direct access to the Supreme Court to challenge breaches of human rights by public entities.[74] By contrast, in both Queensland and Victoria, 'piggyback' provisions are in place, requiring claimants to have another claim (for example, under equality law) before their human rights claim can proceed to the courts or a tribunal.[75] In Queensland and the ACT, breaches of human rights can be resolved via conciliation, but claims must first be raised with the entity involved before making a claim elsewhere.[76] This may support the early and better resolution of issues. Conversely, it might deter individuals from escalating enforcement further. These points, and their statutory basis, are developed in more detail in the sections to follow.

Tamara Walsh and Dominique Allen's empirical investigation of the *Human Rights Act 2004* (ACT), drawing on interviews with lawyers and public servants, found the Act has had the greatest impact in influencing the executive's decision-making process, including in drafting laws and policies, and in enabling the early resolution of disputes.[77] This echoes Helen Watchirs and Gabrielle McKinnon's

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68 *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 28–31; *Human Rights Act 2004* (ACT) ss 37–9; *Human Rights Act 2019* (Qld) ss 38–47.

69 *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 32–37; *Human Rights Act 2004* (ACT) ss 29–36; *Human Rights Act 2019* (Qld) ss 48–57.

70 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 38; *Human Rights Act 2004* (ACT) ss 40–40D; *Human Rights Act 2019* (Qld) ss 58–60.

71 See further Alysia Blackham, 'Promoting Innovation or Exacerbating Inequality? Laboratory Federalism and Australian Age Discrimination Law' (2023) 51(3) *Federal Law Review* 347.

72 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 3(1).

73 *Human Rights Act 2004* (ACT); *Human Rights Act 2019* (Qld) sch 1. See the detailed discussion in Alice Taylor, 'Substantive Equality and the Possibilities of the Queensland *Human Rights Act 2019*' (2024) 43(1) *University of Queensland Law Journal* 41, 51 ('Substantive Equality and the Possibilities of the Queensland Human Rights Act 2019').

74 *Human Rights Act 2004* (ACT) s 40C.

75 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 39; *Human Rights Act 2019* (Qld) s 59. See further the discussion of each jurisdiction below.

76 *Human Rights Commission Act 2005* (ACT) s 41D; *Human Rights Act 2019* (Qld) ss 65, 77, 79.

77 Walsh and Allen (n 67) 394.

findings 15 years earlier.[78] These successes are unlikely to be evident in case law: case law likely underrepresents the early resolution and successful conciliation of human rights matters.[79] Case law is therefore only a partial representation of the success or potential of human right statutes in Australia. Indeed, while lawyers in Walsh and Allen's study reported raising human rights to bolster existing claims, they rarely pursued direct claims under the Act.[80] While acknowledging the limits of case law for analysing the impact of human rights statutes, then, in the sections that follow I examine the legislative framework and existing decisions in each jurisdiction, to consider how the framing of equality rights as human rights has influenced the development of equality law.

A *Victoria*

In Victoria, the *Charter* is grounded in ideas of equality, diversity, and non-discrimination.[81] The Preamble states:

> This Charter is founded on the following principles—
>
> - human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom;
> - human rights belong to all people without discrimination, and the diversity of the people of Victoria enhances our community ...

The *Charter* includes non-discrimination rights, both in relation to *Charter* rights themselves and more generally. In relation to *Charter* rights, s 8(2) provides: 'Every person has the right to enjoy their human rights without discrimination.' The *Charter* also includes broader rights to protection from discrimination. In this respect, s 8(3) says: 'Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.' The *Charter* clarifies, too, that '[m]easures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination'.[82]

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78 Helen Watchirs and Gabrielle McKinnon, 'Five Years' Experience of the *Human Rights Act 2004* (ACT): Insights for Human Rights Protection in Australia' (2010) 33(1) *University of New South Wales Law Journal* 136, 141.

79 This is similar to discrimination law generally: see Alysia Blackham and Dominique Allen, 'Resolving Discrimination Claims Outside the Courts: Alternative Dispute Resolution in Australia and the United Kingdom' (2019) 31(3) *Australian Journal of Labour Law* 253.

80 Walsh and Allen (n 67) 403.

81 *Charter of Human Rights and Responsibilities Act 2006* (Vic) Preamble.

82 Ibid s 8(4).

As under the ICCPR, the right to equality in the *Charter* creates an 'autonomous' right.[83] As recognised in *Re Lifestyle Communities Ltd [No 3]*[84] by Bell P, article 26 of the ICCPR (and, likewise s 8(3) of the *Charter*)

> is an autonomous human right. It operates independently according to its own terms. It is not a mere accessory to other recognised human rights. The right to equality and protection of the law without and against discrimination in s 8(3) of the *Charter* is likewise autonomous. It creates that right substantively and independently, not in terms which are purely protective of the other rights in the *Charter*.[85]

Equality is also embedded in the *Charter* as a consideration when assessing whether limits on rights are justifiable.[86] Non-discrimination is further embedded in the rights of children[87] and rights to participate in public life.[88]

The notion of discrimination in the *Charter* is developed by reference to discrimination law and, in particular, the *Equal Opportunity Act 2010* (Vic). Section 3(1) of the *Charter* defines 'discrimination' as 'discrimination (within the meaning of the *Equal Opportunity Act 2010*) on the basis of an attribute set out in section 6 of that Act'. Thus, the grounds protected by the *Charter* are limited to those in the *Equal Opportunity Act 2010* (Vic).

The *Charter* binds public authorities,[89] including public officials and employees of the public service, councils, Victoria Police, and entities exercising public functions on behalf of the state. Under s 38(1), it is unlawful for a public authority 'to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right'. However, human rights can be limited: under s 7(2), human rights may be

> subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including–
>
> (a) the nature of the right; and
>
> (b) the importance of the purpose of the limitation; and
>
> (c) the nature and extent of the limitation; and
>
> (d) the relationship between the limitation and its purpose; and
>
> (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

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[83] *Lifestyle Communities Ltd [No 3] (Anti-Discrimination)* [2009] VCAT 1869, [126].
[84] Ibid.
[85] Ibid.
[86] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2). See the discussion below.
[87] Ibid s 17(2).
[88] Ibid s 18.
[89] Ibid s 4.

The *Charter* further provides in s 32(1) that '[s]o far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights'. In *Momcilovic v The Queen*[90] the High Court considered how s 32(1) of the *Charter* should shape statutory interpretation. The majority of the Court viewed s 32(1) as operating in a similar way to the principle of legality.[91] As French CJ summarised: 'section 32(1) applies to the interpretation of statutes in the same way as the principle of legality but with a wider field of application.'[92] For Crennan and Kiefel JJ, 'section 32 does not state a test of construction which differs from the approach ordinarily undertaken by courts towards statutes';[93] instead, 'the process referred to in s 32(1) is clearly one of interpretation in the ordinary way'.[94] This approach to s 32(1) limits and confines its operation, removing its 'normative force'[95] and diluting the protections of the *Charter*.[96]

Individual enforcement of the *Charter* is limited. Under s 39, claims for a breach of the *Charter* by a public authority are limited to a 'piggyback' provision, which enables a *Charter* claim only when attached to some other civil claim. Section 39 provides:

> If, otherwise than because of this Charter, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of this Charter.

A *Charter* claim might be 'piggybacked' onto an *Equal Opportunity Act 2010* (Vic) claim. However, damages cannot be awarded for breach of the *Charter*.[97] This may limit the benefit of bringing an additional claim under the *Charter*.

In practice, then, the *Charter* is rarely directly invoked by claimants, but can be relevant, especially to statutory interpretation.[98] In *Slattery v Manningham City Council* ('*Slattery*'),[99] for example, s 32(1) of the *Charter* supported an interpretation of the *Equal Opportunity Act 2010* (Vic) that did not require a

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90 (2011) 245 CLR 1.

91 Ibid 50 [51] (French CJ), 210 [543]–[545], 217 [565]–[566] (Crennan and Kiefel JJ), 250 [684] (Bell J). Cf at 184 [455] (Heydon J).

92 Ibid 50 [51].

93 Ibid 217 [565].

94 Ibid 219 [574].

95 Bruce Chen, 'The Quiet Demise of Declarations of Inconsistency under the *Victorian Charter*' (2021) 44(3) *Melbourne University Law Review* 928, 942.

96 It also has implications for other provisions of the *Charter*: see, eg, the critique in ibid 937–8, 941.

97 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 39(3).

98 Ibid s 32(1). Cf *Mulder v Victoria Police* [2020] VCAT 428, where the *Charter* did not change the interpretation of the *Equal Opportunity Act 2010* (Vic).

99 *Slattery v Manningham City Council* [2013] VCAT 1869 ('*Slattery*').

comparator to establish direct discrimination.[100] In *Slattery*, the Council was found to have breached both the *Charter* and the *Equal Opportunity Act 2010* (Vic).[101]

In *Kuyken v Lay*,[102] which related to the introduction of new grooming standards for Victoria Police, the *Charter* supported an interpretation of the *Equal Opportunity Act 2010* (Vic) that included facial hair as a 'physical feature'.[103] The Tribunal held that it

> should prefer a broad and liberal interpretation of physical features that promotes the objects of the [*Equal Opportunity Act 2010* (Vic)] to one that does not. I also consider this interpretation of physical features to be the interpretation that is most compatible with human rights, particularly the right to equal and effective protection against discrimination, as required by section 32 of the Charter.[104]

In that case, though, the proposed disciplinary action was permitted under s 75 of the *Equal Opportunity Act 2010* (Vic), as it was done with statutory authority.[105] Further, the facial hair was not a form of protected expression under the *Charter*, and so the *Charter* was not engaged.[106] The decision was upheld on appeal to the Supreme Court of Victoria;[107] Garde J summarised the relevance of the *Charter* to statutory interpretation as:

> (1) s 32(1) does not permit the adoption of an interpretation that is contrary to the intention of the Parliament when it enacted the legislation;
>
> (2) s 32(1) does not create a new paradigm of interpretation which requires courts, in the pursuit of human rights compatibility, to depart from the ordinary meaning of the statutory provision and from the intention of Parliament when enacting the statute;
>
> (3) a statute is constructed against the background of human rights and freedoms set out in the Charter in the same way that the principle of legality is applied;
>
> (4) if the words of a statute are capable of more than one meaning, the court should give them whichever of the meanings best accords with the human rights in question; and
>
> (5) it is impermissible for a court to attribute a meaning to a provision which is inconsistent with both the grammatical meaning and the apparent purpose of the enactment.[108]

In the Victorian case law to date, there has not yet been a claim where the *Equal Opportunity Act 2010* (Vic) claim failed but the *Charter* claim succeeded.[109] In

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100 Ibid [52]–[53]. This approach was endorsed in *Tsikos v Austin Health* (2022) 314 IR 269, 284–5 [47].
101 *Slattery* (n 99) [165].
102 (2013) 240 IR 89.
103 Ibid 103 [74].
104 Ibid 102–3 [71] (footnotes omitted).
105 Ibid 118 [166]–[167].
106 Ibid 125 [208]–[211].
107 *Kuyken v Chief Commissioner of Police* (2015) 249 IR 327.
108 Ibid 351–2 [78] (citations omitted).
109 See, eg, *Richardson v City of Casey Council (Human Rights)* [2014] VCAT 1294.

Goode v Common Equity Housing Ltd,[110] the appeal was allowed for a failure to consider the *Charter* claim when the *Equal Opportunity Act 2010* (Vic) claim failed. However, the *Charter* claim still ultimately failed.[111] Again, in *Rein v Australian Health Practitioner Regulation Agency*[112] the *Charter* claim was reinstated, even if the *Equal Opportunity Act 2010* (Vic) claim ultimately failed due to a statutory exception;[113] s 39(1) is directed to showing some other relief or remedy being available 'at the time the foundation proceeding was commenced'.[114] Again, though, in that case the *Charter* claim (like the *Equal Opportunity Act 2010* (Vic) claim) failed.[115] While the justification process under the *Charter* was different to the focus of s 75 of the *Equal Opportunity Act 2010* (Vic), the end result was the same.[116]

Overall, then, the *Charter*'s equality rights may be influencing statutory interpretation, though perhaps not more than the principle of legality. There are not yet instances where a claim based on the *Charter* has led to a different outcome than under the *Equal Opportunity Act 2010* (Vic). The *Charter* right to non-discrimination is often invoked by self-represented claimants,[117] but does not necessarily strengthen the claim. In addition to the limited enforcement mechanisms under the *Charter*, another possible reason for the limited *Charter* case law in Victoria, particularly in the context of employment, is the referral of most industrial relations matters to the federal jurisdiction.[118] As a result, unlike in Queensland, *Charter* case law is not emerging from industrial tribunals in Victoria (compare Part IVC below). Matters relating to the *Equal Opportunity Act 2010* (Vic) remain state matters.[119]

B *ACT*

In the ACT, the *Human Rights Act 2004* (ACT) includes a right to recognition and equality before the law. Section 8 says:

> (2) Everyone has the right to enjoy his or her human rights without distinction or discrimination of any kind.

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110 [2014] VSC 585.
111 *Goode v Common Equity Housing Ltd* [2016] VCAT 93.
112 [2017] VCAT 452.
113 Ibid [33].
114 Ibid.
115 Ibid [50].
116 Ibid.
117 See, eg, *Djime v Kearnes* [2015] VCAT 941; *Pham v Clark* [2012] VCAT 801; *Sloan v Victoria* [2021] VCAT 933.
118 See, eg, *Fair Work (Commonwealth Powers) Act 2009* (Vic).
119 Ibid s 3(1).

> (3) Everyone is equal before the law and is entitled to the equal protection of the law without discrimination. In particular, everyone has the right to equal and effective protection against discrimination on any ground.

There is no explicit provision for special measures to combat discrimination in the *Human Rights Act 2004* (ACT). Equality and non-discrimination are further embedded in the right to participate in public life,[120] the rights of children,[121] the right to education,[122] and the right to work,[123] but are not embedded as a consideration as to when human rights may be limited.[124]

'Discrimination' is not defined in the *Human Rights Act 2004* (ACT). This may mean that 'discrimination' in the Act is not confined to how that idea is developed under discrimination law. In *Islam v Director-General Justice and Community Safety Directorate [No 3]*,[125] Mossop AsJ opined that

> the drafting of s 8(3) is such that the grounds of discrimination are not limited to those identified in the example. Nor are they limited to grounds which might be considered to be socially inappropriate forms of discrimination. A prohibition on 'discrimination on any ground' would, prima facie, prevent discrimination on grounds such as lack of intelligence, laziness, propensity to violence, unpleasantness of personality, lack of personal hygiene or poor grooming, unless such discrimination involved a 'limit set by laws' which were justified under s 28 of the HR Act. While such a result might appear to be an unusual one, it is not obvious how, by orthodox means of interpretation, the terms of s 8(3) could be read down to give them a more confined operation. … There is no equivalent confinement of the scope of 'discrimination' in the Territory [as in Victoria].[126]

That case involved religion, which is a recognised ground in the *Discrimination Act 1991* (ACT) s 7, meaning 'it [was] not necessary to explore any consequences of the scope of s 8(3) which may be perceived to be anomalous'.[127] However, Mossop AsJ expressed the view that it might be necessary to confine the idea of discrimination in some way.[128]

As in Victoria, the *Human Rights Act 2004* (ACT) creates obligations for public authorities, making it unlawful for public authorities

> (a) to act in a way that is incompatible with a human right; or
>
> (b) in making a decision, to fail to give proper consideration to a relevant human right.[129]

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120 *Human Rights Act 2004* (ACT) s 17(c).
121 Ibid s 11(2).
122 Ibid s 27A(3).
123 Ibid s 27B(5).
124 Ibid s 28.
125 [2016] ACTSC 27.
126 Ibid [156].
127 Ibid.
128 Ibid.
129 *Human Rights Act 2004* (ACT) s 40B(1).

Following passage of the *Human Rights (Complaints) Legislation Amendment Act 2023* (ACT), individuals can make a complaint about a human rights breach by a public authority to the ACT Human Rights Commission.[130] As in Queensland (discussed below), the complaint can only generally be made after first approaching the entity, and either not receiving a response within 45 days, or receiving an inadequate response.[131] The Commission may conciliate complaints,[132] or refer complaints to statutory office-holders.[133] However, unlike for discrimination complaints, the Commission cannot refer human rights complaints to the ACT Civil and Administrative Tribunal ('ACAT'). Rather, if conciliation is unlikely to succeed, the Commission may close the complaint and issue a final report including recommendations for action.[134] The Commission may publish information about the complaint,[135] and can publish information about the public authority as a non-complying entity if they do not fulfil the recommendations within the allocated time.[136]

Enforcement in the ACT is not limited to 'piggyback' enforcement. Dedicated proceedings against public authorities can be commenced in the Supreme Court, or rights under the *Human Rights Act 2004* (ACT) can be relied on in other legal proceedings.[137] Damages are not available, but the Supreme Court can grant any other relief it considers appropriate.[138] Watchirs and McKinnon, reflecting on five years of the Act's operation, viewed the non-availability of damages for most claims as having a 'dampening effect on [the Act's] uptake by potential litigants'.[139] In Walsh and Allen's empirical investigation of the *Human Rights Act 2004* (ACT), some respondents reported 'piggybacking' human rights complaints in ACAT proceedings to 'bolster' other claims.[140] However, direct action under s 40C in the Supreme Court was regarded as a 'last resort'.[141] Respondents did note, though, that even the threat of litigation could lead to change.[142] That study found that there was often a lack of knowledge of the Act, and of human rights, among lawyers and advocates, which might explain its limited use in the courts,[143] and the lack of jurisprudence in this area.[144]

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130 *Human Rights Commission Act 2005* (ACT) s 41D.
131 Ibid s 41D(2).
132 Ibid s 51.
133 Ibid s 52A.
134 Ibid s 82D.
135 Ibid s 86A.
136 Ibid s 86.
137 *Human Rights Act 2004* (ACT) s 40C.
138 Ibid s 40C(6).
139 Watchirs and McKinnon (n 78) 169.
140 Walsh and Allen (n 67) 403.
141 Ibid.
142 Ibid 403–4.
143 Ibid 405.
144 Ibid 405–6.

This is echoed by the case law findings in this study. In a search of Austlii case law databases conducted on 5 September 2024, 315 documents in the ACT Supreme Court mentioned the *Human Rights Act 2004* (ACT), and 70 documents in the Court of Appeal. Section 8 of the Act — the right to equality and non-discrimination — was raised in 27 documents in the ACT Supreme Court, and 5 documents in the Court of Appeal. Cases addressing equality rights variously related to criminal law and procedure,[145] rights of detainees,[146] native title rights,[147] medical care,[148] personal protection orders,[149] appeals against findings of the Legal Practitioners Disciplinary Tribunal,[150] the granting of exemptions under the *Discrimination Act 1991* (ACT),[151] and restitution.[152] A substantial number of these cases were brought by the same self-represented claimant, seeking an unrestricted legal practicing certificate.[153] Few joined cases in the ACT refer to both the *Human Rights Act 2004* (ACT) s 40C and the *Discrimination Act 1991* (ACT). Of the 11 cases that refer to both, 8 again related to that same self-represented claimant, who had filed at least 38 applications.[154] The claimant was eventually declared to be a vexatious litigant.[155]

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145 See, eg, *R v QX [No 2]* [2021] ACTSC 244 (Loukas-Karlsson J); *R v Forsyth* (2013) 281 FLR 62 (Penfold J); *Cattanach v Harrison* (2016) 307 FLR 188 (Walmsley AJ); *R v UM [No 2]* [2021] ACTSC 115 (Elkaim J); *NH v Dixon* [2022] ACTSC 218 (Elkaim J); *Re Application by a Person Summoned for Jury Service for Support* (2023) 20 ACTLR 151 (McCallum CJ); *R v Pye* [2012] ACTSC 79 (Refshauge J); *Achanfuo-Yeboah v The Queen* [2016] ACTCA 71 (Refshauge ACJ); *R v UG* [2020] ACTCA 8 (Murrell CJ, Burns and Mossop JJ).

146 *Islam v Director General of the Justice and Community Safety Directorate* [2018] ACTSC 323 (McWilliam AsJ); *Islam v Director General of the Justice and Community Safety Directorate [No 2]* [2015] ACTSC 314 (Mossop AsJ); *Islam v Director-General Justice and Community Safety Directorate [No 3]* [2016] ACTSC 27 (Mossop AsJ); *Davidson v Director-General, Justice and Community Safety Directorate* (2021) 18 ACTLR 1 (Loukas-Karlsson J); *Islam v Director-General of the Justice and Community Safety Directorate* [2015] ACTSC 20 (Mossop M); *Williams v Australian Capital Territory* [2023] ACTSC 18 (McWilliam AsJ).

147 *Mortimer v Land Development Agency* [2012] ACTSC 158 (Burns J).

148 *Hassan v Calvary Private Hospital Health Care Canberra Ltd* [2018] ACTSC 53 (McWilliam AsJ).

149 *Polleycutt v Aldcroft* [2019] ACTSC 174 (McWilliam AsJ); *SI v KS* (2005) 195 FLR 151 (Higgins CJ).

150 *Lander v Council of the Law Society of the Australian Capital Territory* (2009) 168 ACTR 32 (Higgins CJ, Gray and Refshauge JJ).

151 *ACT Human Rights Commission v Raytheon Australia Pty Ltd* [2009] ACTSC 55 (Harper M).

152 *Beagle v Australian Capital Territory and Southern New South Wales Rugby Union Ltd* [2017] ACTCA 29 (Murrell CJ, Burns and Collier JJ).

153 *Ezekiel-Hart v Council of the Law Society of the ACT* [2021] ACTSC 133 (McWilliam AsJ); *Ezekiel-Hart v Reis [No 2]* [2019] ACTSC 192 (Crowe AJ); *Ezekiel-Hart v Council of the Law Society of the ACT [No 3]* [2022] ACTSC 300 (Kennett J); *Ezekiel-Hart v The Council of the Law Society of the ACT [No 7]* [2024] ACTSC 12 (Curtin AJ); *Ezekiel-Hart v Reis* [2018] ACTSC 264 (McWilliam AsJ); *Ezekiel-Hart v Council of the Law Society of the ACT [No 2]* [2022] ACTSC 29 (Mossop J); *Ezekiel-Hart v The Council of the Law Society of the ACT [No 2]* [2023] ACTSC 207 (Curtin AJ); *Ezekiel-Hart v Reis* [2019] ACTCA 31 (Mossop J); *Ezekiel-Hart v The Law Society of the Australian Capital Territory* (2010) 173 ACTR 15 (Gray P).

154 *Ezekiel-Hart v Council of the Law Society of the Australian Capital Territory (Appeal)* [2021] ACAT 116, 4 [13] (Presidential Member Symons); *Ezekiel-Hart v The Council of the Law Society of the ACT [No 7]* [2024] ACTSC 12, [14] (Curtin AJ).

155 *Ezekiel-Hart v The Council of the Law Society of the ACT [No 7]* [2024] ACTSC 12 (Curtin AJ).

The situation in 2024 in relation to equality rights appears akin to that noted by Watchirs and McKinnon after five years of the *Human Rights Act 2004* (ACT):

> In a great many cases … the HR Act was merely mentioned, without any real examination of the content of the rights raised, or used to support a conclusion arrived at through the application of existing common law principles. This slow start is not solely the responsibility of the judiciary, but also reflects the lack of considered human rights arguments being made by the ACT legal profession.[156]

After 20 years of the *Human Rights Act 2004* (ACT), a 'slow start' is perhaps becoming a slow status quo. However, the introduction of conciliation for human rights complaints in the ACT may support the better enforcement of human rights claims going forward.

C *Queensland*

Equality is embedded in the preamble to the *Human Rights Act 2019* (Qld), which recognises

> 1 The inherent dignity and worth of all human beings.
>
> 2 The equal and inalienable human rights of all human beings.

As in Victoria and the ACT, the *Human Rights Act 2019* (Qld) creates both enabling and autonomous rights to non-discrimination and equality. Section 15 relevantly says:

> (2) Every person has the right to enjoy the person's human rights without discrimination.
>
> (3) Every person is equal before the law and is entitled to the equal protection of the law without discrimination.
>
> (4) Every person has the right to equal and effective protection against discrimination.
>
> (5) Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.

Discrimination is defined as including direct or indirect discrimination, 'within the meaning of the *Anti-Discrimination Act 1991* (Qld), on the basis of an attribute' in that Act.[157] As Taylor emphasises, however, the definition of discrimination in the *Human Rights Act 2019* (Qld) is not limited to the definition of discrimination in the *Anti-Discrimination Act 1991* (Qld): it could go further to better address substantive inequality.[158] In *Austin BMI Pty Ltd v Deputy Premier*,[159]

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156 Watchirs and McKinnon (n 78) 147.

157 *Human Rights Act 2019* (Qld) sch 1.

158 Taylor, 'Substantive Equality and the Possibilities of the Queensland Human Rights Act 2019' (n 73) 50.

159 [2023] QSC 95 (Freeburn J).

which related to the right to participate in public life without discrimination under s 23, Freeburn J opined that:

> The definition of 'discrimination' in the *Human Rights Act* is inclusive. That is consistent with the ACT equivalent, but contrasts with the Victorian and New Zealand equivalents which contain exhaustive definitions …
>
> The legislature, in choosing to tie the definition of 'discrimination' to the definition in the *Anti-Discrimination Act* 1991 in a non-exclusory way, must be taken to have left the door open for an analogous grounds of discrimination. In other words, in linking the definition of 'discrimination' to the definition of the same concept in the *Anti-Discrimination Act*, but not directly adopting that definition, it is reasonable to infer that Parliament intended for the definition to be read as allowing an analogous ground of discrimination. …
>
> In my view, Parliament's use of the legislative device of defining the term 'discrimination' as including the concept of discrimination in the *Anti-Discrimination Act* means that these principles apply. First, the use of the word 'includes' means that the incorporation of the definition of 'discrimination' in the *Anti-Discrimination Act* is not intended to be exhaustive. Second, conduct qualifying as 'discrimination', by applying the ordinary use of that word, but beyond the definition of 'discrimination' in the *Anti-Discrimination Act*, may be comprehended. Third, to say that the concept of 'discrimination' includes various matters is a way of giving at least some meaning to the term; the concept of 'discrimination' cannot have some meaning independent of the meaning that it is given by the legislation.[160]

The scope of protection under human rights law may therefore be broader than that under discrimination law, perhaps enabling recognition of new protected grounds.[161] Further, as in Victoria, equality is embedded as a consideration as to when human rights may be limited.[162] Non-discrimination is further embedded in rights to take part in public life and to vote,[163] the protection of children,[164] and access to health services.[165]

The *Human Rights Act 2019* (Qld) binds public entities.[166] Section 58(1) makes it unlawful for a public entity

> (a) to act or make a decision in a way that is not compatible with human rights; or
>
> (b) in making a decision, to fail to give proper consideration to a human right relevant to the decision.

Complaints under the *Human Rights Act 2019* (Qld) must first be made to the public entity itself and, after 45 business days have passed, can then be made to the

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160 Ibid 83–4 [317]–[320].

161 Taylor, 'Substantive Equality and the Possibilities of the Queensland Human Rights Act 2019' (n 73) 52–8.

162 *Human Rights Act 2019* (Qld) s 13.

163 Ibid s 23.

164 Ibid s 26(2).

165 Ibid s 37(1).

166 Ibid s 9.

Human Rights Commissioner.[167] The Commissioner can conduct preliminary inquiries,[168] and can refer complaints to other entities.[169] The Commissioner can also refuse to deal with a complaint if there is a more appropriate course of action under a different law to deal with the complaint.[170] Equally, the Commissioner can deal with a complaint as if it was a complaint under the *Anti-Discrimination Act 1991* (Qld) if it is more appropriately dealt with under the latter Act.[171] Complaints can be subject to conciliation.[172] If they are not resolved by conciliation, the Commissioner must make a report on the complaint, which is given to the complainant and respondent.[173] The Commissioner can also publish information about complaints when it has finished dealing with them.[174] As in Victoria, complaints under the *Human Rights Act 2019* (Qld) can only proceed to the courts if the claimant 'may seek any relief or remedy in relation to an act or decision of a public entity on the ground that the act or decision was, other than because of section 58, unlawful'.[175] Damages cannot be awarded for a breach of the *Human Rights Act 2019* (Qld).[176]

Reflecting the situation in Victoria, then, it will be unlikely to see the *Human Rights Act 2019* (Qld) raised in case law. As in the ACT, most complaints will be resolved directly with the entity itself, or at the Commission. Indeed, this is a clear strength of the Act. Some information on equality rights and equality complaints might be ascertained from the Commission's reporting. In the Queensland Human Rights Commission's 2022–23 annual report on the operation of the *Human Rights Act 2019* (Qld), it noted 2,364 human rights complaints across selected public entities in Queensland, based on the entities' own annual reporting.[177] The Commission itself received 561 human rights complaints; of these, 241 were accepted, and 57 were resolved (51 via conciliation).[178] The most common outcome for a resolved complaint was an apology, which was provided in 14 complaints.[179] Seventy-three complaints were accepted but unconciliable, and therefore referred to tribunals; 41 were referred to the Queensland Civil and Administrative Tribunal ('QCAT'), which deals with discrimination complaints.[180] The rate of resolution for human rights only complaints (32%) was lower than for anti-discrimination only complaints (44%); the lowest rate of resolution, though, was for 'piggyback'

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[167] Ibid s 65. Though the Commissioner can receive complaints earlier in exceptional circumstances: s 65(2).
[168] Ibid s 68.
[169] Ibid s 73.
[170] Ibid s 70(a).
[171] Ibid s 75.
[172] Ibid ss 77, 79.
[173] Ibid s 88.
[174] Ibid s 90.
[175] Ibid s 59(1).
[176] Ibid s 59(3).
[177] Queensland Human Rights Commission, *Progress and Pitfalls: 2022-23 Annual Report on the Operation of the Human Rights Act 2019* (Report, 2023) 95–7.
[178] Ibid 101.
[179] Ibid 103.
[180] Ibid 102.

complaints (20%).[181] The Commission explains this disparity as being because human rights only complaints can be deemed to be resolved, even without a settlement agreement, if the Commissioner deems the matter to be resolved.[182] The Commission is continuing to monitor these trends, however,[183] perhaps because they imply that human rights matters are more difficult to resolve. It may be, then, that claimants are better off pursuing only a discrimination claim, as these have a higher rate of resolution. Alternatively, it may mean that claims involving both discrimination and human rights complaints are the more complicated or intractable matters, which are more difficult to resolve via conciliation.

Recognition and equality before the law was the third most common human rights complaint finalised by the Commission in 2022–23:[184] 180 of these complaints were accepted and finalised, and 71 were not accepted and finalised.[185] In previous years, recognition and equality before the law had consistently been the most identified right in complaints.[186] In 2022–23, however, it was overtaken by the right to privacy and reputation, reflecting the high number of complaints about COVID-19 vaccination and bodily autonomy (43%).[187] Overall, though, recognition and equality before the law had a higher number of accepted complaints (180) than privacy and reputation (106).[188]

To examine how these provisions are impacting on case law in practice, a search was conducted of Austlii case law databases for cases referring to both the *Human Rights Act 2019* (Qld) s 15 (non-discrimination rights) and the *Anti-Discrimination Act 1991* (Qld). As at 21 August 2024, 80 documents from the Queensland Civil and Administrative Tribunal (QCAT) referred to the *Human Rights Act 2019* (Qld) s 15; 25 documents referred to both the *Human Rights Act 2019* (Qld) s 15 and the *Anti-Discrimination Act 1991* (Qld). Of these 25 documents, 16 related to an exemption application under the *Anti-Discrimination Act 1991* (Qld).[189]

Only nine decisions, across all courts, related to s 59 of the *Human Rights Act 2019* (Qld) (enabling individual enforcement) and the *Anti-Discrimination Act 1991*

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181 Ibid 104.

182 Ibid.

183 Ibid.

184 Ibid 105.

185 Ibid.

186 Ibid 106.

187 Ibid.

188 Ibid 105–6.

189 See *Anti-Discrimination Act 1991* (Qld) s 113. Similarly, many cases relating to both the *Anti-Discrimination Act 1991* (Qld) and the *Human Rights Act 2019* (Qld) s 58 relate to the granting of exemptions from the *Anti-Discrimination Act 1991* (Qld): see, eg, *Re Ipswich City Council* (2020) 305 IR 289 (Merrell DP); *Re Leidos Australia Pty Ltd* [2021] QIRC 229 (Hartigan IC); *Re Mackay Regional Council* [2022] QIRC 64 (Power IC); *Re: Rheinmetall Defence Australia Pty Ltd* [2022] QIRC 440 (Dwyer IC); *Sunshine Coast Regional Council [No 2]* [2021] QCAT 439 (Sammon M); *Re Protech Personnel Pty Ltd* [2022] QIRC 29 (Merrell DP); *Miami Recreational Facilities Pty Ltd* [2021] QCAT 378 (Gordon M); *Burleigh Town Village Pty Ltd (3)* [2022] QCAT 285 (Roney M); *Re Cobham Aviation Services Australia Pty Ltd* [2022] QIRC 326 (McLennan IC); *Fernwood Womens Health Clubs (Australia) Pty Ltd* [2021] QCAT 164 (Traves M).

(Qld); three of the nine decisions related to exemptions granted to the Brisbane Housing Company.[190] None of the remaining six decisions determined the substantive merits of the piggybacked claims.[191] For example, in *Fraser v Queensland*,[192] Ms Fraser made claims of direct discrimination on the grounds of race and breach of her human rights in relation to the behaviour of police at James Cook University campus. QCAT found that it had jurisdiction to determine the complaint, as it was referred in time. The substance of the complaint was not resolved. In *Mizner v Queensland*[193] an interlocutory injunction was granted, preventing the claimant from being placed in a dual-occupancy cell, pending the hearing of both the discrimination and human rights complaints.

In the Queensland Industrial Relations Commission ('QIRC'), some substantive 'piggyback' decisions have been adjudicated; as in Victoria, though, so far, there is no case where the *Human Rights Act 2019* (Qld) claim has been successful yet the other claim has failed. In *Mocnik v Queensland*,[194] which related to a challenge to mandatory vaccination requirements for health service employees, claims were brought under the *Human Rights Act 2019* (Qld) and the *Anti-Discrimination Act 1991* (Qld) (as well as on other grounds). While the protected attribute for the discrimination claim was not clear,[195] it was held that any discrimination would be indirect discrimination, which would be reasonable.[196] There was no evidence regarding how the respondent had breached the *Human Rights Act 2019* (Qld), and any limit on human rights was justifiable.[197]

In *Gilbert v Metro North Hospital Health Service*[198] there was held to be no breach of discrimination or industrial law and no breach of the *Human Rights Act 2019* (Qld). The case related to a notice sent to a nurse to show cause for why she should not be disciplined for making comments in a newspaper without proper authority. The claimant argued the notice was sent because she was an officer or member of the Nurses' Professional Association of Queensland Inc ('NPAQ'), but NPAQ was held to not be a union or industrial association, and therefore the claimant's actions could not constitute trade union or industrial activity.[199] There was therefore no protected attribute.[200] Further, any limits on freedom of expression and association under the

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190 *Brisbane Housing Co Ltd [No 1]* [2024] QCAT 5 (Fitzpatrick SM); *Brisbane Housing Co Ltd [No 2]* [2024] QCAT 6 (Fitzpatrick SM); *Brisbane Housing Co Ltd [No 3]* [2024] QCAT 7 (Fitzpatrick SM).

191 In *Dale v Queensland* [2022] QIRC 8 (Power IC), the claims under the *Human Rights Act 2019* (Qld) were not formally raised as grounds of appeal, and the claim based on equality rights was not expanded upon: see [45]–[46].

192 [2024] QCAT 57 (Fitzpatrick SM).

193 [2022] QCAT 245 (Fitzpatrick M).

194 [2023] QIRC 58 (O'Connor VP).

195 Ibid [29].

196 Ibid [53].

197 Ibid [75].

198 [2021] QIRC 255 (O'Connor VP).

199 Ibid [95], [116].

200 Ibid [321].

relevant Code of Conduct were reasonable and demonstrably justifiable,[201] meaning there was no breach of the *Human Rights Act 2019* (Qld).

While there are few substantive 'piggyback' decisions in Queensland, the *Human Rights Act 2019* (Qld) may be prompting a more considered approach to the granting of exemptions under s 113 of the *Anti-Discrimination Act 1991* (Qld). In determining whether to grant an exemption, the QIRC has been held to be acting in an administrative capacity, and must therefore comply with the *Human Rights Act 2019* (Qld).[202] Therefore, 'the Commission must not act to make a decision in a way that is not compatible with human rights and, in making a decision, the Commission must not fail to give proper consideration to a human right relevant to the decision.'[203] In *Re: Rheinmetall Defence Australia Pty Ltd*,[204] for example, which related to an application for an exemption to comply with US export control laws, it was noted that the determination required a robust application of the proportionality test in s 13 of the *Human Rights Act 2019* (Qld),[205] which was more intensive than applying the criteria in the *Anti-Discrimination Act 1991* (Qld) for granting an exemption.[206] Regardless, the tests reached the same conclusion, and the exemption was granted.

V The UK

Like Australian jurisdictions, the UK has a dedicated piece of equality legislation: the *Equality Act 2010* (UK). Equality rights are protected by the Convention, which the UK remains a member of, but only in relation to Convention rights (that is, as an enabling right). Article 14 of the Convention says:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Parties to the Convention are required to 'secure to everyone within their jurisdiction the rights and freedoms' in the Convention.[207] Some scholars have argued that the Convention (and the European Court of Human Rights) have come to be a form of constitutional statute and constitutional court,[208] though the UK

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201 Ibid [380].
202 *Re Ipswich City Council* [2020] QIRC 194, [36] (Merrell DP).
203 Ibid [37].
204 [2022] QIRC 440 (Dwyer IC).
205 Ibid [70]–[90].
206 Ibid [91]–[102].
207 *Convention for the Protection of Human Rights and Fundamental Freedoms* (n 2) art 1.
208 Robert Harmsen, 'The European Court of Human Rights as a "Constitutional Court": Definitional Debates and the Dynamics of Reform' in John Morison, Kieran McEvoy and Gordon Anthony (eds), *Judges, Transition, and Human Rights* (Oxford University Press, 2007) 33.

sees its obligations to comply with decisions of the European Court of Human Rights as a matter of international (not constitutional) law.[209]

For a provision to be discriminatory under article 14 requires a difference in treatment that is

- based on an identifiable characteristic or status;[210]
- 'of persons in analogous, or relevantly similar, situations';[211] and
- 'which has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised'.[212]

However, states have a margin of appreciation in assessing whether differences justify different treatment.[213]

The UK gives effect to the Convention through the *Human Rights Act 1998* (UK). The Act makes it unlawful for a public authority to act in a way incompatible with a Convention right.[214] Unlawful acts by public authorities can be pursued in a court or tribunal, or relied on in other legal proceedings.[215] However, Employment Tribunals ('ETs'), which are the primary forum for resolving employment-related disputes in the UK (and therefore the primary forum for hearing discrimination claims in the UK), have no jurisdiction to determine self-standing claims under the Convention.[216] As articulated in *Walsh v Ministry of Defence*:[217]

> The Employment Tribunal is a creature of statute and only has jurisdiction to hear matters that the legislature has given it power to hear. Unlike the High Court, it has no 'inherent' jurisdiction. It also has no 'freestanding' jurisdiction under the *Human Rights Act 1998* (HRA 1998) as it has not been given any such jurisdiction by way of subordinate legislation made under s 7 of that Act, nor is it a 'court' within the meaning of s 4(5) of that Act and so it does not have jurisdiction under that section to make a declaration of incompatibility in respect of any legislation that it might consider to be incompatible with the provisions of the European Convention on

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209 *R (on the application of Chester) v Secretary of State for Justice* [2014] AC 271, 299 [28] (Lord Mance JSC, Lord Kerr and Lord Hughes JJSC and Lord Hope agreeing).

210 *Kjeldsen v Denmark* (1976) 1 EHRR 711, 24–5 [56]; *British Gurkha Welfare Society v United Kingdom* (No 44818/11) [2016] ECHR 755 (15 September 2016) 13–14 [62] ('*British Gurkha Welfare*').

211 See *DH v Czech Republic* [2007] ECHR 922, 62 [175]; *Burden v United Kingdom* (European Court of Human Rights, Grand Chamber, Application no 13378/05, 29 April 2008) 21 [60]; *British Gurkha Welfare* (n 210) 13–14 [62].

212 *British Gurkha Welfare* (n 210) 13–14 [62].

213 *Burden v The United Kingdom* (European Court of Human Rights, Grand Chamber, Application no 13378/05, 29 April 2008) 21 [60]; Ibid 13–14 [62].

214 *Human Rights Act 1998* (UK) s 6(1).

215 Ibid s 7.

216 See, eg, *Wasteney v East London NHS Foundation Trust* [2016] ICR 643, 653 [48]; *Greenwood v Caldedale and Huddersfield NHS Foundation Trust* [2022] UKET 1801272/2022.

217 [2023] UKET 2208894/2022.

> Human Rights (ECHR) incorporated into domestic law by s 1 to that Act ('the Convention rights'). The Employment Tribunal is obliged by s 3 of the HRA 1998 to interpret legislation compatibly with the Convention rights.[218]

The Convention is therefore primarily relevant to how ETs interpret and give effect to legislation.[219]

The potential significance of Convention non-discrimination rights to the interpretation of employment rights is illustrated by the UK Supreme Court decision of *Gilham v Ministry of Justice* ('*Gilham*').[220] In that case, the UK Supreme Court considered whether a district judge was a 'worker' or a 'person in Crown employment' for the purposes of whistleblower protections in Part IVA of the *Employment Rights Act 1996* (UK). The claimant argued that, if she was excluded from statutory whistleblowing protections, this would be a breach of article 14 read with article 10 (freedom of expression), meaning the section should be read to bring her within the protections. The Supreme Court accepted this argument, holding that the claimant had been treated less favourably than employees would be treated in being excluded from the protections in Part IVA,[221] and that this less favourable treatment was on the basis of her occupational classification (which could be a 'status' for article 14).[222] There was no legitimate aim for the exclusion of judges from these protections:[223] indeed, offering judges protection for public interest disclosures could enhance judicial independence.[224] The Supreme Court held, then, that the *Employment Rights Act 1996* (UK) should be read and given effect to extend the whistle-blowing protections to judicial office holders.[225]

To examine how Convention rights are impacting equality rights in practice, a search of ET decisions was conducted on 22 August 2024 on the GOV.UK website.[226] The phrase 'European Convention on Human Rights' was included in 306 of 114,255 decisions (0.2% of decisions). The vast majority of these decisions (226 of 306) raised at least one ground of discrimination (age, disability, harassment, race, religion or belief, sex, sexual orientation or victimisation). Seventy of these 306 decisions related to religious or belief discrimination. Nearly a third of the decisions (93 of 306) referred to 'anonymity', often reflecting the role of Convention rights in informing decisions on anonymity orders.[227] Indeed,

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218 Ibid [9].

219 See, eg, *Wasteney v East London NHS Foundation Trust* [2016] ICR 643, 653 [48]; *Greenwood v Caldedale and Huddersfield NHS Foundation Trust* [2022] UKET 1801272/2022.

220 [2019] 1 WLR 5905 .

221 Ibid 5916 [30] (Baroness Hale PSC, Lord Kerr, Lord Carnwath and Lady Arden JJSC and Sir Declan Morgan agreeing).

222 Ibid 5916 [32].

223 Ibid 5917 [37].

224 Ibid 5917 [36].

225 Ibid 5919 [44].

226 'Employment Tribunal Decisions', *GOV.UK* (Web Page) <https://www.gov.uk/employment-tribunal-decisions>.

227 See, eg, *Ithia v MUFG Securities EMEA plc* [2023] UKET 2206616/2020, [21]–[23], anonymising the names of comparators; *Kassem v North Tees and Hartlepool NHS Foundation Trust* [2021] UKET 2502292/2019.

123 of these 306 decisions referred to 'article 8' (the right to private life), and 81 of 306 referred to 'rule 50' (relating to anonymity orders).[228]

In this search, only 42 decisions referred to 'European Convention on Human Rights' and 'article 14'; 5 referred to the Convention and 'art 14'. In some of these decisions, the ET drew on Convention rights to aid legislative interpretation, and this occasionally was held to expand the scope of discrimination and equality law. For example, arguments based on Convention rights informed ET decisions regarding who is a 'worker' for the purposes of employment law[229] and whistleblowing protections, in some cases extending the statutory definition (that is, a *Gilham*-style argument). In other cases, an interpretation grounded in Convention rights led to the reading in of terms into the *Equality Act 2010* (UK) to allow selected claims against the armed forces to proceed.[230]

A search was also conducted for 'Human Rights Act' and 'article 14'; this produced 40 ET decisions, though the vast majority of these decisions had already been captured by the earlier search.[231] Most of the additional decisions mentioned article 14 in passing[232] or in the description of the claim.[233] One case related to an application for an anonymity order.[234] In *Aukett v Sentimental Care Ltd*,[235] though, an argument based on *Gilham* (for an extension of whistleblowing protections) was unsuccessful.

Substantively, in UK employment decisions, article 14 has commonly been invoked in relation to article 1 of Protocol 1 (the protection of property) in relation

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228 *Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013* (UK) r 50.

229 *Newman v The St Albans Diocesan Board of Finance* [2023] UKET 3310171/2022; *Moon v Lancashire and South Cumbria NHS Foundation Trust* [2022] UKET 2414248/2021; *Griffiths v The Institution of Mechanical Engineers* [2020] UKET 2200023/2020; *Mok v Fitzmaurice House Ltd* [2023] UKET 2201796/2022; *Green v The Lichfield Diocesan Board of Finance* [2023] UKET 2409635/2022. Note, though, that arguments based on Convention rights were not accepted in relation to extending equality rights to volunteers: *Randall v The Bishop of Derby* [2023] UKET 2600807/2022. Arguments based on Convention rights were also not accepted as extending protections for public interest disclosures to job applicants: *Sullivan v Isle of Wight Council* [2022] UKET 1406053/2020. Arguments based on Convention rights were not accepted as expanding the territorial scope of employment law beyond the UK: *Bradley v BAE Systems plc* [2023] UKET 2208689/2022; though see *Beldica v The British Council* [2023] UKET 2202073/2021, where the ET was found to have jurisdiction.

230 *Rubery v Ministry of Defence* [2022] UKET 3312963/2021; *T v Ministry of Defence* [2021] UKET 2201755/2021. But see *Gregory v Ministry of Defence* [2022] UKET 3207239/2021; *Dunn v Ministry of Defence* [2024] UKET 3309378/2023. See also *Zulu v Ministry of Defence* [2019] UKET 2205687/2018 and 2205688/2018.

231 A search for 'Human Rights Act' and 'art 14' returned no additional decisions.

232 See, eg, *Mackereth v Department for Work and Pensions* [2019] UKET 1304602/2018; *Kahn v VisitDenmark* [2019] UKET 2202549/2015; *Muda v Malaysia* [2024] UKET 2203623/2021.

233 See, eg, *Onyebalu v The Governing Body of Gascoigne Primary School* [2023] UKET 3205347/2021; *Onyebalu v The Governing Body of Gascoigne Primary School* [2023] UKET 3200006/2022; *Goodison v High Speed Two Ltd (HS2)* [2022] UKET 2207032/2021; *Stevenson v Scottish Police Authority* [2023] UKET 4106994/2019; *Dimitrova v Barchester Healthcare Ltd* [2022] UKET 1803315/2021; *Hamam v British Embassy in Cairo* [2018] UKET 2207403/2017. In *Bilsbrough v Berry Marketing Services Ltd* [2019] UKET 1401692/2018, arguments based on art 14 were put in the alternative.

234 *Kirkham v United Kingdom Research and Innovation* [2019] UKET 2501482/2018.

235 [2021] UKET 3201600/2020.

to pension rights[236] and the granting of interim relief;[237] and article 9 (freedom of thought, conscience and religion) in relation to religion and belief at work.[238] Article 9 says:

> 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

In this context, Convention rights are relevant to how courts and tribunals interpret what is a 'belief' for the purposes of s 10 of the *Equality Act 2010* (UK),[239] often extending the scope of a recognized 'belief' for equality law. In particular, article 14 and article 9 have been invoked by those refusing to recognise transgender people in the workplace or holding gender critical beliefs.[240]

VI Discussion

As explored in Part II, reframing equality rights as human rights might lead to three important shifts in our understanding of equality law: to emphasise a public and holistic understanding of inequality, to prompt the better enforcement of equality rights by individuals, and to support a more nuanced judicial interpretation of equality rights. Indeed, in the ACT and Queensland, the scope of

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236 See, eg, *British Gurkha Welfare* (n 210).

237 *Marshall v The Doctors Laboratory Ltd* [2020] UKET 2203491/2020.

238 See, eg, *Cave v The Open University* [2023] UKET 3313198/2020 (belief in English Nationalism); *Burch v British Airways plc* [2023] UKET 3309902/2022 (belief in being a sovereign being who has a right to breathe freely without a mask); *Uncles v National Health Service Commissioning Board* [2017] UKET 1800958/2016 (belief in English Nationalism); *Thomas v Surrey and Borders Partnership NHS Foundation Trust* [2021] UKET 2304056/2018 (belief in English Nationalism); *Edwards v Cliff College* [2024] UKET 1804160/2023 (orthodox Christian beliefs about homosexuality); *Casamitjana Costa v The League Against Cruel Sports* [2020] UKET 3331129/2018 (belief in ethical veganism); *Corby v Advisory, Conciliation and Arbitration Service* [2023] UKET 1805305/2022 (belief on race/racial equality and sex/feminism); *Embery v Fire Brigades Union* [2021] UKET 2203219/2019 (belief in National Independence ('pro-Brexit')); *Sleath v West Midlands Trains Ltd* [2021] UKET 1310379/2020 (belief in secularism and atheism); *Ngole v Touchstone Leeds* [2024] UKET 1805942/2022 (Christian religious beliefs); *Legge v Environment Agency* [2024] UKET 3314044/2021 (non-feminist beliefs); *Omooba v Michael Garret Associates Ltd* [2021] UKET 2202946/2019 and 2602362/2019 (belief that you cannot be born gay).

239 *Mackereth v Department for Work and Pensions* [2022] EAT 99, [84]; *Forstater v CGD Europe* [2022] ICR 1, [53], [68]. Section 10(2) of the *Equality Act 2010* (UK) says: 'Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.'

240 See, eg, *Mackereth v Department for Work and Pensions* [2022] EAT 99, [84]; *Forstater v CGD Europe* [2022] ICR 1.

the protection for equality under human rights law could be broader than that under discrimination law,[241] potentially opening up protection for new grounds or characteristics and for intersectional claims. This potentially reflects a more holistic understanding of inequality.

In mapping the case law that has arisen in relation to equality rights under human rights statutes in Australia and the UK, this article has illustrated the ways in which the framing of equality rights as human rights could enhance the process and reasoning in the adjudication of equality rights. This is evident, for example, in how the QIRC considers applications for exemptions under s 113 of the *Anti-Discrimination Act 1991* (Qld), which involves a more robust examination under human rights law than under equality law. There is some evidence, then, that framing equality rights as human rights might support a more nuanced judicial interpretation of equality rights. In the cases that have been considered in this article, the ability to justify limitations on equality rights typically means that the outcome under human rights legislation is the same as under equality legislation, though the decision-making process often involves different considerations. While the framing of equality rights as human rights has not yet led to different judicial outcomes in Australia, it has affected the outcomes of claims in the UK. That said, even in the Australian jurisdictions, there are signs that framing equality rights as human rights is leading to a more sophisticated and nuanced analysis of claims and exemptions. The more embedded equality rights are, the more impact their framing as rights is likely to have in practice.

Overall, though, the case law analysed in this article arguably shows that the potential of framing equality rights as human rights has not yet been realised in Australia. This, in part, reflects the difficulties of enforcement under existing human rights Acts, where claims need to be 'piggybacked' (in Victoria and Queensland) or pursued in the high-cost jurisdiction of the Supreme Court (in the ACT), and where damages are not available. These barriers to enforcement mean human rights statutes — as currently drafted — are unlikely to prompt the better enforcement of equality rights by individuals. Indeed, given these barriers, it is likely that case law undersells the successes and influence of the human rights Acts, especially in conciliation (in Queensland and the ACT) and in shaping executive decision-making and behaviour.

This article therefore offers new evidence of the potential importance of embedding equality rights as human rights in Australia, including through reform at the federal level. However, to realise this potential, human rights legislation needs to be supported by effective enforcement mechanisms, including by enabling conciliation, making damages available, and in enabling access to justice in low-cost tribunals. Indeed, in framing equality rights as human rights, multiple decisions need to be made about how equality rights are positioned,

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241 *Human Rights Act 2004* (ACT); *Human Rights Act 2019* (Qld) sch 1. See the detailed discussion in Taylor, 'Substantive Equality and the Possibilities of the Queensland *Human Rights Act 2019*' (n 73) 51.

which will affect their efficacy in practice. Equality rights might be entrenched or embedded as constitutional rights (as flagged, but likely rejected, in Australia) or provided for only in legislation (as in Victoria, Queensland and the ACT). Human rights statutes might bind only the public sector and governments, or could apply more broadly to all organisations and individuals. Equality rights could be independent, autonomous rights (as in Victoria, Queensland and the ACT), or could be framed solely as enabling rights for other human rights (as in the UK). Individual enforcement can be enabled in various ways, and with different limits or restrictions. This might mean that claims can only be pursued directly in certain courts (as in the UK and ACT) or as piggyback claims (in Queensland and Victoria). Conciliation might be enabled (as in Queensland and the ACT), but might require first approaching the entity concerned. Claims might then also be limited in whether they can proceed to the courts if conciliation is unsuccessful.

This positioning, and these decisions, matter in practice, and can support or curtail the impact of human rights statutes. In Australia, for example, individual enforcement of human rights statutes remains particularly fraught, and this has likely limited the case law that is emerging across the jurisdictions. The importance of the framing of equality rights as human rights can also be seen, for example, in how equality rights influence statutory interpretation. In the UK, courts and tribunals may interpret legislation, including by reading in terms, to ensure it is consistent with the Convention. As the UK experience shows, the scope of equality law, and the grounds it protects, can be extended through statutory interpretation aided by human rights instruments. As discussed in Part V, this has led to the expansion of employment and discrimination rights to benefit a broader group of workers. In the ACT, Victoria and Queensland, however, courts and tribunals have more limited powers in ensuring statutory interpretation aligns with human rights statutes, with interpretive provisions now seen as requiring something akin to the principle of the legality.[242] The High Court's decision in *Momcilovic v The Queen*[243] has confined and dampened the potential for the Victorian *Charter* (and other human rights statutes) to meaningfully shape statutory interpretation in Australia. This likely reflects the positioning of equality rights in Australia in legislation that is not embedded as a constitutional right.

Further, confining human rights statutes to public authorities, as in Australia, potentially limits the transformative effect of framing equality rights as human rights. According to the Australian Bureau of Statistics, in June 2024, state and local governments[244] in Victoria, Queensland and the ACT collectively

[242] Note the discussion above of *Momcilovic v The Queen* (2011) 245 CLR 1.

[243] Ibid.

[244] While noting that 'public authorities' includes a broader group of entities than just state and local governments.

employed around 1,037,800 people,[245] compared to 6,981,900 total employed persons across the jurisdictions.[246] While human rights statutes capture a broader group of entities than just state and local governments, these statistics imply that the vast majority of the workforce in the private sector is unlikely to be able to invoke human rights in the workplace. This is despite the clear importance of human rights to and at work,[247] including equality rights. The absence of a federal human rights Act has even more significant consequences for the reach of human rights: in June 2024, there were 14,370,200 employed persons across Australia.[248] At present, then, in the context of work, human rights statutes might be relevant to around 7% of employed persons in Australia. The impact of human rights legislation could be felt far beyond the context of work; but these statistics help to illustrate the limited scope of human rights statutes, both in the absence of federal reform and when their scope is confined to public entities.

VII Conclusion

This article has interrogated what difference, if any, the positioning and framing of equality law makes in practice, and whether the framing of equality rights as human rights might better support the advancement of equality. This article has illustrated the significant potential for the (re)framing of equality rights as human rights to de-individualise equality rights, expand the grounds protected by discrimination law, expand the scope of those protected by discrimination law, and to prompt a more nuanced and robust examination of equality rights and exceptions. This discussion could not be more timely, given the AHRC's and Parliamentary Joint Committee on Human Rights's renewed calls to adopt a statutory human rights Act in Australia. These findings support and bolster the calls for a federal human rights Act, emphasising the potential significance of (re)framing equality rights as human rights to the development and interpretation of equality law.

In Australian jurisdictions like the ACT, Queensland and Victoria, though, the significant potential of (re)framing equality rights as human rights to shape equality law remains just that: *potential*. The limited enforcement mechanisms in place under human rights statutes have severely curtailed the case law on these issues. As a result, the potential benefits of framing equality rights as human

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[245] Australian Bureau of Statistics, *Public Sector Employment and Earnings, 2023–24* (Catalogue No 6248.0.55.002, 7 November 2024) <https://www.abs.gov.au/statistics/labour/employment-and-unemployment/public-sector-employment-and-earnings/latest-release> and author's own calculations.

[246] Australian Bureau of Statistics, *Labour Force, Australia, Detailed, June 2024* (Catalogue No 6291.0.55.001, 25 July 2024) <https://www.abs.gov.au/statistics/labour/employment-and-unemployment/labour-force-australia-detailed/jun-2024> ('*Labour Force*') and author's own calculations.

[247] See also a discussion of Collins (n 34) above.

[248] Australian Bureau of Statistics, *Labour Force* (n 246) and author's own calculations.

rights remain largely unrealised to date. In developing a statutory human rights act for Australia, then, it is critical that the Parliamentary Joint Committee on Human Rights's recommendations — of rights enforceable via stand-alone complaints, with conciliation at the AHRC, and direct claims to the federal courts, with remedies including damages[249] — be embedded in any proposed Act. Further, the private sector should be brought within the scope of reform. The key successes of human rights Acts may not yet be evident in case law. Regardless, fully realising the benefits of reframing equality rights as human rights requires the effective enforcement and development of equality rights in the courts.

[249] Parliamentary Joint Committee on Human Rights (n 59) 309–10.

THE RIGHT TO DISCONNECT: FINDING THE RIGHT 'OFF SWITCH' FOR EMPLOYERS AND EMPLOYEES

JACKSON LIVORI*

The right to disconnect has been recognised in Australia following the passage of the Fair Work Legislation Amendment (Closing Loopholes No 2) Act 2024 *(Cth). In short, the right allows employees to refuse to read or respond to communications from their employer or third parties about work outside of working time. This article will critique the adequacy of the model chosen by the Australian Parliament by reference to the rationale for implementing the right to disconnect and whether there are alternative mechanisms in Australia which are sufficient to achieve the same outcomes.*

I INTRODUCTION

In 1999, Guy Standing wrote:

> Every period of economic reconstruction, associated with major technological change and the renewed pursuit of flexibility, has eventually induced a counter-movement to provide new systems of social protection compatible with new structures and processes.[1]

Despite that quote being made about 25 years ago, it describes the topic of this article well. During the COVID-19 pandemic there was a forced rise in remote working arrangements and digital technologies became more widely used as part of this transition.[2] While constant connection was already an emerging issue, the pandemic increased the prevalence of workers remaining connected to their work beyond their standard hours by reading and responding to messages.[3] Essentially,

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All opinions and errors in this article are my own. I thank Professor Andrew Stewart for his guidance and feedback on the drafts of this article. I also thank the anonymous reviewers for their feedback.

[1] Guy Standing, *Global Labour Flexibility: Seeking Distributive Justice* (Macmillan Press, 1999) 50.

[2] Mihaela Marica, 'Considerations on the Protection of Teleworkers, in Light of the Current European Regulations: Elements of Comparative Law' (2022) 12(4) *Juridical Tribune* 509, 510; Mauro Pucheta and Ana Cristina Ribeiro Costa, 'Going Beyond the Right to Disconnect in a Flexible World: Light and Shadows in the Portuguese Reform' (2022) 51(4) *Industrial Law Journal* 967, 968; Tyler Jochman, 'Effects on Employees' Compensation under the Right to Disconnect' (2021) 22(2) *Marquette Benefits & Social Welfare Review* 209, 209.

[3] Olga Chesalina, 'The Legal Nature and the Place of the Right to Disconnect in European and in Russian Labour Law' (2021) 9(3) *Russian Law Journal* 36, 37.

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many modern employees never disconnect from their workplace, leading to burnout and stress.[4] As French politician Benoît Hamon explained:

> Employees physically leave the office, but they do not leave their work. They remain attached by a kind of electronic leash — like a dog. The texts, the messages, the emails — they colonise the life of the individual to the point where he or she eventually breaks down.[5]

On 26 February 2024, the *Fair Work Legislation Amendment (Closing Loopholes No 2) Act 2024* (Cth) (‘*Closing Loopholes Act No 2*’) received royal assent.[6] Within the *Closing Loopholes Act No 2* was a right to disconnect. From 26 August 2024 most employees — except employees of small business employers who had to wait until 26 August 2025[7] — can ‘refuse to monitor, read or respond to contact, or attempted contact, from an employer outside of the employee’s working hours unless the refusal is unreasonable’.[8] This also extends to messages from third parties.[9]

Internationally several countries implemented legislation to recognise a right to disconnect prior to Australia, including France,[10] Italy,[11] Portugal,[12] and Spain[13] amongst many others.[14] These countries have implemented a variety of types of legislation to recognise the right to disconnect, including soft approaches that involve encouraging negotiations and hard approaches prohibiting out-of-hours communication.[15]

The principal aim of this article is to evaluate whether the right to disconnect model implemented by the *Closing Loopholes Act No 2* is adequate by reference to the reasons why that right was implemented.

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4 Marica (n 2) 515; Productivity Commission, *Working from Home* (Research Paper, September 2021) 39.

5 Hugh Schofield, ‘The Plan to Ban Work Emails out of Hours’, *BBC News* (online, 11 May 2016) <https://www.bbc.com/news/magazine-36249647>.

6 *Fair Work Legislation Amendment (Closing Loopholes No 2) Act 2024* (Cth) s 2.

7 Ibid sch 1 item 308, inserting *Fair Work Act 2009* (Cth) sch 1 cl 111D (‘*FW Act*’).

8 *FW Act* (n 7) s 333M(1).

9 *FW Act* (n 7) s 333M(2). I invite readers interested in a more comprehensive history of Australia’s journey to a legislative right to disconnect to see Gabrielle Golding, ‘Unwinding Australia’s New Right to Disconnect’ (2024) 37(2) *Australian Journal of Labour Law* 201, 202–7.

10 *Code du travail* [Labour Code] (France) art L2242-17.

11 Legge 22 maggio 2017, n. 81 [Law No 81 of 22 May 2017] (Italy) art 19(1).

12 *Código do Trabalho* [Labour Code] (Portugal) art 199.º-A (‘*Portuguese Labour Code*’).

13 *Ley Orgánica 3/2018, de 5 de Diciembre, de Protección de Datos Personales y garantía de los derechos digitales* [Organic Law 3/2018, of 5 December, on the Protection of Personal Data and Guarantee of Digital Rights] (Spain) art 88.

14 See Gabrielle Golding, ‘The Right to Disconnect in Australia: Creating Space for a New Term Implied by Law’ (2023) 46(2) *UNSW Law Journal* 728, 731–3 (‘The Right to Disconnect in Australia’).

15 See generally Tina Weber and Oscar Vargas Llave, *Right to Disconnect: Exploring Company Practices* (Research Report, Eurofound, 9 September 2021).

This article focuses on the right to disconnect now enshrined in the *Fair Work Act 2009* (Cth) ('*FW Act*'). That right only applies to national system employees,[16] however, similar considerations could be applied to non-national system employees covered by the state-based legislative equivalents to the *FW Act* in non-referring states, who do not presently have a right to disconnect.[17]

Part II briefly summarises the reasons why the right to disconnect has been recognised for the purposes of evaluating whether the model chosen will achieve its purposes. Part III discusses whether pre-existing mechanisms in Australia could achieve the same outcomes as a right to disconnect. Part IV draws on prior discussions to evaluate the adequacy of the Australian right to disconnect. This will include a view on an alternative 'right to request disconnection' model. Part V provides concluding remarks.

II The Rationale for the Right to Disconnect

Gabrielle Golding considers the four reasons why the right to disconnect was implemented were to: (1) reduce stress, burnout, and overwhelm; (2) reduce unpaid work from constant connectivity; (3) provide clarity on the divide between an employee's working and private life; and (4) boost productivity.[18]

In addition to Golding's points, the Senate Select Committee on Work and Care first recommended the right to disconnect in March 2023 in the context of an expectation of constant connection having an unjustifiably disproportionate negative effect on those providing unpaid care.[19]

For completeness, I will also briefly analyse the argument that a right to disconnect will reduce flexibility in the workplace, which appears to be the main grievance against the new legislative right.

A *Psychological Impacts of Constant Connection*

Golding's finding on review of various studies was that more time spent monitoring work emails and on information and communications technology ('ICT') generally can lead to stress, increased anxiety and a general decrease in

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16 A national system employee is any employee — except those on vocational placements — employed by a national system employer: *FW Act* (n 7) s 13. National system employers mainly include constitutional corporations, the Commonwealth, and employers in referring states: *FW Act* (n 7) ss 14, 30D, 30N. Except for Western Australia, the definition of national system employer includes nearly all non-government employers in Australia: see generally Andrew Stewart, *Stewart's Guide to Employment Law* (Federation Press, 7th ed, 2021) 35–48.

17 That is those employees still covered by the: *Industrial Relations Act 1979* (WA); *Fair Work Act 1994* (SA); *Industrial Relations Act 2016* (Qld); or *Industrial Relations Act 1984* (Tas).

18 Golding, 'Unwinding Australia's New Right to Disconnect' (n 9) 213–6.

19 Senate Select Committee on Work and Care, Parliament of Australia, *Final Report* (Report, 9 March 2023) 119 [6.44]. See also Andrew Pakes, 'Right to Disconnect: A Guide for Union Activists' (Guide, Prospect, 21 May 2021) 5.

the health and wellbeing of employees.[20] For example, CW Von Bergen and Martin S Bressler suggest that constant connection leads to a lack of balance between work and non-work, causing 'poorer quality of life and decreased life satisfaction, psychological strain, depression, anxiety, and alcohol abuse', and relationship difficulties with partners and children.[21]

In a more recent and highly on-point study, Hiroki Ikeda et al found longer time on work-related communication outside of working hours was associated with increased fatigue and worse 'psychological detachment before bedtime'.[22] Further, another recent study found 'significant adverse brain structural differences' when overworked employees were compared to non-overworked employees.[23]

Golding also notes studies illustrating that excessive mobile phone usage can lead to an addiction.[24] These studies are relevant as employees are frequently connected to work by receiving communications through their mobile phones.

While some weight must be given to the minor inconsistencies of the studies,[25] overall, I agree with Golding that the empirical studies justify that constant connection to ICT can cause negative psychological effects.

B *Constant Connection Leads to Underpayment*

The second rationale for implementing the right to disconnect is that the distinction between working and rest time has been blurred, leading to availability creep where employees may not be remunerated for all work performed.[26] Responding to a text or email may only take a couple of minutes, but cumulatively responding to multiple texts or emails over time can result in a significant amount of unrecognised work.[27]

Whether underpayment is a relevant rationale for the right to disconnect is not so straightforward in my view. To determine the validity of this argument it

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[20] Golding, 'The Right to Disconnect in Australia' (n 14) 738–40.

[21] CW Von Bergen and Martin S Bressler, 'Work, Non-Work Boundaries and the Right to Disconnect' (2019) 21(2) *Journal of Applied Business and Economics* 51, 54 (citations omitted).

[22] Hiroki Ikeda et al, 'Effects of Work-Related Electronic Communication during Non-Working Hours after Work from Home and Office on Fatigue, Psychomotor Vigilance Performance and Actigraphic Sleep: Observational Study on Information Technology Workers' (2023) 80(11) *Occupational & Environmental Medicine* 627, 630.

[23] Wonpil Jang et al, 'Overwork and Changes in Brain Structure: A Pilot Study' (2025) 82(3) *Occupational & Environmental Medicine* 105, 109.

[24] Golding, 'The Right to Disconnect in Australia' (n 14) 739–40.

[25] See Fatema Akbar et al, 'Email Makes You Sweat: Examining Email Interruptions and Stress Using Thermal Imaging' (Paper No 668, Association for Computing Machinery, 2 May 2019) 7–8, 11; Issac Vaghefi, Liette Lapointe and Camille Boudreau-Pinsonneault, 'A Typology of User Liability to IT Addiction' (2017) 27(2) *Information Systems Journal* 125, 149.

[26] Golding, 'Unwinding Australia's New Right to Disconnect' (n 9) 213–15; Jochman (n 2) 209. See also Senate Select Committee on Work and Care, Parliament of Australia, *Interim Report* (Report, 18 October 2022) 108 [6.39]; Dan Nahum, *Work and Life in a Pandemic: An Update on Hours of Work and Unpaid Overtime under COVID-19* (Report, Centre for Future Work, Australia Institute, 18 November 2020).

[27] Jochman (n 2) 215.

is necessary to consider whether time spent connected could constitute working time or an on-call period.

The *FW Act* specifies that '[a]n employer must pay an employee amounts payable to the employee in relation to the performance of work ... in full'.[28] However, the *FW Act* does not specify what is considered 'work'.

Alternatively, some modern awards require an employee to be paid on on-call allowance.[29] Hence, if constant connection meets the criteria of being on-call and the employee is covered by an award with an on-call allowance, there may be remuneration payable for remaining connected.

I note 'there is no universally applicable definition of the term "work"'.[30] An employee's employment contract will outline what is within the scope of their work.[31] However, generally work needs to be directed from the employer and cannot be considered too minuscule to be compensated due to the *de minimis* principle.

1 *Direction from Employer*

For something to be considered 'work' there needs to at least be an implied direction from the employer for that activity to be performed. This is exemplified through the decision in *Shop, Distributive & Allied Employees' Association v Aldi Foods Pty Ltd* ('*SDA v Aldi*').[32] Judge Humphreys considered the 15 minutes of preliminary tasks completed by Aldi workers was remunerable work on the bases that: (1) there 'was an expectation' employees would complete the tasks;[33] (2) disciplinary action would be considered by management if the tasks were not undertaken;[34] (3) there was no personal benefit to the employee by completing the tasks; and (4) the tasks were to the benefit of the employer.[35]

In *Australian Salaried Medical Officers' Federation v Peninsular Health* ('*Peninsular Health*'),[36] Bromberg J also considered that work can be authorised by an implied direction:

> In practical terms, the performance of work by an employee is sanctioned by his or her employer when the employer requests or requires the work to be done or, where the

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28 *FW Act* (n 7) s 323(1).
29 See, eg, Fair Work Commission, *Rail Industry Award 2020* (MA000015, 1 January 2010) cl 18.2(b); Fair Work Commission, *Medical Practitioners Award 2020* (MA000031, 1 January 2010) cl 20.3.
30 *Seo v Bindaree Food Group Pty Ltd* (2021) 306 IR 408, 414 [12] (Catanzariti V-P, Saunders D-P, Commissioner Lee) ('*Seo*'). See also *Shop, Distributive & Allied Employees' Association v Aldi Foods Pty Ltd* (2022) 318 IR 206, 212 [34] (Judge Humphreys) ('*SDA v Aldi*').
31 *Seo* (n 30) 414 [12] (Catanzariti V-P, Saunders D-P, Commissioner Lee); *SDA v Aldi* (n 30) 212 [38] (Judge Humphreys).
32 *SDA v Aldi* (n 30).
33 Ibid 211 [31].
34 Ibid 211 [33].
35 Ibid 213 [39].
36 (2023) 325 IR 26.

> performance of the work is at the initiative of the employee, where the employer approves the performance of the work by the employee.[37]

Bromberg J noted the following in the context of determining when an implied direction had been given:

> In most employment arrangements, it is simply not practicable for employees to be closely supervised and directed and, accordingly, what an employer will do is communicate the outcome it expects to employees rather than provide a series of specific directions as to how, when and in what order the tasks necessary to obtain that outcome are to be performed. In those circumstances, the requirements made of the employee will be mainly implicit rather than express and will often arise out of the expectations set by the employer. Further, expectations set by the employer will often not be set expressly but will themselves be implicit from the circumstances, *including the nature of the employee's duties and the way in which, or the pattern in which, work is ordinarily performed to the apparent satisfaction of the employer*.[38]

His Honour noted constructive or actual knowledge that an employee is performing work can constitute an acceptance of the work, and therefore be authorisation of such work.[39]

Applying these cases to the issue of constant connection, it is difficult to determine whether a message from an employer by itself could constitute an implied direction to respond. As *SDA v Aldi* establishes, it may depend on whether the employee is subject to disciplinary consequences for not responding. Alternatively, the *Peninsular Health* decision — in particular the emphasised portion of the judgment quoted above — seems to indicate that a culture of constant connection could qualify as an implied direction.

To refute the argument an implied direction was given to respond, an employer may put a statement to the following effect in an email signature: 'I have sent this email at a time convenient to me; you are not expected to read or respond to this message outside of your working hours'.

I tentatively conclude that repeated expectations of after-work communication and other work can constitute an implied direction to perform such work. Therefore, in the right circumstances an employer may be considered to have impliedly directed an employee to remain constantly connected, satisfying the first general hurdle to be considered work.

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37 Ibid 43 [69].

38 Ibid 54–5 [121] (emphasis added).

39 Ibid 66 [173]–[175].

2 *Application of the* De Minimis *Principle*

Assuming there has been at least an implied direction to monitor communications outside of working hours, the question becomes: would short periods of time reading and responding to messages be subject to the *de minimis* principle?[40]

The most on point case in this area is *Polan v Goulburn Valley Health* ('*Polan*').[41] Ms Polan was required to rearrange rosters to replace absent junior doctors while off duty.[42] Justice Mortimer distinguished between an employee being recalled to work and directed to work overtime. Her Honour described an employee being recalled to work to involve 'a specific instruction or direction', while an instruction to perform overtime could be implied from 'an ongoing arrangement between employer and employee'.[43] Justice Mortimer considered Ms Polan to be performing overtime and it was:

> clearly authorised by her employer because the making of these arrangements was a core aspect of the duties of her employment, and it was contemplated by both the respondent and the applicant that the need for these arrangements could arise at any time of the day or night.[44]

Justice Mortimer concluded the out-of-hours rostering was overtime and specifically contemplated the periods of work could be as little as 10 minutes long.[45]

While not an authoritative ruling, the New South Wales Industrial Commission has suggested the *Polan* decision should only apply to the provisions of the specific agreement in that decision. Commissioner Sloan opined that the *Polan* decision 'does not stand as authority for the proposition that overtime will always be available for all work performed by an employee outside ordinary working hours, whether or not that takes place at the employer's premises'.[46]

In 2018, a Fair Work Commission Full Bench ('FWCFB') reviewed the *Nurses Award 2010* — the award underpinning the enterprise agreements in *Polan* — and determined 'that taking a telephone call, answering a text, replying to an email or responding via other form of electronic communication is work'.[47] The FWCFB

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[40] See Tanya Marcum, Elizabeth A Cameron and Luke Versweyveld, 'Never off the Clock: The Legal Implications of Employees' After Hours Work' (2018) 69(2) *Labor Law Journal* 73, 76–7. The *de minimis* principle is a principle of interpretation where '[u]nless the contrary intention appears, … the law does not concern itself with trifling matters': *Farnell Electronic Components Pty Ltd v Collector of Customs* (1996) 72 FCR 125, 128 (Hill J), quoting Butterworths, *Halsbury's Laws of England*, vol 44(1) (at 1 September 1995) Statutes, '5 Statutory Interpretation' [1441].

[41] [2016] FCA 440 ('*Polan*').

[42] Ibid [17] (Mortimer J).

[43] Ibid [76].

[44] Ibid [84].

[45] Ibid [86].

[46] *Health Services Union New South Wales v Health Secretary* [2019] NSWIRComm 1055, [55].

[47] *Re 4 Yearly Review of Modern Awards* [2018] FWCFB 7347, [67] (Catanzariti V-P, Booth D-P, Commissioner Cribb).

decided workers under this award should be entitled to one hour of overtime pay for each instance of this work, regardless of whether they are formally on-call.[48]

Until recently, this was persuasive authority that a breach of the right to disconnect by requiring an employee to complete administrative work outside of working hours could constitute work — subject to the relevant industrial instruments — and entitled the employee to overtime pay.

However, the recent decision of *Australian Nursing and Midwifery Federation v Johnson Stenner Aged Care Pty Ltd* (‘*New Auckland Place*’)[49] suggests that constant connection and incidental activities may not be considered work. *New Auckland Place* involved a direction for nurses to undertake a rapid-antigen test (‘RAT’) prior to attending work.[50] A FWCFB found that undertaking a RAT test was within the duties of nurses.[51] However the FWCFB also found:

> The Agreement nowhere provides that there is an entitlement to payment for any time spent performing any duty whatsoever which may fall within the classification descriptions. [52]

The FWCFB also helpfully explained the common understanding of overtime:

> As a general proposition, the established industrial conception of overtime is that (subject to any meal break requirement) it is worked continuously upon the completion of ordinary hours in a day, or worked as a discrete overtime shift, or is worked upon the employer recalling the employee to work after they have already completed their ordinary hours and left the workplace.[53]

As the nurses could do what they wished in the 15 minutes in between taking the test and viewing the result, this was inconsistent with any notions of work.[54] In a similar way, remaining connected and answering the occasional message is discontinuous and not part of any continuous shift.

This concurs with the FWCFB's view in *New Auckland Palace*:

> Not every incident of employment duty attracts an entitlement to payment under the applicable industrial instrument. Employment will often involve minor and incidental duties being required to be performed outside of working hours without payment, *such as making or answering occasional telephone calls about work attendance and rostering matters* or dressing in uniforms required to be worn by the employer.[55]

Reconciling the *Polan* and *New Auckland Place* decisions is not particularly useful given the different industrial instruments at play. It appears that activities

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48 Ibid [69]–[70].
49 [2023] FWCFB 162 (‘*New Auckland Place*’).
50 Ibid [2] (Hatcher P, Easton D-P, Roberts D-P).
51 Ibid [25].
52 Ibid [27].
53 Ibid [31].
54 Ibid. Cf *Australian Nursing and Midwifery Federation v Jeta Gardens (QLD) Pty Ltd* [2022] FWC 3039, where employees were directed to wait in a certain area while they undertook their rapid-antigen test.
55 *New Auckland Place* (n 49) [34] (emphasis added).

that are considered more than incidental can be considered work if it is part of some continuous period. Hence simply reading and responding to a few sporadic messages is unlikely to be considered work as it is merely incidental. However, a direction — whether implied or explicit — to perform some substantive activity could be considered work. Ambiguity remains at where the line is drawn between what is considered substantial and what is considered incidental.

3 *Is a Constantly Connected Employee On-Call?*

On-call allowances and breaks between on-call periods are not specifically provided for within the *FW Act* and apply only if required by awards, enterprise agreements, or individual employment contracts. While it will depend on the instrument,[56] being on-call generally involves the employee being 'free to conduct his, or her, private life subject to the employer being able to direct the employee to report for duty, and to the employee organizing his or her affairs to be able to respond to that direction if given'.[57]

The *Polan* decision makes it reasonably clear — subject to the text of the relevant instrument — that being constantly connected could be considered being on-call. Justice Mortimer relevantly noted:

> I do not consider it can be said that when the applicant was away from the workplace, and outside her ordinary working hours, but required to be ready and available to take calls so as to rearrange the rosters and shifts of doctors, she was performing her duties of employment. Rather, she was on-call. Once she received and made calls, and commenced trying to find replacement doctors or locums, and rearrange shifts, then she was performing the duties of her employment and was entitled to be remunerated for it.[58]

Interestingly, Mortimer J concluded this time should be paid as overtime and not under the recall provision, despite the finding that the on-call allowance was owed.[59]

4 *Is the Rationale Justified?*

Based on the discussion above, in my view the right to disconnect is unlikely to solve any issues with unremunerated work. Sporadically reading and responding to messages is unlikely to be considered 'work' that would entitle an employee to remuneration.

If an employee is undertaking a sufficiently continuous task of the necessary duration such that it is considered 'work', then this is not an issue related to the right to disconnect, it is simply that the employee is working and not being paid.

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56 See *Polan* (n 41) [64]–[65] (Mortimer J).
57 *Warramunda Village Inc v Pryde* (2002) 116 FCR 58, 62 [17] (Lee J).
58 *Polan* (n 41) [68].
59 Ibid [82]–[84].

Further, an on-call allowance is not a uniform entitlement applicable to the workforce. While the *Polan* decision indicates constant connection would likely entitle an employee to an on-call allowance, this is reliant on that employee being covered by an industrial instrument that contemplates this. Given the entitlement to an on-call allowance is not a general right, a right to disconnect does not limit underpayment for employees that do not have an on-call entitlement in the first place. In my view, the more appropriate and direct resolution for employees required to monitor communications outside working hours without any remuneration is to bargain for an on-call allowance in an industrial instrument.

For those employees already covered by an industrial instrument with such an entitlement, they would be entitled to remuneration if they agree to remain connected irrespective of the right to disconnect.

Further, this rationale is complicated for salaried employees without any strict set hours of work, especially those outside of award coverage. Salaried employees are usually implicitly compensated for all working time. Typically, salaried employees — and even some part-time employees — will be paid above minimum rates and therefore would be remunerated for short periods of working time outside of formal working hours, assuming they are completing compensable work. While these short periods may entitle the worker to overtime, or the constant connection may be considered as on-call time, it is common for employment contracts to include a set-off clause, which purports to make a salary cover all entitlements owed to an employee under their enterprise agreement or award, and the national employment standards ('NES'). For the purposes of this argument, I will assume that the employee's employment contract is well-drafted, and the set-off clause applies to all entitlements.[60] If salaried employees are paid more than their minimum entitlements, unless the unpaid work is substantial, those salaried employees are likely already being compensated for this time and any additional entitlements by virtue of the set-off clause. Hence, the argument that a right to disconnect prevents underpayment can only be made for employees paid precisely — or only slightly above — their minimum entitlements.[61]

C *Constant Connection Blurs the Divide Between an Employee's Working and Private Life*

In modern times, it is common for employees to work flexibly, in terms of where and when they complete work. Further, it is common for employees to take work-

[60] Set-off clauses may not operate as intended and not cover all entitlements due to poor drafting: see, eg, *Kernaghan v Neffray Pty Ltd* [2020] FCCA 1141, [34]–[35] (Judge Riethmuller).

[61] However, the employer may still be in breach of payslip reporting obligations in some cases for not separately outlining overtime or on-call allowances: see *Fair Work Regulations 2009* (Cth) regs 3.33–3.34 ('*FW Regulations*').

related devices home, receive work-related correspondence on their personal devices, or even use personal devices to complete more substantive work. Many employees simply do not travel to the workplace and start at 9:00am, clock off at 5:00pm, and go home to an uninterrupted private life. Their 'non-working time' is intruded on by work-related communications or a requirement to complete more substantive work, blurring the distinction between when work starts and ends.

This lack of distinction between a working and private life can lead to the issues discussed in Parts II(A) and (B) above.[62] Additionally, this lack of distinction can have implications for family and friends, as employees may be unable to sufficiently engage with others if they are being distracted by a requirement to monitor work-related communications. In this way, constant connection has the potential to diminish the value in an employee's private life. In my view, there is significant value in a private life, and the right to disconnect has the potential to help employees maintain this value by creating a clearer boundary between their working and non-working lives.

However, the situation is more complicated for those with flexible working arrangements. There is a necessary trade-off between the benefits of flexible working and the lack of clarity between working and private lives. If an employee has agreed to work irregular hours, particularly if some of those hours are at their home, they have, to some extent, agreed to remove a clear distinction between their working and private lives. They no longer have clear working hours or a distinct place of work that creates clear boundaries to establish where and when work starts and ends. As will be discussed more below, particularly in Part IV(B), this issue can be addressed by a right to disconnect that involves specifically negotiated terms on non-contactable times as part of a flexible working arrangement.

For completeness, some people identify their personality through their work — to the extent where their private life is also their working life. Some studies have shown this interconnection between a private and working life has a positive effect on work performance.[63] For that group of people, the right to disconnect is likely to have less significance. However, for those that do not have such a connection to their work, the right to disconnect can be an important mechanism for creating clearer boundaries between their working and private lives.

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62 See Golding, 'The Right to Disconnect in Australia' (n 14) 735–40.

63 See generally Irina M Paullay, George M Alliger and Eugene F Stone-Romero, 'Construct Validation of Two Instruments Designed to Measure Job Involvement and Work Centrality' (1994) 79(2) *Journal of Applied Psychology* 224; Murat Bolelli and Beril Durmuş, 'Work Attitudes Influencing Job Involvement Among "Y" Generation' (2017) 3(1) *International Journal of Commerce and Finance* 1; Liang-Chih Huang et al, 'High Performance Work Systems, Employee Well-Being, and Job Involvement: An Empirical Study' (2016) 45(2) *Personnel Review* 296.

D *Productivity Benefits from a Right to Disconnect*

To summarise Golding's research, employers may gain productivity benefits for their business with less absenteeism from overworked employees and more effort from satisfied employees through the right to disconnect.[64] Relatedly, recent studies have shown that employee productivity would not decrease with a lighter workweek.[65]

This rationale is supported by research undertaken since the right to disconnect was implemented, which showed 58% of employers reported the right to disconnect has had a positive effect on employee engagement and productivity. Additionally, only 4% of employers reported the right to disconnect had a negative impact on employee engagement and productivity.[66] This early research supports the rationale that the right to disconnect boosts employee productivity, or at the very least, does not harm it.

E *Disproportionate Impact on the Informal Care Sector*

Early discussions on the right to disconnect in Australia were in the context of informal carers being disadvantaged in the labour market.[67] While the right to disconnect implemented by the *Closing Loopholes Act No 2* is not exclusive to informal carers, I still argue the impact of the right is particularly important to those performing informal care.

Informal care refers to 'unpaid care and support to family members and friends', in particular young, elderly, and disabled people.[68] Unpaid childcare in Australia is estimated to be valued at $345 billion, which is 'almost three times the size of financial and insurance services, the largest industry in the formal economy'.[69] Recent data confirms that women are still undertaking the majority of the informal care, especially in terms of looking after young children.[70] Resultingly, women's 'healthy work-hour threshold is considerably lower than

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64 Golding, 'Unwinding Australia's New Right to Disconnect' (n 9) 215–16. See also Von Bergen and Bressler (n 21) 54–5; Paul M Secunda, 'Hybrid Federalism and the Employee Right to Disconnect' (2019) 46(4) *Pepperdine Law Review* 873, 876; Pucheta and Costa (n 2) 970.

65 Golding, 'Unwinding Australia's New Right to Disconnect' (n 9) 215–16. See also Marcum, Cameron and Versweyveld (n 40) 75; Kyle Lewis et al, *The Results Are in: The UK's Four-Day Week Pilot* (Report, February 2023); Guðmundur D Haraldsson and Jack Kellam, *Going Public: Iceland's Journey to a Shorter Working Week* (Report, June 2021).

66 Australia HR Institute, *Quarterly Australian Work Outlook: June Quarter 2025* (Report, June 2025) 18–23.

67 Senate Select Committee on Work and Care, Parliament of Australia, *Interim Report* (n 26) 108–9 [6.37]–[6.45].

68 Ibid 4 [1.25]–[1.26].

69 Ibid 14 [2.8].

70 Australian Institute of Family Studies, *Towards COVID Normal: Employment & Work-Family Balance in 2020* (Research Report No 2, June 2021) 1, 9.

men doing the same' work.[71] Consequently, women are disadvantaged in obtaining higher paying jobs as '[t]here is a direct correlation between long working hours and high-paying jobs'.[72] A Spanish study on the connection between telework and care noted:

> the pressure on women to act as superwomen who can do it all has intensified in recent years, forcing them to display a high capacity to cope with all life scenarios, in a context where the division of labour in the private sphere remains an unresolved challenge.[73]

When male and female informal carers are then required to remain connected to work, they are placed in a more difficult position compared to employees not performing informal care. A recent study by Lily Chernyak-Hai et al on Australian employees with care responsibilities found that the higher the competing demands of work and care responsibilities, the higher the level of work-life interference.[74] This is reinforced by another recent Australian study, which found that a strong majority of employees working from home reported difficulty managing actively caring for children and working.[75]

Informal carers are already in a difficult situation in terms of managing time. Requiring constant connection furthers the burden on an informal carer's time management to a point where they simply do not have the hours in a day to be able to balance care and work responsibilities. Trying to remain dedicated to both these areas may negatively impact the health of carers.[76] Ultimately, a right to disconnect could contribute to creating more equitable labour market opportunities for carers, especially in terms of attaining more high-paying jobs.

F *A Right to Disconnect could Reduce Flexibility in the Workplace*

The main argument opposing the new right to disconnect from the Business Council of Australia and the Australian Industry Group ('AIG') appears to be the impact the right to disconnect will have on flexibility in the workplace.[77] This is also one of the

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71 Senate Select Committee on Work and Care, Parliament of Australia, *Final Report* (n 19) 18 [2.50]. See also Iduzki Soubelet-Fagoaga et al, '(Tele)Work and Care during Lockdown: Labour and Socio-Familial Restructuring in Times of COVID-19' (2021) 18(22) *International Journal of Environmental Research and Public Health* 12087:1–19, 14.

72 Senate Select Committee on Work and Care, Parliament of Australia, *Final Report* (n 19) 16 [2.43]–[2.44].

73 Soubelet-Fagoaga et al (n 71) 14.

74 Lily Chernyak-Hai et al, 'Unpaid Professional Work at Home and Work-Life Interference among Employees with Care Responsibilities' (2021) 155(3) *The Journal of Psychology* 356, 366–7.

75 Australian Institute of Family Studies (n 70) 7.

76 Senate Select Committee on Work and Care, Parliament of Australia, *Final Report* (n 19) 99–100 [5.71]–[5.75].

77 Business Council of Australia, 'Industrial Relations Changes a Blow to Australia's Prosperity' (Media Release, 8 February 2024)

main contentions of the Coalition.[78] Acknowledging national system employees presently have a right to disconnect, I still note this point for the purposes of later discussions on the adequacy of the new right to disconnect in Australia.

These concerns are understandable in that some flexibility will be removed. The current right to disconnect model is based on not requiring employees to monitor communications outside of working hours. For employees allowed to work flexibly within a span of hours, as opposed to having set working periods, flexibility may be curtailed as having a right to disconnect first requires having set working hours.

However, if implemented properly I argue a right to disconnect will still have a net positive effect. As noted by Barbara Pocock, the new legislation is likely to facilitate discussions between employees and employers around methods and time of contact.[79] If anything, this can facilitate the improved operation of informal and formal flexible working arrangements in that contactable times are included within the negotiation.

Flexible working arrangements are seen to have many benefits, including for example, increasing productivity[80] and giving workers with caring responsibilities access to similar opportunities to those without caring responsibilities.[81] However, this is countered by the blurring of the line between working and non-working time, leading to more hours being worked.[82] Hence the right to disconnect has the potential to take away one of the key disadvantages of flexible working arrangements if applied correctly.

In a more general sense, it is important for the right to disconnect to be flexible to accommodate for the diverse needs of different industries, employers, and employees.[83]

<https://www.bca.com.au/industrial_relations_changes_a_blow_to_australia_s_prosperity>; Rob Harkavy, 'New Australian "Right to Disconnect" Law Sparks Backlash from Business Groups', *ICLG* (Web Page, 12 February 2024) <https://iclg.com/news/20133-new-australian-right-to-disconnect-law-sparks-backlash-from-business-groups>.

78 Senate Select Committee into Work and Care, Parliament of Australia, *Final Report* (n 19) 201 [1.2]–[1.5]; Senate Select Committee into Work and Care, Parliament of Australia, *Interim Report* (n 26) 120 [1.11]–[1.14].

79 David Marin-Guzman, 'Crossbench and Greens Seal Deal on Workplace Changes', *Australian Financial Review* (online, 7 February 2024) <https://www.afr.com/work-and-careers/workplace/workers-to-get-right-to-ignore-after-hours-calls-from-bosses-20240207-p5f313>.

80 Pucheta and Costa (n 2) 970.

81 Productivity Commission (n 4) 84.

82 See Jon Messenger et al, *Working Anytime, Anywhere: The Effects on the World of Work* (Research Report, Eurofound and the International Labour Office, 24 April 2017) 23; Jochman (n 2) 209; Secunda, 'Hybrid Federalism and the Employee Right to Disconnect' (n 64) 876.

83 Pakes (n 19) 4; Daniel Ziffer, '"Right to Disconnect" Fight to Expand as Unions Push Claims in Enterprise Agreements', *ABC News* (online, 7 April 2021) <https://www.abc.net.au/news/2021-04-07/right-to-disconnect-fight-to-expand-trade-union-eba-push/100050264>.

III Were the Pre-Existing Laws in Australia Sufficient?

Before discussing the adequacy of the Australian right to disconnect model, this Part will discuss the adequacy of the pre-existing Australian laws at addressing the rationale for the right to disconnect discussed in Part II. This includes: (1) maximum working hours provisions in the NES; (2) work health and safety laws; and (3) common law duties.

A *Maximum Weekly Hours*

The AIG has contended the maximum weekly hours provision in s 62 of the *FW Act* could be sufficient in enforcing a right to disconnect. They have stated '[i]f there are concerns that these laws aren't being followed we need to look at educating people about them and enforcing them, rather than simply introducing a further layer of impractical regulation'.[84]

Employees have a right to refuse to work unreasonable overtime,[85] however they can otherwise be directed to work overtime.[86] Hence if the employer is not asking for too much, and they are not disincentivised by the premium to be paid for working overtime, then an employee must work that overtime. Failure to follow a lawful and reasonable direction is grounds for dismissal.[87]

As discussed in Part II(B), replying to sporadic messages is unlikely to be considered 'work' and therefore the maximum weekly hours provision in s 62 of the *FW Act* is not applicable and consequently inadequate. However, given some activities associated with constant connection may be considered work, I will still consider whether any overtime would be considered reasonable.

The *FW Act* sets out a list of factors to consider whether overtime is reasonable. The factors are: (1) employee health and safety; (2) employee's personal circumstances; (3) workplace needs; (4) entitlement to overtime payments; (5) notice given by the employer; (6) notice given by the employee to refuse additional hours; (7) work patterns in the industry; (8) nature of the employee's role; (9) accordance with averaging terms in awards; and (10) other relevant matters.[88]

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[84] Australian Industry Group, 'Pushing "Right to Disconnect" through Parliament a Recipe for Disaster' (Media Release, 2 February 2024) <https://www.aigroup.com.au/news/media-centre/2024/pushing-right-to-disconnect-through-parliament-a-recipe-for-disaster/>.

[85] *FW Act* (n 7) s 62(2). See also *Brown v Premier Pet* [2012] FMCA 1089 [20]–[22] (Jarrett FM), affd *Premier Pet Pty Ltd v Brown [No 2]* [2013] FCA 167 ('*Premier Pet*').

[86] See, eg, *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* (2015) 230 FCR 298, 332–3 [175]–[180] (Logan, Bromberg and Katzmann JJ); *Gorval v Employsure Pty Ltd* [2016] FCCA 231, [37] (Judge Altobelli) ('*Gorval*').

[87] *Adami v Maison de Luxe Ltd* (1924) 35 CLR 143, 153–4 (Isaacs ACJ), 155–6 (Gavan Duffy and Starke JJ); *Grant v BHP Coal Pty Ltd* [2014] FWC 1712, [148] (Commissioner Spencer), affd (2014) 244 IR 176. See also *R v Darling Island Stevedoring & Lighterage Co Ltd; Ex parte Halliday; Ex parte Sullivan* (1938) 60 CLR 601, 621–2 (Dixon J); *FW Regulations* (n 61) reg 1.07(3)(c).

[88] *FW Act* (n 7) s 62(3).

In applying these factors, 'each case must be considered on its own facts'.[89] In deciding what is considered reasonable, it may also be necessary to consider awards, enterprise agreements and contracts. For example, a clause in an enterprise agreement stating 104 hours of overtime per year is reasonable can inform a decision that a requirement to work 455 hours of overtime per year is unreasonable.[90] There can be no claim of unreasonable overtime if the employee voluntarily works the overtime without the direction of their employer.[91]

As outlined in Part II(A), constant connection can have negative health implications. Consequently, overtime involving constant connection that is a 'risk to employee health and safety' is arguably unreasonable.[92] Further, as outlined in Part II(E), constant connection has a particularly strong impact on those involved in informal care. Consequently, requiring overtime involving constant connection without considering this personal circumstance may similarly be considered unreasonable.[93]

However, the number of additional hours can be considered as an additional matter in determining reasonableness.[94] Time spent returning calls and messages is likely to be nominal, weighing against an argument a direction to communicate beyond standard working hours would be unreasonable.[95]

The laws around work and reasonable overtime lend themselves to flexible application, with each case being decided on its own merits due to ambiguous and unique industrial instruments. The issue with flexibility in this sense is that the maximum weekly hours provision may not cover some employees that wish to disconnect, leading to continuation of the issues discussed in Part II. Further, if an employer directs an employee to communicate outside of the employee's working hours, but without exceeding the maximum hours allowed by the NES, the ability to refuse unreasonable overtime will not help the employee. Maximum working time legislation should complement an explicit right to disconnect for maximum effectiveness.[96]

While breaks between on-call periods may offer a mechanism to recognise a right to disconnect, it is far from uniform. As breaks between on-call periods are not required by the *FW Act*, it is down to specific instruments to establish this right. Not all awards contain on-call provisions,[97] and those that do may not

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89 *Premier Pet* (n 85), [31] (Collier J).

90 See *Construction, Forestry, Maritime, Mining and Energy Union v Hay Point Services Pty Ltd* (2019) 291 IR 415.

91 See *Picos v Healthengine Pty Ltd* [2015] FCCA 1983, [76]–[82], [231] (Judge Lucev).

92 See *FW Act* (n 7) s 62(3)(a).

93 See ibid s 63(3)(b).

94 *Australasian Meat Industry Employees Union v Dick Stone Pty Ltd* (2022) 314 IR 441, 487 [250] (Katzmann J).

95 See *Gorval* (n 86) [36] (Judge Altobelli).

96 See Chesalina (n 3) 47–9.

97 See, eg, Fair Work Commission, *Aged Care Award 2010* (MA000018, 1 January 2010); Fair Work Commission, *Miscellaneous Award 2020* (MA000104, 1 January 2010); Fair Work Commission, *Restaurant Industry Award 2020* (MA000119, 1 January 2010); Fair Work Commission, *Fast Food Industry Award 2020* (MA000003, 1 January 2010).

mandate breaks between on-call periods.[98] Further, the interpretation of an on-call provision depends on the wording in the specific instrument.[99] Consequently, the same issues arise regarding variable application.

Given the ambiguities around whether constant connection is work, and then whether it would be unreasonable overtime, the maximum weekly hours provision does not provide any uniform protection against the psychological risks of constant connection and overwork. In the same vein, there is little clarity around the distinction between an employee's working and private life, which does not help the disadvantages of flexible working arrangements. In terms of offering equity to informal carers, it is equally inadequate. There remains the issue of whether responding to messages is work in the first place, and informal carers may not be working more than the required 38 hours to enliven this protection.

B *Work Health and Safety Acts*

The Commonwealth and each state and territory in Australia have work health and safety Acts that provide punishments for persons conducting a business or undertaking ('PCBU') who breach their duty of care to workers.[100] While this legislation was initially intended to be uniform, various circumstances now mean this is not the case.[101] For simplicity, the *Work Health Safety Act 2011* (Cth) ('*WHS Act*') will be referred to throughout this Part. Unlike the *FW Act*, the *WHS Act* does not apply to national system employers; it only applies to the Commonwealth, Commonwealth authorities and some limited designated private sector entities.[102] Workers in each state are covered by the work health and safety Act for that state.

PCBU's have a general duty to 'ensure, so far as is reasonably practicable, the health and safety of' workers.[103] This requires the elimination of risks, or if that is not reasonably practicable, the minimisation of risks so far as is reasonably practicable.[104]

The *Work Health Safety Regulations 2011* (Cth) ('*WHS Regulations*') were recently amended to specifically mention that PCBUs 'must manage psychosocial risks'.[105] All states except Victoria specifically address psychosocial risks in their

98 See, eg, Fair Work Commission, *Gas Industry Award 2020* (MA000061, 1 January 2010) cl 17.3; Fair Work Commission, *Plumbing and Fire Sprinklers Award 2020* (MA000036, 1 January 2010) cls 17.2–17.3.

99 See *Polan* (n 41) [64]–[65] (Mortimer J).

100 *Work Health and Safety Act 2011* (Cth) ('*WHS Act*'); *Work Health Safety Act 2011* (ACT); *Work Health Safety Act 2011* (NSW); *Work Health and Safety (National Uniform Legislation) Act 2011* (NT); *Work Health and Safety Act 2011* (Qld); *Work Health Safety Act 2012* (SA); *Work Health and Safety Act 2012* (Tas); *Occupational Health and Safety Act 2004* (Vic); *Work Health and Safety Act 2020* (WA).

101 Stewart (n 16) 356–7.

102 *WHS Act* (n 100) s 12.

103 Ibid s 19(1).

104 Ibid s 17.

105 *Work Health Safety Regulations 2011* (Cth) reg 55C ('*WHS Regulations*').

work health and safety legislation,[106] and Victoria is due to implement psychosocial risk regulations by the end of 2025.[107] The Managing Psychological Hazards at Work Code of Practice specifically identifies '[u]nreasonable or excessive time pressures or role overload' and '[s]hifts/work hours that do not allow adequate time for sleep or recovery' as psychosocial hazards.[108]

As noted in Part II(A), constant connection can lead to negative health implications, particularly mental health. Constant connection can be caused by excessive time pressures and work hours that do not allow adequate recovery time. Consequently, I argue constant connection constitutes a 'reasonably foreseeable [hazard] that could give rise to risks to health and safety'.[109] Therefore PCBUs are required to eliminate or minimise the psychosocial risks arising from constant connection 'so far as is reasonably practicable'.[110]

This seems to align with the view the Productivity Commission took prior to the amendments and new codes of practice that specifically recognise psychosocial risks:

> Given the relative clarity about this issue in WHS law, a 'right to disconnect' would only be needed as a preventative measure if evidence suggested that employees faced unreasonable pressure from their employers to remain 'available' despite existing protections.[111]

The effectiveness of the protection depends on what is considered 'reasonably practicable'.[112] Various factors are outlined in s 18 of the *WHS Act* to aid this interpretation. The degree of harm that could occur from overwork is as high as death,[113] which weighs in favour of eliminating the risk.[114] Further, in most circumstances it would seem available to the employer to message the employee

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[106] See *Work Health and Safety (General) Regulations 2022* (WA) pt 3.2 div 11; *Work Health and Safety Regulations 2012* (SA) ch 3 pt 2 div 11; *Work Health and Safety Regulation 2017* (NSW) pt 3.2 div 11; *Work Health and Safety Regulations 2022* (Tas) pt 3.2 div 11; *Work Health and Safety Regulation 2011* (ACT) pt 3.2 div 3.2.11; *Work Health and Safety (National Uniform Legislation) Regulations 2011* (NT) pt 3.2 div 11; *Work Health and Safety Regulation 2011* (Qld) pt 3.2 div 11.

[107] Ben Carroll, 'New Rules to Protect Workers' Mental Health' (Media Release, Victoria State Government, 21 February 2025) <https://www.premier.vic.gov.au/new-rules-protect-workers-mental-health>.

[108] Safe Work Australia, *Model Code of Practice: Managing Psychosocial Hazards at Work* (Code of Practice, 1 August 2022) 16.

[109] *WHS Regulations* (n 105) reg 34.

[110] See ibid reg 35; *WHS Act* (n 100) s 19.

[111] Productivity Commission (n 4) 46.

[112] *WHS Act* (n 100) s 18.

[113] Paul M Secunda, 'The Employee Right to Disconnect' (2019) 9(1) *Notre Dame Journal of International & Comparative Law* 1, 14. See also Justin McCurry, 'Japanese Woman "Dies from Overwork" after Logging 159 Hours of Overtime in a Month', *The Guardian* (online, 5 October 2017) <https://www.theguardian.com/world/2017/oct/05/japanese-woman-dies-overwork-159-hours-overtime>; Reuters, 'Working Long Hours Kills Hundreds of Thousands a Year, WHO Says', *ABC News* (online, 17 May 2021) <https://www.abc.net.au/news/2021-05-17/long-working-hours-kill-thousands-who-report-finds/100144968>.

[114] See *WHS Act* (n 100) s 18(b).

at a different time, which is a low-cost and easy-to-implement way to avoid this psychosocial hazard.[115]

A recent example of the intersection of work health and safety duties and the right to disconnect concerns Cobar Management Pty Ltd ('Cobar'). An anonymous notifier reported two finance employees were working excessive hours, noting those employees reported to a manager who was based in Switzerland and had a significant time difference. Cobar made several voluntary changes to decrease the risks of psychosocial injury from excessive working hours, notably including locking staff out of computers between 9:00pm and 5:00am unless an exemption was granted and providing training on the right to disconnect. Additionally, managers in different time zones were required to conduct risk assessment plans. Cobar spent $1,251,511.10 on rectifying initiatives and entered an enforceable undertaking with further initiatives costing $1,031,060.00 (inclusive of the regulator's recoverable costs).[116] While the issues within Cobar were broader than employees being unable to disconnect from work, the rectification measures highlight allowing employees to disconnect from work is one way to mitigate psychosocial hazards.

In practice more generally, it is evident there has been an increased focus on psychosocial risks in workplaces since the amendments to the *WHS Regulations*. While there is still some way to go, employers appear to be more conscious of the mental health of their employees. This is perhaps due to the significant penalties for a breach of a work health and safety duty, including a maximum $16,630,000.00 monetary penalty for corporations and 15 years imprisonment for individuals.[117] This creates a strong deterrence factor in breaching a work health and safety duty, including potentially by not allowing employees to disconnect from work. Albeit it is highly unlikely a breach of a work health and safety duty related to constant connection would attract such significant penalties.

In this regard the *WHS Act* is arguably an adequate way to protect against the psychological impact of constant connection. In the same way, allowing employees adequate rest time between work is a way to mitigate the risk of psychological injury, helping to clarify the distinction between an employee's working and private life and boosting productivity. The incidental effect of allowing employees adequate rest time is that employees are not contacted as frequently, preventing the possibility of unremunerated work.

However, one clear issue is that regulators have limited resources, and a limited ability to enforce compliance when the health and safety risk arises

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[115] See ibid ss 18(d)–(e).

[116] NSW Government, 'Enforceable Undertaking Accepted from Cobar Management Pty Ltd', *NSW Resources* (News Article, 31 January 2025) <https://www.resources.nsw.gov.au/news-articles/enforceable-undertaking-accepted-from-cobar-management-pty-ltd>.

[117] *WHS Act* (n 100) ss 31–3, sch 4 cl 1; Australian Government, 'Indexation of Penalty Amounts under the WHS Act', *Comcare* (News Article, 4 July 2024) <https://www.comcare.gov.au/about/news-events/news/penalty-amounts-indexation>. Penalties vary in different jurisdictions.

outside of the workplace. While the regulator has broad investigative powers,[118] their usefulness in enforcing a right to disconnect is questionable. It is far more difficult to identify the potential risk of a psychological injury from constant connection that could develop over time and potentially away from the workplace, in comparison to some acute physical injury that could occur at a workplace from an unsafe plant. Additionally, it is difficult to see any regulator having the resources to deal with such a broad issue. Consequently, the new right to disconnect is a useful complement to the *WHS Act* to further highlight, and create discussion on, the need to limit psychosocial risks to protect the mental health of employees.

Further, the *WHS Act* applies equally to those providing informal care and workers more generally. Hence it does not specifically address the inequalities for informal carers. However, they still stand to benefit from increased consideration of psychological health.

Overall, it is arguable the *WHS Act* creates an obligation for employers to allow employees to disconnect to mitigate psychosocial hazards. While not an explicit right to disconnect, viewing constant connection from a work health and safety perspective with the requirement to limit psychosocial hazards in the *WHS Act* can address the same issues the right to disconnect aims to resolve. This weighs against the need for an explicit right to disconnect, provided the requirements in the work health and safety Acts are being followed by employers, employees are making appropriate notifications to the regulators when the requirements are not being followed, and regulators are properly investigating and penalising PCBUs who breach their obligations. However, in circumstances where it will be difficult for a regulator to monitor compliance and enforce the work health and safety requirements, there remains a need for an explicit right to disconnect.

C *Common Law Duties: Negligence and Contractual Duty of Care*

An employer also has a duty of care to an employee at common law, both through negligence and an implied contractual term.[119] These two causes of action can coexist, in that the availability of one does not limit the availability of the other.[120] Further, these duties are 'identical in content'.[121] The general understanding of the duties in an employment context is as follows:

> The … employer was of course under a duty, by his servants and agents, to take reasonable care for the safety of the [employee] by providing proper and adequate means of carrying out his work without unnecessary risk, by warning him of unusual

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[118] *WHS Act* (n 100) s 155.

[119] Golding, 'The Right to Disconnect in Australia' (n 14) 740.

[120] *Astley v Austrust Ltd* (1999) 197 CLR 1, 22–3 [47]–[48] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

[121] *Nationwide News Pty Ltd v Naidu* (2007) 71 NSWLR 471, 517 [332] (Beazley JA).

> or unexpected risks, and by instructing him in the performance of his work where instructions might reasonably be thought to be required to secure him from danger of injury.[122]

However, the issue with these mechanisms and enforcing an indirect right to disconnect is *Koehler v Cerebos (Australia) Ltd* ('*Koehler*').[123] In that case, the employee frequently complained that she had insufficient resources and time to complete her job effectively, but did not disclose that she was stressed or otherwise at risk of psychiatric injury.[124] She was later diagnosed with a psychiatric disorder and it was not disputed stress from work was the cause.[125] However, the High Court decided the injury was not foreseeable, and set a precedent that has proved difficult to overcome:

> An employer may not be liable for psychiatric injury to an employee brought about by the employee's performance of the duties originally stipulated in the contract of employment. In such a case, notions of 'overwork', 'excessive work', or the like, have meaning only if they appeal to some external standard. ... Yet the parties have made a contract for employment that, by hypothesis, departs from that standard. Insistence upon performance of a contract cannot be in breach of a duty of care.[126]

The risks of psychiatric injury from constant connection that the right to disconnect aims to address fall squarely within the 'notions of "overwork", [and] "excessive work"' described in *Koehler*. Consequently, unless there is some clear outward indication that makes a stress-related injury foreseeable, it is unlikely constant connection would be compensable within these common law claims. Peter Handford has succinctly outlined the practicalities of this situation:

> The employee who stoically battles on, or who makes some sort of reference to his or her workload but is reluctant to disclose personal medical details, will be in a worse position than one who pours out a litany of problems at the earliest opportunity.[127]

The decision in *Kozarov v Victoria* ('*Kozarov*') exemplifies that it is still possible for employees to enforce the duty of care to protect themselves from psychiatric injuries.[128] However, it is conceded that *Kozarov* sets a high bar, as it involved a worker being repeatedly exposed to particularly distressing material in their role assisting in the prosecution of sexual offences, including viewing child pornography.[129] Indeed, Kiefel CJ and Keane J noted that complaints of excessive

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[122] *O'Connor v Commissioner for Government Transport* (1954) 100 CLR 225, 229 (Dixon CJ, Webb, Fullagar, Kitto and Taylor JJ).
[123] (2005) 222 CLR 44 ('*Koehler*').
[124] Ibid 51 [10] (McHugh, Gummow, Hayne and Heydon JJ).
[125] Ibid 51–2 [14].
[126] Ibid 56 [29].
[127] Peter Handford, 'Liability for Work Stress: Koehler Ten Years On' (2015) 39(2) *University of Western Australia Law Review* 150, 162.
[128] (2022) 273 CLR 115 ('*Kozarov*').
[129] Ibid 129–30 [32] (Gageler and Gleeson JJ).

work are still not sufficient to put the employer on notice that an employee is at risk of psychiatric injury.[130]

Consequently, the common law duty of care does not protect employees from psychological injury from constant connection in the same way as the new right to disconnect. Nor do the common law duties sufficiently protect against unpaid work, provide clarity between an employee's working and private lives, help boost productivity or reduce inequalities for informal carers.

It is beyond the scope of this article to discuss whether workers' compensation legislation in each state and territory would cover psychiatric injuries caused by constant connection to work. However, as a passing comment these schemes are primarily aimed at compensating for injuries after they have occurred, not as a preventative measure.[131] Accordingly, their effectiveness at preventing workplace injuries, including potential psychiatric injuries arising from constant connection, is largely dependent on the deterrence from the consequences of an accepted claim on employers. This may be impacted by: (1) whether that type of injury is compensable under the relevant legislation; (2) the financial consequences (which in turn may depend on the employer's insurance arrangements); (3) reputational damage; and (4) the practical difficulties of managing injured employees.

IV What is the Optimal Approach in Australia

This Part will provide a prospective analysis as to whether the new right to disconnect model in the *Closing Loopholes Act No 2* will be effective at solving the problems discussed in Part II. I will then discuss an alternative of a soft approach encouraging negotiations between employers and employees. This Part will conclude by outlining the methods of monitoring compliance that can be implemented to complement either the current model, or a revised model.

While the present model is new and its effectiveness will take some time to properly evaluate, there is merit in considering alternatives at this early stage. Simply because there is a model in place it does not mean it is not worth considering alternatives to optimise the operation of the present right to disconnect.

In her first article on this topic, Golding primarily focused on a right to disconnect as a term implied by law into employment contracts.[132] I do not generally disagree with this possibility, however, given we now have a legislative right to disconnect I have opted not to discuss this option in detail here.[133]

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130 Ibid 126–7 [12]–[19].

131 See, eg, *Workers' Compensation and Rehabilitation Act 2003* (Qld) s 5; *Workplace Injury Management and Workers Compensation Act 1998* (NSW) s 3; *Workers Rehabilitation and Compensation Act 1988* (Tas) s 2A.

132 See Golding, 'The Right to Disconnect in Australia' (n 14) 750–5.

133 However, the discussion on the right to disconnect as an implied contractual term could be relevant for employees in non-referring states: see above n 17.

A *Right to Disconnect Model Implemented by the* Closing Loopholes Act No 2

The right to disconnect model implemented by the *Closing Loopholes Act No 2* allows '[a]n employee [to] refuse to monitor, read or respond to contact, or attempted contact, from an employer outside of the employee's working hours unless the refusal is unreasonable'.[134] Employees' right to disconnect also extends to work-related communication from third parties.[135] While it is not an exhaustive list, the following must be considered when determining whether a refusal is unreasonable:

(a) the reason for the contact or attempted contact;

(b) how the contact or attempted contact is made and the level of disruption the contact or attempted contact causes the employee;

(c) the extent to which the employee is compensated:

  (i) to remain available to perform work during the period in which the contact or attempted contact is made; or

  (ii) for working additional hours outside of the employee's ordinary hours of work;

(d) the nature of the employee's role and the employee's level of responsibility;

(e) the employee's personal circumstances (including family or caring responsibilities).[136]

There is also a mandated dispute resolution process that requires an employee and employer to first have workplace level discussions before an application can be made to the Fair Work Commission ('FWC').[137] The FWC is then empowered to make orders against an employee requiring them to stop unreasonably refusing communication, or against an employer preventing them from taking any action against an employee exercising their right to disconnect.[138] A contravention of these orders can result in a maximum civil penalty of 60 penalty units,[139] or pecuniary penalty of five times this amount for body corporates, being 300 penalty units.[140] This equates to $19,800.00 for individuals and $99,000.00 for body corporates.[141] Notably, the potential for criminal penalties for failure to recognise a right to disconnect was removed by the *Fair Work Amendment Act 2024* (Cth).[142]

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134 *FW Act* (n 7) s 333M(1).
135 Ibid s 333M(2).
136 Ibid s 333M(3).
137 Ibid s 333N.
138 Ibid s 333P.
139 Ibid ss 333Q, s 539.
140 Ibid s 546(1)(b).
141 At the time of writing, a penalty unit equates to $330.00: *Crimes Act 1914* (Cth) s 4AA(1).
142 *FW Act* (n 7) s 675(2)(fa).

The right to disconnect is also a workplace right,[143] which is an important protection for employees. An employer cannot take adverse action against an employee because the employee has exercised a workplace right.[144] Adverse action includes dismissing an employee or generally treating them less favourably compared to other employees.[145] Accordingly, the inclusion of the right to disconnect as a workplace right is particularly important, as an employee has a claim of action against an employer who dismisses them or otherwise treats them less favourably because of a reasonable refusal to monitor out-of-hours contact. This is also significant as there are no eligibility requirements for employees to make an adverse action claim, or a cap on compensation that can be awarded. In this way, it provides protection to employees who do not meet the qualifying requirements to make an unfair dismissal claim, and enables them to seek reinstatement, or compensation above what could be awarded in an unfair dismissal claim.[146]

The right to disconnect is also a mandatory award term, [147] which will allow the FWC to decide on the appropriate carve-outs in awards for when employees must monitor communications in addition to the general unreasonable refusal to monitor carve-out in the legislation.

It is noteworthy that the current model is not a prohibition on out-of-hours contact from the employer,[148] but framed as an employee right to refuse to monitor such contact. Hence under the current model, there is nothing stopping employers and third parties continually contacting employees. In this way the adequacy of the model at preventing the psychological risks is somewhat diminished. If employees receive work communications on personal devices, they will still see the notification of a message and potentially some of its content depending on their notification settings. Seeing the notification may prompt them to read the message in any event, and hence the right to disconnect becomes partially redundant. While an employee may simply turn off their notifications, or not monitor a work device, this begs the question of how an employee will determine whether a refusal to monitor or respond to communications is

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143 Ibid s 333M(4).

144 See ibid s 340(1)(a).

145 Ibid s 342.

146 To be eligible to make an unfair dismissal claim, an employee must be employed for six months and either: (1) be covered by an award; (2) be covered by an enterprise agreement; or (3) be under the high-income threshold: ibid s 382. Remedies for unfair dismissal are limited to reinstatement and compensation capped at the lesser of 26 weeks of remuneration or half the high-income threshold: ibid s 392. Comparatively, adverse action is a civil remedy provision, and the Federal Circuit and Family Court of Australia is granted board powers to 'make any order the court considers appropriate if the court is satisfied that a person has contravened, or proposes to contravene, a civil remedy provision': ibid s 545(1).

147 Ibid s 149F. For more detailed discussion of the legislative scheme see Golding, 'Unwinding Australia's New Right to Disconnect' (n 9) 207–13.

148 For example, in Portugal, employers are prohibited from contacting employees during their rest periods except for situations of '*force majeure*': *Portuguese Labour Code* (n 12) art 199.º-A. See also Ana Teresa Ribeiro, 'Labour Law in Portugal during the Pandemic: Main Measures and Developments' (2022) 15(2) *Italian Labour Law e-Journal* 105, 115.

reasonable if they are not even seeing the message. They would be unable to determine the reason for the contact as well as the method and level of disruption of the contact, two of the factors in determining reasonableness.

Alternatively, this could be viewed as a strength of the model as it accommodates employees who do not want to disconnect from their workplace.[149] The model allows those employees to continue to monitor communication without consequence to the employer. A prohibition on contact would have taken the decision out of the hands of employees.

The European experiences regarding the right to disconnect have illustrated that a hard approach is effective at creating a cultural change towards better work-life balance. For example, Groupe JLO started with a hard approach, completely preventing out-of-hours contact. They later changed their approach to better facilitate employee flexibility. However, they noted that the hard approach successfully contributed to a culture shift towards more balanced working.[150] In a similar way, a hard approach like the current model in Australia could facilitate a culture shift towards more balanced working and non-working lives.

One strength of this model is the explicit consideration of compensation for being contactable when determining reasonableness. This partially alleviates the issue that responding to isolated messages is unlikely to fall within compensable work time as discussed in Part II(B) as employers may start to explicitly pay employees more to be contactable outside working hours through on-call or similar clauses. Modern awards with on-call provisions provide some clarity that the right to disconnect does not apply: (1) when an employee is being paid an availability allowance and the contact is for notification of attendances at work; (2) when an employee is being recalled to work; and (3) for an emergency roster change.[151]

Of course, remuneration is only one consideration, and it is possible that employees will not be able to exercise a right to disconnect despite not receiving additional remuneration if other factors suggest exercising the right is unreasonable. Further, it seems an inevitability that employment contracts will begin to have a standard term to the effect of: 'your salary includes compensation for being contactable outside of working hours'. This will likely diminish the relevance of the consideration as employers can then argue they are compensating their salaried employees for being contactable outside working hours when there is unlikely to be any specific allowance for this in a salaried employee's remuneration. However, I suggest this is still a positive change as employees may be able to negotiate a right to disconnect in return for a slightly lower salary or vice versa.

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149 See, eg, Schofield (n 5).

150 Weber and Llave (n 15) 41, 50, 52.

151 See, eg, Fair Work Commission, *Nurses Award 2020* (MA000034, 1 January 2010) cls 13A.4–13A.5; Fair Work Commission, *Banking, Finance and Insurance Award 2020* (MA000019, 1 January 2010) cls 13A.4–13A.5; Fair Work Commission, *Fire Fighting Industry Award 2020* (MA000111, 1 January 2010) cls 12A.4–12A.5.

Having a consideration for caring responsibilities is a positive step in resolving some of the challenges faced by informal carers discussed in Part II(E). However, it is unclear how the FWC will balance the considerations if there is a senior employee with a high level of responsibility who is also providing informal care. If the level of responsibility consideration is given greater weight compared to the caring responsibilities consideration, then the model may be ineffective in this purpose. Alternatively, if they are given equal weight the other considerations may be the deciding factor.

The main issue with this model is the ambiguity. Until cases begin coming before the FWC, it is unclear what will be considered an unreasonable exercise of the right to disconnect. Indeed, President Hatcher has indicated the FWC will not produce guidelines until they have dealt with some disputes and 'have some understanding of the practical issues for which guidance may be required.'[152] This ambiguity could have significant consequences for an employee or employer if the first case to come before the FWC concerns an adverse action claim involving termination following a worker exercising the right to disconnect. For an employee, they may be terminated for what they believed was a permissible exercise of the right to disconnect. On the other hand, an employer may be required to pay damages or reinstate the employee. However, this situation will not arise if the parties use the dispute resolution procedure in s 333P of the *FW Act* and the FWC determines whether the refusal to monitor communications is unreasonable prior to any dismissal.

I acknowledge the ambiguity associated with the right to disconnect is generally aligned with the industrial relations system created by the *FW Act*. The right to disconnect provision in s 333M of the *FW Act* is comparable to the maximum weekly hours provision in s 62 of the *FW Act* and the employee's entitlement to be absent on a public holiday in s 114 of *FW Act*, in that all three provisions list out several factors that the FWC is required to take into account to determine reasonableness for each test. However, that does not mean the ambiguity will not be an issue. For example, s 114 of the *FW Act* continues to be subject of numerous disputes.[153]

By the start of March 2025, seven right to disconnect disputes had been lodged in the FWC, with four related to adverse action and other dismissal laws.[154] However, as at 21 August 2025, the FWC has not 'been asked to deal with any test

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152 *Re Variation of Modern Awards to Include a Right to Disconnect Term* [2024] FWC 1818, [11] (Hatcher P).

153 See, eg, *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1; *Premier Pet* (n 85); *Sagona v R & C Piccoli Investments Pty Ltd* [2014] FCCA 875; *Fair Work Ombudsman v DTF World Square Pty Ltd (in liq) [No 3]* [2023] FCA 201; *Australasian Meat Industry Employees Union v Dick Stone Pty Ltd* (n 94); *United Workers' Union v Bervar Pty Ltd* [2022] FedCFamC2G 418; *Australian Salaried Medical Officers Federation v Goulburn Valley Health* [2024] FWC 807.

154 David Marin-Guzman, 'The Right to Disconnect is Becoming the Right to Sue', *Australian Financial Review* (online, 2 March 2025) <https://www.afr.com/work-and-careers/workplace/the-right-to-disconnect-is-becoming-the-right-to-sue-20250228-p5lfuz>.

cases regarding the substantive right to disconnect provisions in the FW Act'.[155] Acknowledging seven cases in approximately six months is not an excessive amount, it remains to be seen whether the right to disconnect will be an ongoing basis for unfair dismissal and adverse action claims.

Another negative of the current model is the framing of the current right to disconnect may reduce flexibility, in that for an employee to have a right to refuse to monitor out-of-hours communications, they must first have defined hours. Salaried employees without specific set working hours may now be forced into a specific period of work if they wish to disconnect. This may have a similar effect on employees with flexible working arrangements. In this way the framing of the right to disconnect around working hours appears to be a step backwards for flexible working arrangements, however a step forward in distinguishing between an employee's working and private life.

Overall, the ambiguities in the present model make it difficult to determine how adequate the model will be. The level of psychological protection from the impacts of constant connection and associated boosts to productivity will largely depend on the interpretation of what is an unreasonable refusal to monitor communications. The specific consideration for caring responsibilities does help to address the inequalities for carers in the labour market. The specific consideration for remuneration for being connected may help initiate discussions on more on-call or similar constant connection allowances.

However, these positives must be weighed against a potential to limit flexibility and considered in the context of work health and safety legislation which largely addresses the issues with psychosocial risks. Acknowledging the lack of any judicial interpretation of the current right to disconnect, in my view the current model is not the best approach when considered against the issues it is attempting to solve.

B *Soft Approach: Encouraging Negotiations*

One legislative approach Australia could have implemented is a framework that encourages negotiations between employees and employers to implement a right to disconnect. Indeed, the right to disconnect was implemented, to some extent, with the intention of encouraging communications between employees and employers about boundaries and working time.[156]

At least having a legislative requirement to negotiate is preferable to having no legislation aimed at recognising a right to disconnect. Self-regulation generally risks 'abuse [of] unequal power relationships' in an employment

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[155] *Re Variation of Modern Awards to Include a Right to Disconnect Term* [2025] FWCFB 185, [4] (Hatcher P, Asbury V-P, O'Neill D-P, Commissioner McKinnon).

[156] See above n 79. See also Commonwealth, *Parliamentary Debates*, Senate, 8 February 2024, 232 (Murray Watt).

relationship.[157] Even if companies are prepared to negotiate voluntarily, there is no fall-back option if negotiations fall through.[158]

Alternatively, an employer is generally entitled to create a policy and then simply not follow it. There is no legally enforceable obligation for employers to follow their own policies unless they are incorporated into an enterprise agreement or an employment contract.[159] Employers may inadvertently incorporate policies into employment contracts, which can lead to significant awards of damages in an action for breach of contract if an employer is found to not have complied with their own policy.[160] However, following the decision in *WorkPac Pty Ltd v Rossato*, where the High Court emphasised the primacy of express terms in employment contracts,[161] an express term in an employment contract to the effect that an employer's polices do not form part of the contract is a strong basis for excluding policies from having contractual status. Consequently, a well-drafted employment contract will expressly exclude polices from having contractual status, enabling employers to enforce polices as a lawful and reasonable direction, without creating rights for an employee or binding the employer to a specific process.[162]

As a further alternative, without legislative guidance a company may make a policy which seems positive from an outside perspective to improve public image, but not actually offer any substantive protection.[163] Hence any policy-based approach is unlikely to offer any substantive protection to employees, as they will not actually have an enforceable right to disconnect.

In Australia, there were reportedly at least 56 enterprise bargaining agreements with a right to disconnect prior to the legislative amendments,[164] which suggests there was only a small portion of employers voluntarily creating legally enforceable rights for their employees.

The preferable soft approach is to give employees a right to negotiate an agreement with their employers on the right to disconnect that is then legally enforceable. This involves a similar type of legislation to that of France, however the precise model could have been improved and adapted to the Australian environment.

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[157] Judy Fudge, 'The New Discourse of Labor Rights: From Social to Fundamental Rights?' (2007) 29(1) *Comparative Labor Law & Policy Journal* 29, 56.

[158] See Weber and Llave (n 15) 2, 55.

[159] See Mark Giancaspro, 'Do Workplace Policies Form Part of Employment Contracts: A Working Guide and Advice for Employers' (2016) 44(2) *Australian Business Law Review* 106.

[160] See, eg, *Elisha v Vision Australia Ltd* (2024) 99 ALJR 171; *Romero v Farstad Shipping (Indian Pacific) Pty Ltd* (2014) 231 FCR 403; *Goldman Sachs JBWere Services Pty Ltd v Nikolich* (2007) 163 FCR 62.

[161] (2021) 271 CLR 456, 479–80 [65] (Kiefel CJ, Keane, Gordon, Edelman, Steward and Gleeson JJ).

[162] See, eg, *Robinson v Pilbara Iron Company (Services) Pty Ltd [No 2]* (2023) 326 IR 132.

[163] Secunda, 'The Employee Right to Disconnect' (n 113) 31.

[164] Commonwealth, *Parliamentary Debates*, Senate, 22 January 2024, 18 (Barbara Pocock).

In France, companies with over 50 employees are required to negotiate how they can respect employees' right to disconnect with employee representatives.[165] Failing this, employers are required to publish a charter that outlines 'the duties and rights of the employees beyond formal working time and allows the right to disconnect'.[166]

The French approach has illustrated that collective agreements are not the most effective way to implement the right to disconnect, with issues including a lack of enforceability,[167] and 'cut-and-paste' style agreements.[168] This is not dissimilar to many of the clauses in Australian awards at the time of writing, which simply cut-and-paste s 333M of the *FW Act*.[169]

It is possible the inclusion of the right to disconnect as a mandatory award term may increase the prevalence of more specific clauses in enterprise agreements. For the FWC to approve an enterprise agreement, it must be satisfied the agreement passes the better off overall test.[170] This requires that 'each award covered employee, and each reasonably foreseeable employee, for the agreement would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee'.[171] Accordingly, during enterprise bargaining, there may be some negotiation on right to disconnect clauses to ensure the enterprise agreement passes the better off overall test, which may lead to more specific right to disconnect clauses. However, a search of enterprise agreements on the FWC website shows that while, at the time of writing, there are several hundred enterprise agreements that now include a right to disconnect clause, many of them are still mostly copy and paste clauses from s 333M of the *FW Act* or from the relevant award, with little additional clarity.[172]

Further, only 34% of Australian employees are covered by enterprise agreements according to the most recent data.[173] Therefore, most employees will not benefit from the potential for more specific right to disconnect clauses in enterprise agreements.

I suggest that the right to disconnect could have been recognised by a 'right to request' style model that operates in a similar way to flexible working

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165 Golding, 'The Right to Disconnect in Australia' (n 14) 728–9; Tammy Katsabian, 'It's the End of Working Time as We Know It: New Challenges to the Concept of Working Time in the Digital Reality' (2020) 65(3) *McGill Law Journal* 379, 385; UNI Global Union, *Legislating a Right to Disconnect* (Report, 1 October 2020) 3–4.

166 Katsabian (n 165) 394.

167 Secunda, 'The Employee Right to Disconnect' (n 113) 28.

168 Katsabian (n 165) 395.

169 See, eg, Fair Work Commission, *Meat Industry Award 2020* (MA000059, 1 January 2010) cl 14A; Fair Work Commission, *Fast Food Industry Award 2020* (MA000003, 1 January 2010) cl 13A; Fair Work Commission, *Seafood Processing Award 2020* (MA000068, 1 January 2010) cl 13A.

170 *FW Act* (n 7) s 186(2)(d).

171 Ibid s 193(1)(a).

172 See, eg, Fair Work Commission, *DTM Enterprise Agreement 2024* (AE528116, 27 February 2025) cl 36; Fair Work Commission, *Svitzer Australia Port of Eden Lines and Launch Services Enterprise Agreement 2024* (AE527695, 31 January 2025) cl 27; Fair Work Commission, *Diona Pty Ltd Enterprise Agreement 2024–2028* (AE527145, 17 December 2024) cl 37.

173 Department of Employment and Workplace Relations (Cth), *Trends in Federal Enterprise Bargaining: December Quarter 2024* (Report, 27 March 2025) 5.

arrangements.[174] A right to request disconnection could have been included as part of the flexible working arrangements system or could have been implemented separately but using a similar model. Using this model or the framework of this model preserves flexibility, addressing the concerns noted above.[175]

Iain Campbell and Sara Charlesworth have outlined some key criteria for an effective right to request model.[176] The first criterion is that a right to request should be 'available to *all* employees, not only those with caring responsibilities'.[177] While Part II(E) noted that the impact of constant connection disproportionally affects informal carers, the negative health effects discussed in Part II(A) apply to all workers. Currently, there is only a right to request flexible work arrangements for limited classes of employees, namely, those that are pregnant, carers, disabled, over 55, or experiencing family and domestic violence (collectively, 'designated classes').[178] Hence if a right to request disconnection were implemented in line with the right to request flexible work arrangements, it would help the carers disproportionately affected by constant connection, but not all employees. From an employer perspective, they could reject such requests for any of the reasons in s 65A(5) of the *FW Act*, maintaining a balance between the interests of employees and employers.

Given the focus on addressing psychosocial hazards in the work health and safety legislation and the heightened impact of constant connection for informal carers, I am slightly more persuaded that only those within the designated classes should be able to request disconnection. If this were the case, it would still be within an employer's prerogative as to whether they would be willing to negotiate with employees outside the designated classes on a right to disconnect.

However, I equally accept being able to disconnect has benefits for all employees. In my view, if a right to request disconnection — and even to request flexible working arrangements more generally — was available to the entire workforce, it could still have an overall positive effect with employees feeling more refreshed, and employers potentially seeing productivity benefits and less absenteeism.[179]

The second criterion is that there should be a procedure for 'direct facilitation of a request', which includes anti-discrimination provisions for making a request.[180] The anti-discrimination portion of this criterion is accommodated by the general protections in the *FW Act*.[181] If a right to request disconnection were included as part of a flexible working arrangement, then it would already be covered by the

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[174] See Senate Select Committee on Work and Care, Parliament of Australia, *Interim Report* (n 26) 109 [6.44], where this idea received a passing mention.

[175] See above Part II(F).

[176] Sara Charlesworth and Iain Campbell, 'Right to Request Regulation: Two New Australian Models' (2008) 21(2) *Australian Journal of Labour Law* 116.

[177] Ibid 129 (emphasis in original).

[178] *FW Act* (n 7) s 65(1A).

[179] See above Part II(D).

[180] Charlesworth and Campbell (n 176) 129.

[181] *FW Act* (n 7) ss 341–2.

general protections. If it were introduced as a new mechanism, it may need to be included as an explicit workplace right.[182] In terms of the facilitation, there should be clear guidelines implemented on what is required in a disconnection agreement.[183] The most important requirement is clearly the uncontactable times. However, other important points include any permissible exceptions, both in terms of the purpose and methods of the communication that may be acceptable. The Fair Work Ombudsman could facilitate these guidelines in a similar manner to the current information provided on flexible working arrangement requests, which includes template letters and fact sheets.[184]

The final criterion is that a right to request disconnection would need to place a clear obligation on the employer to actually consider the request, including a right to review the decision.[185] Using the flexible working arrangements framework would accommodate this given the recently added detailed provisions on the requirements for an employer to refuse a request for flexible working arrangements, and the ability to refer the dispute to the FWC.[186]

Using the flexible working arrangement model would embrace the notions of flexibility that must be enshrined within any right to disconnect. It would allow workers who do not wish to disconnect to remain connected, and those that wish to disconnect to request that. The employer could refuse the request if it fell within the established reasons in s 65A(5) of the *FW Act*, but could not unreasonably refuse a request. In this way, all parties would have their interests balanced.

This would in theory improve the French model and prevent cut-and-paste style agreements applying to broad classes of employees. A personalised touch reduces the ambiguities that are present in the current model. If a right to request disconnection agreement was well-made, it would outline specific periods an employee could disconnect without having to worry about considering if their refusal to monitor communications is unreasonable. Further, using a disconnection window in a similar way to BMW and Evonik in Germany could alleviate the issue of defining working time in the current model.[187] For example, while an employee may work between 7:00am and 3:00pm Monday to Friday, the agreed disconnection period may be from 7:00pm to 5:00am Monday to Friday and all day Saturday and Sunday.

Once an agreement is reached, it would place an enforceable duty on the employer to not contact the employee. In this way, it would adhere to the

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[182] Although it may be part of 'other process or proceedings under a workplace law or instrument' that are already a protected workplace right: ibid s 341(2)(k).

[183] See Productivity Commission (n 4) 45; Golding, 'The Right to Disconnect in Australia' (n 14) 749.

[184] See 'Flexible Working Arrangements', *Fair Work Ombudsman* (Web Page) <https://www.fairwork.gov.au/employment-conditions/flexibility-in-the-workplace/flexible-working-arrangements>.

[185] Charlesworth and Campbell (n 176) 130.

[186] *FW Act* (n 7) ss 65A–65B. These provisions only came into effect on 6 June 2023: *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) s 2, sch 1 pt 11. See also *Naden v Catholic Schools Broken Bay Ltd* [2025] FWCFB 82.

[187] Weber and Llave (n 15) 33, 37.

argument that an employer duty is more effective than an employee right for effectively recognising a right to disconnect.[188]

The downside is that this would place the obligation on the employee to make the initial request, instead of making it a duty of the employer. Even with anti-discrimination provisions in place, employees might be reluctant to make a request for fear of reprisal. This is one weakness compared to the current model, which does not require the employee to do anything at first instance.

Overall, a right to request disconnection could be effectively implemented using the flexible working arrangement framework, either by making it part of the existing framework, or creating a new section based on that framework. In this way, it could reduce the inadequacies in the ambiguities in the present model and better serve the rationale the right to disconnect was implemented for.

C *Monitoring Compliance*

Any method of recognising a right to disconnect should be complemented with adequate monitoring and compliance auditing.[189] This could be like the requirements for heavy vehicle drivers to keep a diary of working and rest times for fatigue management.[190] Given employees remain connected through ICT, and employers already use software to track ICT use, this does not appear too onerous for employees using devices supplied and maintained by employers. However, the difficulty arises for employees with work communications on their personal devices, or employers who do not have the resources to track ICT use. This also raises the significant issue that data surveillance is unlawful in some jurisdictions without the consent of the owner of the device.[191]

Further, mandatory recording of time outside formal working time — accounting for the minutes it takes to respond to a message — may make an employer feel justified in capturing all working time by an employee while at work, and docking pay for incidental things like toilet breaks.[192]

While it is beyond the scope of this article to discuss specific recordkeeping obligations under the *Privacy Act 1988* (Cth), employee information about 'the employee's hours of employment' is exempt from the requirements of that Act.[193]

However, from a policy perspective there should also be some consideration to respect the privacy of the worker.[194] One method is to require the worker's consent

[188] Chesalina (n 3) 57; Ribeiro (n 148) 115.
[189] See Secunda, 'The Employee Right to Disconnect' (n 113) 28; Weber and Llave (n 15) 56.
[190] *Heavy Vehicle National Law 2013* (ACT) s 293; *Heavy Vehicle National Law 2013* (NSW) s 293; *Heavy Vehicle National Law Act 2012* (Qld) s 263; *Heavy Vehicle National Law (South Australia) Act 2013* (SA) s 293.
[191] See, eg, *Surveillance Devices Act 2016* (SA) s 8; *Surveillance Devices Act 2007* (NSW) s 10.
[192] Katsabian (n 165) 392.
[193] *Privacy Act 1988* (Cth) ss 6 (definition of 'employee record'), 7B(3).
[194] Katsabian (n 165) 391. See also Secunda, 'The Employee Right to Disconnect' (n 113) 8–10.

before tracking their ICT activity to monitor compliance.[195] An alternative method is to use software which tracks the time emails or messages are sent to ensure they are within the allowable timeframes.[196] Irrespective of the method of data collection, the collection process and uses of the data should be transparent to employees.[197]

In the absence of software to track these communications, an employer could use the cheaper but more time-consuming method of manually recording out-of-hours communications. However, it seems impossible for an employer to track work-related communications from third parties to their employees outside of working hours on non-employer-owned devices without data tracking software. In such situations, the responsibility would likely fall on the employee to record out-of-hours communications themselves.

I acknowledge the wording of the current right to disconnect model does not place an obligation on an employee to report incidents of out-of-hours contact. However, a record of out-of-hours contact may be relevant if there is a dispute about whether a refusal to monitor communications was unreasonable. In addition, this data could be considered by employers to reduce the chances of psychosocial injury in accordance with the *WHS Act*.

V Conclusion

It is becoming a necessity in the modern working world dominated by ICT for employees to be able to disconnect from their work, both in terms of completing substantive work, and sporadically reading and replying to messages. Without this disconnection, employees are exposed to a range of health issues associated with stress and overwork.

Prior to the *Closing Loopholes Act No 2*, a variety of mechanisms may have been indirectly able to recognise a right to disconnect in Australia. In particular, the new focus on psychosocial risks in the various work health and safety Acts arguably makes constant connection an identifiable psychosocial hazard and places an obligation on employers to allow employees to disconnect from work. Accordingly, there is less necessity in an explicit right to disconnect given the negative psychological effects are the primary issue the right to disconnect aims to resolve.

However, I remain of the view an explicit right to disconnect has some utility, but I tentatively suggest a right to request disconnection would be more appropriate than the current model in the *Closing Loopholes Act No 2*. I argue the broad-brush approach taken presents too much ambiguity, especially when considering what is unreasonable, and has the potential to limit flexible working arrangements.

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195 Katsabian (n 165) 391.

196 See Weber and Llave (n 15) 45–7.

197 See Australian Unions, *Working from Home* (Charter, 17 November 2020) 3 <https://www.actu.org.au/wp-content/uploads/2023/06/media1449328d59-working-from-home-charter-2.pdf>.

Contrastingly, a right to request disconnection allows for individual circumstances to be considered leading to tailored and more effective agreements directly between employers and employees that preserve flexibility. In my view, a right to disconnect negotiated on a case-by-case basis between employers and employees is more effective than a broad prohibition on out-of-hours contact.

At the very least, the discussions generated by the right to disconnect have and will continue to foster improved communications about work-life balance. Following Labor being re-elected to government in the 2025 federal election, the right to disconnect is likely to continue to feature within the Australian industrial relations framework. With some slight tweaks, a right to disconnect has the potential to lead to happier and more productive workplaces and have a positive impact on both employers and employees.

LOCKDOWN LAWS: LOCATION, REGULATORY CHANGE AND THE RULE OF LAW IN AUSTRALIA DURING THE COVID-19 PANDEMIC

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Lockdowns introduced in response to the COVID-19 pandemic impacted the lives of Australians during 2020 and 2021. In this article, we analyse the number and duration of lockdowns in Australian states and territories during this period, with the aim of developing a picture of the differing impact of lockdowns across the country. We begin by considering the importance of transparency for the rule of law. We explain our methodology and challenges for collecting the data on the lockdowns, and the implications of this complexity for the rule of law. We then analyse the lockdowns in terms of their number and duration, beginning with a national overview and then analysis by individual state and territory. We conclude with recommendations for the future of public health directions in Australia.

I INTRODUCTION

During 2020 and 2021, Australians spent significant periods of time in lockdown. Lockdowns were introduced in response to the COVID-19 pandemic which was declared a public health emergency of international concern in early 2020.[1] As a result, the lives of millions of Australians were adversely impacted.

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1 The World Health Organization declared a public health emergency of international concern in late January 2020: 'Statement on the Second Meeting of the International Health Regulations (2005) Emergency Committee Regarding the Outbreak of Novel Coronavirus (2019-nCov)', *World Health Organization* (Web Statement, 30 January 2020) <https://www.who.int/news/item/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov)>. In Australia, a human biosecurity emergency was declared on 18 March 2020: *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020* (Cth).

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Unemployment rates increased[2] and pandemic-related lockdowns led to increased psychological distress.[3] For some, the lockdowns presented increased risks of domestic violence.[4] While the lockdown restrictions varied between jurisdictions (and between lockdowns within the same jurisdiction), a common feature was that people were required to stay at home and were only permitted to leave home for specified authorised reasons. However, across Australia the experience of lockdowns was not even. Some jurisdictions such as Tasmania and South Australia experienced few lockdowns, but in Australia's most populous states, New South Wales ('NSW') and Victoria, the number and duration of lockdowns was much greater. In 2021, Melbourne earned the title of being the most locked-down capital city in the world.[5]

In this article, we chart the number and duration of lockdowns in each Australian state and territory during 2020 and 2021. In doing so we aim to develop a picture of the differing impact of lockdown laws on Australians, the complexity of the restrictions introduced, and the implications of this complexity for the rule of law. The lockdown laws were part of a suite of measures introduced around Australia in response to the pandemic.[6] By 'lockdown laws', we refer to the directions and orders made under state and territory public health laws that imposed stay-at-home orders and related restrictions limiting freedom of movement. A review of these lockdowns is warranted given the scale and impact of the lockdowns on the lives and rights of Australians. In mid-2021, lockdowns in Sydney, Victoria and South Australia in response to the Delta variant meant that more than half of the Australian population was living in lockdown.[7] Furthermore, the experience of the pandemic led to reform of public health laws, for example, with Victoria introducing new pandemic-specific public health laws.[8]

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[2] 'Employment and Unemployment', *Australian Institute of Health and Welfare* (Web Article, 7 September 2023) <www.aihw.gov.au/reports/australias-welfare/employment-unemployment#covid>.

[3] Daniel Griffiths et al, 'The Health Impacts of a 4-month Long Community-Wide COVID-19 Lockdown: Findings from a Prospective Longitudinal Study in the State of Victoria, Australia' (2022) 17(4) *Public Library of Science One* e0266650:1–13.

[4] For discussion, see UN Women et al, *Justice for Women Amidst COVID-19* (Report, May 2020) 19–20.

[5] Judd Boaz, 'Melbourne Passes Buenos Aires' World Record for Time Spent in COVID-19 Lockdown', *ABC News* (online, 3 October 2021) <https://www.abc.net.au/news/2021-10-03/melbourne-longest-lockdown/100510710>.

[6] See Rebecca Storen and Nikki Corrigan, 'COVID-19: A Chronology of State and Territory Government Announcements (Up Until 30 June 2020)' (Research Paper Series 2020–21, Parliamentary Library, Parliament of Australia, 22 October 2020).

[7] Renju Jose and Jonathan Barrett, 'More Than Half of Australia's Population Under COVID-19 Lockdowns', *Reuters* (online, 20 July 2021) <https://www.reuters.com/business/healthcare-pharmaceuticals/australias-victoria-reports-13-local-covid-19-cases-lockdown-call-looms-2021-07-19/>.

[8] *Public Health and Wellbeing Amendment (Pandemic Management) Act 2021* (Vic). See also 'Victoria has Become the First State with Pandemic-Specific Laws After Controversial Bill Passes', *SBS News* (online, 2 December 2021) <https://www.sbs.com.au/news/article/victoria-has-become-the-first-state-with-pandemic-specific-laws-after-controversial-bill-passes/8vasu3oha>.

While the focus of this article is on periods of lockdown, it is also the case that border closures within Australia were a key feature of the COVID-19 pandemic response. As one Victorian report noted:

> State and territory border closures have been a key part of Australia's COVID-19 management plan. At some point during 2020, Victorians were locked out of every state and territory (apart from the Northern Territory) and required special permission to cross those borders.

The Victorian Government has also used border closures to manage outbreaks in other states. Victoria closed the border, on various occasions, to Queensland, Western Australia, South Australia and New South Wales in 2020 and 2021.[9]

Increased vaccination rates played a key role in ending the cycle of lockdowns and border closures, with states and territories lifting restrictions once key levels of vaccination were reached.[10]

Now that Australia is several years removed from the use of lockdowns as a COVID-19 management strategy, it is appropriate to reflect on how the law was implemented to facilitate these lockdowns. These laws were necessarily created quickly, at a time when people were genuinely concerned about COVID-19 and its means and speed of transmission in an unvaccinated population. Strong and clear state government responses were required, but the context placed strain on the law-making process, the substance of those laws and the way they were communicated to the broader public. In short, genuine rule of law questions arose from the differing response of state governments to COVID-19 transmission and the need for lockdowns. For law-abiding citizens, there was difficulty in understanding what lockdowns required of them, in what areas, and for what duration.

The concept of the rule of law provides a useful yardstick by which to measure the legal response of Australian state governments to the COVID-19 pandemic. Despite its contested nature, there is broad agreement that the rule of law requires supremacy of the law. No individual or institution of government is above the law and the law applies equally to everyone.[11] According to Joseph Raz, the rule of law requires '(1) that people should be ruled by the law and obey it, and (2) that the law should be such that people will be able to be guided by it'.[12] Certain principles or practices must exist so that the rule of law can be realised within a legal system. The rule of law requires transparency and clarity of laws, so that people can locate and understand the laws to which they are subject. The complexity of the lockdown laws introduced in Australia, and the way they were communicated to the broader public,

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9 Annie Wright, 'Chronology of Victorian Border Closures Due to COVID-19' (Research Note No 4, Parliamentary Library and Information Service, Parliament of Victoria, June 2021) 1.

10 For discussion of the roll-out of COVID-19 vaccines in Australia, see Department of the Prime Minister and Cabinet, *COVID-19 Response Inquiry Report* (Report, 29 October 2024) 61–3.

11 AV Dicey, *An Introduction to the Study of the Law of the Constitution* (Macmillan, 8th ed, 1915) 183–9.

12 Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 1979) 213.

raised important questions about transparency and clarity of laws that significantly impacted upon the lives of Australians.

In Part II of this article, we analyse the rule of law principle of transparency, arguing that Australia's COVID-19 public health directions often failed to meet this important principle because of the number of directions, the frequency with which they changed, and the difficulty in locating them. In this Part, we also outline the data collection methodology used to identify public health directions related to lockdowns in each jurisdiction. We outline our approach to defining a 'lockdown' for the purposes of this article. We also analyse the difficulties with collating the public health orders and directions in some jurisdictions, due to the lack of openness and naming clarity of these laws.

As we demonstrate in Part III, the frequency and duration of lockdowns varied across Australia, resulting in very different experiences of the pandemic for people, depending on where they lived. In Part IV, we provide an overview of the lockdown requirements in each jurisdiction to highlight the complex and ever-changing nature of the lockdown requirements. Finally, in Part V, we conclude by reflecting on the challenges of collecting data on the public health orders and directions that were made in Australian jurisdictions during the first two years of the COVID-19 pandemic and make recommendations for the future of public health directions.

II Public Health Directions and the Rule of Law

The ability of Australians to locate public health orders and directions was an important step in ensuring that law-abiding citizens could understand what they were not permitted to do during the initial years of the COVID-19 pandemic. As will become clear throughout this article, most Australian states failed to implement an effective, publicly available resource that allowed citizens to read the detail of public health directions relating to lockdowns. This situation detracted from the quality of rule of law that was present in Australia at the time.

According to Raz, '[t]he rule of law is a political ideal which a legal system may lack or possess to a greater or lesser degree.'[13] Judgements about the strength of the rule of law in Australia during the early pandemic can be made by examining governmental adherence to the principles which underpin the rule of law. Legal theorists such as AV Dicey,[14] Lon Fuller,[15] Raz[16] and Lord Bingham[17] have all acknowledged that the concept of the rule of law is guided by similar underlying principles. Governmental adherence to these principles dictates the

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[13] Ibid 211.
[14] Dicey (n 11).
[15] Lon Fuller, *The Morality of Law* (Yale University Press, 1969) 33–9.
[16] Raz (n 12).
[17] Tom Bingham, *The Rule of Law* (Penguin, 2011) 37–90.

extent to which the rule of law is realised in a legal system. As an example, Raz states the following rule of law principles:

1. All laws should be prospective, open, and clear.
2. Laws should be relatively stable.
3. The making of particular laws (orders) should be guided by open, stable, clear and general rules.
4. The independence of the judiciary must be guaranteed.
5. The principles of natural justice must be observed.
6. The courts should have review powers over the implementation of the other principles.
7. The courts should be easily accessible.
8. The discretion of the crime-preventing agencies should not be allowed to pervert the law.[18]

Raz's conception of the rule of law, with its underpinning principles, has been described as a 'thin' or formal conception of the rule of law, which focuses on the process through which laws are made and applied without considering their substantive content.[19] In contrast, a similar list of principles (or requirements) that support the rule of law was self-labelled as a 'thick' definition of the rule of law by Lord Bingham, who argued that the substantive content of laws must contribute to any assessment of the rule of law. To make his point, Lord Bingham stated:

> a state which savagely represses or persecutes sections of its people cannot in my view be regarded as observing the rule of law, even if the transport of the persecuted minority to the concentration camp or the compulsory exposure of female children on the mountainside is the subject of detailed laws duly enacted and scrupulously observed.[20]

This article highlights procedural issues related to the rule of law, concerning matters of legal certainty. In this Part II, it will be demonstrated that public health directions or orders rarely satisfied the rule of law principle of openness. If such directions were to guide human behaviour, then members of the public must be able to find them and read them. Instead, people were reliant upon news updates, or other media releases to guide them on what the public health directions actually stated.

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18 Raz (n 12) 214–18.

19 Jeremy Waldron, 'The Concept and the Rule of Law' (2008) 43(1) *Georgia Law Review* 1, 6–7; Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004) 91.

20 Bingham (n 17) 67.

III The Nature and Location of Lockdown Laws

The primary research objective for this article was to collect quantitative, empirical, and comparative data to consider the different jurisdictions' legislative responses to COVID-19 lockdowns in Australia. The aim was to make statements about the number of lockdowns experienced by each state and territory, but most importantly, to cross-reference these with the public health directions that were the legal genesis of each lockdown. As a result, it would become possible to conclusively determine the number of days that each jurisdiction spent in lockdown. This article is also the first of its kind to provide data on the number and duration of lockdowns experienced in each Australian state during 2020–21 supported by the public health directions that created, extended and concluded each lockdown, thus providing an important contribution to understandings of Australia's legal history during the lockdown years of the COVID-19 pandemic.

Despite the seemingly straightforward nature of this task, there were two major challenges. First, we needed to define a lockdown for the purposes of identifying the relevant legal provisions. Second, there were significant difficulties in locating the primary legal materials in some jurisdictions.

A *Defining Lockdowns*

Issues relating to classification and measurement of lockdowns required definition and, in some cases, the exercise of subjective judgement. For the purpose of this article, a lockdown is defined to occur when a 'stay at home order' restricting a person to their place of residence is given through a public health direction. These lockdown orders could usually (but not always) be found in the Government Gazette for each jurisdiction.

One challenge with counting the number of lockdowns in each jurisdiction, was that there were often lockdowns occurring in different areas of a state/territory for overlapping periods of time. Rather than treating each lockdown in each geographical area as a separate lockdown, we treated a lockdown period (considered for the state as a whole) as a period of non-interrupted time when there was a lockdown happening somewhere in the state/territory.

An example might help to explain this approach. Assume a lockdown in Greater Melbourne from 8 July to 28 October 2020 (111 days). During this period, regional Victoria was also placed in lockdown from 5 August to 16 September 2020 (42 days). Rather than treat these as two separate lockdowns, our approach was to classify this scenario as one lockdown that was experienced in different areas of the State at the same time. Given that the purpose of this article was to make statements about the number of lockdowns experienced *at the state and territory level*, we believe this approach to classification strikes a ready balance between accuracy and parsimony

in data collection and presentation. For completeness, we have captured all declared lockdowns, sorted by jurisdiction, in the tables below.

B *Locating Lockdown Laws*

Research for this article also highlighted the challenges involved in collecting information about the public health orders and directions relating to lockdowns in the various jurisdictions in Australia. Others have also noted the difficulties with accessing revoked public health directions.[21] Below we provide an overview of the approaches taken by different Australian jurisdictions regarding the accessibility of their public health orders and directions — essential for the principle of open and clear laws — and the challenges this presented for accessing the primary legal materials needed to draw comparisons and analysis for this article.

1 *New South Wales*

NSW catalogued their public health orders in a database of COVID-related legislation available through the government's website.[22] These were catalogued by in-force directions and those no longer in force, with a subsequent breakdown by category of direction. This made directions relating to gathering and movement easy to locate.[23] The public health orders were sorted according to the effective date and provided a summary of the title and any relevant amendments with a link to the order itself. The NSW catalogue also provided directions specific to certain areas for those lockdowns which specified a geographic region for the stay-at-home order.[24]

2 *Victoria*

At the time of data collection, locating Victorian directions was challenging as only current directions were published on the Victorian Health Department webpage. However, since 15 December 2021, the Victorian government has recorded and maintained access to pandemic orders through their 'Pandemic Order Register'.[25] This provides a vast improvement in accessibility of information for Victoria for any order post-15 December 2021. Some directions

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21 Julie Falck, Jessica Kerr and Marco Rizzi, 'I Sought the Law and the Law is Gone: Revoked COVID-19 Directions in Western Australia', *Australian Public Law* (Blog Post, 12 May 2023) <www.auspublaw.org/blog/2023/5/i-sought-the-law-and-the-law-is-gone-revoked-covid-19-directions-in-western-australia>.

22 New South Wales Government, 'Public Health Orders', *NSW Legislation* (Web Page, last updated 23 February 2024) <https://legislation.nsw.gov.au/information/covid19-legislation>.

23 See ibid.

24 See, eg, *Public Health (COVID-19 Northern Beaches) Order 2020* (NSW) cl 8(1), as at 19 December 2020.

25 Victorian Government, 'Pandemic Order Register', *Department of Health* (Web Page, last updated 28 November 2023) <https://www.health.vic.gov.au/covid-19/pandemic-order-register>.

were also available on the Australasian Legal Information Institute.[26] Initially, a Victorian parliamentary research paper was used, which provided a chronology of directions with links to each direction from 16 March 2020 to 3 August 2020.[27]

Post-August-2020, approximate lockdown dates were ascertained through media publications and then cross-referenced with the Department of Health and Human Services daily media updates.[28] This enabled the daily updates to be narrowed down to locate relevant media releases. Lockdown dates were scrutinised and then utilised to locate lockdown directions through the government Gazette.[29] The report of a Victorian parliamentary review of pandemic orders published in 2022 also provided information about lockdown periods and public health directions.[30]

3 *Queensland*

Queensland catalogued their Chief Health Officer's directions in a simple and easy-to-navigate database which was able to be sorted by the title of the order or by date.[31] The database provided the effective date, the title of the direction and a link to the direction itself. This database was transparent, easy to locate and provided both current and superseded directions.

4 *Tasmania*

Tasmania provided current restrictions published on a 'Coronavirus' section of the government webpage but did not catalogue historical restrictions.[32] These restrictions provided a simplified summary of requirements for public access but did not provide links or references to the legislative framework. However, they did

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[26] 'Victorian COVID-19 Public Health Directions', *Australasian Legal Information Institute* (Web Page) <https://www.austlii.edu.au/cgi-bin/viewdb/au/legis/vic/covid-19_dir/>.

[27] Holly Mclean and Ben Huf, 'Emergency Powers, Public Health and COVID-19' (Research Paper No 2, Parliamentary Library and Information Service, Parliament of Victoria, August 2020).

[28] Joseph Dunstan, 'Melbourne Marks 200 days of COVID-19 lockdowns since the pandemic began', *ABC News* (online, 19 August 2021) <https://www.abc.net.au/news/2021-08-19/melbourne-200-days-of-covid-lockdowns-victoria/100386078>; Victorian Government, 'Updates Archive', *Department of Health and Human Services* (Web Page) <https://www.dhhs.vic.gov.au/coronavirus/updates/> (no longer available)

[29] See, eg, Deputy Public Health Commander (Vic), 'Stay at Home Directions (Restricted Areas) (No. 3)' in Victoria, *Victorian Government Gazette*, No S 361, 20 July 2020, 1, 5.

[30] Pandemic Declaration Accountability and Oversight Committee, Parliament of Victoria, *Review of the Pandemic (Quarantine, Isolation and Testing) Orders* (Report, July 2022) ('Pandemic Declaration Accountability and Oversight Committee').

[31] Queensland Government, 'Chief Health Officer Public Health Directions', *Queensland Health* (Web Page, last updated 10 November 2023) <https://www.health.qld.gov.au/system-governance/legislation/cho-public-health-directions-under-expanded-public-health-act-powers>.

[32] Tasmanian Government, 'Current Restrictions', *Coronavirus disease (COVID-19)* (Web Page) <https://www.coronavirus.tas.gov.au/families-community/current-restrictions> (not currently available).

link to frameworks for meeting the requirements of the restrictions published on the 'Business Tasmania' webpage.[33] To draw data for Tasmanian lockdown directions, media releases published on the government webpage were used.[34] The media releases provided information limited to the duration of lockdown, impacted geographical regions and restrictions associated with the lockdown.[35] Details of lockdown periods and relevant public health directions were then confirmed with reference to relevant reports[36] and the Tasmanian Government Gazette.

5 *Western Australia*

Western Australia published current, in-force directions on their government webpage but not historical data.[37] To ascertain data for Western Australia, media releases and Public Health Emergency Operations Centre Bulletins were used.[38] Media announcements provided by the Department of the Premier and Cabinet provided the duration of lockdown, the impacted geographical area and the restrictions to be implemented as part of the lockdown.[39]

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33 See, eg, Department of State Growth (Tas), 'COVID-19 Safety at Events', *Business Tasmania* (Web Page) <https://www.business.tas.gov.au/coronavirus_information/event_framework>.

34 Tasmanian Government, 'Media Releases', *Coronavirus disease (COVID-19)* (Web Page) <https://www.coronavirus.tas.gov.au/media-releases>.

35 See, eg, Department of Premier and Cabinet (Tas), '3-day Lockdown in Southern Tasmania', *Tasmanian Government: Coronavirus Disease (COVID-19)* (Community Update, 1 November 2021) <https://www.coronavirus.tas.gov.au/important-community-updates/3-day-lockdown-in-southern-tasmania>, archived at <https://web.archive.org/web/20211101174341/https://www.coronavirus.tas.gov.au/important-community-updates/3-day-lockdown-in-southern-tasmania>.

36 Greg Melick, *Response to the North-West Tasmania COVID-19 Outbreak* (Independent Review, 30 November 2020); Parliamentary Standing Committee of Public Accounts, Parliament of Tasmania, *Inquiry into the Government's Economic Response to the COVID-19 Pandemic* (Final Report, 13 August 2021) ('Tasmanian Parliamentary Standing Committee of Public Accounts'). The report contains a 'COVID-19 Chronology' in Appendix 1 and a 'List of Directions and Notices Related to COVID-19 in Tasmania' in Appendix 1A.

37 The COVID-19 declarations made in Western Australia are now available on the Western Australian Legislation website <www.legislation.wa.gov.au> . For discussion of accessing historical data in Western Australia, see Falck, Kerr and Rizzi (n 21).

38 Government of Western Australia, *Announcements* (Web Page) <https://www.wa.gov.au/government/announcements>. See for example, PHEOC Bulletin #4 available at <https://www.healthywa.wa.gov.au/~/media/Files/Corporate/general-documents/Infectious-diseases/PDF/Coronavirus/COVID19-PHEOC-Bulletin-4.pdf> .

39 See, eg, Department of the Premier and Cabinet (WA), 'Perth Metro, Peel and South West to Enter Hard Lockdown', *Government of Western Australia* (News Story, 27 June 2023) <https://www.wa.gov.au/government/announcements/perth-metro-peel-and-south-west-enter-hard-lockdown>.

6 *Northern Territory*

The Northern Territory catalogued their Chief Health Officer directions in a database available through the government's website.[40] The catalogue separated current directions from historical directions which are classified according to calendar year. All directions are presented according to the effective date and time and provide the name and number of the direction with direct links to the direction itself. This database was transparent and easy to locate.

7 *South Australia*

South Australia catalogued their Chief Health Officer directions in a database on the government's website.[41] The database provides in-force declarations and directions in addition to those which have ceased or been superseded. In-force directions were presented according to the effective date and provided the title and a link to the document itself. Historical directions are catalogued by subject area which included a specific database for 'Stay at Home' directions. This provided easy-to-locate and clear information on the lockdown directions for South Australia.

8 *Australian Capital Territory*

The Australian Capital Territory ('ACT') updated their website to publish only in-force or current directions and not historical data.[42] To draw data from the ACT, media releases were used.[43] As the media releases were catalogued according to the Minister issuing the release, releases issued by the Premier and then subsequently the health minister were investigated for releases relating to COVID-19 lockdown.[44] Where no release was able to be located, government news articles were used.[45] Both

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[40] Northern Territory Government, 'Chief Health Officer Directions', *NT Health* (Web Page, last updated 11 November 2022) <https://coronavirus.nt.gov.au/chief-health-officer-directions>.

[41] Government of South Australia, 'COVID-19 Directions', *South Australian Legislation* (Web Page, last updated 23 November 2022) <https://www.legislation.sa.gov.au/legislation/CV19>.

[42] Australian Capital Territory Government, 'ACT Public Health Directions', *COVID-19* (Web Page, 17 January 2022) <https://www.covid19.act.gov.au/restrictions/act-public-health-directions>, archived at <https://web.archive.org/web/20220120171008/https://www.covid19.act.gov.au/restrictions/act-public-health-directions>

[43] Australian Capital Territory Government, *ACT Government Media Releases* (Web Page) <https://www.cmtedd.act.gov.au/open_government/inform/act_government_media_releases>.

[44] See, eg, Andrew Barr and Rachel Stephen-Smith, 'ACT Lockdown Arrangements' (Joint Media Release, Australian Capital Territory Government, 17 August 2021) <https://www.cmtedd.act.gov.au/open_government/inform/act_government_media_releases/barr/2021/act-lockdown-arrangements>.

[45] See, eg, Australian Capital Territory Government, 'Seven-Day Lockdown for the ACT', *COVID-19* (Web Page, 12 August 2021) https://www.covid19.act.gov.au/news-articles/seven-day-lockdown-for-the-act, archived at < https://web.archive.org/web/20250314090753/https://www.covid19.act.gov.au/news-articles/seven-day-lockdown-for-the-act>.

the media releases and government news articles provided basic information regarding the duration of lockdown, the impacted geographic region and the restrictions imposed. Details of lockdown periods and public health directions were also confirmed with reference to the report of the Select Committee on the COVID-19 2021 Pandemic Response.[46] Copies of the public health directions were then accessed via AustLII[47] or the ACT Legislation Register.[48]

9 *Limitations*

Where some jurisdictions did not publish historical legislative instruments, media releases were used. This resulted in less detailed information as the direction itself was unable to be located. This means for those jurisdictions where media releases were used, the picture gained is limited to the brief snapshot shared with the community. This contrasts with the databases provided by some jurisdictions which give a far more detailed picture of the restrictions imposed as part of the lockdown.

Jurisdictions issued lockdown directions for specific regions where it was appropriate to do so. As our purpose is to make comparisons about the number and duration of lockdowns *at a state or territory level*, as explained above, we have regarded overlapping periods of lockdown as one lockdown. Consequently, in studying total number of days locked down, these instances of overlap must be considered.

IV Number and Duration of Lockdowns: A National Overview

In this Part, we analyse the number and duration of lockdowns in 2020 and 2021. We recognise that some restrictions were introduced in accordance with decisions of the National Cabinet which were then reflected in state and territory public health orders. For example, during late March 2020, the National Cabinet agreed to restrictions on non-essential indoor gatherings of more than 100 people, mitigation measures for indoor gatherings of less than 100 people, and restrictions on the opening of pubs, clubs, gyms and businesses.[49] Following its meeting on 29 March 2020, National Cabinet advised Australians to stay at home unless shopping for food and necessary supplies, medical or health care, exercise in accordance with

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[46] Select Committee on the COVID-19 2021 Pandemic Response, Legislative Assembly for the Australian Capital Territory, *Inquiry into the COVID-19 2021 Pandemic Response* (Report, 2 December 2021) ('ACT Select Committee on the COVID-19 2021 Pandemic Response').

[47] 'Australian Capital Territory COVID-19 Government Directions', *Australasian Legal Information Institute* (Web Page) <https://www.austlii.edu.au/cgi-bin/viewdb/au/legis/act/covid-19_dir/>.

[48] Australian Capital Territory Government, *ACT Legislation Register* (Web Page) <www.legislation.act.gov.au>.

[49] Kelsey Campbell and Emma Vines, 'COVID-19: A Chronology of Australian Government Announcements (Up Until 30 June 2020)' (Research Paper Series 2020–21, Parliamentary Library, Parliament of Australia, 23 June 2021) 18–25. For discussion of the National Cabinet, see Janina Boughey, 'Executive Power in Emergencies: Where is the Accountability?' (2020) 45(3) *Alternative Law Journal* 168, 169–70.

public health restrictions, and work or study that could not be done remotely.[50] In addition, National Cabinet agreed that indoor and outdoor gatherings would be limited to two persons unless they were from the same household or family unit, with limits on the numbers attending weddings and funerals.[51]

A *National Overview*

There was a total of 31 lockdowns across Australia in 2020 and 2021. Victoria experienced the highest number of lockdowns, with a total of seven lockdowns, followed by Queensland and the Northern Territory, with six lockdowns each. NSW had four lockdowns, with the remaining jurisdictions each having between one and three lockdowns (Table 1 and Figure 1). However, when calculated according to the number of days in lockdown (Table 2 and Figure 2), Victoria had the largest number of days in lockdown, with a total of 302 days, followed by NSW with 174 days. The total number of lockdown days in Queensland and the Northern Territory, were 91 days and 53 days respectively. Tasmania had a total of 69 days in lockdown, while the ACT had a total of 64 days. South Australia and Western Australia had the shortest periods of lockdown in the country with 10 and 12 days respectively. These figures show the stark differences between jurisdictions. For example, South Australia's two lockdowns with a total of 10 days contrast dramatically with Victoria's seven lockdowns and a total of 302 days. Victoria had 39% of Australia's total days in lockdown, and NSW had 22% (Figure 3). Together, these two states accounted for 61% of the total days in lockdown in 2020 and 2021.

As is clear from these figures, location played a crucial role in shaping the experiences of Australians during the first couple of years of the COVID-19 pandemic. Where people lived mattered in terms of their experience of both the frequency and duration of lockdowns. Furthermore, while it may have been relatively straightforward for members of the public to know and understand lockdown rules in those jurisdictions with few(er) and/or short(er) periods of lockdown, the challenges for openness and clarity of laws became more complex as the frequency and duration of lockdowns increased.

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[50] Campbell and Vines (n 49) 27; Australian Government Department of the Prime Minister and Cabinet, 'National Cabinet Statement', *PM Transcripts* (Web Page, 29 March 2020) <https://pmtranscripts.pmc.gov.au/release/transcript-43972> ('PM Transcripts').

[51] PM Transcripts (n 50).

Table 1: Total Number of Lockdowns Per State/Territory

State/Territory	Number of Lockdowns
NSW	4
Vic	7
Qld	6
Tas	2
WA	3
NT	6
SA	2
ACT	1
Grand Total	**31**

Figure 1: Total Number of Lockdowns Per State/Territory

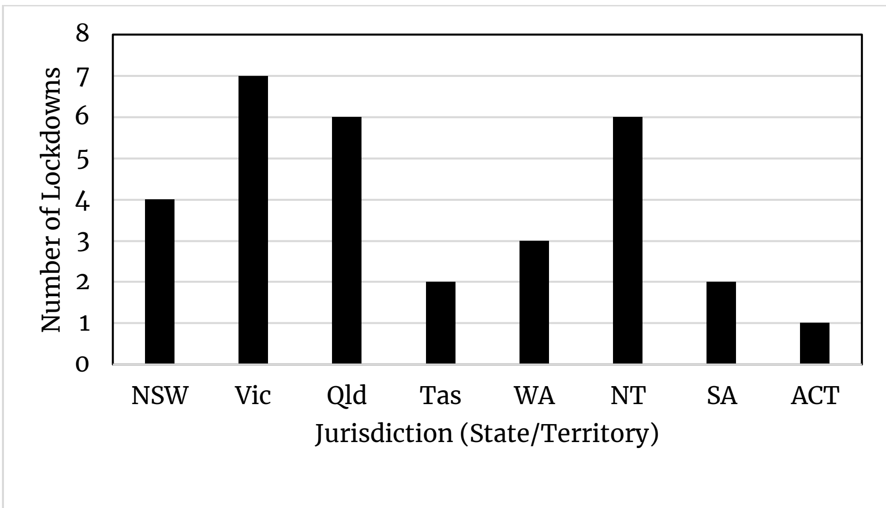


Table 2: Total Lockdown Period (Days)

State/Territory	Total Lockdown Period (Days)
NSW	174
Vic	302
Qld	91
Tas	69
WA	12
NT	53
SA	10
ACT	64
Grand Total	774

Figure 2: Total Lockdown Period (Days) Per Jurisdiction

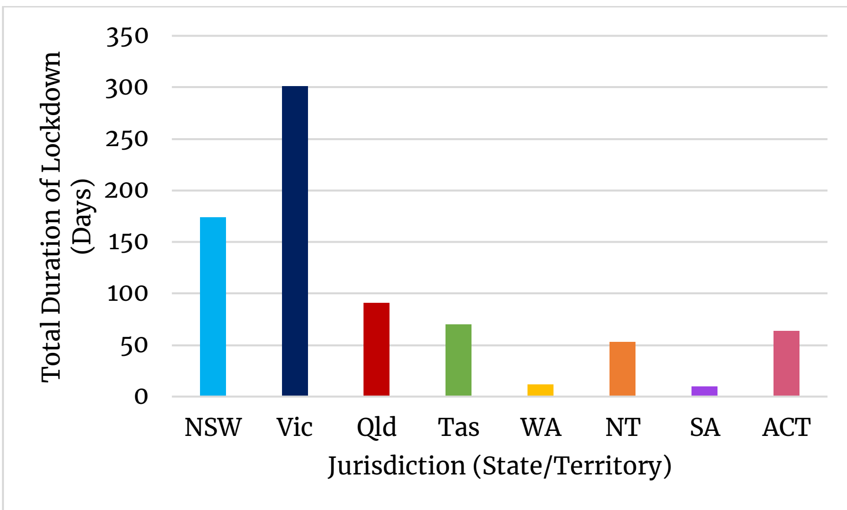
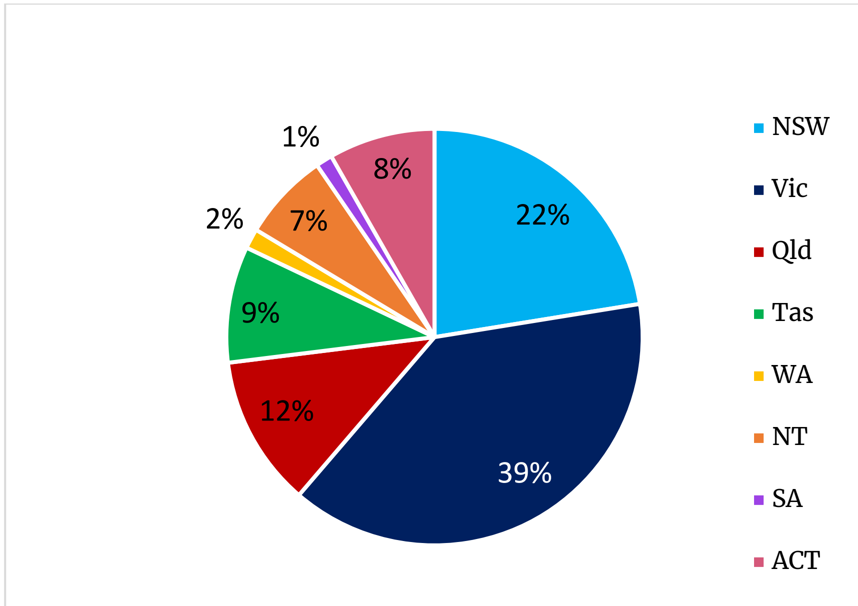


Figure 3: Total Lockdown Duration Per Jurisdiction (State/Territory Percentage)



V A Changing Regulatory Environment

During the pandemic, a large number of orders and directions were made addressing a wide range of issues. In this article, we have only analysed those relating to lockdowns, and collecting these for analysis has been a time-consuming process, even for scholars trained in law.[52] In May 2022, when announcing the end of South Australia's major emergency declaration, the news release noted that '[t]he declaration has been in place for 793 days, and has been extended 28 times with 289 legal directions issued'.[53] While the period of the declaration is longer than the period covered by the study for this article, and this study is limited to directions relating to lockdowns, the South Australian figures provide an indication of the complex and changing regulatory environment

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[52] See also Boughey (n 49) 172; Andrew Edgar, 'Law-Making in a Crisis: Commonwealth and NSW Coronavirus Regulations', *Australian Public Law* (Blog Post, 30 March 2020) <https://www.auspublaw.org/blog/2020/03/law-making-in-a-crisis-commonwealth-and-nsw-coronavirus-regulations>; Matthew McLeod, 'Distancing from Accountability? Governments' Use of Soft Law in the COVID-19 Pandemic' (2022) 50(1) *Federal Law Review* 3, 6.

[53] South Australian Government, 'COVID Major Emergency Declaration Ends' (Media Release, 24 May 2022) <https://www.premier.sa.gov.au/media-releases/news-items/covid-major-emergency-declaration-ends>.

during the COVID-19 pandemic. Furthermore, state and territory orders and directions were at times updated or amended on a frequent basis.[54] For example, in NSW, the *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order 2021* was made on 26 June 2021. However, the Order as amended on 14 August 2021 indicates that it is:

> As amended on 28 June 2021 at 7:36pm, 7 July 2021, 8 July 2021, 9 July 2021, 10 July 2021, 13 July 2021, 16 July 2021, 17 July 2021, 18 July 2021 at 6:10pm, 20 July 2021 at 10:44am, 21 July 2021 at the beginning of the day and at 9:47am, 22 July 2021 at 7:18pm, 23 July 2021, 27 July 2021 at 1pm, 28 July 2021, 29 July 2021, 5 August 2021 at 5pm, 7 August 2021 at 5pm, 8 August 2021 at 5pm, 9 August 2021 at 5pm and at 6pm, 10 August 2021, 11 August 2021 at 1pm and at 8:05pm, 12 August 2021 and 14 August 2021.[55]

In Part II of this article, it was suggested that there were rule of law issues relating to the openness and transparency of public health directions. Related to the issue of openness, are the principles of clarity and stability of law (Raz's principles 1 and 2). Generally, where lockdown provisions in a public health direction existed, they were clearly drafted. The problem was that public health directions that contained lockdown provisions were not always named or labelled in an intuitive way, and in some instances, the name of the direction completely changed after it had received multiple amendments. This lack of clarity in terms of naming conventions for public health directions meant that it became quite difficult in some jurisdictions to identify the public health direction that created a lockdown, and the public health direction that extended a lockdown. The example given above of the *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order 2021* (NSW) raises rule of law concerns with respect to the stability of laws. That said, in a rapidly changing pandemic environment, one can acknowledge the need for public health directions and orders to also change rapidly. The issue is how these changes are then communicated to the broader public. A combination of unstable law (through rapid amendment to public health directions), paired with a lack of openness in terms of public accessibility, meant that the implementation of law in some Australian jurisdictions can fairly be criticised on rule of law grounds.

In the sections below, we provide an overview of the lockdowns introduced in each Australian jurisdiction, with references to the relevant public health orders and directions. In providing this overview, we seek to illustrate both the complexity of the changing regulatory environment, and the differences between — and often within — states and territories in terms of the geographic scope of lockdowns and the rules that applied to them. As is clear from the analysis below, where you lived during 2020 and 2021 made a difference to your experience of the

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[54] See Edgar (n 52).

[55] *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order 2021* (NSW), as at 14 August 2021.

pandemic, with the residents of Australia's two most populous states, NSW and Victoria, and particularly in the capital cities of Sydney and Melbourne, experiencing longer lockdowns. Furthermore, as citations to the public health orders and directions show, these jurisdictions also experienced a heavy burden in terms of regulatory change.

A *New South Wales*

NSW reported its first case of COVID-19 on 25 January 2020 and its first death on 3 March 2020.[56] During 2020–21, there were four lockdowns in NSW (Table 3 and Figure 4, below). The first lockdown marked the early stages of the pandemic. This initial period of lockdown lasted a total of 45 days from 31 March 2020[57] to 15 May 2020,[58] although public health measures (including restrictions on mass gatherings of people)[59] had been introduced prior to the lockdown, and novel coronavirus had been added to list of scheduled and notifiable medical conditions under the *Public Health Act 2010* (NSW) in late January 2020.[60] The lockdown prohibited people from leaving their places of residence without reasonable excuse. Examples of reasonable excuse were shopping for food, goods or services; travelling for work or education that could not be undertaken at home; exercise; or to obtain medical care or to care for another person.[61] The *Public Health (COVID-19 Restrictions on Gathering and Movement) Order 2020* (NSW) specifically provided that '[t]aking a holiday in a regional area is not a reasonable excuse'.[62] Gatherings of more than two persons in a public place were also prohibited[63] unless they were

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[56] Storen and Corrigan (n 6) 3.

[57] *Public Health (COVID-19 Restrictions on Gathering and Movement) Order 2020* (NSW), as enacted.

[58] *Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 2) 2020* (NSW).

[59] See, eg, *Public Health (COVID-19 Gatherings) Order 2020* (NSW), as at 20 March 2020, prohibiting gatherings of 500 or more persons in an outdoor space and 100 or more in an indoor space.

[60] *Public Health Amendment (Scheduled Medical Conditions and Notifiable Diseases) Order 2020* (NSW), as at 21 January 2020. This was later updated on 19 March 2020 to reflect the name 'COVID-19': *Public Health Amendment (Scheduled Medical Conditions and Notifiable Diseases) Order (No 2) 2020* (NSW).

[61] *Public Health (COVID-19 Restrictions on Gathering and Movement) Order 2020* (NSW) cl 5(2), as enacted; cl 5(2A), as amended on 1 May 2020 by *Public Health (COVID-19 Restrictions on Gathering and Movement) Amendment Order (No 2) 2020* (NSW) cl 5(2A): 'it is a reasonable excuse for a person to leave the person's place of residence to visit another person's place of residence for the purpose of providing care or support to the other person while no more than one other visitor is present at the place of residence visited'. 'Providing care or support' was defined in cl 5(6) as including 'providing care or support for the mental, physical or emotional health or well-being of the person.'

[62] *Public Health (COVID-19 Restrictions on Gathering and Movement) Order 2020* (NSW) cl 5(4), as amended by *Public Health (COVID-19 Restrictions on Gathering and Movement) Amendment Order 2020* (NSW) on 4 April 2020 and later amended by *Public Health (COVID-19 Restrictions on Gathering and Movement) Amendment Order (No 2) 2020* (NSW) on 1 May 2020.

[63] *Public Health (COVID-19 Restrictions on Gathering and Movement) Order 2020* (NSW) cl 6, as enacted.

an ‘essential gathering’,[64] or came within a specified exception,[65] and closure of certain business and premises was ordered.[66] When restrictions were eased from 15 May 2020[67] gatherings of people in public places increased to 10 people and increased numbers were permitted at weddings and funerals,[68] as was a re-opening of some businesses and premises.[69] People were permitted to have up to five visitors in their homes.[70] There was a direction to work from home ‘where it is reasonably practicable to do so’.[71] Restrictions were eased further from 1 July 2020[72] and 1 December 2020.[73]

The second lockdown occurred in December 2020. Lasting a total of 22 days, it was a geographically limited lockdown focused on Sydney’s Northern Beaches. The lockdown started on 19 December 2020,[74] and was extended seven times[75] before ending on 10 January 2021,[76] disrupting the Christmas and new year holiday travel plans of thousands of Australians as other states and territories either closed their borders or imposed quarantine requirements on travellers from the Northern Beaches.[77] Residents within the Northern Beaches Local

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[64] Ibid sch 2. For example, ‘a gathering at a supermarket, market that predominately sells food, grocery store or shopping centre (but not a retail store in a shopping centre other than a supermarket, market that predominately sells food or grocery store) that is necessary for the normal business of the supermarket, market, store or centre’ was an essential gathering: sch 2 item 9.

[65] For example, the limit on gatherings of two persons did not apply to weddings (which permitted no more than five persons) and funerals (which had a limit of no more than 10 persons) with the limit in each case including the person conducting the service: *Public Health (COVID-19 Restrictions on Gathering and Movement) Order 2020* (NSW) cls 6(2)(d) and (e), as enacted.

[66] Ibid cl 7.

[67] *Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 2) 2020* (NSW).

[68] Ibid cl 6.

[69] Ibid cl 7.

[70] Ibid cl 8(2).

[71] Ibid cl 5.

[72] *Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 4) 2020* (NSW), as at 30 June 2020.

[73] *Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 6) 2020* (NSW), as enacted.

[74] *Public Health (COVID-19 Northern Beaches) Order 2020* (NSW), as at 19 December 2020. See ‘Sydney’s Northern Beaches in Lockdown’, *The Sydney Morning Herald* (online, 21 December 2020) <https://www.smh.com.au/national/nsw/northern-beaches-move-into-lockdown-the-day-in-photos-20201219-h1sx05.html>.

[75] The extension periods were 20–23 December 2020, 23–28 December 2020, 29 December 2020, 30 December 2020, 31 December 2020, 31 December 2020 – 2 January 2021, and 3–10 January 2021: see New South Wales Government, ‘Public Health Orders Relating to the Northern Beaches LGA’, *NSW legislation* (Web Page, last updated 18 July 2021) <https://legislation.nsw.gov.au/information/covid19-legislation/northern-beaches>.

[76] *Public Health (COVID-19 Northern Beaches) Order 2020* (NSW), as at 3 January 2021. See also Cecilia Connell, ‘Three-Week Coronavirus Lockdown Lifts in Northern Zone of Sydney’s Northern Beaches’, *ABC News* (online, 10 January 2021) <https://www.abc.net.au/news/2021-01-10/northern-beaches-reopen-after-three-week-covid-lockdown/13045954>.

[77] Megan Levy and Esther Han, ‘Christmas Travel Plans in Disarray After Northern Beaches COVID-19 Cluster’, *The Sydney Morning Herald* (online, 18 December 2020)

Government Area ('LGA') were required to work from home where 'reasonably practicable',[78] and were required to stay at home, leaving only for a specified permitted reason such as exercise or shopping for food.[79] Persons were not permitted to enter the Northern Beaches LGA without reasonable excuse,[80] and outdoor public gatherings were limited to two persons except in specified exceptions.[81] Certain businesses and premises were directed to be closed to the public, subject to some exceptions for hospitality venues (for example, permitting the sale of take-away food).[82] Over the Christmas period of 24–26 December 2020, special provisions applied. Residents living within the northern part of the Northern Beaches LGA were permitted to leave home to visit another residence within the northern part of the Northern Beaches, and residences were limited to a maximum of 5 visitors.[83] Those living in the southern part of the Northern Beaches were permitted to have a maximum of 10 visitors in their homes.[84]

The third lockdown in NSW was associated with the COVID-19 Delta variant and was introduced for the Greater Sydney area from 26 June 2021.[85] Restrictions on non-essential travel to areas outside metropolitan Sydney had come into effect three days earlier (23 June 2021) and applied to residents of some Sydney LGAs.[86] During this third period of lockdowns, restrictions were also extended to include some regional areas as cases emerged.[87] During this period, requirements were also

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<https://www.smh.com.au/national/nsw/christmas-travel-plans-in-disarray-after-northern-beaches-covid-19-cluster-20201218-p56okw.html>; Alicia Nally and Liam Butterworth, 'Northern Beaches Coronavirus Cluster Throws Christmas Plans into Disarray as States Ramp Up Travel Restrictions', *ABC News* (online, 20 December 2020) <https://www.abc.net.au/news/2020-12-20/sydney-coronavirus-cluster-throws-christmas-plans-into-disarray/12999754>.

78 *Public Health (COVID-19 Northern Beaches) Order 2020* (NSW), cl 6, as at 19 December 2020.

79 Ibid cl 7.

80 Ibid cl 8.

81 Ibid cl 9.

82 Ibid cl 10.

83 *Public Health (COVID-19 Northern Beaches) Amendment Order (No 2)* 2020 (NSW) cl 10C.

84 Ibid cl 10D.

85 *Public Health (COVID-19 Temporary Movement and Gathering Restrictions) Order 2021* (NSW) pt 4, as at 26 June 2021. The 'Greater Sydney' area includes the Greater Sydney region, as well as the Central Coast, the City of Shellharbour and the City of Wollongong LGAs: cl 3.

86 *Public Health (COVID-19 Greater Sydney) Order (No 2) 2021* (NSW), as at 23 June 2021.

87 *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Amendment (No 18) Order 2021* (NSW), enacted on 5 August 2021, extended some Greater Sydney restrictions to the Newcastle and Hunter area; *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Amendment (No 19) Order 2021* (NSW), enacted on 7 August 2021, extended some restrictions to the Armidale Regional LGA; *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Amendment (No 21) Order 2021* (NSW), enacted on 9 August 2021, extended some restrictions to the Tamworth Regional LGA; *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Amendment (No 22) Order 2021* (NSW), enacted on 9 August 2021, extended some restrictions to the Northern Rivers area; *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Amendment (No 24) Order 2021* (NSW), enacted on 11 August 2021, extended some restrictions to the Dubbo Regional LGA; *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Amendment (No 25) Order 2021* (NSW), enacted on 11 August 2021, extended some restrictions to Bogan, Bourke, Brewarrina, Coonamble, Gilgandra, Narromine, Walgett and Warren LGAs.

introduced for workers from Greater Sydney not to enter premises for work more than 50 km outside Greater Sydney unless the worker had been tested for COVID-19 during the preceding seven days and had 'evidence of the test available for inspection on request by an employer or occupier of the premises or a police officer.'[88] A requirement was also introduced requiring COVID-19 testing of workers from certain LGAs within Greater Sydney that were specified by the Chief Health Officer as an affected area[89] with workers within affected areas required to be tested for COVID-19 every 72 hours in order to be permitted to leave the LGA for work. This led to long queues at testing centres[90] and differing lockdown rules across the city.[91] In addition, residents of certain LGAs[92] were not permitted to leave the LGA for work unless they were an authorised worker,[93] restrictions were imposed on construction sites[94] and on leaving home to obtain goods or services,[95] and exercise was only permitted within 5 km of the person's home.[96] In response to the growing number of cases, the Premier announced that the crisis was 'a national emergency' and called for other states to send more vaccine doses to NSW.[97]

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88 *Public Health (COVID-19 Temporary Movement and Gathering Restrictions) Order 2021* (NSW) cl 24C(2), as amended by *Public Health (COVID-19 Temporary Movement and Gathering Restrictions) Amendment (No 6) Order 2021* (NSW) on 13 July 2021. This clause was later relocated and relabelled as cl 24AD: *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order 2021* (NSW), as amended on 8 August 2021.

89 *Public Health (COVID-19 Temporary Movement and Gathering Restrictions) Amendment (No 6) Order 2021* (NSW) cl 24B. The City of Fairfield was originally listed as an affected area: cl 24A(a). See also NSW Government, 'Mandatory COVID-19 Surveillance Testing for Greater Sydney Workers', *NSW Health* (Web Page, 13 July 2021) <https://www.health.nsw.gov.au/news/Pages/20210713_03.aspx>.

90 Tom McIlroy, 'Fairfield Residents Queue for Hours at Testing Sites', *Australian Financial Review* (online, 14 July 2021) <https://www.afr.com/politics/federal/fairfield-residents-queue-for-hours-at-testing-sites-20210714-p589ll>.

91 Byron Kaye and Jill Gralow, '"We Are Not the Virus": Two-Tier Delta Lockdowns Divide Sydney', *Reuters* (online, 10 August 2021) <https://www.reuters.com/world/asia-pacific/we-are-not-virus-two-tier-delta-lockdowns-divide-sydney-2021-08-10/>.

92 This originally included the City of Liverpool and Canterbury-Bankstown: *Public Health (COVID-19 Temporary Movement and Gathering Restrictions) Order 2021* (NSW), as at 18 July 2021 and was later extended to the City of Blacktown, City of Campbelltown, Cumberland, City of Fairfield, Georges River, and City of Parramatta: cl 24E, as at 29 July 2021. This was subsequently extended to include specified suburbs within the City of Penrith: *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order 2021* (NSW), as at 8 August 2021. Bayside, Burwood and Strathfield were also added: *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order 2021* (NSW) cl 24DA, as at 14 August 2021.

93 *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order 2021* (NSW) cl 24E, as at 14 August 2021.

94 Ibid cl 24EA.

95 Ibid cl 24EB.

96 Ibid cl 24EC.

97 Deborah Snow, 'Delta's Dawn: Our Winter of Discontent', *The Sydney Morning Herald* (online, 28 August 2021) <https://www.smh.com.au/national/nsw/delta-s-dawn-our-winter-of-discontent-20210827-p58mjc.html>.

The lockdown was extended state-wide on 14 August 2021[98] marking the start of lockdown four in NSW. Lasting 58 days, this lockdown commenced on 14 August 2021 and lasted until 11 October 2021. For Sydney-siders, this meant that their total period in lockdown lasted for more than 100 days, with lockdown ending when 70% of the State's population over 16 years had received two doses of a COVID-19 vaccine.[99] During this period, the relevant public health order provided for geographic areas within the State to be designated as stay-at-home areas or areas of concern, with differing restrictions applying according to which type of area a city, town, or part thereof was within.[100]

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98 *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order 2021* (NSW) cl 24F, as at 14 August 2021, applied Greater Sydney restrictions to regional NSW. This order had the practical effect of putting the entire state of NSW into lockdown. Clause 19, as modified by Part 4B of the Order, meant that an 'affected person' was one who lived in either Greater Sydney or the regional NSW area (where regional NSW area is defined in cl 24F(4) to mean an area of NSW other than Greater Sydney). See also NSW Government, 'Stay-at-Home Orders for Regional NSW from 5pm Today', *NSW Health* (Web Page, 14 August 2021) <https://www.health.nsw.gov.au/news/Pages/20210814_03.aspx>. Stay-at-home orders applied to an 'affected person'. During this lockdown, *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) 2021* (NSW) changed the language through which stay-at-home orders were implemented. Stay-at-home orders were now applied to a person who had been in a 'stay at home area' or an 'area of concern'. Greater Sydney and regional NSW, other than areas listed as an area of concern, were listed as stay at home areas: sch 1.

99 Alice Klein, 'Sydney Comes Out of a 4-Month Lockdown After Reaching Vaccination Target', *New Scientist* (online, 11 October 2021) <https://www.newscientist.com/article/2293117-sydney-comes-out-of-4-month-lockdown-after-reaching-vaccination-target/>. See also *Public Health (COVID-19 General) Order 2021* (NSW), enacted on 3 October 2021 and amended 8 October 2021, where the Explanatory Note for the Order states: 'The object of this Order is to repeal and remake the *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) 2021* as part of the roadmap for easing restrictions when 70% of the population of New South Wales who are over 16 years of age are fully vaccinated against COVID-19.'

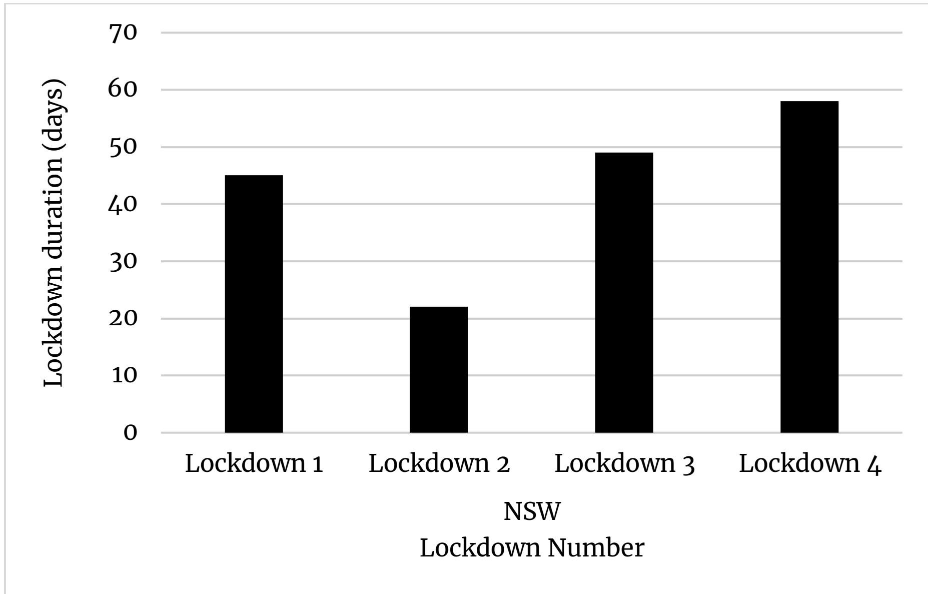
100 *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) 2021* (NSW), as at 20 August 2021.

Table 3: New South Wales Lockdowns

NSW		Dates	Total Lockdown Period (Days)
Lockdown 1	Entire State	31 March – 15 May 2020	45
Lockdown 2	Northern Beaches	19 December 2020 – 10 January 2021	22
Lockdown 3	Greater Sydney	26 June – 5 August 2021	40
	Greater Sydney + Newcastle and Hunter Area	5 August – 7 August 2021	2
	Areas listed for Lockdown 3 above + Armidale	7 August – 9 August 2021	2
	Areas listed for Lockdown 3 above + Tamworth and Northern Rivers area	9 August – 11 August 2021	2
	Areas listed for Lockdown 3 above + Dubbo area	11 August – 12 August 2021	1
	Areas listed for Lockdown 3 above + Far North area	12 August – 14 August 2021	2
			49
Lockdown 4	Entire State[101]	14 August – 11 October 2021	58
Total			**174**

[101] *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order 2021* (NSW) commenced at 5pm on 14 August 2021. See above n 98 and accompanying text.

Figure 4: Duration of Each Lockdown in NSW



B *Victoria*

Victoria's first case of COVID-19 was reported on 25 January 2020 and the first death from COVID-19 was reported in Victoria on 26 March 2020.[102] During the COVID-19 pandemic, Victorians not only experienced the longest total period of lockdowns in Australia, but Melbourne earned the title of being the most locked-down capital city in the world, surpassing the record previously held by Buenos Aires.[103] There were a total of seven lockdowns during 2020 and 2021, involving 302 days in lockdown. The number and duration of lockdowns in Victoria are illustrated in Table 4 and Figure 5 respectively.

The lockdowns were not without controversy. A lockdown of approximately 3,000 residents in nine public housing towers in Melbourne in July 2020 attracted widespread media attention.[104] The lockdown of the housing towers was also the subject of a report by the Ombudsman.[105] The lockdowns also led to litigation. In *Gerner v Victoria*,[106] the plaintiff, who owned a restaurant business, unsuccessfully

[102] Storen and Corrigan (n 6) 2.
[103] Boaz (n 5).
[104] See also Mclean and Huf (n 27) 42.
[105] For discussion, see Ian Freckelton, 'Government Inquiries, Investigations and Reports During the COVID-19 Pandemic' in Belinda Bennett and Ian Freckelton (eds), *Pandemics, Public Health Emergencies and Government Powers: Perspectives on Australian Law* (Federation Press, 2021) 106–8.
[106] (2020) 270 CLR 412.

challenged the lockdown laws in the High Court of Australia, alleging that the lockdown had caused a significant loss of revenue to his business. He had sought a declaration that the provisions of Victoria's *Public Health and Wellbeing Act 2008* which permitted the Chief Health Officer to make directions to restrict the movement of people within an emergency area, and the lockdown directions that had been made, were invalid as they infringed an implicit Constitutional guarantee of freedom of movement. A further challenge to Victoria's lockdown laws was made in *Loielo v Giles*[107] which unsuccessfully challenged a COVID-related curfew in Victoria.

The COVID-19 pandemic was declared a public health emergency in Victoria on 16 March 2020.[108] With extensions, the emergency declaration lasted until 10 December 2021. On 22 March 2020, the Victorian Premier Daniel Andrews announced that non-essential activities would be shut down over 48 hours and the start of school holidays would be moved forward to 24 March.[109] Stage 2 restrictions, including closure of non-essential services, started on 25 March 2020.[110] At midnight on 30 March 2020,[111] Victoria began its first lockdown which was to last until 11:59pm on 31 May 2020.[112] Restrictions were eased from 12 May 2020.[113]

Lockdown two commenced on 1 July 2020 and lasted until 19 July 2020.[114] Initially focused on 10 specific postcodes,[115] this was extended on 4 July 2020 to

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107 (2020) 63 VR 1. For discussion, see Rosalind Croucher, 'Lockdowns, Curfews and Human Rights – – Unscrambling Hyperbole' (2021) 28(3) *Australian Journal of Administrative Law* 137; Bruce Chen, 'The Victorian COVID-19 Response: Reflections on *Loielo v Giles*' (2021) 32(1) *Public Law Review* 8.

108 Premier of Victoria, 'State of Emergency Declared in Victoria Over COVID-19' (Media Release, 16 March 2020) <https://www.premier.vic.gov.au/state-emergency-declared-victoria-over-covid-19>. See also Pandemic Declaration Accountability and Oversight Committee (n 30) 10.

109 Storen and Corrigan (n 6) 75.

110 Ibid.

111 Deputy Chief Health Officer (Communicable Disease) (Vic), 'Stay at Home Directions' in Victoria, *Victoria Government Gazette,* No S 169, 31 March 2020, 8, 8. See also Department of Health and Human Services (Vic), 'Coronavirus Update for Victoria — 30 March 2020' (Media Release, 30 March 2020) <https://www.dhhs.vic.gov.au/coronavirus-update-victoria-30-march-2020>, archived at <https://web.archive.org/web/20200817220836/https://www.dhhs.vic.gov.au/coronavirus-update-victoria-30-march-2020>. The lockdown was extended again from midnight on 2 April 2020: Deputy Chief Health Officer (Communicable Disease) (Vic), 'Stay at Home Directions (No. 2)' in Victoria, *Victoria Government Gazette*, No S 177, 3 April 2020, 1, 1; from midnight on 7 April 2020: Deputy Chief Health Officer (Communicable Disease) (Vic), 'Stay at Home Directions (No. 3)' in Victoria, *Victoria Government Gazette,* No S 191, 8 April 2020, 13, 13; and from midnight on 13 April until midnight on 11 May 2020: Deputy Chief Health Officer (Communicable Disease) (Vic), 'Stay at Home Directions (No. 4)' in Victoria, *Victoria Government Gazette,* No S 194, 14 April 2020, 16, 16.

112 Deputy Chief Health Officer (Communicable Disease) (Vic), 'Stay at Home Directions (No. 7)' in Victoria, *Victoria Government Gazette*, No S 253, 25 May 2020, 12, 12.

113 Pandemic Declaration Accountability and Oversight Committee (n 30) 13.

114 Deputy Chief Health Officer (Communicable Disease) (Vic), 'Stay at Home Directions (Restricted Postcodes)' in Victoria, *Victoria Government Gazette*, No S 339, 2 July 2020, 3, 3.

115 Deputy Chief Health Officer (Communicable Disease) (Vic), 'Area Directions' in Victoria, *Victoria Government Gazette*, No S 339, 2 July 2020, 1, 1.

include two additional postcodes and a number of public housing towers.[116] During this period, other states and territories introduced restrictions on people from Victoria entering their jurisdiction and closed their borders to Victoria.[117]

Victoria's third lockdown commenced at 11:59pm on 8 July 2020 and originally applied to greater Melbourne and the Mitchell Shire.[118] Originally scheduled to last until 19 July 2020, the lockdown in Greater Melbourne extended to 28 October 2020 — a total of 112 days.[119] During that time, the Victorian government declared a state of disaster on 2 August 2020[120] and in early August 2020, a night-time curfew was introduced for Melbourne.[121] In regional Victoria, lockdown restrictions were implemented from 5 August 2020,[122] and were not eased until 16 September 2020.[123]

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116 Deputy Chief Health Officer (Communicable Disease) (Vic), 'Area Directions (No. 2)' in Victoria, *Victoria Government Gazette*, No S 343, 5 July 2020, 1, 1. For discussion of the lockdown of the public housing towers, see Freckelton (n 105).

117 Wright (n 9) 2–5.

118 Deputy Chief Health Officer (Communicable Disease) (Vic), 'Stay at Home Directions (Restricted Areas)' in Victoria, *Victorian Government Gazette*, No S 346, 9 July 2020, 5, 5; Deputy Chief Health Officer (Communicable Disease) (Vic), 'Area Directions (No. 3)' in Victoria, *Victorian Government Gazette*, No S 346, 9 July 2020, 1, 1; Department of Health and Human Services (Vic), 'Coronavirus update for Victoria — 8 July 2020' (Media Release, 8 July 2020) <https://www.dhhs.vic.gov.au/coronavirus-update-victoria-08-july-2020>, archived at <https://web.archive.org/web/20200711185105/https://www.dhhs.vic.gov.au/coronavirus-update-victoria-08-july-2020>.

119 Chief Health Officer (Vic), 'Stay at Home Directions (Restricted Areas) (No. 19)' in Victoria, *Victoria Government Gazette*, No S 531, 19 October 2020, 1, 1 initially had extended the lockdown until 8 November 2020. This direction was revoked by Chief Health Officer (Vic), 'Stay Safe Directions (Melbourne)' in Victoria, *Victoria Government Gazette*, No S 552, 28 October 2020, 12, 12; Pandemic Declaration Accountability and Oversight Committee (n 30) 18.

120 Pandemic Declaration Accountability and Oversight Committee (n 30) 17. The declaration of the state of disaster expired on 8 November 2020: at 19.

121 Pandemic Declaration Accountability and Oversight Committee (n 30) 18. See also Zena Chamas, 'Victoria Has Introduced a Curfew and Stage 4 Coronavirus Restrictions for Melbourne, and Stage 3 Restrictions for Regional Victoria. Here's What That Means', *ABC News* (online, 2 August 2020) <https://www.abc.net.au/news/2020-08-02/victorias-latest-coronavirus-restrictions-explained/12516182>; Yara Murray-Atfield and Joseph Dunstan, 'Melbourne Placed Under Stage 4 Coronavirus Lockdown, Stage 3 for the Rest of Victoria as State of Disaster Declared', *ABC News* (online, 2 August 2020) <https://www.abc.net.au/news/2020-08-02/victoria-coronavirus-restrictions-imposed-death-toll-cases-rise/12515914>.

122 Public Health Commander (Vic), 'Stay at Home Directions (Non-Melbourne)' in Victoria, *Victoria Government Gazette*, No S 397, 6 August 2020, 33, 33.

123 Chief Health Officer (Vic), 'Stay Safe Directions (Non-Melbourne)' in Victoria, *Victoria Government Gazette,* No S 474, 17 September 2020, 26, 26 with the effect that stay-at-home orders for regional Victoria ended on 16 September 2020 at 11:59pm.

In February 2021, Victoria had its fourth lockdown — a snap lockdown that lasted five days, starting from 12 February.[124] As the State exited lockdown, it recorded a 'donut day' of zero locally acquired cases of COVID-19.[125]

In lockdown number five, 'circuit breaker restrictions' were introduced from 11:59pm on 27 May 2021.[126] This involved a seven-day state-wide lockdown for Victoria in response to 26 cases of COVID-19 and 14,000 Victorians either in 14-day quarantine or required to isolate until they returned a negative test result.[127] On 2 June 2021, Melbourne's lockdown was extended for a further seven days,[128] with the Acting Premier stating: 'We now have 60 local cases and more than 350 exposure sites. And a variant of the virus that is quicker and more contagious than we've seen before'.[129] Lockdown five ended for metropolitan Melbourne at 11:59pm on 10 June 2021.[130]

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124 Chief Health Officer (Vic), 'Stay Safe Directions (Victoria) (No. 14)' in Victoria, *Victoria Government Gazette,* No S 70, 13 February 2021, 1, 1; Department of Health and Human Services (Vic), 'Coronavirus Update for Victoria — 13 February 2021' (Media Release, 13 February 2021) <https://www.dhhs.vic.gov.au/coronavirus-update-victoria-13-february-2021>, archived at <https://web.archive.org/web/20210213122655/https://www.dhhs.vic.gov.au/coronavirus-update-victoria-13-february-2021>; Pandemic Declaration Accountability and Oversight Committee (n 30) 20; Yara Murray-Atfield and staff, 'Daniel Andrews Announces Snap Coronavirus Lockdown for Victoria in Response to "Hyper-Infectious" UK Strain', *ABC News* (online, 12 February 2021) <https://www.abc.net.au/news/2021-02-12/victoria-coronavirus-lockdown-announced-by-daniel-andrews/13128514>. The lockdown directions were revoked from 11:59pm on 17 February 2021: Chief Health Officer (Vic), 'Stay Safe Directions (Victoria) (No. 15)' in Victoria, *Victoria Government Gazette*, No S 77, 18 February 2021, 1, 1.

125 Lucy Mae Beers, 'Victoria Records Another DONUT DAY as State Exists Harsh Snap COVID Lockdown', *7 News* (online, 18 February 2021) <https://7news.com.au/lifestyle/health-wellbeing/victoria-records-another-donut-day-as-state-exits-harsh-snap-covid-lockdown-c-2187481>.

126 Acting Chief Health Officer (Vic), 'Stay at Home Directions (Victoria)' in Victoria, *Victoria Government Gazette*, No S 256, 28 May 2021, 13, 13; Department of Health and Human Services (Vic), 'Coronavirus Update for Victoria — 27 May 2021' (Media Release, 27 May 2021) <https://www.dhhs.vic.gov.au/coronavirus-update-victoria-27-may-2021>, archived at <https://web.archive.org/web/20210527135708/>; James Merlino, 'Statement from the Acting Premier' (Media Release, Victoria State Government, 27 May 2021) <https://www.premier.vic.gov.au/statement-acting-premier-1>.

127 Richard Willingham and staff, 'Victoria Enters COVID-19 Lockdown as Cases from Melbourne Outbreak Grow', *ABC News* (online, 27 May 2021) <https://www.abc.net.au/news/2021-05-27/victoria-covid-cases-melbourne-outbreak-lockdown-restrictions/100169172>.

128 Acting Chief Health Officer (Vic), 'Stay at Home Directions (Metropolitan Melbourne)' in Victoria, *Victoria Government Gazette,* No S 266, 4 June 2021, 35, 35 ('Stay at Home Directions (Metropolitan Melbourne)') declaring a stay-at-home period from 11:59pm on 3 June 2021 until 11:59pm on 10 June 2021; 'Victorians Urged to "Keep Fighting" by Premier Daniel Andrews as Lockdown Extended', *ABC News* (online, 2 June 2021) <https://www.abc.net.au/news/2021-06-02/new-covid-cases-recorded-in-victoria-lockdown-decision/100183416>.

129 James Merlino, 'Statement from the Acting Premier' (Media Release, Victoria State Government, 2 June 2021) <https://www.premier.vic.gov.au/statement-acting-premier-2>.

130 Stay at Home Directions (Metropolitan Melbourne) (n 120) as repealed by Acting Chief Health Officer (Vic), 'Stay Safe Directions (Metropolitan Melbourne)' in Victoria, *Victoria Government Gazette*, No S 281, 11 June 2021, 39, 39; James Merlino, 'Statement from the Acting Premier' (Media Release, Victoria State Government, 9 June 2021) <https://www.premier.vic.gov.au/statement-acting-premier-3>. See also 'Victoria Records No New Local COVID Cases as Melbourne Emerges from Two-Week Lockdown', *ABC News* (online, 11 June 2021) <https://www.abc.net.au/news/2021-06-11/victoria-new-covid-cases-melbourne-lockdown-lifts/100207318>.

Victoria's sixth lockdown was to occur only a little over a month later in response to the spread of the Delta variant.[131] At 11:59pm on 15 July 2021, Victoria entered a five-day lockdown[132] with the Premier stating: 'If we act now — while we're right on the heels of this outbreak — we can give ourselves every chance of getting ahead of it. If we wait — we lose that option'.[133] The Department's update stated: 'This lockdown has been put in place in response to our new cases of COVID-19, a large number of popular exposure sites and to combat the circulating strain of virus that is wildly infectious'.[134] On 20 July 2021, the lockdown was extended for another seven days and a pause was placed on issuing permits on those from Red Zones to enter Victoria.[135] The effect of the pause on Red Zone permits was that Victorians who were seeking to return home from Red Zones in NSW were unable to do so without a permit.[136]

With 80 active cases of COVID-19 in Victoria, the State entered its seventh lockdown on 5 August 2021.[137] This was a state-wide lockdown initially planned for seven days,[138] but lockdowns affecting different areas at different times would continue until 21 October 2021.[139] On 16 August 2021, it was announced that the

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131 'Victoria to Enter Five-Day Snap Lockdown as More COVID Cases Recorded', *ABC News* (online, 15 July 2021) <https://www.abc.net.au/news/2021-07-15/melbourne-lockdown-response-to-covid-outbreak/100296220> ('Victoria to Enter Five-Day Snap Lockdown').

132 Acting Chief Health Officer (Vic), 'Stay at Home Directions (Victoria) (No. 2)' in Victoria, *Victorian Government Gazette*, No S 389, 16 July 2021, 13, 13; 'Victoria to Enter Five-Day Snap Lockdown' (n 131).

133 Daniel Andrews, 'Statement from the Premier' (Media Release, Victoria State Government, 15 July 2021) <https://www.premier.vic.gov.au/statement-premier-92>.

134 Department of Health and Human Services (Vic), 'Coronavirus Update for Victoria — 15 July 2021' (Media Release, 15 July 2021) <https://www.dhhs.vic.gov.au/coronavirus-update-victoria-15-july-2021>, archived at <https://web.archive.org/web/20210716002633/https://www.dhhs.vic.gov.au/coronavirus-update-victoria-15-july-2021>.

135 Chief Health Officer (Vic), 'Stay at Home Directions (Victoria) (No. 3)' in Victoria, *Victoria Government Gazette,* No S 398, 21 July 2021, 13, 12; Daniel Andrews, 'Extended Lockdown and Stronger Borders to Keep Us Safe' (Media Release, Victoria State Government, 20 July 2021) <https://www.premier.vic.gov.au/extended-lockdown-and-stronger-borders-keep-us-safe> ('Extended Lockdown and Stronger Borders to Keep Us Safe').

136 'Extended Lockdown and Stronger Borders to Keep Us Safe' (n 135).

137 Acting Chief Health Officer (Vic), 'Stay at Home Directions (Victoria) (No. 4)' in Victoria, *Victoria Government Gazette*, No S 427, 6 August 2021, 13, 13; Department of Health and Human Services (Vic), 'Coronavirus Update for Victoria — 5 August 2021' (Media Release, 5 August 2021) <https://www.dhhs.vic.gov.au/coronavirus-update-victoria-5-august-2021>, archived at <https://web.archive.org/web/20210806044428/https://www.dhhs.vic.gov.au/coronavirus-update-victoria-5-august-2021>.

138 Acting Chief Health Officer (Vic), 'Stay at Home Directions (Victoria) (No. 4)' in Victoria, *Victoria Government Gazette*, No S 427, 6 August 2021, 13, 13 cl 4; Daniel Andrews, 'Seven Day Lockdown to Keep Victorians Safe' (Media Release, Victoria State Government, 5 August 2021) <https://www.premier.vic.gov.au/seven-day-lockdown-keep-victorians-safe>.

139 This extension of the lockdown was initially managed through: Chief Health Officer (Vic), 'Stay at Home Directions (Victoria) (No. 5)' in Victoria, *Victoria Government Gazette*, No S 455, 23 August

lockdown would be extended until 2 September and a curfew implemented from 9pm to 5am each night.[140]

On 21 August 2021, it was announced that the restrictions in place in Melbourne, except for the curfew, would be extended to regional Victoria.[141] The Premier stated:

> With the number of positive cases this high and so many Victorians still to be vaccinated, we cannot afford to let this virus run free — our hospital system would be overrun, our frontline staff would be placed under huge pressure and quite simply, people will die.[142]

On 2 September 2021, it was announced that most of the lockdown restrictions would remain in place until 70% of Victorians had received at least one dose of a COVID-19 vaccine, which was estimated to occur around 23 September 2021.[143] Lockdown restrictions were lifted for regional Victoria (except Greater Shepparton) from 11:59pm on 9 September 2021.[144] On 19 September, the Premier announced that Melbourne would remain in lockdown until late October when it was expected that 70% of the population aged 16-and-over would have received two doses of a

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2021, 1; Chief Health Officer (Vic), 'Stay at Home Directions (Victoria) (No. 6)' in Victoria, *Victoria Government Gazette,* No S 458, 23 August 2021, 14; Acting Chief Health Officer (Vic), 'Stay at Home Directions (Victoria) (No. 7)' in Victoria, *Victoria Government Gazette*, No S 467, 27 August 2021, 2; Acting Chief Health Officer (Vic), 'Stay at Home Directions (Victoria) (No. 8)' in Victoria, *Victoria Government Gazette*, No S 483, 3 September 2021, 1. The extension was then further achieved through: Acting Chief Health Officer (Vic), 'Stay at Home Directions (Restricted Areas) (No. 20)' in Victoria, *Victoria Government Gazette*, No S 495, 10 September 2021, 1; Chief Health Officer (Vic), 'Stay at Home Directions (Restricted Areas) (No. 21)' in Victoria, *Victoria Government Gazette*, No S 511, 16 September 2021, 4; Acting Chief Health Officer (Vic), 'Stay at Home Directions (Restricted Areas) (No. 22)' in Victoria, *Victoria Government Gazette*, No S 515, 18 September 2021, 1; Acting Chief Health Officer (Vic), 'Stay at Home Directions (Restricted Areas) (No. 23)' in Victoria, *Victoria Government Gazette*, No S 529, 24 September 2021, 2. See also Pandemic Declaration Accountability and Oversight Committee (n 30) 21.

[140] Daniel Andrews, 'Extended Melbourne Lockdown to Keep Victorians Safe' (Media Release, Victoria State Government, 16 August 2021) <https://www.premier.vic.gov.au/extended-melbourne-lockdown-keep-victorians-safe-0>.

[141] Chief Health Officer (Vic), 'Stay at Home Directions (Victoria) (No. 5)' in Victoria, *Victoria Government Gazette,* No S 455, 23 August 2021, 1.

[142] Daniel Andrews, 'Lockdown Across Regional Victoria to Keep Us Safe' (Media Release, Victoria State Government, 21 August 2021) <https://www.premier.vic.gov.au/lockdown-across-regional-victoria-keep-us-safe>.

[143] Department of Health and Human Services (Vic), 'Coronavirus Update for Victoria — 2 September 2021' (Media Release, 2 September 2021) <https://www.dhhs.vic.gov.au/coronavirus-update-victoria-2-september-2021>, archived at <https://web.archive.org/web/20210902121106/https://www.dhhs.vic.gov.au/coronavirus-update-victoria-2-september-2021>. Playgrounds were re-opened from 11:59pm on 2 September 2021.

[144] Acting Chief Health Officer (Vic), 'Stay at Home Directions (Restricted Areas) (No. 20)' in Victoria, *Victoria Government Gazette*, No S 495, 10 September 2021, 1, 1; Acting Chief Health Officer (Vic), 'Area Directions (No. 15)' in Victoria, *Victoria Government Gazette*, No S 495, 10 September 2021, 77; Daniel Andrews, 'Coronavirus Restrictions to Lift for Regional Victoria' (Media Release, Victoria State Government, 8 September 2021) <https://www.premier.vic.gov.au/coronavirus-restrictions-lift-regional-victoria-0>.

COVID-19 vaccine, with a further easing of restrictions once 80% of Victorians aged 16-and-over had received two doses of a COVID-19 vaccine.[145]

While Melbourne was to remain in lockdown until late October 2021, parts of regional Victoria also experienced periods of lockdown in late 2021. We have listed these separately in Table 4 below in order to distinguish the experience of people living in regional Victoria from those living in Melbourne. As noted above, on 21 August 2021, the lockdown in Melbourne was extended to regional Victoria.[146] It was originally due to last until 2 September but was extended until 9 September when it was lifted, except for Greater Shepparton.[147] The lockdown in Shepparton continued until 15 September 2021.[148] At 11:59pm on 15 September 2021, Ballarat entered lockdown,[149] and lasted until 22 September 2021.[150] On 19 September 2021, Greater Geelong, the Surf Coast Shire and Mitchell Shire began a seven-day lockdown,[151] with the same restrictions as in Ballarat and metropolitan Melbourne except for the curfew.[152] From 11:59pm on 26 September 2021, the lockdown was

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145 Richard Willingham, Bridget Rollason and Yara Murray-Atfield, 'Victoria's Roadmap Out of COVID Lockdown Released by Premier Daniel Andrews', *ABC News* (online, updated 3 October 2021) <https://www.abc.net.au/news/2021-09-19/victoria-roadmap-out-of-covid-lockdown-released-dan-andrews/100474302>.

146 See above n 141.

147 Acting Chief Health Officer (Vic), 'Stay at Home Directions (Restricted Areas) (No. 20)' in Victoria, *Victoria Government Gazette*, No S 495, 10 September 2021,1; Acting Chief Health Officer (Vic), 'Area Directions (No. 15)' in Victoria, *Victoria Government Gazette*, No S 495, 10 September 2021, 77; Department of Health and Human Services (Vic), 'Coronavirus Update for Victoria — 9 September 2021' (Media Release, 11 July 2022) <https://www.dhhs.vic.gov.au/coronavirus-update-victoria-9-september-2021>, archived at <https://web.archive.org/web/20210909093712/https://www.dhhs.vic.gov.au/coronavirus-update-victoria-9-september-2021>; Daniel Andrews, 'Coronavirus Restrictions to Lift for Regional Victoria' (Media Release, Victoria State Government, 8 September 2021) <https://www.premier.vic.gov.au/coronavirus-restrictions-lift-regional-victoria-0>; Christopher Testa, 'Regional Victoria is About to Leave COVID-19 Lockdown. Here's What's Changing', *ABC News* (online, 8 September 2021) <https://www.abc.net.au/news/2021-09-08/regional-victoria-new-rules-once-covid-19restrictions-ease/100443524>.

148 Chief Health Officer (Vic), 'Area Directions (No. 16)' in Victoria, *Victoria Government Gazette*, No S 511, 16 September 2021, 1; Chief Health Officer (Vic), 'Stay at Home Directions (Restricted Areas) (No. 21)' in Victoria, *Victoria Government Gazette*, No S 511, 16 September 2021, 4; Department of Health and Human Services (Vic), 'Coronavirus Update for Victoria — 15 September 2021' (Media Release, 15 September 2021) <https://www.dhhs.vic.gov.au/coronavirus-update-victoria-15-september-2021>, archived at < https://web.archive.org/web/20210915100601/https://www.dhhs.vic.gov.au/coronavirus-update-victoria-15-september-2021> ('Coronavirus Update for Victoria — 15 September 2021').

149 Department of Health and Human Services (Vic), 'Coronavirus Update for Victoria — 15 September 2021' (n 148).

150 Victoria, *Victoria Government Gazette,* No S 524, 23 September 2021; Pandemic Declaration Accountability and Oversight Committee (n 30) 21.

151 Victoria, *Victoria Government Gazette,* No S 518, 20 September 2021; Department of Health and Human Services (Vic), 'Coronavirus Update for Victoria — 19 September 2021' (Media Release, 19 September 2021) <https://www.dhhs.vic.gov.au/coronavirus-update-victoria-19-september-2021>, archived at <https://web.archive.org/web/20210920001757/https://www.dhhs.vic.gov.au/coronavirus-update-victoria-19-september-2021>.

152 Daniel Andrews, 'Seven-Day Lockdown: Geelong, Surf Coast and Mitchell Shire' (Media Release, Victoria State Government, 19 September 2021) <https://www.premier.vic.gov.au/seven-day-lockdown-geelong-surf-coast-mitchell-shire>.

lifted for Greater Geelong and the Surf Coast Shire and remained in place for the Mitchell Shire.[153] For the Mitchell Shire, the lockdown was lifted on 13 October 2021.[154] From 28 September to 5 October 2021, the City of Latrobe was in a seven-day lockdown.[155] Greater Shepparton had a lockdown period from 1 to 8 October 2021.[156] However, as Shepparton was ending its period of lockdown, Mildura was entering a seven-day lockdown from 8–15 October.[157] On 15 October 2021, Mildura's lockdown was extended 'for a further seven days due to the significant

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153 Victoria, *Victoria Government Gazette,* No S 530, 27 September 2021; Department of Health and Human Services (Vic), 'Coronavirus Update for Victoria — 26 September 2021' (Media Release, 26 September 2021) <https://www.dhhs.vic.gov.au/coronavirus-update-victoria-26-september-2021>, archived at <https://web.archive.org/web/20210926075240/https://www.dhhs.vic.gov.au/coronavirus-update-victoria-26-september-2021>.

154 Department of Health and Human Services (Vic), 'Lockdown Restrictions in Mitchell Shire to Lift Tonight — 13 October 2021' (Media Release, 13 October 2021) <https://www.dhhs.vic.gov.au/lockdown-restrictions-mitchell-shire-lift-tonight-13-october-2021>, archived at <https://web.archive.org/web/20211013045317/https://www.dhhs.vic.gov.au/lockdown-restrictions-mitchell-shire-lift-tonight-13-october-2021>. See also Pandemic Declaration Accountability and Oversight Committee (n 30) 21.

155 Acting Chief Health Officer (Vic), 'Area Directions (No. 22)' in Victoria, *Victoria Government Gazette,* No S 539, 29 September 2021, 85; Department of Health and Human Services (Vic), 'City of Latrobe to Enter Seven Day Lockdown Tonight — 28 September 2021' (Media Release, 28 September 2021) <https://www.dhhs.vic.gov.au/city-latrobe-enter-seven-day-lockdown-tonight-28-september-2021>, archived at <https://web.archive.org/web/20211109075600/https://www.dhhs.vic.gov.au/city-latrobe-enter-seven-day-lockdown-tonight-28-september-2021>. See also Pandemic Declaration Accountability and Oversight Committee (n 30) 21.

156 Commenced by Acting Chief Health Officer (Vic), 'Area Directions (No. 23)' in Victoria, *Victoria Government Gazette,* No S 543, 2 October 2021, 80 and ended by Chief Health Officer (Vic), 'Area Directions (No. 25)' in Victoria, *Victoria Government Gazette,* No S 555, 9 October 2021, 27; Department of Health and Human Services (Vic), 'City of Greater Shepparton to Enter Seven-day Lockdown Tonight — 1 October 2021' (Media Release, 1 October 2021) <https://www.dhhs.vic.gov.au/city-greater-shepparton-enter-seven-day-lockdown-tonight-1-october-2021>, archived at https://web.archive.org/web/20211027152345/https://www.dhhs.vic.gov.au/city-greater-shepparton-enter-seven-day-lockdown-tonight-1-october-2021>; Department of Health (Vic), 'Lockdown Restrictions in Shepparton to Lift Tonight – 8 October 2021' (Media Release, 8 October 2021) <https://www.health.vic.gov.au/media-releases/lockdown-restrictions-in-shepparton-to-lift-tonight-8-october-2021>, archived at <https://web.archive.org/web/20220118011119/https://www.health.vic.gov.au/media-releases/lockdown-restrictions-in-shepparton-to-lift-tonight-8-october-2021>.

157 Victoria, *Victoria Government Gazette,* No S 551, 6 October 2021; Yara Murray-Atfield and Alexandra Treloar, 'Mildura Enters COVID-19 Lockdown as Regional Victorian Regions of Shepparton and Moorabool Exit', *ABC News* (online, 8 October 2021) <https://www.abc.net.au/news/2021-10-08/mildura-covid-lockdown-shepparton-moorabool-ease/100526008>; Department of Health (Vic), 'Mildura to Enter Seven-Day Lockdown Tonight — 8 October 2021' (Media Release, 8 October 2021) <https://www.health.vic.gov.au/media-releases/mildura-to-enter-seven-day-lockdown-tonight-8-october-2021>, archived at <https://web.archive.org/web/20220125013028/https://www.health.vic.gov.au/media-releases/mildura-to-enter-seven-day-lockdown-tonight-8-october-2021>.

and ongoing transmission of COVID-19 in the local community'.[158] The final lockdown in this study period was lifted in Mildura on 21 October 2021.[159]

Table 4: Victorian Lockdowns

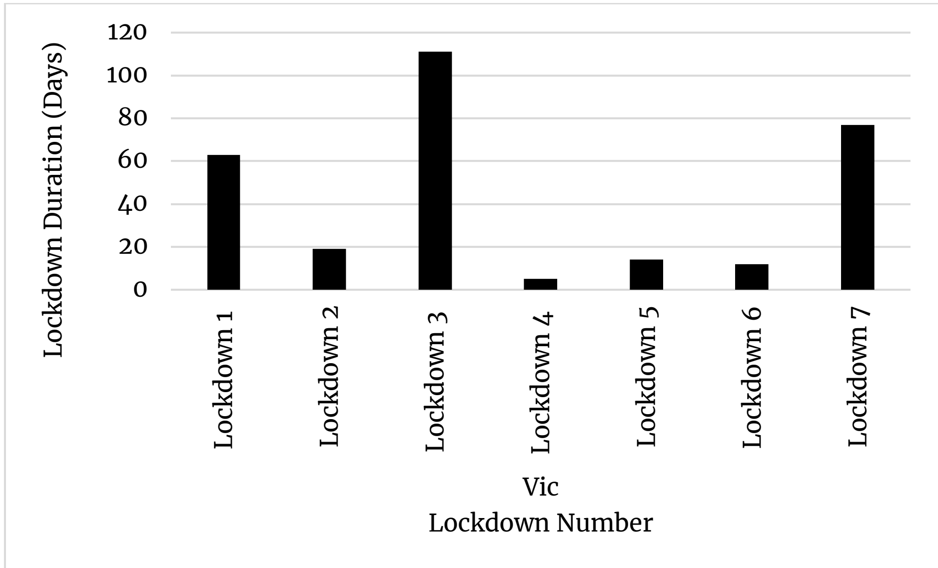
Victoria		Dates	Total Lockdown Period
Lockdown 1	All Victoria	30 March – 31 May 2020	63
Lockdown 2	10 postcodes	1–4 July 2020	4
	Two additional postcodes	4–19 July 2020	15
			19
Lockdown 3	Greater Melbourne + Mitchell Shire	8 July 2020 – 28 October 2020	112
	Regional Victoria	5 August 2020 – 16 September 2020	42
			112
Lockdown 4	All Victoria	12–17 February 2021	5
Lockdown 5	All Victoria	27 May 2021 – 3 June 2021	7
	Metropolitan Melbourne	3–10 June 2021	7
			14
Lockdown 6	All Victoria	15–27 July 2021	12

[158] Department of Health (Vic), 'Seven-day Extension to Mildura's Lockdown to Curb Transmission — 15 October 2021' (Media Release, 15 October 2021) <https://www.health.vic.gov.au/media-releases/seven-day-extension-to-milduras-lockdown-to-curb-transmision-15-october-2021>, archived at <https://web.archive.org/web/20220125105947/https://www.health.vic.gov.au/media-releases/seven-day-extension-to-milduras-lockdown-to-curb-transmision-15-october-2021>.

[159] Acting Chief Health Officer (Vic), 'Stay Safe Directions (Metropolitan Melbourne) (No. 4)' in Victoria, *Victoria Government Gazette*, No S 588, 22 October 2021, 2 ended this lockdown by revoking Chief Health Officer (Vic), 'Stay at Home Directions (Restricted Areas) (No. 28)' in Victoria, *Victoria Government Gazette*, No S 556, 10 October 2021, 1; Department of Health (Vic), 'Lockdown Restrictions in Mildura to Lift Tonight' (Media Release, 21 October 2021) <https://www.health.vic.gov.au/media-releases/lockdown-restrictions-in-mildura-to-lift-tonight>, archived at <https://web.archive.org/web/20220709154059/https://www.health.vic.gov.au/media-releases/lockdown-restrictions-in-mildura-to-lift-tonight>.

Lockdown 7	All Victoria	5–9 August 2021 21 August – 9 September 2021	23
	Metropolitan Melbourne	9 August 2021 – 21 October 2021	73
	All Regional Victoria	21 August – 9 September 2021	19
	Greater Shepparton	21 August – 15 September 2021	25
	Ballarat	15–22 September 2021	7
	Geelong + Surf Coast and Mitchell Shire	19–27 September (Geelong and Surf Coast) 19 September – 13 October (Mitchell Shire)	8 24
	Latrobe Valley	28 September – 5 October 2021	7
	Greater Shepparton	1–8 October 2021	7
	Mildura	8–21 October 2021	13
			77
Total Lockdown days in Victoria			**302**

Figure 5: Duration of Each Lockdown in Victoria



C *Queensland*

Queensland reported its first case of COVID-19 on 29 January 2020 and its first death on 25 March 2020.[160] In Queensland, a public health emergency was declared on 29 January 2020. During 2020 and 2021, the emergency declaration was extended a number of times, with the public health emergency ending on 31 October 2022.[161] Although Queensland experienced a total of six lockdowns, with the exception of lockdown one (which lasted 70 days), most were of relatively short duration as shown by Table 5 and Figure 6 (below).

In March 2020, restrictions were imposed on entry into remote designated areas in the State.[162] Non-essential businesses were closed from 23 March 2020, with restaurants and cafes only permitted to serve take-away food or hotel room

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[160] Storen and Corrigan (n 6) 3.

[161] *Public Health (Further Extension of Declared Public Health Emergency — COVID-19) Regulation (No 3) 2022* (Qld).

[162] *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Remote Communities) Determination 2020* (Cth) (‘*Biosecurity Determination 2020*’).

service.[163] Queensland's first lockdown started at 11:59pm on 29 March 2020[164] and was extended a number of times until 1 June 2020.[165] People were permitted to travel up to 50 km from their principal place of residence for approved recreational activities.[166] From 15 May 2020, seated dining was permitted, and recreational travel was permitted up to 500 km from a person's principal place of residence for residents of the Outback, and for up to 150 km from a person's principal place of residence for those who did not live in the Outback, with the

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163 Chief Health Officer (Qld), *Non-Essential Business Closure Direction* (23 March 2020) <https://www.health.qld.gov.au/system-governance/legislation/cho-public-health-directions-under-expanded-public-health-act-powers/revoked/non-essential-business-closure-direction-23-03-2020>.

164 Chief Health Officer (Qld), *Home Confinement Direction* (29 March 2020) <https://www.health.qld.gov.au/system-governance/legislation/cho-public-health-directions-under-expanded-public-health-act-powers/revoked/home-confinement-direction-1>.

165 Chief Health Officer (Qld), *Home Confinement, Movement and Gathering Direction* (2 April 2020) <https://www.health.qld.gov.au/system-governance/legislation/cho-public-health-directions-under-expanded-public-health-act-powers/revoked/home-confinement-movement-gathering-direction-1>; Chief Health Officer (Qld), *Home Confinement, Movement and Gathering Direction (No. 2)* (26 April 2020) <https://www.health.qld.gov.au/system-governance/legislation/cho-public-health-directions-under-expanded-public-health-act-powers/revoked/home-confinement-movement-gathering-direction-2>; Chief Health Officer (Qld), *Home Confinement, Movement and Gathering Direction (No. 3)* (1 May 2020) <https://www.health.qld.gov.au/system-governance/legislation/cho-public-health-directions-under-expanded-public-health-act-powers/revoked/home-confinement-movement-gathering-direction-3>; Chief Health Officer (Qld), *Home Confinement, Movement and Gathering Direction (No. 4)* (8 May 2020) <https://www.health.qld.gov.au/system-governance/legislation/cho-public-health-directions-under-expanded-public-health-act-powers/revoked/home-confinement-movement-gathering-direction-4>; Chief Health Officer (Qld), *Home Confinement, Movement and Gathering Direction (No. 5)* (14 May 2020) <https://www.health.qld.gov.au/system-governance/legislation/cho-public-health-directions-under-expanded-public-health-act-powers/revoked/home-confinement-movement-gathering-direction-5>; Chief Health Officer (Qld), *Home Confinement, Movement and Gathering Direction (No. 6)* (19 May 2020) <https://www.health.qld.gov.au/system-governance/legislation/cho-public-health-directions-under-expanded-public-health-act-powers/revoked/home-confinement-movement-gathering-direction-6>. Lockdown orders were effectively removed by Chief Health Officer (Qld), *Movement and Gathering Direction* (31 May 2020) <https://www.health.qld.gov.au/system-governance/legislation/cho-public-health-directions-under-expanded-public-health-act-powers/revoked/movement-and-gathering-direction>, which replaced Chief Health Officer (Qld), *Home Confinement, Movement and Gathering Direction (No. 6)* (19 May 2020) <https://www.health.qld.gov.au/system-governance/legislation/cho-public-health-directions-under-expanded-public-health-act-powers/revoked/home-confinement-movement-gathering-direction-6>.

166 Chief Health Officer (Qld), *Home Confinement, Movement and Gathering Direction (No. 2)* (n 165); Chief Health Officer (Qld), *Home Confinement, Movement and Gathering Direction (No. 3)* (n 165); Chief Health Officer (Qld), *Home Confinement, Movement and Gathering Direction (No. 4)* (n 165).

proviso that the person must not enter the Outback.[167] Queenslanders were able to travel freely within the State from 1 June 2020.[168]

Queensland's second lockdown was a three-day lockdown for the Greater Brisbane area in January 2021 in response to cases of a more infectious strain of the virus.[169] Another three-day lockdown for the Greater Brisbane area — lockdown three — was imposed from 29 March to 1 April 2021.[170] Lockdown four was from 29 June 2021 to 2 July 2021, and applied to areas of South-East Queensland, as well as Townsville, Magnetic Island and Palm Island,[171] although the lockdown for Brisbane City Council area and Moreton Bay Regional Council area was extended for another 24 hours and lifted on 3 July 2021.[172]

During lockdown five, which commenced on 31 July 2021, large areas of South-East Queensland were placed in lockdown. The affected areas were Brisbane City Council, Gold Coast City Council, Ipswich City Council, Lockyer Valley Regional Council, Logan City Council, Moreton Bay Regional Council, Noosa Shore Council, Redland City Council, Scenic Rim Regional Council,

[167] Chief Health Officer (Qld), *Home Confinement, Movement and Gathering Direction (No. 6)* (n 165). This *Direction* included a list of areas of Queensland that were regarded as the Outback for the purposes of the *Direction*. It included the Shire Councils of Balonne, Banana, Barcoo, Boulia, Bulloo, Carpentaria, Cloncurry, Croydon, Diamantina, Etheridge, Flinders, McKinlay, Murweh, Paroo, Quilpie, Richmond and Winton and the Regional Shire Councils of Barcaldine, Blackall-Tambo, Central Highlands, Longreach, Maranoa, and Mount Isa City Council.

[168] Annastacia Palaszczuk, 'Major Easing of Restrictions Will Open Queensland for Queenslanders' (Media Statement, Queensland Government, 31 May 2020) <https://statements.qld.gov.au/statements/89931>.

[169] Chief Health Officer (Qld), *Restrictions for Impacted Areas Direction* (8 January 2021) <https://www.health.qld.gov.au/system-governance/legislation/cho-public-health-directions-under-expanded-public-health-act-powers/revoked/restrictions-impacted-areas>. Greater Brisbane is composed of Brisbane City, Ipswich, Logan City, Moreton Bay and Redland City. This lockdown was effectively ended by the publication of Chief Health Officer (Qld), *Restrictions for Impacted Areas Direction (No. 2)* (11 January 2021) <https://www.health.qld.gov.au/system-governance/legislation/cho-public-health-directions-under-expanded-public-health-act-powers/revoked/restrictions-impacted-areas-2>.

[170] Chief Health Officer (Qld), *Restrictions for Impacted Areas Direction (No. 3)* (29 March 2021) <https://www.health.qld.gov.au/system-governance/legislation/cho-public-health-directions-under-expanded-public-health-act-powers/revoked/revocation-of-restrictions-for-impacted-areas-direction-3>.

[171] Chief Health Officer (Qld), *Restrictions for Impacted Areas Direction (No. 5)* (29 June 2021) <https://www.health.qld.gov.au/system-governance/legislation/cho-public-health-directions-under-expanded-public-health-act-powers/revoked/restrictions-impacted-areas-5>. The impacted areas were the following city council areas: Brisbane, Ipswich, Logan, Redland, Gold Coast, Townsville; the following regional council areas: Moreton Bay, Sunshine Coast, Somerset, Lockyer Valley, Scenic Rim; and Noosa Shire Council and Palm Island Aboriginal Shire Council.

[172] Chief Health Officer (Qld), *Revocation of Restrictions for Locked Down Areas (Brisbane and Moreton Bay Lockdown) Direction* (3 July 2021) <https://www.health.qld.gov.au/system-governance/legislation/cho-public-health-directions-under-expanded-public-health-act-powers/revoked/revocation-of-restrictions-for-locked-down-areas>.

Somerset Regional Council, Sunshine Coast Regional Council.[173] The lockdown was extended on 3 August 2021.[174] While the lockdown for Southeast Queensland ended on 8 August 2021,[175] a three-day lockdown for Cairns and Yarrabah — lockdown 6 — started on the same day and lasted for three days from 8–11 August 2021.[176]

Table 5: Queensland Lockdowns

Queensland	Dates	Total Lockdown Period
Lockdown 1 — All Queensland	23 March – 1 June 2020	70
Lockdown 2 — Greater Brisbane	8–11 January 2021	3
Lockdown 3 — Greater Brisbane	29 March – 1 April 2021	3
Lockdown 4 — Southeast Queensland + Impacted Areas	29 June – 3 July 2021	4
Lockdown 5 — South-East Qld	31 July – 8 August 2021	8
Lockdown 6 — Cairns + Yarrabah	8–11 August 2021	3
Total		**91**

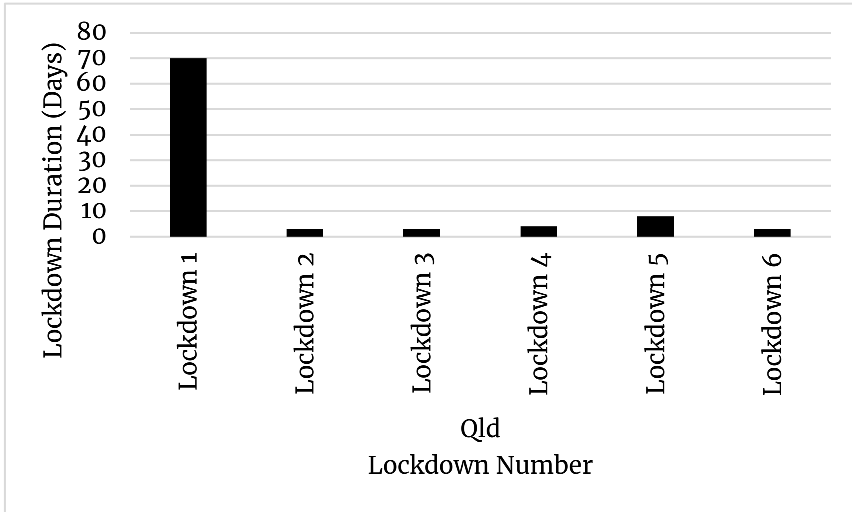
173 Chief Health Officer (Qld), *Restrictions for Locked Down Areas (South-East Queensland) Direction* (31 July 2021) <https://www.health.qld.gov.au/system-governance/legislation/cho-public-health-directions-under-expanded-public-health-act-powers/revoked/restrictions-for-locked-down-areas-1>. See also 'South-East Queensland is Going into Lockdown: Here Are Some of the COVID-19 Restrictions', *ABC News* (online, 1 August 2021) <https://www.abc.net.au/news/2021-07-31/queensland-covid-19-lockdown-restrictions/100339780>.

174 Chief Health Officer (Qld), *Restrictions for Locked Down Areas (South-East Queensland) Direction (No. 2)* (1 August 2021) <https://www.health.qld.gov.au/system-governance/legislation/cho-public-health-directions-under-expanded-public-health-act-powers/revoked/restrictions-for-locked-down-areas-2>; Chief Health Officer (Qld), *Restrictions for Locked Down Areas (South-East Queensland) Direction (No. 3)* (3 August 2021) <https://www.health.qld.gov.au/system-governance/legislation/cho-public-health-directions-under-expanded-public-health-act-powers/revoked/restrictions-for-locked-down-areas-3>.

175 Chief Health Officer (Qld), *Restrictions for Locked Down Areas (South-East Queensland) Direction (No. 4)* (4 August 2021, revoked 8 August 2021) <https://www.health.qld.gov.au/system-governance/legislation/cho-public-health-directions-under-expanded-public-health-act-powers/revoked/restrictions-for-locked-down-areas>.

176 Chief Health Officer (Qld), *Restrictions for Locked Down Areas (Cairns and Yarrabah) Direction* (8 August 2021) <https://www.health.qld.gov.au/system-governance/legislation/cho-public-health-directions-under-expanded-public-health-act-powers/revoked/restrictions-for-locked-down-areas-cairns>. See also 'Lockdown Lifts in Queensland's South, as Another Starts in the North. Here's What You Need to Know', *ABC News* (online, 8 August 2021) <https://www.abc.net.au/news/2021-08-08/queensland-coronavirus-lockdown-lifts-explainer/100356356>.

Figure 6: Duration of Each Lockdown in Queensland



D *Tasmania*

Tasmania recorded its first case of COVID-19 on 2 March 2020 and its first death on 30 March 2020.[177] A Public Health Emergency for Tasmania was declared on 17 March 2020, and a state of emergency was declared on 19 March 2020.[178] From 23 March 2020, a range of businesses were required to close, and social distancing measures were introduced in line with restrictions adopted across Australia.[179] Commencing 31 March 2020, Tasmanians were required to stay at home except for a limited number of reasons.[180] In mid-April, additional restrictions were

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177 Storen and Corrigan (n 6) 3.

178 Melick (n 36) 14. See also ibid 61–2.

179 Tasmanian Parliamentary Standing Committee of Public Accounts (n 36) 103.

180 Director of Public Health (Tas), 'Public Health Act 1997 Direction Under Section 16' in Tasmania, *Tasmanian Government Gazette*, No 21 959, 31 March 2020, 167. This initial lockdown order was extended by directions called: Director of Public Health (Tas), 'Stay at Home Requirements – No. 2' in Tasmania, *Tasmanian Government Gazette*, No 21 969, 8 April 2020, 235; Director of Public Health (Tas), 'Stay at Home Requirements – No. 3' in Tasmania, *Tasmanian Government Gazette*, No 21 977, 22 April 2020, 269; Director of Public Health (Tas), 'Stay at Home Requirements – No. 4' in Tasmania, *Tasmanian Government Gazette*, No 21 988, 20 May 2020, 351; Director of Public Health (Tas), 'Stay at Home Requirements – No. 5' in Tasmania, *Tasmanian Government Gazette*, No 21 990, 27 May 2020, 374. See also Peter Gutwein, 'Press Conference — 30 March 2020: Coronavirus Update' (Press Conference, Department of Premier and Cabinet (Tas), 30 March 2020) <https://www.premier.tas.gov.au/covid-19_updates/press_conference_-_30_march_2020>,

imposed upon businesses in response to a cluster of cases in Northwest Tasmania. These business restrictions were imposed in Northwest Tasmania from 13 April 2020[181] and lifted on 4 May 2020.[182] Restrictions began to be eased from 11 May 2020 and the stay-at-home direction was revoked on 5 June 2020.[183] In October 2021 Hobart and Southern Tasmania entered a three-day lockdown.[184]

Table 6: Tasmanian Lockdowns

Tasmania	Dates	Total Lockdown Period
Lockdown 1 — Tasmania	31 March – 5 June 2020	66
Lockdown 2 — Southern Tasmania	15–18 October 2021	3
Total		**69**

E *Western Australia*

Western Australia recorded its first case of COVID-19 on 21 February 2020 and its first death on 1 March 2020.[185] In March 2020 restrictions were imposed on entry into remote communities in designated areas of the State.[186] Western Australia introduced strict border controls in April 2020. These were to remain in place for

archived at <https://web.archive.org/web/20200401232052/https://www.premier.tas.gov.au/covid-19_updates/press_conference_-_30_march_2020>; Matt Maloney, 'Tasmanian Households Ordered to Go into Lockdown for Four Weeks Due to Coronavirus Pandemic', *The Examiner* (online, 31 March 2020) <https://www.examiner.com.au/story/6704057/tasmanian-households-to-be-in-lockdown-for-month/>.

181 Peter Gutwein and Sarah Courtney, 'Further Measures to Protect the North-West Community' (Media Release, Department of Premier and Cabinet (Tas), 12 April 2020) <https://www.premier.tas.gov.au/releases/further_measures_to_protect_the_north-west_community>, archived at <https://web.archive.org/web/20200418145905/https://www.premier.tas.gov.au/releases/further_measures_to_protect_the_north-west_community>. See also Melick (n 36) 24.

182 Peter Gutwein, 'Additional North West COVID-19 Measures to be Lifted' (Media Release, Department of Premier and Cabinet (Tas), 1 May 2020) https://www.premier.tas.gov.au/releases/additional_north_west_covid-19_measures_to_be_lifted, archived at <https://web.archive.org/web/20200502002409/https://www.premier.tas.gov.au/releases/additional_north_west_covid-19_measures_to_be_lifted>.

183 Tasmanian Parliamentary Standing Committee of Public Accounts (n 36) 112–14.

184 Director of Public Health (Tas), 'Stay at Home Requirements — Southern Lockdown — No. 1' in Tasmania, *Tasmanian Government Gazette*, No 22 133, 27 October 2021, 1028; Australian Associated Press, 'Hobart and Southern Tasmania Enter Snap Three-Day COVID Lockdown', *The Guardian* (online, 15 October 2021) <https://www.theguardian.com/australia-news/2021/oct/15/hobart-and-southern-tasmania-enter-snap-three-day-covid-lockdown>.

185 Storen and Corrigan (n 6) 3.

186 *Biosecurity Determination 2020* (n 162).

almost 700 days,[187] until the restrictions were lifted in March 2022.[188] Western Australia's border closure was also challenged unsuccessfully in the High Court with the plaintiff arguing unsuccessfully that the Western Australian directions that closed the Western Australian border were contrary to s 92 of the *Australian Constitution* which addresses freedom of interstate 'trade, commerce and intercourse'.[189] Western Australia's state of emergency and public health state of emergency which came into effect on 16 March 2020 were not lifted until 4 November 2022.[190] As detailed in Table 7 and Figure 7, the State entered a five-day lockdown in early 2021,[191] a three-day lockdown in April 2021,[192] and a further lockdown for four days from late June 2021.[193]

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[187] Cason Ho et al, 'WA Border to Open After Two Years of COVID-19 Travel Restrictions, Bringing Tears of Joy in Perth', *ABC News* (online, 3 March 2022) <https://www.abc.net.au/news/2022-03-03/wa-border-opens-after-697-days-closed-as-first-planes-land-perth/100871788>.

[188] Elias Visontay, 'Western Australia to Reopen 3 March to Triple-Vaccinated Travellers', *The Guardian* (online, 18 February 2022) <https://www.theguardian.com/australia-news/2022/feb/18/western-australia-to-reopen-3-march-to-triple-vaccinated-travellers>.

[189] *Palmer v Western Australia* (2021) 272 CLR 505.

[190] Department of the Premier and Cabinet (WA), 'Western Australia's State of Emergency Set to End', *Government of Western Australia* (News Story, 1 November 2022) <https://www.wa.gov.au/government/announcements/western-australias-state-of-emergency-set-end>; Department of the Premier and Cabinet (WA), 'COVID-19 Coronavirus: Declarations', *Government of Western Australia* (Web Page, 4 November 2022) <https://www.wa.gov.au/government/document-collections/covid-19-coronavirus-declarations>.

[191] Commissioner of Police and State Emergency Coordinator (WA), *Stay at Home and Closure (Perth, Peel and the South West Regions) Directions (No 2)* (1 February 2021); Mark McGowan and Roger Cook, 'Western Australia Enters Five-Day Lockdown from 6pm Tonight' (Media Statement, Government of Western Australia, 31 January 2021) <https://www.wa.gov.au/government/media-statements/McGowan-Labor-Government/Western-Australia-enters-five-day-lockdown-from-6pm-tonight-20210131>.

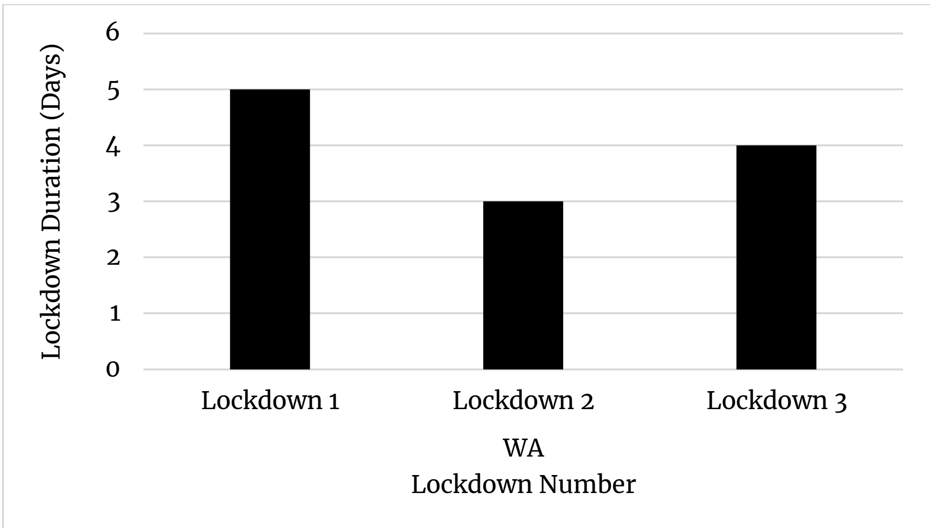
[192] Department of the Premier and Cabinet (WA), 'Perth Metro and Peel to Enter a 3-day Lockdown', *Government of Western Australia* (News Story, 27 June 2023) <https://www.wa.gov.au/government/announcements/perth-metro-and-peel-enter-3-day-lockdown>; Department of the Premier and Cabinet (WA), 'End of Lockdown in Perth and Peel', *Government of Western Australia* (News Story, 26 June 2023) <www.wa.gov.au/government/announcements/end-of-lockdown-perth-and-peel>. See also Department of Health (WA), *PHEOC Bulletin No 59* (27 April 2021) <https://www.lakegrace.wa.gov.au/council-meetings/ordinary-council-meetings/26-may-2021/184/documents/information-bulletin-26-may-2021.pdf>.

[193] Commissioner of Police and State Emergency Coordinator (WA), *Outbreak Restrictions (Circuit-Break Lockdown -- Level 3) Directions* (28 June 2021); Department of the Premier and Cabinet (WA), '4-Day Lockdown Introduced for Perth and Peel', *Government of Western Australia* (News Story, 27 June 2023) <https://www.wa.gov.au/government/announcements/4-day-lockdown-introduced-perth-and-peel>. See also Department of Health (WA), *PHEOC Bulletin No 68* (29 June 2021) <https://www.ravensthorpe.wa.gov.au/Profiles/ravensthorpe/Assets/ClientData/Coronavirus/PHEOC_BULLETIN___68.pdf>.

Table 7: Western Australian Lockdowns

Western Australia	Dates	Total Lockdown Period
Lockdown 1 — Perth Metro + Peel and South West	31 January – 5 February 2021	5
Lockdown 2 — Perth Metro + Peel	24–27 April 2021	3
Lockdown 3 — Perth + Peel and Rottnest Island	29 June – 3 July 2021	4
Total		**12**

Figure 7: Duration of Each Lockdown in Western Australia



F *Northern Territory*

The Northern Territory recorded its first case of COVID-19 on 4 March 2020[194] and its first death on 2 December 2021.[195] A public health emergency was declared on 19 March 2020.[196] In March 2020, access to remote communities in the Northern Territory was restricted.[197] From 24 March 2020, travellers arriving in the Northern Territory were required to quarantine for 14 days, unless exempt.[198] On 23 March 2020, it was announced that, in line with the decision of National Cabinet, some businesses would close, and limits were imposed on the number of attendees at weddings and funerals.[199] Restrictions began to be eased from May 2020.[200]

As shown in Table 8 and Figure 8 below, the Northern Territory did not experience lockdowns until 2021 when, in the second half of 2021, the Northern Territory experienced a series of lockdowns in response to the Delta strain. While the first lockdowns in Darwin,[201] Alice Springs[202] and Katherine,[203] respectively, were in late June through to August 2021, the remaining lockdown periods were in November and December 2021. As shown in Table 8 below, most of the lockdowns were for seven days or less. The exception to this was the lockdown in Binjari in November 2021 which lasted for 18 days. During this period, Binjari was in a hard lockdown from 20 November until 2 December 2021. During the hard lockdown, Binjari residents were prohibited from leaving their homes except for a very limited number of reasons: to receive medical treatment; to provide care or support to another person within the lockdown area who could not care for themselves; in an

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194 Storen and Corrigan (n 6) 4.

195 Alicia Perera and Jacqueline Breen, 'Binjari Woman in her 70s Becomes First Person in Northern Territory to Die from COVID-19', *ABC News* (online, 4 December 2021) <https://www.abc.net.au/news/2021-12-03/nt-covid-outbreak-first-death-binjari-woman-in-her-70s/100671362>.

196 Storen and Corrigan (n 6) 24.

197 Ibid 24–5. See also *Biosecurity Determination 2020* (n 162).

198 Storen and Corrigan (n 6) 25.

199 Ibid 25. Remote communities were exempt from these requirements, given previously introduced measures.

200 Ibid 28.

201 Chief Health Officer (NT), *COVID-19 Directions (No. 9) 2021: Directions to Lock Down Darwin, Palmerston, Litchfield, Wagait, Belyuen and Dundee Beach* (27 June 2021). This was extended by the following: Chief Health Officer (NT), *COVID-19 Directions (No. 13) 2021: Directions to Lock Down Darwin and Surrounding Areas of the Territory* (27 June 2021); Chief Health Officer (NT), *COVID-19 Directions (No. 16) 2021: Directions to Lock Down Darwin and Surrounding Areas of the Territory* (28 June 2021); Chief Health Officer (NT), *COVID-19 Directions (No. 20) 2021: Directions to Lock Down Darwin and Surrounding Areas of the Territory* (29 June 2021); Chief Health Officer (NT), *COVID-19 Directions (No. 25) 2021: Directions to Lock Down Darwin and Surrounding Areas of the Territory* (1 July 2021).

202 Chief Health Officer (NT), *COVID-19 Directions (No. 21) 2021: Directions to Lock Down Alice Springs* (30 June 2021); Chief Health Officer (NT), *COVID-19 Directions (No. 23) 2021: Directions to Lock Down Alice Springs* (1 July 2021).

203 Chief Health Officer (NT), *COVID-19 Directions (No. 42) 2021: Directions to Lock Down Darwin and Surrounding Areas of the Territory and Katherine* (16 August 2021); Chief Health Officer (NT), *COVID-19 Directions (No. 46) 2021: Directions to Lock Down Katherine* (19 August 2021).

emergency; in order 'to escape a risk of harm, including harm relating to family violence'; or if authorised by a law of the Territory or Commonwealth.[204]

In some instances, lockdowns were supplemented by lockouts which restricted movement into and out of areas covered by lockdowns. A further feature of the Northern Territory lockdowns was that in some instances, the stay-at-home orders only applied to unvaccinated persons. As is clear from Table 8, these directions meant longer stay-at-home periods for unvaccinated persons.

Table 8: Northern Territory Lockdowns

Northern Territory		Dates	Total Lockdown period
Lockdown 1	Darwin + surrounding areas	27 June – 2 July 2021	5
	Alice Springs	30 June – 3 July 2021	3
			6
Lockdown 2	Darwin + surrounding areas	16–19 August 2021	3
	Katherine	16–20 August 2021	4
			4
Lockdown 3	Katherine[205] Katherine (unvaccinated only)[206]	5–7 November 2021 7–8 November 2021	2 1

[204] Chief Health Officer (NT), *COVID-19 Directions (No. 105) 2021: Directions for Hard Lockdown in Binjari* (27 November 2021) 3 cl 11. See also Myles Houlbrook-Walk, 'After Enduring the Northern Territory's Harshest COVID-19 Lockdown Rules, the Community of Binjari is Grieving', *ABC News* (online, 12 December 2021) <https://www.abc.net.au/news/2021-12-12/nt-binjari-grieves-after-covid-outbreak/100693438>.

[205] Acting Chief Health Officer (NT), *COVID-19 Directions (No. 59) 2021: Directions to Lock Down Katherine* (4 November 2021); Acting Chief Health Officer (NT), *COVID-19 Directions (No. 68) 2021: Directions to Lock Down Katherine* (5 November 2021); Acting Chief Health Officer (NT), *COVID-19 Directions (No. 71) 2021: Directions to Lock Out Katherine* (7 November 2021) ('*Directions to Lock Out Katherine*').

[206] *Directions to Lock Out Katherine* (n 205).

	Darwin + surrounding areas (unvaccinated only)[207]	5–9 November 2021	4
			4
Lockdown 4	Katherine[208]	15–18 November 2021	3
	Robinson River + surrounding homelands[209]	15–18 November 2021	3
			3
Lockdown 5	Binjari[210]	20 November – 8 December 2021	18
	Robinson River (unvaccinated only)[211]	22 November – 1 December 2021	9
	Katherine (unvaccinated only)[212]	27 November – 8 December 2021	11
	Lajamanu[213]	27 November – 1 December 2021 1–7 December 2021	4 6

207 Acting Chief Health Officer (NT), *COVID-19 Directions (No. 61) 2021: Directions to Lock Out Darwin and Surrounding Areas of the Territory* (4 November 2021); Acting Chief Health Officer (NT), *COVID-19 Directions (No. 67) 2021: Directions to Lock Out Darwin and Surrounding Areas of the Territory* (5 November 2021); Acting Chief Health Officer (NT), *COVID-19 Directions (No. 76) 2021: Directions to Lock Out Darwin and Surrounding Areas of the Territory* (8 November 2021).

208 Acting Chief Health Officer (NT), *COVID-19 Directions (No. 85) 2021: Directions to Lock Down Katherine* (15 November 2021).

209 Acting Chief Health Officer (NT), *COVID-19 Directions (No. 86) 2021: Directions to Lock Down Robinson River and Homelands* (15 November 2021).

210 Acting Chief Health Officer (NT), *COVID-19 Directions (No. 94) 2021: Hard Lockdown of Binjari and Rockhole* (20 November 2021); Acting Chief Health Officer (NT), *COVID-19 Directions (No. 105) 2021: Directions for Hard Lockdown in Binjari* (27 November 2021); Deputy Chief Health Officer (NT), *COVID-19 Directions (No. 112) 2021: Directions to Lock Down Binjari* (2 December 2021); Deputy Chief Health Officer (NT), *COVID-19 Directions (No. 115) 2021: Amendment of COVID-19 Directions (No.106) 2021 and revocation of COVID-19 Directions (No. 112) 2021* (6 December 2021) ('*COVID-19 Directions (No. 115) 2021*').

211 Acting Chief Health Officer (NT), *COVID-19 Directions (No. 97) 2021: Directions to Lock Out Robinson River and Surrounding Homelands* (22 November 2021).

212 Acting Chief Health Officer (NT), *COVID-19 Directions (No. 106) 2021: Directions to Lock Out Katherine* (27 November 2021); *COVID-19 Directions (No 115) 2021* (n 210).

213 Acting Chief Health Officer (NT), *COVID-19 Directions (No. 108) 2021: Directions to Lock Down Lajamanu and Homelands* (27 November 2021), revoked by Acting Chief Health Officer (NT), *COVID-19 Directions (No. 111) 2021: Directions to Lockout Lajamanu and Homelands* (1 December 2021) ('*COVID-19 Directions (No. 111) 2021*').

	Lajamanu (unvaccinated only)[214]		
			18
Lockdown 6	Beswick (unvaccinated only)[215]	11–14 December 2021	3
	Kalkarindji + Daguragu[216] (unvaccinated only) Timber Creek + Gilwi[217] (unvaccinated only)	14–17 December 2021 14–17 December 2021	3 3
	Tennant Creek[218]	17–22 December 2021	5
	Ali Curung + Imangara + Imperrenth + Double D + Junkaji and Wakurlpu[219]	19–22 December 2021	3
	Tennant Creek (unvaccinated only)[220]	23–29 December 2021	6
			18
Total			**53**

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214 *COVID-19 Directions (No. 111) 2021* (n 213).

215 Acting Chief Health Officer (NT), *COVID-19 Directions (No. 121) 2021: Directions to Lock Out Beswick* (11 December 2021).

216 Chief Health Officer (NT), *COVID-19 Directions (No. 125) 2021: Directions to Lock Out Kalkarindji and Daguragu* (14 December 2021).

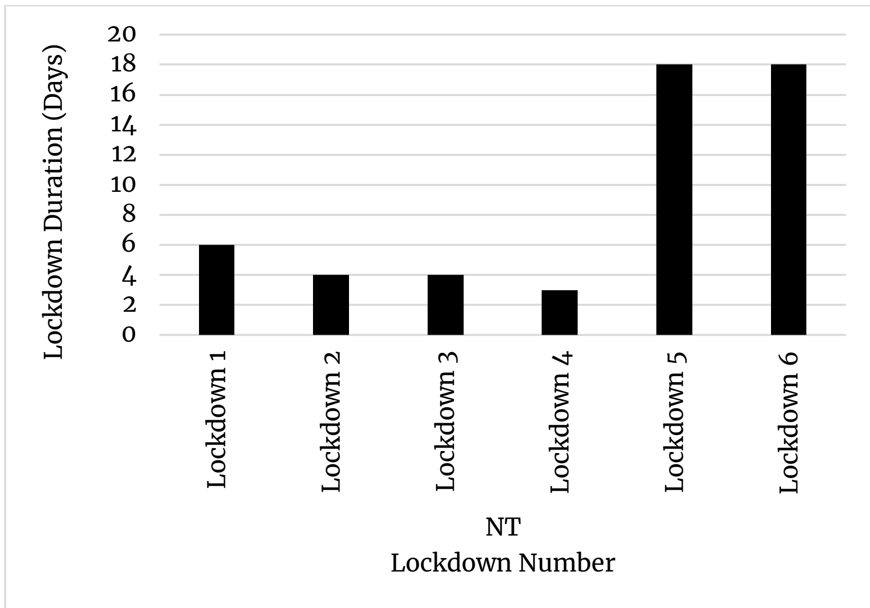
217 Chief Health Officer (NT), *COVID-19 Directions (No. 126) 2021: Directions to Lock Out Timber Creek and Gilwi* (14 December 2021).

218 Chief Health Officer (NT), *COVID-19 Directions (No. 127) 2021: Directions to Lockdown Tennant Creek* (17 December 2021); Chief Health Officer (NT), *COVID-19 Directions (No. 135) 2021: Amendment and Revocation of Other Directions* (20 December 2021). See also Samantha Dick and Steve Vivian, 'NT Town of Tennant Creek Enters Lockdown After Four COVID-19 Cases Recorded in Community', *ABC News* (online, 17 December 2021) <https://www.abc.net.au/news/2021-12-17/nt-covid-tennant-creek-lockdown/100708100>; Steve Vivian, 'NT Records Three New COVID-19 Cases as Tennant Creek Lockdown Extended', *ABC News* (online, 20 December 2021) <https://www.abc.net.au/news/2021-12-20/nt-covid-outbreak-tennant-creek-ali-curung-katherine/100713116>.

219 Chief Health Officer (NT), *COVID-19 Directions (No. 133) 2021: Directions to Lock Down Ali Curung, Imangara, Imperrenth, Double D, Junkaji and Wakurlpu* (19 December 2021).

220 Chief Health Officer (NT), *COVID-19 Directions (No. 140) 2021: Directions to Lock Out Tennant Creek* (23 December 2021).

Figure 8: Duration of Each Lockdown in the Northern Territory



G *South Australia*

South Australia recorded its first case of COVID-19 on 1 February 2020 and its first death on 7 April 2020.[221] South Australia declared a major emergency in relation to COVID-19 on 22 March 2020 and the declaration remained in place until 24 May 2022 — a total of 793 days.[222] On 22 March 2020, the Premier announced that the State's borders would be closed from 24 March with travellers arriving from interstate or overseas required to self-isolate for 14 days.[223] In March 2020, restrictions were imposed on entry into remote communities in designated areas in the State.[224] In November 2020, all of South Australia entered a six-day 'circuit breaker' lockdown in which people were required to stay at home except for a

221 Storen and Corrigan (n 6) 3.

222 'COVID Major Emergency Declaration Ends', *Government of South Australia* (News Story, 24 May 2022) <https://www.premier.sa.gov.au/media-releases/news-items/covid-major-emergency-declaration-ends>.

223 Storen and Corrigan (n 6) 6, 45.

224 *Biosecurity Determination 2020* (n 162).

small number of specified reasons, such as to receive medical care.[225] The lockdown commenced on 19 November 2020,[226] was extended on 20 November[227] and ended on 22 November 2020.[228] In July 2021, South Australia entered a week-long lockdown in response to cases of the Delta variant. The lockdown commenced on 20 July 2021[229] and ended on 27 July 2021.[230]

Table 9: South Australian Lockdowns

South Australia	Dates	Total Lockdown Period
Lockdown 1 (statewide)	19–22 November 2020	3
Lockdown 2 (statewide)	20–27 July 2021	7
Total		**10**

H *Australian Capital Territory*

The ACT reported its first case of COVID-19 on 12 March 2020 and its first death on 30 March 2020.[231] A public health emergency was declared on 16 March 2020.[232] Although the ACT did not enter a lockdown with stay-at-home orders during this initial period of the pandemic, restrictions on gatherings were imposed and non-essential businesses were closed. Indoor gatherings of more than 100 people[233] and outdoor gatherings of more than 500 people[234] were prohibited from 19 March 2020.

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[225] Bension Siebert and Rebecca Brice, 'South Australia Ordered into Six-day Lockdown Amid Coronavirus Outbreak', *ABC News* (online, 18 November 2020) <https://www.abc.net.au/news/2020-11-18/sa-ordered-into-major-lockdowns-amid-coronavirus-outbreak/12894666>.

[226] Commissioner of Police and State Co-ordinator (SA), *Emergency Management (Stay at Home) (COVID-19) Direction 2020* (18 November 2020).

[227] Commissioner of Police and State Co-ordinator (SA), *Emergency Management (Stay at Home No 2) (COVID-19) Direction 2020* (19 November 2020); Commissioner of Police and State Co-ordinator (SA), *Emergency Management (Stay at Home No 3) (COVID-19) Direction 2020* (20 November 2020) ('*Stay at Home No 3 Direction 2020*').

[228] *Stay at Home No 3 Direction 2020* (n 227).

[229] Jack Paynter and Health Parkes-Hupton, 'South Australia Heads into Lockdown After Fifth Covid-19 Recorded', *News.com.au* (online, 20 July 2021) <www.news.com.au/national/south-australia/south-australia-records-one-new-local-covid19-case-as-restrictions-tighten/news-story/edb822e1da5664bcec5f7bca72f24efb>.

[230] Rebecca Opie, 'South Australia's COVID-19 Lockdown is Ending — Here's What You Will and Won't Be Able to Do', *ABC News* (online, 26 July 2021) <https://www.abc.net.au/news/2021-07-26/what-restrictions-will-remain-when-sa-covid-19-lockdown-ends/100323482>.

[231] Storen and Corrigan (n 6) 4.

[232] Ibid 7.

[233] Chief Health Officer (ACT), *Public Health (Indoor Gatherings) Emergency Direction 2020* (NI2020-162, 19 March 2020).

[234] Chief Health Officer (ACT), *Public Health (Outdoor Gatherings) Emergency Direction 2020* (NI2020-163, 19 March 2020).

Non-essential businesses and activities were closed from 23 March 2020, in line with the decision of National Cabinet.[235] From 11:59pm on 31 March 2020, restrictions were imposed on the number of visitors people could have in their homes.[236] Some easing of restrictions was announced on 1 May 2020,[237] with a further easing of restrictions during May and June 2020.[238] The ACT entered a period of lockdown from 12 August 2021. Initially for a period of seven days,[239] the lockdown was extended a number of times and was finally lifted on 15 October 2021.[240]

Table 10: Australian Capital Territory Lockdowns

ACT	Dates	Total Lockdown Period
Lockdown 1	12 August – 15 October 2021	64
Total		**64**

VI Lockdowns and the Rule of Law

By charting the course of the pandemic through the lockdown laws of 2020–21, we have provided a rich doctrinal history of the primary legal sources for the lockdowns that were such a defining feature of the COVID-19 pandemic.

There are two key findings from our analysis. First, there were pronounced differences in the number and duration of lockdowns experienced by people in different states and territories in Australia. To a large degree, these differences were shaped by Australian federalism, as most of the lockdown laws were made under state or territory public health laws. While some national harmonisation occurred, for example, through the National Cabinet, the reality was that state and territory governments made their own decisions about the geographic reach and duration of lockdowns within their borders,[241] and the locking out of others

[235] Storen and Corrigan (n 6) 8. See, eg, Chief Health Officer (ACT), *Public Health (Closure of Non-Essential Business or Undertaking) Emergency Direction 2020* (NI2020-169, 23 March 2020).

[236] Chief Health Officer (ACT), *Public Health (Non-Essential Gatherings) Emergency Direction 2020* (NI2020-202, 31 March 2020).

[237] Storen and Corrigan (n 6) 11.

[238] Ibid 12–13.

[239] Chief Health Officer (ACT), *Public Health (Lockdown Restrictions) Emergency Direction 2021 (No 1)* (NI2021-480, 12 August 2020); Australian Capital Territory Government, 'Seven-Day Lockdown for the ACT', *COVID-19* (News Article, 12 August 2021) <https://www.covid19.act.gov.au/news-articles/seven-day-lockdown-for-the-act>, archived at <https://web.archive.org/web/20210812023408/https://www.covid19.act.gov.au/news-articles/seven-day-lockdown-for-the-act>. See also ACT Select Committee on the COVID-19 2021 Pandemic Response (n 38) 2.

[240] ACT Select Committee on the COVID-19 2021 Pandemic Response (n 38) 3–4.

[241] Scott Stephenson, 'The Relationship Between Federalism and Rights During COVID-19' (2021) 32(3) *Public Law Review* 222, 224.

through domestic border closures.[242] This localised decision-making meant that, 'limitations were imposed by decision-makers that had detailed knowledge of local conditions, were closely accountable to affected persons, and were in a better position to explain and therefore justify their decisions to members of the public'.[243] However, it also meant that there were inconsistencies between the states in terms of their responses that added to the challenges for members of the public in understanding the implications of the restrictions.[244]

These differing experiences of the pandemic are also reflected in public sentiment. In its recent report on the COVID-19 pandemic and human rights in Australia, the Australian Human Rights Commission reported that in a quantitative survey of more than 3,000 participants, 66% believed 'that their State Government took the appropriate steps to stop the spread of COVID-19.'[245] However, the results varied between the states and territories, with the Northern Territory (83%), Western Australia (79%) and South Australia (78%) receiving the highest results agreeing with the statement. This compared to Tasmania (71%), the ACT (69%), and NSW and Queensland (both 68%). Victoria, the most locked down state in terms of number and duration of lockdowns, only had 54% of participants agree with the statement.

The second key finding from our analysis relates to the sheer number of orders and directions that were introduced during 2020–21, the difficulty that existed in locating the primary sources for the public health requirements, and the frequency with which they changed. All of these factors presented challenges to the rule of law. Commentators have noted the difficulties with locating the directions and orders and the challenges this presents for clarity about obligations.[246] As one commentator noted in 2020: 'Given the number of declarations, directions and amendments being made to facilitate the response to COVID-19, knowing what the law is at a given point in time and how it will be implemented has become a daily challenge'.[247]

In its quantitative survey of more than 3,000 participants, the Australian Human Rights Commission reported that 42% of respondents agreed (29% mildly agreed; 13% strongly agreed) with the statement 'I was not always clear on what the current restrictions were'.[248] In its report the Commission observed: 'If

[242] Ibid 229–30.

[243] Ibid 224.

[244] Ibid.

[245] Australian Human Rights Commission, *Collateral Damage: What the Untold Stories from the COVID-19 Pandemic Reveal About Human Rights in Australia* (Report, March 2025) 28.

[246] Boughey (n 49); Edgar (n 52); McLeod (n 52) 6; Peta Stephenson and Jonathan Crowe, 'Queensland Public Health Laws and COVID-19: A Challenge to the Rule of Law?' *Australian Public Law* (Blog Post, 21 August 2020) <https://www.auspublaw.org/blog/2020/08/queensland-public-health-laws-and-covid-19-a-challenge-to-the-rule-of-law>.

[247] Katie Miller, 'Finding Law in a Time of Emergency: COVID-19' (2020) 27(2) *Australian Journal of Administrative Law* 66, 68.

[248] Australian Human Rights Commission (n 245) 94.

close to half of the population is unsure what the current regulations are, this raises serious concerns about human rights, the rule of law, and the validity of enforcing rules that people did not necessarily know they are breaking'.[249]

It is important to recognise what aspect of the rule of law was lacking in the legal response of different state and territory governments to the pandemic. This article highlights that the principle of openness/transparency of laws was one of the major rule of law failings across the nation. Authors such as Fuller, Raz and Lord Bingham all stress the importance of legal certainty to the operation of the rule of law.[250] Laws must be clear, published and relatively stable, so that law-abiding citizens can conduct their lives in accordance with the law.[251] Some situations demand frequent changes to the law, but that simply increases the need for government to openly and transparently publish those laws. When public health directions are issued that majorly curtail fundamental rights, including a requirement that people stay in their homes, then there is a concomitant need for those directions to be readily accessible and understood by members of the public. Accessibility means that there is a known resource (in the form of a government website, or the government gazette) that contains for example, all of the public health directions relating to lockdowns. Whilst media reporting through traditional outlets and social media was helpful in terms of informing the public about the area of effect, duration and conditions of a lockdown, this was not a substitute for a well compiled government resource that captured verbatim each public health direction.

VII Conclusion: The Future of Public Health Directions

As our analysis has illustrated, there was considerable variation between Australian states and territories in terms of the number and duration of lockdowns in response to the COVID-19 pandemic in 2020 and 2021. This variation was understandable given factors such as differences between jurisdictions in the number of COVID-19 cases, differing approaches to and availability of hotel quarantine, and state-based differences in views about closure of state borders,[252] as well as population density and rolling vaccination rates across geographical locations.

Analysing the frequency and duration of the lockdowns in response to COVID-19 across the Australian states and territories has presented significant challenges. These challenges arose in three main areas: (i) the difficulty in some jurisdictions with locating historical directions; (ii) the number of directions, and the frequency with which they were introduced or amended; and (iii) the titles given to the directions in some jurisdictions. Together these challenges made it

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[249] Ibid.

[250] Fuller (n 15) 33-9; Raz (n 12) 214–18; Bingham (n 17) 37–8.

[251] Ibid.

[252] For discussion, see Stephenson (n 241) 224–6.

difficult to readily identify the periods of lockdown and the restrictions that applied during those periods.

We have outlined in Part II the methodology that was used to locate the relevant public health directions in each jurisdiction. In some jurisdictions, such as Tasmania and Western Australia for example, historical restrictions were not included on the government webpage for coronavirus restrictions.[253] In other jurisdictions, such as Queensland, all directions were readily available. In Victoria, the introduction of a Pandemic Orders Register following amendment of the public health legislation in 2021 will ensure that orders are readily available during any future emergency. The introduction of similar legislative provisions in other states and territories would ensure that public health orders and directions made during an emergency are readily available to the public during the emergency, and also available for historical analysis following the emergency.[254]

Another area in which reform would be welcome is in the titles given to public health orders and directions. In some instances, the topic and content of the order were clear from the title; for example, the *Stay at Home Directions* made in Victoria,[255] the *Home Confinement Directions* in Queensland,[256] or the *Lockdown Directions* made in the Northern Territory.[257] In other instances, stay-at-home requirements were included within orders that had broader titles covering a geographic area, as for example in NSW with the orders relating to the Northern Beaches[258] or Greater Sydney,[259] or in Queensland in orders for impacted areas.[260] These broader titles make it more difficult to identify the orders and directions that relate to lockdowns and stay-at-home orders. Providing a title which clearly indicates the topic and content of the order would help to address this issue.

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[253] For discussion of Western Australia, see Falck, Kerr and Rizzi (n 21).

[254] See also ibid. Miller has recommended the establishment of a single website covering both federal and state laws to ensure citizens can find the relevant laws affecting their right during the pandemic, chart the changes to laws during the recovery phase and assist with deciding which laws should be retained or repealed, and to assist with historical legal analysis: Miller (n 247) 69.

[255] See, eg, Deputy Chief Health Officer (Communicable Disease) (Vic), 'Stay at Home Directions' in Victoria, *Victoria Government Gazette,* No S 169, 31 March 2020, 8.

[256] See, eg, Chief Health Officer (Qld), *Home Confinement Direction* (29 March 2020) <https://www.health.qld.gov.au/system-governance/legislation/cho-public-health-directions-under-expanded-public-health-act-powers/revoked/home-confinement-direction-1>.

[257] See, eg, Chief Health Officer (NT), *COVID-19 Directions (No. 42) 2021: Directions to Lock Down Darwin and Surrounding Areas of the Territory and Katherine* (16 August 2021).

[258] See, eg, *Public Health (COVID-19 Northern Beaches) Order 2020* (NSW).

[259] See, eg, *Public Health (COVID-19 Temporary Movement and Gathering Restrictions) Order 2021* (NSW), as at 26 June 2021.

[260] See, eg, Chief Health Officer (Qld), *Restrictions for Impacted Areas Direction* (8 January 2021) <https://www.health.qld.gov.au/system-governance/legislation/cho-public-health-directions-under-expanded-public-health-act-powers/revoked/restrictions-impacted-areas>.

Ideally, the titles given to directions and orders made during a public health emergency would also be an issue for national harmonisation.[261]

Clarity of public health orders and directions during an emergency is of vital importance. While emergencies require flexible forms of regulation to deal with rapidly evolving situations, the speed and frequency with which public health directions (and therefore the legal obligations of the public) may change, requiring clear and accessible means of communicating public health laws in an emergency.

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[261] See also, Peta Stephenson, Ian Freckelton and Belinda Bennett, 'Public Health Emergencies in Australia' in Belinda Bennett and Ian Freckelton (eds) *Pandemics, Public Health Emergencies and Government Powers: Perspectives on Australian Law* (Federation Press, 2021) 69, 89 arguing for harmonised public health legislation.

LECTURE FOR THE INAUGURAL EVENT OF THE HUMAN RIGHTS LAW ASSOCIATION

PROPORTIONALITY UNDER THE AUSTRALIAN STATE-LEVEL HUMAN RIGHTS STATUTES

30 APRIL 2024, BANCO COURT, SUPREME COURT OF QUEENSLAND

THE HON PAMELA TATE AM KC*

I INTRODUCTION

I applaud the Human Rights Law Association on its choice of topic for my speech tonight, 'Proportionality Under the Australian State-level Human Rights Statutes'. I will seek to demonstrate that proportionality analysis lies at the heart of modern human rights law — it is not an optional extra or a technical device that only the most committed public lawyers need understand. Proportionality is the key concept underlying laws aimed at human rights protection and it has its proper place in each of the three human rights jurisdictions in Australia. Those jurisdictions are the Australian Capital Territory ('ACT'), Victoria and Queensland and the human rights statutes are, respectively, the *Human Rights Act 2004* (ACT) ('*ACT HRA*'), the *Charter of Human Rights and Responsibilities* (Vic) ('*Charter*'),[1] enacted in 2006, and the *Human Rights Act 2019* (Qld) ('*Qld HRA*').

My aim is to try to ensure that those who have never before confronted proportionality analysis in a human rights context, as well as those who are specialists, and those whose understanding lies somewhere in between, all derive some utility out of what I have to say.

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1 'This Act may be referred to as the Charter of Human Rights and Responsibilities and is so referred to in this Act': *Charter of Human Rights and Responsibilities* (Vic) s 1(1) ('*Charter*').

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My speech will fall into three Parts. In Part II, I consider the provenance of proportionality as an analytical tool for decision-making in the context of human rights law, what it means and what are its elements.

In Part III, I examine how the concept of proportionality has been captured in the human rights statutes of each of the Australian human rights jurisdictions starting with Victoria, then Queensland, and then the ACT. To illustrate how a proportionality analysis plays out in practice, I consider how the concept has been applied in some of the leading cases in each jurisdiction. I will seek to highlight the common ground between the jurisdictions but also to identify some differences.

In Part IV, I compare the approach to proportionality adopted in human rights law with the proportionality analysis applied by the majority of the High Court in the context of the constitutionally implied freedom of political communication. I am by no means the first to make that connection. Kent Blore, the Deputy President of the Human Rights Law Association, has shed light on that connection in his academic writing.[2]

II. The Historical Origins of 'Proportionality' Within a Human Rights Context

Let me start by considering what it is we are talking about — what does 'proportionality' mean?

Proportionality within a human rights context is probably best understood as an analytical tool for assessing whether we can justify restrictions on, or interferences with, human rights — if the restrictions are proportionate to the outcome to be achieved, they pass the test. If the restrictions are not proportionate, they fail the test and amount to an unjustified interference with human rights.

A good example of how this analysis works is *PJB v Melbourne Health* (*Patrick's Case*).[3] This is the case of a mentally ill man detained involuntarily in a hospital in Victoria for whom an administrator was appointed by the State. The administrator was to have complete power over the management and control of Patrick's money and property. They would probably sell Patrick's house. In the Victorian Supreme Court, Bell J held that the appointment of an administrator, with unlimited powers, infringed Patrick's right not to be subjected to arbitrary interference with his home and his privacy, including his autonomy to choose where to live. The interference with his right could not be justified as there was not a sufficient purpose for such broad-ranging restrictions and there were other less restrictive

2 Kent Blore, 'Proportionality under the *Human Rights Act 2019* (Qld): When are the Factors in s 13(2) Necessary and Sufficient, and When are They Not?' (2022) 45(2) *Melbourne University Law Review* 419 ('Factors'); Kent Blore, 'Six Unexplored Aspects of Proportionality under Human Rights Legislation in Australia' (2022) 105 (September) *Australian Institute of Administrative Law Forum* 42.

3 (2011) 39 VR 373 ('*Patrick's Case*').

alternatives available to guard against the risk of mismanagement. The interference with Patrick's right to privacy was disproportionate and therefore unlawful under the *Charter*.[4]

Notions of proportionality in law have been applied since at least the development of the concepts of corrective justice and distributive justice in classical Greek times.[5] Early Roman law also understood the concept and by 1215, it was recognised in the Magna Carta as a principle governing the infliction of punishment in the following way: 'For a trivial offence a free man shall be fined *only in proportion to the degree of his offense*, and *for a serious offence correspondingly*'.[6]

In the eighteenth century, Sir William Blackstone, in his *Commentaries on the Laws of England*, reflected upon the natural liberty of humankind. Influenced by John Locke,[7] he considered what each person had to relinquish in order to enter into society and become subject to its laws. He observed that:

> every man, when he enters into society, gives up a part of his natural liberty, as the price of so valuable a purchase; and, in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws, which the community has thought proper to establish.[8]

He concluded that the exchange must be one of restraining one's liberty only to the extent of what is necessary for security and society. He said:

> For no man, that considers a moment, would wish to retain the absolute and uncontrolled power of doing whatever he pleases; the consequence of which is, that every other man would also have the same power; and then there would be no security to individuals in any of the enjoyments of life. *Political* therefore, *or civil*, *liberty*, which is that of a member of society, is no other than natural liberty *so far restrained by human laws (and no farther) as is necessary and expedient* for the general advantage of the publick.[9]

The former Chief Justice of the Supreme Court of Israel, Professor Aharon Barak, argues that 'the historical roots of proportionality as a public-law standard can be found in eighteenth-century German administrative law'.[10] In the Prussian Civil Code of 1794 proportionality was considered a social ideal to be

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4 Ibid 395 [85], 455–6 [373].

5 Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press, 2012) 175–6.

6 Ibid 176 (emphasis added).

7 Locke's social compact was based on consent: 'MEN being … by nature, all free, equal, and independent, no one can be put out of this estate, and subjected to the political power of another, without his own consent. The only way whereby any one divests [themselves] of [their] natural liberty, and puts on the bonds of civil society, is by agreeing with other men to join and unite into a community, for their comfortable, safe, and peaceable living one amongst another, in a secure enjoyment of their properties, and a greater security against any, that are not of it': John Locke, *The First and Second Treatises of Government* (Pantianos Classics, 2016) bk 2, ch 8 [95].

8 William Blackstone, *Commentaries on the Law of England*, ed David Lemmings (Oxford University Press, 2016) bk 1, 85 [121].

9 Ibid (emphasis added).

10 Barak (n 5) 177.

adopted by the state to protect against the government making arbitrary decisions, rather than as an enforceable standard. The word 'proportionality' was not expressly used[11] but, in what has since been described as 'an important textual "hook" for proportionality's later doctrinal development',[12] the Code included, within the provision dealing with discretionary police powers, the statement that: 'The office of the police is to take *the necessary measures* for the maintenance of public peace, security, and order'.[13]

Police action was conceived broadly as including state measures aimed at promoting public welfare, morality and public safety.[14] It was recognised, building on Blackstone's insight, that '[t]he social contract justified the state's authority, but also fixed the outer bounds of that authority.'[15] The legitimacy of interventions by the police, broadly understood, were to be based on principles that resolved the conflict between different interests, especially private autonomy and the public good.[16] Autonomy was to be restricted only in the service of legitimate goals or objectives and, adopting in effect a 'least restrictive means' test, the measures employed were to be limited to what was necessary. It was said:

> The first law ... is this: the police power may go no farther than its own goals require. The police law may abridge the natural freedom of the subject, but only insofar as a lawful goal requires as much. This is its second law.[17]

There was to be a balancing of interests, but this was to occur 'with a thumb on the scale in favour of rights'.[18] In the words of the drafter of the Prussian Civil Code:

> Only the achievement of a weightier good for the whole can justify the state in demanding from an individual the sacrifice of a less substantial good. So long as the difference in weights is not obvious, the natural freedom must prevail ... The [*social] hardship*, which is to be averted through the restriction of the freedom of the individual, has to be *more substantial by a wide margin than the disadvantage* to the individual or the whole that results from the infringement.[19]

In the second half of the 19th century, proportionality came to be applied as an enforceable restraint on the power of the state, that is, as an analytical tool within the context of positive law.

The Supreme Administrative Court of Prussia repeatedly ruled that police conduct was illegal because it was disproportionate. For example, in 1886 the Supreme Administrative Court of Prussia overruled a police order directing the

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11 Ibid 178.

12 Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47(1) *Columbia Journal of Transnational Law* 72, 100.

13 Ibid 100 (emphasis added).

14 Ibid 98.

15 Ibid 98–9.

16 Ibid 98.

17 Günther Heinrich von Berg, quoted in Stone Sweet and Mathews (n 12) 99 (emphasis added).

18 Ibid 99.

19 Carl Gottlieb Svarez, *Lectures on the State and Law*, quoted in ibid 99 (emphasis added).

closure of a liquor store because the store owner had violated the liquor licence several times. The Court held that a 'complete closure was a disproportional sanction in the case, given the clear option of revoking the store's liquor license.'[20]

The approach of the Court was summarised at the time, in a saying that is revealing of the historical context, namely: 'You should never use a cannon to kill a sparrow.'[21]

The imagery has been softened only a little in more contemporary times with the maxim: 'A sledgehammer should not be used to crack a nut.'[22]

By the middle of the 20th century, the Basic Law for the Federal Republic of Germany was enacted. This established the Federal Constitutional Court and introduced a Constitution aimed at protecting a broad range of rights. Proportionality soon became elevated to the status of constitutional principle to be applied in upholding all the rights mentioned in the Basic Law other than the absolute right to human dignity.[23] It was applied in a long line of major cases, including a leading case in 1958 that challenged a Bavarian law regulating pharmacies ('*Pharmacies Case*').[24]

A Bavarian statute required those who sought to operate a pharmacy to obtain a permit. Permits would only be granted if the new pharmacy would not harm the commercial success of neighbouring pharmacies. The law was challenged on the grounds that it infringed an individual's freedom of occupation.[25] The Court invalidated the legislation primarily because the legislature had not chosen the least restrictive means of regulation.[26] In doing so, the Court 'began to develop a framework for testing whether a limitation on a right was permissible'[27] from which developed the structured proportionality test of suitability, necessity and balancing.[28] This is the test I will discuss in Part IV, in the context of the implied freedom of political communication.

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20 Barak (n 5) 179. Similarly, in 1886, the Court ruled against the police when they ordered a property owner to remove a post at the edge of his property because it was not visible at night and, therefore, a hazard to pedestrians. The Court recognised that a less drastic measure would be for the installation of proper lighting to eliminate the risk, for, as it remarked, 'the chosen measures may not extend farther than they must to meet the goal of eliminating the danger': Stone Sweet and Mathews (n 12) 101, n 70.

21 Barak (n 5) 179, attributed to F Fleiner, *Institutionen des Deutschen Verwaltungsrechts* (Tubingen, 1928), 404.

22 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, 16 [18].

23 Barak (n 5) 180.

24 *Apothekenurteil*, *Bundesverfassungsgericht* [German Constitutional Court], 1 BvR 596/56, 11 June 1958 reported in (1958) BVerfGE 7, 377 ('*Pharmacies Case*').

25 Freedom of occupation is protected under the Basic Law: *Grundgesetz für die Bundesrepublik Deutshland* [Basic Law for the Federal Republic of Germany] art 12(1).

26 Niels Petersen, 'Balancing and Judicial Self-Empowerment: A Case Study on the Rise of Balancing in the Jurisprudence of the German Federal Constitutional Court' (2015) 4(1) *Global Constitutionalism* 49, 62. The Court also based its judgment on a lack of rational connection.

27 Anne Carter, *Proportionality and Facts in Constitutional Adjudication* (Hart Publishing, 2022) 64.

28 Ibid; Petersen (n 26) 62.

By 1968, proportionality was declared 'to be a "transcendent standard for all state action" binding all public authorities.'[29] It is estimated that by 1973, the Federal Constitutional Court in Germany had used proportionality analysis in 132 cases.[30]

Proportionality analysis spread from Germany to multiple jurisdictions. As some commentators have said approvingly, '[f]rom a comparative law perspective, PA [proportionality analysis] exhibits a viral quality, spreading relatively quickly from one jurisdiction to another.'[31] In particular, it spread, post-1989, throughout Central and Eastern Europe against the background of the earlier case law of the German Federal Constitutional Court and the European Court of Human Rights.[32] Proportionality analysis has also spread more recently to Canada, South Africa and Israel.[33]

It is argued that the extent of the migration has meant that: 'proportionality is the post-war paradigm of human rights protection.'[34]

Different legal systems attribute somewhat different content to the components of a proportionality analysis. Restrictions on, or interferences with, rights are often expressed as 'limits' or 'limitations' on rights. In essence, the test of proportionality in contemporary times in respect of a legislative interference with rights, in the words of Professor Barak in highlighting the elements of proportionality, means that a court:

> must find a proper purpose and a rational connection between the means used by the limiting statute and the proper purpose, the absence of less intrusive means, and a proper balance between the limitation on the right and the benefit gained by the limiting statute.[35]

These elements can be expressed in a variety of ways. Sometimes all these elements are jointly considered to express a general test of proportionality and sometimes the focus is on the third element, the balancing exercise, as requiring a relationship of strict proportionality.[36] Each of these elements is reflected in the human rights statutes in all of the relevant Australian jurisdictions.

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29 Stone Sweet and Mathews (n 12) 109–10.

30 Ibid 110, n 111.

31 Ibid 112.

32 The European Court of Human Rights had been established in 1959 under the European Convention for the Protection of Human Rights and Fundamental Freedoms.

33 Stone Sweet and Mathews (n 12) 112.

34 Barak (n 5) 181, indicating his agreement with LE Weinrib, 'The Postwar Paradigm and American Exceptionalism', in S Choudry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press, 2006), 84.

35 Barak (n 5) 180.

36 In *R v Oakes* [1986] 1 SCR 103, 139 ('*Oakes*'), Dickson CJ describes a test of proportionality as having three components, the third element of which also requires a proportional relationship between certain matters: see (n 45). In the context of the implied freedom of political communication, the High Court applies an overall test of structured proportionality and describes the third component of its test, namely, adequacy of balance, as expressing a relationship of 'strict proportionality': see discussion at (n 166) below.

III. The Statutory Elements of Proportionality in the Australian Human Rights Jurisdictions

A *Victoria*

1 *The* Charter

In Victoria, the statutory formulation of proportionality seeks to capture the analysis embraced in Canada and the methodology applied in South Africa.

The Victorian *Charter* includes a general limitations clause that applies to all of the rights the *Charter* protects. The rights are principally drawn from the *International Covenant on Civil and Political Rights* ('*ICCPR*').[37] The general limitations clause is an umbrella statement about the types of interference with rights that may be justifiable. It governs the analytical exercise and inherently requires a balance between rights and limitations. It is based on s 1 of the *Canadian Charter of Rights and Freedoms.*[38] This provides:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.[39]

The Supreme Court of Canada, in *R v Oakes* ('*Oakes*'),[40] famously interpreted the notion of 'reasonable' limits that can be 'demonstrably justified in a free and democratic society' as reflecting a proportionality test. Dickson CJ, on behalf of the Court, held that s 1 demanded the identification of an objective that is of 'sufficient importance'[41] to warrant limiting a right or freedom. There must be a 'sufficiently significant objective';[42] one that relates to 'concerns which are pressing and substantial in a free and democratic society before it can be characterised as sufficiently important'.[43] Dickson CJ said that once the sufficiently important objective is identified,

> [T]hen the party invoking s 1 must show that the means chosen are reasonable and demonstrably justified. *This involves 'a form of proportionality test'* … Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups.[44]

The Chief Justice went on to identify three components of a proportionality test:

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[37] Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

[38] *Canada Act 1982* (UK) c 11, sch B pt I ('*Canadian Charter of Rights and Freedoms*').

[39] Ibid, s 1 (emphasis added).

[40] (n 36).

[41] Ibid 138, quoting *R v Big M Drug Mart Ltd* [1985] 1 SCR 295, 352.

[42] *Oakes* (n 36) 139.

[43] Ibid 138–9.

[44] Ibid 139 (emphasis added) (citations omitted).

> There are, in my view, *three important components of a proportionality test*. First, *the measures adopted* must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they *must be rationally connected to the objective.* Second, the *means*, even if rationally connected to the objective … *should impair 'as little as possible' the right or freedom in question* … Third, there must be *a proportionality between the effects of the measures which are responsible for limiting the … right or freedom, and the objective* which has been identified as of 'sufficient importance'.[45]

The Court later clarified that the means chosen need not be 'the least restrictive … [it] suffices if the means adopted fall within a range of reasonable solutions to the problem confronted'.[46] Moreover, the third component requires that the beneficial and restrictive effects of the measures must be identified and balanced against each other because, as Lamer CJ said in *Canadian Broadcasting Corporation v Dagenias*:

> there must be a proportionality between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in question and the objective, *and there must be a proportionality between the deleterious and the salutary effects of the measures.*[47]

In Victoria, the Human Rights Consultation Committee that recommended the enactment of the *Charter*, explicitly relied upon the proportionality test as expounded in *Oakes*, in a generalised way, as providing the intended meaning and operation of the Charter's general limitations clause. The Committee was aware that the *New Zealand Bill of Rights Act 1990* ('*NZ BORA*') contains a general limitations clause in almost identical language to Canada's.[48] However, Victoria drafted the clause a little differently from the Canadian and New Zealand versions. It did this in two ways. First, it opted for a form of words that made clear certain values to which our society is committed, namely, the values of human dignity, equality and freedom.[49] These were drawn from the general limitations clause applicable in South Africa under s 36 of its *Bill of Rights*.[50]

The second difference was to look at the specific guidance given under South Africa's *Bill of Rights* with respect to the factors that were required to be considered in determining if a limit on a right was reasonable and demonstrably

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45 Ibid (emphasis added, underlining as in original).

46 *R v Sharpe* [2001] 1 SCR 45, 102 [96]. See also *RJR-MacDonald Inc v Attorney-General (Canada)* [1995] 3 SCR 199, 342 [160] (McLachlin J).

47 *Canadian Broadcasting Corporation v Dagenais* [1994] 3 SCR 835, 889 [95] (emphasis in original).

48 *New Zealand Bill of Rights Act 1990* (NZ) ('*NZ BORA*') s 5: 'Subject to section 4 [no implied repeal], the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.'

49 These values are infused throughout the *Charter*. For example, ss 22 (dignity in detention), 8 (equality right), 21 (liberty).

50 *Constitution of the Republic of South Africa 1996* (South Africa) ch 2. Carter (n 27) 66–7 emphasises the similarity between the factors used in the proportionality analysis of Canada, Germany and South Africa.

justified, as spelt out in s 36. Unlike Canada or New Zealand, South Africa's *Bill of Rights* includes *both* a general limitations clause *and* a set of enumerated factors to be considered.[51] In s 36, the general limitations clause is set out by way of opening words governing a series of individual factors to be considered in assessing whether a limit placed on a right is reasonable and justified. The same is true of the *Charter*. The factors are mandatory considerations — all of them *must* be taken into account. However, the factors identified are expressly not exhaustive, neither in the South African *Bill of Rights* nor under the *Charter*. Rather, *all relevant considerations* are to be taken into account. The factors need not be applied in a particular step-by-step sequence. Some factors may be more relevant, and therefore given primacy, than others, in the circumstances of a case. There is to be a global and holistic approach adopted in assessing the overall proportionality of a measure. I develop this consideration further in Part IV.

Just as in South Africa, the exhortation under the *Charter* is to assess the restriction placed on a right by 'taking into account all relevant factors' including the five identified factors. The five factors are set out in s 7(2) of the *Charter.* These are:

(a) the nature of the right; and

(b) the importance of the purpose of the limitation; and

(c) the nature and extent of the limitation; and

(d) the relationship between the limitation and its purpose; and

(e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

This section of the *Charter*, s 7(2), is the key to how the *Charter* is intended to operate. It is the lynchpin in determining whether a public authority has discharged the express obligation the *Charter* imposes on it to act compatibly with human rights. That is, it provides the basis for determining compatibility. For '[w]here a public authority limits a right but the limit is *justified,* the human right is *not breached*, and there is *no contravention* of the obligation on a public authority to act *compatibly* with human rights'.[52] Conversely, if a public authority has limited a right in a manner that is *not justified* under s 7(2), a court may declare that the conduct of the public authority is *unlawful* — because it is *incompatible* with a human right.[53]

The obligation on public authorities to act compatibly with human rights is characterised as the substantive obligation — this obligation now appears in all three Australian human rights jurisdictions. There is a twin obligation, a

[51] Some describe this as a 'hybrid' model of limitations: Michael Brett Young, *From Commitment to Culture: the 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (Parliamentary Paper No 77, September 2015) 157.

[52] *Baker v DPP (Vic)* (2017) 270 A Crim R 318, 331–2 [57] ('*Baker*') (emphasis added).

[53] *Thompson v Minogue* (2021) 67 VR 301, 326 [96] ('*Minogue*') (emphasis added).

procedural obligation, that governs the process of decision-making; this is the obligation imposed on public authorities to give proper consideration to human rights in the course of their decision-making. This obligation is imposed in a variety of ways in the three jurisdictions[54] and some of those differences are significant, as I'll attempt to show.

Victoria chose to spell out specific factors supporting the proportionality test in s 7(2) partly because it was informed during the process leading up to the enactment of the *Charter* that government lawyers in New Zealand, in giving advice on the human rights implications of legislation or executive action, informally relied on the factors identified under s 36 of the South African *Bill of Rights* as a means of consistently breaking down the exercise of assessing whether a restriction on a right is reasonable and demonstrably justified as required by the general limitations clause in the *NZ BORA*. The five factors were set out in the *Charter* to facilitate rigorous assessments of when an interference with a human right is lawful.

2 *The Victorian Case Law*

The analysis adopted by Justice John Dixon in *Certain Children v Minister for Families and Children (No 2)* ('*Certain Children*')[55] is a good illustration of how the five factors in s 7(2) of the *Charter* are applied. He gave a particular focus to the *purpose* of the limitations.

The background to this case involved a riot at a youth justice centre that destroyed parts of the centre. There was an accommodation crisis for detainees. Following the riot, the Governor in Council made orders establishing a unit, the Grevillea Unit, as a remand centre and youth justice centre for children. Some renovations were to take place to the unit in an attempt to make it suitable. However, the unit was on the site of Barwon prison, a maximum-security male adult prison. Young detainees, aged between 15 and 18, were transferred to the Grevillea Unit.[56]

Dixon J began by identifying the dignity right as engaged in the circumstances — this is the right of persons who are deprived of their liberty to be treated with humanity and respect for the inherent dignity of the human person.[57] The other relevant right was the right of every child to such protection as is in their best interests and is needed by reason of being a child.[58]

He identified the limits placed upon those rights by looking in detail at the circumstances of the detention and the likely effect on the young detainees. He held that there were significant limits on the children's dignity right because the built environment of the prison remained immutably an adult maximum-

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54 *Charter* (n 1) s 38(1); *Human Rights Act 2019* (Qld) s 58(1)(b) ('*Qld HRA*'); *Human Rights Act 2004* (ACT) s 40B(1)(b) ('*ACT HRA*').

55 *Certain Children v Minister for Families and Children (No 2)* (2017) 52 VR 441 ('*Certain Children*').

56 Ibid 503 [197].

57 *Charter* (n 1) s 22(1).

58 Ibid s 17(2).

security gaol. There were extensive lockdowns and isolation up to 23 hours a day. Handcuffs were sometimes used in the brief periods in which children were released from cells. There was a presence of high-level security staff reinforcing a sense of adult punishment.

He identified the limits imposed on the children's best interests right as consisting in the disciplinary measures applied, including isolation and handcuffing, as well as the constraints imposed on contact with families because of the remoteness of the prison. He considered that there was a failure to give due regard to the children's need for privacy and sensory stimulation, including the need for peer contact, especially in sport and recreation, and this amounted to an interference with their best interests right. So too did the inadequate opportunity for education and vocational training and the risk of inadequate medical and psychological care.

Dixon J then considered whether the limits he had identified on the relevant rights were reasonable and demonstrably justified because they were proportionate. He held that they were not.

He arrived at that conclusion by looking at each of the five factors under s 7(2). Starting with the nature of the right,[59] he considered both relevant rights protected the values of bodily integrity, mental health, dignity, and self-worth. He understood that, as Bell J observed in *Patrick's Case*:

> The meaning of the right is identified broadly and purposefully in terms of the fundamental interests which it protects and from the cardinal values which it embodies. Starting with this consideration is intended to anchor the analysis in the Charter.[60]

Dixon J considered the context to be important because children in detention are particularly vulnerable by reason of age and circumstance and are not to be treated like adults.

Looking at the purposes for which the limits were imposed on the rights,[61] he considered that they were complex. He took a dim view of the purpose of the limitations, refusing to look only at the recent events. He saw the predominant purpose of the regime of isolation and lockdown, and the handcuffing restraints, as managerial. This arose from the need to control the environment for safety in the context of the renovation and modification of the built environment. He considered that, in the absence of a proper explanation, the accommodation crisis that led to the need for the modification of the maximum-security prison must have been the result of past policy failure on resource allocation. He concluded that the riot that immediately led to the crisis was symptomatic of past poor decisions within youth justice rather than causal of the accommodation shortage.

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59 Ibid s 7(2)(a).

60 *Patrick's Case* (n 3) 449 [335]. As Dame Sian Elias has observed: 'the meaning of the right is to be ascertained from the "cardinal values" it embodies': *R v Hansen* [2007] 3 NZLR 1, 15 [22].

61 *Charter* (n 1) s 7(2)(b).

He also considered that the manner in which isolation times and behaviour management plans operated indicated that the purpose of the limits on the rights was, at times, punitive.

Considering the nature and extent of the limitations on the rights,[62] he said that the detainees experienced long periods of lockdown and isolation in their cells because appropriate facilities and services at Grevillea Unit were still being put in place. The limitations were not due to the need to ensure safe custody but were due to the unsuitability of the facility.

The judge reflected on whether there was a rational connection between the limitations imposed on the rights and the purpose of the limitations.[63] He again characterised the purpose of the limitations negatively, observing that the limitations were imposed to make the built environment, which was *inappropriate*, function.

This raised as a significant issue the question of whether there were any less restrictive means reasonably available.[64] It was not necessary for the judge to consider whether Grevillea Unit amounted to the least possible impairment on the relevant rights because the proportionality analysis adopted in the *Charter* does not impose such an exacting test. As noted in the development of the Canadian jurisprudence, the test rather invites a consideration of whether there are any less restrictive means that fall within a range of reasonable solutions and are reasonably available to achieve the purpose that the limitation seeks to achieve.

There was no evidence of the decision-makers being financially constrained. The judge was ultimately satisfied that the allocation of much greater financial resources was an option that was reasonably available to achieve the purposes of management relating to safety and security. So too was the option of reducing time spent in remand by reducing the delays in the court process for youth charged with offences.

He therefore concluded that the limits on the dignity right and the best interests right 'were not demonstrably justified';[65] he held that '[i]n a free and democratic society based on human dignity equality and freedom, these limits were unreasonable.'[66] The public authorities were in breach of their substantive obligation under the *Charter* not to act incompatibly with human rights.[67]

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62 Ibid s 7(2)(c).
63 Ibid s 7(2)(d).
64 Ibid s 7(2)(e).
65 *Certain Children* (n 55) 581 [476].
66 Ibid. He also held that there had been a breach of the duty to give proper consideration to the relevant rights because there had been a failure to properly consider the potential of the built environment to impact negatively upon the mental health and wellbeing of the children detainees in breach of both relevant rights.
67 The relief granted included declarations of unlawfulness and mandatory and prohibitory injunctions: *Certain Children* (n 55) 607–8 [588].

The second Victorian case I'll discuss to illustrate how proportionality is applied under the *Charter* is *Thompson v Minogue* ('*Minogue*').[68] The case is authority for what is required of a public authority to discharge the procedural obligation under the *Charter*. However, it is also important in its examination of the nature and extent of limitations upon rights and the availability of less restrictive alternatives.

The case also involved Barwon prison. The Court of Appeal held that strip-searches before random urine tests for drugs were carried out, were unlawful. This was because the manner in which the searches were carried out was incompatible with prisoners' rights to privacy and dignity while they were held in detention.

The protocol at Barwon prison for strip-searching required the removal of all clothing while facing a prison officer. This requirement imposed limits on both the right to privacy and the right to dignity. Prisoners were required to bend over and part their buttocks to show that they were not concealing contraband.

The Court concluded that the limits imposed on the privacy and dignity rights were not proportionate to achieve their purpose; the limits were unjustified.

Applying the elements of s 7(2), the Court focused first upon the nature of the rights and observed that, in particular, the dignity right is fundamental. It identified the purpose of the limitation as being to avoid adulteration of a person's urine sample, or substitution of another person's sample, thereby assisting the security of the prison and the safe custody and welfare of prisoners. This was recognised as an important purpose.

In examining the nature and extent of the limitation, the Court emphasised that the manner in which the strip-searching was carried out was extremely invasive and demeaning and amounted to a severe limitation on Minogue's privacy and dignity rights.

The Court examined the relationship, or rational connection, between the limitation and its purpose and whether there were any less restrictive means reasonably available to achieve the purpose.

The Court considered that the claim that full strip-searches were necessary to prevent interference with urine samples, through adulteration or substitution, was not adequately explained. Random urine tests occurred with at least one officer watching the sample being delivered. Given that random urine tests were always conducted without warning the requirement that strip-searches be conducted prior to a random urine test was seen as excessive to achieve the purpose.[69]

There was evidence of alternative search methods that were clearly less restrictive of a prisoner's rights to dignity and privacy. These included top and bottom

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[68] (n 53).

[69] There was no independent evidence that a strip-search prior to taking a urine sample ensured that the random urine testing regime was effective. The requirement to bend over and part the buttocks was only used for female prisoners when it was a targeted strip-search of a particular suspected prisoner and not part of random drug testing.

strip-searches which involved a person being searched with only half the clothes being removed at any one time. It was used for female prisoners in other prisons.

In some prisons low-dose X-ray body scans were used. The primary judge referred to the random alcohol and drug testing of motorists that occurs without strip-searching every person tested. All of these measures indicated that there were alternative means reasonable available to the public authorities to achieve the same purpose as the strip-searching that was carried out, yet they had the benefit of being less restrictive of human rights.

The measures were therefore not demonstrably justified and the public authorities had breached their substantive obligation under the *Charter* not to act incompatibly with human rights.

When it came to the procedural obligation, the obligation to properly consider relevant human rights, the Court of Appeal somewhat controversially concluded that the public authorities had not breached their procedural obligation, although they had not dealt separately and expressly with each of the elements of the proportionality analysis set out in s 7(2). On this issue, they reversed the finding of the primary judge.

The Court of Appeal held that the obligation to give proper consideration involves a decision-maker in a 'forward-looking' process and this requires only that they adopt 'a broad and general assessment' of whether the impact of their decision upon relevant human rights is justified in the sense of 'appropriate in all the circumstances'.[70] The factors in the proportionality test under s 7(2) need not be individually considered. The factors *may* be considered by a public authority, in appropriate cases, in arriving at the broad and general assessment but 'that does not mean that those matters [in s 7(2)] are incorporated into the procedural limb so as to make them mandatory relevant considerations.'[71]

The Court held that it is wrong to conflate the test for 'proper consideration' with the proportionality test encapsulated by s 7(2). It relied on the statutory language. It noted there is no express definition of 'compatible with human rights' under the *Charter*. Nevertheless, it recognised that a conclusion about 'compatibility' demands a proportionality analysis. However, the Court remarked that, under the *Charter*, while there is a reference in the substantive obligation to 'incompatibility with human rights — [which] therefore engages s 7(2)' there is no such reference to 'compatibility' in respect of the procedural obligation.[72] It said the *Charter* 'does not use that language [of compatibility] in the procedural limb.'[73] Its conclusion that proper consideration does not demand a proportionality analysis was therefore supported by the text of the *Charter*. The statutory language in the *ACT HRA* is similar to Victoria's.

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70 *Minogue* (n 53) 343 [147], 325 [89], [91].
71 Ibid 325 [89].
72 Ibid 324–5 [88].
73 Ibid 325 [88].

However, the meaning of the procedural obligation is not quite so straightforward under the *Qld HRA*.

B *Queensland*

1 *The* Human Rights Act 2019

The *Qld HRA* improves upon Victoria's *Charter* in a number of ways. The improvements include the stipulation that the unlawfulness of a decision does not result in invalidity.[74] The improvements also include the addition of rights to education and health services.[75] Furthermore, there is access to the Queensland Human Rights Commission for the ventilation and potential resolution of human rights complaints.[76] Queensland is the only one of the three human rights Australian jurisdictions to make available a cheap, speedy, and efficient forum for voluntary dispute resolution.

Queensland also improves upon Victoria's interpretive requirement in a number of ways. Under s 48(1) of the *Qld HRA*, '[a]ll statutory provisions must, to the extent possible that is consistent with their purpose, be interpreted in a way that is compatible with human rights.'[77] The interpretive requirement is an improvement upon the Victorian model by including a directive, in s 48(2), that if a provision cannot be interpreted compatibly with human rights, it 'must, to the extent possible that is consistent with its purpose, be interpreted in a way that is most compatible with human rights'.

The most significant improvement, in my view, is the inclusion of an express definition of what is meant by 'compatible with human rights' in s 8. The definition provides that:

> An act, decision or statutory provision is *compatible with human rights* if the act, decision or provision —
>
> (a) does not limit a human right; or
>
> (b) limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with section 13.[78]

Section 13 sets out Queensland's test for proportionality and is the equivalent of s 7(2) of the *Charter*.

Can I say immediately that the express definition of '*compatible with human rights*' brilliantly avoids, in the stroke of a legislative pen, the vexed dispute

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[74] *Qld HRA* (n 54) s 58(6)(a). Such a stipulation would have been very useful for the Victorian Court of Appeal, and no doubt practitioners, in *Bare v Independent Broad-Based Anti-Corruption Commission* (2015) 48 VR 129 ('*Bare*').

[75] *Qld HRA* (n 54) ss 36 and 37.

[76] Ibid pt 4, div 2.

[77] Cf s 32(1) of the *Charter*: 'So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.'

[78] *Qld HRA* (n 54) s 8 (emphasis in original).

played out in the High Court in *Momcilovic v The Queen* (‘*Momcilovic*’)[79] about the appropriate methodology to be adopted to discharge the interpretive requirement. This is the dispute that focused upon whether, in interpreting a statutory provision, regard should be had to the fact that a construction, arrived at according to the ordinary principles of statutory interpretation, would unjustifiably limit a human right — assessed by means of the proportionality analysis — so that an alternative rights-compatible interpretation should be investigated to assess whether that would still achieve the statutory purpose.[80]

In my view, Gummow, Hayne and Bell JJ were correct in *Momcilovic* in accepting that this was the appropriate methodology to adopt under the *Charter*.

The express definition of ‘*compatible with human rights*’ in s 8, in effect, accepts that the appropriate methodology for meeting the interpretive requirement is one that incorporates a proportionality analysis. The definition is unique to Queensland. The 2015 Review of the *Charter* recommended that a definition of ‘*compatible with human rights*’ in similar terms as that now adopted by s 8 of the *Qld HRA* be introduced by way of amendment to the *Charter*.[81] Sadly for Victoria, the recommendation has not yet been acted upon.

The proportionality test in s 13 of the *Qld HRA* includes a general limitations clause in the same terms as Victoria’s, that is, drawing on Canada’s article 1, famously interpreted in *Oakes,* informed by the values embraced by the South African *Bill of Rights*. The general limitations clause is contained in a standalone sub-section[82] and the sub-section that follows it identifies seven relevant factors to be used in the analysis.

Amongst the factors are those common to Victoria (and South Africa) but some of them enjoy a more expansive and useful description. There is a requirement to assess whether the purpose of the limitation is consistent with a free and democratic society, separately from the overall assessment of the compatibility of the limitation.[83] There are also two additional factors, one is the

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[79] *Momciolovic v The Queen* (2011) 245 CLR 1 (‘*Momcilovic*’).

[80] The argument in support of the interpretive requirement incorporating a proportionality analysis is that this follows from the basic proposition that the word ‘compatible’ must carry the same meaning whenever it appears in the *Charter.* The obligation on public authorities under s 38(1) to act compatibly, or its converse, not to act incompatibly, demands a proportionality analysis. The obligation on parliamentarians to table compatibility statements for proposed legislation, pursuant to s 28(1), also attracts a proportionality analysis and this is evident in the detailed proportionality assessments made in the statements that have routinely accompanied legislation in Victoria after the *Charter* was enacted. For the High Court to leave the central issue of the methodology unresolved in *Momcilovic* has rendered the interpretive requirement under Victoria’s *Charter* uncertain and largely ineffective. As mentioned, the *Qld HRA* has resolved this issue.

[81] Young (n 51) 148, recommendation 28(c).

[82] *Qld HRA* (n 54) s 13(1): ‘A human right may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.’

[83] Ibid s 13(2)(b).

importance of preserving the right and the other is the need to balance that factor with the importance of the purpose of the limitation.[84]

The seven factors to be included in the proportionality analysis under s 13(2) of the *Qld HRA* are:[85]

(a) *the nature of the* human *right*;[86]

(b) the nature of *the purpose of the limitation*, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom;[87]

(c) *the relationship between the limitation and its purpose*, including whether the limitation helps to achieve the purpose;[88]

(d) whether there are *any less restrictive* and *reasonably available* ways *to achieve the purpose*;[89]

(e) *the importance of the purpose of the limitation*;[90]

(f) the importance of preserving the human right, taking into account the *nature and extent of the limitation* on the human right;[91]

(g) the balance between the matters mentioned in paragraphs (e) and (f).

By contrast with the mandatory character of the statutory language of the *Charter*, the *Qld HRA* states that, in deciding whether a limit on a human right is reasonable and justified, the factors set out '*may* be relevant'.[92] It is unlikely that this represents a wholly permissive authorisation to select only one or other factor, whatever or whichever, of those that seem relevant to any particular case. The Queensland Parliament has chosen a set of elements as representing the proportionality analysis it has directed to be undertaken, many of which represent the core features of proportionality analysis, the history and meaning of which I have been discussing, and s 13(2) has a step-by-step quality, reflected especially in the last three factors.[93]

The proportionality analysis set out in s 13 will clearly be relevant when determining whether a public entity has breached its substantive obligation under the *Qld HRA*.

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84 Ibid ss 13(2)(f) and (g).

85 I have italicised aspects of the factors that s 13(2) *Qld HRA* has in common with s 7(2) of the *Charter*.

86 Cf *Charter* (n 1) s 7(2)(a).

87 Ibid s 7(2)(b).

88 Ibid s 7(2)(d).

89 Ibid s 7(2)(e).

90 Ibid s 7(2)(b).

91 Ibid s 7(2)(c).

92 *Qld HRA* (n 54) s 13(2).

93 Blore, 'Factors' (n 2) 461. Blore argues that, with certain exceptions, the factors in s 13(2) are both necessary and sufficient for the conclusion that a limit on a human right is reasonable and justified.

The question arises whether s 13 will be relevant to the procedural obligation in Queensland; that is, will it be consistent with the statutory scheme for a decision-maker in Queensland to discharge the obligation of giving proper consideration to a human right without giving direct and express consideration to each of the factors set out in s 13(2)? Will it be sufficient for a public entity in Queensland to take the approach now countenanced in Victoria in *Minogue* of adopting simply 'a broad and general assessment' of whether the impact of its decision upon a relevant human right is appropriate?[94] I mentioned earlier that this conclusion has been controversial in Victoria and it will be interesting to see what unfolds in Queensland.

It strikes me that in Queensland it may be difficult to give an easy answer. There are two indicia in the *Qld HRA* that lean in different directions.

The first indicia supports the procedural obligation being a precise exercise. This includes the stipulation in s 58(5)(a) that giving proper consideration to a human right includes 'identifying the human rights that may be affected by the decision'. In the leading case of *Owen-D'Arcy v Chief Executive, Queensland Corrective Services*,[95] Martin J contrasted the *Charter*, where 'proper consideration need not involve formally identifying the "correct" rights [yet] [u]nder s 58(5) HRA the contrary is the case — proper consideration includes identification of the human rights that may be affected by the decision.'[96]

The rigour of the procedural obligation under the *Qld HRA* extends in terms to the requirement, under s 58(5)(b), for public entities to 'consider … whether the decision would be *compatible* with human rights.'[97] Compatibility therefore directly qualifies the procedural obligation. The s 8 definition of '*compatible with human rights*', and the elements for testing whether a limit is reasonable and demonstrably justified under s 13, are engaged. This is reinforced by s 4(b) that provides that the main objects of the *Qld HRA* are to be achieved primarily by, amongst other things, 'requiring public entities to act and *make decisions* in a way *compatible* with human rights'.[98] Furthermore, s 58(1) provides that it 'is unlawful for a public entity … to act or *make a decision* in a way that is *not compatible* with human rights'. These indicia reinforce the conclusion that the requirement for compatibility straddles both the decision-making process as well as acts of a public entity.

The Victorian Court of Appeal, in *Minogue*, made much of the fact that the *Charter* does not require, in terms, that the decision-making process be '*compatible*' with human rights and this severs the textual link between the procedural obligation and a full proportionality analysis.[99] By contrast, the text of the *Qld HRA* does not support the severance of that link; on the contrary, the

[94] See (n 70) above.
[95] (2021) 9 QR 250.
[96] Ibid 298 [136].
[97] *Qld HRA* (n 54) s 58(5)(b) (emphasis added).
[98] *Qld HRA* (n 54) s 4(b) (emphasis added).
[99] See (n 73) above.

statutory text favours the need for decision-makers to apply a proportionality analysis; that is, to apply each of the elements of s 13(2), to meet the standard of 'proper consideration'.

However, the second indicia supports the more generalised approach to the procedural obligation adopted by the Victorian Court of Appeal. This also turns on the statutory text. As mentioned, s 13(2) of the *Qld HRA* identifies a list of considerations that '*may*' be taken into account. Although, as I've argued, this does not seem to me to permit in general an ability for a public entity to choose which of any of the elements of the test for justification it will apply, nevertheless the *Qld HRA* seems to allow for the possibility that, in some circumstances, only one or two of the factors will be relevant. The legislative context is one in which, as Emerton J said in *Castles v Secretary of the Department of Justice* ('*Castles*'),[100] '[t]he consideration of human rights is … intended to become a "common or garden" activity for persons working in the public sector, both senior and junior.'[101] This context supports public entities concentrating on the elements that appear most relevant in the circumstances. If so, just as in Victoria, in discharging the procedural obligation, no error of law would arise from a public entity failing to give 'direct and express consideration to each of the matters set out' in s 13(2).[102]

This could be an area of significant departure between Victoria and Queensland, given the differences in statutory language between the *Charter* and the *Qld HRA*, and we may see the jurisprudence on this topic reflect a marked divide.

2 *The Queensland Case Law*

A good illustration of how Queensland's proportionality test operates in practice is the case of *Johnston v Carroll*,[103] a judgment of Martin SJA. The case demonstrates the force of the procedural obligation by showing that a contravention of the procedural obligation can lead to effective relief independently of whether or not there has been a breach of the substantive obligation.

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[100] (2010) 28 VR 141 ('*Castles*').

[101] Ibid 184 [185].

[102] *Minogue* (n 53) 324 [87]. Perhaps, as Kent Blore has argued, the word 'may' in s 13(2) is explicable, not as allowing for a justification analysis to be generally undertaken by being selective about which of the elements to apply but as providing a recognition that expectations of everyday decision-making cannot be unrealistically high because 'the standard of proper consideration required cannot be so onerous that it proves unworkable in the day-to-day reality of government decision-making': Blore, 'Factors' (n 2) 456.

[103] (2024) 329 IR 365 ('*Johnston*').

The relevant issue concerned the lawfulness of two directions given by the Commissioner of Police to the effect that, with some exemptions, each police officer or staff member was required to receive doses of the COVID-19 vaccine.[104]

Martin SJA carefully considered the range of rights relied upon. Ultimately, the only right that was found to be engaged and limited by the circumstances of the case was the right not to be subjected to medical or scientific experimentation or treatment without the person's full, free and informed consent.[105] This finding was made on the basis that there was a practical compulsion to comply with the directions,[106] especially as a potential consequence of non-compliance was disciplinary action, including termination of employment for police officers.[107]

With respect to the decision-making process leading up to the making of the directions, the judge described the evidence of the Commissioner of Police as 'vague and inconclusive.'[108] The Commissioner was said to be 'reluctant to commit to having read particular documents, [and] … frequently could not recall how she received information or what the information was, and she frequently evaded these issues by referring in a vague way to briefings, discussions, summaries and the like.'[109]

On the basis of what was clearly unsatisfactory evidence, Martin SJA concluded that the Commissioner of Police failed to demonstrate that she understood even in general terms which rights of the persons affected by the decision might be relevant and how those rights would be interfered with by her decision. Nor did she demonstrate that she had turned her mind to the possible impact of the decision on a person's human rights, nor identified the countervailing interests and obligations, nor balanced competing private and

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104 Ibid 414 [224], 415 [230]–[231], 459 [469(c)]. The directions contained exemptions for medical contraindications, genuinely held religious beliefs, and other exceptional circumstances. The directions had been revoked but there was concern about any liability that might have arisen under them. A separate matter concerned the lawfulness of a similar direction given by the Director General of Queensland Health, to employees of the Queensland Ambulance Service ('the ambulance directions') but the focus here is only on the police directions as the ambulance directions were found to be of no effect, independently of any human rights considerations.

105 *Qld HRA* (n 54) s 17(c); *Johnston* (n 103) 434 [332]–[333]. The rights relied on by the applicants included the right to equal and effective protection against discrimination; the right to life; the right to freedom of thought, conscience, religion and belief; the right to take part in public life; the right to privacy, and the right to liberty and security. These rights were held either not to be engaged or not limited. It is not unusual, at this comparatively early stage in Australian human rights jurisprudence, for litigants to rely on rights that, on close inspection, are not relevant in the circumstances of the case. An example from Victoria is *Baker* (n 52). It might be noted that, as in *Johnston*, this can require extensive analysis by judges as to the rights that are engaged before they can begin to examine whether the public entity is in breach of the procedural or substantive obligations.

106 *Johnston* (n 103) 434 [332].

107 Ibid 429 [314].

108 Ibid 397 [134].

109 Ibid.

public interests.[110] He did not accept that the Commissioner had either identified the human rights that might be affected by the decision or considered whether the decision would be *compatible* with human rights.[111]

On the basis of the evidence, it was unnecessary for him to examine whether the Commissioner applied any of the specific factors of the proportionality analysis under s 13(2) because it was clear she had not — she had neither engaged in a full proportionality analysis under s 13 nor engaged in the broad general assessment found to be sufficient in other circumstances for 'proper consideration' under the *Charter.* The Commissioner had failed to give proper consideration to the rights of those affected by her directions and the making of the police directions was, therefore, unlawful.[112]

Orders were made that the Commissioner was restrained from taking any steps to enforce the directions or taking any disciplinary proceedings against the applicants.

It was held, however, that there was no breach of the substantive obligation. The critical factor in the proportionality analysis was whether there were any less restrictive measures reasonably available that would achieve the purpose of ensuring Queensland police officers were 'frontline-ready and available for deployment'[113] and would minimise the risk of transmission of COVID-19 throughout the Queensland police force and members of the community. Could the purpose be achieved by a regime of voluntary vaccination (the rate of which was high) together with requirements for the unvaccinated to wear masks or use personal protective equipment? Could the workforce be organised so as divide vaccinated personnel into a different area from the unvaccinated?

Martin SJA ultimately favoured the expert medical evidence that alternatives to mandatory vaccination would *not* achieve the same purpose.[114] In arriving at this conclusion, he considered each of the factors under s 13(2), noting especially the nature of the right and its importance as an absolute right under the ICCPR.[115] He considered that there was a rational relationship between the limitation and its purpose because there was evidence that the vaccination had an effect in protecting against serious infections.[116]

He also emphasised that the directions were given in the context of an emergency and at a time when there was limited knowledge available about the virus, its variants, its virulence and its transmissibility.[117] On the basis of these considerations, he was not satisfied that the balancing exercise between the

110 Ibid 386 [75], [77], 397 [136], applying the test from *Bare* (n 74) 223 [288], 297–8 [535]–[536], 298–9 [538], and *Castles* (n 100) 184 [185]–[186].

111 *Johnston* (n 103) 397 [137]–[138].

112 Ibid 397 [139].

113 Ibid 454 [438]; *Qld HRA* (n 54) s 13(2)(b).

114 *Johnston* (n 103) 456 [452]; *Qld HRA* (n 54) s 13(2)(d).

115 *Johnston* (n 103) 454 [437]; *Qld HRA* (n 54) s 13(2)(a).

116 *Johnston* (n 103) 454 [440]; *Qld HRA* (n 54) s 13(2)(c).

117 *Johnston* (n 103) 457 [457].

importance of preserving the human right and the importance of the purpose of the limitation favoured the right-holders.[118]

An illustration of how the proportionality analysis operates within the context of Queensland's interpretive requirement is *The Australian Institute for Progress Ltd v Electoral Commission of Queensland* ('*Progress*'),[119] a judgment of Applegarth J. At stake was whether a statutory prohibition on political donations by prohibited donors was compatible with human rights.

Under the *Electoral Act 1992* (Qld), it was unlawful for prohibited donors to make a political donation.[120] Prohibited donors included property developers.[121] At issue was the interpretation to be given to the expression 'political donations'. The *Electoral Act* defined a 'political donation' to include, in s 274(1)(a), a gift made to or for the benefit of a political party, or an elected member, or a candidate in an election. It also included, in s 274(1)(b), a 'gift made to or for the benefit of another entity … to enable the entity (directly or indirectly) to make a gift mentioned in paragraph (a) or *to incur electoral expenditure*'.[122] The relevant limb was the limb prohibiting gifts to, or for the benefit, of another entity to enable it to incur electoral expenditure.

The question arose whether the prohibited gifts to entities should be narrowly confined to those that enabled the entity to incur electoral expenditure *on behalf of* a political party, or an elected member, or a candidate in an election.[123] If it was so narrowly confined, the Australian Institute for Progress ('the Institute'), a think tank, could receive financial gifts from property developers and could use those funds to encourage votes in an election campaign for a political party, elected member, or a candidate providing it did not do so *on behalf of* a political party, elected member, or a candidate. The Institute would be largely free to incur electoral expenditure without it being transparent to the public that its funds came from property developers.

If the prohibition on political donations was more broadly understood, property developers would be prohibited from making gifts to an entity like the Institute to enable it to incur electoral expenditure more generally.

However, the broad construction would have the effect of clearly limiting the funds available to the Institute for election campaigns and this would affect, directly or indirectly, rights to freedom of expression and political participation

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[118] Ibid 456–7 [453]–[459]; *Qld HRA* (n 54) s 13(2)(g) in respect of ss 13(2)(e), (f). Martin SJA also dismissed the judicial review grounds, eg the unreasonableness ground, at 457 [460].

[119] (2020) 4 QR 31 ('*Progress*').

[120] *Electoral Act 1992* (Qld) s 275.

[121] Ibid s 273(1)(a)(i).

[122] Emphasis added. 'Electoral expenditure' was relevantly defined, under s 197, as at the date of the hearing, to mean 'expenditure incurred for the purposes of a campaign for an election, whether or not the expenditure is incurred during the election period for the election': *Progress* (n 119) 41 [4].

[123] That is, on behalf of any one of the entities mentioned in s 274(1)(a).

protected under the *Qld HRA*.[124] A proportionality analysis was therefore required in respect of the broad construction to determine if it was compatible with human rights, as required by s 48(1).

The general purpose of the limitation was preventing corruption and undue influence in the government of the State and improving transparency and accountability in State elections, an important purpose.[125] Queensland had learned the lessons of New South Wales about the risks associated with property developers in the State planning framework.[126] The nature and purpose of the limitation was assessed as consistent with a free and democratic society because, by improving transparency and accountability in State elections and reducing corruption, it would enhance the democratic system.[127]

There was a rational relationship between the limitation and its purpose because the limitation clearly helped to achieve its purpose. It did this by seeking to ensure that the prohibition on making gifts to political parties, or elected members, or candidates, was not thwarted by prohibited donors, instead, giving money to an entity that in turn used that money to urge votes for the party or member or candidate of the prohibited donor's choice.[128] In effect, this would amount to property developers being able to do indirectly what they could not do directly, namely, make donations to achieve their favoured electoral outcome by providing gifts to, or for the benefit of, parties, members or candidates. To permit this would be to defeat the purpose of the prohibition. The measure would not achieve the transparency and accountability in State elections that was sought nor reduce the risk of undue influence and corruption in the State government.

No less restrictive and reasonably available ways to achieve the purpose was apparent or seriously advanced by the Institute.[129]

In considering the importance of preserving the human right and the nature and extent of the limitation on the right, it was recognised that preserving freedom of expression and the right to take part in public life is important. However, the limitation still permitted prohibited donors to participate in the political process through 'direct and open means', for example, by purchasing advertisements in their own name in favour of a political party or candidate.[130]

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124 *Progress* (n 119) 75 [130]; *Qld HRA* (n 54) s 13(2)(a). The evidence did not disclose whether the prohibited donors to the Institute were corporations or individuals and only individuals have human rights: *Qld HRA* s 11(2). In any event, it was recognised that the prohibition on political donations from prohibited donors would indirectly limit individuals' freedom of expression and the right to take part in public life insofar as it affected gifts that could be made to an entity to enable it to incur electoral expenditure and the information individuals would receive: *Progress* 73 [119]–[120], 75 [129].

125 *Progress* (n 119) 73–4 [122]–[123]; *Qld HRA* (n 54) s 13(2)(e).

126 *Progress* (n 119) 74 [122].

127 Ibid 75 [127]; *Qld HRA* (n 54) s 13(b).

128 *Progress* (n 119) 74 [125]; *Qld HRA* (n 54) s 13(c).

129 *Progress* (n 119) 75 [126]; *Qld HRA* (n 54) s 13(d).

130 *Progress* (n 119) 75 [131]; *Qld HRA* (n 54) s 13(f).

Prohibited donors could still buy political advertisements that made public that they had paid for them. They could openly engage in political debates.[131]

What prohibited donors could not do was to make gifts — either to a candidate, a member, or a political party or, relevantly, to an entity for the purpose of it incurring electoral expenditure because the public would not know that the source of the expenditure ultimately came from funds of property developers.

Prohibited donors were also free to donate to the Institute for expenditure on other forms of political participation, such as policy research and advocacy, or other activities that did not fall within the scope of the prohibition, for example, expenditure that was not to be used for the purposes of a campaign for an election.[132] This was critical to the conclusion that, balancing the importance of the purpose of the limitation and the importance of preserving the human right,[133] the broad construction of s 274(1)(b) was a reasonable limit demonstrably justified in a free and democratic society based on human dignity, equality and freedom. Applegarth J expressed the conclusion in these terms:

> The [prohibitions on political donations by prohibited donors] seek to prevent corruption and undue influence in the government of the State. They enhance our democratic system. The nature and extent of the limitations on freedom of expression and the right of individuals to participate in public life does not preclude prohibited donors from participating in public affairs, including election campaigns, by *direct and open means*, including by incurring expenditure on activities which they undertake in order to influence the outcome of an election, including advertising which urges electors to vote for or against political parties and candidates.[134]

The broad construction of the meaning of a 'political donation' was therefore compatible with human rights. There was no need to look for an alternative interpretation.[135] The proportionality analysis had done its work.

C *The ACT*

1 *The* Human Rights Act 2004

The *ACT HRA* is the only legislation in the three Australian human rights jurisdictions to provide for a separate standalone cause of action for a contravention by a public authority of its substantive or procedural obligations. The 2015 review of the *Charter* called for such a separate standalone cause of action for breach, to remove the requirement to 'piggyback' on a ground of

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131 *Progress* (n 119) 77 [144].

132 Ibid 75 [131], 78 [150]–[151].

133 Ibid 76 [133]; *Qld HRA* (n 54) s 13(g) in respect of ss 13(2)(e), (f).

134 *Progress* (n 119) 76 [135] (emphasis added).

135 *Qld HRA* (n 54) s 48(2).

judicial review or other matter before commencing legal proceedings for breach,[136] but this recommendation has also not been acted upon.

The obligations on public authorities are imposed by s 40B(1) of the *ACT HRA*. The cause of action is provided for under s 40C; it confines claims of breaches by public authorities to proceedings that can be commenced in the Supreme Court.[137] The *ACT HRA* imposes a requirement for standing, namely, that the person is or would be a victim of the contravention.[138] There is a time restriction on the commencement of the proceeding of one year from the date of the alleged contravention.[139] Similarly to the Victorian and Queensland human rights statutes, it excludes damages from the relief than can be granted.[140]

In determining if there has been a contravention, recourse is to be had to the proportionality test set out in the general limitations clause and the factors identified in s 28. The general limitations clause, s 28(1), is a standalone sub-section, similarly to Queensland's.[141] It is in much the same terms as in the *Charter* and the *Qld HRA* insofar as it commands that rights be subject only to reasonable restrictions that can be demonstrably justified, but the limits are required to be 'set by laws' rather than 'under law'.[142] There is no reference to the values of human dignity, equality and freedom.

The same five factors identified as relevant under the *Charter* to determine the lawfulness of a restriction on rights are enumerated in s 28(2).[143] Similarly to the *Charter*, *all* relevant factors must be considered, including each of the five enumerated factors.

2 *The ACT Case Law*

A good illustration of the force of the general limitations clause and the application of the enumerated factors is to be found in a decision of Loukas-Karlsson J, *Davidson v Director-General, Justice and Community Safety Directorate* ('*Davidson*').[144]

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136 *Charter* (n 1) s 39(1); Young (n 51) 133, Recommendation 27(a). The *Qld HRA* also imposes a requirement for a separate cause of action to which a breach of human rights can be attached before a person can seek relief for the breach by means of a legal proceeding: *Qld HRA* (n 54) ss 59(1), (2).

137 *ACT HRA* (n 54) s 40C(2). By being restricted to litigation in the Supreme Court, it may not be available to many victims who would seek access to justice. Nevertheless, the *ACT HRA* does not impose the preconditions imposed by the *Charter* and the *Qld HRA*.

138 *ACT HRA* (n 54) s 40C(1)(b).

139 Ibid s 40C(3).

140 Ibid s 40C(6). However, there is a right to compensation for unlawful arrest or detention under s 18(7), and for wrongful conviction under s 23(2).

141 See (n 82).

142 *ACT HRA* (n 54) s 28(1): 'Human rights may be subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society.'

143 The factors are identical to those enumerated under Victoria's *Charter* with the exception that the nature of the right to be considered is the right 'affected' in the circumstances.

144 (2021) 18 ACTLR 1 ('*Davidson*').

Davidson concerned a prisoner who was held in separate or solitary confinement in the 'Management Unit' of ACT's prison for a total of 63 days. When in the Management Unit, he was granted access, on request, to what was euphemistically called 'the rear courtyard' of his cell. This was a small adjoining area at the rear of his cell enclosed by four walls and a mesh ceiling. These areas were often used by detainees to smoke. Davidson was not permitted to use a larger outdoor exercise yard.

Davidson brought proceedings in the Supreme Court of the ACT, alleging, relevantly, that the Director-General had acted in contravention of the obligation to act compatibly with the right Davidson had to be treated with humanity and with respect for the inherent dignity of the human person when deprived of his liberty, the dignity right.[145]

Her Honour accepted that once a plaintiff has given evidence that their rights have been interfered with, the burden of proof shifts to the defendant to justify the limitation on the right and the burden is a heavy one.[146] She observed that the 'assessment of proportionality requires a greater intensity of review [than judicial review]'.[147] She noted the evidence of the Director-General that there were practical obstacles to compliance with the *ACT HRA*. Detainees from the Management Unit were required to be kept in handcuffs during any period spent in the general access areas because of safety and security risks. Davidson had been violent towards other prisoners. The doors for the general exercise yards did not contain a hatch for detainees to insert their hands through to be handcuffed. Another obstacle was the need for more staff to assist in taking detainees to the general exercise yard. She treated these obstacles as matters that could be met by proper resourcing.[148]

Her Honour determined that the rear courtyard of Davidson's cell was not located in 'open air' and nor did it amount to providing an opportunity for Davidson to exercise. This constituted a failure to protect Davidson from conduct that lacked humanity given that he was a person deprived of his liberty and therefore vulnerable.[149]

There was a deeming provision in an Operating Manual, cl 4.3, that purported to authorise the arrangements as amounting to the provision of open air and opportunities for exercise, as required under the *Corrections Management Act 2007* (ACT). The judge found the deeming provision to be inconsistent with its enabling Act and therefore invalid as ultra vires. The limitations on the dignity right were therefore not authorised under the relevant legislation, and were thus not 'set by

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145 *ACT HRA* (n 54) s 19(1).

146 *Davidson* (n 144) 71 [354], 72 [360]–[361].

147 Ibid 73 [362].

148 Ibid 81 [408].

149 She relied upon the decision of the New Zealand Supreme Court in *Taunoa v Attorney-General (NZ)* [2008] 1 NZLR 429 for the proposition that the deprivation of open air and exercise is a failure to treat a detained person with humanity, especially for a detainee the subject of segregation or separate confinement.

laws', as the threshold condition of the general limitations clause required. Her Honour said:

> The limit is not 'set by law' because cl 4.3 is invalid. The … 2011 Operating Policy did not and could not authorise a policy of non-compliance with the open air and exercise requirements in s 45 of the *Corrections Management Act*. The limit is not proportionate because the reasons for non-compliance, that is, the absence of a hatch and that taking detainees to the general exercise yard would require more staff, are practical obstacles that are readily overcome with the application of sufficient resources. The open air and exercise requirements are basic entitlements that countries with lesser economic means are required to resource. The limit is not something that only occurs in an emergency or occasionally.[150]

She noted, wryly, that the Director-General had not even sought to justify the limitations as reasonable under the *ACT HRA*.

The ACT Director-General had therefore breached the obligation to act compatibly with Davidson's dignity right. The judge also found that there been a failure to give proper consideration to the dignity right; there was 'no evidence that any consideration was given to the right in s 19(1) of the [*ACT HRA*], let alone "proper consideration".'[151]

Loukas-Karlsson J made a declaration that the defendant had breached Davidson's human rights but refused to grant what would have been novel relief under the *ACT HRA*, namely, a reduction to Davidson's sentence.

Let me move then to the final Part of my speech to address the question: 'What similarities and differences exist between the proportionality analysis under Australia's human rights statutes and the test for proportionality developed at common law by the High Court in the context of the implied freedom of political communication?'

Let me start with the similarities.

IV The Implied Freedom and Proportionality

A *Similarities*

I have argued elsewhere that the juridical task undertaken in a proportionality analysis, directed at assessing the compatibility of the conduct of a public authority with human rights, is substantially similar to that undertaken by courts when determining if the implied freedom of communication on government and

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150 *Davidson* (n 144) 81 [408].

151 Ibid 82–3 [414].

political matters has been unjustifiably burdened.[152] These similarities can serve to clarify and simplify the task of determining if a measure that restricts a human right is reasonable and demonstrably justified. Just as one can ask, as the key question in the context of the implied freedom of political communication, whether a legislative or executive measure *imposes a disproportionate burden* on the implied freedom, one might ask, as the key question in the human rights context, whether a restriction *imposes a disproportionate burden* on a right. The broad conceptual approach to the task of determining whether a limit on a human right is reasonable and demonstrably justified would be the familiar one employed in the context of the implied freedom of political communication.[153]

Notwithstanding that the implied freedom is concerned with constitutional validity and is to be understood as a restraint on legislative and executive action and not as a personal right,[154] the similarities remain. This is apparent from the articulation of the test in *LibertyWorks Inc v Commonwealth* ('*LibertyWorks*'),[155] where the majority of the High Court reaffirmed the structured proportionality test set out in *McCloy v New South Wales* ('*McCloy*')[156] and commented that:

> In *Lange v Australian Broadcasting Corporation*, the final question as to the validity of a law effecting a burden on the freedom was stated to be whether the burden is 'undue' having regard to its purpose. Whether that question should be determined by reference to a test of whether the law is 'reasonably appropriate and adapted' or of whether it is 'proportionate' was left open by the Court, as were the means by which those

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[152] Pamela Tate, 'Judicial Review and Rights Review' (2023) 30(1) *Australian Journal of Administrative Law* 30, 45–7. Other contexts may also attract a proportionality analysis, eg a proportionality test was applied by three judges in the context of the guarantee of freedom of interstate trade, commerce and intercourse among the states under s 92 of the *Constitution*: *Palmer v Western Australia* (2021) 272 CLR 505, 526–9 [50]–[58] (Kiefel CJ and Keane J), 596–8 [261]–[265] (Edelman J) ('*Palmer*'). More recently, in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005, 1017–18 [52]–[54], Edelman J adopted an approach of asking whether a law authorising detention could be characterised as punitive because it employs means that are disproportionate to its legitimate purpose. The use of a proportionality test in the context of Ch III of the *Constitution* has been viewed as controversial: see Zachary Gomes, Aryan Mohseni, Charlie Ward, 'Going Out on a *Lim*: Reconceptualising the Constitutional Limit on Preventative Detention' *Australian Law Journal* (forthcoming).

[153] This would be so regardless of the exact nature of the proportionality test under the respective human rights statutes.

[154] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560 ('*Lange*'); *Unions NSW v New South Wales* (2013) 252 CLR 530, 554 [36]; *Tajjour v New South Wales* (2014) 254 CLR 508, 558 [59]. With respect to the level of analysis to be considered in respect of executive action, see *Comcare v Banerji* (2019) 267 CLR 373, 405–6 [43]–[45], 421–2 [96]; *Palmer* (n 152) 545–7 [117]–[124] (Gageler J).

[155] (2021) 274 CLR 1 ('*LibertyWorks*').

[156] (2015) 257 CLR 178, 194–5 [2] ('*McCloy*'). See also 195–6 [3]–[4], 200–1 [23], 215–16 [73]–[74] (French CJ, Kiefel, Bell and Keane JJ); *Brown v Tasmania* (2017) 261 CLR 328, 363–4 [104], 368–9 [123]–[127] (Kiefel CJ, Bell and Keane JJ), 416–17 [277]–[280] (Nettle J) ('*Brown*'); *Clubb v Edwards; Preston v Avery* (2019) 267 CLR 171, 200–2 [70]–[74] (Kiefel CJ, Bell and Keane JJ), 264–5 [266] (Nettle J), 330–1 [463] (Edelman J). The modification in *Brown* of the words of Questions 2 and 3 of the test set out in *McCloy* 194–5 [2] does not impact upon the use of the structured proportionality test to answer Question 3.

> conclusions might be reached. But in *McCloy v New South Wales* a majority of this Court provided the answer, holding that the final question to be addressed is whether a law is a proportionate response to its purpose and that that is to be ascertained by a structured method of proportionality analysis.[157]

The structured proportionality test broadly reflects the elements favoured by the German Federal Constitutional Court following the *Pharmacies Case* in 1958.[158] Once it is established that the measure burdens the freedom, it is necessary to identify the statutory purpose of the legislation to determine if it is legitimate: if not, no further enquiry is needed. The plurality in *LibertyWorks* went on to say:

> In addition to having the requisite purpose, the law must be shown to be proportionate to the achievement of that purpose. In order to justify a burdensome effect on the freedom a law must be a proportionate, which is to say a rational, response to a perceived mischief … A law will satisfy the requirements of proportionality if it is suitable, necessary and adequate in its balance.[159]

There are three stages that are to be examined in sequence, each stage building upon the last. A failure at any stage brings the exercise to a halt. An advantage of this approach, is that 'it allows the person conducting proportionality analyses to think analytically, not to skip over things which should be considered, and to consider them in their time and place.'[160]

As explained by the plurality in *McCloy*, the first stage is to assess *suitability*:

> Suitability is also referred to as 'appropriateness' or 'fit' … If the measure cannot contribute to the realisation of the statute's legitimate purpose, its use cannot be said to be reasonable. This stage of the test requires that there be a rational connection between the provision in question and the statute's legitimate purpose, such that the statute's purpose can be furthered … It is an inquiry which logic requires.[161]

As suitability involves determining whether the measure is capable of achieving the objective, in general terms this requires an understanding of the nature and extent of the restriction or limitation imposed. Suitability also reflects

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157 *LibertyWorks* (n 155) 23 [48]. See also *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537, 545 [5], 552 [29] (Kiefel CJ and Keane J); 616 [250] (Edelman J); 623 [269] (Steward J); 624 [271] (Gleeson J).

158 (n 24).

159 *LibertyWorks* (n 155) 23 [46] (Kiefel CJ, Keane and Gleeson JJ). Edelman J also agreed with the use of the structured proportionality test to determine validity: 75 [194].

160 Barak (n 5) 461. See also 460–1: 'A person applying proportionality must think in stages … during the stage of justification of the limitation of the right and its protection, they should distinguish between the threshold question regarding a proper purpose and questions relating to the means selected to advance that purpose, as well as the relation between the fulfillment of the purpose and the harm caused to the … right. In other words, once the threshold requirement of proper purpose has been satisfied, the focus shifts to the three sub-questions relating both to the rational connection of the means selected … to advance [the] proper purpose, the necessity of the law, and the balance struck between the advancement of this purpose and the harm caused to the right in question.'

161 *McCloy* (n 156) 217 [80].

the requirement, reflected in all of the Australian human rights statutes, that there be a relationship, understood as a need for a rational connection, between a limitation imposed on a right and the purpose or objective of that limitation.[162]

Necessity reflects the requirement to consider whether there are less restrictive alternatives reasonably available. The plurality in *McCloy* observed that:

> The second stage of the test – necessity – generally accords with the inquiry ... as to the availability of other, equally effective, means of achieving the legislative object which have a less restrictive effect on the freedom and which are obvious and compelling. If such measures are available, the use of more restrictive measures is not reasonable and cannot be justified.[163]

The inquiry directed to necessity is not an exercise in seeking a preferred, or *the* preferred, alternative. Rather, the existence of a range of less restrictive reasonably practicable alternatives for achieving the same purpose assists in drawing a conclusion that the burden imposed is undue or disproportionate, but this remains a conclusion about the impugned law and not an attempt to substitute some alternative for the impugned law.[164] The stage of necessity is addressed by all three human rights jurisdictions.[165]

The third stage, adequacy of balance, is one whereby the importance of the purpose of the law is to be measured against the extent of the restriction. The High Court has described this third stage, the balancing exercise, as an assessment of 'strict proportionality'.[166] This was explained in *McCloy* as follows:

> It requires an 'adequate congruence between the benefits gained by the law's policy and the harm it may cause', which is to say, a balance. Balancing is required because it is rare that the exercise of a right or freedom will be prohibited altogether. Only aspects of it will be restricted, so what is needed, to determine whether the extent of this restriction is reasonable, is a consideration of the importance of the purpose and the benefit sought to be achieved. Logically, the greater the restriction on the freedom, the more important the public interest purpose of the legislation must be for the law to be proportionate.[167]

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[162] *Charter* (n 1) s 7(2)(d); *Qld HRA* (n 54) s 13(2)(c); *ACT HRA* (n 54) s 28(2)(d). The nature and extent of the limitation is addressed in the *Charter* s 7(2)(c), *Qld HRA* s 13(2)(f), and the *ACT HRA* s 28(2)(c). While the test in respect of the implied freedom speaks more generally of the purpose of the statute rather than the purpose of the limitation, there is a focus upon identifying objectives and assessing the rationality of the connection between the objectives and the means to achieve them.

[163] *McCloy* (n 156) 217 [81].

[164] Ibid 217 [82]: 'It is important to recognise that the question of necessity does not deny that it is the role of the legislature to select the means by which a legitimate statutory purpose may be achieved. It is the role of the Court to ensure that the freedom is not burdened when it need not be. Once within the domain of selections which fulfil the legislative purpose with the least harm to the freedom, the decision to select the preferred means is the legislature's.'

[165] *Charter* (n 1) s 7(2)(e); *Qld HRA* (n 54) s 13(2)(d); *ACT HRA* (n 54) s 28(2)(e). *Minogue* (n 53) 398 [357].

[166] *McCloy* (n 156) 219 [87].

[167] Ibid.

This reflects, although it is neither identical in terms to, nor an exact expression of, the balancing test expressly provided for under s 13(2)(g) of the *Qld HRA*, in its requirement to balance the importance of the purpose of the limitation against the importance of preserving the human right, taking into account the nature and extent of the limitation on the right.[168] There may be other comparisons that can be made.

Kent Blore has argued, and he is probably correct, that, overall, the proportionality test in s 13(2) of the *Qld HRA* more closely resembles the structured proportionality test favoured in the High Court for assessing whether a restriction on the implied freedom is justified than does the test applicable in the context of human rights in Victoria and the ACT.[169]

Section 13(2) of the *Qld HRA* appears to set out steps to be dealt with in sequence leading to the final requirement of fair balance between the importance of the purpose of the limitation and the importance of preserving the human right. While both the *Charter* and the *ACT HRA* require an assessment of the importance of the purpose of the limitation,[170] neither of them expressly requires that a balancing exercise be undertaken with respect to that particular factor and the importance of preserving the human right, although the nature of the right is, as Bell J commented, the starting point and the 'anchor' of the proportionality analysis under the *Charter*.[171] Blore argues that, under s 13(2) of the *Qld HRA*, '[t]he "factors" are more definitive, the balancing is more explicit, and, overall, s 13(2) more clearly suggests the path of reasoning to follow.'[172]

Although, as I have sought to describe, the core elements of proportionality are expressed in all three human rights statutes, there is arguably a greater reflection in the *Qld HRA* of the test for proportionality used by the High Court in the context of the implied freedom.

B *Differences*

The first difference to note is one already identified. There is a set structure, and perhaps rigidity, to the test favoured by a majority of the High Court in the implied freedom cases. While that set structure might be reflected in s 13(2) of the *Qld HRA*, it is not reflected in Victoria and the ACT.

By contrast, the proportionality test expressed under the *Charter* and the *ACT HRA* invites a *global* assessment of whether a limit imposed on a right is

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[168] *Qld HRA* (n 54) s 13(2)(g). The balance between the matters mentioned in ss 13(2)(e) (the importance of the purpose of the limitation) and (f) (the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right).

[169] Blore, 'Factors' (n 2).

[170] *Charter* (n 1) s 7(2)(b); *ACT HRA* (n 54) s 28(2)(b).

[171] See (n 60). See *Charter* s (n 1) s 7(2)(a); *ACT HRA* (n 54) s 28(2)(a).

[172] Blore, 'Factors' (n 2) 434.

justified.[173] All of the factors enumerated (including, of course, the nature of the right)[174] cumulatively assist with an *overall balancing* process; that is, the balance between the nature and extent of the limit imposed on the human right and what it is that the limit achieves. In other words, overall, does the benefit justify interfering with the particular right to the extent of the limitation?

Moreover, as I've mentioned, the factors identified under the *Charter* and the *ACT HRA* are non-exhaustive. Rather, *all* relevant considerations are to be taken into account. This means that the proportionality tests under the *Charter* and the *ACT HRA* avoid the risk that considerations that are relevant in the circumstances of a case will be ignored because they fail to fall under any particular prescribed element of the proportionality test. There may be features of the circumstances of a case that reveal, for example, that a public authority has a history of refusing to explore potentially less restrictive alternatives or a history of repeatedly engaging in conduct that is incompatible with a human right. Alternatively, it may be relevant that a public authority had taken steps to avoid acting incompatibly.

Moreover, while all of the enumerated factors under the statutory tests have to be taken into account, they are not necessarily to be considered in the sequence in which they are set out because the circumstances may make one of the factors the primary focus. This promotes flexibility and avoids rigidity.

It was emphasised in the judgment of the Constitutional Court of South Africa in *S v Manamela* ('*Manamela*')[175] that a mechanical approach is to be avoided in engaging in a proportionality analysis under s 36 of the South African *Bill of Rights*. The majority said:

> It should be noted that the five factors expressly itemised in section 36 are not presented as an exhaustive list. They are included in the section as key factors that have to be considered in an overall assessment as to whether or not the limitation is reasonable and justifiable in an open and democratic society. In essence, the Court *must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list.* As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Ultimately, the question is one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available … but without losing sight of the ultimate values to be protected.[176]

A flexible and non-mechanistic approach ensures that no particular consideration invariably becomes dominant and the proportionality analysis

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173 *Charter* (n 1) s 7(2); *ACT HRA* (n 54) s 28(2); Carter (n 27) 66–7.

174 *Charter* (n 1) s 7(2)(a); *ACT HRA* (n 54) s 28(2)(a). The importance of the right is likely to be considered as an aspect of the nature of the right but this factor is not expressly singled out in the way it is in Queensland: *Qld HRA* (n 54) s 13(2)(f). However, in eg both *Patrick's Case* (n 3) and *Minogue* (n 53), the Court emphasised the significance of the rights at issue and the fundamental interests the rights protected.

175 [2000] 3 SA 1 (Constitutional Court).

176 Ibid 29–30 [32] (Madala, Sachs and Yacoob JJ) (emphasis added).

undertaken is able to capture the range of considerations relevant to the circumstances.[177]

V Conclusion

In my view, the differences between the forms of proportionality analysis adopted under the *Qld HRA* and that adopted under the *Charter* and the *ACT HRA*, interesting though they may be, are ultimately matters of detail, although the differences may be significant in individual cases. The *Qld HRA* includes a form of proportionality analysis that is perhaps more closely aligned to the structured proportionality test applied in the context of the implied freedom of political communication than is the global and holistic form of proportionality analysis expressed in the *Charter* and the *ACT HRA*. However, all the tests adopted in the Australian State-level human rights statutes express, by one means or another, the concepts Professor Barak identified as central to an understanding of proportionality.[178] Each of them is directed to the important objective of determining whether a restriction imposes a disproportionate burden on a right or is justified, by facilitating a rigorous and transparent process of reasoning.

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177 The inflexibility of the structured proportionality test in the context of the implied freedom appears to be one of the sources of disagreement in the High Court about the utility and merits of the test, alongside the concern that there is a risk that other relevant considerations may be overlooked. This is apparent from two reservations made by Gageler J, namely, that it may not be that 'one size fits all … irrespective of the subject matter of the law and no matter how large or small, focused or incidental, that restriction on political communication might be' (*McCloy* (n 156) 235 [142]) and a concern that the structured proportionality test will not 'adequately … reflect the reasons for the implication of the constitutional freedom and adequately … capture considerations relevant to the making of a judicial determination as to whether or not the implied freedom has been infringed' (*McCloy* 236 [145]).

178 See (n 35).

CONTRACTUAL REMOTENESS AND PSYCHIATRIC INJURY IN THE HIGH COURT

DAVID WINTERTON*

I INTRODUCTION

The origin of the modern doctrine of remoteness of damage in the law of contract is Alderson B's famous dictum in *Hadley v Baxendale* ('*Hadley*').[1] That dictum stipulates that, absent 'special circumstances', loss resulting from a breach of contract is recoverable only when it arose 'according to the usual course of things', or could 'reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it'.[2] Persistent questions nevertheless remain regarding the precise content of the *Hadley* rule, and its most plausible justification, particularly following the House of Lords' decision in *Transfield Shipping Inc v Mercator Shipping Inc* ('*The Achilleas*').[3] A majority of that Court arguably there endorsed the proposition that, rather than being an externally imposed default rule, the contractual remoteness rule gives effect to an 'assumption of responsibility' derivable from the parties' contract.

The recent appeal in *Elisha v Vision Australia Ltd* ('*Elisha*')[4] afforded the High Court of Australia an opportunity to re-examine the foundations of the Australian law of contractual remoteness. It is thus unfortunate that, in consequence of the way that the appeal was argued, the Court's reasoning was directed principally towards reconsidering earlier judicial statements regarding the degree of specificity with which a recoverable loss must be described, and the degree of probability with which it must (reasonably) be foreseen. It is argued below that the transparency and justifiability of Australian law would be improved if judges generally avoided these kinds of unhelpful semantic debates since the likelihood, assessed at contract formation, of the relevant adverse consequence occurring is not the true determinant of whether damages are (or should be) recoverable. The principal focus should instead be on determining the scope of recoverable loss

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1 (1854) 9 Ex 341; 156 ER 145, 151 ('*Hadley*').

2 Ibid.

3 [2009] 1 AC 61 ('*The Achilleas*').

4 (2024) 421 ALR 184 ('*Elisha*').

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that is dictated by the requirement of ensuring next-best conformity with (the reasons that justify) the parties' obligations, as created by their agreement.

II Background

Mr Elisha was employed at Vision Australia ('Vision') under a written contract of employment. He was accused of inappropriate behaviour towards the owner of a hotel where he stayed during travel for his work duties and, following a disciplinary meeting, his employment was terminated. Vision had a disciplinary process that was incorporated into Mr Elisha's employment contract. In contravention of that process Vision failed to put to him all the reasons that influenced the decision to dismiss him in proceedings that the primary judge described as a 'sham'.[5] Following his dismissal, Mr Elisha developed a severe depression that affected his capacity for work in the foreseeable future. He succeeded in receiving a settlement for statutory damages for unfair dismissal, but when his condition failed to improve, he brought alternative claims against Vision for breach of contract and in negligence.

Mr Elisha's claim for damages for breach of contract succeeded at trial, with Vision ordered to pay $1,442,404.50 in damages. But his alternative claim for breach of his employer's alleged duty to take reasonable care to avoid injuring an employee in implementing its employment termination process was dismissed on the basis that Australian law does not presently recognise such a duty. On appeal, the Victorian Court of Appeal affirmed the absence of the alleged common law duty of care, and allowed an appeal against the award of damages for breach of contract, (1) relying upon the House of Lords' decision in *Addis v Gramophone Company Ltd* ('*Addis*')[6] for the proposition that that this type of loss was not recoverable; and (2) holding that Mr Elisha's psychiatric injury was too remote.

III Decision

Following a further appeal, a majority of the High Court of Australia (Gageler CJ, Gordon, Edelman, Gleeson and Beech-Jones JJ) reversed the Court of Appeal's decision in relation to the breach of contract claim, holding that (1) *Addis* does not preclude an award of damages for diagnosed psychological harm flowing from a contractually wrongful dismissal; and (2) Mr Elisha's psychiatric injury was not too remote. Their Honours further held that it was unnecessary to decide upon the existence of Mr Elisha's negligence claim in the absence of comprehensive submissions regarding the 'coherence between the scope of the duty of care to

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5 See *Elisha* (n 4) 186 [1] (Gageler CJ, Gordon, Edelman, Gleeson and Beech-Jones JJ).

6 [1909] AC 488 ('*Addis*').

provide a safe system of work and employment law'.[7] Separately, Jagot J concurred in the result, while Steward J, the lone dissentient, held that Mr Elisha's psychiatric injury was too remote to be recoverable and agreed with the courts below that Australian law does not recognise the duty of care contended for by Mr Elisha. For his Honour, 'the need for coherence' mandated that the Victorian Court of Appeal was correct to reject any such duty because, applying *Sullivan v Moody*,[8] its recognition 'would subvert ... other principles of law, and statutory provisions'.[9]

Elisha raises several important issues, including the possibility of a novel common law duty of care. But the focus of this comment will be the justifiability of the award of substantial damages for breach of contract. One central issue on appeal was whether *Addis* precluded damages for psychiatric injury arising from the manner of termination of an employment contract. The Court unanimously — and convincingly — held that it did not. According to the majority, this was because *Addis*: (1) does not in fact establish that liability for psychiatric injury arising from the manner of dismissal is beyond the scope of an employer's contractual duty; (2) was 'decided more than a century ago in a different social context and has been overtaken substantially by more recent decisions in the United Kingdom and Australia'; and (3) is in tension with *Baltic Shipping Co v Dillon*,[10] which established that 'damages for psychiatric injury were available for breach of contract without any suggestion of an exception for employment contracts'.[11]

An issue of broader significance was whether Mr Elisha's psychiatric injury was 'too remote' to justify recovery. According to the *Hadley* formulation, the question is whether the particular adverse consequence arose 'according to the usual course of things' or could 'reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it'.[12] The *Elisha* majority confirmed that this is the appropriate starting point,[13] and that when applying the *Hadley* rule to specific facts, two principal issues arise.

The first issue is 'at what level of generality should the damage, and the process by which it occurred, be described for the purposes of assessing whether the damage could reasonably have been contemplated as "on the cards"'.[14] Here their Honours observed that 'it is well established that the precise damage and the precise manner of [its] occurrence ... need not be contemplated',[15] whilst also recognising that the more particularly the damage, and the manner of its occurrence, is described, the more likely it is that it will be found to be 'too

7 *Elisha* (n 4) [76].
8 (2001) 207 CLR 562.
9 *Elisha* (n 4) [94].
10 (1993) 176 CLR 344.
11 *Elisha* (n 4) 199 [51].
12 *Hadley* (n 1) 151.
13 *Elisha* (n 4) 202 [61].
14 Ibid 202 [62], citing *Koufos v C Czarnikow Ltd* [1969] 1 AC 350, 390 (Lord Reid).
15 *Elisha* (n 4) 202 [63].

remote'.[16] The second issue is 'the degree of relevant knowledge or contemplation' denoted by the requirement that the damage be 'on the cards'.[17] After observing that the alternative 'serious possibility' test constitutes a 'better formulation' of the relevant standard, the majority confirmed the well-accepted proposition that the requirement of a serious possibility is 'more stringent' than the reasonable foreseeability test employed in the law of torts.[18]

According to the majority, when applying *Hadley* to a specific fact pattern, one must first 'identify the circumstances of the breach', described here as 'serious', and then consider 'the general type of damage that occurred', and its 'general manner' of occurrence.[19] Invoking the notion that a person's employment 'is usually one of the most important things in ... her life',[20] their Honours concluded that both 'the "unfathomable nature" of what occurred' given Vision's failure to explain the reasons for dismissal, and its 'grave effect' on Mr Elisha, could be supposed to have been in Vision's reasonable contemplation at contract formation.[21] Accordingly, even if the precise psychiatric injury that Mr Elisha suffered may not have been (reasonably) contemplated, recovery was justified because there was 'a serious possibility' of psychiatric injury.[22]

IV Analysis

A *The Inadequacy of the* Hadley *Rule*

The majority's observations regarding contractual remoteness are relatively uncontroversial, reflecting the orthodox view in England, at least prior to *The Achilleas*. These observations nevertheless reveal the significant indeterminacy of the 'reasonable contemplation' standard. Not only is it possible to describe 'the type of damage' suffered at different levels of specificity, as occurred in *Elisha* itself,[23] but there is also room for significant disagreement regarding what degree of likelihood is denoted by the 'serious possibility' test. The result is a substantial degree of judicial discretion in deciding whether any specific adverse consequence of a contractual breach is too remote.[24]

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[16] Ibid.

[17] Ibid 202 [62].

[18] Ibid 203 [64].

[19] Ibid 203 [65].

[20] Ibid 204 [67], quoting *Johnson v Unisys Ltd* [2003] 1 AC 518, 539 (Lord Millett).

[21] *Elisha* (n 4) 204 [69].

[22] Ibid 204–5 [69].

[23] Compare the majority's characterisation of the damage as 'psychiatric injury': ibid 204 [66] with their own later characterisation of it as 'serious psychiatric injury': at 205 [69]. The latter characterisation was also adopted by Steward J and Jagot J, at 208–9 [86] and 223–4 [132] respectively.

[24] See Julius Stone, *Legal System and Lawyers' Reasonings* (Maitland Publications, 1964) 265–6.

A more fundamental difficulty with the *Hadley* rule, consistent with its substantial indeterminacy,[25] is that the justification for its use is unclear.[26] Fuller and Perdue may accordingly have been correct in postulating that the rule 'is less a definite test itself than a cover for a developing set of tests'[27] to determine the proper limits of contractual liability.

B *The Need for an 'Agreement-Centred' Approach*

Given these difficulties, it is unfortunate that so little progress has been made in rationalising the law. Enter *The Achilleas*, where (at least) Lord Hoffmann and Lord Hope explained the contractual remoteness rule as upholding an objective 'assumption of responsibility' derivable from the parties' agreement. Considering the substantial academic and judicial commentary that has subsequently ensued, it is unfortunate that the parties' submissions in *Elisha* did not refer to the decision, particularly given the majority's assertion that 'remoteness of damage in contract is separate from the scope of a contractual duty'.[28]

1 *Normative Appeal*

The main attraction of an 'agreement-centred' analysis of contractual remoteness is that, in contrast to the *Hadley* rule, it identifies a plausible justification both for restricting — and for *awarding* — damages following a contractual breach. Expressed at a high level of generality, this justification is the necessity of achieving 'next-best conformity' with the reasons that justify the breaching party's primary obligations.[29]

A common objection to an 'agreement-centred' approach is that it is artificial because contracting parties' do not invariably contemplate what losses should be recoverable in the event of non-performance. But this objection misunderstands the legal concept of an agreement, which, once made, can have effects independent of the parties' subjective intentions.[30] One striking example of this, considered further below, is the High Court's decision in *Burns v MAN Automotive (Aust) Pty Ltd* ('*Burns*').[31]

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[25] See Lord Hoffmann, '*The Achilleas*: Custom and Practice or Foreseeability?' (2010) 14(1) *Edinburgh Law Review* 47, 53.

[26] See Andrew Tettenborn, '*Hadley v Baxendale* Foreseeability: A Principle beyond Its Sell-by Date?' (2007) 23(1) *Journal of Contract Law* 120, 126–33.

[27] LL Fuller and William R Perdue, 'The Reliance Interest in Contract Damages' (1936) 46(1) *Yale Law Journal* 52, 85.

[28] *Elisha* (n 4) [60].

[29] See, eg, John Gardner, 'What is Tort Law for Part I: The Place of Corrective Justice' (2011) 30(1) *Law and Philosophy* 1.

[30] See Robert Stevens, 'What is an Agreement?' (2020) 136(Oct) *Law Quarterly Review* 599.

[31] (1986) 161 CLR 653.

A secondary concern with an 'agreement-centred' analysis is that is also somewhat indeterminate, requiring judgement to determine the agreement's proper construction. But this alone is not a sufficient reason to reject this approach because some indeterminacy, and the concomitant need for judgement, is a universal feature of all legal rules.[32]

2 *Explanatory Power*

Of greater practical significance is that an 'agreement-centred' analysis can explain certain decisions that are otherwise irreconcilable with the *Hadley* rule. One notable English example is *Siemens Building Technologies FE Ltd v Supershield Ltd* ('*Supershield*'),[33] where the defendant defectively performed its contractual obligation to install a valve in a storage tank in order to prevent flooding. The tank overflowed causing substantial damage to electrical equipment. At contract formation, damage of this kind was highly improbable due to the existence of an additional safety feature — drains designed to take excess water away upon the occurrence of such an event — which (unfortunately) were blocked. It was nevertheless held that the damage that eventuated was within the potential scope of recovery because the sole purpose of installing the valve was to prevent such damage, however unlikely its occurrence may have been. The decision is accordingly best rationalised on the basis that, properly construed, the parties' agreement assigned responsibility to the defendant for the specific circumstances that eventuated.

Supershield demonstrates how the content of the parties' agreement may *extend* liability to include unlikely damage. More commonly, however, the parties' agreement will restrict the recovery of reasonably foreseeable loss, as occurred in *Burns*. There Mr Burns acquired a prime mover via a hire-purchase arrangement under which MAN provided an enforceable warranty regarding the state of the vehicle's engine. The engine was not as warranted, but Burns' repair request was refused. As Burns could not afford the necessary repairs, he continued to use the vehicle, albeit in a more limited way than originally envisaged, operating his business at a loss. When the vehicle later broke down and was repossessed, Burns sued for breach of contract seeking, *inter alia*, the profits he expected to make over the four-year period that the machine should have operated. Significantly, the loss of such profits was found to be within MAN's reasonable contemplation because it had reason to know that Burns intended to use the vehicle for interstate haulage and should also have appreciated his limited financial circumstances. The Court's majority nevertheless held that Burns' projected, but unrealised, profits for the period following discovery of the defect were too remote. The critical fact

32 See, eg, HLA Hart, *The Concept of Law* (Oxford University Press, 3rd ed, 2012) 124–36.

33 [2010] 2 All ER (Comm) 1185 (CA). The Court's decision was limited to assessing the reasonableness of a settlement offer.

said to justify this conclusion was that Burns had a statutory entitlement, via *Hire Purchase Act 1959* (Qld) s 12, to terminate the hire-purchase agreement at any time, which was held, by necessary implication, to exclude such recovery.

Burns is an unusual case, but it starkly demonstrates how the legal effect of an agreement is determined independently of the parties' subjective intentions. It is also not an isolated example of liability being limited by reference to the content of the parties' agreement. Another decision preferably explained in these terms is *Stuart Pty Ltd v Condor Commercial Insulation Pty Ltd*.[34] Despite paying lip service to the need for 'reasonable contemplation' at contract formation of the lost profits claimed, the substance of the Court's reasoning there was that these profits were sufficiently disproportionate to the value of the parties' contract to conclude that the defendant could not have assumed responsibility for them.[35]

C *Explaining* Elisha

Returning to *Elisha*, the majority emphasised both the personal significance of one's employment and Vision's failure to explain its reasons for dismissal in concluding that Vision should have contemplated, as a serious possibility, that Mr Elisha 'would suffer a serious psychiatric injury' due to the manner of its wrongful dismissal.[36] Concurring in the result, Jagot J also focussed upon 'the relationship between ... the kind of breach that occurred and the kind of resulting injury',[37] but placed particular emphasis on the fact that Vision's 'actions fundamentally undermined the very purpose of those procedures — to enable an employee's side of the story to be heard and taken into consideration'.[38]

Stepping back, one sees that both of these analyses are ultimately grounded in the content (or purpose) of the parties' agreement. While the majority obviously focussed principally on the contract's overall purpose, Jagot J placed greater emphasis on the purpose of the specific obligation breached. The decision accordingly reinforces the central thesis here advanced that, when determining the proper extent of a breaching party's reparative responsibility, 'ritual incantation'[39] of *Hadley* should be replaced with a focus on identifying the scope of recoverable loss dictated by the parties' agreement.

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34 (2006) Aust Contract Reports ¶90-245.

35 See ibid 89,482–7 [74]–[106] (Beazley P).

36 *Elisha* (n 4) 205 [69].

37 Ibid 222 [128].

38 Ibid 223 [131].

39 See *McElroy Milne v Commercial Electronics Ltd* [1993] 1 NZLR 39, 42 (Cooke P).

V Conclusion

The aim of this brief comment has been to highlight the necessity of commencing any examination of the justified limits of a contracting party's reparative responsibility following breach with an objective construction of the parties' agreement. That this proposal is in any way controversial appears to stem from misconceptions regarding: (1) the utility of the *Hadley* rule; and (2) the implications that follow from the common law's wholly objective concept of 'agreement'.

Finally, it is noteworthy that the remoteness test applicable to the tort of negligence is arguably also unsatisfactory.[40] Whilst it is not possible to substantiate this claim here, that doctrine's coherence may similarly be improved by avoiding, so far as is possible, unhelpful semantic debates about what kind of damage was 'reasonably foreseeable' at the date of breach. An alternative, and more justifiable, focus of analysis would be to ask whether part of the justification for imposing the relevant duty breached was to prevent damage of the kind that occurred.[41] Whilst such an approach also necessitates judicial consideration of which interest(s) justify the imposition of the relevant duty, it would at least facilitate a more principled resolution of certain difficult cases.[42]

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[40] See, eg, Alexander Waghorn, 'Remoteness in the Supreme Court' (2024) 140(Oct) *Law Quarterly Review* 502.

[41] See, eg, E Anthony Machin, 'Negligence and Interest' (1954) 17(5) *Modern Law Review* 405.

[42] See, eg, *Arsalan v Rixon* (2021) 274 CLR 606.

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